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111. Hon'ble Mr. Justice Samit Gopal

(2019)12 ILR A1
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 15.11.2019

BEFORE
THE HON'BLE MRS. SANGEETA CHANDRA, J.

Consolidation No. 31286 of 2019

Alam & Ors. ...Petitioners
Versus
Deputy Director of Consolidation Faizabad & Ors. ...Respondents

Counsel for the Petitioners:
Ankit Pande

Counsel for the Respondents:
C.S.C.

A. Civil Law-U.P. Consolidation of Holdings Act, 1953 - Section 11-C - In the course of hearing of an objection under Section 9-A or an appeal under Section 11, or in proceedings under Section 48, the Consolidation Officer, the Settlement Officer (Consolidation) or the Director of Consolidation, as the case may be, may direct that any land which vests in the State Government or the Gaon Sabha or any other local body or authority may be recorded in its name, even though no objection, appeal or revision has been filed by such Government, Gaon Sabha, body or authority. (Para 16)

The application of Revision was moved by the opposite party, it was entertained and therefore, the Dy. Director of Consolidation was within his jurisdiction to consider whether such application was defective and whether all necessary parties had been impleaded in the said Revision or not? (Para 23)

Held:- The Dy. Director of Consolidation has exercised the necessary jurisdiction as has been given to him under the statute - A duty has been cast under Section 11-C of the Act on Consolidation Authorities to protect the rights of the State Government, the Gaon Sabha or any other local Body or Authority in any proceeding that is entertained by them. (Para 25)

Writ Petition dismissed. (E-7)

List of cases cited: -

1.Vidur Impex and Traders Private Limited and Others Vs. Tosh Apartments Private Limited and Others, (2012) 8 SCC 384

2.Bibi Zubaida Khatoon V. Nabi Hasan, (2004) 1 SCC 191

3.Sarvinder Singh v. Dalip Singh (Supra) and Dhurandhar Prasad Singh V. Jai Prakash University, (2001) 6 SCC 534

4.Ramakant Singh Vs. Dy. Director of Consolidation, U.P. and Others, AIR 1975 Allahabad 126

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

(1) Heard Shri R.S. Pande, learned Senior Advocate assisted by Shri Ankit Pande for the petitioners and Shri Upendra Singh, learned Standing Counsel appearing on behalf of the State-respondents.

(2) This petition has been filed challenging the order dated 01.11.2019 passed by the Dy. Director of Consolidation, Faizabad now Ayodhya for impleading the U.P. Express Way Industrial Development Authority, Lucknow, by exercising *"Suo-moto"* power in the Revision pending before him, against the order passed by the Settlement Officer Consolidation in respect of a dispute with regard to the co-tenancy right in Khata No.102 situated in Village Idilpur, Pargana-Khandasa, Tehsil Milkipur, District Ayodhya.

(3) It has been submitted by the 18.02.1978, the Assistant Consolidation Officer passed an order giving co-tenancy rights to the opposite party nos.2 to 6, on the basis of an alleged compromise under Section 9 of the Act. The order dated 18.02.1978 was also recorded in the Khatauni of 1382 & 1384 Fasli. The petitioners filed a time barred Appeal on 01.04.2017 against the order dated 18.02.1978 before the Settlement Officer Consolidation under Section 11 of the Act with the claim that the land in question was obtained by his father through Patta granted by Gram Panchayat and it was non-Bhumidhari land with non-transferable right, being leased out by the Gram Panchayat to the father of the petitioners i.e. Nanhey.

(4) The Appeal filed by the petitioners was allowed by the Settlement Officer, Consolidation on 23.06.2017. Since the shares were not determined between the brothers of the petitioners, the petitioners filed a Revision before the Dy. Director of Consolidation, against the order dated 23.06.2017. The Dy. Director Consolidation allowed the Revision and determined 1/4th share of each of the petitioners by his order dated 19.07.2017.

(5) The opposite party nos. 2 to 6 moved a Recall/Restoration application for recalling of order dated 19.07.2017. The said Recall application was rejected on the ground that opposite party nos.2 to 6 had already filed another Revision No.673/1342/2019 before the opposite party no.1 which was pending for disposal.

(6) It has been submitted that the petitioners being apprehensive of the attitude of the current DDC filed an learned counsel for the petitioners that on application for transfer of Revision from the Court of the opposite party no.1 before the District Magistrate, Ayodhya, on 30.10.2019 but before said application could be disposed of, the current DDC passed the order on 01.11.2019 directing them to implead Government of U.P. and U.P. Expressway Industrial Development Authority (for short UPEIDA).

(7) Shri R.S. Pande, has submitted that no power as has been exercised by the DDC could have been exercised *Suo-moto* as the Government of U.P. had no say in the dispute regarding co-tenancy rights. It was a purely private dispute between the petitioners and the opposite party nos.2 to 6.

(8) Learned counsel for the petitioners has placed reliance upon the judgment of the Hon'ble Supreme Court rendered in ***Vidur Impex and Traders Private Limited and Others Vs. Tosh Apartments Private Limited and Others reported in (2012) 8 SCC 384.*** (Paragraph nos.40 & 41) The said Paragraphs nos.40 and 41 of the judgment are being quoted hereinbelow:-

"40. In ***Bibi Zubaida Khatoon V. Nabi Hasan (2004) 1 SCC 191,*** *this Court was called upon to consider the correctness of the High Court's order, which declined to interfere with the order passed by the trial Court dismissing the applications filed by the appellant for impleadment as party to the cross suits of which one was filed for redemption of mortgage and the other was filed for specific performance of the agreement for sale. While dismissing the appeal, this Court referred to the judgments in* ***Sarvinder Singh v. Dalip Singh (Supra)***

and Dhurandhar Prasad Singh V. Jai Prakash University reported in (2001) 6 SCC 534 *and observed that there is no absolute rule that the transferee pendente lite shall be allowed to join as party in all cases without leave of the Court and contest the pending suit.*

41. Though there is apparent conflict in the observations made in some of the aforementioned judgments, the broad principles which should govern disposal of an application for impleadment are:

1. The Court can, at any stage of the proceedings, either on an application made by the parties or otherwise, direct impleadment of any person as party, who ought to have been joined as plaintiff or defendant or whose presence before the Court is necessary for effective and complete adjudication of the issues involved in the suit.

2. A necessary party is the person who ought to be joined as party to the suit and in whose absence an effective decree cannot be passed by the Court.

3. A proper party is a person whose presence would enable the Court to completely, effectively and properly adjudicate upon all matters and issues, though he may not be a person in favour of or against whom a decree is to be made.

4. If a person is not found to be a proper or necessary party, the Court does not have the jurisdiction to order his impleadment against the wishes of the plaintiff.

5. In a suit for specific performance, the Court can order impleadment of a purchaser whose conduct is above board, and who files application for being joined as party within reasonable time of his acquiring knowledge about the pending litigation.

6. However, if the applicant is guilty of contumacious conduct or is beneficiary of a clandestine transaction or a transaction made by the owner of the suit property in violation of the restraint order passed by the Court or the application is unduly delayed then the Court will be fully justified in declining the prayer for impleadment."

(9) This Court has carefully perused the judgment rendered by a Division Bench of the Hon'ble Supreme Court with regard to the question it was considering on the facts as mentioned before it. The question before the Hon'ble Supreme Court was that the Suit property was leased by the Secretary of State for India to Sidh Nath Khanna and Sukh Nath Khanna sometime in the year 1930. After 12 years, the Governor General-in-Council sanctioned the grant of perpetual lease in favour of one of them, namely, Sidh Nath Khanna. In the family partition which took place in December, 1955, the Suit property fell to the share of Shri Devi Prasad Khanna, who was one of the heirs of Sidh Nath Khanna the name of the son of Devi Prasad Khanna was entered in the records of the Ministry of Works and Housing, Land and Development Office, and the lease was transferred in his name. He rented out the same to the Sudan Embassy on 12.09.1962. In October, 1977, the name of Mr. Pradeep Kumar Khanna (son of Devi Prasad Khanna, who died during the pendency of the litigation before the High Court and was represented by his legal representatives) was entered in the records of the Ministry of Works and Housing, Land and Development Office and the lease was transferred in his name in March 1980. Pradeep Kumar Khanna mortgaged the said property to Shri S.N. Tandon. After 5

years, he entered into a collaboration agreement with Shri Arun Kumar Bhatia for construction of a multi-storied building. He also executed an agreement for sale in favour of Arun Kumar Bhatia. Pradeep Kumar Khanna then took loan from Shri Avtar Singh and also created an equitable mortgage in his favour. On 13.09.1988 Pradeep Kumar Khanna executed an agreement for sale in favour of Tosh Apartments Private Limited for a consideration of Rs.2.5 crores. After some time, Arun Kumar Bhatia executed an assignment deed dated 13.12.1988 in favour of Pradeep Kumar Khanna. A Collaboration agreement was also entered into between Pradeep Kumar Khanna and Arun Kumar Bhatia.

(10) After three months, Pradeep Kumar Khanna again mortgaged the Suit property in favour of one other person. In 1992 respondent nos.2 and 4 entered into an agreement whereby the latter agreed to provide various services including the one that he will get the suit property vacated from the Sudan Embassy, and for that he will charge Rs.4 crores. The Sudan Embassy vacated the Suit property on 12.05.1982 and handed over possession to Pradeep Kumar Khanna, who is said to have handed over the same to respondent no.4. On coming to know about the proposed alienation of property, Tosh Apartments. The Respondent no.1 filed a suit in the Delhi High Court for specific performance of agreement for sale dated 13.09.1988 and for award of damages and an injunction.

(11) Although the respondent no.2 Pradeep Kumar Khanna and respondent no.4 also filed an application under Order 7 Rule 11 CPC for rejection of plaint on the ground that the same was barred by time, such application was rejected by the learned Single Judge of the High Court on 05.04.1994 who directed continuance of interim injunction.

(12) Thereafter on 19.02.1997, Pradeep Kumar Khanna executed six agreements for sale in favour of ***Vidur Impex and Traders Private Limited and Others,*** the appellants, for a total sale consideration of Rs.2.88 crores. In furtherance of thus agreement, six sale deeds were executed and registered on 30.05.1997.

(13) The appellants ***Vidur Impex*** in turn executed the agreement for sale dated 18.03.1997 in favour of Bhagwati Developers for a consideration of Rs.4.26 crores and received Rs.3.05 crores. The appellants ***Vidur Impex and Traders Private Limited and Others,*** thereafter filed an application for impleadment on the ground that they are subsequent purchasers and they are necessary and proper parties to be heard. They also filed an application for vacation of interim injunction.

(14) Several other developments have been noted by the Hon'ble Supreme Court in its judgment. The question that was being considered by the Supreme Court was framed in Paragraph 2 of the judgment as *"whether M/s Vidur Impex and Traders Private Limited and five Other Companies who were said to purchase the suit property i.e. 21 New Delhi in violation of order of injunction passed by the learned Single Judge, Delhi High Court, are entitled to be impleaded as parties to suit no.4 to 5 in 1993 filed by Tosh Apartments Private Ltd. thereof."*

(15) The Supreme Court made observations as aforesaid in Paragraph 41

of its judgment in the context in which the facts were being considered by it, with regard to a totally private dispute where no statutory/obligation was cast upon the Court to implead necessary and proper parties in the proceedings before it.

(16) However, learned Standing counsel Shri Upendra Singh has pointed out Section 11 C of the U.P. Consolidation of Holdings Act, 1953 which is being quoted hereinbelow:-

"11 C. In the course of hearing of an objection under Section 9-A or an appeal under Section 11, or in proceedings under Section 48, the Consolidation Officer, the Settlement Officer (Consolidation) or the Director of Consolidation, as the case may be, may direct that any land which vests in the State Government or the Gaon Sabha or any other local body or authority may be recorded in its name, even though no objection, appeal or revision has been filed by such Government, Gaon Sabha, body or authority."

(17) It has been submitted that the Statute itself cast a duty upon the consolidation authorities to protect the interest of the State Government or the Gaon Sabha, or any other local body or Authority, in case land is recorded in its name, even though no objection against Appeal or Revision has been filed by such Government Gaon Sabha, Body or Authority.

(18) It has been submitted by the learned counsel appearing for the State-respondents that from a perusal of the order impugned, which is a short order, directing impleadment of U.P. Government as a party to the Revision, it is apparent that the Dy. Director of Consolidation has recorded his satisfaction that the land in dispute Gata No.172 and 23 had been sold to the Government on 24.10.2016 and 29.10.2016 and land had vested in the State Government and the State Government has been recorded as its owner in the Revenue record on 03.12.2016 and 07.12.2016 respectively. By another sale agreement dated 21.01.2017 which has been recorded in the Revenue records on 06.03.2017, the Government had been recorded as tenure holder/owner of the property. However, the Appellant did not implead the State Government or U.P. as a party though it was filed in April, 2017, the SOC in his order dated 26.03.2017 did not notice this fact that even before the decision of the Appeal the land had been recorded in favour of the State Government as its owner. Since the State of U.P. was not made a party by the SOC in the Appeal nor was impleaded in the Revision and UPEIDA which was the beneficiary of such sale transaction was also not impleaded, the DDC rightly directed them to be impleaded and that they should be served notice and be heard before any order could be passed in the Revision.

(19) Learned Standing Counsel has pointed out that the land having vested in the State Government and thereafter being transferred to U.P.E.I.D.A. by the State Government, the DDC exercised his jurisdiction under Section 11 C of the Act to direct impleadment and no fault can be found in the order passed by the DDC, which is only an interlocutory order. This Court should not interfere in its extra ordinary jurisdiction under Article 226 in such an order.

(20) Shri R.S. Pande, in rejoinder has placed reliance upon a Full Bench

decision rendered by this Court in ***Ramakant Singh Vs. Dy. Director of Consolidation, U.P. and Others, reported in AIR 1975 Allahabad 126,*** where this Court has observed that after the record has been called for by the Dy. Director of Consolidation under Section 48 he should examine the record to decide whether it was a fit case for exercise of the revisional jurisdiction Suo-motu. Such opinion shall have to be formed even where the application in Revision moved by a party is defective, having been made beyond the prescribed period of limitation, or all the necessary parties have not been impleaded. If the Dy. Director of Consolidation finds that the case requires further hearing, he shall give notice to all the necessary parties irrespective of whether they were, or were not impleaded, in the application and after giving them reasonable opportunity of hearing, pass such order as he thinks fit. Where the application in Revision is not defective and is maintainable, the exercise of revisional jurisdiction shall be at the instance of the parties and not *Suo-moto*.

(21) It has been submitted on the basis of such observations made by the Full Bench that it was not open for the DDC to exercise his Revisional Jurisdiction to direct impleadment of State Government and UPEIDA *Suo-moto*.

(22) This Court has carefully considered the judgment cited of the Full Bench of this Court. It finds that there are two instances mentioned by the Full Bench; one relates to exercise of power of revision *Suo-moto*, by calling records and examining the same; the other relates to application being made in Revision under Section 48 (1) by a party. When such application is moved, the Dy Director of Consolidation has power to see whether it is a defective application for Revision, it can see the defects with regard to the period of limitation and whether all necessary parties have not been impleaded.

(23) In this case, the application of Revision was moved by the opposite party nos.2 to 6, it was entertained and therefore, the Dy. Director of Consolidation was within his jurisdiction to consider whether such application was defective and whether all necessary parties had been impleaded in the said Revision or not?

(24) The judgment cited by the learned Senior Advocate, in fact, supports the order passed by the Dy. Director of Consolidation, rather than going against it.

(25) This Court finds that the Dy. Director of Consolidation has exercised the necessary jurisdiction as has been given to him under the statute. A duty has been cast under Section 11-C of the Act on Consolidation Authorities as aforesaid to protect the rights of the State Government, the Gaon Sabha or any other local Body or Authority in any proceeding that is entertained by them.

(26) From a perusal of the judgment rendered by the Hon'ble Supreme Court in ***Vidur Impex and Traders Private Limited and Others (Supra)***, also this Court finds that the judgment rendered in the circumstances where two private parties are fighting over property owned by them. The observation made by the

Section in Paragraph nos. 41.1, 41.2 and 41.3 supports the order passed by the DDC.

(27) More so, when the statute itself casts a duty upon the Consolidation Authorities to protect the interest of the State Government and the Gaon Sabha or Local Body or Authority.

(28) This Court, therefore, does not find any good ground to show interference in such order.

(29) The petition is **dismissed**. No order as to costs.

(2019)12 ILR A7
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.11.2019

BEFORE
THE HON'BLE AJIT SINGH, J.

Criminal Revision No. 3318 of 2019

Ram Kishore ...Revisionist
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Revisionist:
Sri Krishna Mishra

Counsel for the Opposite Parties:
A.G.A.

A.Criminal Law - Maxim- *judex damnatur cum nocens absolvitur* (judge is condemned when guilty is acquitted) and this doctrine must be used as a beacon light while explaining the ambit and the spirit underlying the enactment of Section 319 Code of Criminal Procedure. (Para 7)

B.Criminal Law - Code of Criminal Procedure, 1973 - Sections 397/401 & Indian Penal Code, 1860 - Sections 302,201,404 - Application u/s 319 – rejection-witnesses were cross-examined by the counsel for the accused-no admissible evidence on record indicating the complicity of the opposite parties in the commission of offence-trial court rightly rejected the application. (Para 9 & 10)

It is the duty of the court to do justice by punishing the real culprit. Where the investigating agency for any reason does not array one of the real culprits as an accused, the court is not powerless in calling the said accused to face trial. The question remains under what circumstances and at what stage should the court exercise its power as contemplated in Section 319 Cr.P.C. The Court is the sole repository of justice and a duty is cast upon it to uphold the rule of law and, therefore, it will be inappropriate to deny the existence of such powers with the courts in our criminal justice system where it is not uncommon that the real accused, at times, get away by manipulating the investigating and/or the prosecuting agency. The desire to avoid trial is so strong that an accused makes efforts at times to get himself absolved even at the stage of investigation or inquiry even though he may be connected with the commission of the offence. (Para 7)

Criminal Revision dismissed. (E-6)

List of cases cited: -

1. Hardeep Singh Vs. St. of Punjab, reported in (2014) 3 SCC, 92

2. Vikas Vs. St. of Rajasthan, 2013 (11) SCALE 23

(Delivered by Hon'ble Ajit Singh, J.)

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

2. Present revision under Sections 397/401 Cr.P.C. has been filed with prayer to set aside the order dated 27.05.2019 passed by Additional Sessions Judge,

Court No.3, Kaushambi passed in Session Trial No.205 of 2016 (State Vs. Anup Kumar) arising out of Case Crime No.139 of 2016, under Sections 302, 201, 404 I.P.C., Police Station Mahewaghat, District Kaushambi, whereby application 14 Kha under Section 319 Cr.P.C. filed by the revisionist for summoning the opposite party nos.2 and 3 was rejected. Aggrieved by the said order, the instant criminal revision has been preferred.

3. The brief facts leading to this revision are that the first information report was lodged by the complainant/revisionist, Ram Kishor on 13.05.2016 with the allegation that his son, namely, Sandeep Kumar @ Sanjeev, who was residing with Anup Kumar and was also working with him in Rajapur. It was further alleged that on 25.04.2016 Anoop Kumar with the intention to cause death came to the village with Sandeep and Sandeep after taking Rs.15,000/- in cash and pass book from the house and after withdrawing Rs.25,000/- from the bank returned to the house and informed that he is going with Anoop Kumar as he is having an important work. It was also alleged that Anoop Kumar hatched a conspiracy involving his father, Shivcharan Lal and brother, Aniruddh along with two hired miscreants and murdered the son of the complainant. The complainant got information from the newspaper on 26.04.2016 about the death of his son, Sandeep @ Sanjeev and the deceased was recognized by his cloths. The police after investigation submitted the charge-sheet against Anoop Kumar only. The trial of this case was proceeded. The prosecution has examined PW-1, PW-2 and PW-3 and the witnesses were cross-examined by the counsel for the accused Anoop Kumar. After the statements of PW-1, PW-2 and PW-3 an application under Section 319 Cr.P.C. was given and after hearing the application, the trial court rejected the application filed under Section 319 Cr.P.C.

4. Learned counsel for the revisionist submitted that the trial court has not properly considered the application and it has been decided in a cursory manner. He further submitted that the entire facts and circumstances of the case has not been properly discussed by the trial court.

5. Learned A.G.A. has vehemently opposed the argument of learned counsel for the revisionist and has submitted that the incident is alleged to have taken place on 25.04.2016 and the first information report of the incident was lodged on 13.05.2016. He further submitted that there is no reliable and cogent evidence against the other accused person, whose names were mentioned in the application, filed under Section 319 Cr.P.C., and the application has rightly been dismissed by the trial court and no interference is required in the impugned order. He has further submitted that the powers given under Section 319 Cr,.P.C. are discretionary powers of the Court are to be exercised sparingly and the trial court after having thoroughly examined the record, found no substance in the application so moved. He further submitted that the impugned order has been passed after due consideration of the material available on record. He submitted that the prosecution has examined three witnesses and the PW-1, Ram Kishore, who has lodged the first information report of this incident named the opposite party nos.2 and 3 in the first information report is not an eye-witness

of the incident and the PW-2 Shivnathiya, who is the wife of the complainant and the mother of the deceased, Sandeep, is also not an eye-witness and she has only seen Sandeep going with the accused, Anoop Kumar and she had not seen the opposite party nos.2 and 3 going with her son, the deceased Sandeep. The prosecution has also examined PW-3, Durga Prasad and he said in his statement during trial that on 25.04.2016 he had seen the deceased, Sandeep and Anoop Kumar going on one motor-cycle. He further deposed that he had also seen Aniruddh and Shivcharan going on another motor-cycle along with two unknown persons. He further deposed that when he asked from these people they told him that they are in a hurry and are going to Rajapur.

6. The provisions of Section 319 Cr.P.C. have been enacted in the Cr.P.C. with a view to achieve the objective that the real culprits should not get away unpunished. By virtue of these provisions the Court is empowered to proceed against any persons not shown as an accused, if it appears from evidence that such person has committed any offence for which, he could be tried together with the other accused persons then he may be summoned to face the trial.

7. Hon'ble Apex Court in the case of **Hardeep Singh Vs. State of Punjab, reported in (2014) 3 SCC, 92** has explained the purpose behind this provision, inter-alia in the following :

"12. Section 319 Code of Criminal Procedure springs out of the doctrine judex damnatur cum nocens absolvitur (judge is condemned when guilty is acquitted) and this doctrine must be used as a beacon light while explaining the ambit and the spirit underlying the enactment of Section 319 Code of Criminal Procedure.

13. It is the duty of the court to do justice by punishing the real culprit. Where the investigating agency for any reason does not array one of the real culprits as an accused, the court is not powerless in calling the said accused to face trial. The question remains under what circumstances and at what stage should the court exercise its power as contemplated in Section 319 Cr.P.C.

19. The Court is the sole repository of justice and a duty is cast upon it to uphold the rule of law and, therefore, it will be inappropriate to deny the existence of such powers with the courts in our criminal justice system where it is not uncommon that the real accused, at times, get away by manipulating the investigating and/or the prosecuting agency. The desire to avoid trial is so strong that an accused makes efforts at times to get himself absolved even at the stage of investigation or inquiry even though he may be connected with the commission of the offence."

8. As regards the decree of satisfaction required for invoking the powers under Section 319 Cr.P.C., the Constitution Bench in the case of **Hardeep Singh Vs. State of Punjab (Supra)** has laid down the principles as follows :

"95. At the time of taking cognizance, the court has to see whether a prima facie case is made out to proceed against the accused. Under Section 319 Cr.P.C., though the test of

prima facie case is the same, the degree of satisfaction that is required is much stricter. A two- Judge Bench of this Court in Vikas Vs. State of Rajasthan, 2013 (11) SCALE 23, held that on the objective satisfaction of the court a person may be 'arrested' or 'summoned', as the circumstances of the case may require, if it appears from the evidence that any such person not being the accused has committed an offence for which such person could be tried together with the already arraigned accused persons.

105. Power under Section 319 Cr.P.C. is a discretionary and an extra-ordinary power. It is to be exercised sparingly and only in those cases where the circumstances of the case so warrant. It is not to be exercised because the Magistrate or the Sessions Judge is of the opinion that some other person may also be guilty of committing that offence. Only where strong and cogent evidence occurs against a person from the evidence led before the court that such power should be exercised and not in a casual and cavalier manner.

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."

9. After careful consideration of the provisions contained in Section 319 Cr.P.C. it emerges that Section 319 Cr.P.C. sanction the summoning of any person on the basis of any relevant evidence as available on record. However, it being a discretionary power and an extraordinary one, is to be exercised sparingly and only when strong cogent evidence is available indicating that the proposed accused/summoned accused may be guilt of committing offence. The prima facie opinion which is to be formed for exercise of this power requires stronger evidence than mere probability of complicity of a person. The test to be applied is the one which is more than a prima facie case as examined at the time of framing of charge but not of satisfaction to the extent that the evidence, if goes uncontroverted, would lead to the conviction of the accused as earlier held by the Apex Court.

10. After considering all the material available on record filed with this revision and after considering the evidence available on record and the impugned order this Court finds that the impugned order does not suffer from any illegality, improbability or infirmity requiring any

interference by this Court. The learned Additional Sessions Judge after noticing that there was no admissible evidence on record indicating the complicity of the opposite party nos.2 and 3 in the commission of the offence. The learned trial court has rightly rejected the application moved by the complainant/revisionist. This Court after careful consideration does not find any illegality, improbability or infirmity in the impugned order.

11. The revision lacks merit and is accordingly, dismissed.

(2019)12 ILR A11

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.11.2019

BEFORE

THE HON'BLE AJAY BHANOT, J.

Second Appeal No. 521 of 2016

Smt. Savrunisha & Ors. ...Appellants
Versus
Bhola Nath ...Respondent

Counsel for the Appellants:
Sri Narendra Kumar Chaturvedi, Sri Vivek Singh Shrinet

Counsel for the Respondent:
Sri Umesh Chandra Tripathi

A.Civil Law - Specific Relief Act - Sections 36 & 38 - Permanent Injunction - Suit by tenant against true owner - Tenant inducted as tenant without valid allocation order under U.P. Act No. 13 of 1972 - such tenant an illegal trespasser in possession - Not entitled to permanent injunction against true owner (Para 12)

B. Civil Law - Eviction of unauthorized occupant - lawful process of eviction of unauthorized occupant by a true owner - means grant of an opportunity to the parties to tender their defence & its adjudication by a court of law – Once court finds that the occupant is in unauthorized occupation - such unauthorized occupant does not have any further right to possession over the disputed premises - said unauthorized occupant has to vacate the premises voluntarily, after the adjudication - upon failure to do so, the said person is liable to be evicted through execution proceedings (Para 21)

Second Appeal dismissed. (E-5)

List of cases cited: -

1. Thomas Cook (India) Ltd. Vs Hotel Imperial 2006(88) DRJ 545

(Delivered by Hon'ble Ajay Bhanot, J.)

1. The second appeal arises from a judgment and decree dated 11.02.2016 passed in Civil Appeal No.85 of 2015 (Bhola Nath Vs. Savrunisha and others), rendered by the learned appellate court, allowing the appeal after reversing the judgment and decree dated 30.07.2015, passed by the learned trial court in Original Suit No.718 of 2007 {Mohd. Rafeeq (since deceased) Through L.Rs. Vs. Bhola Nath}. The appellate court dismissed the suit of the plaintiffs-appellants. The learned trial court had decreed the suit, by granting an injunction in favour of the plaintiffs-appellants.

2. The suit was originally instituted by one Mohd. Rafeeq.

3. The plaintiff had filed a suit for injunction against the defendant-

respondent, from interfering in his possession, over the property in dispute.

4. The suit was registered as Original Suit No.718 of 2007 {Mohd. Rafeeq (since deceased) Through L.Rs. Vs. Bhola Nath}, before the learned Additional Civil Judge, (Junior Division), Court No.2, Gorakhpur.

5. The plaintiff asserted that he was a tenant of the defendant-respondent in the disputed premises. The defendant respondent was trying to evict him forcibly, by recourse to illegal means. The relief sought in the suit, was to injunct defendant-respondent, from evicting the plaintiffs, except in accordance with law.

6. During the pendency of the suit, the plaintiff, Mohd. Rafeeq, died. The legal heirs/legal representatives of the plaintiff Mohd. Rafeeq (since deceased) were substituted after his death. The litigation was thereafter prosecuted by the legal heirs of the plaintiff Mohd. Rafeeq (since deceased). This appeal has been filed by the legal heirs of the plaintiff, who were substituted as plaintiffs.

7. The defendant-respondent filed a written statement, traversing the claim set up in the plaint. The defence taken in the written statement was fourfold. Firstly, the plaintiff was a habitual defaulter who defaulted in payment of rent, and other dues including water tax. Secondly, the plaintiff had sublet the premises to his brother. Thirdly, the plaintiff was also inducted without an allotment order. The subtenant too was inducted without an allotment order. In any case the tenancy was fixed for 11 months. After expiry of 11 months, the tenancy was not renewed.

8. The trial court after exchange of pleadings formulated the following issues for determination:

I. Whether the plaintiff was entitled to an injunction against the defendant to the effect that the plaintiff could not be evicted from shop in dispute except in accordance with process of law?

II. Whether the suit was maintainable? What was the nature relief to which the plaintiff was entitled to?

III. Whether the plaintiff was a lawful tenant of the premises in dispute?

9. Learned trial court found that the plaintiffs-appellants, were the tenants of the defendant-respondent. Since the defendant-respondent had accepted the fact of the tenancy of the plaintiffs-appellants, the plaintiffs-appellants had established their case. The learned trial court, accordingly reasoned that the plaintiffs-appellants were entitled to an injuction. The learned trial court rendered a judgment and decree dated 30.07.2015, in favour of the plaintiffs-appellants, injuncting the defendant-respondent from dispossessing the plaintiffs-appellants without adopting the procedure as per law.

10. Being aggrieved the defendant-respondent carried the judgment and decree of the learned trial court in appeal.

11. The appeal was registered as Civil Appeal No. 85 of 2015 (Bhola Nath Vs. Savrunisha and others), before the learned appellate court. The appellate court formulated the following questions for determination.

I. Whether the plaintiff was the tenant of the premises in dispute?

II. Whether the plaintiff was trespasser over the premises in dispute?

12. The appellate court found that the plaintiffs-respondents, were inducted into possession, in violation of the procedure prescribed under Sections 11, 12, 13, 17 and 21 of the Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (hereinafter referred to as U.P. Act No. 13 of 1972). The learned appellate court held that without a valid allocation under the U.P. Act No. 13 of 1972, no person could be inducted as a tenant, in a premises coming under the purview of the said Act. According to the appellate court, any person who is inducted as a tenant, in violation of the aforesaid provisions of law, like the plaintiffs-appellants, was nothing but an illegal trespasser in possession. Such persons were liable to be evicted.

13. The learned appellate court found that the plaintiffs-appellants, were tenants who consistently defaulted in payment of rent. On this line of reasoning too, the learned appellate court held that the plaintiffs-appellants, were in illegal possession over the premises, and declared them to be trespassers.

14. In the wake of the aforesaid findings, the learned appellate court opined the plaintiffs-appellants being in illegal possession cannot be granted an injunction by the court against the true owner.

15. By the judgment and decree dated 11.02.2016, the learned appellate court accordingly allowed the appeal of the defendant-respondent, and dismissed the suit of the plaintiffs-appellants.

16. The findings of the learned appellate court rest on the material and evidence in the record, and are backed by cogent reasons. No illegality can be found in the aforesaid findings.

17. There is another aspect to the matter, which may be considered.

18. The method of "due process of law" to be adopted by a true owner to evict an unauthorized occupant, and the import of the phrase, "eviction in accordance with law", is settled by authority.

19. Faced with the question of the remedy available in law to a true owner to eject an unlawful occupant, the Hon'ble Delhi High Court in the case of ***Thomas Cook (India) Ltd. Vs. Hotel Imperial, reported at 2006(88) DRJ 545,*** in eloquent words explained the phrases "due process of law", "due course of law" and "recourse to law" in similar fact situation to enduring effect:

"28. The expressions `due process of law', `due course of law' and `recourse to law' have been interchangeably used in the decisions referred to above which say that the settled possession of even a person in unlawful possession cannot be disturbed `forcibly' by the true owner taking law in his own hands. All these expressions, however, mean the same thing --ejectment from settled possession can only be had by recourse to a court of law. Clearly, `due process of law' or `due course of law', here, simply mean that a person in settled possession cannot be ejected without a court of law having adjudicated upon his rights qua the true owner.

Now, this `due process' or `due course' condition is satisfied the moment

the rights of the parties are adjudicated upon by a court of competent jurisdiction. It does not matter who brought the action to court. It could be the owner in an action for enforcement of his right to eject the person in unlawful possession. It could be the person who is sought to be ejected, in an action preventing the owner from ejecting him. Whether the action is for enforcement of a right (recovery of possession) or protection of a right (injunction against dispossession), is not of much consequence. What is important is that in either event it is an action before the court and the court adjudicates upon it. If that is done then, the `bare minimum' requirement of `due process' or `due course' of law would stand satisfied as recourse to law would have been taken. In this context, when a party approaches a court seeking a protective remedy such as an injunction and it fails in setting up a good case, can it then say that the other party must now institute an action in a court of law for enforcing his rights i.e., for taking back something from the first party who holds it unlawfully, and, till such time, the court hearing the injunction action must grant an injunction anyway? I would think not. In any event, the `recourse to law' stipulation stands satisfied when a judicial determination is made with regard to the first party's protective action. Thus, in the present case, the Plaintiff's failure to make out a case for an injunction does not mean that its consequent cessation of user of the said two rooms would have been brought about without recourse to law."

20. The Hon'ble Supreme Court placing reliance on the law laid down by the Hon'ble Delhi High Court, in the case of ***Thomas Cook (supra),*** reiterated the same position of law in the case of ***Maria Margarida Sequeira Fernandes (supra)*** by holding thus:

"79. Due process of law means nobody ought to be condemned unheard. The due process of law means a person in settled possession will not be dispossessed except by due process of law. Due process means an opportunity for the Defendant to file pleadings including written statement and documents before the Court of law. It does not mean the whole trial. Due process of law is satisfied the moment rights of the parties are adjudicated by a competent Court.

97. Principles of law which emerge in this case are crystallized as under:

1. No one acquires title to the property if he or she was allowed to stay in the premises gratuitously. Even by long possession of years or decades such person would not acquire any right or interest in the said property.

2. Caretaker, watchman or servant can never acquire interest in the property irrespective of his long possession. The caretaker or servant has to give possession forthwith on demand.

3. The Courts are not justified in protecting the possession of a caretaker, servant or any person who was allowed to live in the premises for some time either as a friend, relative, caretaker or as a servant.

4. The protection of the Court can only be granted or extended to the person who has valid, subsisting rent agreement, lease agreement or license agreement in his favour.

5. The caretaker or agent holds property of the principal only on behalf of the principal. He acquires no right or

interest whatsoever for himself in such property irrespective of his long stay or possession."

21. The law has thus been settled, that the lawful process of eviction of an unauthorized occupant by a true owner, essentially means grant of an opportunity to the parties to tender their defence, and its adjudication by a court of law. Once, the courts of law have found that the occupant is a trespasser, or a person in unauthorized occupation, against the claim of the lawful owner; such unauthorized occupant does not have any further right to possession over disputed premises. The said unauthorized occupant has to vacate the premises voluntarily, after the adjudication is entered by the courts. Upon failure to do so, the said person is liable to be evicted by execution of the judgement and decree, holding the former to be an unauthorized occupant/trespasser.

22. In such cases, the findings of illegal occupation by an unauthorized occupant, against the claim of a true owner, rendered by the court, operate as the lawful basis for eviction of such illegal occupant through execution proceedings. No fresh suit for any further adjudication is necessary.

23. This Court in a Second Appeal No. 621 of 2016, Ashfaq Ali Vs. Smt. Tahira and 2 Others, held thus:

"53. A judgment by a court, holding a person to be an unauthorized occupant against the claim of a true owner fully constitutes the lawful basis of eviction of the unauthorized occupant. This determination is conclusive for securing the eviction of an unauthorized occupant. In the face of the said adjudication, it does not matter who brought the suit. No further judicial enquiry or adjudication by the courts is required for eviction of the unauthorized occupant."

24. The instant appeal is squarely covered with the law settled in the authorities referenced in the preceding paragraphs. No substantial questions of law as such arise in the instant second appeal.

25. Further, learned counsel for the appellant could not point out any substantial question of law which arises in this appeal. The questions of law stated in the memo of appeal are all issues of fact, and do not pose any substantial question of law for determination.

26. In light of the preceding narrative, the Second Appeal is liable to be dismissed and stands, accordingly, dismissed.

(2019)12 ILR A15

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.10.2019

BEFORE
THE HON'BLE VIVEK KUMAR BIRLA, J.

First Appeal No. 704 of 2019

Smt. Richa Gaur ...Appellant/Defendant
Versus
Kamal Kishore Gaur
...Plaintiff/Respondent

Counsel for the Appellant:
Sri Shyam Shanker Pandey

Counsel for the Respondent:

Sri Kapil Tyagi, Sri Samarth Sinha, Sri Vijay Sinha

A. Property Law - Mandatory Injunction - Matrimonial Home - Right of daughter-in-law to reside in the house of her father-in-law - Status of the daughter-in-law was a mere licensee and had no right to reside in the house in question after cancellation of the licence by the original owner i.e. her father -in-law

Suit for mandatory injunction filed by plaintiff/respondent against appellant who is daughter-in-law of the plaintiff - After marriage appellant started living with her husband, son of the plaintiff, but subsequently, matrimonial disputes arose - Plaintiff divested his son and daughter-inlaw from his property - husband of the appellant left the house and started living elsewhere - *Held* - Status of daughter-in-law merely of a licensee, whose license stood terminated by the original owner i.e. the plaintiff - As such daughter-in-law has no right to reside in the house in question after cancellation of the license by the original owner i.e. the plaintiff herein. (Para 15)

First Appeal dismissed. (E-5)

List of cases cited: -

1. Smt. Sunita Vs Smt. Brahmwati And Another First Appeal No. 76 of 2014

2. S.R. Batra and another Vs Taruna Batra (Smt) 2007 (3) SCC 169

3. Vimlaben Ajitbhai Patel Vs Vatslaben Ashokbhai Patel & Others (2008) 4 SCC 649

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

1. Heard learned counsel for the appellant and Sri Vijay Sinha alongwith Sri Samarth Sinha, learned counsel appearing for the respondent.

2. Present appeal has been filed against the judgment and order dated 17.8.2019 passed by the Civil Judge (Senior Division), Ghaziabad in Civil Suit No. 839 of 2017, Kamal Kishore Gaur Vs. Smt. Richa Gaur.

3. A suit for mandatory injunction was filed by the plaintiff-respondent against the defendant-appellant herein, who is daughter-in-law of the plaintiff. Relevant facts are that after marriage the defendant started living with her husband, son of the plaintiff, but subsequently, matrimonial disputes arose between them and the plaintiff divested his son and daughter-in-law on 25.7.2017 from his property and asked them to leave the house, which belongs to the plaintiff. Thereafter, son of the plaintiff, namely, Vikas Gaur, husband of the defendant-appellant herein, left the house and started living elsewhere. The suit for mandatory injunction was filed on the ground that the defendant is a licensee and has no right to reside in the house in question after cancellation of license by the plaintiff. It is not in dispute that several matrimonial disputes including criminal cases are pending between the husband and wife, wherein plaintiff and other family members were also implicated.

4. The Trial Court framed six issues. For the purpose of considering the appeal at the admission stage three issues are relevant, namely, (1) whether the defendant is licensee in the house in question; (2) whether the defendant is entitled to live in the house in question; and (3) to what relief the plaintiff is entitled for. On issue Nos. 1 and 2 it was found by the Trial Court that the defendant was a mere licensee and has no right to reside in the house in question after cancellation of the licence by the original owner i.e. the plaintiff. The suit

was decreed and the defendant was directed to handover the possession of the property in question to the plaintiff otherwise the plaintiff shall be entitled to recover the possession of the suit property through Court.

5. Challenging the aforesaid judgment, submission of the learned counsel for the defendant-appellant is that the trial court has not considered the right of the daughter-in-law, who is residing in the house in dispute since 2012 and that admittedly, her husband is residing in another house and is not maintaining her, therefore, she is entitled to reside in the house in question as daughter-in-law as soon after marriage she had started living in this house and has a right to reside therein.

6. Per contra, learned counsel for the respondent has disputed the same and submits that the law is settled that the plaintiff is exclusive owner of the house and admittedly, husband of the defendant is living separately and license of the defendant, who is living in the house, was legally terminated by the plaintiff, therefore, she has no right to reside in the house in question. In support of his arguments, learned counsel for the respondent has placed reliance on a judgment of this Court dated 29.9.2015 passed by Hon'ble Single Judge in **First Appeal No. 76 of 2014 (Smt. Sunita vs Smt. Brahmwati And Another)** whereby the appeal was dismissed at the admission stage itself.

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

8. On perusal of record I find that admitted fact is that plaintiff is the owner of the house in question; son of the plaintiff i.e. husband of the defendant-Vikas Gaur, who is living separately, has been divested from the property and was asked to leave the house by his father, the plaintiff.

9. Under such circumstances, she has no right to reside in the house in question after cancellation of license by the original owner i.e. the plaintiff herein. A reference may be made in this regard, to a judgment of the Hon'ble Apex Court in the case of **S.R. Batra and another vs. Taruna Batra (Smt) 2007 (3) SCC 169.** Paragraphs 24, 25, 26, 29 and 30 of the aforesaid judgment are quoted as under:-

"24. Learned counsel for the respondent Smt. Taruna Batgra stated that the definition of shared household includes a household where the person aggrieved lives or at any stage had lived in a domestic relationship. He contended that since admittedly the respondent had lived in the property in question in the past, hence the said property is her shared household.

25. We cannot agree with this submission.

26. If the aforesaid submission is accepted, then it will mean that wherever the husband and wife lived together in the past that property becomes a shared household. It is quite possible that the husband and wife may have lived together in dozens of places e.g. with the husband's father, husband's paternal grand parents, his maternal parents, uncles, aunts, brothers, sisters, nephews, nieces etc. If the interpretation canvassed by the learned counsel for the respondent is accepted, all these houses of the husband's relatives will be shared households and the wife can well insist in living in the all these houses of her husband's relatives

merely because she had stayed with her husband for some time in those houses in the past. Such a view would lead to chaos and would be absurd.

29. As regards Section 17(1) of the Act, in our opinion the wife is only entitled to claim a right to residence in a shared household, and a `shared household' would only mean the house belonging to or taken on rent by the husband, or the house which belongs to the joint family of which the husband is a member. The property in question in the present case neither belongs to Amit Batra nor was it taken on rent by him nor is it a joint family property of which the husband Amit Batra is a member. It is the exclusive property of appellant No. 2, mother of Amit Batra. Hence it cannot be called a shared household.

30. No doubt, the definition of 'shared household' in Section 2(s) of the Act is not very happily worded, and appears to be the result of clumsy drafting, but we have to give it an interpretation which is sensible and which does not lead to chaos in society."

10. In the aforesaid case, the Hon'ble Apex Court has interpreted the provisions of Section 2(s) and Section 17 of the Protection of Women From Domestic Violence Act, 2005 and has observed as noted above and refused to grant relief to the wife.

11. **S.R. Batra (supra)** was relied on in **Vimlaben Ajitbhai Patel vs. Vatslaben Ashokbhai Patel & Others (2008) 4 SCC 649,** paragraphs of 28, 47 and 48 whereof are quoted as under:-

"28. Interpreting the provisions of the Domestic Violence Act this Court in S.R. Batra vs. Taruna Batra (2007) 3 SCC 169 held that even a wife could not claim a right of residence in the property belonging to her mother-in-law, stating :

"17. There is no such law in India like the British Matrimonial Homes Act, 1967, and in any case, the rights which may be available under any law can only be as against the husband and not against the father-in- law or mother-in-law.

18. Here, the house in question belongs to the mother- in-law of Smt Taruna Batra and it does not belong to her husband Amit Batra. Hence, Smt Taruna Batra cannot claim any right to live in the said house.

19. Appellant 2, the mother-in-law of Smt Taruna Batra has stated that she had taken a loan for acquiring the house and it is not a joint family property. We see no reason to disbelieve this statement."

47. Reliance has also been placed on I.J. Divakar and others vs. Govt. of Andhra Pradesh and another : (1982) 3 SCC 341. The said decision was rendered under the Industrial Law. Regularization was directed to be provided to the workmen. A Constitution Bench of this Court in Secretary State of Karnataka and others vs. Umadevi and others : (2006) 4 SCC 1 opined that all such decisions shall stand overruled.

48. Sympathy or sentiment, as is well known, should not allow the Court to have any effect in its decision making process. Sympathy or sentiment can be invoked only in favour a person who is entitled thereto. It should never be taken into consideration as a result whereof the other side would suffer civil or evil consequences."

12. It would also be relevant to extract the relevant paragraphs of **Smt.**

Sunita (supra) which are quoted as under:-

"The appellant is daughter-in-law of the plaintiff who has filed a suit for mandatory injunction against her son and daughter-in-law. The defendant no. 1, son of the plaintiff did not appear in the suit and hence the suit had proceeded ex-parte against defendant no. 2. The claim made by defendant no. 2 was that soon after marriage, she came to this house and as such she has a right to reside therein. The plaintiff cannot evict her from her marital home.

.....

More so, in view of the findings recorded by the court that the defendant no. 2 was a mere licencee and has no right to reside in the house in question after cancellation of licence by the original owner i.e. plaintiff.

The challenge to this finding on issue no. 1 cannot be accepted for the reason that a woman has a right to reside in the house of her husband after marriage. She has no claim on the house of her father-in-law or mother-in-law. The property in dispute was self acquired property of her father-in-law and the plaintiff had inherited the said house after death of her husband. On account of mis-deeds of defendant no. 2, the relations between mother-in-law and daughter-in-law have strained and therefore, the plaintiff has asked the defendants to leave her house. The plaintiff is a 70 years old lady and she cannot be subjected any more physical or mental harassment at the hands of the defendant, her son and daughter-in-law."

13. Thus, not only what has been held in **S.R Batra (supra)** as held by Constitutional Bench in **Uma Devi (supra)** referred to in **Vimlaben Ajitbhai Patel (supra),** if any relief is granted to the defendant-appellant it would be a case of misplaced sympathy in favour of the defendant, who had already filed several cases including criminal case against the old age plaintiff and other family members.

14. In the present case, undisputedly, the house in question belongs to the father, the plaintiff and he had divested his son from his property and admittedly, the son (husband of the defendant) is not living in the house.

15. In view of the discussion as made hereinabove, it is clear that the house, which admittedly belongs to the plaintiff, cannot be treated as a shared house in the facts and circumstances of the case and as such the status of defendant, as rightly held by the trial court, would be merely of a licensee, whose license stood terminated by the original owner i.e. the plaintiff herein. As such she has no right to reside in the house in question after cancellation of the license by the original owner i.e. the plaintiff herein.

16. In case of **Smt. Sunita (supra)** the plaintiff was about 70 years old lady and in the present case also the plaintiff was aged about 68 years in the year 2017 when the suit was filed and as such the ratio of the said judgment applies with full force.

17. Accordingly, I find that there is no legal infirmity in the findings recorded by the trial court. No other ground has been pressed.

18. The appeal stands dismissed at the admission stage itself.

(2019)12 ILR A20

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.10.2019

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE RAJEEV MISRA, J.

First Appeal No. 737 of 2017
connected with
First Appeal No. 672 of 2018

Smt. Saroj Singh Chauhan ...Appellant
Versus
Arvind Kumar Chauhan ...Respondent

Counsel for the Appellant:
Sri Arvind Kumar Chauhan

Counsel for the Respondent:
Sri Triloki Nath, Sri T.N. Tiwari.

Civil Law - Family Court Act (66 of 1984) Section 19 - Civil Procedure Code (5 of 1908) Order 5, Rule 20 - Order 9, Rule 13 - Appeal against ex parte decree - Substituted service of summons - Suit for divorce filed by husband - No summons served upon wife prior to passing ex-parte judgment & decree - Court below did not record its satisfaction that publication had been made in daily newspaper, which has wide circulation in locality in which wife resides - Ex-parte decree & order rejecting recall application liable to be set aside

First Appeal allowed. (E-5)

List of cases cited: -

1. Ramji Dass and Others Vs Mohan Singh, 1978 ARC 496 (SC)

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

1. These are two Defendants' First Appeals filed under Section 19 of Family Courts Act 1984 (hereinafter referred to as Act, 1984).

2. First Appeal No. 737 of 2017(Smt. Saroj Singh Chauhan Vs. Arvind Kumar Chauhan) has been filed challenging judgement dated 25.07.2017 and decree dated 23.08.2017 passed by Principal Judge, Family Court, Varanasi in Misc. Case No. 77 of 2008 (Saroj Vs. Arvind) in Marriage Petition No.565 of 2007 (Arvind Kumar Chauhan Vs. Saroj Singh Chauhan) whereby and where-under application dated 03.10.2008 (Paper No. 4Ga) filed by Defendant-Appellant (hereinafter referred to as 'Appellant') under Order IX Rule13 C.P.C. for recall of exparte judgement dated 08.05.2008 and decree dated 04.08.2008, respectively has been rejected.

3. First Appeal No. 672 of 2018 (Smt. Saroj Singh Chauhan Vs. Arvind Kumar Chauhan) has been filed challenging exparte judgement dated 08.05.2008 as well as decree dated 04.09.2008 passed by Principal Judge, Family Court, Varanasi in Marriage Petition No.565 of 2007 (Arvind Kumar Chauhan Vs. Saroj Singh Chauhan) whereby Court below has allowed Marriage Petition filed by plaintiff-respondent (hereinafter referred to as'Plaintiff') and consequently, annulled marriage of parties.

4. We have heard Mr. T. N. Tiwari, Advocate, learned counsel for Appellant. No one has appeared on behalf of respondent.

5. According to plaint allegations marriage of Appellant was solemnized

with Plaintiff on 03.05.2004 in accordance with Hindu Rites and Customs. After marriage, Appellant came to her matrimonial home on 04.05.2004. After staying about three days at her marital home, Appellant went to her parental home and thereafter returned to her marital home after one month. According to Plaintiff, Appellant duly performed her spousal obligations. It is the case of Plaintiff that at the time of marriage, Appellant had just passed her intermediate examination i.e. Class 12th. However, Appellant wanted to pursue her studies further. Appreciating her desire for further studies, Plaintiff with permission of his parents got Appellant admitted in B.A. First Year Course at Kasi Vidyapith, Varanasi. Consequently, Appellant started receiving her education in the aforesaid Course by residing at her parental home as well as with her classmates. It is alleged by Plaintiff that after taking admission in B.A. First Year Course, Appellant visited her marital home only for two months but thereafter, she mostly stayed at her parental home, despite repeated requests made by Plaintiff requesting Appellant not to stay at her parental home for such long periods. Appellant on the excuse of her studies did not pay any heed to the request of Plaintiff and his parents. Appellant as such used to visit her marital home at her will. Appellant came in family way. In the last days of her family way she insisted for staying at her parental home and accordingly went to her parental home. Ultimately, she gave birth to a girl child on 29.07.2005 at her parental home. Plaintiff, his mother and other relatives allege to have gone to parental home of Appellant and contributed by every means for well being of Appellant and newly born child. According to Plaintiff, he alongwith his mother visited parental house of Appellant and brought back Appellant to her marital home on 05.11.2005. However, just after two days Appellant on the pretext of her studies forcibly went to her parental home. Appellant started residing at her parental home. On the request made by Plaintiff and his mother requesting Appellant to return to her marital home, she was not agreeable. To the contrary she used to indulge in creating a 'Facade' on the said issue. Appellant as such started residing at her parental home and used to come to her marital home only to collect money to meet her expenses. Many attempts are alleged to have been made by Plaintiff to pursue Appellant to live in her marital home but she never agreed. Ultimately, after great efforts Appellant came to her marital home but again on the pretext of her studies, she went back to her parental home. Appellant is alleged to have stayed for a period of one or two days at her marital home and while leaving her marital home she took away all jewellary and clothes given by her in-laws at the time of marriage. After completing B.A. Second Year Course, Appellant demanded money for her educational and other expenses so that she could fill up form for B.A. Third Year Course. However, this request of Appellant was refused by Plaintiff and his family members on the ground that even if Appellant is desirous of pursuing her studies, she should stay at her marital home and pursue her studies from there only. However, according to Plaintiff, Appellant was not agreeable to this suggestion and ultimately, returned to her parental home.

6. One day in August, 2006, when mother of Plaintiff was all alone at home,

as other family members had gone out, Appellant came to her marital home alongwith her brother Manoj Chauhan and her father. She had a scuffle with her mother-in-law and took away her clothes and other goods, which were lying at her marital home. Plaintiff, his father and his elder brother -Akhilesh came to know of aforesaid incident in evening. As such, they all went to parental home of Appellant. They had a dialogue with family members of Appellant and requested for sending Appellant to her marital home alongwith all her jewellery and clothes. On this, family members of Appellant revolted and abused father of Plaintiff. They did not agree to the request made by Plaintiff and his family members for sending Appellant to her marital home. After some time Plaintiff alone went to meet Appellant at her parental home for requesting her to return at her marital home. However, Appellant plainly refused to return to her marital home. According to Plaintiff, she alleged that in case Plaintiff wants to maintain relations with her, he should separate himself from his family and start residing with Appellant at her parental home. Thus, in October, 2006, father and brother of Appellant went to the house of Plaintiff to discuss about separation/divorce of Appellant from Plaintiff. They requested for holding a Panchayat in that regard. On this issue, exchange of hot words between Plaintiff and father/brother of Appellant is alleged to have taken place. On this, father of Appellant and his brother, who are notorious and have formed a gang, threatened mother of Plaintiff and after extending threat and exchanging hot words, returned. After aforesaid incident, Plaintiff and relatives of Appellant wanted to amicably settle dispute. Unfortunately on 20.12.2006, father of Appellant and her brother connived with each other to get mother of Plaintiff killed. Unfortunately, mother of Plaintiff died at her matrimonial home. An F.I.R. in respect of aforesaid incident was lodged against unknown persons. Police upon investigation implicated father and brother of Appellant as accused. They were released on bail. Appellant failed to discharge her spousal obligations after 10.05.2005, nor established conjugal relations. After 10.02.2005, conduct of Appellant towards Plaintiff is full of cruelty and without any reason Appellant has deserted Plaintiff. Since conduct of Appellant towards Plaintiff is full of cruelty and she has also deserted Plaintiff as such he/Plaintiff filed suit for divorce on the aforesaid grounds under Section 13 (1) of Hindu Marriage Act, 1955 (hereinafter referred to as Act, 1955).

7. After institution of suit, summons were issued to Appellant. Summons were refused to be received by Appellant herein. Same were thereafter sent by registered post. Ultimately, service upon Appellant was affected by way of substituted service by getting publication made in a Daily Newspaper 'Janwarta' in its Edition Dated 17.01.2008. Despite of aforesaid, Appellant did not appear in the suit.

8. Plaintiff in order to prove his case adduced himself as P.W.-1, Arvind Kumar Chauhan as P.W.-2 and Akhilesh Kumar Chauhan as P.W.-3. Vide list of documents Paper No. 20Ga, Plaintiff filed copy of charge sheet and F.I.R. pertaining to Case No. 7751 of 2007 (State Vs. Ahok Chauhan and others) under Section 302 I.P.C., P.S. Sarnath, District-Varanasi.

9. Court below proceeded to decide suit filed by Plaintiff ex-parte as in the

opinion of Trial Court, in spite of service of notice, Appellant failed to appear in suit.

10. According to Court below, Plaintiff filed suit for divorce on the grounds of 'cruelty' and 'desertion', which are recognized as grounds of divorce under Sections 13 (1) (i-a) and 13(1) (i-b) of Act, 1955. For ready reference Sections 13 (1) (i-a) and 13(1) (i-b) are reproduced herein-under:

" 13. Divorce--(1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party--

"(i-a) has, after the solemnization of the marriage, treated the petitioner with cruelty;

(i-b) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petitioner;"

11. It may be noted here that marriage of parties was solemnized on 03.05.2005 and suit for divorce was filed on 29.08.2007. Therefore, as per mandate of Section 13(1) (i-b) of Act, 1955, a period of two years must have preceded on 29.08.2007. Trial Court concluded that in para 10 of plaint, it has been pleaded that Appellant alongwith her father and brother came to her matrimonial house when mother of Plaintiff was all alone at home. In view of aforesaid, it cannot be said that a period of two years have rolled by immediately before presentation of suit. As such, ground of desertion pleaded by Plaintiff is misconceived. The mandatory period required to have lapsed for taking the plea of desertion is not satisfied in the facts and circumstances of the case. In respect of cruelty, Trial Court concluded that in order to prove cruelty, Plaintiff has got examined himself and one Akhilesh Kumar Chauhan and also filed Documentary evidence i.e. photocopy of F.I.R. and charge-sheet. However, no evidence was adduced on behalf of Appellant contradicting averments made in plaint. Consequently, simply on the aforesaid ground, Court below concluded that commission of 'cruelty' by Appellant upon Plaintiff is proved and consequently, suit for divorce filed by Plaintiff was decreed on the ground of 'cruelty' vide judgement dated 8.5.2008 and decree dated 4.8.2008.

12. On coming to know of aforesaid exparte judgement and decree Appellant filed an application dated 03.10.2008 (Paper No.4Ga) under Order IX Rule 13 C.P.C. for recall of exparte judgement dated 25.07.2017 and decree dated 23.08.2018 passed by Principal Judge, Family Court, Varanasi. Since there was a delay in filing recall application, an application under 5 of Limitation Act was also filed for condonation of delay in filing recall application.

13. No objection was filed by Plaintiff to delay condonation application or recall application filed by Appellant. Vide order dated 11.11.2011, Court below allowed delay condonation application (Paper No.6 ga) but ultimately rejected recall application (Paper No. 4 Ga) vide order dated 25.7.2017 and formal order dated 23.8.2017.

14. A perusal of order dated 25.07.2017 will go to show that Court below rejected the recall application filed

by appellant by recording a finding that grounds shown by Appellant regarding knowledge of ex-parte decree are not believable. It was further observed that in spite of service upon Appellant by substituted mode, i.e., by way of publication in Newspaper, she did not appear and participate in proceedings, as such there is no ground to allow recall application filed by Appellant.

15. Feeling aggrieved by order dated 25.07.2017 and formal order dated 23.08.2017, Appellant has filed First Appeal No. 737 of 2017 (Smt. Saroj Singh Chauhan Vs. Arvind Kumar Chauhan) whereas First Appeal No. 672 of 2018 (Smt. Saroj Singh Chauhan Vs. Arvind Kumar Chauhan) has been filed challenging ex-parte judgement dated 08.05.2008 and decree dated 04.08.2008.

16. We have heard Mr. T.N. Tiwari, learned counsel for Appellant. Challenging the judgement and decree as well as order passed by Court below, learned counsel for Appellant invited attention of Court to original record of court below. He submits that there is nothing on record to show when summons were issued and on which date, they were refused to be received by Appellant. There is no report of Process Server on record proving aforesaid. He then submits that on record there is only a receipt issued by Postal Department but there is no acknowledgment or endorsement by postal Official available on record to show that notices sent by Registered Post were sought to be served upon Appellant but she refused. He lastly submits that publication has been made in Daily Newspaper 'Janwarta' in its Edition Dated 17.01.2008, which is not having wide circulation in District-Varanasi. He thus submits that procedure adopted for service upon Appellant is contrary to the mandate of Order 5 Rules 12, 17, 18 and 20 C.P.C. Hence impugned judgement and decree passed by Court below being ex-parte against Appellant are liable to be set aside by this Court.

17. Before proceeding to consider correctness of submissions advanced by learned Counsel for Appellant, it will be appropriate to reproduce Order 5 Rules 12, 17, 18 and 20 of C.P.C. for ready reference:

*"**12. Service to be on defendant on person when practicable, or on his agent**--Wherever it is practicable service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on such agent shall be sufficient.*

***17. Procedure when defendant refuses to accept service, or cannot he found**--Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgement, or where the serving officer, after using all due and reasonable diligence, cannot find the defendant, who is absent from his residence at the time when service is sought to be effected on him at his residence and there is no likelihood of his being found at the residence within a reasonable time and there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the Court from which it was*

issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed.

18. Endorsement of time and manner of service--*The serving officer shall, in all cases in which the summons has been served under rule 16, endorse or annex, or cause to be endorsed or annexed, on or to the original summons, a return stating the time when and the manner in which the summons was served, and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of the summons.*

20. Substituted services--*(1) Where the Court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service, or that for any other reason the summons cannot be served in the ordinary way, the Court shall order the summons to be served by affixing a copy thereof in some conspicuous place in the Court-house, and also upon some conspicuous part of the house (if any) in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the Court thinks fit.*

(1-A) Where the Court acting under sub-rule (1) orders service by an advertisement in a newspaper, the newspaper shall be a daily newspaper circulating in the locality in which the defendant is last known to have actually and voluntarily resided, carried on business or personally worked for gain.

(2) ***Effect of substituted service-****Service substituted by order of the Court shall be as effectual as if it had been made on the defendant personally.*

(3) ***Where service substituted, time for appearance to he fixed*** *-Where service is substituted by order of the Court, the Court shall fix such time for the appearance of the defendant as the case may require."*

18. We ourselves have examined original record. Suit was presented on 31.08.2007 and summons were issued to Appellant on 31.08.2007 itself. Summons were returned on 17.11.2017, 'unserved'. There is no report of Process Server on record. On 27.11.2007, Court passed an order that fresh steps be taken for service. Steps were taken on 01.12.2007 for service upon Appellant. On 07.01.2008, an application (Paper No. 11Ga) alongwith affidavit (Paper No. 12 Ga) was filed by Plaintiff for service of notice on Appellant by Publication. On this application, Court passed an order that Steps be taken within a week. On 10.01.2018, Court passed an order that notice be served upon Appellant by Publication in Newspaper. Accordingly Publication was made in Daily Newspaper "Janwarta" in its Edition dated 17.01.2008. On record we also find a receipt issued by Postal Department in respect of registry sent to Saroj Singh Chauhan, wherein her address was shown as R/o Cantt. Varanasi. It may be noted here that address of Appellant shown in plaint of Matrimonial Petition is S 2/214 Rhitori Mahal, P.S. Cantt. District-Varanasi. There is nothing in order-sheet to show that Court permitted Plaintiff to serve notices upon Appellant, by registered post.

19. When procedure adopted by Court below for service upon Defendant-

Appellant is examined in the light of provisions contained in Order 5 Rules 12, 17, 18 and 20 of C.P.C, this Court finds that there is no compliance of Order 5 Rule 17 C.P.C. Secondly, there is no endorsement by Process Server in terms of Order 5 Rule 18 C.P.C. nor Court below has examined Process Server under Order 5 Rule 19 C.P.C. Service of summons by Registered Post which is contemplated under Order 5 Rule 19A, came to be omitted by Act 46 of 1999. Therefore, no service by registered post could be made. Lastly, Court below has not complied with the mandate of Order 5 Rule 20 C.P.C. before directing service upon Defendant-Appellant by way of substituted service.

20. Having examined relevant provisions of law in the light of facts of the case, we are satisfied with the plea taken by Appellant that no summons were served upon her, prior to passing ex-parte judgement and decree. We are also satisfied that Court below did not record its satisfaction that Publication has been made in a Daily Newspaper, which has vide circulation in the locality in which Appellant resides. Lastly, this Court is not unmindful of law laid down in ***Ramji Dass and Others Vs. Mohan Singh, 1978 ARC 496 (SC),*** wherein Supreme Court has observed that a judgement after hearing parties is far far better than a judgement which is ex-parte. For ready reference, relevant observations made in Ramji Dass (Supra) are quoted herein under:

"An ex parte decree passed eight years ago was set aside by the Court which passed it and the order was confirmed in revision by the District Court. The High Court, in exercise of its powers under Section 115 C.P.C, set aside on various grounds. After having heard counsel, we are inclined to the view that, as far as possible, Courts' discretion should be exercised in favour of hearing and not to shut out hearing. Therefore, we think that the order of the High Court should not have been passed in the interests of Justice which always informs the power under S. 115 C.P.C. We, therefore, set aside that order and also the ex parte decree. We direct the trial court to take back the suit on file and proceed forthwith to trial. The suit is very old and it should be disposed of within six months from the receipt of this order by the trial court. We further direct that as a condition for setting aside the ex parte decree, the appellants shall pay to the respondent, within one month from today a sum of Rs. 250/- by way of costs."

21. In view of discussion made above, we have no hesitation to allow

565 of 2007 (Arvind Kumar Chauhan Vs. Saroj Singh Chauhan) is restored. Defendant-Appellant shall be permitted to file her written statement and thereafter, Court below shall proceed to decide the marriage petition on merits afresh.

22. Appellant shall be entitled to her costs, which we assess at Rs.50,000/-.

Amount of cost shall be deposited by Plaintiff-Respondent before Court below by way of Bank Draft payable to Defendant-Appellant. Aforesaid deposit shall be made withing a period of two months from today, failing which, Court below shall proceed to recover the same as a recovery under its own order.

(2019)12 ILR A27
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.10.2019

BEFORE
THE HON'BLE JAYANT BANERJI, J.

Second Appeal No. 881 of 2006

Hindustan Petroleum Corporation
...Appellant
Versus
Satish Chandra Jain & Ors.
...Respondents

Counsel for the Appellant:
Sri Vikas Budhwar

Counsel for the Respondents:
Sri Vijay Singh, Sri H.P. Sahi, Sri Chandra Prakash Yadav, Sri Sankalp Narain, Sri Samarth Singh, Sri M.K. Gupta, Sri Pankaj Agarwal

A. Civil Law - Civil Procedure Code (5 of 1908) - Order12 - Rule 6, Order 15 -Rule 5 – 'Striking off defence' Vis-s-vis 'striking out of the pleadings' - Difference - Effect on admissions made in W.S. – *Held* - Even on striking off the defence admissions made in the W.S. could be looked into by the courts below

Striking off the defence would have the effect of parties being not at issue - material facts contained in the written statement would not be considered as denial of the truth or validity of the material facts contained in the plaint - Striking off the defence as envisaged in Order 15 Rule 5 cannot be construed to mean as striking out of the pleadings under Order 6 Rule 16 CPC - It is not as if on striking off the defence, each and every statement made in the written statement would be struck off without reference to the fact whether a particular statement is in defence or otherwise - On striking off the defence, it is always open for the Court to consider those statements of the written statement other than in defence, which may include admissions (Para 25 & 26)

B. Civil Law - Civil Procedure Code (5 of 1908) – Order 15, Rule 5 - Striking off defence – Right of defendant - *Held* - Post striking off the defence, defendant has the right of cross examination of the plaintiff's witnesses and of addressing arguments on the basis of the plaintiff's case - even though the defence of the defendant is struck off, plaintiff enjoined to plead and prove their case (Para 44)

C. Civil Law - Civil Procedure Code (5 of 1908) - Order 12, Rule 6- Order 15, Rule 5 - By a composite order the court could not strike off the defence under Order 15, Rule 5 CPC & simultaneously decree the suit either under Order 12, Rule 6 CPC or Order 15, Rule 1 -relying on admission made in the written statement for

Held - Order of the trial court simultaneously decreeing the suit of the plaintiff on the basis of the admission while striking off the defense cannot be countenanced - trial court ought to have permitted the counsel for the defendant to address it on the issue of admission – defendant ought to have opportunity to cross examine the plaintiff's witnesses or to address arguments post striking off its defence. (Para 16)

D. Civil Law - Civil Procedure Code (5 of 1908) – Order 15, Rule 5 - Striking off defence for failure to deposit admitted rent – admitted monthly rent was deposited by the defendant-appellant in the Court after lapse of more than a week of its accrual and there was no representation filed by defendant within ten days as provided in clause (2) of Order 15, Rule 5 –

Held **- Trial court was justified in striking off the defence of the defendant under Order 15, Rule 5 CPC** (Para 24)

E. Civil Law - Rent Control & Eviction – Term 'permanent structure' – Test to determine 'permanent structure' - "permanent" does not mean that the structure must last forever - A structure that lasts till the end of the tenancy can be treated as a permanent structure. The intention of the party putting up the structure is important - Removability of the structure without causing any damage to the building is another test that can be applied while deciding the nature of the structure.

Held - The nature of construction permitted by the lease deed also refers to permanent constructions being permitted to be made by the defendant-appellant which could not be removed except by substantial damage to the property in dispute and which were meant to last till determination of the tenancy. Clause 4-(b) of the lease deed provides for the lessee to make good any damage which may be caused to the demised land by such removal. Held - it is held that the constructions on the property in dispute were made by the defendant-appellant after due consent of the plaintiff-respondents which is evident from the terms of the lease deed, and, they are permanent in nature (Para 59)

F. Civil Law - U.P. Urban Buildings (Regulation of Letting Rent and Eviction) Act 1972 - U.P. Act No. 13 of 1972 - Section 29 A - Protection against eviction to certain classes of tenants of land on which building exists - 'with the landlord's consent has erected any permanent structure' – Applicability in present case

Held – It was held that the constructions on the property in dispute were made by the defendant-appellant after due consent of the plaintiff & they are permanent in nature. - Defendant-appellant became a statutory tenant u/s 29A and the benefit of Section 29A would be available to the defendant-appellant, thereby barring the suit for eviction of the defendant-appellant except on the ground specified in Section 20 of the U.P. Act No. 13 of 1972. The tenancy of the defendant-appellant is protected from termination by efflux of time.

Second Appeal allowed. (E-5)

List of cases cited: -

1. Syeda Rahimunnisa Vs Malan Bi 2016 (10) SCC 315

2. Sunder Lal Bhatia Vs Onkar Nath Saxena and others 2013 (4) AWC 4072

3. Rameshwar Dayal Agarwal Vs Pawan Kumar 2012 (2) ADJ 357

4. Himani Alloys Limited Vs Tata Steel Limited (2011) 15 SCC 273

5. Payal Vision Limited Vs Radhika Chodhary (2012) 11 SCC 405

6. M/s Bharat Petroleum Corporation Ltd & anr Vs Smt. Indira Pandey & anr 2013 (6) ADJ 653

7. Hindustan Petroleum Corporation Ltd Vs Diwan Bahadur Visheshwar Nath Trust, Civil Appeal No. 5414 of 2000 26.8.2008

8. S.M. Asif Vs Virendra Kumar Bajaj (2015) 9 SCC 287

9. Bharat Petroleum Corporation Limited Vs Ramavati Devi 2007(1) AWC 679

10. Rameshwar Dayal Agarwal Vs Pawan Kumar 2012 (2) ADJ 357

11. Modula India Vs Kamakshya Singh Deo (1988) 4 SCC 619

12. Karam Kapahi and others Vs Lal Chand Public Charitable Trust and another (2010) 4 SCC 753

(Delivered by Hon'ble Jayant Banerji, J.)

1. This second appeal has been filed by the defendant-appellant against the

judgement and decree dated 1.8.2006, passed by the Additional District Judge, Court No. 6, Bareilly in Civil Appeal No. 222 of 1998 arising out of O.S. No. 203 of 1988 from the Court of Additional Civil Judge (Senior Division), Bareilly.

2. In this appeal the following substantial questions of law were framed:

"A. Whether in the facts and circumstances of the case the trial court was justified in striking off the defence of the defendant under Order 15 Rule 5 CPC?

B. Whether by a composite order the court could have struck off the defence under Order 15 Rule 5 CPC and simultaneously decree the suit either under Order 15 Rule 1 or Order 12 Rule 6 CPC?

C. Whether after framing as many as 13 contentious issues including the availability of the protection of U.P. Act No. 13 of 1972 to the defendant, as well as the jurisdiction of the court, the courts were justified in law by taking recourse to the provisions of Order 15 Rule 1 and Order 12 Rule 6 CPC for decreeing the suit without recording of evidence?

D. Whether it is permissible for the court to rely on an alleged admission made in the written statement for the purpose of decreeing the suit under Order 12 Rule 6 CPC particularly when the defence has already been struck off under Order 15 Rule 5 CPC?

E. Whether from the own case of the plaintiff coupled with the registered lease deed, the provisions of Section 29-A of the U.P. Act No. 13 of 1972 were attracted thereby protecting the tenancy from termination of efflux of time?

F. Whether for purpose of determining the applicability of U.P. Act No. 13 of 1972 in view of Section 29-A, the lower appellate court was justified in holding that the constructions on the suit property were temporary, only on the basis of the clause in the lease deed that provides that the lessee shall remove the constructions made by him on determination of the lease, without recording a categorical finding that the constructions actually existing on the suit property were temporary or permanent in nature?"

BACKGROUND OF THE CASE.

3. The plaint case is that by means of a lease deed dated 20.8.1969 between the plaintiffs and Smt. Darshan Devi Jain (the lessors of the one part) and Caltex India Limited,(the lessee of the other part), lease was granted in respect of suit property to Caltex India Limited on the terms and conditions mentioned in the lease deed. A few years after execution of the lease deed, the Caltex India Limited was merged and vested in the defendant, Hindustan Petroleum Corporation Limited1 and the identity of the Caltex India Limited got extinct. It is alleged that after the aforesaid merger, the tenancy came to an end but to avoid any conflict the plaintiffs accepted the defendant-appellant as month to month tenant and the tenancy period of ten years granted to M/s Caltex India Limited expired at the end of February, 1978 and the defendant-appellant continued to be a month to month tenant.

4. It is stated that one option regarding renewal of lease was granted in the year 1978 and the defendant-appellant

was not entitled to any further option of renewal and thus the defendant-appellant remained a month to month tenant only. After defendant-appellant's tenancy expired at the end of February, 1988, it was liable to be evicted but to avoid any dispute, a notice for termination of tenancy was given by the plaintiff-respondent to the defendant-appellant treating it to be a month to month tenant and was informed that its tenancy would stand terminated on the expiry of 30 days from the date of receipt of the notice. Though the defendant-appellant's tenancy was terminated through registered notice dated 10.2.1988, the defendant-appellant did not vacate the land. To this notice, the defendant-appellant gave a reply to the notice that the defendant-appellant's tenancy is protected by U.P. Act No. 13 of 1972 and it is entitled to renewal of lease for a further term.

5. It is further stated that the lease granted to Caltex India Limited was in respect of a piece of land measuring 150 X 120 X 93 X 105 feet for the purpose of running a Petrol Pump and all the constructions, fittings and fixtures which have been made by the defendant-appellant are liable to be removed and the defendant-appellant cannot claim any benefit from the constructions whether permanent or temporary. It is mentioned that only land was given on lease hence the provisions of the U.P. Act No. 13 of 1972 were not applicable. Since the defendant-appellant failed to vacate the land despite notice of termination of tenancy, therefore, the suit was filed. It is alleged that the defendant-appellant had not paid rent with effect from 1.3.1988. That land of the plaintiff-respondents is at important locality in the city of Bareilly and the existing market value of the tenanted land would be Rs. 20,000/ per month. The defendant-appellant is liable to pay compensation for use and occupation at the rate of Rs. 20,000/ per month. It is stated that the cause of action for the suit arose firstly on 10.2.1988 when the notice for termination of tenancy was given to the defendant-appellant and, thereafter on or about 15.2.1988 when the notice of termination of tenancy was served and finally on 15.3.1988 when the period of notice of termination of tenancy expired and on the defendant-appellant's failure to vacate the land. Therefore, decrees for ejectment, recovery of arrears of rent, compensation and mesne profit were sought.

6. In the written statement, the allegations levelled by the plaintiff-respondents are denied. It is stated that Caltex India Limited was the original lessee of the demised land which subsequently merged in the defendant-appellant by Act No. 13 of 1977 and the Company Law Board Order No. S.O. 312(E) dated 9 May 1978. The allegation of the plaintiff-respondents that on merger of Caltex India Limited, tenancy came to an end was denied. It was stated that the defendant-appellant had exercised his option for renewal of lease after ten years from 1.3.1988 and the tenancy was renewed for a further ten years with effect from 1.3.1988. The renewal was granted pursuant to the registered lease deed. The receipt of notice dated 10.2.1988 was admitted but it was denied that such a notice could be deemed as a notice for termination of tenancy. Reply to the notice by the defendant-appellant was admitted. It was denied that the provisions of U.P. Act No. 13 of 1972 were not applicable. It was stated that the tenancy of the defendant-appellant was continued

and stood renewed. In paragraph No. 25 of the written statement, it was stated that the predecessor of the defendant-appellant had erected permanent structure and construction and incurred expenses in connection thereto with the consent of the then landlords hence also provisions of Section 20 of the U.P. Act No. 13 of 1972 apply and suit was barred by the provisions of Section 20 read with Section 29A of the U.P. Act No. 13 of 1972. The termination of tenancy was denied.

7. The trial court framed 13 issues on 5.9.1988 and 28.2.1990 as under:-

1. Whether the U.P. Act 13 of 1972 is applicable over land/ premises in suit, if so its effect?

2. Whether this Court has court has no jurisdiction to try the suit?

3. Whether the tenancy in question stands terminated as alleged in plaint?

4. Whether the plaintiff is entitled to any compensation or mesne profit, if so at what rate?

5. Whether the suit is barred by the principle of estoppel and acquiescence?

6. Whether the defendant is protected under Section 20 read with Section 29 of U.P. Act 13 of 1972?

7. To what relief , if any, the plaintiff is entitled?

8. Whether the suit is not properly valued and court fee is also insufficient?

9. Whether the daughter of late Shri Heera Lal Jain became co-owner of the disputed property in dispute on the death of Shri Heera Lal Jain, if so its effect?

10. Whether the plaintiffs are sole owner of the disputed property?

11. Whether plaintiff's lease stand renewed upto the period of 29.2.1998 as per term of registered lease deed dated 20.8.69?

12. Whether the suit is bad for non-joinder of necessary parties?

13. Whether the suit is misconceived and not properly framed?"

8. However, thereafter, an application bearing paper No. 84-Ga was filed by the plaintiff-respondents to the effect that in view of the admission made by the defendant-appellant in its written statement, the suit for eviction be decreed under Order 15 Rule 1 of the Code of civil Procedure, 19082 keeping in view the determination of the tenancy. The defendants-appellants filed an objection paper No. 86-Ga. Another application paper No. 85-Ga was filed by the plaintiff-respondent to the effect that since the defendant-appellant has not deposited the rent in the court under the provisions of order 15 Rule 5 CPC, therefore, his defence be struck off. The defendant-appellant filed his objection 87-Ga.

9. After hearing the counsel for the parties on the aforesaid two applications (84-ga and 85-Ga), by means of the order dated 9.10.1998, the trial court directed striking off the defence of the defendant-appellant. The trial court, simultaneously, relying on paragraph nos. 6 and 20 of the written statement of the defendant-appellant observed that the defendant-appellant had admitted that the tenancy was extended upto 28.2.1998 and as such till 28.2.1998 they cannot be evicted. Therefore, the trial court under the provisions of Order 15 Rule 1 CPC held that since the defendant-appellant had no right to continue in possession over the disputed premises after 28.2.1998, it is

liable to be evicted and directed the defendant-appellant to hand over peaceful possession to the plaintiffs-respondents alongwith outstanding rent and damages.

10. Challenging the decision of the trial court, an appeal under section 96 of the CPC was filed by the defendant-appellant before the lower appellate court. In the appeal, while noticing that the defence of the defendant-appellant had been struck off, the lower appellate court observed that it was open for the defendant to make his submissions and to cross examine the plaintiff. However, the lower appellate court held that when the defendant-appellant admitted the facts in any manner, then the court had authority to proceed under Order 12 Rule 6 CPC to dispose of the suit on the basis of admitted facts.

11. The lower appellate court observed that any such kind of construction which is to be removed after determination of tenancy would come under the meaning of temporary construction and by making such construction, the premises would not come within the definition of word 'building'. As such, the lower appellate court observed that the provision of Section 29A of the U.P. Act No. 13 of 1972 would not be applicable. It held the after striking off the defence, the defendant-appellant had opportunity to make their submissions. The lower appellate court further observed that the lease was renewed for a period of ten years twice and if during the period of lease, the tenancy was not renewed, the termination of tenancy would be deemed and, therefore, the conclusion drawn by the trial court were in accordance with law. The lower appellate court also observed that the notice for termination of tenancy was correctly given to the defendant.

SUBMISSIONS OF THE LEARNED COUNSEL.

12. It is contended by Sri Vikas Budhwar, learned counsel for the defendant-appellant, that though the trial court had decreed the suit only on the alleged admission made by the defendant in its written statement, the lower appellate court went a step further and entered into the merits of the case. He referred to paragraph number 7 of the plaint that the lease was granted to the predecessor-in-interest of the defendant-appellant in respect of a piece of land for purpose of running a petrol pump and that all construction, fittings and fixtures which were made by the defendant-appellant, which were of the time of its predecessor-in- interest, Caltex India Limited, were to be removed and the allegation was that the defendant cannot claim any benefit from the construction whether permanent or temporary. It is contended that there is no averment in the plaint that the constructions were illegal or without consent. Learned counsel has referred to the lease deed (paper No. 17Ga), and stated that in terms of paragraph no.2 thereof, open land was given to the predecessor-in-interest of the defendant-appellant together with right to the lessee to install, erect and maintain permanent constructions in and upon the said piece of land.

13. It is, therefore, contended that the lower appellate court ought to have recorded a finding about the nature of the constructions actually existing over the land in dispute in order to ascertain the

applicability of the U.P. Act No. 13 of 1972. Learned counsel has referred to various paragraphs of the plaint to demonstrate that the issue of applicability of provision of U.P. Act No. 13 of 1972 was clear from a reading of the plaint itself and, therefore, the lower appellate court was bound to record a finding regarding the nature of the constructions actually existing on the land in dispute, with reference to the provisions of Section 29-A (2) read with Section 20 of the U.P. Act No. 13 of 1972.

14. The learned counsel has stated that specific and serious objections also with regard to jurisdiction were taken in the written statement and several contentious issues were framed on 15.9.1998 and 28.2.1990 and therefore, it was incumbent on the court below to have permitted proper cross examination of the plaintiff witness after the defense was struck off. The learned counsel relied upon the judgements of the Supreme Court rendered in **Himani Alloys Limited Vs. Tata Steel Limited3, Payal Vision Limited Vs. Radhika Chodhary4, M/s Bharat Petroleum Corporation Ltd and another Vs. Smt. Indira Pandey and another5** and an unreported decision dated 26.8.2008 of the Supreme Court in the case of **Hindustan Petroleum Corporation Ltd Vs. Diwan Bahadur Visheshwar Nath Trust, in Civil Appeal No. 5414 of 2000** and also a judgement in the case of **S.M. Asif Vs. Virendra Kumar Bajaj6**.

15. Sri V.K.Singh, learned Senior Advocate appearing for the plaintiff-respondents has rebutted the contention of the learned counsel for the appellant and has referred to paragraph no. 6 and 20 of the written statement to contend that admissions were made by the defendant which have been justifiably relied upon by the courts below. He stated that a condition precedent for applicability of section 29A of U.P. Act No. 13 of 1972 is the consent of the landlord with regard to making any permanent construction over the land in dispute, but no such consent is on record. Learned counsel has stated that the defendant-appellant was required to remove the constructions at the site on determination of the tenancy and thus, it is clear that the constructions were temporary in nature. It is contended that the tenancy lease was of open land and, therefore, the provision of the U.P. Act No. 13 of 1972 will not apply.

16. Learned counsel for the plaintiff-respondents, in support of his contentions, has relied upon two judgements of this Court in the case of **Bharat Petroleum Corporation Limited Vs. Ramavati Devi7 and Rameshwar Dayal Agarwal Vs. Pawan Kumar8.**

DISCUSSION & ANALYSIS

17. Two applications bearing paper No. 84Ga and 85Ga, both dated 25.7.1998 were filed on behalf of the plaintiffs-respondents. Paper No. 84Ga is an application filed with a prayer that the extremely old suit be disposed of and decided immediately, and, on the basis of admission of the defendant-appellant, the tenancy of the defendant-appellant having determined, the suit be decreed under the provision of Order 15 Rule 1 CPC.

18. The application paper No. 85-Ga was filed with a prayer that the suit be heard on a day to day basis in compliance

of a direction of the High Court, Allahabad and the defence of the defendant-appellant be struck off for non-deposit of rent. (This order of the High Court does not appear to be on record.)

19. Two objections were filed by the defendant-appellant in respect of the aforesaid two applications bearing paper No. 87-Ga and 86-Ga respectively both dated 7.9.1998. In the objections, it is stated that the property in dispute is an accommodation which is protected under the Act No. 13 of 1972 and the suit is barred by the said Act. That the contractual tenancy of the defendant-appellant stood renewed till 28.2.1998 and it is wrong to say that the plaintiffs-respondents has any right to evict the defendant-appellant after expiry of the period of renewal. The defendant-appellant cannot be evicted, as provided for under the Act 13 of 1972. It is stated that the rights of the parties are to be decided on the date of filing of the suit and the plaintiffs-respondents is not entitled to evict the defendant-appellant even now. It is denied that the defendant-appellant had not deposited the admitted rent under Order 15 Rule 5 CPC. It is stated that up to date rent had been deposited in court which is a matter of record of the court.

20. With regard to the issue of striking off the defence of defendant-appellant, the trial court observed that the defendant-appellant was bound to prove that it had deposited the rent as per rule upto date which it failed to do. The trial court held that the defendant-appellant cannot participate in the proceedings of the suit and the application (paper No. 85-Ga) was allowed. The trial court, further, relied upon the averments contained in paragraph No. 6 and 20 of the written statement of the defendant-appellant which, as per the trial court, amounted to an admission that the period of tenancy of the defendant-appellant would automatically come to an end in February 1998. It was held that after 28.2.1998, the defendant-appellant had no right to retain possession of the property in dispute.

21. The lower appellate court, while referring to the provisions of Order 12 Rule 6 CPC, held that the tenancy having terminated on 28.2.1998 was admitted by the defendant-appellant and that if in any manner, an admission is made, the court is competent to dispose of the suit on the basis of admitted facts. While considering the applicability of provision of U.P. Act No. 13 of 1972, the lower appellate court held that in terms of original lease deed (Paper No. 17-Ga), the construction made by the defendant-appellant were not permanent in nature inasmuch as it was mentioned that after termination of tenancy, the tenant would remove the construction and would give possession of the vacant land. Such kind of construction would not come within the definition of word 'building' and as such the provisions of Section 29A of U.P. Act No. 13 of 1972 would not apply. However, the lower appellate court held that in view of the judgement of the Supreme Court in the matter of **Modula India V. Kamakshya Singh Deo9,** the defendant-appellant is not rendered helpless after his defence is struck off but is entitled to challenge the validity and legality of the notice and is entitled to cross examine the witness. The lower appellate court observed that 9.10.1998 was not the first date of hearing and, therefore, the application (paper No. 84-Ga) was an application actually under Order 12 Rule 6 CPC. The lower appellate court held that in case there was

only an application under Order 15 Rule 5 CPC then definitely the trial court was required to give time to the defendant-appellant to challenge the evidence of the plaintiffs-respondents and point out its falsity and weakness. However, the submission of the learned counsel that the order dated 9.10.1998 was passed without hearing him, was brushed aside by the lower appellate court on the ground that the decision of the trial court was made after hearing both the applications. While considering the deposit of rent made by the defendant-appellant, the lower appellate court held that there were several instances where the rent was deposited after the due date without there being any application/representation filed within ten days. The lower appellate court observed that the original lease deed was registered and the case was instituted on the basis of its not being renewed which proved that the lease was never renewed. Since, the defendant-appellant itself stated that the term was extended once for ten years and the extended terms of 10 years each came to an end during the pendency of the suit and, therefore, there was no necessity for giving another notice of termination of tenancy. Once a notice was given for termination of the tenancy and admittedly, the defendant-appellant's extended term of tenancy of ten years came to an end during the pendency of the suit, there was no ground or necessity for giving a separate notice. Accordingly, the summary order of the trial court was upheld, it being under the provision of Order 12 Rule 6 CPC.

Question 'A':

22. So far as the question that whether in the facts and circumstances of the case, the trial court was justified in striking off the defence of the defendant under Order 15 Rule 5 CPC, no arguments have been advanced by the learned counsel for the defendant-appellant in this regard. It is also observed from the finding of fact recorded by the lower appellate court that there was default in payment of rent by the defendant-appellant and there was no representation filed by it within ten days as provided in clause (2) of Order 15 Rule 5 (U.P. Amendment).

23. Order 15 Rule 5 was inserted by U.P. Act No. 57 of 1976. Under this provision, the defendant is mandated to deposit the entire amount admitted by him to be due along with the specified interest in a suit by a lessor for the eviction of a lessee after the determination of his lease and for the recovery from him of rent or compensation for use and occupation and the defendant is required throughout the continuation of the suit to regularly deposit monthly amount due within a week from the date of its accrual and in the event of any default in making the deposit of the entire amount admitted by him to be due or the monthly amount due as aforesaid, the court may, subject to the provisions of sub-rule (2) strike off his defence. Sub-rule (2) provides that before making an order for striking off the defence, the Court may consider any representation made by the defendant in that behalf provided such representation is made within 10 days of the first hearing or, of the expiry of the week referred to in sub-section (1) as the case may be.

24. A perusal of the record reveals that the monthly rent was being deposited in the Court after lapse of more than a week of its accrual. Admittedly, no representations were filed. Such deposit

of rent cannot be said to be rent deposited in terms of Order 15 Rule 5(1) CPC. Therefore, striking off the defence of the defendant-appellant by the trial court under Order 15 Rule 5 CPC was justified.

Questions 'B' and 'D':

25. Striking off the defence would have the effect of parties being not at issue. That is to say, the material facts contained in the written statement would not be considered as denial of the truth or validity of the material facts contained in the plaint. In Wharton's Law Lexicon (Sixteenth Edition), the word 'defence' is defined as:

"popularly a justification, protection, or guard; in law, a denial by the defendant of the truth or validity of the plaintiff's complaint.

In civil matters, a defence (which is always in writing or printed) is either (1) by statement of defence, which may be a denial of the plaintiff's right, or may be an allegation of a set off or counter claim by the defendant which will cover wholly or in part the claim of the plaintiff; or (2) by a statement of defence raising a point of law, so as to show that the facts alleged by the plaintiff do not disclose any cause of action to which effect can be given by the Court."

26. Striking off the defence as envisaged in Order 15 Rule 5 of the CPC (U.P. Amendment) or for that matter, in Order 11 Rule 21, cannot be construed to mean as striking out of the pleadings in the manner referred to under Order 6 Rule 16 CPC. Therefore, it is not as if on striking off the defence, each and every statement made in the written statement would be struck off without reference to the fact whether a particular statement is in defence or otherwise. Thus, on striking off the defence, it is always open for the Court to consider those statements of the written statement other than in defence, which may include admissions. So the admissions made in the written statement could be looked into by the courts below.

27. Order 15 Rule 1 CPC and Order 12 Rule 6 CPC operate in distinguishable areas, borders of which may overlap. While proceeding to pass judgement on an admission under Order 12 Rule 6 CPC, the Court is guided by the provisions of Section 17 and onwards of the Indian Evidence Act. A combined reading of Section 31 and Section 58 of the Evidence Act cast a duty on the Courts to exercise discretion, in appropriate cases, in the matter of passing judgements on such admissions of fact to be proved otherwise than by such admissions.

28. The word 'admission' is defined under Section 17 of the Indian Evidence Act, 1972 which is as follows:-

"17. An admission is a statement, oral or documentary or contained in electronic form, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned".

Sections 31 and 58 of the Indian Evidence Act read as follows:

"31. Admissions not conclusive proof, but may estop.- Admissions are not conclusive proof of the matters admitted, but they may operate as estoppels under the provisions hereinafter contained."

"58. Facts admitted need not be proved.- No fact need to be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings:

Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions."

29. Thus, the first requirement of admission is a statement whether oral or documentary which is made by any of the person and under the circumstances provided in sections subsequent to Section 17 of the Indian Evidence Act. In the present case, the statement of admission of the defendant-appellant is stated to be in its written statement.

Rule 6 of Order 12 of CPC reads as under:-

"6. Judgment on admissions- (1) Where admissions of fact have been made either in the pleading or otherwise, whether orally or in writing, the Court may at any stage of the suit, either on the application of any party or of its own motion and without waiting for the determination of any other question between the parties, make such order or give such judgment as it may think fit, having regard to such admissions.

(2) Whenever a judgement is pronounced under sub-rule (1) a decree shall be drawn up in accordance with the judgment and the decree shall bear the date on which the judgment was pronounced".

30. Rule 6 of Order 12 CPC, therefore, is referable to any admission of fact made either in pleading or otherwise whether oral or in writing. It also vests a discretion in the Court, by usage of the word 'may', to make or not to make such order or give such judgement, having regard to such admissions.

Rule 1 of Order 15 CPC reads as follows:

"1. Parties not at issue.- Where at the first hearing of a suit it appears that the parties are not at issue on any question of law or of fact, the Court may at once pronounce judgement."

31. Parties may not be at issue for want of denial or in view of clear, categorical and unequivocal admissions. Where there is want of specific denial or an allegation of fact in the plaint is stated to be not admitted in the written statement, it shall be taken to be admitted, but even in such a case, the court has discretion to require any fact so admitted to be proved otherwise than by such admission (Order 8 Rule 5 CPC). Order 15 Rule 1 CPC vests in the Court the discretion to pronounce judgement forthwith at the first hearing of the suit where it appears that the parties are not at issue on any question of law or of fact.

32. However, while looking into an admission under Order 12 Rule 6 CPC the court is required to be more careful. The lower appellate court has correctly observed that 9.10.1998 was not the first date of hearing and that the application, paper no. 84-Ga, was an application under Order 12 Rule 6 CPC and not under Order 15 Rule 1 CPC. That having been said, in the present case before the trial court, on 9.10.1998, not only were the alleged

admissions of the defendant-appellant in the written statement being considered, but the defence itself was struck off. The defendant-appellant was visited by these twin consequences simultaneously, albeit after hearing. But there is no gainsaying the fact that prior to passing of the impugned order dated 9.10.1998, there was no clue what decision would visit each of the applications, paper nos. 84-Ga and 85-Ga.

33. The so-called admission of the defendant-appellant as referred to by the courts below is stated to be in paragraph Nos. 6 and 20 of the written statement. Paragraph Nos. 6 and 20 of the written statement are as follows:

"6. With regard to Para 6 of the plaint it is stated that there is a provision of 2 firm renewals of 10 years each in the Lease Deed dated 20.8.1969 and lease was renewed firstly for 10 years on 1.3.1978 to 29.2.1988 and stands renewed for a further period of 10 years from 1.3.1988 to 28.2.1998 as defendant has exercised his option for renewal orally and amongst other through registered letter dated 15.12.87 duly received by the plaintiff. It is not admitted that the plaintiff (sic defendant) is not entitled to further renewal. It is also not admitted that renewal which was granted to the defendant in 1978 was through registered document hence defendant was month to month tenant. It is also not admitted that the defendant tenancy has been rightly or in any way terminated through notice dated 10.2.88."

"20. That the lease renewed firstly upto 28.2.88 and thereafter upto 28.2.98 in pursuance of the registered lease deed mentioned earlier. In fact plaintiffs and their predecessors accepted and have been accepting this preposition and acting upon the same".

34. In light of above facts and law, it is to be considered whether the statements made in paragraphs 6 and 20 of the written statement are admissions and if so, whether they are clear, unconditional and unequivocal. The courts below have held that the averments in the aforesaid two paragraphs of the written statement that the lease stood renewed up till 28.2.1998 is an admission by the defendant-appellant that the term of the lease expired on 28.2.1998.

35. The averment in paragraph no. 6 of the written statement, that the lease was renewed upto 28.2.1998 is a reply to paragraph no. 6 of the plaint which is as follows:

"6. That the facts are that one renewal was permitted as per the lease deed dated 20.8.1969 which has already been granted to the defendant and now the defendant was and is not entitled to any further renewal and as the renewal which was given to the defendant in the year 1978 was not through a registered document, hence the defendant was month to month tenant and the defendant's tenancy was rightly terminated through notice dated 10.2.1988."

36. The admission referred to by the courts below made in paragraphs 6 and 20 of the written statement, in the facts and circumstances of the present case, ought not to be read in isolation for purpose of exercise of power under O.12 R.6 CPC, but having regard to the plaint as well as the written statement. The Court has to consider the admissions made by a party in any proceeding and exercise its discretion whether or not the facts

admitted are required to be proved otherwise than by such admissions. Moreover, a perusal of the written statement reveals that there are serious objections as to the maintainability of the case in view of the provisions of Section 20 read with section 29A of the U.P. Act No. 13 of 1972. Some issues were also framed in this regard.

37. Order 12 Rule 6 of the CPC provides for passing of judgements on admissions without waiting for the determination of any other question between the parting having regard to such admissions. In the instant case, the courts below have, without giving any opportunity to the defendant-appellant, proceeded to decree the suit for possession only on the basis of the aforesaid admission. After the defence was struck off on 9.10.1998, the defendant-appellant was left with no opportunity by the courts below to attempt to demonstrate the falsity of the claim of the plaintiff-respondent made in paragraph no. 7 of the plaint in which the allegation is that the suit is not barred under the provisions of the U.P. Act No. 13 of 1972. Paragraph No. 7 of the plaint is as follows:-

"7.That the lease granted to the Caltex India Limited was in respect of a piece of land measuring 150 x 120 x 93 x 105 feet for the purpose to run the petrol pump and all the constructions, fittings and fixtures which have been made by the defendant and which were of the time of Caltex India Limited are liable to be removed and the defendant cannot claim any benefit from the constructions whether permanent or temporary. It may be mentioned that only land was given on lease hence the provisions of the U.P. Act XIII of 1972 are not applicable."

38. It would have been prudent for the courts below to have elicited from the defendant-appellant a clarification or explanation for the admission.

39. Even though such "non-admissions' appearing in paragraph no.6 of the written statement create a legal fiction of admission under the provisions of Order 8 Rule 5 CPC ("taken to be admitted"), the discretion of the court to require any fact so admitted to be proved otherwise than by such admissions, is kept intact in the proviso. The admission itself is not unconditional, unequivocal or clear. It would have been in the fitness of things for the trial court, under the circumstances, to ask for a clarification from the defendant-appellant regarding the admission instead of proceeding to decree the suit. The lower appellate court has held that the defendant-appellant was heard prior to decision of the application paper no.84-Ga, without adverting to the fact that the defendant-appellant was actually left with no opportunity, after striking off its defence, to cross-examine the plaintiff-respondents and make submissions. There is no admission that the lease would come to an end on 28.2.1998 entitling the plaintiff-respondent for a decree of eviction by the civil court exercising plenary jurisdiction *dehors* the competence / jurisdiction of the courts below given the objection of non-maintainability of the suit in view of the provision of Section 20 read with Section 29A of the U.P. Act No. 13 of 1972. Even in the plaint, it is admitted that the one option of renewal of the lease was granted till February 1988. Admittedly, to the notice sent by the plaintiff-respondent dated 10.02.1988, the defendant-appellant replied that its tenancy is protected by the U.P. Act No.13 of 1972 and that it is entitled to renewal of the lease for a further term. Therefore,

such an 'admission' as construed by the courts below would not be a clear and unequivocal admission in the facts and circumstances of the present case and the defendant-appellant had showed no intention to be bound by it. It was a fit case for the courts below to have exercised its discretion not to decree the suit on the basis of that admission given the fact that the defendant-appellant had pleaded that the suit is barred under the provisions of Section 20 read with Section 29A of U.P. Act No. 13 of 1972.

40. In this regard, it is useful to refer to the following judgments. Considering the scope of Order 12 Rule 6 of CPC, the Supreme court in the case of **Karam Kapahi and others Vs. Lal Chand Public Charitable Trust and another10** observed as follows:-

"37. The principles behind Order 12 Rule 6 are to give the plaintiff a right to speedy judgment. Under this Rule either party may get rid of so much of the rival claims about "which there is no controversy" (see the dictum of Lord Jessel, the Master of Rolls, in Thorp. V. Holdsworth in Chancery Division at p.640)....."

39. "".....In our opinion the thrust of the amendment is that in

an appropriate case, a party, on the admission of the other party, can press for judgment, as a matter of legal right. However, the court always retains its discretion in the matter of pronouncing judgment."

"48. However, the provision under Order 12 Rule 6 of the Code is enabling, discretionary and permissive and is neither mandatory nor it is peremptory since the word "may" has been used. But in a given situation, as in the instant case, the said provision can be applied in rendering the judgment."

41. In **Himani Alloys Limited** (supra), the Supreme Court held as follows:

"11. It is true that a judgement can be given on an "admission" contained in the minutes of a meeting. But the admission should be categorical. It should be a conscious and deliberate act of the party making it, **showing an intention to be bound by it.** Order 12 Rule 6 being an enabling provision, it is neither mandatory nor peremptory but discretionary. The court, on examination of the facts and circumstances, has to exercise its judicial discretion, keeping in mind that a judgment on admission is a judgement without trial which permanently denies any remedy to the defendant, by way of an appeal on merits. Therefore unless the admission is clear, unambiguous and unconditional, the discretion of the Court should not be exercised to deny the valuable right of a defendant to contest the claim. In short the discretion should be used only when there is a clear "admission" which can be acted upon.(See also Uttam Singh Duggal & Co. Ltd. Vs. United Bank of India11, Karam Kapahi V. Lal Chand Public Charitable Trust12 and Jeevan Diesels and Electricals Ltd. V. Jasbir Singh Chadha13). There is no such admission in this case.

(emphasis by Court)

42. In the case of **Payal Vision Limited** (supra), the Supreme Court observed as follows:-

"8. The above sufficiently empowers the court trying the suit to

deliver judgment based on admissions whenever such admissions are sufficient for the grant of the relief prayed for. Whether or not there was an unequivocal and clear admission on either of the two aspects to which we have referred above and which are relevant to a suit for possession against a tenant is, therefore, the only question that falls for determination in this case and in every other case where the plaintiff seeks to invoke the powers of the court under Order 12 Rule 6 CPC and prays for passing of the decree on the basis of admission. Having said that we must add that whether or not there is a clear admission upon the two aspects noted above is a matter to be seen in the fact situation prevailing in each case. Admission made on the basis of pleadings in a given case cannot obviously be taken as an admission in a different fact situation. That precisely is the view taken by this Court in Jeevan Diesels & Electricals Ltd relied upon by the High Court where this Court has observed: (SCC p. 604, para 10).

"10.... Whether or not there is a clear, unambiguous admission by one party of the case of the other party is essentially a question of fact and the decision of this question depends on the facts of the case. The question, namely, whether there is a clear admission or not cannot be decided on the basis of a judicial precedent. Therefore, even though the principles in Karam Kapahi may be unexceptionable they cannot be applied in the instant case in view of totally different fact situation."

43. Further, in the case of **S.M. Asif** (supra), it was held by the Apex Court as follows:-

"8. The words in Order 12 Rule 6 CPC "may" and "make such order...." show that the power under Order 12 Rule 6 CPC is discretionary and cannot be claimed as a matter of right. Judgment on admission is not a matter of right and rather is a matter of discretion of the court. Where the defendants have raised objections which go to the root of the case, it would not be appropriate to exercise the discretion under Order 12 Rule 6 CPC. The said rule is an enabling provision which confers discretion on the court in delivering a quick judgment on admission and to the extent of the claim admitted by one of the parties of his opponent's claim".

44. Where the defence is struck off under the provisions of Order 15 Rule 5, it is not as if the defendant is left to the mercy of the facts pleaded in the plaint. The Supreme Court in the case of **Modula India** (supra) held that where the defence is struck off, the defendant-appellant should be allowed his right of cross examination and argument. The court held that as follows:

"16- ..... But it does not necessarily follow that, once the defence is struck off, the defendant is completely helpless and that his conduct of the case should be so crippled as to render a decree against him inevitable. To hold so would be to impose on him a punishment disproportionate to his default. The observations made by this Court, while discussing the provisions of the CPC, and the Original Side rules of the Calcutta High Court which deal with somewhat analogous situations, cannot be lightly brushed aside. Those decisions have enunciated a general equitable principle. We are also of the same view

that provisions of this type should be construed strictly and that the disabilities of a person in default should be limited to the minimum extent consistent with the requirements of justice. This should be all the more so in the context of a tenancy legislation, the main object of which is to confer protection on tenants against eviction by the landlord, unless certain statutory conditions are fulfilled. The provisions should not be given any wider operation than could have been strictly intended by the legislature.

.....

18- We agree that full effect should be given to the words that defence against ejectment is struck off. But does this really deprive the defendant tenant of further participation in the case in any manner? While it is true that, in a broad sense, the right of defence takes in, within its canvass, all aspects including the demolition of the plaintiff's case by the cross-examination of his witnesses, it would be equally correct to say that the cross-examination of the plaintiff's witnesses really constitutes a finishing touch which completes the plaintiff's case. It is a well established proposition that no oral testimony can be considered satisfactory or valid unless it is tested by cross-examination. The mere statement of the plaintiffs witnesses cannot constitute the plaintiff's evidence in the case unless and until it is tested by cross-examination. The right of the defence to cross-examine the plaintiff's witnesses can, therefore, be looked upon not as a part of its own strategy of defence but rather as a requirement without which the plaintiff's evidence cannot be acted upon. Looked at from this point of view it should be possible to take the view that, though the defence of the tenant has been struck out, there is nothing in law to preclude him from demonstrating to the court that the plaintiff's witnesses are not speaking the truth or that the evidence put forward by the plaintiff is not sufficient to fulfill the terms of the statute.

19- To us it appears that the basic principle that where a plaintiff comes to the court he must prove his case should not be whittled down even in a case where no defendant appears. It will at once be clear that to say that the Court can only do this by looking the plaintiff's evidence and pleadings supplemented by such questions as the court may consider necessary and to completely eliminate any type of assistance from the defendant in this task will place the court under a great handicap in discovering the truth or otherwise of the plaintiffs statements. For after all, the court on its own motion, can do very little to ascertain the truth or otherwise of the plaintiff's averments and it is only the opposite party that will be more familiar with the detailed facts of a particular case and that can assist the court in pointing out defects, weaknesses, errors and inconsistencies of the plaintiffs case.

20- We, therefore, think that the defendant should be allowed his right of cross-examination and arguments. But we are equally clear that this right should be subject to certain important safeguards. The first of these is that the defendant cannot be allowed to lead his own evidence. None of the observations or decisions cited have gone to the extent of suggesting that, inspite of the fact that the defence has been struck off, the defendant can adduce evidence of his own or try to substantiate his own case.

.....

.....

.....

24- For the above reasons, we agree with the view of Ramendra Mohan Dutta, ACJ that, even in a case where the defence against delivery of possession of a tenant is struck off under Section 17(4) of the Act, the defendant, subject to the exercise of an appropriate discretion by the court on the facts of a particular case, would generally be entitled:

(A) to cross-examine the plaintiff's witnesses; and

(b) to address argument on the basis of the plaintiff's case.

We would like to make it clear that the defendant would not be entitled to lead any evidence of his own nor can his cross-examination be permitted to travel beyond the very limited objective of pointing out the falsity or weaknesses of the plaintiff's case. In no circumstances should the cross-examination be permitted to travel beyond this legitimate scope and to convert itself virtually into a presentation of the defendant's case either directly or in the form of suggestions put to the plaintiff's witnesses".

45. Thus, on striking off the defence, the right of cross examination of the plaintiff's witnesses and of addressing arguments on the basis of the plaintiff's case has been elaborated by the Supreme Court in Modula India. The original record of the court below reveals that the testimony of PW-1 was recorded on 3.12.1997 and 18.3.1998 but the cross examination was not concluded. Moreover, it is much prior to the striking off the defence of the defendant-appellant on 9.10.1998. Therefore, the defendant-appellant had actually no opportunity to cross-examine the plaintiff's witnesses or to address arguments post striking off its defence.

46. Therefore, the order of the trial court dated 9.10.1998 simultaneously decreeing the suit of the plaintiff-respondent on the basis of the admission while striking off the defense of the plaintiff-appellant without exercising its discretion as envisaged under the aforesaid provisions of the Evidence Act, cannot be countenanced in view of the facts and circumstances of the present case. The trial court ought to have permitted the counsel for the defendant-appellant to address it on the issue of admission. As a matter of fact, the exercise of trial court in proceeding to determine both the applications (paper No. 84-Ga and 85-Ga) together does not appear to be an act of circumspection that is required to be exercised by a court. Therefore, under the fact and circumstances of the present case, the composite order dated 9.10.1998 ought not to have been passed by the trial court.

Questions 'C', 'E' and 'F':

47. Thirteen contentious issues were framed by the trial court which included one with regard to the protection of U.P. Act No. 13 of 1972 to the defendant-appellant as well as with regard to the jurisdiction of the Court. However, on the defence being struck off, under the provisions of Order 15 Rule 5 CPC (U.P. Amendment), the statements of denial of the question of fact and law raised by the defendant-appellant in his written statement were deemed to have been struck off. However, the issue of maintainability of the suit and to the applicability of the U.P. Act No.13 of 1972 is apparent even on reading of the plaint. In view of the judgement of the Supreme Court in **Modula India,** the

defendant-appellant ought to have been permitted to cross examine the plaintiffs witnesses as observed by the Supreme Court in **Modula India.**

48. It would be pertinent to turn to the contents of the lease deed dated 20.8.1969 executed by the plaintiffs-respondents in favour of the defendant-appellant. This lease deed (paper No. 17-Ga) is the genesis of the present controversy. The terms and condition of the lease commence from page 1 of the lease deed itself which is as follows:

"WHEREBY IT IS AGREED as follows:-

The Lessor hereby lets and the Lessee hereby takes All that piece of land measuring 150' x 120' x 93' x 105' on Lucknow Bareilly Road at Bareilly Kasba Hafizpur as per CALTEX DRAWING NO. DLH 788-4 and more particularly described in the Schedule hereto and delineated on the plan hereto annexed being thereon surrounded by a red colour boundary line TOGETHER WITH all ways passages lights drains sewers water courses rights easements advantages and appurtenances whatsoever to the said piece of land belonging or therewith usually held or enjoyed AND TOGETHER ALSO WITH the right for the Lessee to instal erect and maintain in and upon the said piece of land roadways and pathways and **underground petroleum storage tanks and petroleum delivery pumps connected with the said tanks and shelter for an attendant and any other building erection or equipment whether of a permanent or temporary nature for the purpose of storing selling or otherwise carrying on trade in petrol petroleum products oil and kindred motor accessories** and any other trade or business that can conveniently be carried on therewith AND TOGETHER ALSO with the right for the Lessee its local dealers or agents to use the premises hereby demised at all times and for all purposes TO HOLD the demised premises unto the lessee from the first day of March, 1968 till 28th of February 1978 (renewable and determinable as hereinafter provided) at the monthly rent of Rs. 100/ only (Rupees One Hundred Only) payable on or before the fifth day of every succeeding English calendar month, the first payment of Rs. 1,200.00 being advance rental for the period 1.3.1968 to 28.2.1969 will be paid at the time of registration."

The other relevant terms of the lease deed are as follows:-

"2(g). To deliver up the demised premises at the expiration or sooner determination of the tenancy or in the event of the Lessee removing the said underground petrol tank and said Petrol delivery pump and the said shelter with their appurtenances and other buildings, erections or equipment pursuant to the proviso in that behalf hereinafter contained to deliver up the demised land restored to its former condition.

4(b). The Lessee shall be at liberty (1) to construct fix erect in or upon or fasten to the demised premises office and trade fixtures and fittings such as screens counters partitions benches shelves lockers and sun-blinds and gas and electric fittings and to remove the said fixtures and fittings and also the said underground petrol tank and petrol delivery pump and shelter with their appurtenances and other buildings erections and equipment at the expiration or sooner determination of the tenancy or within one month thereafter without objection on the part of the Lessor, **but in**

such case the Lessee shall make good any damage which may be caused to the demised land by such removal."

(emphasis by Court)

49. It is, therefore, evident that only land was given on lease with the right for the lessee to install, erect and maintain constructions, buildings and fixtures whether of a permanent or temporary nature.

50. At this stage, it would be pertinent to refer the contents of Section 20 and 29-A of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 as under:

20. **Bar of suit for eviction of tenant except on specified grounds.-** (1) Save as provided in sub-section (2), no suit shall be instituted for the eviction of a tenant from a building, notwithstanding the determination of his tenancy by efflux of time or on the expiration of a notice to quit or in any other manner :

Provided that nothing in this sub-section shall bar a suit for the eviction of a tenant on the determination of his tenancy by efflux of time where the tenancy for a fixed term was entered into by or in pursuance of a compromise or adjustment arrived at with reference to a suit, appeal, revision or execution proceeding. which is either recorded in court or otherwise reduced to writing and signed by the tenant.

(2) A suit for the eviction of a tenant from a building after the determination of his tenancy may be instituted on one or more of the following grounds, namely : -

(a) that the tenant is in arrears of rent for not less than four months. and has failed to pay the same to the landlord within one month from the date of service upon him of a notice of demand:

Provided that in relation to a tenant who is a member of the armed forces of the Union and in whose favour the prescribed authority under the Indian Soldiers (Litigation) Act, 1925 has issued a certificate that he is serving under special conditions within the meaning of section 3 of that Act or where he has died by enemy action while so serving, then in relation to his heirs, the words "four months" in this clause shall be deemed to have been substituted by the words "one year";

(b) that the tenant has wilfully caused or permitted to be caused substantial damage to the building;

(c) that the tenant has without the permission in writing of the landlord made or permitted to be made any such construction or structural alteration in the building as is likely to diminish its value or utility or to disfigure it ;

(d) that the tenant has done any act which is inconsistent with the purpose for which he was admitted to the tenancy of the building, or has without the consent in writing of the landlord used it for a purpose other than such purpose, or has been convicted under any law for the time being in force of an offence of using the building or allowing it to be used for illegal or immoral purposes;

(e) that the tenant has sub-let, in contravention of the provisions of section 25, or as the case may be, of the old Act, the whole or any part of the building;

(f) that the tenant has renounced his character as such or denied the title of the landlord, and the latter has not waived his right of reentry or condoned the conduct of the tenant ;

(g) that the tenant was allowed to occupy the building as part of his

contract of employment under the landlord, and his employment, has ceased.

(3) omitted.
(4) .....
(5) .....
(6) ....."

29-A. Protection against eviction to certain classes of tenants of land on which building exists. -

(1) For the purposes of this section, the expression "tenant" and "landlord" shall have the meanings respectively assigned to them in clauses (a) and (j) of Section 3 with the substitution of the word "land" for the word "building".

(2) This section applies only to land let out, either before or after the commencement of this section, where the tenant, with the landlord's consent has erected any permanent structure and incurred expenses in execution thereof.

(3) Subject to the provisions hereinafter contained in this section, the provisions of section 20 shall apply in relation to any land referred to in subsection (2) as they apply in relation to any building.

(4) The tenant of any land to which this section applies shall be liable to pay to the landlord such rent as may be mutually agreed upon between the parties, and in the absence of agreement, the rent determined in accordance with sub-section (5).

(5) The District Magistrate shall on the application of the landlord or the tenant determine the annual rent payable in respect of such land at the rate of ten per cent per annum of the prevailing market-value of the land, and such rent shall be payable, except as provided in sub-section (6) from the date of expiration of the term for which the land was let or from the commencement of this section, whichever is later.

(6)(a) In any suit or appeal or other proceeding pending immediately before the date of commencement of this section, no decree for eviction of a tenant from any land to which this section applies, shall be passed or executed except on one or more of the grounds mentioned in sub-section (2) of Section 20, provided the tenant, within a period of three months from the commencement of this section by an application to the Court, unconditionally offers to pay to the landlord, the enhanced rent of the land for the entire period in suit and onwards at the rate of ten per cent per annum of the prevailing market value of the land together with costs of the suit (including costs of any appeal or of any execution or other proceedings).

(b) In every such case, the enhanced rent shall, notwithstanding anything contained in sub-section (5), be determined by the Court seized of the case at any stage.

(c) Upon payment against a receipt duly signed by the plaintiff or decree-holder or his counsel or deposit in Court of such enhanced rent with costs as aforesaid being made by the tenant within such time as the Court may fix in this behalf, the Court shall dismiss the suit, or, as the case may be, discharge the decree for eviction, and the tenancy thereafter shall continue annually on the basis of the rent so enhanced.

(d) If the tenant fails to pay the said amount within the time so fixed (including any extended time, if any, that the Court may fix or for sufficient cause allow) the Court shall proceed further in the case as if the foregoing provisions of this section were not in force.

(7) The provisions of this section shall have effect, notwithstanding anything to the contrary contained in any contract or instrument or in any other law for the time being in force.

Explanation.--For the purposes of sub-section (6) where a case has been decided against a tenant by one Court and the limitation for an appeal therefrom has not expired on the date immediately before the commencement of this section, this section shall apply as it applies to pending proceedings and the tenant may apply to that Court for a review of the judgment in accordance with the provisions of this section."

51. This Court in the case of **M/s Bharat Petroleum Corporation Ltd and another Vs. Smt. Indira Pandey and another** (supra) while deciding the second appeal, observed that "in order to attract, Section 29-A, and to bring a premises/land within the ambit of Section 29-A(2), three things are required to be satisfied:(i) only land is/was let out (ii) tenant has/had erected a permanent structure incurring his own expenses and (iii) aforesaid permanent structure raised by the tenant must be with the consent of landlord. If these three conditions are satisfied, Section 29-A(2), or in other words, the aforesaid Section itself shall apply to such land."

52. In the aforesaid case of **M/s Bharat Petroleum Corporation Ltd and another Vs. Smt. Indira Pandey and another,** by lease deed dated 18.9.1957, the landlord had specifically permitted the lessee to raise permanent construction over the land so let out for the purpose of running filling station/service station etc. for which lease was executed. The Court held that since there exist permanent structure which included machinery etc. on the land in dispute which was raised by the defendant-appellant by incurring their own expense, the consent of landlord was obvious. The Court held that the land in dispute clearly comes within the ambit of Section 29-A(2) of the U.P. Act No. 13 of 1972 and satisfies all the requirements thereunder. That judgment of this Court in the case of Bharat Petroleum Corporation Ltd. was upheld by the Supreme Court by means of its order dated 8.2.2016 passed in Petition for Special Leave to Appeal (C) No.33567-33568 of 2013, whereby, the Special Leave Petitions filed against the Bharat Petroleum Corporation Ltd. were dismissed.

53. In the present case, the lower appellate court has observed that since there exists a clause in the lease deed which requires removal of construction after determination of the tenancy, the construction would come under the meaning of temporary construction and by making such construction, the premises would not come within the definition of word 'building'. As such, the lower appellate court observed that the provisions of Section 29-A of the U.P. Act No. 13 of 1972 would not be applicable.

54. The plaintiffs-respondents, even though the defence of the defendant-appellant was struck off, were enjoined to plead and prove their case that the constructions made by the defendant-appellant on the demised land were non-consensual and/or temporary in nature and therefore, would not confer any benefit to the defendant-appellant and hence the provisions of U.P. Act No. 13 of 1972 were not applicable. Neither is there any pleading nor evidence by the plaintiff-respondent regarding want of consent or the nature of the constructions.

55. The defendant-appellant, once its defence was struck off, was entitled to an opportunity to cross examine the plaintiffs' witness on this issue as only then the facts pertaining to the case of the plaintiff-respondent could be said to be proved or not. This cross examination would be permissible as it would be on the case in the plaint and not in defence. Just because a clause in the lease requires the lessee to remove construction made by him on determination of lease, would not make the constructions made in terms of lease deed aforesaid on the site as temporary. A specific finding of fact was necessarily required to be returned by the courts below, after recording evidence of the structures/constructions actually existing on the premises in dispute, whether the structures are permanent or temporary.

56. Admittedly, the lease deed dated 20.8.1969 granted the lease of the premises in dispute upto 28.2.1978 at a monthly rent of Rs. 100/- only, with provision for extension of the lease. Section 29A of the U.P. Act No. 13 of 1972 was inserted with effect from 5.7.1976 by U.P. Act No. 28 of 1976. Thus, the defence of protection against the eviction provided by Section 20 read with Section 29A was available to the defendant-appellant even prior to the lease coming to an end on 28.2.1978.

57. The findings of the courts below that since a clause in the lease deed provided for removal of erected structure/construction by the defendant-appellant at the time of expiration or sooner determination of the tenancy, the structure/construction are temporary, have been wrongly determined by the courts below. There is no material or evidence on record to substantiate what is the nature of the construction actually existing on the property in dispute. However, in paragraph No. 7 of the plaint, it has been admitted that constructions were made on the disputed property by the defendant-appellant which is also corroborated by the PW-1 in his testimony.

58. The Supreme Court in the matter of **Purshottam Das Bangur and others Vs. Dayanand Gupta; 2012 (10) SCC 409** observed as follows:-

"16. In *Venkatlal G. Pittie v. Bright Bros.* (P) Ltd. [(1987) 3 SCC 558] the landlord alleged that the tenant had without his consent raised a permanent structure in the demised premises. The trial court as also the first appellate court had taken the view that the construction raised by the tenant was permanent in nature. The High Court, however, reversed the said finding aggrieved whereof the landlord came up to this Court in appeal. This Court referred to several decisions on the subject including a decision of the High Court of Calcutta in *Suraya Properties (P) Ltd. v. Bimalendu Nath Sarkar* [AIR 1965 Cal 408] to hold that one shall have to look at the nature of the structure, the purpose for which it was intended to be used and take a whole perspective as to how it affects the enjoyment and durability of the building, etc. to come to a conclusion whether or not the same was a permanent structure. This Court approved the view taken in *Suraya Properties (P) Ltd. v. Bimalendu Nath Sarkar* [AIR 1965 Cal 408] and Surya Properties (P) Ltd. v. Bimalendu Nath Sarkar [AIR 1964 Cal 1] , while referring to the following tests formulated by Malvankar, J. in an

unreported decision in Special Civil Application No. 121 of 1968: *(Venkatlal G. Pittie case* [(1987) 3 SCC 558] , SCC p. 567, para 22)

"22. ... (1) intention of the party who put up the structure; (2) this intention was to be gathered from the mode and degree of annexation; (3) if the structure cannot be removed without doing irreparable damage to the demised premises then that would be certainly one of the circumstances to be considered while deciding the question of intention. Likewise, dimensions of the structure; and (4) its removability had to be taken into consideration. But these were not the sole tests. (5) The purpose of erecting the structure is another relevant factor; (6) the nature of the materials used for the structure; and (7) lastly the durability of the structure."

"20. To sum up, no hard-and-fast rule can be prescribed for determining what is permanent or what is not. The use of the word "permanent" in Section 108(p) of the Transfer of Property Act, 1882 is meant to distinguish the structure from what is temporary. **The term "permanent" does not mean that the structure must last forever. A structure that lasts till the end of the tenancy can be treated as a permanent structure. The intention of the party putting up the structure is important for determining whether it is permanent or temporary.** The nature and extent of the structure is similarly an important circumstance for deciding whether the structure is permanent or temporary within the meaning of Section 108(p) of the Act. Removability of the structure without causing any damage to the building is yet another test that can be applied while deciding the nature of the structure. So also the durability of the structure and the material used for erection of the same will help in deciding whether the structure is permanent or temporary. Lastly, the purpose for which the structure is intended is also an important factor that cannot be ignored.

(emphasis by Court)

59. The nature of construction permitted by the aforesaid lease deed in the present case undoubtedly also refers to permanent constructions being permitted to be made by the defendant-appellant which could not be removed except by substantial damage to the property in dispute and which were meant to last till determination of the tenancy. As a matter of fact, clause 4-(b) of the lease deed itself, while providing for removal of the construction/building/erection at the expiration or sooner determination of the tenancy by the defendant-appellant, also provides for the lessee to make good any damage which may be caused to the demised land by such removal. It is not the case of the plaintiff-respondent that the structure/erection/construction permitted by the lease deed aforesaid, are not existing over the property in dispute. Thus, it is held that the constructions on the property in dispute were made by the defendant-appellant after due consent of the plaintiff-respondents which is evident from the terms of the lease deed, and, they are permanent in nature.

60. The reliance of the learned counsel for the plaintiff-respondent on the judgment of **Bharat Petroleum Corporation Limited Vs. Smt. Ramavati Devi** (supra) (hereinafter referred to as the **Ramavati Devi's case)** and on the case of **Rameshwar Dayal Agarwal Vs. Pawan Kumar** (supra) are,

misplaced. The decision in **Ramavati Devi's** case did not rest, but was taken to the Apex Court in Civil Appeal No. 391 of 2010 which was disposed of by the Supreme Court with the direction that it was open for the defendant to claim benefit of Section 29A(3) of the U.P. Act No. 13 of 1972 in the pending suit. The Supreme Court further observed that it is not for the court concerned to decide whether the appellant is entitled to benefit of Section 29A(3) or not [refer paragraph 12 of the case of **M/s Bharat Petroleum Corporation Ltd Vs. Smt. Indira Pandey and another** (supra)]. The suit consequentially continued and was decided. This Court then considered the judgement of trial court and lower appellate court in Second Appeal No. 319 of 2012 (M/s Bharat Petroleum Corporation Limited Vs. Smt. Ramavati Devi) which was connected to the aforesaid case of **M/s Bharat Petroleum Corporation Limited Vs. Smt. Indira Pandey** and the decision thereof forms the judgement in the matter of M/s Bharat Petroleum Corporation Ltd Vs. Smt. Indira Pandey (supra). This decision was challenged by Ramavati Devi before the Supreme Court of India in a petition for **Special Leave to Appeal (C) No. 33567-33568 of 2013** which came to be dismissed by means of an order dated 8.2.2016.

61. The decision in the matter of **Rameshwar Dayal Agarwal (supra)** was passed in a writ petition filed by the decree holder for quashing the order dated 1.12.1997 passed by the executing court whereby the objection filed by the judgement-debtor seeking benefit of Section 29A of U.P. Act No. 13 of 1972 were allowed and it was ordered that if the enhanced annual rent were deposited by the judgement-debtor, the decree for eviction shall stand discharged. In paragraph No. 52 of the judgement it is observed ".....thus, if the work of erection of a structure is substantial or brings about a substantial change in the character of the premises and it is not merely a small physical change of temporary nature, such work of erection will be of permanent nature. The nature of the construction and intention with which it is made are relevant for determining whether any permanent structure has been erected. If on an open plot of land a structure is raised, it may not be a permanent structure if it can be removed without causing harm or detriment to the plot of land". This Court, therefore, held that the executing as well as the revisional court had misread the terms of lease deed and recorded a perverse finding that the lease deed permitted all kinds of construction to be raised whether temporary or permanent and since there were temporary construction raised, the benefit of Section 29A of the U.P. Act No. 13 of 1972 was available to the tenant.

62. The facts and circumstances of the case in **Rameshwar Dayal Agarwal Vs. Pawan Kumar** are different from the present case. Moreover, the decision rendered by the Supreme Court in **Purshottam Das Bangur and ors Vs. Dayanand Gupta (supra)** as followed and relied upon by this Court in the judgement of **Sunder Lal Bhatia Vs. Onkar Nath Saxena and others14** are to the effect that the nature of the constructions existing on the property in dispute would have to be considered.

63. Thus, the courts below were not justified in decreeing the suit by taking recourse to the provisions of Order 15

Rule 1 or 12 Rule 6 C.P.C without recording of evidence or returning a categorical finding regarding the nature of the constructions.

64. Though, the learned counsel for the defendant-appellant has argued that no evidence regarding nature of construction actually existing on the site is on record and the learned counsel has indicated that it is a fit case for remand under the provisions of Order 41 Rule 23A C.P.C, it is noticed that no grounds for remand are raised in this appeal.

65. The Supreme Court in the case of **Syeda Rahimunnisa Vs. Malan Bi ; 2016 (10) SCC 315** observed as follows:

"It is a settled principle of law that in order to claim remand of the case to the trial court, it is necessary for the appellant to first raise such plea and then make out a case of remand on facts. The power of the appellate court to remand the case to the subordinate court is contained in Order 41 Rules 23, 23-A and 25 CPC. It is, therefore, obligatory upon the appellant to bring the case under any of these provisions before claiming a remand. The appellate court is required to record reasons as to why it has taken recourse to any one out of the three Rules of Order 41 CPC for remanding the case to the trial court. In the absence of any ground taken by the respondents (the appellants before the first appellate court and the High Court) before the first appellate court and the High Court as to why the remand order in these cases is called for and if so under which Rule of Order 41 CPC and further in the absence of any finding, there was no justification on the part of the High Court to remand the case to the trial court. The High Court instead should have decided the appeals on merits. We, however, do not consider it proper to remand the case to the High Court for deciding the appeals on merits and instead examine the merits of the case in these appeals."

66. Therefore, this Court has proceeded to decide this second appeal on its merits.

67. The construction/erection made by the defendant-appellant on the demised land and existing on the property in dispute having been held by this court as permanent in nature and the aforesaid lease deed dated 28.2.1969 permitting raising of such structure, on coming into force of the U.P. Act No.28 of 1976 on 5.7.1976 whereby Section 29A was inserted in U.P. Act No.13 of 1972, the defendant-appellant became a statutory tenant and the benefit of Section 29A would be available to the defendant-appellant, thereby barring the suit for eviction of the defendant-appellant except on the ground specified in Section 20 of the U.P. Act No. 13 of 1972. The tenancy of the defendant-appellant is protected from termination by efflux of time.

CONCLUSION

68. This second appeal is, accordingly, allowed in view of the substantial questions of law answered above. The judgements and decree of both the courts below are set aside.

69. Needless to add, under the provisions of sub-section (5) of Section 29A of the U.P. Act No. 13 of 1972, it is open for the plaintiff-respondent to move the authorities concerned for determination of the annual rent. No order as to costs.

(2019)12 ILR A52

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.12.2019

BEFORE
THE HON'BLE BISWANATH SOMADDER, J.
THE HON'BLE NEERAJ TIWARI, J.

Public Interest Litigation No. 2075 of 2019

Mamta Singh ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
In Person

Counsel for the Respondents:
Sri Anand Kumar Roy, Addl. C.S.C., Sri Ashish Mishra

A. Public Interest Litigation- PIL filed with the grievances that no medical facilities available in the dispensary of Court precinct - High Court has provided space within premises for functioning of the dispensary-Its administration is in the hands of the Chief Medical Officer, Prayagraj – An advocate fell unconscious due to heart attack. There was no stretcher or ambulance facility to take him comfortably and advocates had to carry him-Registrar General shall monitor basic requirements - In case of inadequacy he shall immediately bring the same to the notice of Chief Medical Superintendent, Prayagraj. (Para 3, 4 & 5)

Public Interest Litigation is disposed of. (E-6)

(Delivered by Hon'ble Biswanath Somadder, J.)

1. This public interest litigation (PIL) has been instituted by a practising advocate of this Court primarily for the purpose of seeking this Court's intervention in respect of the medical facility provided within the precinct of this Court. The writ petitioner / learned advocate has given certain instances in the writ petition which indicate lack of adequate medical facility within the precinct of this Court. By an order dated 27th November, 2019, an earlier Division Bench allowed the writ petitioner to implead the Chief Medical Superintendent, Prayagraj, as respondent no. 3 and also granted time to the respondents to file their respective counter affidavits.

2. When the matter is taken up for consideration today, the learned advocate representing the High Court Administration hands-over a copy of parawise comments which he has received from the Registrar (Protocol). Certain paragraphs of the written instruction are required to be reproduced hereinbelow;-

"3. That in reply to the contents of Paragraph Nos. 25 & 26 of the P.I.L. it is submitted that the High Court Dispensary was established in the premises of the High Court for the purpose of providing first aid in case of hands of the Chief Medical Officer, Prayagraj.

4. That in reply to the contents of Paragraph No. 27 of the P.I.L. it is submitted that 02 (two) Ambulances are deputed at High Court for taking any emergency. In no way, it has been established as a substitute to a full-fledged hospital. The High Court has only provided space within the premises for functioning of the said Dispensary. The administration of Dispensary is in the

patient(s) in case of emergency to nearby hospital.

6. That in reply to the contents of Paragraph Nos. 29 of the P.I.L. it is submitted that the Stretcher are available inside the Ambulance and therefore instead of waiting for the Stretcher, Sri Amulya Ratna Srivastava was immediately carried on hands for the purpose of providing him first aid immediately."

3. The above - quoted paragraphs clearly reveal that the High Court Medical Unit / Dispensary has not been established to be a substitute of a full-fledged hospital. However, we are unable to accept the reasoning provided by the High Court Administration as contained in paragraph 6. Let us suppose that the only available ambulance is already commissioned for the purpose of taking someone who has suddenly fallen ill in the High Court to the hospital. Will that mean that no stretcher will be available till such time the ambulance returns? In other words, can it possibly mean that no other person can fall ill / sick within the High Court precinct till such time the ambulance returns? That will simply be a patently absurd proposition. We are, therefore, not at all satisfied with the above statement made in paragraph 6 of the parawise comments, especially in the backdrop of the statement made in paragraph 29 of the writ petition which reads as follows:-

"29. That when Advocate Amulya Ratana Srivastava fell unconscious due to heart attack, there was no stretcher available to take him comfortably and advocates had to carry him on their own hand."

4. The medical facility within the High Court (by whichever name it is called) is required to have adequate infrastructure and logistics should also clearly be in place in order to provide standard first line of medical care to those who may fall sick / ill in the High Court. Such standard first line of medical care shall include not only availability of adequate wheel chairs / stretchers, but should also include a fully stocked medical dispensary equipped, *inter alia*, with essential life saving medication and oxygen. Basic diagnostic tools such as blood-sugar, blood pressure, E.C.G. monitors, etc., should be readily available. At least one of the ambulances should be equipped with intensive care facility so that a critically ill patient can be transported safely to the nearest hospital with minimum risk to the patient. An emergency contact number shall be provided - either by the Registry of this Court or by the Health Department of the State of Uttar Pradesh - by means of which any person can access the Medical Unit situated in the High Court premises. This contact number shall be made known to all by means of public display, especially at conspicuous places within the High Court premises. The Learned Registrar General shall ensure that a regular monitoring system in place so that the existing medical facility does not fall short of the basic requirements necessary for providing standard first line of medical care as detailed above. In the event any inadequacy is noticed, the Learned Registrar General or anyone connected with the High Court Administration shall bring the same immediately to the notice of the respondent no. 3 / Chief Medical Superintendent, Prayagraj, so that

remedial action and corrective measures are taken.

5. The writ petition stands disposed of accordingly.

6. Let a copy of this order be transmitted forthwith by the learned Registrar General to the Chief Medical Superintendent, Prayagraj, as well as the Principal Secretary, Health, Government of Uttar Pradesh, Lucknow.

(2019)12 ILR A54

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.07.2019

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.

Crl. Misc. Application (U/S 482 Cr. P.C.) No. 899 of 2005

Managing Director M/S Indofil Chemical Company ...Applicant
Versus
State of U.P.& Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Nitin Gupta, Sri G.S. Chaturvedi

Counsel for the Opposite Parties:
A.G.A.

A. Criminal Law - Insecticide Act, 1968 - Section 29 (1)(a) & Section 33 - Vicarious liability – Offence by company - Officers of the company who may be said to be responsible to the company for conduct of its business or were in charge thereof.

Held **:- would arise only when an offence has been committed by a company. If company is not made an accused, alleging vicarious liability only against Managing Director, complaint cannot be maintained-Managing Director of Company can be responsible for vicarious liability only when there are specific allegations as to how he is responsible vicariously for the offence in question**. (Para 7,10,11,12,13,19 & 20)

Application u/s 482 Cr.P.C allowed. (E-3)

List of cases cited: -

1. Aneeta Hada & Ors. Vs Godfather Travels & Tours Private Ltd. & Ors. (2012) 5 SCC 661

2. Himanshu Vs. B. Shivamurthy & Ors. (2019) 3 SCC 797

3. Maksud Saiyed Vs St. of Gujarat & Ors. (2008) 5 SCC 668

4. Sharad Kumar Sanghi Vs Sangita Rane (2015) 12 SCC 781

5. S.M.S. Pharmaceuticals Ltd. Vs Neeta Bhalla & Anr. (2005) 8 SCC 89

6. Mah. St. Electricity Distribution Co. Ltd. & Ors. Vs Datar Switchgear Ltd. & Others (2010) 10 SCC 479

7. GHCL Employees Stock Option Trust Vs. India Infoline Ltd. (2013) 4 SCC 505.

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

1. Heard Sri G.S. Chaturvedi, learned Senior Advocate assisted by Sri Nitin Verma, learned counsel for applicant and learned AGA for State of U.P.

2. This application under Section 482 Cr.P.C. has been filed praying for quashing of proceedings in Complaint Case No. 8976 of 2004 under Sections 29 (1)(a) of Insecticide Act, 1968 (hereinafter referred to as "Act, 1968"), Police Station-Kavi Nagar, District- Ghaziabad.

3. It is submitted that Managing Director of M/s Indofil Chemical Company was made an accused in a complaint filed under Section 29 (1)(a) of Act, 1968 on the ground that Insecticide seized at the sale premises of accused-1 Rishipal Singh, was sub-standard and, therefore, Company was indulged in manufacturing of sub-standard insecticide and has committed an offence under Section 29(1)(a) of Act, 1968. Complainant has not impleaded 'Company' at all and only Managing Director has been implicated though manufacturer is the Company and if no offence is said to have been committed by Company, vicarious liability cannot be fastened upon Managing Director of the Company, hence, prosecution of only Managing Director of Company is not maintainable. Reliance is placed on a Supreme Court's judgement in **Sharad Kumar Sanghi vs. Sangita Rane (2015) 12 SCC 781.**

4. Learned AGA on the contrary, submitted that insecticides having been found sub-standard i.e. spurious, amounts to sale of mis-branded insecticides and an offence under Section 29(1)(a) read with Section 3(k)(viii) of Act, 1968 has been committed, hence, prosecution has rightly been instituted against seller as well as manufacturer. Referring to Section 33, he said that where an offence is committed by a Company, every person who was in charge of, or responsible for Company for conduct of its business is deemed to be guilty of an offence and such person is equally responsible for prosecution of said offence.

5. It is not in dispute that accused-1 was the seller and accused-2 is Managing Director of the Company who said to have manufactured alleged misbranded insecticides.

6. When an offence is committed by a Company, it is governed by Section 33 of Act, 1968 which reads as under:-

"33. Offences by companies.--(1) ***Whenever an offence*** *under this Act* ***has been committed by a company, every person*** *who at the time the offence was committed,* ***was in charge of, or was responsible to the company for the conduct of the business of, the company, as well as the company, shall be deemed to be guilty of the offence*** *and shall be liable to be proceeded against and punished accordingly:*

Provided that nothing contained in this sub-section shall render any such person liable to any punishment under this Act if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any Director, Manager, Secretary or other officer of the company, such Director, Manager, Secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation.--For the purpose of this section,--

(a) "company" means any body corporate and includes a firm or other association of individuals; and

(b) "director", in relation to a firm, means a partner in the firm."

(emphasis added)

7. Having gone through aforesaid submissions and relevant provisions of Act, 1968, I find that vicarious liability of officers of the Company who may be said to be responsible to the Company for conduct of his business or was in-charge thereof would arise only when an offence has been committed by a Company. If no offence has been committed by a Company and the Company is not one of the accused, question of vicarious liability of its officials will not arise.

8. Construing a similar provisions contained in Section 141 of Negotiable Instruments Act, 1881 *(hereinafter referred to as "Act, 1881").* Court in **Aneeta Hada and Others Vs. Godfather Travels and Tours Private Limited and Others (2012) 5 SCC 661,** said that commission of offence by Company is an express condition precedent to attract the vicarious liability of others. Court said, when a Company can be prosecuted then only persons mentioned in other categories could be vicariously liable for the offence subject to the averments in the petition and proof thereof. Court further said:

"we arrive at the irresistible conclusion that ***for maintaining the prosecution under Section 141 of the Act, arraigning of a company as an Accused is imperative."*** (emphasis added)

9. Following the above dictum in **Himanshu Vs. B. Shivamurthy and Others (2019) 3 SCC 797,** Court said :

"In the absence of the company being arraigned as an accused, a complaint against the appellant was therefore not maintainable".

10. In the present case, Company itself has not been impleaded at all. Once Company is not made an accused, alleging vicarious liability only against Managing Director, complaint cannot be maintained.

11. Section 33 of Act, 1968 also make it clear that in absence of Company as an accused, complaint only against Managing Director is not maintainable. The offence when committed by Company, the further question of vicarious liability of others will arise.

12. There is another aspect in the matter. In the entire complaint filed by Insecticide Inspector/ District Agricultural Protection Officer, Ghaziabad, I do not find any allegations made against applicant as to how he was vicariously liable for offence under Section 29(1)(a) of Act, 1968. The entire complaint reads as under:-

''कीटनाशी अधिनियम 1968 की धारा 29 (1) ए0बी0सी0 के तहत उक्त वाद निम्न बिन्दुओं पर आधारित है–

1. अभियुक्त संख्या एक अधोमानक कीटनाशक रसायन का भण्डारण कर्ता एवं विक्रेता है।

2. अभियुक्त संख्या दो अधोमानक कीटनाशक रसायन की उत्पादन इकाई के मैनेजिंग डायरेक्टर हैं।

3. दिनांक 28.1.04 की प्रातः लगभग 9 बजे जिलाधिकारी महोदय, गाजियाबाद द्वारा दूरभाष पर अधोहस्ताक्षरी को यह सूचित करते हुए कि एक नकली कीटनाशक रसोयनों को फैक्ट्री पकड़ी गयी है। जिसका समस्त भण्डार पुलिस तत्काल कविनगर थाना पहुंचकर एकत्रित कीटनाशक रसायनों के भण्डार का विधिवत

निरीक्षण करके आवश्यक कार्यवाही कीटनाशी अधिनियम के अन्तर्गत करना सुनिश्चित करें।

जिलाधिकारी द्वारा दूरभाष पर दिये गये निर्देशों के परिपालन में अधोहस्ताक्षरी तत्काल थाना कविनगर पहुंचे एवं पुलिस द्वारा एकत्रित किये गये कीटनाशक रसायनों की स्थिति का निरीक्षण किया। थाने में उपलब्ध समस्त कीटनाशक रसायनों का भण्डार जो थाने की फर्द के अनुसार श्री ऋषिपाल सिंह, ई–71 बुलन्दशहर रोड, औद्योगिक क्षेत्र गाजियाबाद का संदर्भित है। ***श्री ऋषिपाल सिंह इस पते पर बिना कीटनाशी विक्रय लाईसेंस प्राप्त किये कीटनाशक रसायनों का व्यापार कर रहे हैं।*** *श्री ऋषिपाल सिंह का स्थाई पता एस0बी0–81, शास्त्रीनगर (गाजियाबाद।)*

4. कीटनाशी अधिनियम 1968 की धारा 20 के अन्तर्गत जिला कृषि रक्षा अधिकारी गाजियाबाद को कीटनाशी निरीक्षक के अधिकार प्राप्त है जिसके अन्तर्गत दिनांक 28.1.2004 को कविनगर थाना परिसर में एकत्रित विभिनन कीटनाशक रसायनों में से मैन्कोजेब 75 प्रतिशत डबलू0 पी0 बैच संख्या–टी0 709 जिसकी उत्पादन तिथि 3/03 एवं अन्तिम प्रयोग तिथि 2/05 ***जो मैसर्स इण्डोफिल कैमिकल्स कम्पनी, निरलौन हाउस पोस्ट बाक्स नं0–9112 मुम्बई द्वारा निर्मित थी, का नमूना विधिवत हाअरित कर सील मोहर किया गया।*** *उसी समय फार्म 20तैयार किया गया। चूंकि श्री ऋषिपाल सिंह पुत्र श्री बलराम सिंह पुलिस अभिरक्षा (कस्टडी) में थे, इसलिए नमूने की एक सीलबन्द थैली एवं फार्म–20 की एक प्रति थाना कविनगर (गाजियाबाद) में प्राप्त करा दी गयी। श्री हरिश्चंद कौशिक कृषि रक्षा पर्यवेक्षक एवं श्री इन्द्रपाल सिंह वरिष्ठ सहायक कार्यालय जिला कृषि रक्षा अधिकारी, गाजियाबाद मेरे साथ मौजूद थे।*

5. नमूने की एक सीलबन्द थैली जिस पर कोड संख्या–ए0 173 अंकित कर विधिवत रूपपत्र–21 पत्रांक 1506 दिनांक 20.1.04 के साथ कार्यालय के पत्रांक–1509 दिनांक 29.1.04 के द्वारा संयुक्त निदेशक (कृ0र0) उ0प्र0, कृषि भवन लखनऊ के यहां विश्लेषण कराने हेतु भेजी गयी।

6. संयुक्त निदेशक कृषि रक्षा उ0प्र0, कृषि भवन लखनऊ ने अपने पत्रांक 30 दिनांक 05.04.04 के द्वारा नमूने की विश्लेषण रिपोर्ट कीटनाशी विश्लेषक उर्वरक एवं कीटनाशी गुण नियंत्रण प्रयोगशाला वाराणसी के पत्रांक पी0आर0 545 दिनांक 29.3.04 भेजी है। जिसमें मैन्कोजेब 75 प्रतिशत डबलू0 पी0 बैच संख्या–टी0 709 (कोड संख्या–ए00173) के उक्त ***नमूने को मिस्ब्राण्डेड (अधोमानक) घोषित किया है।***

7. ***नमूना मिस्ब्रान्डेड (अधोमानक) होने की सूचना*** *कार्यालय के पंजीकृत पत्रांक 233 दिनांक 29.4.04 के द्वारा* ***श्री ऋषिपाल सिंह पुत्र श्री बलराम सिंह एस0बी0–81, शास्त्रीनगर (गाजियाबाद) एवं निर्माता कम्पनी को भेज दी गयी है।***

8. ***अभियुक्त संख्या एक ने बिना कीटनाशी विक्रय*** *लाईसेंस के कीटनाशक रसायनों का भण्डारण, उत्पादन एवं विक्रय आदि कर कीटनाशी अधिनियम 1968 की धारा (1) ए0बी0सी0, एवं* ***अभियुक्त संख्या दो ने कीटनाशी अधिनियम 1968 की धारा 29 (1) ए0 के अन्तर्गत दण्डनीय अपराध किया है।***

9. न्यायालय में अभियोजन दायर करने हेतु कीटनाशी अधिनियम 1968 की धारा 31 (1) के अन्तर्गत जिलाधिकारी गाजियाबाद ने दिनांक 21.8.04 को अपनी स्वीकृति प्रदान कर दी है।

अतः आपसे अनुरोध है कि अभियुक्त संख्या 1, एवं 2 को तलब फरमाकर दण्डनीय कार्यवाही करने का कष्ट करें।''

"The aforesaid suit u/s 29(1) (a)(b)(c) of the Insecticides Act, 1968, is based on the following points: -

1. The accused 1 is a storer and seller of the misbranded insecticides.

2. The accused 2 is the Managing Director of the manufacturing unit of the misbranded insecticides.

3. Giving information to the undersigned at around 9:00 a.m. on 28.01.2004, the District Magistrate, Ghaziabad, while informing that an illegal factory manufacturing insecticides has been unearthed, instructed that the undersigned should immediately reach the Kavinagar Police Station and ensure to take necessary action under the

Insecticide Act after examining the chemicals kept there.

In compliance with the directives of the District Magistrate, the undersigned immediately reached the Kavinagar Police Station and examined the insecticides kept by the police there. As per the memo of the police station, the store of insecticides is of Shri Rishipal Singh, E-71, Bulandshahr Road, Industrial area, Ghaziabad, and he trades in insecticides from this address without obtaining any licence. The permanent address of Shri Rishipal Singh is SB - 81, Shastri Nagar (Ghaziabad).

4. District Agricultural Defense Officer (Krishi Raksha Adhikari) has been vested with the power of the Insecticide Inspector u/s 20 of the Insecticides Act, 1968, under which out of the insecticides collected on the campus of the Police Station - Kavi Nagar, the Mancozeb was 75 percent with WP Batch No. - T. 709, the manufacturing date of which is 3/03 and expiry date is 02/05; it was manufactured by M/s Indofil Chemicals Company, Nirlaun House, Post Box No. 9112, Mumbai and its samples were sealed after being signed properly. At that very time, Form 20 was prepared. Since Sri Rishipal Singh s/o Sri Balram Singh was in police custody, a sealed pouch of sample and a copy of Form 20 were made available to P.S. Kavinagar (Ghaziabad). Sri Harishchand Kaushik, Krishi Raksha Paryavekshak and Sri Indrapal Singh, Senior Assistant, Office of the Zila Krishi Raksha Adhikari, Ghaziabad were present with me.

5. A sealed pouch of sample with Code No A-173, alongwith duly filled Form 21 no 1506 dated 20.1.04 were sent to the Joint Director (Kri.Ra.) U.P., Krishi Bhawan, Lucknow for analysis.

6. The Joint Director, Krishi Raksha, U.P., Krishi Bhawan, Lucknow vide letter 30 dated 05.04.04 has sent analysis report of the sample vide letter no P.R. 545 dated 29.3.04 of the Fertiliser Analyst and Fertiliser Quality Control Laboratory, Varanasi, wherein the aforesaid sample of Mancojeb 75 percent W.P. Batch no T-709 (Code No A00173) has been declared to be misbranded.

7. Information regarding the sample being misbranded has vide registered office letter no 233 dated 29.4.04 been sent to Sri Rishipal Singh s/o Sri Balram Singh, S.B.-81, Shastri Nagar (Ghaziabad) and to the manufacturing company.

8. Without possessing licence for sale of insecticides, accused no 1 has by involving himself in storage, production, sale, etc, of insecticides, committed an offence punishable under section 1(a)(b)(c) and so did accused no 2 u/s 29 (1) (a) of the Insecticides Act.

9. The District Magistrate on 21.8.04 granted permission u/s 31 (1) of the Insecticides Act, 1968 for bringing prosecution.

Hence, accused nos 1 and 2 may please be summoned and punishment proceedings be taken."

(emphasis added)

(English Translation by Court)

13. Managing Director of Company can be responsible for vicarious liability only when there are specific allegations as to how he is responsible vicariously for the offence in question. Nothing has been said in the entire complaint in respect of role of the applicant to make him vicariously liable for the offence under Section 29(1)(a) of Act, 1968.

14. In **Maksud Saiyed Vs. State of Gujarat and Others (2008) 5 SCC 668,** Court said :

"it is obligatory on the part of the complainant ***to make requisite allegations which would attract the provisions constituting vicarious liability".***

(emphasis added)

15. In **Sharad Kumar Sanghi Vs. Sangita Rane (2015) 12 SCC 781,** Court said:

"When ***a complainant intends to proceed against the Managing Director or any officer of a company, it is essential to make requisite allegation to constitute the vicarious liability."***

(emphasis added)

16. In **S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla and Another (2005) 8 SCC 89,** while dealing with an offence under Section 138 of Act, 1881, Court said:

"It is necessary to specifically aver in a complaint under Section 141 that at the time the offence was committed, the person accused was in charge of, and responsible for the conduct of business of the company. This ***averment is an essential requirement of Section 141 and has to be made in a complaint. Without this averment being made in a complaint, the requirements of Section 141 cannot be said to be satisfied."*** (emphasis added)

17. The same principle has been reiterated in **Maharashtra State Electricity Distribution Co. Ltd. and Others Vs. Datar Switchgear Ltd. and Others (2010) 10 SCC 479 and GHCL Employees Stock Option Trust Vs. India Infoline Ltd. (2013) 4 SCC 505.**

18. In **Sharad Kumar Sanghi (supra)** Court also said:

"When a company has not been arrayed as a party, no proceeding can be initiated against it even where vicarious liability is fastened on certain issues."

(emphasis added)

19. In view of above discussion, proceedings initiated against applicant for committing offence under Section 29(1)(a) of Act, 1968 cannot be sustained.

20. Application is accordingly allowed. Proceedings initiated against applicant in Complaint Case No. 8976 of 2004 under Sections 29 (1)(a) of Act, 1968, Police Station Kavi Nagar, District Ghaziabad, are hereby quashed.

(2019)12 ILR A59

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.10.2019

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Crl. Misc. Application (U/S 482 Cr. P.C.) No. 960 of 1997 connected with

Crl. Misc. Application (U/S 482 Cr. P.C.) No. 1910 of 1997

Mr. R.P. Goenka & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:

Sri S. Trivedi, Sri Mohit Singh, Sri Shashank Shekhar Mishra, Sri Shiv Kumar Singh Rajawat, Ms. Saumya Chaturvedi, Ms. Tanisha J. Munir

Counsel for the Opposite Parties:
A.G.A., Sri A.K. Awasthi, Sri Manish tiwari, Sri V.C. Tewari, Sri Nikhil Chaturvedi

A. Criminal Law - Indian Penal Code, 1860 - Section 499 & 500- Defamation- Code of Criminal Procedure - Section 482 - Indian Evidence Act, 1872- At the stage of summoning the accused, a Magistrate is not supposed to pass a detailed judgement but the order must reflect application of mind- Magistrate must be satisfied that there is material to issue process, in absence of which, the Magistrate will refrain from taking cognizance under Section 190(1)(a) Cr.P.C. Ex-facie an offence of defamation requires a false statement and if a statement itself is not false then Section 499 IPC is not attracted- Exceptions laid down in Section 499 cannot be considered at the time of issuing process by the Magistrate since the same are defence of the accused - If an inference is drawn by the person claiming that before him the statement was made then that person has to verify that a statement justifying such inference was made and unless such fact is not brought before Court concerned, any other statement of a person would amount to hearsay and cannot be said to have proved the commission of the offence of "defamation". A newspaper reporting is a hearsay secondary evidence and not admissible in evidence without proper proof of contents under Indian Evidence Act, 1872- Trial Court cannot treat newspaper report as duly proved only by production of copies of newspaper which was not "legal evidence". Complainant having implicated several other persons who did not make the alleged statement is ex facie illegal and amounts to gross abuse of process of law.

Application u/s 482 Cr.P.C allowed. (E-3)

List of cases cited: -

1. R.P. Kapur Vs St. of Punjab AIR 1960 SC 866

2. Ramachandra Venkataramanan Vs Shapoorji Pallonji & Co.Ltd. 2019 SCC OnLine Bom 524

3. Mehmood Ul Rehman Vs Khazir Mohammad Tunda (2015) 12 SCC 420

4. Smt. Kiran Bedi Vs Committee of Inquiry and anr 1989 (1) SCC 494

5. Board of Trustees of the Port of Bombay Vs Dilipkumar Raghavendranath Nadkarni and Ors (1983) 1 SCC 124

6. Vishwanath S/o Sitaram Agrawal Vs Sau. Sarla Vishwanath Agrawal 2012 (6) SCALE 190

7. Kishore Samrite Vs St. of U.P. and Ors 2013 (2) SCC 398

8. Samant N. Balkrishna and anr. Vs George Fernandez and others, 1969(3) SCC 238

9. Laxmi Raj Shetty and anr. Vs State of Tamil Nadu, 1988(3) SCC 319

10. Quamarul Islam Vs S.K. Kanta and ors, 1994 Supp. (3) SCC 5

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

1. Heard Sri G.S. Chaturvedi, learned Senior Advocate assisted by Ms. Saumya Chaturvedi, Advocate and SriArvind Verma, learned Senior Advocate assisted by Ms. Tanish J. Munir, Advocate for applicants and Sri Nikhil Chaturvedi, learned A.G.A. for State as well as Sri Manish Tiwari, Advocate for Complainant-Respondent.

2. Both these applications have been filed against same proceedings pending in the Court of 9th Additional Chief Judicial Magistrate, Ghaziabad, hence were heard together and are being decided by this common judgment.

3. Application No. 960 of 1997 has been filed by 12 applicants with a prayer to quash Complaint No. 447 of 1996 filed by Respondent-2 in the Court of 9th Additional Chief Judicial Magistrate, Ghaziabad and entire proceedings including Criminal Case No. 2234 of 1996 as also bailable warrant dated 11.09.1996 issued by Magistrate concerned against applicants.

4. Applicant-1 is the Chairman of M/s Gramaphone Company of India Ltd. *(hereinafter referred to as "GCIL")* having its registered office at 33, Jessore Road, Dumdum, Calcutta. Applicants-2, 5, 7, 8, 9 and 11 were Directors of GCIL when application was filed and Applicants-4, 6 and 12 were former Directors having ceased w.e.f. 07.03.1996, 30.11.1995, and 01.011.1995 respectively. Similarly Applicants-3 and 10 were Directors and ceased to be so w.e.f. 15.11.1996 and 28.06.1996 respectively.

5. GCIL is engaged in the business of manufacturing and marketing of Sound Recordings, Audio Cassettes and Compact Discs etc. with the Trademark Logo "HMV". In 1994 GCIL got copy right ownership of sound track recordings, lyrics and musical composition in respect of film "Hum Apke Hain Kaun". Towards end of December, 1994 M/s Super Cassettes Industries Ltd., i.e., Respondent-2 also introduced Audio Cassettes of aforesaid film infringing copy rights of GCIL. It resulted in a litigation inasmuch as GCIL filed Suit No. 2924 of 1994 in Delhi High Court.

6. Respondent-2, i.e., Complainant, filed a complaint under Sections 500, 501, 502 read with Sections 34 and 120B IPC against all the applicants and five others stating that a news item was published in "The Economic Times" dated 10.05.1996 with the title "Gramaphone Co-accuses T-Series of faking HMV cassettes" and published a defamatory article/ news item, in connivance and conspiracy of accused, against Chairman and Managing Director, Sri Gulshan Kumar and Company. The said news item reads as under:

"Gramaphone Co accuses T-Series of faking HMV cassettes

Mr. ***Sanjiv Goenka, vice-chairman,*** *The Gramaphone Company of India Ltd. (GCIL),* ***today accused T-Series of faking HMV audio cassettes***.

Talking to reporters after the company's extraordinary general meeting, ***Mr. Goenka said some 65,000 cassettes of the popular Hindi film 'Hum Apke Hain Kaun' were seized from the premises of T-Series in January.***

T-Series, which has emerged as possibly the fastest growing music company, is owned by Mr. Gulshan Kumar.

Attacking the organization, ***Mr. Goenka said: "T-Series is hampering the Gramaphone Company in fighting the counterfeit problem."***

Already, a similar case between the two companies is pending before the Delhi High Court.

Earlier, during the meeting the GCIL board passed the special resolution for restructuring the company's capital.

The company has decided to slash its capital base by 60 per cent to enable the company which has now come out of the BIFR ambit to pay dividend within the current financial year.

The extraordinary general meeting also passed a resolution to float a wholly owned international subsidiary in

the name of RPG Music International Ltd. to fully exploit the potential of Indian music, which is quite popular abroad.

The overseas assets of GCIL will be transferred to this company.

GCIL, taken over by the R.P. Goenka group in the early 1980s and only recently deregistered from the BIFR's sick list, had an accumulated loss of Rs. 15 crore on March 1995.

Under the resolution passed today, each Rs. 10 equity share would be reduced to a Rs. 4 equity share and, thereby, the company's existing equity capital of Rs. 18.17 crore would be reduced to Rs. 7.27 crore.

The company would seek the permission of the Calcutta High Court to undertake the reduction in equity.

Minority shareholders, however, expressed their resentment at the proposed plan expressing dissatisfaction at being deprived of Rs. 6 in their existing share.

However, the capital reduced would increase the earnings per share (EPS) of the company by at least two-and-half times and hence total market capitalisation of the company would go up.

The holding of the RPG Enterprise in GCIL is around 50 per cent, while 25 per cent is held by the financial institutions.

Another 10 per cent is held by the EMI and 15 per cent by minority shareholders." (Emphasis added)

7. Complainant alleged that Chairman and Managing Director, Sri Gulshan Kumar of Complainant-Company was shocked to read the entire article pertaining to them as it has no truth. Complainant-Company has made audio cassettes of aforesaid film in compliance of provisions of Copyright Act, 1957 and paid prescribed royalty to accused company, i.e., GCIL. All the accused persons conspired together to discredit, humiliate, denigrate and defame complainant in the estimation of right thinking members of society (dissimulating) by publishing false, frivolous and defamatory article containing imputations against Sri Gulshan Kumar, Chairman and Managing Director of Complainant-Company. Imputations against them were made, edited, printed and published by accused persons in furtherance of their conspiracy with common intention to defame and denigrate the complainant as an industry, industrialist, social and religious person of high morale, standard and dignity in society at large. Complainant sent a legal notice dated 11.05.1996 which remained unreplied. Accused persons edited, printed, published and circulated the aforesaid article containing false, reckless and defamatory remark against complainant and its Chairman and Managing Director without any substance and there was no relevancy to make such defamatory remarks in extraordinary general meeting of GCIL. Accused persons have no reason or excuse and are not protected under any law to make such false, frivolous and reckless imputations against Chairman and its Managing Director. The acts and deeds of accused are not exempted under any of exceptions provided under Section 499 IPC or under any other Act. Accused persons are fully aware that imputations made by them against complainant has no truth. They were also aware that defamatory remarks will injure reputation of complainant. The sole objective of accused persons was only to harm reputation of complainant.

Accused persons have no privilege under any law to publish libel/ defamatory articles against complainant. Complainant and its Chairman/ Managing Director have suffered ill reputation among fellow traders, industrialists, industries, dealers, family member, employees, directors, officers, associates and members of society who have started looking down on complainant and as such it has also suffered reputation/ image amongst industries, traders, dealers, stockists, business circle etc., who has started asking questions and complainant is facing an uphill task in satisfying everyone. Several persons have sent, to complainant, in writing, that after going through the above said news item they have lost faith in honesty of complainant and its Chairman/ Managing Director. GCIL and other members of society have also read the entire defamatory publication. Complainant's friends and others have made enquiries from complainant on telephone at Plot No. 1, Film Center, Sector 16A, Noida, District Ghaziabad, where complainant has its Corporate Office. Complainant has also read defamatory language published in said newspaper at Film Center, Noida. Newspaper was being circulated and sold in the area of Noida and Ghaziabad through various vendors. The act done by accused persons constitute an offence publishable under Sections 500, 501, 502 read with Sections 34/120B IPC.

8. After registering aforesaid complaint, Magistrate recorded statement of Sri S. Kanan, Senior Executive, Super Cassettes Industries Ltd. on 01.06.1996 under Section 200 Cr.P.C. Statements of Sri Aditya Kumar Jain, Advocate and Sri Gulshan Kumar son of Sri Chandra Bhan were recorded under Section 202 Cr.P.C. Thereafter Magistrate passed order on 14.06.1996 mentioning that on the basis of evidence and material on record there are sufficient ground to proceed against Accused-1 to 17 in complaint for an offence punishable under Section 500 IPC and consequently it summoned accused persons to appear for trial. On 11.09.1996 when accused persons were not present, Magistrate issued bailable warrant to all accused persons and it is at this stage this application has been filed.

9. Application No. 1910 of 1997 has been filed by sole applicant-Sanjeev Goenka in his capacity as Vice Chairman of GCIL against aforesaid Criminal Case No. 2234 of 1996 arising from Complaint No. 447 of 1996 wherein summoning order was issued on 11.09.1996 and, therefore, facts being common, are not repeated.

10. Sri G.S. Chaturvedi, learned Senior Counsel appearing for applicants contended that alleged statement attributed to Sri Sanjeev Goenka, Vice Chairman, GCIL, does not constitute a defamatory statement and, therefore, Section 500 IPC is not attracted at all and Magistrate has not applied its mind on this aspect. He further contended, when statement alleged to have been made only by Sri Sanjeev Goenka, accusation by impleading Applicants-1 and 3 to 12, in Application No. 960 of 1997, is wholly illegal and Magistrate without application of mind on this aspect, in a mechanical manner, has issued summons to all the accused and for this reason alone, summoning order and entire proceedings are vitiated against the applicants. He next contended that there was no legal evidence available before Magistrate justifying inference, even prima facie, to

be drawn that applicants are guilty of committing offence under Section 500 IPC, therefore, also entire proceedings are illegal and liable to be set aside. He said that entire complaint and evidence is founded on news item published in newspaper and no person before whom alleged statement said to have been made was examined. Statement of Sri S. Kanan, Senior Executive of Respondent-2 recorded under Section 200 Cr.P.C. and two alleged persons whose statements are recorded under Section 202 Cr.P.C. are all strangers and third parties who have no knowledge about the matter except what they derived from reading of newspaper. Therefore, alleged witnesses are nothing but strangers and hearsay. A newspaper by itself is not admissible in evidence unless the person reported the matter is also examined and, therefore, entire proceedings initiated, only on the basis of newspaper article is clearly founded on no legal evidence at all, therefore, proceedings initiated against applicants are nothing but gross abuse of process of law, hence, entire proceedings are liable to be set aside. He lastly contended that Magistrate has not examined the matter that there was an apparent business rivalry among complainant-Respondent-2 and GCIL of which applicants were Chairman/Vice-Chairman/ Directors, sitting or former, and a suit was already pending in Delhi High Court wherein CGIL has made complaint that Respondent-2 has committed breach of copyrights. To pressurize and blackmail accused applicants and as a counterblast, above complaint was made and unfortunately, Magistrate without application of mind has proceeded to summon accused applicants, therefore, there is a serious legal error on the part of Magistrate and entire proceedings amounts to harassment of accused applicants by initiating wholly unlawful, not maintainable and illegal proceedings.

11. Sri Arvind Verma, learned Senior Advocate adopting arguments of Sri Chaturvedi in connected application also reiterated the said arguments and both learned Senior Advocates placed reliance on Supreme Court's judgement in **R.P. Kapur Vs. State of Punjab AIR 1960 SC 866** and a Single Judge judgement of Bombay High Court in **Ramachandra Venkataramanan Vs. Shapoorji Pallonji & Company Ltd. 2019 SCC OnLine Bom 524.**

12. Learned counsel appearing for Respondent-2, on the contrary, submitted that a perusal of complaint as also the statements recorded by Magistrate under Sections 200 and 202 Cr.P.C. categorically show commission of an offence punishable under Section 500 IPC and, therefore, Magistrate has rightly summoned accused-applicants and they are liable to be tried for the said offence, hence, no interference is called for and would be justified by this Court. He submitted that at the stage of summoning accused persons in a complaint case, Magistrate's scope of enquiry is confined to the complaint and evidence adduced before it and it cannot examine the merit and demerits of case in detail. Magistrate has done what was required by it and it cannot be said that from the material placed on record, prima facie offence punishable under Section 500 IPC is not made out, therefore, both the applications deserve to be dismissed and no interference would be justified.

13. I have heard learned counsel for parties at length and perused record as

also authorities and relevant law on the subject.

14. At the stage of summoning accused persons, a Magistrate is not supposed to pass a detailed judgement. The requirement, however, is that order must reflect application of mind. Magistrate must be satisfied that there is material to issue process. If complaint on the face of it does not disclose commission of an offence or if there is no legal evidence in support of complaint to prove the charge, then Magistrate will refrain itself from taking cognizance under Section 190(1)(a) Cr.P.C. In **Mehmood Ul Rehman Vs. Khazir Mohammad Tunda (2015) 12 SCC 420,** Court said that satisfaction for proceeding would mean that the facts alleged in the complaint would constitute an offence and when considered along with the statements recorded, would, prima facie, make the accused answerable before Court. If no application of mind is evident or no offence is made out, Court said that High Court under Section 482 Cr.P.C. is bound to invoke its inherent power in order to prevent abuse of power of Court.

15. Section 499 IPC provides as to what is "defamation" and reads as under:-

"499. Defamation.--Whoever, by words either spoken *or intended to be read, or by signs or by visible representations,* ***makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person,*** *is said, except in the cases hereinafter expected, to defame that person."*

16. There are four Explanations and ten Exceptions in Section 499 IPC which I had not quoted.

17. Explanations covers some shades of the words, spoken or intended to be read etc., which may amount to "defamation" while exceptions give the illustrations of what will not constitute "defamation". To be more particular, Explanations-1, 2 and 3 provide certain aspects which would amount to defamation and Explanation-4 explains the words "will harm the reputation of such person" which is a necessary and integral part of Section 499 IPC so as to constitute defamation. Offence of defamation, therefore, consists of three essential ingredients. (i) making or publishing an imputation concerning a person; (ii) such imputation must have been made by words either spoken or intended to be read or by signs or by visible representations; and, (iii) the said imputation must have been made with the intention of harming or with the knowledge or having reason to believe that it will harm the reputation of the person concerned.

18. Thus, to bring an offence under Section 500 IPC, prosecution has to show, (a) that an imputation was made consisting of words spoken or written or intended to be read or made by signs or by visible representations; (b) that the imputation concerned the complainant i.e. the person defamed and the person who has come forward qua complainant alleging that defamation concerned him, are identical persons; (c) that the accused made or published the incriminating imputation; and, (d) that the intention behind making and publishing words causing harm to the reputation of such person.

19. Offence punishable under Section 500 IPC, therefore, is to protect a fundamental right of a person i.e.

'reputation' which is part of right to enjoyment of life and liberty and property having an ancient origin as explained by Supreme Court in **Smt. Kiran Bedi v. Committee of Inquiry and another 1989 (1) SCC 494** wherein Court reproduced the observations from **D.F. Marion v. Davis 10 55 ALR 171** as under:-

*"The **right to enjoyment of a private reputation**, unassailed by malicious slander is of **ancient origin,** and is **necessary to human society. A good reputation is an element of personal security**, and is protected by the Constitution equally with the right to the enjoyment of life, liberty and property. "*
(emphasis added)

20. In **Board of Trustees of the Port of Bombay vs. Dilipkumar Raghavendranath Nadkarni and Others (1983) 1 SCC 124,** Court said that "right to reputation" is a facet of right to life of a citizen under Article 21 of Constitution.

21. In **Vishwanath S/o Sitaram Agrawal v. Sau. Sarla Vishwanath Agrawal 2012 (6) SCALE 190**, Court dealt with the aspect of "reputation" though in a different context, and said:-

*"**.....reputation** which is not only the salt of life, but also the **purest treasure and the most precious perfume of life**. It is extremely delicate and a cherished value this side of the grave. It is a revenue generator for the present as well as for the posterity. " (emphasis added)*

22. In **Kishore Samrite Vs. State of U.P. and Others 2013 (2) SCC 398,** Court said:-

*"The term '**person' includes not only the physical body and members but also every bodily sense and personal attribute among which is the reputation a man has acquired.** Reputation can also be defined to be good name, the credit, honour or character which is derived from a favourable public opinion or esteem, and character by report. The right to enjoyment of a good reputation is a valuable privilege of ancient origin and necessary to human society. '**Reputation' is an element of personal security and is protected by Constitution equally with the right to enjoyment of life, liberty and property.** Although 'character' and 'reputation' are often used synonymously, but these terms are distinguishable. 'Character' is what a man is and 'reputation' is what he is supposed to be in what people say he is. 'Character' depends on attributes possessed and '**reputation' on attributes which others believe one to possess.** The former signifies reality and the latter merely what is accepted to be reality at present. ". (emphasis added)*

23. Offence under Section 500 IPC, therefore, covers a very important aspect involving a person's right to life and liberty, hence when a complaint is made that a person's reputation has been jeopardized, any Magistrate if has taken cognizance in the matter by initiating proceedings, Court under Section 482 Cr.P.C. or in writ jurisdiction under Article 226 of Constitution should not interfere lightly unless a clear case of abuse of process of law is made out. I, therefore, would examine the matter in question, whether here a case of abuse of process has been made out or not.

24. Before coming to other aspects of the matter, first of all, straightway I propose to consider whether news item,

said to have been published in daily newspaper "The Economic Times", taking on the face of it to be correct, satisfy the requirement of Section 499 IPC so as to constitute an offence of defamation punishable under Section 500 IPC.

25. The published news items has various parts. The first part, talks of alleged statement made by Sri Sanjeev Goenka; second part, talks of a case pending between two companies in Delhi High Court; and, third part, deals with the meeting of GCIL Board and passing of resolution for restructuring the Company's capital and gives some details of restructuring of Company and shareholding thereof.

26. For the purpose of present case, though second part i.e. pendency of case between two companies i.e. GCIL and T-Series in Delhi High Court, as per applicants, is the genesis for entire dispute but as per complaint made by Respondent-2, it is the first part of news item which has caused in commission of offence punishable under Section 500 IPC. The first part of news item again talks of two things. One is, what has been said by Mr. Goenka and another, inferential news which reflects the conclusion drawn by Reporter. Two statements are said to have been made by Sri Goenka in the aforesaid news item; (a) "Mr. Goenka said, some 65000 cassettes of popular Hindi film "Hum Aapke Hain Kaun" were ceased from the premises of T-Series in January", and (b) "Mr. Goenka said, T-Series is hampering the Gramaphone Company in fighting the counterfeit problem".

27. The remaining two sub-parts of first part of above news item show the inference drawn by Newspaper Reporter and these sub-parts are; (i) Mr. Sanjeev Goenka, Vice-Chairman, the Gramaphone Company of India Limited (GCIL), today accused T-Series of faking HMV audio cassettes and (ii) T-Series, which has emerged as possibly the fastest growing music company, is owned by Mr. Gulshan Kumar.

28. Obviously, the inference drawn by Newspaper Reporter cannot be attributed to be the statement of Sri Goenka unless such statement is brought on record to show that statement causing inference drawn by Newspaper Reporter was also stated by Sri Goenka and the said inference is not an extra stretching of a fact which as such has not been uttered by the person to whom it is attributed.

29. The first part of statement of Mr. Goenka, published in news items, relates to a fact and another is the opinion formed by Mr. Goenka on a particular aspect.

30. Now, when I go through the complaint, I do not find even a whisper stating that statement of Mr. Goenka that "65000 cassettes of Hindi film "Hum Aapke Hain Kaun" were ceased from the premise of T-Series in January", is a false statement and no such seizure had taken place. In the complaint, newspaper article has been reproduced in para-10 and thereafter from paras-11 to 17 it is said that aforesaid news item constitute an offence of defamation punishable under Section 500 IPC but I do not find even a whisper in the entire complaint that this statement of fact alleged by stated by Mr. Goenka that a particular number of cassettes were seized from the premise of T-Series, is false and incorrect. When

aforesaid statement was not shown incorrect in entire complaint, I do not find that utterance of such statement of fact do constitute an offence of "defamation" as defined in Section 499 IPC and punishable under Section 500 IPC. Ex-facie an offence of defamation required firstly, a false statement and if a statement itself is not false, one need not go further as to whether such statement has the effect of damaging one's goodwill or reputation or image, inasmuch as, if a statement of fact which is not false is uttered then Section 499 IPC is not attracted at all.

31. Further the alleged statement of Mr. Goenka, when talks of seizure of cassettes from the premise of T-Series, nowhere stated that said cassettes were fake. This part of statement in news item is an inference drawn by Newspaper Reporter and on what basis he drew this inference, atleast from the two statements of Mr. Goenka, which are reproduced in aforesaid news item, it is difficult to find any reason for forming such opinion. Reporter may have extended the word "seizure" in the manner that seizure must be of fake cassettes.

32. The second part of alleged statement of Mr. Goenka shows that T-Series is obstructing GCIL fighting against counterfeit problem but it does not show or statement suggests that T-Series itself is indulged in counterfeit cassettes and is encouraging the same. Further, Mr. Goenka has not named Respondent-2 at all i.e. Super Cassettes Industries Limited or its Chairman and Managing Director, Sri Gulshan Kumar. That is a fact stated in the News item by Newspaper Reporter and he has said on his own that T-Series Company is owned by Sri Gulshan Kumar. I do not find that from reading of newspaper item that any common man would immediately relate it to M/s Super Cassettes Industries Limited as Respondent-2 has not been named by Mr. Goenka.

33. Rest averments contained in paras- 11 to 15 of complaint are the manner of reaction of Mr. Gulshan Kumar after reading said news item and his friends, members of society etc. known to him which would be irrelevant if the news item itself fails to bring applicants within the catch of Sections 499/500 IPC.

34. In a matter, complaining of offence of defamation, the alleged statement has to be appreciated in a manner which will be read, understood and viewed by right thinking and reasonable minded person of ordinary prudence. The statement has to be read and understood in its entirety and not selectively, in piecemeal, or by adding something which is not there. Natural and ordinary meaning of words would be supplied and what meaning and message it would convey to a man of ordinary prudence is a crucial aspect. Imputation of fraud, dishonesty and corruption in any manner directly attributing to complainant, no doubt, would amount to defamation but every statement which is not liked by complainant himself cannot be said to be a defamatory statement.

35. I have no manner of doubt that while considering the questions, whether an offence under Section 499 IPC punishable under Section 500 IPC has been committed, and whether Magistrate is justified in issuing process, the

exceptions laid down in Section 499 IPC would not be considered since the same are defence available to accused and not to be looked into at the stage of issue of process by Magistrate but he (Magistrate) yet has to examine whether alleged statement, if read, as it is, do satisfy the requirement of "defamation" as defined in Section 499 IPC. It cannot be ignored that different persons react to the same situation differently, had different assessments and judgment of a situation and facts are based on human nature, mindset, approach, intelligentsia and ability of appreciation. Reaction of a reasonable person or right thinking member of society to the words spoken is a relevant consideration to find, whether statement in question amounts to defamation. Section 499 IPC clearly provides that statement of imputation must be with the intent of causing harm or having reason to belief that such imputation will harm reputation of the person about whom it is made. Meaning thereby, the identity of person in respect of whom the statement is made must be clear from the statement itself and not from the inference drawn by the person who claims that in his presence or before him an statement was made.

36. Further, if an inference is drawn by the person claiming that before him the statement was made then first of all it is the person who has drawn inference has to verify that a statement justifying such inference was made and unless such fact is not brought before Court concerned, any other statement of a person would amount to a hearsay and cannot be said to have proved that an offence under Section 499 IPC punishable under Section 500 IPC has been committed. Thus prima facie I am of the view that alleged statements of Mr. Goenka which are reported in aforesaid news item do constitute an offence of defamation under Section 499 IPC and punishable under Section 500 IPC is made out.

37. Then the next aspect on which non-application of mind by Magistrate is clear, is that, the news item very clearly and categorically refers to Mr. Goenka who made alleged statement constituting defamation but in the complaint several persons, i.e., Applicants-1 and 3 to 12 in Application No. 960 of 1997 have been implicated. Alleged statement nowhere shows that they either authorised Mr. Suneel Goenka to make such statement or that he was talking on behalf and under authority of all these persons to make such statement. News item itself refers to the statement of Mr. Sanjeev Goenka only and not anyone else. Therefore, implication of persons other than Sri Goenka in the complaint by complainant-Respondent-2 is ex facie illegal and amounts to gross abuse of process of law. Magistrate having failed to apply its mind on this aspect has committed gross illegality and summoning orders issued to other persons, i.e., Applicants-1 and 3 to 12 in Application No. 960 of 1997 is clearly illegal and cannot be sustained.

38. The next submission is that witnesses examined by Court below were all strangers and their statements are nothing but hearsay, inadmissible in evidence at all, and there was no legal evidence whatsoever since reporter of newspaper before whom the statement allegedly made, was not examined and newspaper by itself is not admissible in evidence, therefore, entire proceedings are illegal and bad in view of law laid down in **R.P. Kapur (supra)** which says that if

a process has been initiated on the basis of material which do not constitute "legal evidence", then such a process would amount to abuse of process of law and must be quashed.

39. Learned counsel appearing for complainant could not dispute that three persons examined by Court below, i.e., Sri S. Kanan, under Section 200 Cr.P.C. and Sri Aditya Kumar Jain, Advocate and Sri Gulshan Kumar, under Section 202 Cr.P.C. were not the persons before whom alleged statements were made by Sri Sanjeev Goenka. They have founded the entire case on the basis of newspaper article which they have read, quoted in complaint and placed in evidence.

40. Newspaper reporting, whether correct or not, has not been fortified. A newspaper reporting by itself is a hearsay secondary evidence and not admissible unless the Reporter is examined or any person before whom the incident has occurred, is examined and prove the facts as such.

41. Question as to whether newspaper report is admissible in evidence and if so in what circumstances, has been considered time and again. In **Samant N. Balkrishna and another vs. George Fernandez and others, 1969(3) SCC 238** this aspect has been considered by Supreme Court. Therein the dispute had arisen from an election petition wherein Sri George Fernandez was declared elected from Bombay South Parliamentary Constituency of Lok Sabha in the elections held in February, 1967 which was challenged by Samant N. Balkrishna, an elector in the Constituency on various grounds including allegations of corrupt practice. Election petition was dismissed by High Court and that is how the matter reached Supreme Court. Therein certain allegations of false publication of a news item in 'Maratha' was pleaded in election petition so as to constitute corrupt practice on the part of returned candidate through its agent but a direct allegation of corrupt practice against returned candidate was sought to be added which was not approved by Supreme Court. In para 47 of the judgment, in the context of news item published in newspaper 'Maratha', Court observed as under:

"A news item without any further proof of what had actually happened through witnesses is of no value. It is at best a secondhand secondary evidence. It is well-known that reporters collect information and pass if on to the editor who edits the news item and then publishes it. In this process the truth might get perverted or garbled. Such news items cannot be said to prove themselves although they may be taken into account with other evidence if the other evidence is forcible."

(emphasis added)

42. Court also observed that trial of an election petition is made in accordance with Code of Civil Procedure but a corrupt practice must be proved in the same way as a criminal charge is proved. An election petitioner must exclude every hypothesis except that of guilt on the part of returned candidate or his election agent. When a corrupt practice is alleged against a returned candidate through his agent, consent of returned candidate has to be proved or election petitioner must go further and prove that the result of election in so far as returned candidate is

concerned, was materially affected. In para 48 of judgment, Court said that a newspaper reporting a meeting, does so as part of its own activity, and there can be no inference of consent. What was necessary, had to be pleaded and proved, that Mr. Fernandez said this and this. Newspaper reports could be taken in support but not independently. Here the plea was not taken at all and evidence was not direct but indirect.

43. In **Laxmi Raj Shetty and another v. State of Tamil Nadu, 1988(3) SCC 319** Court had an occasion to consider the matter arisen from a trial for conviction under Section 302 IPC wherein punishment of life imprisonment was awarded to convict. In an incident of robbery and murder of Manager of a Bank appellant, Laxmi Raj Shetty was convicted under Section 302 IPC with death sentence by Trial Court and under Sections 392 and 449 IPC imprisonment for seven years each. High Court confirmed death sentence and other sentence under Section 302, 392, 449 IPC and matter went in appeal to Supreme Court. There was no direct evidence in the matter and conviction and sentence founded on circumstantial evidence. Reliance on newspaper reports was placed by convict which was objected by State contending that unauthenticated news items in press cannot be treated to be a credible evidence for either convicting or acquitting a person in a Court of Law. Accepting argument of State, Court said that in cases where evidence is purely of circumstantial nature, facts and circumstances from which conclusion of guilt is sought to be drawn must be fully established beyond any reasonable doubt and circumstances so established should not only be consistent with the guilt of accused but they must in their effect be such as to be entirely incompatible with innocence of accused and must exclude a reasonable hypothesis with his innocence. Rejecting argument advanced on behalf of convict relying on newspaper reports, in para 25 of judgment, Court said:

*"We cannot take judicial notice of the **facts stated in a news item being in the nature of hearsay secondary evidence, unless proved by evidence aliunde. A report in a newspapers is only hearsay evidence.** A newspaper is not one of the documents referred to in Section 78(2) of the Evidence Act, 1872 by which an allegation of fact can be proved. The presumption of genuineness attached under Section 81 of the Evidence Act to a newspapers report cannot be treated as proved of the facts reported therein."*

(emphasis added)

44. Further in para 26 of judgment, Court said:

*"26. It is now **well-settled that a statement of fact contained in a newspapers is merely hearsay and therefore inadmissible in evidence in the absence of the maker of the statement appearing in Court and deposing to have perceived the fact reported.** The accused should have therefore produced the persons in whose presence the seizure of the stolen **money from appellant No. 2's house at Mangalore was effected or examined the press correspondents in proof of the truth of the contents of the news item.** The question as to the admissibility of newspaper reports has been dealt with by this Court in Samant N. Balakrishna v. George Fernandez & Ors [1969] 3 SCR 603. There the question arose whether Shri George Fernandez,*

the successful candidate returned to Parliament from the Bombay South Parliamentary Constituency had delivered a speech at Shivaji Park attributed to him as reported in the Maratha, a widely circulated Marathi newspaper in Bombay, and it was said:

*"**A newspaper report without any further proof of what had actually happened through witnesses is of no value. It is at best a second-hand secondary evidence.** It is well known that reporters collect information and pass it on to the editor who edits the news item and then publishes it. In this process the truth might get perverted or garbled. Such news items cannot be said to prove themselves although they may be taken into account with other evidence if the other evidence is forcible."*

We need not burden the judgment with many citations. There is nothing on record to substantiate the facts as reported in the newspapers showing recovery of the stolen amount from the residence of appellant No. 2 at Mangalore. We have therefore no reason to discard the testimony of PW 50 and the seizure witnesses which go to establish that the amount in question was actually recovered at Madras on the 29th and the 30th as alleged."

(emphasis added)

45. Next in the line is **Quamarul Islam v. S.K. Kanta and others, 1994 Supp.(3) SCC 5** . It is again a dispute arising from an election petition under R.P. Act, 1951. Election of Quamarul Islam from 10 Gulbarga Assembly Constituency held in September, 1992 was challenged on the ground of corrupt practices. Reliance was placed on speeches allegedly made by returned candidate published in certain news papers. In para 48 of judgment Court said:

*"48. **Newspaper reports by themselves are not evidence of the contents thereof. Those reports are only hearsay evidence. These have to be proved and the manner of proving a newspaper report is well settled.** Since, in this case, **neither the reporter who heard the speech and sent the report was examined nor even his reports produced, the production of the newspaper by the Editor and publisher, PW 4 by itself cannot amount to proving the contents of the newspaper reports. Newspaper, is at the best secondary evidence of its contents and is not admissible in evidence without proper proof of the contents under the Indian Evidence Act. The learned trial judge could not treat the newspaper reports as duly 'proved' only by the production of the copies of the newspaper.** The election petitioner also examined Abrar Razi, PW 5, who was the polling agent of the election petitioner and resident of the locality in support of the correctness of the reports including advertisements and messages as published in the said newspaper. We have carefully perused his testimony and find that his evidence also falls short of proving the contents of the reports of the alleged speeches or the messages and the advertisements, which appeared in different issues of the newspaper. Since, **the maker of the report which formed basis of the publications, did not appear in the Court to depose about the facts as perceived by him, the facts contained in the published reports were clearly inadmissible. No evidence was led by the election petitioner to prove the contents of the messages and the advertisements as the original manuscript** of the*

advertisements or the messages was not produced at the trial. No ***witness came forward to prove the receipt of the manuscript of any of the advertisements or the messages or the publication of the came in accordance with the manuscript.*** *There is no satisfactory and reliable evidence on the record to even establish that the same were actually issued by IUML or MYL, ignoring for the time being, whether or not the appellant had any connection with IUML or MYL or that the same were published by him or with his consent by any other person or published by his election agent or by any other person with the consent of his election agent. The evidence of the election petitioner himself or of PW 4 and PW 5 to prove the contents of the messages and advertisements in the newspaper in our opinion was wrongly adm*itted and relied upon as evidence of the contents of the statement contained therein."

(emphasis added)

46. The above authorities clearly show that a newspaper report by itself does not constitute an evidence of the contents thereof. Those reports are only hearsay evidence. These have to be proved either by production of Reporter who heard the statement and sent the same for reporting or by production of report sent by such Reporter and production of Newspaper's Editor or Publisher to prove such report. As held by Supreme Court in the above authorities a newspaper is at the best secondary evidence and not admissible in evidence without proper proof of contents under Indian Evidence Act, 1872. Trial Court cannot treat newspaper report as duly proved only by production of copies of newspaper. Thus the newspaper report was not a "legal evidence" which could have been examined to support the complaint.

47. In **R.P. Kapur (supra)** Supreme Court has held that inherent jurisdiction can be exercised to quash proceedings in a proper case either to prevent abuse of process in Court or otherwise to secure ends of justice. Ordinarily criminal proceedings instituted against an accused person must be tried in accordance with procedure prescribed in Cr.P.C. and this Court should be reluctant to interfere with the said proceedings at an interlocutory stage but an order of summoning is not an interlocutory order since it compels the accused persons to come to the Court and face trial and his valuable rights of freedom to some extent are affected, hence in such cases if it can be shown that there is a legal bar against institution or continuation of proceedings, Court would interfere. For example, absence of requisite sanction could be one of such matters where Court would be justified for quashing the proceedings exercising power under Section 482 Cr.P.C. Next category is where allegations contained in FIR or complaint, if taken at their face value, and accepted in entirety to be correct, still do not constitute the offence alleged. While forming its opinion Court will not examine or appreciate any evidence and it will only look to the complaint or FIR to decide whether offence alleged is disclosed or not. If no offence is made out, Court would be justified to interfere. Then the third category is where allegations made against accused persons may constitute offence alleged but there is either no "legal evidence" adduced in support of case or evidence adduced, clearly and

manifestly, fails to prove the charge. In such case also interference under Section 482 Cr.P.C. would be justified. I may quote the relevant extract from the judgment in **R.P. Kapur (supra)** on this aspect as under:

"A third category of cases in which the inherent jurisdiction of the High Court can be successfully invoked may also arise. In cases falling under this category the allegations made against the accused person do constitute an offence alleged ***but there is either no legal evidence adduced in support of the case*** *or evidence adduced clearly or manifestly fails to prove the charge. In dealing with this class of cases* ***it is important to bear in mind the distinction between a case where there is no legal evidence or where there is evidence which is manifestly and clearly inconsistent with the accusation made and cases where there is legal evidence which on its appreciation may or may not support the accusation in question."*** *(emphasis added)*

48. In the present case, evidence under Sections 200 and 202 Cr.P.C. recorded by Court below does not prove the allegation that statements alleged to have been made by accused-applicants were made and newspaper report itself with regard to its contents was inadmissible hence there is no legal evidence.

49. Hence, here is a case where accused persons have been summoned without any "legal evidence" available before Trial Court to support the charge it comes within the category of gross abuse of process. This Court is aware that in considering whether evidence adduced is a "legal evidence" or not, it will not go to examine reliability of evidence but it is only admissibility of evidence and the factum, whether such evidence if admissible supports the charge or not which has to be seen by this Court and that is what I have considered in this matter and find that there was/ is no "legal evidence" whatsoever, hence proceedings initiated by Magistrate in the cases in hand are patently illegal and amounts to abuse of process of Court. Therefore, to secure ends of justice interference of this Court under Section 482 Cr.P.C. is justified and called for.

50. In view thereof, both the applications are allowed. Proceedings in Complaint No. 447 of 1996 filed by Respondent-2 in the Court of 9th Additional Chief Judicial Magistrate, Ghaziabad including Criminal Case No. 2234 of 1996 as also bailable warrant dated 11.09.1996, are hereby quashed.

(2019)12 ILR A74

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.04.2019

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Crl. Misc. Application (U/S 482 Cr. P.C.) No. 1312 of 1992

M/S Upper Doad Sugar Mill & Ors. ...Applicants

Versus

State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri G.S. Chaturvedi, Sri G.S. Hajela, Sri Diptiman Singh, Sri P.N. Ojha

Counsel for the Opposite Parties:

Sri H.N. Tripathi, A.G.A.

A. Criminal Law - Water (Prevention and Control of Pollution) Act, 1974 - Section 44 & 47 - Code of Criminal Procedure - Section 482 - "offences by companies"- Offence must have been committed by company. Without making that company an accused person, no offence could have been committed- Sub-section (2) of Section 47 by the directors. Every director of company would not be vicariously liable – A director of a Company, who was not in-charge of and not responsible for conduct of business of company at the relevant time, will not be liable for a criminal offence under the provisions. The complainant has simply reiterated language of Section 47(1)- Applicants 6, 8 and 11 are only directors and there is nothing to show that they were responsible for day to day functioning or otherwise act of Company concerned-Proceedings against them quashed.

Application u/s 482 Cr.P.C partly allowed. (E-3)

List of cases cited: -

1. Delhi Municipality vs. Ram Kishan AIR 1983 SC 67

2. Megh Shyam Sharma & Ors. vs. St. of U.P. & Ors. 1985 AWC 923

3. National Small Industries Corp. Ltd. vs. Harmeet Singh Paintal and Anr., 2010 (3) SCC 330

4. S.M.S. Pharmaceuticals Ltd. vs. Neeta Bhalla and Anr. (2005) 8 SCC 89

5. Sabitha Ramamurthy and Anr. vs. R.B.S. Channabasavaradhya (2006) 10 SCC 581

6. N.K. Wahi vs. Shekhar Singh & Ors. (2007) 9 SCC 481

7. Ramrajsingh vs. St. of M.P. and Anr. (2009) 6 SCC 729

8. A.R.Radha Krishna vs. Dasari Deepthi & Ors. AIR 2019 SC 2518

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

1. Heard Sri Gopal Swaroop Chatrvedi, Senior Advocate, assisted by Sri Diptiman Singh, learned counsel for applicants, Sri H.N.Tripathi, learned counsel for opposite party no.2, Sri Syed Ali Murtza, learned A.G.A. for State of U.P. and perused the record.

2. In para 4 of IInd Supplementary Affidavit dated 08.4.2019 filed by applicant, it is pointed out that applicants 3, 4, 5, 7, 9, 10, 12, 13 and 14 have already died therefore, proceedings against them have already abated. Hence, this application stands abated so far as these applicants are concerned.

3. It is now alive only in respect of applicants no.1, 2, 6, 8 and 11.

4. Applicants have invoked jurisdiction of this Court under Section 482 of Code of Criminal Procedure, 1973 *(hereinafter referred to as "Cr.P.C.")* with the prayer to quash proceedings in Case No. 74 of 1988 (U.P. Pollution Control Board, Lucknow vs. M/s Upper Doab Sugar Mills Shamli and others), under Section 44 of Water (Prevention and Control of Pollution) Act, 1974 *(hereinafter referred to as "Act, 1974")* pending in the Court of Special Judicial Magistrate (Pollution), Lucknow.

5. A complaint was filed by U.P. Pollution Control Board *(hereinafter referred to as "UPPCB")* before Special Court (Water and Air Pollution) of Judicial Magistrate Ist Class, Lucknow registered as Case No.74 of 1988

impleading two companies namely M/s Upper Doab Sugar Mills Shamli and M/s Sir Shadi Lal Enterprises, as opposite parties 1 and 2 and Managing Directors and Directors thereof alleging that aforesaid Companies are discharging their polluted trade effluent without obtaining consent under Sections 25/26 of Act, 1974, therefore, have committed offences punishable under Sections 44 read with 47 of Act, 1974.

6. The application mainly contains allegations against Companies but in respect of Directors etc., averments have been made in paras 16, 18, 20, 21, 22 and 23 thereof. Magistrate took cognizance whereupon this application has been filed for quashing the said proceedings.

7. Before this Court, learned Senior Counsel has confined his case in respect of applicants 1, 2, 6, 8 and 11 since this application has already abated in respect of other applicants. However, during course of argument, learned Senior Counsel could not dispute that allegations contained in application, if taken to be true, proceedings initiated against applicants 1 and 2 may not be challenged at this stage since it is difficult to hold that proceedings initiated by UPPCB against applicants 1 and 2 are *prima facie illegal*, if allegations contained in complaint on the face are taken to be true. He, therefore, confined his submissions so far as applicant 6 Hemantpat Singhania, applicant 8 P.N.Mathur and applicant 11 Pradeep Narang are concerned.

8. He submitted that these Directors are not at all in-charge and responsible for functioning of Company and as per information communicated to UPPCB itself, Sri S.P.Dubey, Personal and Factory Manager of Sugar Mill is responsible for conduct of business of Sugar Mill. Directors are residing at different places and did not even visit Company regularly hence they cannot be responsible for day to day business.

9. By way of IInd Supplementary Affidavit dated 08.4.2019, it has been brought on record that applicant 6 Hemantpat Singhania is about 90 years of age and bedridden. Similarly, applicant 8 Onke Agarwal is aged about 88 years of age and depends on wheel-chair for movement. Applicant 11 Pradeep Narang has left the Company long back and his whereabouts are not known.

10. It is also stated that Companies were subsequently granted consent under Act 1974 as well as Air (Prevention and Control of Pollution) Act, 1981 *(hereinafter referred to as "Act, 1981")* and last consent given by UPPCB is on 11.01.2019, which is effective till 31.12.2019.

11. Sri Tripathi, learned counsel for respondent -UPPCB, however, submitted that affluent was being discharged without any consent of Board and all the Directors, as specifically stated in application, were responsible for business of Company, therefore, it cannot be said that action taken by Magistrate against applicants is bad in law and present application deserves to be dismissed.

12. Section 47 of Act, 1974 deals with "offences by companies" and the same reads as under :

"Offences by companies.- (1) Where an offence under this Act has been committed by a company, *every person who at the time the offence was*

committed was in charge of, and was responsible to the company for the conduct of, the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation.--For the purposes of this section,--

(a) "company" means any body corporate, and includes a firm or other association of individuals; and

(b) "director" in relation to a firm means a partner in the firm."

13. Section 47 of Act, 1974 provides that where an offence under Act, 1974 has been committed by a Company then every person, who at the time of commission of offence was in charge of, and responsible to the Company for conduct of business as well as the company shall be deemed to be guilty of offence. Meaning thereby, the first condition is that offence must have been committed by Company and where an offence is committed by Company, category of persons, who are stated therein i.e. in charge of and was responsible to the Company for conduct of, the business of Company shall be deemed to be guilty of offence, but, it shall include Company also. Therefore, offence must have been committed by Company and without Company, no offence could have been committed. Rest of the persons of the category mentioned in sub-section (2) of Section 47 are those who are vicariously responsible.

14. Sub-section (2) of Section 47 shows that every Director of company would not be vicariously liable and it is confined only to such Director, who has given consent or connivance of, and, due to any act of negligence attributable to him offence has been committed.

15. Use of word "such" in sub-section (2) of Section 47 of Act, 1974 shows that an exception has been carved out and every Director has not been made responsible. It is clarified that under sub-section (1), every person who at the time of offence was committed, was in-charge of, and was responsible to the company for the conduct of the business of company as well as company itself shall be deemed to be guilty of offence. Therefore, deeming clause is applicable in respect of such person, who was in charge of conduct of business of company and responsible for the same purpose. Sub-section (2) starts with non-obstante clause. It is an exception to sub-section (1) and says that only such Director would be responsible with whose consent or connivance or on account of whose negligence, offence has been committed.

16. A similar provision existing in Prevention of Food Adulteration Act, 1954 *(hereinafter referred to as "Act, 1954")* i.e. Section 17 came up for consideration before Supreme Court in **Delhi Municipality vs. Ram Kishan AIR 1983 SC 67**. Court held that there should be some material to show that Director(s), who were not otherwise in-charge or responsible for conduct of business, are responsible due to their consent or connivance or negligence and it will not be suffice to mention language of Section 47 of Act, 1974 to implicate all the Directors of Company. There has to be some facts and details to show their consent, connivance and negligence. In para 15 of judgment, Court held that so far as Manager is concerned, by very nature of his duties, he would be responsible but so far as Directors are concerned, there was not even a whisper or shred of evidence apart from presumption drawn by complainant, which is not sufficient to hold a Director vicariously liable.

17. A similar issue was considered by this Court also in **Megh Shyam Sharma and others vs. State of U.P. and others 1985 AWC 923** and in para 13, this Court has said as under :

"So far as applicants 3 to 5 are concerned, namely, Sri M.K. Tikmani, R.K. Paliwal and M.M. Rajgarhia are concerned, there are no averment of facts against these Directors that they were really incharge and responsible for the conduct of the business or the offence has been committed by their connivance, neglect etc. Of course, ***a presumptive statement is contained in certain paragraphs of the complaint, but on the authority of Delhi Municipality (supra) that would not lead to any inference regarding the ingredients of Section 47 of the Act and it can, therefore, be safely held that the complaint does not disclose a prima facie case*** *against applicants 3 to 5 aforesaid."*

(emphasis added)

18. Similar provision namely Section 141 of Negotiable Instruments Act, 1881 *(hereinafter referred to as "Act, 1881")* has been considered in **National Small Industries Corp. Ltd. vs. Harmeet Singh Paintal and Anr., 2010 (3) SCC 330**. Court has said that every person connected with company shall not fall within the ambit of the provision. Only those persons who were in-charge of and responsible for the conduct of the business of the company at the time of commission of offence will be liable for criminal action.

19. It follows from the fact that if a Director of a Company, who was not in-charge of and not responsible for conduct of business of Company at the relevant time, will not be liable for a criminal offence under the provisions. The liability arises from being in-charge of and responsible for conduct of business of Company at the relevant time when offence was committed and not on the basis of merely holding a designation or office in a company.

20. Court in **National Small Industries Corporation Ltd. (supra)** said that Section 141 of Act, 1881 is a penal provision creating vicarious liability, hence must be strictly construed. It is therefore, not sufficient to make a bald cursory statement in a complaint that Director (arrayed as an accused) is in charge of and responsible to Company for

the conduct of the business of Company without anything more as to the role of Director. Court said that complaint should spell out as to how and in what manner such Director was in-charge of or was responsible to the accused company for conduct of its business. It further held :

"A company may have a number of Directors and to make any or all the Directors as accused in a complaint merely on the basis of a statement that they are in-charge of and responsible for the conduct of the business of the company without anything more is not a sufficient or adequate fulfillment of the requirements under Section 141. "

(emphasis added)

21. A three judge bench of Supreme Court in S.M.S. **Pharmaceuticals Ltd. vs. Neeta Bhalla and Anr. (2005) 8 SCC 89** considered the following three questions, referred to it :

"(a) whether for purposes of Section 141 of the Negotiable Instruments Act, 1881, it is sufficient if the substance of the allegation read as a whole fulfill the requirements of the said section and it is not necessary to specifically state in the complaint that the persons accused was in charge of, or responsible for, the conduct of the business of the company.

(b) whether a director of a company would be deemed to be in charge of, and responsible to, the company for conduct of the business of the company and, therefore, deemed to be guilty of the offence unless he proves to the contrary.

(c) even if it is held that specific averments are necessary, whether in the absence of such averments the signatory of the cheque and or the Managing Directors of Joint Managing Director who admittedly would be in charge of the company and responsible to the company for conduct of its business could be proceeded against."

22. Considering the above questions, Court said that there is almost unanimous judicial opinion that necessary averments ought to be contained in a complaint before a person can be subjected to criminal process. Questions referred to the Court were answered as under :

"(a) It is necessary to specifically aver in a complaint under Section 141 that at the time the offence was committed, the person accused was in charge of, and responsible for the conduct of business of the company. This averment is an essential requirement of Section 141 and has to be made in a complaint. Without this averment being made in a complaint, the requirements of Section 141 cannot be said to be satisfied.

(b) The answer to question posed in sub-para (b) has to be in negative. Merely being a director of a company is not sufficient to make the person liable under Section 141 of the Act. A director in a company cannot be deemed to be in charge of and responsible to the company for conduct of its business. The requirement of Section 141 is that the person sought to be made liable should be in charge of and responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a director in such cases.

(c) The answer to Question (c) has to be in affirmative. The question notes that the Managing Director or Joint Managing Director would be admittedly

in charge of the company and responsible to the company for conduct of its business. When that is so, holders of such positions in a company become liable under Section 141 of the Act. By virtue of the office they hold as Managing Director or Joint Managing Director, these persons are in charge of and responsible for the conduct of business of the company. Therefore, they get covered under Section 141. So far as signatory of a cheque which is dishonoured is concerned, he is clearly responsible for the incriminating act and will be covered under Sub-section (2) of Section 141."

23. In **Sabitha Ramamurthy and Anr. vs. R.B.S. Channabasavaradhya (2006) 10 SCC 581** Court said :

"It may be true that it is not necessary for the complainant to specifically reproduce the wordings of the section but what is required is a clear statement of fact so as to enable the court to arrive at a prima facie opinion that the accused are vicariously liable."

24. **In N.K. Wahi vs. Shekhar Singh and Ors. (2007) 9 SCC 481,** Court said :

"7. In order to bring application of Section 138 the complaint must show:

1. That Cheque was issued;

2. The same was presented;

3. It was dishonored on presentation;

4. A notice in terms of the provisions was served on the person sought to be made liable;

5. Despite service of notice, neither any payment was made nor other obligations, if any, were complied with within fifteen days from the date of receipt of the notice.

Section 141 of the Act in terms postulates constructive liability of the Directors of the company or other persons responsible for its conduct or the business of the company.

8. The only averment made so far as the respondents are concerned, reads as under:

Preliminary evidence had been recorded and at that time also no specific evidence on assertion was forthcoming. Shri Wahi who appeared at that time only stated that accused 2 to 12 are directors and responsible officers of the company. They are liable for the acts of the company. In other words, there was no averment or evidence that the present petitioners were incharge of or responsible to the company for the conduct of the business of the company as well as the company.

The accused Nos. 2 to 12 are the Directors/persons responsible for carrying out the business of the company and the liability of the accused persons in the present complaint is joint and several."

25. The above view has been reiterated and approved by a three judges bench in **Ramrajsingh vs. State of M.P. and Anr. (2009) 6 SCC 729.**

26. In **A.R.Radha Krishna vs. Dasari Deepthi and others AIR 2019 SC 2518** Court said that law requires that complaint must contain specific averment that Director was in-charge of, and responsible for conduct of Company's

business at the time when offence was committed. Court further said :

"The High Court, in deciding a quashing petition Under Section 482, Code of Criminal Procedure, must consider whether the averment made in the complaint is sufficient or if some unimpeachable evidence has been brought on record which leads to the conclusion that the Director could never have been in charge of and responsible for the conduct of the business of the company at the relevant time. ***While the role of a Director in a company is ultimately a question of fact, and no fixed formula can be fixed for the same, the High Court must exercise its power Under Section 482, Code of Criminal Procedure when it is convinced, from the material on record, that allowing the proceedings to continue would be an abuse of process of the Court."***

(emphasis added)

27. In the light of exposition of law discussed above and the facts of this case, I find that the complainant has simply reiterated language of Section 47(1) but has not shown as to how Directors residing elsewhere are in-charge of company or responsible for conduct of business on day to day basis and nothing has been said that anything has been done with their consent or there is any connivance on their part or negligence. In a mechanical manner, complainant has implicated all the Directors of Company and if proceedings against applicants 6, 8 and 11 are allowed to continue, in my view, it would be abuse of process of Court.

28. Looking to entirety of facts and circumstances and also the fact that this matter is pending for last 27 years before this Court, and applicants 6, 8 and 11 are only Directors and there is nothing to show that they were responsible for day to day functioning or otherwise act of Company concerned, I find it in the interest of justice to quash proceedings against them but do not find any reason to interfere so far as proceedings initiated against applicants 1 and 2 are concerned.

29. Application is accordingly **partly allowed.** Further proceedings of Case No. 74 of 1988 (U.P. Pollution Control Board, Lucknow vs. M/s Upper Doab Sugar Mills Shamli and others), under Section 44 of Act, 1974, pending in the Court of Special Judicial Magistrate (Pollution), Lucknow, so far as it relates to applicants 6, 8 and 11 is hereby quashed, but, the same would continue against applicants 1 and 2.

(2019)12 ILR A81

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.07.2019

BEFORE
THE HON'BLE RAJIV JOSHI, J.

Crl. Misc. Application (U/S 482 Cr. P.C.) No. 3160 of 2018

Sunpat & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Praveen Kumar Singh, Sri Anurag Bajpai

Counsel for the Opposite Parties:
A.G.A., Sri Moeez Uddin

A. Criminal Law - Indian Penal Code, 1860 - Section 406/420 - Code of

Criminal Procedure - Section 482 - Registered agreement to sell- Earnest money paid in anticipation of sale deed- Sale deed not executed by the O.P.NO.2 –Another agreement executed for extending the time for execution of sale deed in favour of the first informant- Difference between "cheating" and "breach of contract"- Intention to cheat from the very inception missing-Case is squarely covered by illustration (i) in the case of Bhajan Lal-Non-execution of a sale deed or non-refund of earnest would not amount to criminal breach of trust- Appropriate remedy available to the first informant/opposite party no.2 is to approach civil court by way of filing a suit for specific performance of contract on the basis of agreement to sell as the dispute between the parties is purely civil in nature.

a. To constitute cheating, fraud / deception has to be practiced by an accused at the time of entering into a transaction to induce the person so deceived to deliver any property to any person. Once a transaction takes place between the parties, subsequent dispute may amount to breach of contract, but no offence under Section 420 IPC is made out.

b. The property in respect of which, criminal breach of trust committed must be either the property of some person other than the accused or the beneficial interest in or ownership of which must be of some other person and the accused must hold such property on trust for such other person or for his benefit which is missing in the present case.

(Para 10,11,14,15,18 & 19)

List of cases cited: -

1. State of Haryana and others Vs. Bhajan Lal and others, 1992 Supp (1) Supreme Court Cases 335

(Delivered by Hon'ble Rajiv Joshi, J.)

1. Heard Sri Anurag Bajpai holding brief of Sri Praveen Kumar Singh, learned counsel for the applicants and Sri Moeez Uddin, learned counsel for the opposite party no.2.

2. Present application under Section 482 Cr.P.C. has been filed for quashing the charge sheet dated 12.12.2017 as well as the entire proceedings of Case No. 339 of 2018 (State Vs. Sunpat and others) arising out of Case Crime No. 610 of 2017, under Sections 406, 420 IPC, P.S. Dankaur, District Gautam Budh Nagar, pending in the court of Additional Chief Judicial Magistrate, Court No. 2, Gautam Budh Nagar.

3. As per the prosecution case in the F.I.R., an agreement to sell was executed on 21.3.2015 by the father of the applicants in favour of first informant/opposite party no.2 in respect of property bearing Khata no. 128, Gata no. 142 Kha, measuring 0.0890 hectare situated as Village Mutaina, Pargana Dankaur, Tehsil Sadar, District Gautam Budh Nagar for a sale consideration of Rs. 7,00,000/-, out of which, a sum of Rs. 4,00,000/- was paid as earnest money and rest of the amount was agreed to be paid at the time of execution of sale deed. In the agreement, it is mentioned that the sale deed could be executed on or before 20.4.2015. After the execution of the said agreement to sell, father of the applicants, Jasram, died on 23.3.2015. Subsequently, second agreement to sell was executed between the applicants and the first informant, whereby the time for executing the sale deed was extended by 20.5.2015.

4. It is further stated in the first information report that the first informant remained present for the whole day on 20.5.2015 in the office of Sub Registrat pursuant to the subsequent agreement, but the applicants did not turn up and

therefore, they have cheated the applicants and committed criminal breach of trust by not executing the sale deed in his favour.

5. The police after investigation, submitted the charge sheet no. 496/2017 on 12.12.2017 under Sections 406 and 420 IPC on which cognizance was taken by the Additional Chief Judicial Magistrate, Court No. 2, Gautam Budh Nagar on 15.11.2018 and all the applicants were summoned for trial for an offence under Sections 406 and 420 IPC, which is impugned herein.

6. Learned counsel for the applicants submits that dispute between the parties is purely civil in nature arising out of registered agreement to sell executed by the father of the applicants and admittedly, the first informant/opposite party no.2 had paid Rs. 4,00,000/- and the balance amount was agreed to be paid at the time of execution of the sale deed and therefore, remedy lies with the first informant/opposite party no. 2 to file a suit for specific performance of contract before the civil court and therefore, no offence under Section 406/420 IPC for cheating and criminal breach of trust has been made out and the applicants have falsely been implicated deliberately in the present case with ulterior motive, and the prosecution being an abuse of process of the Court, is liable to be quashed.

7. On the other hand, learned counsel for the opposite party no.2 submits that in spite of the fact that first informant/opposite party no.2 had appeared before the Sub Registrar pursuant to the agreement between the parties and remained present for the whole day, but the applicants did not turn up for executing the sale deed and therefore, they have cheated the first informant/opposite party no.2 and thus, have committed criminal breach of trust.

8. Learned AGA have also opposed the submissions so raised by learned counsel for the applicants.

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

10. The Apex Court in the case of State of ***Haryana and others Vs. Bhajan Lal and others, 1992 Supp (1) Supreme Court Cases 335,*** after considering the previous decisions of the Apex Court and the provisions of the Code, categories, power to be exercised while quashing the criminal prosecution under Section 482 Cr.P.C. Paragraph 102 of the said judgment mentioning the categories under which such extraordinary power can be exercised, is quoted hereunder:

"102.In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

11. Admittedly, there is no dispute with regard to the execution of registered agreement to sell between the parties and the sale deed has not been executed till date by the applicants in favour of the first informant, hence, the appropriate remedy in the facts and circumstances of the case, is available to the first informant/opposite party no.2 to approach civil court by way of filing a suit for specific performance of contract on the basis of agreement to sell as the dispute between the parties is purely civil in nature.

12. The offence under which the applicants have been summoned for trial are Section 406/420 IPC i.e. cheating and criminal breach of trust. The cheating has been defined under Section 415 of IPC, in the following terms:

"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"."

13. From the definition of cheating, as per Section 415 IPC, following are the essential ingredients:

"1. Deception of any person;

(2)(a)fraudulently or dishonestly inducing that person;

(I) to deliver any property to any person;

(ii) to consent that any person shall retain any property; or

(iii) or intentionally induce 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 but that person, body, mind, reputation of property, is said to cheat."

14. To constitute cheating, fraud / deception has to be practiced by an accused at the time of entering into a transaction to induce the person so deceived to deliver any property to any person. Once a transaction takes place between the parties, subsequent dispute may amount to breach of contract, but no offence under Section 420 IPC is made out. This is a classical difference between "cheating" and "breach of contract".

15. The allegations made in the first information report are that initially agreement to sell was executed by the father of the applicants and subsequently, another agreement was executed extending the time for executing the sale deed, but no sale deed has been executed by the applicants in favour of first informant/opposite party no.2 within the extended time and therefore, they have committed cheating. It appears that the essential ingredients of cheating are lacking in the present case and once the said ingredients of cheating are lacking, dispute, if any, remains in the realm of breach of contract, actionable in civil law.

16. Section 405 defines criminal breach of trust as under:

"405. Criminal breach of trust.-- Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust".

17. The essential ingredients of Section 405 are as under:

"1. Entrusting any person with property or with any dominion over property;

2. That person entrusted

(a) dishonestly misappropriating or converting to his own use that property; or

(b) dishonestly using or disposing of that property or wilfully suffering any other person so to do in violation-

(i) of any direction of law prescribing the mode in which such trust is to be discharged, or

(ii) of any legal contract made touching the discharge of such trust of that person entrusted."

18. Admittedly, the applicants are the owner of the property in dispute and

their father executed the registered agreement to sell in favour of the first informant and subsequently, another agreement was executed by the applicants extending the time for execution of the sale deed. The informant/opposite party no.2 is neither entrusted nor conveyed any dominion of the property in question by the applicants so far, despite execution of the registered agreement to sell, therefore, the applicants continue to be the owner of the property in question with a compromise under the agreement to execute a sale deed in favour of the informant/opposite party no.2 by 20.5.2015. The earnest money was paid in anticipation of a sale deed. The property in respect of which, criminal breach of trust committed must be either the property of some person other than the accused or the beneficial interest in or ownership of which must be of some other person and the accused must hold such property on trust for such other person or for his benefit which is missing in the present case. Thus, non-execution of a sale deed or non-refund of earnest would not amount to criminal breach of trust.

19. On the allegations made in the F.I.R/charge-sheet, no offence whatsoever under Sections 420/406 is made out and the case is squarely covered by illustration (i) in the case of **Bhajan Lal (supra)** and the relevant ingredients for constituting the offence under Section 406/420 IPC are absent, as for that purpose, there must be an intention to cheat, which is missing in the present case.

20. The application stands allowed. The proceedings of Case No. 339 of 2018 (State Vs. Sunpat and others) arising out of Case Crime No. 610 of 2017, under Sections 406, 420 IPC, P.S. Dankaur, District Gautam Budh Nagar pending in the court of Additional Chief Judicial Magistrate, Court No. 2, Gautam Budh Nagar are quashed.

(2019)12 ILR A86

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 04.07.2019

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Crl. Misc. Application (U/S 482 Cr. P.C.) No. 4419 of 2004

Shiv Poojan & Ors. ...Applicants
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicants:
Sri Tripathi B.G. Bhai

Counsel for the Opposite Parties:
A.G.A.

A. Criminal Law - Code of Criminal Procedure, 1973 - Summoning order - Sections 200, 202 (2) & Section 482 - Witnesses of complaint- If Complainant wanted to examine only two witnesses in support of complaint or that the Magistrate was satisfied, it cannot be said that unless all persons named in complaint are examined as witnesses, no order of summoning could have been passed by Magistrate - Magistrate has to satisfy himself on the evidence adduced led by prosecution, whether prima facie case had been made out so as to put the proposed accused on a regular trial. The words "all his witnesses" contained in Sub sec (2), proviso to Section 202 Cr.P.C. cannot be read as "all witnesses"-Even though in the complaint several persons were named but only two persons were examined under Section 202 Cr. P. C. and thereafter process was issued-The procedure adopted by Court below cannot be said to be vitiated in law.

Criminal application u/s 482 Cr.P.C rejected. (E-3)

List of cases cited:-

1. Ranjit Singh Vs. St. of Pepsu (now Punjab), AIR 1959 SC 843

2. Rosy & Ors. vs. St. of Kerala & Ors, 2000 (2) SCC 230

3. Satyadeo Pandey & Ors. v. St. of U. P. & anr, 1987 (1) AWC 572

4. Chhotey Lal v. St. of U. P., 2006 CRI.L.J. 2265

5. Kallu Pal & Ors. v. St. of U. P. and Anr., 2008 CRI.L.J. 3229 (All)

6. Dudh Nath Mishra & Ors. v. St. of U. P. & anr, 2003 CRI.L.J.1087 (All)

7. Gopal Singh v. Dhanraji Devi & anr, 1994 CRI.L.J. 1652 (All)

8. Abdul Hamidkhan Pathan & Ors v. St. of Guj. & Ors, 1989 CRI.L.J. 468 (DB)

9. Shivjee Singh vs. Nagendra Tiwary & Ors, 2010 (7) SCC 578

10. Chandra Deo Singh vs Prokash Chandra Bose alias Chabi Bose & Anr, AIR 1963 SC 1430

11. Kewal Krishan Vs. Suraj Bhan & anr, AIR 1980 SC 1780

12. Mohinder Singh vs Gulwant Singh & Ors, 1992 (2) SCC 213

13. Vijay Dhanuka Etc vs Najima Mamtaj Etc, 2014 (14) SCC 638

14. Abhijit Pawar Vs. Hemant Maudhukar Nimbalkar & Anr, 2017 (3) SCC 528

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

1. Heard Sri Tripathi B. G. Bhai, learned counsel for applicants and learned A.G.A. for State-respondent.

2. This application under Section 482 of Code of Criminal Procedure, 1973 (hereinafter referred to as "Cr.P.C.") has been filed by six persons namely Shiv Poojan, Prem, Dayaram, Devanand, Smt. Audhraji and Smt. Usha Devi, all residents of Village-Katya, Police Station-Ghanghata, District-Sant Kabir Nagar, being aggrieved by summoning order dated 24.11.2000 passed by Chief Judicial Magistrate, Basti (hereinafter referred to as 'C.J.M.') in Criminal Case No.42/12/2000 (arising out of Case Crime No.323-A/1999), under Sections147, 323, 324, 504, 506 of India Penal Code (hereinafter referred to as 'I.P.C.') read with Section 3 (1) (x) of Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred to as "S.C./S.T. Act, 1989"). Applicants have prayed for quashing entire proceedings in aforesaid criminal case.

3. When police did not register report of respondent 3, Komal Harizan (hereinafter referred to as 'complainant'), he filed an application under Section 156 (3) Cr.P.C. alleging that applicants belong to higher caste and on 04.11.1999, applicants' buffalo entered the field of Complainant and damaged crop standing thereon. Complainant when sought to complain applicants and went to their house, they all misbehaved, abused and also beat him. They also used casteist remark and, therefore, committed offences under Section 147, 323, 324, 504, 506, 427 I.P.C. read with Section 3 (1) (x) of S.C./S.T. Act, 1989.

4. In support of complaint, medical examination reports of complainant and statement of one Mahadev were also placed before Magistrate. When comments were required to be submitted by police, it submitted report on

30.11.1999 stating that complaint is false and complainant is misusing provisions of law, since, he belongs to Scheduled Caste.

5. Magistrate, however, directed police to register case, which was registered as Case Crime No.324-A/1999 under Section 147, 323, 324, 504, 506,427 IPC read with Section 3 (1) (x) of S.C./S.T. Act, 1989 on 30.12.1999. Thereafter, investigation was made and Investigating Officer (hereinafter referred to as "I.O.") submitted final report on 01.01.2000. A protest petition dated 05.07.2000 was filed by complainant which was also supported by an affidavit. Magistrate examined the complainant under Section 200 Cr.P.C. on 19.08.2000 and on the same day, statement of witnesses Subhash and Ramjeet were also recorded under Section 202 Cr.P.C. All the three witnesses supported complaint case. On 25.08.2000 and 25.09.2000, C.J.M. passed order that the case is triable by Sessions Court, hence, complete evidence should be given. The orders read as under :

"25.8.2000 मुकदमा सत्र न्यायालय द्वारा परीक्षणीय है। अतः पूरा साक्ष्य दिया जाये। दि. 25.9.2000 में पूरे साक्ष्य पेश हो ।

25.9.2000 आज पेश हुआ । मुकदमा सत्र न्यायालय द्वारा परीक्षणीय है। अतः पूरा साक्ष्य दिया जाये। दि. 25.10.2000 में पूरे साक्ष्य पेश हो।

"25.8.2000 Case is triable by Sessions Court. Hence, complete evidence shall be given. All evidence shall be produced on 25.9.2000.

25.9.2000 Case is taken up. Case is triable by Sessions

Court. Hence, complete evidence shall be given.

All evidence shall be produced on 25.10.2000."

(English Translation by Court)

6. On 25.10.2000, none appeared. Thereafter on 24.11.2000 on the basis of earlier statements recorded by Magistrate on protest petition, applicants were summoned by Magistrate under Section 147, 323, 504, 506, 427 I.P.C. read with Section 3 (1) (x) of S.C./S.T. Act, 1989. Recall application dated 07.02.2001 was filed by applicants. Said recall application was rejected on 13.05.2004 and thereafter, this application has been filed.

7. After submission of final report by police before Magistrate, protest petition was filed by Complainant and thereafter Magistrate proceeded with the matter as a complaint case. After recording statements of complainant and witnesses under Sections 200 and 202 Cr.P.C. and examining record as well as medical report which was available before Magistrate, it has passed summoning order and, therefore, Magistrate has held that there was no reason to recall order dated 24.11.2000.

8. Learned counsel for applicants pointed out that though summoning order was passed on 24.11.2000, but at the end of order 04.01.2001 is mentioned, which shows that the order has been ante dated. However, I find no force in this submission. It appears that there is some error in mentioning of date under signature of Magistrate for the reason that on 25.10.2000 Magistrate fixed next date as 24.11.2000. Thereafter order was passed on 24.11.2000 for summoning applicants and 03.01.2001 was fixed as next date. Had this order been passed on 04.01.2001, there was no occasion for fixing 03.01.2001 as next date and therefore, there is only clerical and

typographical error in respect of mention of date and this is what has been said by Magistrate also in the order dated 13.05.2004 while rejecting recall application of applicants.

9. The next contention is that all witnesses must have been summoned. Here, I find that if Complainant wanted to examine only two witnesses in support of complaint or that the Magistrate was satisfied, it cannot be said that unless all persons named in complaint are examined as witnesses, no order of summoning could have been passed by Magistrate.

10. From perusal of complaint and statements of complainant and witnesses recorded under Section 200 and 202 Cr. P. C., it cannot be said that no prima facie case relating to offences in which applicants have been summoned, is made out.

11. Before considering arguments advanced by learned counsel for applicants it would be appropriate to examine scheme of Cr. P. C. when a Magistrate proceeds on complaint, particularly when it is a case exclusively triable by Court of Sessions.

12. Chapter XIV, Cr.P.C. deals with subject of power of taking cognizance of offence and conditions for the same. Section 190 Cr.P.C. specifies power of Magistrate to take cognizance of offence. Three sources are indicated therein which are of distinct nature. What is material in taking cognizance is the phrase "Upon receiving a complaint on facts which constitutes such offence". The purpose of taking cognizance of offence implicits an exercise to decide whether process should be issued to the accused or not. Section 204 Cr.P.C. envisages issue of process and it means only issuing either summons or warrant for the purpose of bringing the accused before Magistrate. It says that summons or warrants need be issued only if Magistrate is of the opinion that their exists sufficient ground for proceeding. Sub Section 3 of Section 204 Cr.P.C. only contemplates that proceeding if instituted of complaint made in writing, summons or warrants issued shall be accompanied by a copy of such complaint. Before issue of process which is part of Chapter XVI, there are four provisions in Chapter XV, i.e. Sections 200, 201, 202 and 203 Cr.P.C. Section 200 Cr.P.C. deals with examination of Complainant, Section 201 Cr.P.C. provides procedure by Magistrate not competent to take cognizance of the case and Section 202 Cr.P.C. provides postponement of issue of process. Lastly, Section 203 Cr.P.C. confers power upon Magistrate that if offence is not sufficient to make out for proceeding, he shall dismiss the complaint after recording his reasons briefly. I may reproduce Sections 200 to 203 Cr.P.C. as under :

"200. Examination of complainant.-*A Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate:*

Provided that, when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses-

(a) if a public servant acting or purporting to act in the discharge of his

official duties or a Court has made the complaint; or

(b) if the Magistrate makes over the case for inquiry or trial to another Magistrate under section 192:

Provided further that if the Magistrate makes over the case to another Magistrate under section 192 after examining the complainant and the witnesses, the latter Magistrate need not re- examine them."

*"**201. Procedure by Magistrate not competent to take cognizance of the case.** If the complaint is made to a Magistrate who is not competent to take cognizance of the offence, he shall,-*

(a) if the complaint is in writing, return it for presentation to the proper Court with an endorsement to that effect;

(b) if the complaint is not in writing, direct the complainant to the proper Court."

*"**202. Postponement of issue of process.-**(1) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him under section 192, may, if he thinks fit, postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding:*

Provided that no such direction for investigation shall be made,--

(a) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session; or

(b) where the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath under section 200.

(2) In an inquiry under sub-section (1), the Magistrate may, if he thinks fit, take evidence of witnesses on oath:

Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.

(3) If an investigation under sub- section (1) is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Code on an officer- in-charge of a police station except the power to arrest without warrant."

*"**203. Dismissal of complaint.-**If, after considering the statements on oath (if any) of the complainant and of the witnesses and the result of the inquiry or investigation (if any) under section 202, the Magistrate is of opinion that there is no sufficient ground for proceeding, he shall dismiss the complaint, and in every such case he shall briefly record his reasons for so doing."*

13. A cumulative and in depth reading of aforesaid provisions would show that Section 200 requires Magistrate for taking cognizance of an offence on a complaint, to examine upon oath the complainant and the witnesses present, if any. When a complaint is made in writing, proviso to Section 200 provides that it would not be necessary for Magistrate to examine complainant and witnesses if complainant is a public servant, acting or purporting to act in the discharge of his official duties or a Court has made the complaint; or if Magistrate

makes over a case for enquiry or trail to another Magistrate under Section 192. Second proviso takes care when a Magistrate makes over the case to another Magistrate under Section 192 after examining complainant and witnesses and provides that latter Magistrate need not re-examine them. Section 201 is not necessary to be discussed for the issue in question and I straight way come to Section 202.

14. Before discussing Section 202 of Cr.P.C., it would also be necessary to mention that a Magistrate when satisfied that there is sufficient ground for proceeding, he can straight way issue notice and at this stage he has three options : (i) Straight way issue process; (ii) he can postpone the issue of process for having holding an enquiry; and (iii) he can direct an investigation to be made. If the offence is triable by Court of Sessions, it is impermissible for the Magistrate to direct investigation. In such a case, Magistrate not only has discretion but compelling duty to comply with requirements of Section 202 (2) Cr.P.C. and record statements of all witnesses. In other words, if Magistrate decides to hold inquiry, proviso of Section (2) of Section 202, would come into picture and where the offence is triable exclusively by Court of Sessions, Magistrate himself has to hold inquiry and no direction for investigation by police shall then be made. Inquiry can be held by recording evidence on oath and if Magistrate thinks fit, Section 202 (2) gives discretion to Magistrate to take evidence of witness on oath. Thereafter, the next stage where Magistrate would pass order of dismissal of complaint or issue process, in effect is, when a complaint is received, Magistrate by following procedure prescribed under Section 200 may issue process against accused or dismiss the complaint. Section 203 specifically provides that after considering statement on oath, if any, of complainant and witnesses and the result of enquiry of investigation, if any, under Section 202 Cr. P.C., if Magistrate is of the opinion that there is no sufficient ground for proceeding, he shall dismiss the complaint. Section 204 provides that no summons or warrants are to be issued against accused until a list of prosecution witnesses has been filed. The object and purpose of holding enquiry or investigation under Section 202 Cr.P.C. is to find out whether there exists sufficient ground for proceeding against accused or not. Holding of enquiry or investigation is not an indispensable force before issue of process against accused or dismissal of the complaint. It is a enabling provision to form an opinion whether or not process should be issued and to remove from his mind any hesitation that he may have felt upon the mere perusal of complaint and the consideration of complaint's evidence on oath.

15. In **Ranjit Singh Vs. State of Pepsu (now Punjab), AIR 1959 SC 843,** similar argument was raised that Magistrate did not hold inquiry as required under Section 200 and 202 Cr.P.C. Court negated the contention and said as under :

"that contention is equally untenable because under Section 200, proviso (aa) it is not necessary for a Magistrate when a complaint is made by a Court to examine the complainant and neither Section 200 nor Section 202 requires a preliminary enquiry before the Magistrate can assume jurisdiction to issue process against the person complained."

16. In **Rosy and others vs. State of Kerala and others, 2000 (2) SCC 230,** Hon'ble M. B. Shah, J (another opinion by Hon'ble K. T. Thomas, J) recorded a separate but concurrent judgment and said as under :

"It is settled law that the ***inquiry under Section 202 is of limited nature.*** *Firstly, to find out whether there is a prima facie case in issuing process against the person accused of the offence in the complaint and secondly, to prevent the issue of process in the complaint which is either false or vexatious or intended only to harass such a person.* ***At that stage, the evidence is not to be meticulously appreciated, as the limited purpose being of finding out "whether or not there is sufficient ground for proceeding against the accused". The standard to be adopted by the Magistrate in scrutinising the evidence is also not the same as the one which is to be kept in view at the stage of framing charges. At the stage of inquiry under Section 202 Cr.P.C. the accused has no right to intervene and*** *that it is the duty of the Magistrate while making an enquiry to elicit all facts not merely with a view to protect the interests of an absent accused person, but also with a view to bring to book a person or persons against whom grave allegations are made." (emphasis added)*

17. In para 20 of **Rosy and others vs. State of Kerala (supra),** Hon'ble M. B. Shah, J. deduced certain principles as under :

I. (a) Under Section 200 Magistrate has the jurisdiction to take cognizance of an offence on the complaint after examining upon oath the complainant and the witnesses present.

(b) When the complaint is made in writing by a public servant acting or purporting to act in discharge of his official duties, the Magistrate need not examine the complainant and the witnesses.

(c) In such case Court may issue process or dismiss the complaint.

II. (a) The Magistrate instead of following the procedure stated above may, if he thinks fit, postpone the issue of process and hold inquiry for the purpose of deciding whether or not there is sufficient ground for proceeding against the person accused. Such inquiry can be held by him or by the police officer or by other person authorised by him.

(b) However, where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, the direction of investigation by the police officer is not permissible and he is required to hold inquiry by himself. During that inquiry he may decide to examine the witnesses on oath. At that stage, the proviso further gives mandatory directions that he shall call upon the complainant to produce all his witnesses and examine them on oath. The reason obviously is that in a private complaint, which is required to be committed to the Sessions Court for trial, it would safeguard the interest of the accused and he would not be taken by surprise at the time of trial and it would reveal the version of the witnesses whose list is required to be filed by the complainant under Section 204 (2) before issuance of the process,

(c) The irregularity or non-compliance therewith would not vitiate further proceeding in all cases. A person complaining of such irregularity should raise objection at the earliest stage and he should point out how prejudice is

caused or is likely to be caused by not following the proviso. If he fails to raise such objection at the earliest stage, he is precluded from raising such objection later."

18. Thus, evidently statement recorded under Section 202 Cr.P.C. is not for punishing the accused. The purpose of Section 202 Cr.P.C. is that Magistrate has not to ascertain truth or falsehood of complaint as in old Code, but to decide whether or not there is any sufficient ground for proceeding. Issue of process should not be mechanical and it should be based on some material.

19. The words "all his witnesses" contained in Sub sec (2), proviso to Section 202 Cr.P. C. cannot be read as "all witnesses". It has been held in **Satyadeo Pandey and others v. State of U. P. and another, 1987 (1) AWC 572** that words "all his witnesses" connote that all the witnesses of the complainant, associated or connected with his interest and those witnesses who are material and relevant to prove prosecution case, must be examined. The words "all his witnesses" under proviso to Section 202 Cr.P.C. do not refer literally to all prosecution witnesses in number rather all his witnesses (i.e. of complainant) and to whom he considers material to prove his case.

20. In **Chhotey Lal v. State of U. P., 2006 CRI.L.J. 2265,** Court held that all the witnesses in Sub Sec (2) Proviso to Section 202 Cr. P. C. do not mean "all the witnesses" named by complainant but all the witnesses which complainant chooses to examine.

21. In **Kallu Pal and others v. State of U. P. and Anr., 2008 CRI.L.J. 3229 (Allahabad),** this Court said that formal witnesses like Doctor, Investigating Officer etc. are not under the command of the complainant and they are not the witnesses of complainant's confidence, therefore, they cannot be termed as "his witnesses" and are not covered by proviso to Section 202 (2) Cr.P.C.

22. In **Dudh Nath Mishra and others v. State of U. P. and another, 2003 CRI.L.J.1087 (Allahabad),** Court said that it is not necessary to examine all the witnesses who are named in complaint petition.

23. In **Gopal Singh v. Dhanraji Devi and another, 1994 CRI.L.J. 1652 (Allahabad),** this Court said that it is discretion of complainant to examine some witnesses and give up rest of the witnesses. Even when all the witnesses are not examined in a case when it is exclusively triable by Court of Sessions it has been held that process issued by Magistrate to accused is not per se illegal. This is what has also been held in ***Abdul Hamidkhan Pathan and others v. State of Gujrat and others, 1989 CRI.L.J. 468 (DB).**

24. The issue raised in this application also came up for consideration in **Shivjee Singh vs. Nagendra Tiwary and others, 2010 (7) SCC 578.** The question up for consideration formulated by Court in the judgment reads as under :

"Whether examination of all witnesses cited in the complaint is sine qua non for taking cognizance by a Magistrate in a case exclusively triable by the Court of Sessions?"

25. In the above case noticing that there is a serious illegality, a Single Judge

of Patna High Court remitted the matter to Chief Judicial Magistrate with a direction to make further enquiry and pass appropriate order in the light of proviso to Section 202 (2) Cr. P. C. Supreme Court said that Cr.P.C. is a compendium of law relating to criminal procedure. The provisions contained therein are required to be interpreted keeping in view the well recognized rule of construction that procedural prescriptions are meant for doing substantial justice. If violation of the procedural provision does not result in denial of fair hearing or causes prejudice to the parties, the same has to be treated as directory notwithstanding the use of word `shall'. After referring to Sections 190, 192, 200 to 209 Cr.P.C. Court said that the object of examining complainant and witnesses is to ascertain the truth or falsehood of complaint and determine whether there is a prima facie case against the person who, according to the complainant, has committed an offence. If upon examination of complainant and/or witnesses, Magistrate is prima facie satisfied that a case is made out against the person accused of committing an offence, then he is required to issue process.

26. In **Chandra Deo Singh vs Prokash Chandra Bose alias Chabi Bose & Anr, AIR 1963 SC 1430,** Court held, that where there is prima facie evidence, Magistrate was bound to issue process, even though the person charged of an offence in the compliant might have a defence, such defence has to be taken into consideration and left to be decided by appropriate forum at an appropriate stage. At the stage of issue of process, Magistrate can refuse to issue process only when he finds that evidence led by complainant is self contradictory or intrinsically untrustworthy.

27. In **Kewal Krishan Vs. Suraj Bhan and another, AIR 1980 SC 1780,** scheme of Sections 200 to 204 Cr.P.C. was examined and Court said :

"At the stage of Section 203 and 204, Criminal Procedure Code in a case exclusively triable by the Court of Session, all that the Magistrate has to do is to see whether on a cursory perusal of the complaint and the evidence recorded during the preliminary inquiry under Sections 200 and 202, Criminal Procedure Code, there is prima facie evidence in support of the charge levelled against the accused. All that he has to see is whether or not there is "sufficient ground for proceeding against the accused. ***At this stage, the Magistrate is not to weigh the evidence meticulously as if he were the trial court.*** *The standard to be adopted by the Magistrate in scrutinising the evidence is not the same as the one which is to be kept in view at the stage of framing charges."*

(emphasis added)

28. In **Mohinder Singh vs Gulwant Singh And Others, 1992 (2) SCC 213,** Court said that the scope of inquiry under Section 202 Cr.P.C. is extremely restricted. It is only to find out the truth or otherwise of the allegations made in the complaint in order to determine whether process should be issued or not under Section 204 Cr.P.C. or whether the complaint should be dismissed by resorting to Section 203 Cr.P.C. on the footing that there is no sufficient ground for proceeding on the basis of the statements of complainant and his witnesses, if any. But the enquiry at this

stage does not partake the character of a full dress trial which can only take place after process is issued under Section 204 Cr.P.C. calling upon the proposed accused to answer the accusation made against him for adjudging the guilt or otherwise of the said accused person. Further, the question, whether evidence is adequate for supporting conviction, can be determined only at the trial and not at the stage of enquiry contemplated under Section 202 Cr.P.C. To say in other words, during the course of enquiry under Section 202 of Cr.P.C., Magistrate has to satisfy himself simply on the evidence adduced by prosecution, whether prima facie case has been made out so as to put the proposed accused on a regular trial. At that stage no detailed enquiry is called for.

29. Considering the word "shall" in proviso to Section 202 (2) Cr. P.C., Supreme Court in **Shivjee Singh (supra)** Court said :

"The use of the word 'shall' in the proviso to Section 202 (2) is prima facie indicative of mandatory character of the provision contained therein, ***but a close and critical analysis thereof along with other provisions contained in Chapter XV and Section 226 and 227 and Section 465 would show that non-examination on oath of any or some of the witnesses cited by the complainant is, by itself, not sufficient to denude the concerned Magistrate of the jurisdiction to pass an order for taking cognizance and issue of process provided he is satisfied that prima facie case is made out for doing so."***

(emphasis added)

30. In **Shivjee Singh (supra)** Court further said that in proviso to Section 202 (2) word `all' is qualified by the word "his". This implies that complainant is not bound to examine all the witnesses named in the complaint or whose names are disclosed in response to the order passed by the Magistrate. In other words, only those witnesses are required to be examined whom the complainant considers material to make out a prima facie case for issue of process. The choice being of the complainant, he may choose not to examine other witnesses. Consequence of such non-examination is to be considered at the trial and not at the stage of issuing process when Magistrate is not required to enter into detailed discussions on the merits or demerits of the case, that is to say, whether or not the allegations contained in the complaint, if proved, would ultimately end in conviction of the accused. He is only to see whether there exists sufficient ground for proceeding against accused. In taking above view, Court has followed and relied its earlier decisions in **Rosy and others vs. State of Kerala (supra), Chandra Deo Singh (supra) and Kewal Krishan (supra)**. Court also approved judgment of Madras High Court in **M. Govindaraja Pillai v. Thangavelu Pillai 1983 CriLJ 917,** and approved the ratio that Section 202 is an enabling provision. Court pointed out divergent two opinions expressed by Hon'ble Justice M. B. Shah and Hon'ble Justice K. T. Thomas in two separate but concurrent judgments in **Rosy and others vs. State of Kerala (supra)** and then in para 30 said as under :

"30. Although, Shah, J. and Thomas, J. appear to have expressed divergent views on the interpretation of proviso to Section 202 (2) ***but there is no discord between them that non-***

examination of all the witnesses by the complainant would not vitiate the proceedings. With a view to clarify legal position on the subject, we deem it proper to observe that even though in terms of the proviso to Section 202 (2), the Magistrate is required to direct the complainant to produce all his witnesses and examine them on oath, failure or inability of the complainant or omission on his part to examine one or some of the witnesses cited in the complaint or whose names are furnished in compliance with the direction issued by the Magistrate, will not preclude the latter from taking cognizance and issuing process or passing committal order if he is satisfied that there exists sufficient ground for doing so. *Such an order passed by the Magistrate cannot be nullified only on the ground of non-compliance with the proviso to Section 202 (2). (emphasis added)*

31. Similar view has been taken in **Vijay Dhanuka Etc vs Najima Mamtaj Etc, 2014 (14) SCC 638** which has been followed in **Abhijit Pawar Vs. Hemant Maudhukar Nimbalkar and Another, 2017 (3) SCC 528.**

32. In view of above discussions, I am clearly of the view that even though in the complaint several persons were named but only two persons were examined under Section 202 Cr. P. C. and thereafter process was issued, the procedure adopted by Court below cannot be said to be vitiated in law and submission to that effect is clearly erroneous and contrary to above discussions, hence, rejected.

33. Application has no merit. Dismissed accordingly.

34. Interim order, if any, stands discharged.

(2019)12 ILR A96

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.11.2019

BEFORE
THE HON'BLE RAM KRISHNA GAUTAM, J.

Crl. Misc. Application (U/S 482 Cr. P.C.) No. 5165 of 2019

Subhas & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Mahesh Prasad Yadav, Sri D.P. Singh

Counsel for the Opposite Parties:
A.G.A., Sri Vikas Tiwari

A. Criminal Law - Code of Criminal Procedure - Section 482 - Cross cases - Investigation of subsequent case crime number - Final report was submitted repeatedly - Protested by complainant wherein statement of Complainant was got recorded under Section 200 and his witnesses were examined under Section 202 of Cr.P.C. whereupon, impugned summoning order was passed -The occurrence is one and common- One case is running for offence of murder as well as attempt to murder and this second offence for the same occurrence has been initiated by way of summoning, for which apparently prima facie, there was sufficient evidence on record and the impugned order was passed on the basis of it. There was no abuse of process of Court or frustration of end of justice. This Court, in exercise of inherent power under Section 482 of Cr.P.C. is not expected to embark upon the aspects of factual evidence, which is a question of trial. (Para 4, 5 & 6)

Application u/s 482 Cr.P.C rejected. (E-3)

List of cases cited: -

1. St. of A.P Vs. Gaurishetty Mahesh, JT 2010 (6) SC 588: (2010) 6 SCALE 767: 2010 Cr. LJ 3844

2. Hamida v. Rashid, (2008) 1 SCC 474

3. Monica Kumar Vs. St. of U.P, (2008) 8 SCC 781

4. Popular Muthiah Vs. State, Rep. by Insp. of Police, (2006) 7 SCC 296

5. Dhanlakshmi Vs. R.Prasana Kumar, (1990) Cr LJ 320 (DB): AIR 1990 SC 494

6. St.of Bih. Vs. Murad Ali Khan, (1989) Cr LJ 1005: AIR 1989 SC 1

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. This application under Section 482 of Cr.P.C. has been filed by applicants Subhas, Deewan Singh, Rahul, Virendra Singh and Satya Kishore against State of U.P. and Balbeer Singh, with a prayer for quashing the summoning order dated 24.12.2018, passed in Criminal Complaint Case No. 305 of 2018 (Balbeer Singh Vs. Ram Singh and others), under Sections 147, 148, 149, 307 I.P.C., Police Station Kotwali Auraiya, District Auraiya, pending the court of Additional Chief Judicial Magistrate/F.T.C., Auraiya.

2. Learned counsel for the applicants argued that Case Crime No. 403 of 2016, was got registered under Sections 147, 148, 149, 307, 302 of I.P.C., at Police Station Kotwali Auraiya, District Auraiya, on 9.6.2016 at about 22:15 hours, upon the report of Smt. Gyanwati against Badan Singh, Murari, Sahveer @ Sanju, Yaduveer, Deenu and Rinku, with this contention that informant's son Ram Singh, aged about 25 years, along with his nephew Ashish, aged about 15 years, was at their way to home from market and at about 3:30 P.M., when they reached near *Jaruhuliya ki madaiya*, those named accused persons, who were hiding themselves thereat, came and they with intention to kill, did assault over Ram Singh and Ashish. This was by *lathi-danda*. Firearm shot too, was extended, resulting in grievous hurt to Ram Singh and Ashish, who under threat ran from spot for saving his life. Informant and others rushed on spot, took injured Ram Singh at Government Hospital, Auraiya, from where he was referred to PGI Saifai. At PGI Saifai, he was reported to be dead. His dead body was lying thereat and this report was got lodged. Subsequently, case crime number for the same occurrence was got registered upon the report of Sri Balbeer Singh on 12.6.2016 at 22:00 hours, under Sections 147, 148, 149, 307 IPC, against Ram Singh, who is dead in previously instituted case, Subhas, Deewan Singh, Rahul, Virendra Singh and Satya Kishore, with this contention that on same date 9.6.2016, while informant was on his way to Auraiya and reached near *Jaruhuliya ki madaiya tiraha*, at about 3:20 P.M., two motorcycle ridden miscreants Ram Singh and his brother-in-law Subhas, Diwan Singh, Rahul, Virendra Singh and Satya Kishore did intercept. These motorcycle riders, under joint mensrea, under threat of death, did assault regarding their dispute regarding field. Ram Singh caught hold informant and Diwan Singh did firearm shot over him, resulting its injury over abdomen. He was severely injured. Many persons rushed thereat wherein Sahveer @ Sanju and Yaduveer, was there, who took injured at Government Hospital Chichauli, Auraiya. Those persons who were shepherd and rushed

thereat, chased assailants. This injured was referred to Kanpur where he was admitted in Chandni Nursing Home, Kanpur. This report was got submitted. In the investigation of this case crime number, a final report was submitted. This was referred back and for repeated times, final report was submitted. Even opinion of Joint Director of Prosecution was taken wherein submission of final report was said to be on the basis of evidence on record. It was a material fact that at the time of admission at Chandni Nursing Home, injury was said to be caused by Ram Singh, who had died and it was never said to be caused by Diwan Singh. Hence, this final report was protested by complainant-informant Balbeer Singh, wherein, statement of Balbeer Singh was got recorded under Section 200 and his witnesses were examined under Section 202 of Cr.P.C. Whereupon, impugned summoning order was passed but no discussion of reason for this summoning was there. Because final report was submitted, after investigation of above case crime number, and it was based on the evidence collected by I.O. wherein the mention of Chandni Nursing Home, was there that the firearm shot was given by Ram Singh, resulting injury to Balbeer Singh, for which he was admitted thereat and this Ram Singh had died. But in a mechanical way, without application of judicial mind, impugned summoning order was passed by Magistrate and it was misuse of process of Court. Hence, this proceeding under Section 482 of Cr.P.C. for quashing impugned summoning order with entire proceeding of above case, for ensuring end of justice.

3. Learned AGA, as well as learned counsel for the complainant, has vehemently opposed the argument advanced by learned counsel for the applicants with this contention that the sole basis of submission of final report was the mention at Chandni Nursing Home. But this was not by injured Balbeer, who is complainant in this case. Admittedly, Balbeer Singh was having injury over abdomen by firearm shot, for which instant medico legal report is there on record. Death of Ram Singh was owing to assault made by lathi-danda, for which explanation was given in the FIR, got lodged by the Balbeer Singh, that it was shepherd persons, present on spot, who chased those assailants Ram Singh and Ashish and who assaulted them. But for Balbeer Singh, it was categorically said by him that assault of firearm shot was extended by Badan Singh wherein Ram Singh had caught hold. This facts was reiterated by statement of Akhilesh Singh, under Section 202 of Cr.P.C. as well as other witnesses, who were present on spot and who took injured at District Hospital Auraiya, from there to Chandni Nursing Home, Kanpur. They all narrated the same sequence as was said by injured complainant and in this case he was the best witness who has narrated the same fact and on the basis of this evidence collected by Magistrate, under its own inquiry made under Section 200 and 202 of Cr.P.C., impugned summoning order was passed, which was well founded and the previous order of rejection of final report, thereby, registration of complaint case was not challenged by applicants at any stage. This too, was a confirm order and once Magistrate took cognizance as a complaint case, decided to make inquiry by itself. Then after, passed impugned summoning order and then the basis of summoning is the inquiry made by Magistrate and it never requires that previous evidence collected by I.O. For

submission of final report is to be discussed by Magistrate. Moreso, there are repeated precedents of this Court as well as Apex Court that at the time of passing of summoning order application of judicial mind is to be there but need not be elaborate analytical discussion. Rather a prima facie is to be seen and this was very well there. Hence, this application be rejected.

4. Having heard learned counsels for both sides and gone through the material placed on record, it is apparent that the mention at Chandni Nursing Home, was not by injured, rather it was said to be by family members and had apprised that it was firearm shot given by Ram Singh i.e. a vague mention was there and purpose of this mention was just to inform police for taking criminal law in motion. it was not a decision making mention nor it was made by injured Balbeer. But after gaining sense and being settled at Chandni Nursing Home, this Balbeer got First Information Report lodged as case crime number wherein narration was made by him with the same contention as was said by him in his statement recorded under Section 161 of Cr.P.C. as well as under Section 200 of Cr.P.C. in inquiry made by Magistrate. Hence, injured Balbeer Singh complainant-informant is fully intact in his statement recorded during investigation by I.O. in case crime number as well as inquiry made by Magistrate wherein, the contention of this report as well as protest petition was fully intact.

5. In First Information Report got lodged by Smt. Gyanwati Devi, the presence of two witnesses on spot was said. She herself was not eye-witness account and as per her statement recorded under Section 161 of Cr.P.C., it was only two persons present on spot when they were assaulted by those accused persons. They were Ram Singh and Ashish whereas Ashish ran from spot for saving his life. Hence, statement of Ashish was relevant wherein, he has said about this occurrence with this contention that none other than accused persons and deceased Ram Singh and injured Ashish was there. It was upon the rescue call, many other shepherd has rushed on spot. Hence, the informant was not eye-witness account and was of no avail to narrate the occurrence. But what was heard by her, was narrated. But, no recital regarding injury of firearm shot over Balbeer Singh nor Balbeer was made as an accused in it, though, name of Badan Singh is there and Balbeer Sigh is Balbeer Singh @ Badan Singh. But the injured witness on record was Balbeer Singh-complainant, who in his statement has narrated the occurrence. Hence, the mention made at Chandni Nursing Home was not by Balbeer Singh. Balbeer Singh was instantly taken to hospital where he was having firearm injury over his abdomen. He was instantly taken to Chandni Nursing Home. The occurrence is one and common. One case is running for offence of murder as well as attempt to murder and this second offence for the same occurrence has been initiated by way of summoning as above, for which apparently prima facie, there was sufficient evidence on record and the impugned order was passed on the basis of it, there was no abuse of process of Court or frustration of end of justice. This Court, in exercise of inherent power under Section 482 of Cr.P.C., is not expected to embark upon the aspects of factual evidence, which is a question of trial. Apex Court in ***State of Andhra Pradesh v. Gaurishetty Mahesh, JT 2010 (6) SC***

588: (2010) 6 SCALE 767: 2010 Cr. LJ 3844 *has propounded that "While exercising jurisdiction under section 482 of the Code, the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable apprehension of it accusation would not be sustained. That is the function of the trial Judge/Court". In another subsequent* ***Hamida v. Rashid, (2008) 1 SCC 474,*** *hon'ble Apex Court propounded that "Ends of justice would be better served if valuable time of the Court is spent in hearing those appeals rather than entertaining petitions under Section 482 at an interlocutory stage which after filed with some oblique motive in order to circumvent the prescribed procedure, or to delay the trial which enable to win over the witness or may disinterested in giving evidence, ultimately resulting in miscarriage of Justice". In again another subsequent* ***Monica Kumar v. State of Uttar Pradesh, (2008) 8 SCC 781,*** *the Apex Court has propounded "Inherent jurisdiction under Section 482 has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself." While interpreting this jurisdiction of High Court Apex Court in* ***Popular Muthiah v. State,Represented by Inspector of Police, (2006) 7 SCC 296*** *has propounded "High Court can exercise jurisdiction suo motu in the interest of justice. It can do so while exercising other jurisdictions such as appellate or revisional jurisdiction. No formal application for invoking inherent jurisdiction is necessary. Inherent jurisdiction can be exercised in respect of substantive as well as procedural matters. It can as well be exercised in respect of incidental or supplemental power irrespective of nature of proceedings".*

Regarding prevention of abuse of process of Court, Apex Court in ***Dhanlakshmi v. R.Prasana Kumar, (1990) Cr LJ 320 (DB): AIR 1990 SC 494*** *has propounded "To prevent abuse of the process of the Court, High Court in exercise of its inherent powers under section 482 could quash the proceedings but there would be justification for interference only when the complaint did not disclose any offence or was frivolous vexatious or oppressive" as well as in* ***State of Bihar v. Murad Ali Khan, (1989) Cr LJ 1005: AIR 1989 SC 1,*** *Apex Court propounded "In exercising jurisdiction under Section 482 High Court would not embark upon an enquiry whether the allegations in the complaint are likely to be established by evidence or not".*

6. Meaning thereby, exercise of inherent jurisdiction under Section 482 Cr.P.C. is within the limits, propounded as above. Hence, this application merits is dismissal.

7. Accordingly, dismissed.

8. Interim order, if any, stands vacated.

9. However, in view of the entirety of facts and circumstances of the case, it is directed that in case the applicants appear and surrender before the court below within 30 days and no more from today and apply for bail, their prayer for bail shall be considered and decided in view of the settled law laid by this Court in the case of **Amrawati and another Vs. State of U.P.** reported in **2004 (57) ALR 290** as well as judgement passed by

Hon'ble Supreme Court reported in **2009 (3) ADJ 322 (SC) Lal Kamlendra Pratap Singh Vs. State of U.P.** Till then no coercive measures shall be taken against the applicants.

10. With the aforesaid directions, this application is finally **disposed of.**

(2019)12 ILR A101

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 30.08.2019

BEFORE
THE HON'BLE RAMESH SINHA, J.

Crl. Misc. Application (U/S 482 Cr. P.C.) No. 7234 of 2019
connected with
Crl. Misc. Application (U/S 482 Cr. P.C.) No. 7220 of 2019

Dr. M.C. Sharma ...Applicant
Versus
Central Bureau of Investigation ...Opposite Party

Counsel for the Applicant:
Priyanka Midha, Sri Ram M. Kaushik, Sri Tanveer Ahmad

Counsel for the Opposite Party:
Sri Gyan Praksh, Sri Sanjay Kumar Yadav

A. Criminal Law - Code of Criminal Procedure, 1973 – Discharge - Any error in the charge framed by the trial Court can be amended and altered at any stage of the trial considering prosecution evidence led during the course of the trial- It would not be proper for this Court to interfere in the present 482 Cr.P.C. application as the allegations made in the FIR and the evidence collected during the course of investigation by the C.B.I. against the applicant, the prosecution has to be given full opportunity to prove its case by adducing evidence against the applicant and co-accused persons- A prima facie case would naturally depend upon the facts of each case and it is difficult to lay down role of universal application where material placed before the Court discloses grave suspicion against the accused which has not been properly explained, the Court would be fully justified in framing charge and proceeding with the trial.

For applicant Smt. Aparna Saxena-Not disputed by CBI that she is the wife of co-accused and sleeping director - No evidence against the applicant Smt. Aparna Saxena collected during the course of investigation showing that she conspired with her husband along with other co-accused putting the State Exchequer to a loss. The case of the applicant Smt. Aparna Saxena is squarely covered by paragraph nos.11 and 12 of the judgement of Shreya Jha Vs. CBI, ILR (2007) Supp. (2) Delhi 19.

Application u/s 482 of Cr.Pc of Dr. M.C.Sharma rejected.

Criminal Application u/s 482 Cr.Pc of Smt. Aparna Saxena allowed. (E-3)

List of cases cited: -

1. U.O.I Vs. Prafulla Kumar Samal & Anr, (1979) 3 SCC 4,

2. Yogesh Vs. St.of Maha. (2008) 3 SCC 394,

3. Dilawar Balu Kurane Vs. St. of Maha., (2002) 2 SCC 135,

4. C.B.I, Hyderabad Vs. K.Narayana Rao (2012) 9 SCC 512

5. Naresh Vs. St. of U. P (2012) 1 All LJ 202.

6. T. Baray Vs. Nenry A.H. Hoe- (1983) 1 SCC 177

7. Nemi Chand Vs. St. of Raj.-11(2016) CCR 15 (SC), MANU/SC/0506/2016

8. Ratan Lal Vs. St. of Punj.-AIR (1965) SC 444

9. Sham Lal Vs.State (1968) Allahabad 392

10. Shreya Jha Vs. CBI, ILR (2007) Supp. (2) Delhi 19

11. St. of Kar. v. L. Muniswamy (1977 (2) SCC 699)

12. Supdt. & Remembrancer Of Legal vs Anil Kumar Bhunja & Ors 1979 SCC (4) 274

13. M.P. Vs. Mohanlal Soni, (2000) 6 SCC 338

14. Kanti Bhadra Shah & Anr vs St. Of W. B., 2000 (1) SCC 722

15. Smt. Om Wati & Anr vs St., Thru Delhi Admn. & Ors 2001 CR.LJ 1723

16. Palwinder Singh Vs. Balvinder Singh; 2009 (3) SCC 850

17. Sajjan Kumar Vs. Central Bureau of Investigation, (2010) 9 SCC 368

18. Sheoraj Singh Ahlawat and others Vs. State of U.P. and another, (2013) 11 SCC 476

19. State By Karnataka Lokayukta Vs. M. R. Hiremath, 2019 SCC

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

1. Both the applications under Section 482 Cr.P.C. have been filed for quashing the impugned order dated 19.12.2018 and the order dated 23.1.2019 passed by the Court of Special Judge, CBI, Ghaziabad District Court in Special Case No.17 of 2016, arising out of Case Crime No. RCDST/2013/ A/0001/STF/New Delhi under Sections 120B, 420 & 471 I.P.C. and Section 13(2) read with 13(1) (d) of Prevention of Corruption Act, 1988, Police Station CBI/STF, New Delhi, District Ghaziabad.

2. Since both the 482 Cr.P.C. applications are arise of the common order, hence, with the consent of learned counsel for the parties, both the 482 Cr.P.C. applications are being decided by a common order.

3. Brief facts of the case are that a First Information Report was lodged in pursuance of the order passed by this Court on 15.11.2011 in Writ Petition No.3611 (MB) of 2011 "Sachchidanand (Sachchey) Vs. State of U.P. And others" on 14.1.2013 which was lodged by the respondent No.1-CBI on the basis of preliminary enquiry No.0532011S0004 (registered on 19.11.2011), wherein three persons, namely, Sri Arun Kumar Saxena, Sri Prashant Saxena and M/s. Aanjaneya Business (India) Pvt. Ltd. along with unknown officials of Government of Uttar Pradesh, NCCF and others were named as accused.

4. The allegations made in the FIR dated 14.1.2013 in nutshell are that the preliminary enquiry revealed that during 2008-09, a programme implementation plan (PIP) was submitted to NRHM, Government of India, New Delhi, wherein it was proposed to take up a Pilot Telemedicine Project in 10 District of U.P. with the support of SGPGI, Lucknow having a proposed estimate of Rs.915.37 lacs, for which an amount of Rs.9.15 Crores was sanctioned for the year 2008-09 and funds were released to the State Health Society (SHS), NHRM in June, 2008 and March, 2009. Further allegation is that the said Telemedicine Project was originally carried out by the Director General, Medical Health (DGMH) but was arbitrarily decided by the then Principal Secretary (Health and Family Affairs) on 21.2.2009 to get the project implemented through the Director General (Medical Education), U.P. (hereinafter referred to as 'DGME) in

three medical colleges of the State of U.P., for which Rs.9.15 Crore was transferred to the joint account of DGME and Finance Controller (ME). Further allegation is that DGME arbitrarily awarded the Project to M/s. National Consumer Co-operative Federation Ltd. (NCCF), Lucknow Branch without following the tender Process and without calling for any open tender, thereby violating the guidelines of the Central Government on NRHM. The NCCF got the project implemented through M/s. Aanjaneya Business (India) Pvt. Ltd., their Business Partner, which was formed in June, 2007 with Sri Prashant Saxena and his wife Ms. Aparna Saxena as the Director and did not have any experience in Telemedicine Project and were mainly involved in civil constructions, whereas according to the NCCF guidelines for delegation of powers, it was provided that any new line of business had to be undertaken with the approval of NCCF (HO) and the same was not followed. The further allegation is that M/s. Aanjaneya Business (India) Pvt. Ltd. carried out works in three medical colleges and submitted exorbitant bills to NCCF.

5. The further allegation is that M/s. Aanjaneya Business (India) Pvt. Ltd. in criminal conspiracy with Sri Arun Kumar Saxena, Manager NCCF, claimed exorbitant bills, thereby cheating the government causing a wrongful loss to Government and corresponding wrongful gain to M/s. Aanjaneya Business (India) Pvt. Ltd. and the said Sri Arun Kumar Saxena, the then Manager NCCF and presently Senior Research Engineer (RDSO), Lucknow and Sri Prashant Saxena had common business interest through another Company M/s.Firestone Builder Pvt. Ltd., in which wife of Sri Arun Kumar Saxena, namely, Dr. Indu Saxena was a Director.

6. The CBI after completing the investigation, submitted charge sheet being Charge Sheet No.12 of 2016 on 31.5.2016 for the offence under Sections 120B, 420 & 471 I.P.C. and Section 13(2) read with 13(1) (d) of Prevention of Corruption Act, 1988 against (i) Arun Kumar Saxena, the then Manager, NCCF, (ii) Prashant Saxena, the Director, M/s. Aanjaneya Business India Pvt. Ltd., (iii) Smt. Aparna Saxena, the Director, M/s. Aanjaneya Business (India) Pvt. Ltd., (iv) M/s. Aanjaneya Business (India) Pvt. Ltd. through its Directors, (v) **Dr. M.C.Sharma**, the present applicant & (vi) Ram Kumar Prasad, the then Joint Secretary.

7. The Special Judge, Anti Corruption (CBI), Ghaziabad took cognizance on 30.8.2016 for the offence in which charge sheet was submitted and summoned the accused persons including the applicant. The applicant and other co-accused persons were granted bail by the competent court. Thereafter, the applicant moved a discharge application before the trial Court on 27.7.2017 and the same was rejected by the trial Court on 19.12.2018 and thereafter the charges were framed against the applicant and co-accused persons on 23.1.2019 by the trial Court for the offence under Sections 120B, 420 & 471 I.P.C. and Section 13(2) read with 13(1) (d) of Prevention of Corruption Act, 1988. Aggrieved by the same, the applicant has preferred the present 482 Cr.P.C. for quashing of the same.

8. Heard Sri Tanveer Ahmad, assisted by Sri Ram M. Kaushik, learned counsel for the applicant, Sri Gyan

Prakash, learned Senior Advocate assisted by Sri Sanjay Kumar Yadav, learned counsel for the C.B.I. and perused the material brought on record.

9. So far as applicant-Dr. M.C. Sharma is concerned, it has been argued by learned counsel for the applicant that the charges which have been framed against him by the trial Court is erroneously in disregard of the admitted position of the CBI in terms of the materials, documents and witness statements placed on record along with the charge sheet. He further submitted that the trial Court passed the order framing charge mechanically not taking into consideration the submissions made in the written applications and also the fact that every allegation made against the applicant by the CBI controverted by the witnesses whose statements had been recorded during the course of investigation and placed on record as relied upon the documents. He next submitted that the charges levelled against the applicant stood completely, comprehensively and without any reasonable doubt, negated by the prosecution relied upon documents as well as relied upon statements of various witnesses and hence, the exoneration of the applicant was not based on his individual contrarian defence, but upon a mere perusal and plain reading of the statements recorded under Section 161 Cr.P.C. of witnesses like-Dr. Hari Om Dixit; Chanchal Tiwari; S.K.Mishra; Pradeep Shukla; Harbhajan Singh. He submitted that from the statements of the said witnesses which are relied upon by the documents of the CBI were clearly exonerating the applicant in letter and spirit regarding all the allegations made against him. The learned trial Court thus, failed to appreciate this vital aspect of the matter and erred in framing charge against the applicant on 23.1.2019. Hence, the impugned order framing charge is liable to be quashed by this Court.

10. He next submitted that the CBI has alleged in the charge sheet that the main scheme of NRHM was to connect the rural hospitals, also known as First Referral Units of District Level Hospital with a super specialty institute through the tele- medicine project, but the accused persons through a criminal conspiracy changed this basic plan and implemented the tele-medicine project by connecting medical colleges with SGPGI. He submitted that the said allegation has no basis in view of the statements recorded under Section 161 Cr.P.C. of the witnesses, namely, Dr. Hari Om Dixit who at the relevant time was General Manager Community Process NRHM in SPMU dated 1.3.2013 and 27.6.2013 very clearly indicates that the decision to connect medical colleges with SGPGI was more than a prudent decision instead of connecting FRU/CHC/BPHC to a district level hospital and then to SGPGI. He himself admits that he was present in the review meeting dated 21.2.2009 where the decision was taken. The mission director of NRHM Mr. Chanchal Tiwari was also present in the aforesaid meeting of 21.2.2009 and vide his letter dated 3.3.2009, he endorsed connection of medical colleges with SGPGI through DGME. The aforesaid decision was also fully supported by Pradeep Shukla, the then Principal Secretary, Medical Health. Dr. I.S. Srivastava, the then Director General, Medical Health was also present in the aforesaid meeting dated 21.2.2009 and he fully supported the tangible shift to connect medical colleges with SGPGI

through the tele-medicine project which is reflected in the latter dated 24.2.2009 which is a relied upon document filed by the CBI. Moreover, Dr. Hari Om Dixit on 20.4.2009 himself suggested the names of medical colleges which is reflected in the statement dated 28.2.2013 under Section 161 Cr.P.C. of Dr. Suniti Raj Mishra and also by the mechanism of letter dated 4.5.2009 which is relied upon by the CBI, written by DGME to Dr. Hari Om Dixit.

11. He also urged that the allegation made by the CBI against the applicant that he had committed offence of conspiracy, cheating and substantive offences under the Prevention of Corruption Act by being the accessory to NCCF being the implementing agency for the entire tele-medicine project is negated totally by the relied upon documents and relied upon statements of the CBI, which the trial Court has failed to consider. In this regard, he has pointed out the statement of PW1 Dr. Hari Om Dixit who himself endorses and supports selection of NCCF as the agency to implement the tele- medicine project vide his two statements dated 1.3.2013 and 27.6.2013.The NCCF was a nominated agency for implementing various projects for and on behalf of the Department of Medical Education, Government of U.P., fully endorsed vide Government Order dated 12.7.2008, hence, on this count NCCF cannot be stated by any stretch of imagination to be a tainted agency, incapable of implementing the project, for the reason that it is not a case of CBI that even the Government Order dated 12.7.2008 is a project of criminal conspiracy and commission of criminal offences at the end of government officials. Harbhajan Singh (PW-34) himself issued a Government Order being the then Principal Secretary, Medical Education, Government of U.P. dated 30.3.2009 in favour of NCCF to implement the tele-medicine project, which has been supplied and duly received by PW1-Dr. Hari Om Dixit as well as to the office of DGMH. Post 21.2.2009 it was the Principal Secretary, Medical Education, Government of U.P. who is Harbhajan Singh, a cited witness, who himself called Dr. Saroj Kanta Mishra of SGPGI and asked him to lend technical support in the implementation of the tele-medicine project through the agency of NCCF, Dr. Saroj Kanta Mishra vide his statements dated 28.6.2013 and 17.12.2013 had himself endorsed this fact, therefore, on this basis also the selection of NCCF is endorsed as a valid act by all concerned, however, most illegally without any substantive evidence unfounded evidence has been made on the applicant as well as Mr. Ram Kumar Prasad.

12. In support of his argument, learned counsel for the applicant has placed reliance upon the judgments of the Apex Court in the case of ***Union of India Vs. Prafulla Kumar Samal & Another, reported in (1979) 3 SCC 4, Yogesh Vs. State vs. Maharashtra (2008) 3 SCC 394, Dilawar Balu Kurane Vs. State of Maharashtra, (2002) 2 SCC 135, Central Bureau of Investigation, Hyderabad Vs. K.Narayana Rao (2012) 9 SCC 512 & Naresh Vs. State of Uttar Pradesh (2012) 1 All LJ 202.***

13. He next submitted that the learned trial Court also failed to appreciate that post the amendment of the provisions of Prevention of Corruption Act w.e.f. 26.7.2018, there was clear

requirement and a consequent obligation that no criminal trial could proceed against the petitioner in view of the fact that no sanction under Section 19 against him had ever been obtained and, therefore, no charge could be framed against him. Moreover, there was no sanction under Section 197 Cr./P.C. available on record against any one, in any case the entire narrative of section 13 having completely changed, it was imperative on part of learned trial Court to follow the dictum of the following judgments:-

I. T. Baray Vs. Nenry A.H. Hoe- (1983) 1 SCC 177;

II. Nemi Chand Vs. State of Rajastjhan-11(2016) CCR 15 (SC), MANU/SC/0506/2016;

III. Ratan Lal Vs. State of Punjab-AIR (1965) SC 444;

IV. Sham Lal Vs.State (1968) Allahabad 392.

14. It is further submitted that the applicant therefore, is entitled to the benefit of rule of beneficial construction to the extent that beneficial construction requires that ex-post-facto law should be applied to reduce the rigorous sentence and applicability of the previous law of the same subject and such a law is not affected by Article 20(1) of the Constitution of India. Moreover, the aforesaid principle is based on a legal maxim, *"salus populi est suprema lex"* which means that welfare of the people is supreme for law and the aforesaid application of beneficial construction is inspired and guided by the principle of justice, equity and good conscience.

15. It is submitted that the guiding principles of interpretation are explicitly clear and provide a clear path that once there has been an amendment and change in the legal situation and specific to the present case where the provision of Section 13(1) (d) has been obliterated from the statute then in no circumstances would it be just and reasonable if the innocent applicant is subject criminal prosecution under Section 120B read with Section 13(2) r/w 13(1) (d) of Prevention of Corruption Act. Therefore, on this ground alone the impugned orders ought to be quashed and set aside because the learned trial Court has failed to appreciate that the amendment came into force from 26.7.2018, much prior to passing of the impugned orders dated 19.12.2018 and 23.1.2019. It would be pertinent to mention here that this Court in Sham Lal's case clearly opined that with the amendment of the existing law, the previous law would be rendered inchoate and criminal prosecution for the previous law would be unjustified and unreasonable. Moreover, in view of the fact that if a person could not be charged for the amended law as far as the allegation of criminal misconduct is taken into consideration, then he ought not be tried or convicted for the previous law which has been removed, same is also the intent of the legislature.

16. On the other hand, learned counsel for the CBI has opposed the prayer for quashing of the impugned orders passed by the trial Court and has submitted that as the charges have already been framed against the applicant and the trial is in progress, this Court may refrain from interfering in the present 482 Cr.P.C. application for quashing of the impugned orders as the allegations

levelled in the FIR and charge sheet has to be tested during the course of trial and because of the act of the applicant and co-accused persons, there has been a huge financial loss to the State Exhequer to the tune of several Crores of rupees. He further submitted that during the course of investigation by the CBI, the applicant, the then Director General, Medical Education (now retired), informed in the said meeting about the nomination of NCCF (a Central Government Agency) for conducting tele-medicine project for DGME, in the light of Government Order dated 12.7.2008 of Government of Uttar Pradesh. Prior to the decision taken by the Executive Committee of NRHM, Prashant Saxena, Director of M/s. Aanjaneya Business India Pvt. Ltd., Lucknow vide his letter dated 24.2.2009 addressed to the Branch Manager, NCCF, Lucknow furnished preliminary cost analysis estimates worth Rs.81.39 Crores for tele-medicine project at 14 Medical Colleges and 74 District Hospitals of U.P. and it is also proposed to create Networking Hub and Video Conferencing for DGME and main Hub at SGPGI, Lucknow.

17. He next argued that in the letter dated 24.2.2009, M/s. Aanjaneya Business India Pvt. Ltd. had mentioned the deliberations of the discussions already held with the applicant Dr. M.C.Sharma, DGME and Training Lucknow, which shows that it was pre-decided on the part of the applicant to dishonestly get the execution of the Tele-medicine project through M/s. Aanjaneya Business India Pvt. Ltd., Lucknow. The investigation has revealed that on the very same day, the aforesaid proposal with slight modification was forwarded to the applicant, the then Director General Medical Education vide letter dated 24.2.2009 purportedly issued under the signature of one P.D.Sharma, the then In-charge Branch Manager, NCCF, Lucknow. However,, P.D.Sharma denied his signature on the said proposal. Further, the signature which establishes that the signature in the proposal was a forged one. DGME further forwarded the above referred proposal to the office of Secretary, ME along with a covering letter No.1149 dated 24.2.2009. The DGME being the executive agency for the project and acting as a Head of the Department did not examine the proposal of NCCF with market prevailing rates and the feasibility of the proposal while referring the approved PIP and dishonestly with criminal intent to extend undue favour to M/s. Aanjaneya Business India Pvt. Ltd. forwarded the bogus proposal of NCCF to the Medical Education Secretariat flouting the existing NRHM Rules and Guidelines wherein only the Executive Committee of NRHM was competent to approve the funds. The applicant was already known to Prashant Saxena as he had been doing for various State funded constructions projects for DGME and similarly, Arun Kumar and Prashant Saxena were in close association as they had common business interest in another company, namely, M/s. Firestone Builders Pvt. Ltd., in which Dr. Indu Saxena wife of Arun Kumar Saxena is the Managing Director. All the State funded projects awarded to Prashant Saxena through NCCF were got executed by him through M/s. Firestone Builders, Lucknow. It was also proposed for release of the proposed funds of Rs.9 Crores in favour of DGME from the accounts of DGMH, Lucknow, so that the same could be released for the nominated agency, i.e. NCCF. He submitted that after thorough investigation, CBI has submitted charge

sheet against the applicant and co-accused persons who are facing trial.

18. Learned counsel for the CBI has further submitted that the trial Court has dealt with giving cogent and sound reasons rejecting the arguments of the learned counsel for the applicant with respect to the framing of charge under Section 13(1) (d) of the P.C. Act referring to the provision of Section 6 of the General Clauses Act, 1897.

19. So far as applicant-Smt. Aparna Saxena is concerned, it has been argued by learned counsel for the applicant that she is a housewife who got married to co-accused Prashant Saxena in the year 1989 and as on date the she has a young daughter, namely, Sukriti aged about 3 years. The applicant's husband incorporated a Company for his own business, namely, M/s. Aanjaneya Business (India) Pvt. Ltd. in which the applicant was introduced as a Director for fulfilling the paperwork. The applicant has never been working full time or participating in the day-to-day affairs of said Company. The applicant has never been involved and has not been subjected in any criminal case till date except the criminal case in question.

20. It was further argued that the allegation levelled against the applicant Smt. Arpana Saxena is limited to the extent as has been mentioned in the charge sheet that the applicant purportedly signed the MOU dated 28.10.2009 and a cheque for Rs.10 lacs. Admittedly, there is no allegation whatsoever that the applicant played any active role in the business operation or that she was in connivance with any other co-accused. In addition to the admitted position and limited allegations of the Investigating Officer, key prosecution witnesses, namely, Pankaj Kapoor (PW-50) and Hemant Raja (PW-51) in their statements under Section 161 Cr.P.C. have themselves exonerated the applicant Smt. Aparna Saxena as Pankaj Kapoor in his statement dated 23.12.2014 has stated that although the applicant signed the cheque for Rs. 10 lacs, but she was never involved in the matter and that the only point of contact was Mr. Prashant Saxena. Similarly, Hemant Raja who was the Chartered Accountant for NCCF, expressly mentioned in his statement recorded u/s 161 Cr.P.C. on 22.12.2014 that although MOU dated 28.10.2009 was signed by the applicant, but she was not actively working for the Company. The said witness had not seen her attending any meeting, visiting any of the offices and managing any of the work related to project. He further stated that the applicant signed Rs.10 lacs cheque as an advance payment only in the absence of her husband who used to otherwise handle all the business dealing. He submitted that there appears to be no evidence against the applicant to show that there was any criminal conspiracy between the applicant and her husband Prashant Saxena in the alleged crime, hence, no offence under Section 420, or 420 read with 120-B I.P.C. or 471 read with 120-B I.P.C. or 120-B read with 13(2) read with 13(1) (d) of P.C. Act is made out against the applicant. Moreover, there is no strong suspicion against the applicant and she has been arrayed as an accused only on account of being the Director of the Company and wife of co-accued Prashant Saxena. In support of his argument, learned counsel for the applicant has placed reliance upon the judgment of the Apex Court in the case of ***Shreya Jha Vs.***

CBI, ILR (2007) Supp. (2) Delhi 19 and relied upon paragraph nos.7,8,9, 11 & 12 of the said judgment, which is quoted here-in-below:-

"7. The question is regarding the charge under Section 120-B of the IPC. To draw a case under the said section, it must be shown that there was an agreement, link, nexus between the petitioner and the accused. The chargesheet filed by CBI mentions the petitioner Ms. Shreya Jha but once where it states as follows:-

Investigation has revealed that in furtherance of the said criminal conspiracy accused Shreya Jha d/o V.K. Jha r/o B-180, Sector-31, NOIDA, prop. of M/s Anamika Enterprises and M/s Nupur Enterprises aided and abetted the commission of offences as an amount of Rs. 5, 50,000/- and Rs. 39, 95,000/- were transferred in the respective accounts of the above said firm maintained at Canara Bank, Chandni Chowk and Punjab and Sind Bank, Safdarjung Enclave, New Delhi from the said account of M/s Juniper Jewellery Pvt. Ltd. In this way, Shreya Jha was found involved in siphoning of the money at the instance of Smt. Nandita Bakshi and V.K. Jha dishonestly.

8. In Sanjiv Kumar v. State of Himachal Pradesh , the Supreme Court, speaking about what is the essential nature of conspiracy held that the offence under Section 120-B is an agreement between the parties to do a particular act. Association or relation to lead a conspiracy is not enough to establish the intention. It is true that consipracies are products of stealth, and seldom evidenced by direct material; largely it is to be inferred on the circumstances, and attendant facts. Yet, there should be some bedrock facts which can lead to such inferences, even at the charge framing stage. Thus, the sine qua non for a charge to be sustainable under Section 120-B, IPC is the agreement between the parties. Such an essential ingredient is singularly absent; the CBI has been unable to show anything in that regard. I find no infirmity with that approach.

9. The next question is whether the charges framed under Sections 409, 419, 420, 467, 468 and 471 of the Indian Penal Code, 1860 and Sections 13(2) read with 13(1)(d) of the Prevention of Corruption Act, 1988 against the petitioner are sustainable.

11. A fundamental principle of criminal jurisprudence is 'actus non facit reum nisi means sit rea'. In the present case, the respondent CBI has been unable to show a clear case against the petitioner. The circumstances pitted against her are based entirely on her being the daughter of one of the main accused in the alleged fraud, and fraudulent deception, which led to loss to the bank. The role assigned, or attribuited to the petitioner, i.e opening bank accounts which were used by her father to siphon off and misappropriate funds, after opening proprietorship concerns, which were always used by her father, are insufficient to draw an inference of existence of a grave suspicion of such nature as to warrant charges against her. In fact, the chargesheet merely states that the petitioner "at the instance of' Smt. Nandita Bakshi and V.K. Jha was found involved in siphoning of the money." No other link or attendant circumstance, as far as the petitioner's role is shown, or alleged in the chargesheet.

12. In the light of aforementioned observations, no

substantiating prima facie case was made out against the petitioner, at least no prima facie case that about the grave suspicion of her involvement was made out. The trial court could not have proceeded to charge the petitioner as it did, on the available materials, and the allegations levelled in the charge sheet. Its order therefore, cannot be sustained."

21. Learned counsel for the CBI has vehemently rebutted the arguments of learned counsel with respect to the applicant-Smt. Aparna Saxena and has submitted that during the course of investigation, it has been established that M/s. Aanjaneya Business (India) Pvt. Ltd. is the beneficiary Company through its Director Prashant Saxena, Smt. Aparna Saxena and the Company through its Directors was found involved in criminal conspiracy, cheating, use of forged documents in order to get undue work of tele-medicine project wherein huge number of electronic equipments were purchased and installed at exorbitant prices causing huge financial loss to the Government Exchequer, as such involvement of the applicant is also established and there are sufficient evidence both oral and documentary on record to prove that the selection of M/s. Aanjaneya Business (India) Pvt. Ltd.was pre-decided by virtue of criminal conspiracy and DGME being the Head of the Department and member of Executive Committee of NRHM instead of getting the proposal approved in NRHM or going for open tender for purchase and installation of equipments straight away gave the work dishonestly in the name of NCCF and even NCCF awarded the project to M/s. Aanjaneya Business (India) Pvt. Ltd. on the basis of forged and bogus quotation process and the motive behind this was conspiracy to earn undue profit margin by way of installing equipment at exorbitant prices avoiding all the financial guidelines and procurement rules. Hence, the accused persons including the applicant conspired with each other and caused huge financial loss to the Government. He further submitted that the investigation revealed that the applicant Smt. Aparna Saxena, wife of Prashant Saxena and one of the Directors of M/s. Aanjaneya Business (India) Pvt. Ltd., who signed the main MoU dated 28.10.2009 with NCCF on behalf of the Company and also signed a cheque of Rs.10 lacs towards advance payment to sub contract the work of M/s. CSPL is also the beneficiary of the wrongful gain, hence, submitted that the trial court has rightly framed charges against the applicant and her trial is also warranted.

22. Having considered the submissions advanced by learned counsel for the parties and perused the material brought on record.

23. After having examined the submissions advanced by learned counsel for the parties and perused the material brought record with respect to the applicant-Dr. M.C.Sharma is concerned, it is apparent that the C.B.I. during the course of investigation has found his involvement in the present case along with other co-accused persons, namely, Prashant Saxena, who is Director, M/s. Aanjaneya Business India Pvt. Ltd. and Arun Kumar who had close association with the co-accused Prashant Saxena had common business interest through another Company, i.e., M/s. Firestone Builder Pvt. Ltd. with whom the applicant was known to Prashant Saxena as Prashant Saxena

had been doing various State funded construction project for DGME and all the State funded projects awarded to Prashant Saxena through NCCF were got executed by him through M/s. Firestone Builder Pvt. Ltd.

24. The matter relates to NRHM Scam which runs in several Crores and State Exchequer has been put to loss because of the collusion of the applicant along with the co-accused persons, hence, involvement of the applicant in the present case at this stage cannot be doubted.

25. The contention of the learned counsel for the applicant that the charges which have been framed against the applicant by the trial Court is contrary to what has been stated by the witnesses under Section 161 Cr.P.C. and on that count the impugned order framing charge be set aside, is not sustainable because if there is any error in the charge framed by the trial Court the same cannot be amended and altered at any stage of the trial considering prosecution evidence led during the course of the trial.Thus, it would not be proper for this Court to interfere in the present 482 Cr.P.C. application as the allegations made in the FIR and the evidence collected during the course of investigation by the C.B.I. against the applicant, the prosecution has to be given full opportunity to prove its case by adducing evidence against the applicant and co-accused persons .

26. The Apex Court in catena of decisions has summarized the principles in respect of framing of charge or discharge of accused, which are as follows:-

27. The Apex court in case of ***State of Karnataka v. L. Muniswamy (1977 (2) SCC 699)*** has held that at the stage of framing the charge the court has to apply its mind to the question whether or not there is any ground for presuming the commission of offence by the accused. The Court has to see while considering the question of framing the charge as to whether the material brought on record could reasonably connect the accused with the trial. Nothing more is required to be inquired into.

28. In case of ***Supdt. & Remembrancer Of Legal vs Anil Kumar Bhunja & Ors 1979 SCC (4) 274*** the Apex court has observed that it may be remembered that the case was at the stage of framing charges; the prosecution evidence had not yet commenced. The Magistrate had therefore, to consider the above question on a general consideration of the materials placed before him by the investigating police officer. At this stage, as was pointed out by this Court in State of Bihar v. Ramesh Singh, the truth, veracity and effect of the evidence which the prosecutor proposes to adduce are not to be meticulously judged. The standard of test, proof and judgment which is to be applied finally before finding the accused guilty or otherwise, is not exactly to be applied at the stage of Section 227 or 228 of the Code of Criminal Procedure, 1973. At this stage, even a very strong suspicion founded upon materials before the Magistrate, which leads him to form a presumptive opinion as the existence of the factual ingredients constituting the offence alleged; may justify the framing of charge against the accused in respect of the commission of the offence.

29. In State of ***M.P. Vs. Mohanlal Soni, (2000) 6 SCC 338,*** the Hon'ble

Supreme court held in paragraph 7 as under:

" 7.The crystallised judicial view is that at the stage of framing charge, the court has to prima facie consider whether there is sufficient ground for proceeding against the accused. The court is not required to appreciate evidence to conclude whether the materials produced are sufficient or not for convicting the accused."

30. In case of ***Kanti Bhadra Shah And Anr vs State Of West Bengal 2000 (1) SCC 722*** the Apex court has held that if the trial court decides to frame a charge there is no legal requirement that he should pass an order specifying the reasons as to why he opts to do so. Framing of charge itself is prima facie order that the trial judge has formed the opinion, upon consideration of the police report and other documents and after hearing both sides, that there is ground for presuming that the accused has committed the offence concerned.

31. In ***Smt. Om Wati & Anr vs State, Through Delhi Admn. & Ors 2001 CR.LJ 1723,*** the Apex court has observed that we would again remind the High Courts of their statutory obligation to not to interfere at the initial stage of framing the charges merely on hypothesis, imagination and far-fetched reasons which in law amount to interdicting the trial against the accused persons. Unscrupulous litigants should be discouraged from protracting the trial and preventing culmination of the criminal cases by having resort to uncalled for and unjustified litigation under the cloak of technicalities of law.

32. The Apex Court in the case of ***Palwinder Singh Vs. Balvinder Singh; 2009 (3) SCC 850*** has held that the jurisdiction of Sessions Judge at the time of discharge is very limited. In the said judgment it has been held that charges can also be framed on the basis of strong suspicion. Marshaling and appreciation of evidence is not in the domain of the court at that point of time.

33. Hon'ble Supreme Court in ***Sajjan Kumar Vs. Central Bureau of Investigation, (2010) 9 SCC 368,*** held as under:

"At the stage of framing of charge under section 228 Cr.P.C. or while considering the discharge petition filed under Section 227, it is not for the Magistrate or the Judge concerned to analyse all the materials including pros and cons, reliability or acceptability, etc. It is at the trial, the Judge concerned has to appreciate their evidentiary value, credibility or otherwise of the statement, veracity of various documents and is free to take a decision one way or the other."

34. The Apex Court in catena of decisions has summarized the principles in respect of framing of charge or discharge of accused and in the case of **Sheoraj Singh Ahlawat and others Vs. State of U.P. and another, (2013) 11 SCC 476** has held as under:-

"While framing charges, court is required to evaluate materials and documents on record to decide whether facts emerging therefrom taken at their face value would disclose existence of ingredients constituting the alleged offence. At this stage, the court is not required to go deep into probative value of materials on record. It needs to

*evaluate whether there is a ground for presuming that accused had committed offence. But it should not evaluate sufficiency of evidence to convict accused. Even if, there is a grave suspicion against the accused and it is not properly explained or court feels that accused might have committed offence, then framing of charge against the accused is justified. It is only for conviction of accused that materials must indicate that accused had committed offence but for framing of charges if materials indicate that accused might have committed offence, then framing of charge is proper. Materials brought on by prosecution must be believed to be true and their probative value cannot be decided at this stage. The accused entitled to urge his contentions only on materials submitted by prosecution. He is not entitled to produce any material at this stage and the court is not required to consider any such material, if submitted. Whether the prima facie case made out depends upon fact and circumstances of each case. If two views are possible and materials indicate mere suspicion, not being grave suspicion, against accused then he may be discharged. The court has to consider broad probabilities of case, total effect of evidence and documents produced before it. The court should not act as mouthpiece of prosecutio*n and it is impermissible to have roving enquiry at the stage of framing of charges."

35. And recently on 01.05.2019 in ***State By Karnataka Lokayukta Vs. M. R. Hiremath, 2019 SCC*** online SC 734 has reiterated the said principles holding that at this stage, considering an application for discharge, the Court must proceed on the assumption that the material which has been brought on record by the prosecution is true and evaluate the material in order to determine whether the facts emerging from the material, taken on its face value, disclose the existence of the ingredients necessary to constitute the offence.

In the instant case it cannot be said that no offence has been disclosed against the applicant which may reflect that his trial is unwarranted. The trial court on perusal of the material collected during the course of investigation, came to the conclusion that prima facie a case is made out against the applicant for framing of the charge has rightly rejected.

36. The proposition of law with respect to the cases of the Apex Court relied upon by the applicant with respect to Dr. M.C.Sharma is concerned, is not all disputed. But from perusal of the said case law, it is quite apparent that the Apex Court in the said cases also laid down the proposal that it is to be determined a prima facie case would naturally depends upon the facts of each case and it is difficult to lay down role of universal application where material placed before the Court discloses grave suspicion against the accused which has not been properly explained, the Court would be fully justified in framing charge and proceeding with the trial.

37. In view of the foregoing discussions, so far as the applicant **Dr. M.C.Sharma** is concerned, I am of the opinion that the impugned orders are based upon relevant consideration and supported by cogent reasons, the same does not suffer from any irregularity, illegality or jurisdictional error, hence no interference is required by this Court. The

prayer for quashing the same is hereby refused.

38. The 482 Cr.P.C. application with respect to applicant **Dr. M.C. Sharma** is accordingly, **dismissed.** The interim order, if any, stands vacated.

39. As regards applicant-**Smt. Aparna Saxena** is concerned, it is not disputed by the CBI that she is the wife of co-accused Prashant Saxena and sleeping director of M/s. Aanjaneya Business (India) Pvt. Ltd. and from the statements of the prosecution witnesses, namely, Pankaj Kapoor (PW-50) and Hemant Rja (PW-51) it appears that no doubt the applicant had signed the MOU and also issued a cheque of Rs.10 lacs as advancepayment in absence of her husband, but it cannot be said she conspired with her husband and other co-accused persons for committing the crime in question putting a loss to the State Exchequer. There appears to be no evidence against the applicant Smt. Aparna Saxena collected during the course of investigation which may show that she at any point of time was conspired with her husband along with other co-accused persons for being involved in the present offence.

40. The case law which has been relied upon by the learned counsel for the applicant in the case of ***Shreya Jha (supra),*** the case of the applicant Smt. Aparna Saxena is squarely covered in view of paragraph nos.11 and 12 of the said judgement. Hence, in view of the same, the impugned order dated 19.12.2018 rejecting discharge application and the order dated 23.1.2019 passed by the Court of Special Judge, CBI, Ghaziabad District Court framing charge are hereby set aside to the extent of applicant **Smt. Arpana Saxena.**

41. The 482 Cr.P.C. application with respect to applicant **Smt. Aparna Saxena** stands **allowed.**

(2019)12 ILR A115

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.09.2019

BEFORE
THE HON'BLE DINESH KUMAR SINGH-I, J.

Crl. Misc. Application (U/S 482 Cr. P.C.) No. 8541 of 2013
connected with
Crl. Misc. Application (U/S 482 Cr. P.C.) 8558 of 2013

Dr. Mohd. Azam Hasin ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Bhanu Bhushan Jauhari, Meenakshi Chauhan

Counsel for the Opposite Parties:
A.G.A., Sri S.P.S. Chauhan

A. Criminal Law - Indian Penal Code, 1860 - Section - 304 A -Criminal Liability of Doctor - the standard of negligence required to be proved should be so high as can be described as "gross negligence" or "recklessness"- It is not merely lack of necessary care, attention or skill which would make him liable criminally- Where a patient's death results merely from error of judgment or an accident, no criminal liability should be attached to it- Mere inadvertence or some degree of want of adequate care and caution might create civil liability but would not suffice to hold him criminally liable. The act certainly shows the negligence on the part of the doctor,

but the same would not qualify to be called as "criminal negligence" as it may at the most be treated to be negligence for which civil liability would lie. It may also not be ruled out that the accused doctor was having overconfidence that he would be able to handle the situation himself, but it turned out to be otherwise and it can also be inferred that it may have resulted into accidental death of the deceased.

Application u/s 482 Cr.P.C allowed. (E-3)

List of cases cited: -

1. Martin F. D'Souza v. Mohd Ishfaq, (2009)3 SCC 1

2. Dr. Suresh Gupta v. Govt. of NCT of Delhi and Another, AIR 2004 SC 4091

3. A.S.V. Narayanan Rao v. Ratnamala and Another

4. Kusum Sharma and Others v. Batra Hospital and Medical Research Centre and Others, (2010)3 SCC 480

5. R.v. Adomako,1994(3) All E. R.79

6. Jacob Mathew v. State of Punjab and Another, (2005)6 SCC 1

(Delivered by Hon'ble Dinesh Kumar Singh-I, J.)

Since both these applications relate to the same crime number, hence, they are being taken up together.

1. Heard the arguments advanced by Shri Bhanu Bhushan Jauhari, learned counsel appearing on behalf of the applicants and in opposition, Shri S.P.S. Chauhan, learned counsel, is appearing on behalf of opposite party no. 2 and Shri G.P. Singh, learned Additional Government Advocate, is appearing on behalf of the State of Uttar Pradesh. Perused the record.

2. By way of instant applications under Section 482 of the Code of Criminal Procedure, 1973 (for short "Code"), prayer has been made on behalf of the accused-applicants to quash the entire proceedings of Criminal Case No. 5426 of 2012 (State v. Dr. Adil and others), arising out of Case Crime No. 506 of 2012, under Section 304A of the Indian Penal Code, 1860 (for short "I.P.C."), Police Station - Civil Lines, District - Aligarh, pending in the court of Additional Chief Judcial Magistrate, Court No. 3, Aligarh as well as the summoning order dated 09.10.2012 passed by Chief Judicial Magistrate, Aligarh.

3. In order to appreciate the arguments advanced by the respective learned counsel, it would be appropriate to give in a nutshell facts of the case, which are as follows :

The opposite party no. 2/informant had lodged an F.I.R. at Police Station - Civil Lines, District - Aligarh, stating therein that his brother Syed Parvez Ali, who was working in the Land and Garden Department of Aligarh Muslim University (for short "A.M.U.") on the post of Lower Division Clerk (L.D.C.), remained admitted for about 23 days in Special Ward No. 28 and had a tube installed in his chest. He was to be discharged on 16.06.2012 as he had become quite fit and was also in walking condition. His treatment was being given under the supervision of Dr. Hanif Beg and few other junior doctors also used to come to see him. On 16.06.2012 at about 09.00 A.M., the accused-applicant Dr. Adil Mahmud Ali @ Dr. Ali Adil Mahmud (hereinafter referred to as "Dr. Adil") along with a nurse came there and asked

his mother and sister to go out of the room and when it was asked as to why they should got out, in front of them, the said doctor started cutting the tube which was installed in the chest of the patient with the assistance of a blade and as soon as the same was cut, blood oozed out profusely. The said doctor, with a lot of pressure, pressed the chest of the patient, as a result of which, blood started coming out of mouth of his brother and within 20 minutes' time, the whole room including the bed sheet, etc. got soaked in blood. The sister of opposite party no. 2, namely, Ashafiya opposed this act of the doctor, at which the doctor fled away from there. Soon thereafter, the persons taking care of the patient rushed to the emergency in order to give information and after that, one or two persons came there running and tried to stop the blood. Thereafter, the doctors started a drama for about one hour to revive the patient and ultimately, pronounced him dead. Thus, it was prayed that a case under Section 302 of I.P.C. be registered against the accused doctor.

4. On the said information, a case was registered against the accused in aforesaid case crime number, under the aforesaid section. After investigating into the matter, the police submitted charge-sheet against the accused-applicants.

5. The main argument advanced by learned counsel for the applicants is that there was no role assigned to the accused-applicant Dr. Mohd. Azam Hasin (hereinafter referred to as "Dr. Hasin") and yet, he has been charge-sheeted by the police. As regards the other accused-applicant Dr. Adil, it was argued that he had made his best effort to take care of the patient/deceased, but he could not succeed in his effort, which resulted into the death of the deceased. At the most, he could be subjected to only civil liability and not criminal liability. With respect to accused-applicant Dr. Hasin, it was further argued that he could not be held accountable for the said death vicariously, as there is no such concept in criminal case of imposing liability vicariously. The police has submitted charge-sheet in routine manner, without making thorough investigation and therefore, the prosecution of the accused-applicant should be quashed, the same being malicious.

6. Attention of the Court was drawn by learned counsel for the applicants towards the statement of the eye-witnesses of this case, namely, Ashafiya and Aisha Begum, sister and wife, respectively of opposite party no. 2, which are annexed at page nos. 42 and 43 of the paper book. Both these witnesses, who were taking care of the patient/deceased in the hospital, had submitted their affidavits before the Investigating Officer (hereinafter referred to as "I.O."), which was believed by the I.O. and the averments made therein were made part of the case diary by him. In those statements by both the witnesses the prosecution version as given in the F.I.R. has been corroborated and it was argued that the statements of the said witnesses would actually be not treated to have been recorded under Section 161 of the Code as they were only the affidavits given in respect of the present case. Attention was also drawn towards the report of the Inquiry Committee, which was constituted by the Vice-Chancellor (for short "V.C.") of A.M.U. vide letter dated 18.06.2012, in which the following observations were made by the Committee :

Observations of the Inquiry Committee

1. Such procedures (in this case ICTD) should have been performed in minor OT/dressing room available in general ward instead of a private ward.

2. It is preferable to undertake such steps in presence of senior colleague, nursing/paramedical staff.

3. Before performing such procedures, the availability of necessary life saving drugs or equipments should be ensured to face any such eventuality.

4. The attending Doctors should keep in mind all consequences, including the rarest one and should explain the same to the patient/his attendant.

7. On the basis of this report, it was argued that in the said report it was mentioned that in a case of rare complication, it would be unfair on the part of the junior doctor (Dr. Adil) to expect of him to think of such an uncommon procedural complication. This would suggest that the accused-applicant Dr. Adil was a junior doctor and he could not be, therefore, held liable for any intentional negligence, which resulted into the death of the deceased.

8. Further attention of the Court was drawn to the order dated 23.11.2012 passed by the Uttar Pradesh Medical Council to the following effect:

Order

The Ethical Committee observed that the causes of death as per post mortem report is Septicemia. Removal of ICD can not be held as cause of death. Bleeding can occur in few case from the site of ICD after removal which is not under control. Dr. Ali Adil has also done ATLS. He did his best to save the patient life under the circumstances.

The Ethical Committee is the opinion that Dr. Ali Adil can not be held guilty of medical negligence.

9. Pointing out the above order, it was argued that even the Ethical Committee had tendered its opinion that Dr. Adil could not be held guilty of medical negligence and in view of that report, the prosecution of the said doctor needs to be quashed.

10. On the other hand, learned counsel for opposite party no. 2 vehemently defended the charge-sheet as well as the criminal prosecution of the applicants, citing the same report of the Inquiry Committee, which have been quoted above, that it clearly revealed that there was negligence on the part of the said doctor (Dr. Adil) because he conducted the procedure of Inter-coastal chest drain (for short "I.C.T.D.") without taking proper care, in a private ward, in the absence of any nurse/para-medical staff and without there being any life-saving drugs with him to face any such eventuality. He ought to have kept in mind the consequences in such kind of cases and should have explained them to the attendants of the patient. It was, therefore, through and through, a case of criminal negligence, which would be covered for offence under Section 304A of I.P.C.

11. As regards the other accused-applicant Dr. Hasin, it was vehemently argued by learned counsel that it was Dr. Hasin under whose supervision, the patient/deceased was being treated and it was he who had sent the junior doctor (Dr. Adil) to remove the said tube from

the chest of the patient/deceased and therefore, it cannot be denied that even he was rightly charge-sheeted for criminal negligence.

12. In the affidavit filed in support of this application, it was mentioned by the applicants that the patient/deceased Syed Parvez Ali was admitted on 24.05.2012 in J.N. Medical Hospital in a case of road accident with blood trauma chest with right pneumothorax with fracture of multiple ribs on the right side and right clavicle. At the time of admission, he was in respiratory distress and was diagnosed clinically as a patient of right side pneumothorax and I.C.T.D. He was placed under the supervision of senior resident on duty. The patient's condition had stabilized and was conservatively managed on the advice of Professor M.H. Beg. The first-year junior resident in the Department of General Surgery Dr. Adil Mahmood Ali Jr.-I (accused-applicant) was taking care of the patient and the other accused (doctor) Dr. Hasin was also a member of the said team, which was taking care of the said patient. The patient had radiologically improved on 15.06.2012. On 16.06.2012, he was examined by him (Dr. Hasin) and Prof. M.H. Beg and it was declared that clinically and radiologically, he had improved and his I.C.T.D. should be removed. Dr. Adil had to perform the said job and accordingly, he removed the same on 16.06.2012. He cut the suture attached to the skin with a sterile surgical blade and pulled out the tube. Thereafter, some complication developed and Dr. Adil did his best, but the life of the patient could not be saved and he was declared dead by the R.O.C. Anesthesia at 10.30 A.M. on 16.06.2012. After the death of the patient, a first information report was lodged by his brother Zakir Ali, opposite party no. 2 against Dr. Adil Mahmud Ali @ Dr. Ali Adil Mahmud alone. There was no allegation against the accused-applicant Dr. Hasin.

13. After investigation, the police submitted charge-sheet in the said case under Section 304A of I.P.C. against both the applicants and cognizance has been taken by learned Chief Judicial Magistrate, Aligarh. The patient had died due to removal of chest tube, as per first information report dated 16.06.2012, while the cause of death has been mentioned to be septicemic shock in the post-mortem report, as such, there is major material contradiction between the first information report and post-mortem report, which is annexed as Annexure 5. The patient died during treatment in A.M.U., as such, the V.C. of A.M.U. vide Office Memorandum dated 17.06.2012, ordered an inquiry into the whole matter of the demise of Syed Parvez Ali, who was admitted in Ward No. 28 of the J.N. Medical College Hospital. During inquiry, opposite party no. 2, the mother and the sister of patient/deceased were also present with him on 16.06.2012 and were examined by the Inquiry Committee. In the Inquiry Committee report, it has been mentioned that such death occurs in very rare cases and it should not be expected from a junior doctor to think of such an uncommon procedural complication. No adverse finding has been given against the accused-applicant Dr. Hasin. The I.O. had requested the S.P. City, Aligarh to request the C.M.O., Aligarh to submit a report regarding the aforesaid incident and accordingly, the S.S.P., Aligarh had sent a letter to C.M.O., Aligarh on 19.07.2012 for constituting a panel of doctors for submitting its report on the technical

aspect of the matter. In reply to the said letter, the C.M.O. sent a letter dated 21.07.2012, saying that specialized doctors were not available and that the matter had been inquired by the committee of experts, which was constituted by the V.C. of A.M.U. and the said reply was accordingly sent to the I.O. from the office of S.S.P., Aligarh on 02.08.2012, copy of which is Annexure 7.

14. The I.O. has recorded the statement of Ashfiya and Aisha Begum under Section 161 of the Code, but none of them has stated anything against the accused Dr. Hasin. The I.O. has submitted charge-sheet without considering the report of the Committee constituted by the V.C. of A.M.U. as well as the statement of the eye-witnesses and has included his name in the charge-sheet. The learned C.J.M. has passed summoning order and has failed to consider the law laid down by Hon'ble Apex Court in ***Martin F. D'Souza v. Mohd Ishfaq1*** which says that no court, either consumer forum or criminal court, shall issue any process against a doctor before referring the matter to a competent doctor or a committee of doctors specialized in the field, relating to which the medical negligence is attributed. In this case, the C.M.O. has not constituted any committee of experts and the Inquiry Committee constituted by the order of V.C. of A.M.U. has not said anywhere that the accused Dr. Hasin could be held liable for criminal negligence, therefore, the entire proceedings against the accused needs to be quashed.

15. Further, it is mentioned that for fixing criminal liability on a doctor or a surgeon, the standard of negligence required to be proved should be so high as can be described as "gross negligence" or "recklessness". Merely, lack of necessary care, attention or skill or mere inadequacy of some degree or want of adequate care and caution would not suffice to hold him criminally liable. Reliance is also placed upon the judgment of Hon'ble Apex Court in ***Dr. Suresh Gupta v. Govt. of NCT of Delhi and Another2*** in view of which, the present proceedings need to be quashed.

16. In rebuttal, from the side of opposite party no. 2, through filing a counter affidavit, it is stated that the patient/deceased was regularly being given treatment under the supervision of Prof. M.H. Beg and he had clinically and radiologically improved. The senior doctors had advised the patient to be discharged after removal of I.C.T.D. under their supervision, but it is clear from the Inquiry Report dated 17.06.2012 that the accused doctor (Dr. Adil) removed the I.C.T.D. of the patient without consulting the other supervisors, in private ward itself and did not take the patient to even minor operation theatre (for short "O.T.") for the same nor did he adopt any procedure for removal of the same and without adequate usage of any emergency equipments/life-saving drugs. The said act was committed by Dr. Adil taking a big risk, without consulting the superiors. The mother and the sister of the deceased were also present at the time of this occurrence and had seen the occurrence with their own eyes and made their best effort to stop Dr. Adil from removing the I.C.T.D. without any assistance and also made a hue and cry for assistance, but all in vain. Dr. Adil did not stop until the patient died. Although the accused Dr. Hasin was not present at that time because of which he was not named in the F.I.R., but during investigation, he

was also found to be involved rightly by the I.O. Further, it is mentioned that the S.S.P., Aligarh vide letter dated 19.07.2012, had requested C.M.O., Aligarh to constitute a panel of doctors for submitting its report on the technical aspect of the matter, but because the accused-applicants were in collusion with C.M.O., Aligarh, the said request was refused and hence, no technical aspect of the matter is found on record. Dr. Adil did not adopt the adequate procedure for removal of the I.C.T.D. of the patient/deceased, which clearly suggests that there was gross negligence on his part, which resulted into the death of the patient/deceased.

17. After having heard the arguments advanced by learned counsel for both the parties as well as having perused the record of the case, I find that it is undisputed that the patient/deceased was got admitted in the said hospital - J.N. Medical College Hospital on 24.05.2012 in a serious condition as he had met with road accident, but after having been treated for about 20 odd days, he had improved a lot and was about to be discharged after removal of I.C.T.D. The said removal of I.C.T.D. was conducted in this case by Dr. Adil (accused-applicant), who is stated to have removed the same without taking the patient to the O.T. and without taking proper care, which resulted into profuse bleeding of the patient and ultimately, into his death. The two eye-witnesses, namely, the sister and the mother of the deceased have deposed that the accused-applicant Dr. Adil had cut the tube installed in the chest of the deceased in a very rough manner, despite their opposition and in front of them, when the patient started bleeding profusely, the doctor fled away from there and by the time these witnesses rushed to the emergency to call someone to take care of the patient, he died. It also emerges from the record that an Inquiry Report has come on record, which has been submitted by the committee constituted by the V.C. of the said institution (A.M.U.), which has given above-mentioned opinion, which clearly shows that Dr. Adil should have performed the said act/operation in the O.T./dressing room instead of private ward and that the same should have been done in the presence of a senior colleague/nurse/para-medical staff and at that time, he ought to have made adequate usage of life-saving drugs or equipments, which could be needed to meet any such eventuality and the risks involved ought to have been intimated to the attendants of the patient in advance, but all this was not done in this case, which clearly suggests the careless approach/negligence on the part of the said doctor, who went about this job in a very lackadaisical manner, which has resulted into the death of the deceased.

18. From the side of the accused-applicants, reliance has been placed upon the judgment of Hon'ble Apex Court in ***Dr. Suresh Gupta's case (supra)***. In the said judgment, facts of the case were that a doctor (plastic surgeon) was facing charge under Section 304A of I.P.C. for causing death of his patient on 18.04.1994, who was operated by him for removal of his nasal deformity. The anaesthetist who was assisting the said surgeon in the operation was also made co-accused, but he was reported to have died pending trial. The appellant urged before the Magistrate that the medical evidence produced by the prosecution did

not make out any case against him to proceed with the trial, but the learned Magistrate decided to proceed against him, giving the following reasons in the impugned order dated 28.11.1998 :

"Post-mortem report is very categorical and very clear and it has been clearly mentioned therein that death was due to the complication arising out of the operation. That operation was conducted by both the accused persons. It is also clear from the material on record that the deceased was a young man of 38 years having no cardiac problem at all and because of the negligence of the doctors while conducting minor operation for removing nasal deformity, gave incision at wrong part due to that blood seeped into the respiratory passage and because of that patient immediately collapsed and died and it was also attempted to show by the accused persons that he was alive at that time and was taken to Ganga Ram Hospital for further medical attention.

19. It was clear from record that the patient had already died in the clinic of the accused and therefore, there was sufficient ground on record to make out prima facie a case against both the accused under Section 304A of I.P.C. The matter came up before the High Court in proceedings under Section 482 of the Code, which too refused to quash the criminal proceedings, although it recorded that the Metropolitan Magistrate was obviously wrong, in the absence of any medical opinion, in coming to a conclusion that the surgeon had given a cut at wrong place of the body of the patient at the time of operation leading to blood seeping into the respiratory passage and blocking it, resulting into his death. The High Court while refusing to quash the impugned order dated 01.04.2003 recorded its reasons as under :

*In the present case two doctors who conducted the post-mortem examination have taken an emphatic stand which they have reiterated even after the Special Medical Board opinion, that death in this case was due to''asphyxia resulting from blockage of respiratory passage by aspirated blood consequent upon surgically incised margin of nasal septum'. This indicates that adequate care was not taken to prevent seepage of blood down the respiratory passage which resulted in asphyxia. The opinion of the Special Medical Board is not free from ambiguity for the reasons already given. Such ambiguity ca*n be explained by the doctors concerned when they are examined during the trial.

20. Allowing the appeal and quashing the criminal proceedings against the accused, the Honb'le Apex Court held as follows :

The legal position is almost firmly established that where a patient dies due to the negligent medical treatment of the doctor, the doctor can be made liable in civil law for paying compensation and damages in tort and at the same time, if the degree of negligence is so gross and his act was so reckless as to endanger the life of the patient, he would also be made criminally liable for offence under Section 304-A IPC.

(Para 12)

For fixing criminal liability on a doctor or surgeon, the standard of negligence required to be proved should be so high as can be described as "gross

negligence" or "recklessness". It is not merely lack of necessary care, attention and skill. The decision of the House of Lords in R.v. Adomako [(1994) 3 All ER 79 (HL)] relied upon on behalf of the doctor elucidates the said legal position and contains the following observations:

"Thus a doctor cannot be held criminally responsible for patient's death unless his negligence or incompetence showed such disregard for life and safety of his patient as to amount to a crime against the State."

Thus, when a patient agrees to go for medical treatment or surgical operation, every careless act of the medical man cannot be termed as "criminal". It can be termed "criminal" only when the medical man exhibits a gross lack of competence or inaction and wanton indifference to his patient's safety and which is found to have arisen from gross ignorance or gross negligence. Where a patient's death results merely from error of judgment or an accident, no criminal liability should be attached to it. Mere inadvertence or some degree of want of adequate care and caution might create civil liability but would not suffice to hold him criminally liable.

This approach of the courts in the matter of fixing criminal liability on the doctors, in the course of medical treatment given by them to their patients, is necessary so that the hazards of medical men in medical profession being exposed to civil liability, may not unreasonably extend to criminal liability and expose them to the risk of landing themselves in prison for alleged criminal negligence.

For every mishap or death during medical treatment, the medical man cannot be proceeded against for punishment. Criminal prosecutions of doctors without adequate medical opinion pointing to their guilt would be doing great disservice to the community at large because if the courts were to impose criminal liability on hospitals and doctors for everything that goes wrong, the doctors would be more worried about their own safety than giving all best treatment to their patients. This would lead to shaking the mutual confidence between the doctor and the patient. Every mishap or misfortune in the hospital or clinic of a doctor is not a gross act of negligence to try him for an offence of culpable negligence.

(Paras 20 to 23, 25 and 26)

No doubt, in the present case, the patient was a young man with no history of any heart ailment. The operation to be performed for nasal deformity was not so complicated or serious. He was not accompanied even by his own wife during the operation. From the medical opinions produced by the prosecution, the cause of death is stated to be "not introducing a cuffed endotracheal tube of proper size as to prevent aspiration of blood from the wound in the respiratory passage". This act attributed to the doctor, even if accepted to be true, can be described as negligent act as there was lack of due care and precaution. For this act of negligence he may be liable in tort but his carelessness or want of due attention and skill cannot be described to be so reckless or grossly negligent as to make him criminally liable.

(Para 24)

After examining all the medical papers accompanying the complaint, we find that no case of recklessness or gross negligence has been made out against the

doctor to compel him to face trial for offence under Section 304-A IPC. As a result of the discussion aforesaid on the factual and legal aspect, we allow this appeal and by setting aside the impugned orders of the Magistrate and of the High Court, quash the criminal proceedings pending against the present doctor who is the accused and appellant before us. (Para 28)

21. Reliance has also been placed upon the judgment of Hon'ble Apex Court in the case of ***A.S.V. Narayanan Rao v. Ratnamala and Another3.*** In the said case, the appellant cardiologist conducted an angiogram on the deceased and finding three blocks in the coronary arteries, conducted an angioplasty around 1.30 p.m. The appellant thereafter informed the respondent (wife of deceased patient) that the angioplasty failed and the blocks of her husband had calcified. The same day around 3.30 p.m., a bypass surgery was conducted in the same hospital. Various complications arose and eventually the said patient died. The Magistrate took cognizance by prima facie concluding that there was material to try the appellant for offences under Section 304A of I.P.C. and the matter came up before the High Court. It too declined to quash the proceedings, giving the following reasons :

(1) that the appellant chose to conduct the angioplasty without having a surgical standby unit and such failure resulted in delay of 5 hrs in conducting bypass after the angioplasty failed; and

(2) that the appellant did not consult a cardio anaesthesian before conducting an angioplasty.

and held that both the abovementioned lapses on the part of the appellant clearly show the negligence of the appellant.

22. Hon'ble Apex Court, allowing the appeal, held as follows :

13. The basis for such conclusion though not apparent from the judgment, we are told by the learned counsel for the first respondent, is to be found in the evidence of Dr Surajit Dan given before the A.P. State Consumer Disputes Redressal Commission in CD No. 38 of 2004. It may also be mentioned here that apart from initiating criminal proceedings against the appellant and others, the first respondent also raised a consumer dispute against the appellant and others. It is in the said proceedings, the abovementioned Dr Dan's evidence was recorded wherein Dr Dan in his cross-examination stated as follows:

"... Whenever cardiologist performs an angioplasty, he requests for the surgical team to be ready as standby. It was not put on standby in the instant case...."

He further stated:

"... The failure of angioplasty put the heart in a compromised position of poor coronary perfusion that increases the risk of the emergency surgery after that. In a planned coronary surgery, the risk is less than in an emergency surgery...."

However, the same doctor also stated:

"... The time gap between the angioplasty failure and the surgery is not the factor for the death of the patient. The time gap may or may not be a factor for the enhancement of the risk."

14. Unfortunately, the last of the above-extracted statements of Dr Surajit Dan is not taken into account by the High

Court which statement according to us is most crucial in the context of criminal prosecution of the appellant.

15. The High Court unfortunately overlooked this factor. We, therefore, are of the opinion that the prosecution of the appellant is uncalled for as pointed out by this Court in Jacob Mathew case [(2005) 6 SCC 1 : 2005 SCC (Cri) 1369] that the negligence, if any, on the part of the appellant cannot be said to be "gross". We, therefore, set aside the judgment [Criminal Petition No. 6506 of 2007, order dated 28-10-2010 (AP) sub nom Surjit Dan v. State of A.P., Criminal Petition No. 6368 of 2007] under appeal and also the proceedings of the trial court dated 11-12-2006.

23. This Court would like to rely upon the law laid down by Hon'ble Apex Court in the case of ***Kusum Sharma and Others v. Batra Hospital and Medical Research Centre and Others4.*** In this case, Hon'ble Apex Court has summarized the principles to be applied in a case of criminal negligence, which are as follows :

89. On scrutiny of the leading cases of medical negligence both in our country and other countries specially the United Kingdom, some basic principles emerge in dealing with the cases of medical negligence. While deciding whether the medical professional is guilty of medical negligence following well-known principles must be kept in view:

I. Negligence is the breach of a duty exercised by omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.

II. Negligence is an essential ingredient of the offence. The negligence to be established by the prosecution must be culpable or gross and not the negligence merely based upon an error of judgment.

III. The medical professional is expected to bring a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence judged in the light of the particular circumstances of each case is what the law requires.

IV. A medical practitioner would be liable only where his conduct fell below that of the standards of a reasonably competent practitioner in his field.

V. In the realm of diagnosis and treatment there is scope for genuine difference of opinion and one professional doctor is clearly not negligent merely because his conclusion differs from that of other professional doctor.

VI. The medical professional is often called upon to adopt a procedure which involves higher element of risk, but which he honestly believes as providing greater chances of success for the patient rather than a procedure involving lesser risk but higher chances of failure. Just because a professional looking to the gravity of illness has taken higher element of risk to redeem the patient out of his/her suffering which did not yield the desired result may not amount to negligence.

VII. Negligence cannot be attributed to a doctor so long as he performs his duties with reasonable skill and competence. Merely because the doctor chooses one course of action in preference to the other one available, he would not be liable if the course of action

chosen by him was acceptable to the medical profession.

VIII. It would not be conducive to the efficiency of the medical profession if no doctor could administer medicine without a halter round his neck.

IX. It is our bounden duty and obligation of the civil society to ensure that the medical professionals are not unnecessarily harassed or humiliated so that they can perform their professional duties without fear and apprehension.

X. The medical practitioners at times also have to be saved from such a class of complainants who use criminal process as a tool for pressurising the medical professionals/hospitals, particularly private hospitals or clinics for extracting uncalled for compensation. Such malicious proceedings deserve to be discarded against the medical practitioners.

XI. The medical professionals are entitled to get protection so long as they perform their duties with reasonable skill and competence and in the interest of the patients. The interest and welfare of the patients have to be paramount for the medical professionals.

90. In our considered view, the aforementioned principles must be kept in view while deciding the cases of medical negligence. We should not be understood to have held that doctors can never be prosecuted for medical negligence. As long as the doctors have performed their duties and exercised an ordinary degree of professional skill and competence, they cannot be held guilty of medical negligence. It is imperative that the doctors must be able to perform their professional duties with free mind.

24. In view of the above position of law, this Court will have to analyze facts of the present case.

The patient/deceased in the present case had been admitted in the hospital of the accused-applicant, after the former met with an accident and remained hospitalized for about 23 days in a special ward. He was on the verge of getting discharged as he had been cured, as has been mentioned in the first information report. Further, it is mentioned in the F.I.R. that on 16.06.2012, Dr. Adil came with a nurse to disconnect the tube which was installed in the chest, blood oozed out profusely and thereafter, the doctor fled away from the said ward and when the informant gave information about this occurrence in the emergency, one or two people came and tried to stop the blood. Thereafter, the doctors feigned to revive the patient/deceased for about one hour and thereafter, declared him dead. As per post-mortem, cause of death is reported to be due to septicemic shock. The following ante-mortem injuries were recorded :

1. Right side chest tube incertion mark 1.5 x 1.5 cm on right side chest 7.00 cm. lateral to Rt nipple.

2. Cut open mark for yv canula on Rt. side on medial aspect 0.5 cm x 0.2 cm

25. In the report of the Inquiry Committee which was constituted by the V.C., dated 18.06.2012, the following observations were made :

Observations of the Inquiry Committee

1. Such procedures (in this case ICTD) should have been performed in minor OT/dressing room available in general ward instead of a private ward.

2. It is preferable to undertake such steps in presence of senior colleague, nursing/paramedical staff.

3. Before performing such procedures, the availability of necessary life saving drugs or equipments should be ensured to face any such eventuality.

4. The attending Doctors should keep in mind all consequences, including the rarest one and should explain the same to the patient/his attendant.

Fixing the responsibility on the erring official(s) and role of Prof. M.H. Beg

1. The patient from the date of his admission was taken care of by the team and the patient and his attendants were fully satisfied with this progress prior to the incidence that occurred on 16th of June 2012 and this is also reflected in their statements made after this incidence before the IC.

2. The resident Doctor (Dr. Adil JR-2), on the advice of the COC, as recorded in the case sheet on 15.6.2012 and also put on records in his statement submitted to the IC. a decision was made to remove the ICT on 16th June 2012. He acted accordingly the next day without realizing the consequences, however remote it could be. During his maneuvering for removal of ICT, it seems that the situation has gone out of his control as he was not mentally prepared to face such a situation. Had he been accompanied by any one of his colleagues, he could have been in a better position to handle such a situation in a better way.

3. As a rarest complication, even not perceived by a senior person of Dr. Beg's stature, it would be unfair on the part of a junior Doctor (Dr. Adil) to expect from him to think of such an uncommon procedural complication.

26. The matter was taken up before the Uttar Pradesh Medical Council, which passed the following order on 23.11.2012 :

Order

The Ethical Committee observed that the causes of death as per post mortem report is Septicemia. Removal of ICD can not be held as cause of death. Bleeding can occur in few case from the site of ICD after removal which is not under control. Dr. Ali Adil has also done ATLS. He did his best to save the patient life under the circumstances.

The Ethical Committee is the opinion that Dr. Ali Adil can not be held guilty of medical negligence.

27. I have gone through the statements of the witnesses which have been annexed in support of the prosecution version, namely, Ashfiya and Aisha Begum. Both of them have supported the version as mentioned in the F.I.R. I find that if we apply the principles as laid down above in the case of ***Dr. Suresh Gupta (supra),*** it is apparent that for thrusting criminal liability on a doctor or surgeon, the standard of negligence required to be proved should be so high as can be described as "gross negligence" or "recklessness". It is not merely, lack of necessary care, attention or skill which would make him liable criminally. In this very case, reliance was placed upon the judgment delivered by the House of Lords decision in the case of ***R.v. Adomako5*** in which it was held that a doctor cannot be held criminally responsible for patient's death unless his negligence or incompetence showed such disregard for life and safety of his patient as to amount to a crime against the State. There is no doubt that when a patient agrees to undergo medical treatment or surgical operation, every careless act of the medical man cannot be termed as

"criminal". It can be termed "criminal" only when the medical man exhibits a gross lack of competence or inaction and wanton indifference to his patient's safety and which is found to have arisen from gross ignorance or gross negligence. Where a patient's death results merely from error of judgment or an accident, no criminal liability should be attached to it. Mere inadvertence or some degree of want of adequate care and caution might create civil liability but would not suffice to hold him criminally liable.

28. In this case, there is no doubt that the patient was a young man who had met simply with an accident and was recovering also, but due to removal of the tube inserted in the chest during treatment, something appears to have gone wrong, which resulted into his death. The family members of the deceased have given an opinion of a layman that it was gross negligence on the part of the accused doctor (Dr. Adil) who did not take full precaution despite their resistance to take out the said tube in such a manner and hence, in their opinion, the doctor committed gross negligence, which resulted into the death of the deceased. But the said layman's opinion is not strong enough to hold the accused criminally liable. As per the opinion expressed by the Ethical Committee of the U.P. Medical Council, the death of the deceased was found to have occurred due to septicemic shock. It cannot be ruled out that some lack of preparation has also been found on the part of the accused doctor while removing the said tube from the chest as he ought to have done so in the presence of some senior doctor and that too, in an O.T. and having all other medical aids in ready condition and in standby mode, but that certainly shows the negligence on the part of the doctor, but I do not find that the same would qualify to be called as "criminal negligence" as it may at the most be treated to be negligence for which civil liability would lie. It may also not be ruled out that the accused doctor was having overconfidence that he would be able to handle the situation himself, but it turned out to be otherwise and it can also be inferred that it may have resulted into accidental death of the deceased. I do not find any such reckless attitude on the part of the doctor because the patient was given treatment for about 23 days and he was recovering gradually, but as luck would have it, he died on account of this mishandling on the part of the doctor concerned. Life and death are all in the hands of God. A doctor in the Indian society is the most revered person, who is given status of God in case the patient survives. But we all know that in cases like the present one, risk is always involved and when the patient/family members give consent for being operated, they give consent for such kind of operation to be conducted and to bear the consequences. It is also noticed in the recent past that the cases to implicate the doctors after demise of the patient have increased, some on account of extortion of illegal money from the doctors and some due to other reasons, only to harass the doctors, out of frustration and because of these factors, the guidelines have been laid down by Hon'ble Apex Court in the case of ***Jacob Mathew v. State of Punjab and Another6*** and also recently, in the case of ***Kusum Sharma (supra),*** which have been narrated above. Keeping in view those guidelines, I am of the view that in the present case, no criminal liability appears to be made out against

the accused-applicants. In view of the material placed before this Court, at the most, civil liability would arise.

29. In view of the aforesaid, the prayer to quash the entire criminal proceedings as well as the impugned summoning order passed by the court below is hereby accepted and accordingly, the entire proceedings as well as the impugned summoning order passed in the present case are hereby quashed.

30. Resultantly, the instant applications stand **allowed.**

(2019)12 ILR A128

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.09.2019

BEFORE
THE HON'BLE RAJENDRA KUMAR-IV, J.

Crl. Misc. Application (U/S 482 Cr. P.C.) No. 9172 of 2019

Jitesh Kumar Gupta & Ors. ...Applicants
Versus
State of U.P.& Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Rajendra Singh

Counsel for the Opposite Parties:
A.G.A.

A. Criminal Law - Code of Criminal Procedure, 1973 - Section - Complaint case- It is settled that the power under Section 482 Cr.P.C. is not to be exercised in a routine manner, but it is for limited purposes, namely, to give effect to any order under the Code, or to prevent abuse of process of any Court or otherwise to secure ends of justice. The allegation can be adjudicated only after the evidence and truthfulness of allegation cannot be considered in the proceeding under Section 482 Cr.P.C. before this Court.

Held **-** From perusal of allegations made in complaint, statement of witnesses under Sections 200 and 202 Cr.P.C., it cannot be said that no prima facie evidence or sufficient ground for proceeding is there. At the time of passing summoning order, Magistrate is only to see prima facie evidence and sufficient ground for proceeding. (Para 9,10,16 & 17)

Application u/s 482 Cr.P.C rejected. (E-3)

List of cases cited: -

1. St. of Har. & ors Vs. Ch. Bhajan Lal & ors 1992 Supp (1) SCC 335,

2. Popular Muthiah Vs. St. Rep. by Inspector of Police (2006) 7 SCC 296,

3. Hamida Vs. Rashid @ Rasheed and Ors. (2008) 1 SCC 474,

4. Dr. Monica Kumar and Anr. Vs. State of U.P. and Ors. (2008) 8 SCC 781,

5. M.N. Ojha and Ors. Vs. Alok Kumar Srivastav and Anr. (2009) 9 SCC 682,

6. St. of A.P. vs. Gourishetty Mahesh and Ors. JT 2010 (6) SC 588 and

7. Iridium India Telecom Ltd. Vs. Motorola Inc. & Ors. 2011 (1) SCC 74).

8. Priya Vrat Singh & ors vs. Shyam Ji Sahai, 2008 (8) SCC 232

9. Fakhruddin Ahmad v. St. of Uttaranchal, (2008) 1 SCC 157

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

1. By means of this application under Section 482 Cr.P.C., applicants jitesh Kumar Gupta and four others

approached this Court for quashing summoning order dated 14.2.2019 in Complaint Case No. 367 of 2019 (Pooja Rani vs. Jitesh Kumar and others), under Sections 498-A I.P.C. & 3/4 Dowry Prohibition Act, Police Station Shivpur, District Varanasi, pending in the Court of Additional Chief Judicial Magistrate, Court No. 6, Varanasi and entire proceedings thereof.

2. Brief facts giving rise to the present application are that Smt. Pooja Rani filed a complaint under Section 156(3) Cr.P.C. on 18.6.2018 against Jitesh Kumar Gupta, Gopal Chand Gupta, Smt. Parvati Devi, Chandan Gupta and Chandrkesh Gupta stating that her marriage took place with Jitesh Kumar Gupta on 26.4.2016 as per Hindu rites and sufficient Dowry was given according to her father's capability, was given to her in laws at the time of marriage. Complaint further recites that her in-laws started demanding one car and Rs. 5,00,000/- as Dowry and harassing her by saying that Jitesh Kumar Gupta, her husband, is a Government Servant. She was ill-treated and tortured by accused-applicants. On 13.4.2018, she was kicked out from her matrimonial house by husband and family members by snatching her entire belongings.

3. Application under Section 156 (3) Cr.P.C. came to be registered as complaint case. Magistrate recorded the statement of victim-complainant under Section 200 Cr.P.C. and made an enquiry by recording statement of Deen Dayal Prasad (PW-1) and Ashok Kumar Patel (PW-2) under Section 202 Cr.P.C. and found prima-facie case and sufficient ground for proceeding against accused persons, summoned them for facing trial under Sections 498-A IPC and Section 3/4 Dowry Prohibition Act, PS Shivpur, District Varanasi vide impugned order dated 14.2.2019.

4. Feeling aggrieved and dissatisfied with the impugned summoning order, accused-applicants filed present application under Section 482 Cr.P.C. for quashing the summoning order as well as complaint.

5. I have heard Sri S.B. Singh, Advocate holding brief of Sri Rajendra Singh, learned counsel for applicants and learned AGA for State and perused the record on file.

6. It is submitted by learned counsel for applicants that no prima facie case is made out against the applicants. They have falsely been implicated for the purpose of harassment and humiliation. Magistrate has not applied its mind in passing the impugned order. There is no sufficient evidence in the case to summon the applicants for facing trial. It is submitted that complainant was not a lady of good character, she lived in her parental house at her own will just after the marriage performed. Marriage is not consummated, despite that she gave birth to a male child as a result of adultery. It is further submitted by him that applicant no. 1 Jitesh Kumar Gupta filed a divorce petition in the family court concerned agaisnt the complainant and just to escape from legal proceeding of that divorce petition, complainant filed the impugned complaint. Applicants prayed for quashing the impugned complaint.

7. Learned AGA for State vehemently opposed the prayer for quashing the impugned order as well as complaint case and submitted that

marriage of Pooja Rani and applicant no. 1 Jitesh Kumar Gupta is admitted. Applicant no. 1 stigmatized upon character of his wife and disputed the parentage of his son. Applicants tortured and ill-treated the complainant, therefore, complainant filed the complaint case in which Magistrate after making inquiry rightly summoned the accused persons for facing trial.

8. I have considered the rival submissions made by the parties and perused the records.

9. Before I enter into the facts of the present case it is necessary to consider the ambit and scope of jurisdiction under Section 482 Cr.P.C. vested in the High Court. Section 482 Cr.P.C. saves the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.

10. It is settled that the power under Section 482 Cr.P.C. is not to be exercised in a routine manner, but it is for limited purposes, namely, to give effect to any order under the Code, or to prevent abuse of process of any Court or otherwise to secure ends of justice.

11. Time and again, Apex Court and various High Courts, have reminded when exercise of power under Section 482 Cr.P.C. would be justified, which cannot be placed in straight jacket formula, but one thing is very clear that it should not preempt a trial and cannot be used in a routine manner so as to cut short the entire process of trial before the Courts below. If from a bare perusal of first information report or complaint, it is evident that it does not disclose any offence at all or it is frivolous, collusive or oppressive from the face of it, the Court may exercise its inherent power under Section 482 Cr.P.C. but it should be exercised sparingly. This will not include as to whether prosecution is likely to establish its case or not, whether the evidence in question is reliable or not or whether on a reasonable appreciation of it, accusation would not be sustained, or the other circumstances, which would not justify exercise of jurisdiction under Section 482 Cr.P.C. (See : **State of Haryana and others Vs. Ch. Bhajan Lal and others 1992 Supp (1) SCC 335, Popular Muthiah Vs. State represented by Inspector of Police (2006) 7 SCC 296, Hamida vs. Rashid @ Rasheed and Ors. (2008) 1 SCC 474, Dr. Monica Kumar and Anr. vs. State of U.P. and Ors. (2008) 8 SCC 781, M.N. Ojha and Ors. Vs. Alok Kumar Srivastav and Anr. (2009) 9 SCC 682, State of A.P. vs. Gourishetty Mahesh and Ors. JT 2010 (6) SC 588 and Iridium India Telecom Ltd. Vs. Motorola Incorporated and Ors. 2011 (1) SCC 74).**

12. In **State of Haryana and others v. Bhajan Lal and others, 1992 Supp (1) SCC 335,** Court has elaborately considered the scope and ambit of Section 482 Cr.P.C. Although in the above case Court was considering the power of the High Court to quash the entire criminal proceeding including the FIR, the case arose out of an FIR registered under Section 161, 165 IPC and Section 5(2) of the Prevention of Corruption Act, 1947. Court elaborately considered the scope of Section 482 Cr.P.C./ Article 226 of the Constitution of India in the context of quashing the proceedings in criminal investigation. After noticing various

earlier pronouncements of Court, Court enumerated certain Categories of cases by way of illustration where power under Section 482 Cr.P.C. can be exercised to prevent abuse of the process of the Court or secure ends of justice. Paragraph 102 which enumerates 7 categories of cases where power can be exercised under Section 482 Cr.P.C. are extracted as follows:

"102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

13. In **Priya Vrat Singh and others vs. Shyam Ji Sahai, 2008 (8) SCC 232,** Court observed that the inherent power should not be exercised to stifle a

legitimate prosecution. The High Court being the highest court of a State should normally refrain from giving a prima-facie decision in a case where the entire facts are incomplete and hazy, more so when the evidence has not been collected and produced before the Court and the issues involved, whether factual or legal, are of magnitude and cannot be seen in their true perspective without sufficient material. Of course, no hard-and-fast rule can be laid down in regard to cases in which the High Court will exercise its extraordinary jurisdiction of quashing the proceeding at any stage.

14. In **Fakhruddin Ahmad v. State of Uttaranchal,** reported in, **(2008) 1 SCC 157,** the Court held that :

"20. So far as the scope and ambit of the powers of the High Court under Section 482 of the Code is concerned, the same has been enunciated and reiterated by this Court in a catena of decisions and illustrative circumstances under which the High Court can exercise jurisdiction in quashing the proceedings have been enumerated. However, for the sake of brevity, we do not propose to make reference to the decisions on the point. It would suffice to state that though the powers possessed by the High Court under the said provision are very wide but these should be exercised in appropriate cases, ex debito justitiae to do real and substantial justice for the administration of which alone the Courts exist. The inherent powers possessed by the High Court are to be exercised very carefully and with great caution so that a legitimate prosecution is not stifled. Nevertheless, where the High Court is convinced that 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 or where the allegations made in the F.I.R. or the 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, the powers of the High Court under the said provision should be exercised."

15. In the present case marriage of applicant no. 1 Jitesh Kumar Gupta with opposite party no.2 Smt. Pooja Rani is a admitted fact and applicants could not dispute the fact of marriage. Evidently, applicant no. 1 Jitesh Kumar Gupta filed divorce petition under Section 13 of Hindu Marriage Act before Principal Judge Family Court, Varanasi against complainant Pooja Rani seeking a decree of nullity of marriage (Annexure-1) in which in paragraph no. 22, he admitted that there is no consummation of marriage. Despite that Pooja Rani gave a birth to a male child in her parental house as a result of adultery because she was living in her parental house since 11.10.2016. Thus, applicant no. 1 stigmatized character of his wife and parentage of his own son which itself amount to cruelty to his own wife.

16. The allegation levelled against each other can be adjudicated only after the evidence and truthfulness of allegation cannot be considered in the proceeding under Section 482 Cr.P.C. before this Court and trial must go on.

17. From perusal of allegations made in complaint, statement of witnesses under Sections 200 and 202 Cr.P.C., it

cannot be said that no prima facie evidence or sufficient ground for proceeding is there. At the time of passing summoning order, Magistrate is only to see prima facie evidence and sufficient ground for proceeding.

18. Application under Section 482 Cr.P.C. is accordingly **dismissed.**

(2019)12 ILR A133

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.08.2019

BEFORE
THE HON'BLE VIVEK KUMAR SINGH, J.

Crl. Misc. Application (U/S 482 Cr. P.C.) No. 11646 of 2007

Salim ...Applicant

Versus

State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Anil Mullick

Counsel for the Opposite Party:
A.G.A.

A. Criminal Law - U.P. Gangster & Anti-Social Activities (Prevention) Act, 1986 - Sections 2/3 - Cr.P.C - Section 403 & Section 482 - Implication on the basis of a single case -The trial of the said case commenced and after the trial the applicant was acquitted - The proceedings under the Gangsters Act are not independent proceedings. There is only one case shown against the applicant in the gang chart in which the applicant was acquitted by the competent Court and therefore his implication and trial under Section 2/3 of the Gangsters Act was not justified. (Para 14,15 & 16)

Application u/s 482 Cr.P.C allowed. (E-3)

List of cases cited: -

1. Pritam Singh & anr. Vs. St. of Punj., AIR, 1956 Supreme Court 415

2. N.R. Ghosh Vs. the St. of W.B, AIR 1960 Supreme Court (SC) 239

3. Manipur Admin., Manipur Vs. Thokchon Veere Singh, AIR 1965 (SC) 87

4. Lalta & ors. Vs. St. of U.P., AIR 1970 (SC) 1381

5. Municipal Corp. of Delhi vs. Shiv Singh 1971 (1) SCC 422

6. Bhagat Ram Vs. St. of Raj. (1972) 2 SCC 466

7. Masood Khan Vs. St. of U.P. (1974) 3 SCC 469

8. V.K. Agrawal, Assist. Collector of Customs Vs. Vasant Raj Bhagwan Ji Bhatia & ors, (1988) 3 SCC 467

9. Kolla Vira Raghav Rao vs. Gorantla Vlalalalalal Rao, (2011) 2 SCC 703

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

1. Heard Sri Anil Mullick learned counsel for the applicant and Sri Abhinav Prasad, learned A.G.A. on behalf of the state.

2. This 482 Cr.P.C. application has been preferred for quashing the charge sheet No.117 dated 13.9.2001, under Section 2/3 The U.P. Gangster & Anti Social Activities (Prevention) Act, 1986,Police Station Kotwali, District Meerut, pending in the Court of learned Special Judge Gangster Act, Meerut.

3. The facts of the case are that a first information report was lodged

against the applicant as case crime No.166 of 2000, under Sections 2/3 of the U.P. Gangster & Anti Social Activities (Prevention) Act, 1986, Police Station Kotwali, District Meerut and only on the basis of a single case i.e. case crime no.166 of 2000, under Section 384/506 I.P.C. read with Section 7 Criminal Law Amendment Act, Police Station Kotwali, District Meerut, after investigation the Investigating Officer has submitted charge sheet against four persons including the applicant. The trial of the said case commenced and after the trial the applicant was acquitted by the judgment and order dated 27.4.2001 passed in Criminal Case No.871 of 2000.

4. During the pendency of the aforesaid trial a first information report was lodged against the accused, including the applicant on 13.8.2000 under Section 2/3 of the U.P. Gangster Anti-Social Activities (Prevention) Act 1986 (hereinafter referred to as "Gangster Act") only. The sole basis of lodging of the first information report against the applicant was the implication in case crime no.166 of 2000, under Section 384/506 I.P.C. read with Section 7 Criminal Law Amendment Act, Police Station Kotwali, District Meerut, he was acquitted on 27.4.2001. Before acquittal chargesheet dated 15.12.2007 was filed against the applicant.

5. Counter affidavit has been filed on behalf of the state stating that the applicant is an accused in the eye of law who has involved himself in anti-social activities. During investigation of the case evidence also came to light that the applicant formed a gang which is involved in extortion of money from innocent people and therefore he was implicated in the case under Gangster Act. Even after acquittal in case crime no.166 of 2000, under Section 384/506 I.P.C. read with Section 7 Criminal Law Amendment Act, Police Station Kotwali, District Meerut, he cannot be discharged from the proceedings under the Gangster Act and he does not deserve any relief from this court.

6. Learned counsel for the applicant submits that the very basis of initiation of F.I.R. under Gangster Act was the statements recorded under Section 161 Cr.P.C. of case crime no.166 of 2000, under Section 384/506 I.P.C. read with Section 7 Criminal Law Amendment Act, Police Station Kotwali, District Meerut. Learned counsel submitted that said basis for initiation of F.I.R. under Gangster Act has been disbelieved by the trial Court as the applicant has been acquitted in the aforesaid crime, which acquittal order has not been challenged as yet. It is further contended that once very basis of initiation of Gangster's Act proceedings diminished, the entire trial procedure and rigmarole of proceedings of criminal trial under that Act will be nothing but only wastage of time of Court. The learned counsel for the applicant has relied upon the judgment of the Apex Court in the case of ***Pritam Singh and another vs. State of Punjab, AIR, 1956 Supreme Court 415*** in support of his contention that once the revisionist was acquitted by the competent court for the case crime no.166 of 2000, under Section 384/506 I.P.C. read with Section 7 Criminal Law Amendment Act, his trial under the provisions of Gangster Act would not be justified since the basis of implication in the case under the Gangsters Act was the case registered against the applicant in case crime no.166 of 2000, under Section

384/506 I.P.C. read with Section 7 Criminal Law Amendment Act. His contention is that his trial under the Gangster's Act would require trial regarding the same offence which was not found to have been proved by the trial court in the earlier case. He has relied upon the following observations of the Apex Court in the above mentioned case:-

"The effect of a verdict of acquittal pronounced by a competent Court on a lawful charge and after a lawful trial is not completely stated by saying that the person acquitted cannot be tried again for the same offence. To that it must be added that the verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication.

The maxim 'res judicata pro veritate accipitur' is no less applicable to criminal than to civil proceedings. Here, the appellant having been acquitted at the first trial on the charge of having ammunition in his possession, the prosecution was bound to accept the correctness of that verdict and was precluded from taking any steps to challenge it at the second trial".

7. In support of his contention learned counsel has further placed reliance on the judgment of the Apex Court in the case of ***N.R. Ghosh vs. the State of West Bengal, AIR 1960 Supreme Court (SC) 239*** and has relied upon in paragraph 22 of the same reads as under:-

"The principle stated in the section is that when a person has once been tried by a court of competent jurisdiction for an offence and convicted or acquitted of it, he shall not while the conviction or acquittal remains in force, be tried again for the same offence. In order, therefore, that the appellant may have the benefit of the section he must have been tried by a court of competent jurisdiction. Furthermore, such acquittal must be in force."

8. Reference to the Apex Court judgment in the case of ***Manipur Administration, Manipur vs. Thokchon Veere Singh, AIR 1965 (SC) 87*** has also been made wherein paragraph 6 are as follows:-

Before referring to the decision of this Court in ***Pritam Singh v. State of Punjab(1)*** it would be convenient to refer to and put aside one point for clearing the ground. Section 403, Criminal Procedure Code embodies in statutory form the accepted English rule of autre fois acquit. This section is as follows:-

"403 (1) A person who has been once tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any offence for which a different charge from the one made against him might have been made under s. 236, or for which he might have been convicted under section 237. (2) A person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under section 235, sub-section (1). (3) A person convicted of any offence constituted by any act causing consequences which, together with such act, constituted a different offence from that of which he was convicted may be afterwards tried for such last mentioned

offence, if the consequences had not happened, or were not known to the Court to have happened, at the time when he was convicted.

(4) A person acquitted or convicted of any offence constituted by any acts may, notwithstanding such acquittal or conviction, be subsequently charged with, and tried for, any other offence constituted by the same acts which he may have committed if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged.

(1) A.T.R. 1956 S.C. 415.

(5) Nothing in this section shall affect the provisions of section 26 of the General Clauses Act, 1897, or section 188 of this Code.

Explanation-The dismissal of a complaint, the stopping of proceedings under section 249, the discharge of the accused or any entry made upon a charge under section 273, is not an acquittal for the purposes of this section." Section 26 of the General Clauses Act which is referred to in s. 403 enacts:

"26. Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence."

We might also, in this connection, refer to Art. 20(2) of the Constitution since it makes provision for a bar against a second prosecution in an analogous case. That provision reads:

"20(2). No person shall be prosecuted and punished for the same offence more than once." As has been pointed out by this Court in ***State of Bombay v. S. L. Apte(1),*** *both in the case of Art. 20(2) of the Constitution as well as s. 26 of the General Clauses Act to operate as a bar the second prosecution and the consequential punishment thereunder, must be for "same offence" i.e., an offence whose ingredients are the same. It has been pointed out in the same decision that the V Amendment of the American Constitution which provides that no person shall be subject, for the same offence, to be twice put in jeopardy of life or limb, proceeds on the same principle.*

9. Reliace on Apex Court judgment in the case of ***Lalta and others vs. State of U.P., AIR 1970 (SC) 1381*** has been made, wherein case of ***Pritam Singh's (supra) and Manipur Administration's case (supra)*** have been accepted as binding authorities on the issue. Reference to ***Municipal Corporation of Delhi vs. Shiv Singh 1971 (1) SCC 422*** has been made where Section 26 of the general clauses Act 1897 were considered regarding the question of double jeopardy in relation to prosecution of an accused for single offence under two enactments and it was held that Section 26 of the general clauses Act prevents accused from double penalty. This judgment has been relied by the counsel to advance the proposition that the prosecution of the revisionist under the general provisions of Indian Penal Code and then under the provisions of Special Act i.e., Gangster Act on the basis of implication in the case under Section I.P.C., wherein he has been acquitted should not be permitted.

10. Counsel for the applicant has referred to the judgment, ***Bhagat Ram vs. State of Rajasthan (1972) 2 SCC 466,*** wherein the Apex Court held that even if an order of acquittal is passed by Division Bench of the Court, it is not open for the

third Judge of the same Court in a subsequent stage of the same proceedings to convict the person unless the judgment of the Division Bench is set aside by the Supreme Court. In view of the principle embodied in Section 403 I.P.C.

11. The counsel has relied upon the judgment, ***Masood Khan vs. State of U.P. (1974) 3 SCC 469,*** wherein the issue decided was that for getting the benefit of the principle of issue of estoppel both the proceedings should be criminal proceedings and where one proceeding is civil and the other is criminal, the benefit of this principle will not be extended to the accused. Reference to ***V.K. Agrawal, Assistant Collector of Customs vs. Vasant Raj Bhagwan Ji Bhatia and others, (1988) 3 SCC 467*** has also been made.

12. Learned counsel for the applicant has argued that in the present case the prosecution of the applicant is being made under the Gangsters Act. After acquittal under the provisions of I.P.C. If two constructions are possible one leading to anamoly, absurdity and unconstitutionality should be avoided.

13. Learned counsel for the applicant has relied upon the judgment in the case of ***Kolla Vira Raghav Rao vs. Gorantla Vlalalalalal Rao, (2011) 2 SCC 703***. In this case the Apex Court disapproved the prosecution of the accused under Section 420 I.P.C. After he was convicted under Section 138 N.I. Act, holding that the subsequent prosecution is barred by article 20(2) and Section 300(1) Cr.P.C. once the facts are the same.

14. After considering the authorities cited by the counsel for the applicant it is clear that the applicant was implicated in the Gangsters Act only on account of involvement in the case crime no.166 of 2000, under Section 384/506 I.P.C. read with Section 7 Criminal Law Amendment Act. The proceedings under the Gangsters Act are not independent proceedings. The implication of the applicant in the offence under the Gangsters Act was only because of the one case registered against him as case crime no.166 of 2000, under Section 384/506 I.P.C. read with Section 7 Criminal Law Amendment Act, as clear from the gang chart annexed with the affidavit in support of this 482 Cr.P.C. application. The definition of gang is given in Section 2(b) which is as follows:-

Section 2:-

(b)"Gang" means a group of persons, who acting either singly or collectively, by violence, or threat or show of violence, or intimidation, or coercion, or otherwise with the object of disturbing public order or of gaining any undue temporal, pecuniary, material or other advantage for himself or any other person, indulge in antisocial activities, namely:

(i) offences punishable under Chapter XVI, or Chapter XVII, or Chapter XXII of the Indian Penal Code (Act No. 45 of 1860), or

(ii) distilling or manufacturing or storing or transporting or importing or exporting or selling or distributing any liquor, or intoxicating or dangerous drugs, or other intoxicants or narcotics or cultivating any plant, in contravention of any of the provisions of the U. P. Excise Act, 1910 (U. P. Act No. 4 of 1910), or the Narcotic Drugs and Psychotropic

Substances Act, 1985 (Act No. 61 of 1985), or any other law for the time being in force, or

(iii) occupying or taking possession of immovable property otherwise than in accordance with law, or setting-up false claims for title or possession of immovable property whether in himself or any other person, or

(iv) preventing or attempting to prevent any public servant or any witness from discharging his lawful duties, or

*(v) offences punishable under the Suppression of *[Immoral Traffic in Women and Girls Act, 1956 (Act No. 104 of 1956)], or*

(vi) offences punishable under Section 3 of the Public Gambling Act, 1867 (Act No. 3 of 1867), or

(vii) preventing any person from offering bids in auction lawfully conducted, or tender, lawfully invited, by or on behalf of any Government department, local body or public or private undertaking, for any lease or rights or supply of goods or work to be done, or (viii) preventing or disturbing the smooth running by any person of his lawful business, profession, trade or employment or any other lawful activity connected therewith, or

(ix) offences punishable under Section 171-E of the Indian Penal Code (Act No. 45 of 1860), or in preventing or obstructing any public election being lawfully held, by physically preventing the voter from exercising his electoral rights, or (x) inciting others to resort to violence to disturb communal harmony, or (xi) creating panic, alarm or terror in public, or

(xii) terrorising or assaulting employees or owners or occupiers of public or private undertakings or factories and causing mischief in respect of their properties, or

(xiii) inducing or attempting to induce any person to go to foreign countries on false representation that any employment, trade or profession shall be provided to him in such foreign country, or

(xiv) kidnapping or abducting any person with intent to extort ransom, or

(xv) diverting or otherwise preventing any aircraft or public transport vehicle from following its scheduled course.

15. A perusal of the aforesaid sections shows that the applicant was implicated in an offence under chapter 16, I.P.C. and therefore he was implicated in the case under the Gangsters Act. There is only one case shown against the applicant in the gang chart in which the applicant was acquitted by the competent Court and therefore his implication and trial under Section 2/3 of the Gangsters Act was not justified.

16. From the law of the Apex Court as discussed above it is crystal clear that the trial of the applicant for an offence under Section 2/3 of the Gangsters Act is not justified. In view of the fact that only one case is registered against him and he has been acquitted in that case.

17. In view of the above consideration of the facts of the case and law cited the charge sheet No.117 dated 13.9.2001, under Section 2/3 of The U.P. Gangster & Anti Social Activities (Prevention) Act, 1986, Police Station Kotwali, District Meerut, pending in the Court of learned Special Judge Gangster Act, Meerut, is hereby quashed.

18. This application under Section 482 Cr.P.C. henceforth is allowed.

(2019)12 ILR A139

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.07.2019
BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Crl. Misc. Application (U/S 482 Cr. P.C.) No. 14529 of 2004

M/S Ganesh Anhydride Ltd & Ors.
...Applicants
Versus
Addl. Chief Judicial Magistrate & Anr.
...Opposite Parties

Counsel for the Applicants:
Sri Vijai Prakash

Counsel for the Opposite Parties:
A.G.A., Sri Vipin Saxena

A. Criminal Law - Negotiable Instruments Act, 1981- Sections 138, 141 & 142 read with Indian Penal Code, 1860 - Section 420 - The mere fact that cheque is for a higher amount, will not dilute the liability of drawer to the extent of amount which was for discharge of "due debt" or "liability" stood dishonoured. It cannot be said that non encashment of cheque to the extent it was for discharge of due debt and liability would not come within the purview of Section 138 of Act, 1981.

Application u/s 482 Cr.P.C rejected. (E-2)

List of cases cited: -

1. Indus Airways Pvt. Ltd. & ors vs. Magnum Aviation Pvt. Ltd. and anr, 2014(12) SCC 539

2. Sampelly Satyanarayana Rao vs. Indian Renewable Energy Development Agency Ltd., 2016(10) SCC 458

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

1. This application under Section 482 Cr.P.C. has been filed by M/s Ganesh Anhydride Ltd. and nine others with a prayer to quash Complaint Case No. 805 of 2004 pending in the Court of Additional Chief Judicial Magistrate, Ghaziabad under Sections 138, 141, 142 of Negotiable Instruments Act, 1981 *(hereinafter referred to as "Act, 1981")* read with Section 420 IPC and also to set aside summoning order dated 21.03.2002 as also bailable warrant dated 14.12.2004.

2. Facts in brief giving rise to present application are that M/s Morgan Securities and Credit Pvt. Ltd. *(hereinafter referred to as "Complainant")* has its registered office at 53, Friends Colony, East, New Delhi. It is a Company incorporated under the provisions of Companies Act, 1956 *(hereinafter referred to as "Act, 1956")*. Similarly, applicant-M/s Ganesh Anhydride Ltd. *(hereinafter referred to as "Accused-1")* is also a Company registered and incorporated under the provisions of Act, 1956 and Accused-2 to 10 are Managing Director, Directors and other persons, incharge, and responsible for conduct of business of Accused-1. Accused-3, Ramesh Pilani, approached Complainant for financial assistance to meet working capital requirement of Accused-1 by way of Inter Corporate Deposit *(hereinafter referred to as "*Facility for an aggregate amount of Rs. 100 lacs, in one or more trenches, with a promise that Accused-1 stood guarantor and repay the money/ amount taken from Complainant as per the agreement executed between parties. Deed of Corporate Guarantee was executed on 07.03.2000 between Accused-1 and

Complainant. Complainant-Company placed two ICD each of Rs. 50 lacs dated 14.02.2000 for a period of 91 days and dated 07.03.2000 for a period of 90 days. ICD of Rs. 50 lacks placed on 14.02.2000 was repaid to Complainant but ICD placed on 07.03.2000 due for repayment on 05.06.2000 remained unpaid. Notices and reminders were given by Complainant. As per agreement (Corporate Guarantee Agreement) Accused-1 had undertaken to make payment without delay, demur or protest on first demand of the payment of any or all of the obligations that may become payable at any point of time, if borrower, i.e., Accused-1 refuses, defaults, denied, disputes or fails to pay the lender. After giving credit on account of sale of shares pledged to Complainant, a sum of Rs. 37,95,055/- was due on 31.12.2001 in respect whereof arbitration proceedings were initiated. Accused-1 issued a Cheque No. 713308 for a sum of Rs. 1 crore drawn on State Bank of India, Commercial Branch, Mumbai in favour of Complainant as a further security for realization of loan amount. Notice was given by Complainant on several occasions and lastly on 10.11.2001 to repay outstanding due else Complainant shall be compelled to proceed to present Cheque dated 05.12.2001 given for Rs. 1 crore by Accused-1. Ultimately Complainant presented aforesaid cheque for realization to its Banker but it was dishonoured with Bank's remark "insufficient fund". It is said that this is a violation of provisions of Section 138 of Act, 1981 and consequently complaint was filed. Magistrate taken cognizance of matter, issued summons and this has been challenged before this Court.

3. Sri Vijai Prakash, learned counsel appearing for applicants submitted that there was no legally enforceable debt or liability and, therefore, complaint under Section 138 of Act, 1981 was not maintainable. He placed reliance on Supreme Court's decision in **Indus Airways Pvt. Ltd. and others vs. Magnum Aviation Pvt. Ltd. and another, 2014(12) SCC 539** and **Sampelly Satyanarayana Rao vs. Indian Renewable Energy Development Agency Ltd., 2016(10) SCC 458.** He submitted that as per the own case set up by Complainant, outstanding dues upto 31.12.2001 was Rs. 37,95,055/- but Complainant presented the cheque of Rs. 1 crore which was given as a guarantee and larger amount was not a "debt due" or "liability" for discharge, hence even if the cheque was dishonoured no proceedings under Section 138 could have been initiated against applicants.

4. From the facts discussed above it is evident that ICD of Rs. 1 crore under the agreement was given by Complainant through two transactions of Rs. 50 lacs each. There was a default on the part of accused. For ensuring payment of outstanding dues in case of any default there was an agreement between parties to realize the same through cheque of Rs. 1 crore given by Accused-1 to Complainant as a Corporate Guarantor. It is true that outstanding dues were about 30 lacs and odd but since only one cheque of Rs. 1 crore was given by Accused-1, Complainant had no occasion as also option to present any other cheque except the aforesaid one.

5. The fact remains that cheque included the amount of Rs. 30 lacs and odd which admittedly can be termed as "due debt" or "liability" for discharge thereof the said cheque was utilized. If

Accused-1 had given cheque of a higher amount, it could have been utilized by Drawer for realization of outstanding dues, i.e., for discharge of debt or liability and the mere fact that cheque contains higher amount, will not dilute the liability of drawee to the extent of amount which was for discharge of "due debt" or "liability" stood dishonoured.

6. Therefore, outrightly it cannot be said that non encashment of cheque to the extent it was for discharge of due debt and liability would not come within the purview of Section 138 of Act, 1981 and hence contention that entire proceedings are illegal and without jurisdiction cannot be accepted.

7. In the two judgments relied by applicants there was a clear case of advance payment of which there was no supply since contract frustrated for one or the other reason hence Court held that a cheque issued as advance payment, unless liability or debt has accrued, cannot be construed to have been issued for discharge of any debt and liability. The facts of present case are different, hence both authorities are not applicable to present case.

8. In the circumstances, I find no merit in this application. Dismissed accordingly. Interim order, if any, stands vacated.

(2019)12 ILR A141

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.11.2019

BEFORE
THE HON'BLE RAM KRISHNA GAUTAM, J.

Crl. Misc. Application (U/S 482 Cr. P.C.) No. 20843 of 2016
connected with Crl. Misc. Application (U/S 482 Cr. P.C.) No. 16296 of 2016

Som Prakash Rawat @ Sanni & Ors.
...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Kamlesh Kumar Dwivedi, Sri Sandeep Kumar Keshari

Counsel for the Opposite Parties:
A.G.A., Sri Puneet Srivastava

A. Criminal Law - Criminal Procedure Code, 1973 - Section 482 & Protection of Women from Domestic Violence Act, 2005- Sections 12, 18, 19, 21 & 22 –to secure ends of justice, inherent jurisdiction has to be exercised carefully by the tests specifically laid down in the section itself. (Para 8, 9, 10 & 11)

Domestic Violence Act, is special Act to provide more effective protection to the right of women, wherein, Magistrate after exercising due procedure, has passed impugned order against which appeal was preferred and this appeal was decided by appellate court, hence, there remains nothing for any indulgence, in exercise of inherent power, under Section 482 Cr.P.C. for assessing judgment of appellate court, being its second appellate court. (Para 12)

Application u/s 482 Cr.P.C. dismissed. (E-6)

List of cases cited: -

1. St. of A.P. Vs Gour Sheety Mahesh J.T. 2010 (6) SCC 588

2.Hamida Vs Rashid (2008) 1 SCC 474,+

3.Monika Kumar Vs St. of U.P. (2008) 8 SCC 781

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. This application under Section 482 Cr.P.C. has been filed by Som Prakash Rawat @ Sanni and 4 Ors. against State of U.P. & Anr. with prayer for allowing this application and thereby quashing the order dated 16.04.2016 passed by learned Additional Chief Judicial Magistrate, Court No.4, Aligarh in Complaint Case No.584 of 2013 (Sarita vs. Som Prakash Rawat @ Sanni and Ors., under Sections 12, 18, 19, 21 and 22 and Protection of Women from Domestic Violence Act, 2005 of Police Station Sasani Gate, District Aligarh with order dated 24.06.2016 passed by learned Sessions Judge, Aligarh in Criminal Appeal No.81/2016 (Som Prakash Rawat @ Sanni Ors. vs. State of U.P. & Ors.) with a further prayer for staying effect of those two orders till disposal of this proceeding.

2. Learned counsel for the applicants argued that an application under Section 12, 18, 19, 21 and 22 of Protection of Women from Domestic Violence Act of Police Station Sasani Gate, District Aligarh was moved before the court of Additional Chief Judicial Magistrate by Sarita wife of Som Prakash Rawat @ Sanni with a prayer for grant of Stridhan, maintenance and residence in the house where her husband and in-laws were residing. Marriage in between, was performed on 18.11.2010 and Rs.7,00,000 were spent in this marriage by her father. Vipin Kumar gave a list of articles to be purchased at Agra by money to be given by her parents and this list was having mention of double bed, Sofa set, LED 32 inch T.V., A.C., Fridge, utensils, clothes, drawing table, dining table, dressing table, motor-cycle and others. Rupees 5 lakhs in cash was paid to Vipin Kumar, who is brother-in-law of her husband but only motor-cycle was shown at the time of engagement. Rest money for purchase of articles was said to be deposited at shops and after marriage those articles will be at their residence but after 15 days of marriage, those articles could not be there. The relationship became strained, accusation of torturing for demand of dowry and violence, in form of domestic violence, were said to be given to the applicant, then after, the ornaments and Stridhan were snatched by her in-laws and she was ousted from her house. She went to her parents, narrated the occurrence and made a complaint to police. Persuasion was made by in-laws and assurance for no further torture was made and the applicant was taken by her husband. Her husband was working in L.G. Service Centre at Badaun and was earning Rs.1,80,000/- per month. On the basis of compromise entered in between, she went to her in-laws house on 07.08.2012, she was taken at Ujhiani, Badaun and was residing in a rented portion. She lived there with her husband from 7.8.2012 to 10.9.2012, but relations were strained. Again she was sent to house of Aligarh and she was not taken by her husband. Again persuasion was made with her in-laws and her husband, father-in-law and Vipin Kumar came on 12.6.2013, then, demanded that unless the demand is being fulfilled, no 'Bidai' will take place. Thereafter, some hot talk and scuffled took place. Accused-persons abused her and an application under Protection of Women from Domestic Violence Act was moved on 13.6.2013, wherein, prayer was made for protection. Payment of Rs.5,00,000/- which was paid in the marriage with further maintenance

of Rs.5,000/- per month. In addition to it, an accommodation for her at her in-laws house. This was objected by her husband. Marriage on 18.11.2010 was admitted fact but payment of dowry and earning as engineer in L.G. Company thereby earning Rs.80,000/- per month as salary was denied. He was with earning of Rs.5,200/- per month. Applicant never resided with him after 18.09.2011. Husband is an employee at L.G. Service Centre at Badaun. No physical relation was ever established by his wife and Magistrate after hearing both sides concluded with passing of judgment, whereby direction for payment of Rs.5,00,000/- within two month form the date of judgment, in lieu of, 'Stridhan' with a further payment of Rs.5,000/- per month as maintenance was ordered. Beside this, room for accommodation in the house situated in Radhaswami Hajuri Bhawan, Pipal Mandi, Agra along with its amenities of toilet was directed, whereas, the above house, in which in-laws were residing was of Radhaswami Trust and it was handed over to it. Marriage too was dissolved by decree of divorce passed by family court, against which application for restoration was dismissed on merit and the defective appeal is pending before High Court. There was no stay by any Court against above decree of dissolution of marriage between both sides. Husband got married and he was blessed with two kids, with whom he is residing and under above chain of circumstances, there was no possibility for accommodating applicant in that house wherein he is residing. Because she herself would not like to be with family of husband, who is having a second wife with her children. The house which was directed to be given is no more in possession of her in-laws, rather, it was surrendered on 20.06.2017 to the above trust. The grant of Rs.5,000/- per month as maintenance was also not with any basis even then in compliance of order of above court as well as order of this Court passed in defective criminal appeal, the same is being paid to applicant Rs.5,00,000/- was ordered to be paid without any basis and it was beyond the capacity of applicant. Hence, this order was challenged before the appellate court, wherein learned Sessions Judge, Aligarh in Criminal Appeal No.81 of 2016, heard learned counsel for both sides and then after dismissed appeal whereby confirmed order of Magistrate. Above facts which were raised before both of the courts, could no be taken notice of. It was misuse of process of law, hence, this application under Section 482 Cr.P.C. with above prayer for its allowance and thereby setting aside both of impugned order along with proceeding filed under Protection of Women from Domestic Violence Act.

3. Learned counsel for applicant-respondent vehemently opposed the argument with this contention that this was a proceeding under Protection of Women from Domestic Violence Act, 2005 which is a socio-economic legislation and other proceeding under family court or before this Court is not of any effect of this proceeding because it was admitted that applicant is wife of opposite party No.1. The alleged decree of divorce was ex-parte decree, obtained under fraud and there was no service of process, hence, when it came in the knowledge, immediately restoration application was moved and trial court was kind enough to allow application for condonation of delay, but restoration application was dismissed for which appeal has been filed before this Court

and the same is pending for disposal. Hence, dissolution of marriage is sub judice. More so, an application was moved before Superintendent of Police and it was referred before mediation centre, where, both sides appeared continuously for more than two months and husband always assured by extending his inclination for taking his wife with him and at no point of time, this was disclosed that he had got a decree of dissolution of marriage and he had married second time. This fact was got hidden by him. This itself shows by which way he was operating, on one way, he was appearing in mediation centre for taking back his wife to show his inclination for his innocence, on the other way, he was having a decree of dissolution of marriage, obtained ex-parte, by way of fraud, but it was not being disclosed. Applicant being legally wedded wife, was being extended cruelty and she moved application for Protection from Domestic Violence under above Act of 2005, wherein report from District Probation Officer was obtained and it was in respect of above application, both sides were given opportunity of producing their evidences, evidences were furnished and trial court passed judgment for protecting applicant by way of direction for delivery of Stridhan, by way of Rs.5,00,000/-, with further maintenance at the rate of Rs.5,000/- per month, and an accommodation for residence in company of in-laws. Though, it is there that above premises has been surrendered and the order regarding it cannot be complied with. Because in-laws are not residing in above premises and the second wife with two kids is residing with husband, hence, applicant will not be in a position to reside under above circumstances, but she had been protected from domestic violence by impugned order which was confirmed by appellate court, hence, in exercise of inherent power of this Court, under Section 482 of Cr.P.C., it is not expected that Court will analyse factual evidence and will replace finding of appellate court, treating itself to be a second appellate court. Hence, power under Section 482 is to be used where there is abuse of process of law and for doing justice and for ends of justice, this Court is to exercise above jurisdiction, but by way of this application, a prayer for exercise of appellate court has been made. Hence, this application be dismissed.

4. Having heard learned counsel for both sides and gone through the material placed on the record.

5. It is apparent that Protection of Women form Domestic Violence Act, 2005 was passed with an object to provide more effective protection to the rights of women, guaranteed under the Constitution, who are victim of violence of any kind occurring within the family, and for matters connected therewith or incidental thereto. That is the constitutional mandate was to be fulfilled by this legislation to protect a women, who is being subjected to cruelty or violence, within a family. This act is other than other acts and procedure given therein like Family Court Act, Section 125 of Cr.P.C. etc. It being an act for providing effective protection, besides there being other provisions of protection, too, and under this exercise, this application was moved. Admittedly, applicant is legally wedded wife and her husband has admitted that, while he was married with her, he was in Class-IV job at Agra University, meaning thereby, he was an employee of Class-IV at Agra

University and able to maintain his wife, that is why applicant was married with her. Subsequent to it, he is busy in the job at L.G. Shop Centre, but the above shop has been said to be of the same Vipin Kumar to whom worth Rs.5,00,000/- were given at the time of marriage. Strained relation is there. Applicant in her statement has categorically said about the cruelty being meted to her. She has been cross-examined, wherein, she has said about the violence given to her. This was reported by District Probation Officer too. The payment of Rs.5,00,000/- , in lieu of dowry, was said on oath and it was said to be for dowry and articles of households. Husband in his cross-examination has admitted to be registered owner of motor-cycle which was said to be given in this marriage, but he could not say as to when and how this motor-cycle in his name got registered. This motor-cycle has been said to be given in dowry. In all Rs.5,00,000/- cash for household articles to be used by applicant, was said to have been given in this marriage and it amounted to 'Stridhan'. Hence, the Trial Court Magistrate, after examining testimony of both sides, concluded that applicant was legally wedded wife of opposite party No.1 and she was entitled for her maintenance for coping with circumstances for which Rs.5,000/- is being paid per month regularly which has been admitted before this Court and confirmed by this appellate court. In above appeal, instituted against order, dismissing restoration application moved for restoration of divorce decree. There is no dispute hence, husband, may be a worker at L.G. Shop, or, he may be in private job, is making payment Rs.5,000/- per month as maintenance and he is to maintain his wife, hence, this meager amount of Rs.5,000/- per months was a genuine amount and just maintenance awarded by the Magistrate and this was affirmed by appellate court.

6. Regarding Rs.5,00,000/- this was proved to be given in the marriage by parents of applicant for her household articles which was usurpt by husband and in-laws, hence, direction to pay back above amount as 'Stridhan' was also with all substance and evidence on record.

7. Regarding residence, it is admitted that there is no possibility of applicant to reside with her husband where he is residing with his second wife and its in another rented accommodation, hence, that relief itself, being left over by applicant, hence, the same is not being pressed, accordingly for that no adjudication is needed.

8. In all above facts and circumstances, it is apparent that husband, who got this ex-parte divorce decree was appearing before mediation centre in the reference made by Superintendent of Police and he didn't disclose above fact that he had got an ex-parte dissolution of marriage decree rather he continued to assure that he will take his wife back. He showed inclination to keep her, whereas, he had filed a divorce suit and obtained ex-parte divorce decree and subsequently got married with second wife. Hence, on the basis of facts and evidence on record, order of trial court Magistrate as well as appellate court is based on above facts and was of correct perspective of law.

9. Apex Court in State of Andra Pradesh vs. Gour Sheety Mahesh J.T. 2010 (6) SCC 588 has propounded that while exercising jurisdiction under Section 482 Cr.P.C. of Court, High Court

could not ordinarily embark upon an inquiry whether the evidence in question is reliable or not or whether on a reasonable apprehension of it, accusation could not be sustained rather that is the function of trial judge.

10. In Hamida vs. Rashid (2008) 1 SCC 474, Apex Court has propounded that ends of justice would be better served if valuable time of court is expand in hearing those appeals other than entertaining petition under Section 482 Cr.P.C. at an interlocutory stage, which are profiled with some oblique motive in order to circumvent prescribed procedure or to delay the trial which enable to win over the witness or disinterested in giving evidence ultimately resulting in miscarriage of justice.

11. Apex Court further in Monika Kumar vs. State of Uttar Pradesh (2008) 8 SCC 781 has propounded that inherent jurisdiction under Section 482 Cr.P.C. has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself.

12. Section 482 Cr.P.C. provides that nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice. Meaning thereby, inherent jurisdiction under this Section provides this Court's power to make such order as may be necessary to give effect to any order under this Code or to prevent abuse of process of law or otherwise to secure the ends of justice. Hence, to secure ends of justice, to prevent abuse of process of any law, this Court has been given this inherent jurisdiction, beside being any other provision in this Code. Whereas, Protection of Women from Domestic Violence Act, 2005 is special Act to provide for more effective protection to the right of women guaranteed under the Constitution where a women is victim of violence. Hence, it's a self contained Code having procedure and power of appeal, wherein, Magistrate after exercising due procedure, has passed impugned order against which appeal was preferred and this appeal was decided by appellate court, hence, there remains nothing for any indulgence, in exercise of inherent power, under Section 482 Cr.P.C. for assessing judgment of appellate court, being its second appellate court.

13. This application lacks merit and is accordingly dismissed.

14. However, a portion of order regarding residence has become in-executable, in above changed circumstances, for which Magistrate will take notice and will act in accordance with law.

(2019)12 ILR A146

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.08.2019

BEFORE
THE HON'BLE KARUNA NAND BAJPAYEE, J.

Crl. Misc. Application (U/S 482 Cr. P.C.) No. 24277 of 2019

Santosh Kumar Singh ...Applicant
Versus
State of U.P.& Ors. ...Opposite Parties

Counsel for the Applicant:
Sri Syed Wajid Ali, Sri Santosh Kumar Singh

Counsel for the Opposite Parties:
A.G.A.

A. Criminal Law - Code of Criminal Procedure, 1973 - Section 156(3) & Section 197 - Rejection of application moved under Section 156(3) Cr.P.C.- The object for calling police report upon receiving an application under Section 156 (3) Cr.P.C. is to find out primarily whether any F.I.R. for same cause of action has been registered or not- Adopting a conjectural approach and drawing presumptive inferences of some supposed malice does not appear to be a sound approach at all at this preliminary stage- If cognizable offences are disclosed by the version given by the informant, the police is under bounden duty to register the F.I.R.- The basic nature of the relief which the informant seeks in such matters is to get a judicial order so that the statutory function of the police may get initiated and be expedited-The ambit and scope of entering into a kind of pre-trial before the actual trial may begin is highly circumscribed and hazarding an uncertain plunge in this direction will be anticipatory in nature- Whether the allegations made in the application are true or false must be discerned by a proper and fair investigation into the same-Plea with regard to requirement of sanction u/s 197 Cr.P.C. cannot be raised or brought into application in cases where the alleged acts of the proposed accused constituting the offences have no nexus with the official duty and are in the nature of independent delinquent aberrations of a guilty mind. (Para 7, 8 & 9)

Court, therefore, deems it fit to decide the matter on the basis of the record and with

Criminal Application u/s 482 Cr.P.C allowed. (E-3)

List of cases cited: -

1. Lalita Kumari Vs. Govt. of U.P. and others 2014(2) SCC 1 (relied)

2. D.T. Virupakshappa Vs. C. Subash, (2016)1 SCC (Crl.) 82 (Distinguished on facts)

3. Anil Kumar & ors vs. M.K. Aiyappa and another, 2013(10) SCC 705 (Distinguished on facts)

(Delivered by Karuna Nand Bajpayee, J.)

1. This application u/s 482 Cr.P.C. has been filed seeking the quashing of impugned order dated 27.5.2019 passed by Chief Judicial Magistrate, Bareilly as well as the entire proceedings arising out of Criminal Misc. Case No.620 of 2019 (Santosh Kumar Singh Vs. S.I. Siddhant Sharma), u/s 156(3) Cr.P.C., P.S.- Kotwali, District- Bareilly, pending in the Court of Chief Judicial Magistrate, Bareilly.

2. Case called out. None appeared on behalf of the opposite party no.2 and 3 even after repeated calls. Learned A.G.A. as well as learned counsel for the applicant are present. Perusal of the order-sheet shows that notices have been issued to the opposite party no. 2 and 3 which were duly served upon them. Despite sufficient service no one has appeared on behalf of the them to oppose the present application. In the wake of heavy pendency of cases in this Court where dockets are already bursting on their seams there is no justifiable reason to further procrastinate the matter. This the assistance of the learned A.G.A. representing the State.

3. Heard learned counsel for the applicant and learned A.G.A. and also perused the record.

4. Submission of learned counsel for the applicant is that while rejecting the application filed under section 156(3) of Cr.P.C. moved on behalf of the applicant, learned Magistrate has committed manifest error of law as prima facie cognizable offences were well made out from the perusal of the allegations made in the application and therefore, the learned Magistrate was legally bound in the ordinary course to allow the said application and get the matter investigated after due registration of F.I.R. It has further been pointed out that need of sanction as contemplated under Section 197 Cr.P.C. is not at all attracted in the present case. Learned counsel for the applicant has further submitted that the finding recorded by the court below in the impugned order regarding malafide motive of Peshbandi being at the back of moving the application is perverse and unfounded and is not only undesirably premature but is also based on material which itself is the false creation of police.

5. From the perusal of the record it seems that the applicant had moved an application under Section 156(3) Cr.P.C. before the court of C.J.M., Bareilly with a prayer that the S.H.O. of concerned police station may be directed to lodge F.I.R. against the respondent nos.2 and 3 and the matter should be investigated. Upon receiving the said application the learned Magistrate had called for a report and as per the police report there was no F.I.R. lodged in the concerned police station for same cause of action. However, vide impugned order the learned Magistrate had rejected the application of the applicant filed under Section 156(3) Cr.P.C. on the ground that as at earlier point of time F.I.Rs. were lodged against the applicant and his son by the police, therefore, the present application moved by the applicant was a counterblast reaction adopted in Peshbandi. The second ground stated by the learned Magistrate for rejecting the said application was that without sanction of the competent authority, the Magistrate could not order for investigation against a public servant and as the requisite sanction was not available, the the registration of F.I.R. in the matter could not have been directed.

6. The perusal of the application moved by applicant under Section 156(3) Cr.P.C. shows that it contains some very serious and disturbing allegations. According to the version given out in the application it appears that the wife of applicant was the licensee of a Beer Shop. In the evening of 22.4.2019 two police personnel of Police Station Kotwali, District Bareilly, contacted the applicant and had insistently demanded a cartoon of beer. The aforesaid two policemen were in plain dress whom the informant had the occasion to know for the reason that they used to come at times to the beer shop and by exercising their official clout they used to take away the beer bottles without making any payment. On the day of occurrence, when the shop was not open, the aforesaid two policemen came up to the informant and told that a full cartoon of beer is being demanded by the Inspector of Police and therefore, he must arrange for the same. The informant told those policemen that the beer shop had been closed under the directions of the Election Commission and District Excise officer, and therefore, he must be excused

from doing this favour. But despite all this, the two policemen kept on insisting for the same. The things did not stop at that and what happened subsequently that the plain dressed policemen made some calls as a result of which S.I. Siddhant Sharma and Constable Vinay Kumar Baliyan (opposite party no.2 and 3) came over there and instead of being equitable with the informant, they too forcibly insisted to meet out the said unfair and illicit demand which resulted in some altercation also, the details of which have been narrated in the application. Certain persons gathered on the spot and tried to intervene but their requests to the aforesaid policemen did not yield any result. Constable Vinay Kumar Baliyan forcibly took away informant's purse which contained his Aadhar Card, PAN card, Voter I.D. Card etc. and also took away his ATM card, driving license etc. S.I. Siddhant Sharma also snatched away informant's bag which contained his license of revolver and also contained Rs.8000/- in it and thereafter those persons coercively made the informant and his son sit on the motorcycle and whisked them away to the Kotwali. There they were not only abused but were also beaten up. It has been further alleged that at about 10.00 in the night S.I. Siddhant Sharma in the presence of the Police Inspector asked the Munshi of the police station to dump them in the lock up. The informant and his son were then badly assaulted upon in the lock up also and his spectacles, mobile, belt and sphatik beads were also taken away. Later on in the mid night they were again taken out from the lock up and then the Police Inspector, Constable Vinay Kumar Baliyan and S.I. Siddhant Sharma and two aforementioned police personnel forced the informant and his son to put their signatures upon certain papers and they were again dumped back in the lock up. During all this night of torment it was made to appear by these police personnel that the informant shall be taught a lesson which he shall never forget in his life and which shall teach him for future what kind of consequences follow for defying the diktats of the police. Later on, the informant came to know that he has been booked in some false case also. It has also been alleged in the application that the son of informant is a patient of hysteria/epilepsy and as such he was under regular treatment of Dr. Shriprakash Mishra. During the course of informant's unlawful detention and wrongful confinement the aforesaid doctor had even come to the police station to give the medicine to his son but S.I. Siddhant Sharma and Constable Vinay Kumar Baliyan ill-behaved with the doctor also and hurled filthy abuses and disallowed him even to handover the essential medicines needed for informant's son. The doctor was not allowed to meet the informant and threats were given to him that he too shall face the same fate in case he would insist. It has also been alleged in the application that during the course of their wrongful confinement, informant's wife Neeru Singh, Nand Kishor Maurya, Kunwar Pal and certain other persons had made calls to informant but as the mobile of the informant was with the policemen, they did not allow the callers to have any talks with the informant or his son. Aforesaid criminal acts committed by the accused not only decimated informant's social prestige but it also deprived the first informant and his entire family from their constitutional right of casting their votes, not to speak of physical and mental trauma which was caused to them. It further transpires from the application that the informant did not

give up his courage and decided to take up the issue and fight it out. Later on he, therefore, went to the In-charge Inspector of Kotwali and gave him an application making complaint with regard to all the offences that were committed against him and he also sent the same through registered post next day without evoking any result. As no action followed, the informant went and approached the Senior Superintendent of Police, Bareilly also and give him application in this regard, but despite all this, the grievance of the informant remained unaddressed and unredressed both which impelled him to move the application before the Magistrate u/s 156(3) Cr.P.C.

7. The perusal of the impugned order dated 27.5.2019 would reveal that while rejecting the application of the applicant moved under Section 156(3) Cr.P.C. the learned Magistrate had taken into consideration the detailed report submitted by the police station Kotwali, district- Bareilly. Admittedly, both the proposed accused persons also were posted in the said police station. Moreover the object for calling police report upon receiving an application under Section 156 (3) Cr.P.C. is to find out primarily whether any F.I.R. for same cause of action has been registered or not. Other facts mentioned in the police report appear to have been overestimated and given undue weightage. The mere fact that two F.I.Rs. had been already lodged against the applicant and his son on 23.4.2019 by the opposite party no. 2 does not disprove or improbabilize or vitiate the allegations made by the applicant in the application moved under Section 156(3) Cr.P.C. The F.I.R. lodged by the opposite party no. 2 against the applicant and his son was for selling beer in restricted hours as well as for making some alleged assault by the applicant and his son upon the police personnel on 23.4.2019 at about 11.15 A.M. The relative truth of the two versions can be ascertained either through a fair investigation or through a fair trial, as the case may be. Adopting a conjectural approach and drawing presumptive inferences of some supposed malice does not appear to be a sound approach at all at this preliminary stage. It is an inherent right of the aggrieved person to approach the police and get the F.I.R. registered with regard to the cognizable offences, if they have been committed against him by some accused persons. If cognizable offences are disclosed by the version given by the informant, the police is under bounden duty to register the F.I.R. The law as has been laid down in the case of **Lalita Kumari vs. Govt. of U.P. and others 2014(2) SCC 1** is categorical in this regard, and is no more *res integra*. But when the police fails to perform its own duty and even other attempts of the informant in this regard which include its approach to police higher ups do not yield any result, he feels impelled to approach the court and move an application u/s 156(3) Cr.P.C. The basic nature of the relief which the informant seeks in such matters is to get a judicial order so that the statutory function of the police may get initiated and be expedited. The court, when it directs the registration of the F.I.R. or the investigation in the case, is basically doing nothing except asking the police to perform its bounden legal duty which it has otherwise failed to do. The ambit and scope of entering into a kind of pre-trial before the actual trial may begin is highly circumscribed and hazarding an uncertain plunge in this direction will be anticipatory in nature. For reasons of

being premature and dicey it shall not be a sound approach to be adopted. Everyday we see cross cases being registered in police station. Everyday we see cross versions coming in the court. In all such matters one version is registered earlier while another version is registered later on. It cannot be held as a matter of law or even as a rule of prudence that the subsequent version of the other side should be presumed to be false or that it should be invariably presumed that it is a counterblast reaction expressed and brought out of malice. On that analogy there will be scarcely any scope to have either the cross cases or the cross versions registered or to have two cases registered against rival parties that may be lodged against each other even with regard to different incidents that may take place with some hiatus of time existing in between. The judicial disposition of drawing the inference of malice or malafides at such a premature stage with regard to the cases or versions brought later in point of time may prove to be a deceitful prejudice or a misleading guideline. Such an inference may be drawn only in rarest of rare cases where the circumstances may be so overwhelmingly demonstrable that the vicious mal-intention or the oblique motive of false implication prompted by express malafides may be conclusively deduced from the conspicuous circumstances of that particular case. Otherwise in ordinary course whether the allegations made in the application are true or false must be discerned by a proper and fair investigation into the same. In this particular case where the accusations have been made against police personnel themselves, one might find it more probable to presume that after having committed such criminal highhandedness as has been alleged the most normal course likely to be adopted by the police in its own defence is or could have been to register a false case against the informant. The fear of being prosecuted or the fear to face charges after having committed the alleged offences, might naturally prompt the guilty police personnel to invent a defence mechanism and what could have been a better prophylactic defensive strategy than to embroil the informant in some false case and use it as an arm twisting device in order to save themselves from any possible future complaint. It is not difficult to understand as to how difficult it is to get a case registered in the police department itself against its own men. But all such reasonings and inferences would be based on broad generalizations and such kind of approach is again not a very desirable or called for judicious approach. There was no good reason for the court below to draw any such adverse inference either against the informant or against the police party at such a premature stage. To draw the inference of malafides and damning the informant's version as a *Peshbandi* and not to allow his report even to be registered against the policemen and thereby not to allow even a fair investigation into the truthfulness of such serious allegations, was not at all a judicious approach. We live in a society which takes pride in being under the rule of law and for not being under the rule of men or their executives. Under the protective umbrella of our solemn constitution even an ordinary man of humble background has got a legal right to express his grievance against the powers that might be if they have been guilty of being unjust against him, not to speak of having committed punishable offences against him. The truthfulness or

otherwise of the allegations, as have been made by the informant, has to be probed into by a fair and impartial investigation. The duty of the department of police and the investigating officer in such a matter would be much more onerous as he shall be required to perform his duty with a higher sense of non partisan fairness, the accused persons in the case being his own compatriots and peers. If the allegations, as have been made, are not found false, they shall have constituted a very sad commentary upon the working of this executive arm which is otherwise supposed to act and function in order to protect the people and maintain the law and order. When law enforcing agencies go awry and unruly, it evokes a serious judicial concern and reports of such kind cannot be either soft-pedalled or be countenanced with. In the wake of the serious allegations as have been made in the application u/s 156(3) Cr.P.C., the least which was required was that the Magistrate should have directed the investigation into the case and get the truth ascertained and not to scuttle the inquiry and bury forever all the possibilities of finding the truth.

8. So far as the requirement of sanction u/s 197 Cr.P.C. is concerned, there may be cases where the acts of the accused or the proposed accused allegedly said to be constituting the offence are such that may be so inextricably intertwined with their official duty that they would be termed to be acts committed during the course of discharge of their official duty. The alleged acts must be either in excess or in dereliction of the supposed or purported official duty. Such kind of plea with regard to requirement of sanction cannot be raised or brought into application in cases where the alleged acts of the proposed accused constituting the offences have no nexus with the official duty and are in the nature of independent delinquent aberrations of a guilty mind. The version as has been disclosed in the application moved by the informant shows that from the very inception of the alleged criminal transaction the proposed accused indulged in the illicit demand of beer which had nothing to do with their official duty. The allegations of snatching the purse or money and making a criminal assault which included beating and abusing, are also acts so independent and disconnected with any official duty that they cannot at all be termed as acts having been committed by the accused person or persons while acting or purporting to act in the discharge of their official duty. According to the version given out in the application the informant had gone to the vegetable Mandi from his house along with his son and while he was going to his house back after making the necessary purchases, he met with a friend of his namely Mohsin Ansari at a certain place near Raghuvanshi Complex. At that point of time when he was conversing with his friend, the two policemen in plain dress arrived there, about whom the reference has already been made in earlier part of the order while describing the version of the application. This Court has already referred to the facts contained in the application wherein it has been described as to how these two policemen used to come to the beer shop of informant and indulged in the illicit demand of beer off and on in the name of Inspector of Police without making any payment in lieu of the same. On the day of incident also it was made to appear by these two policemen that a cartoon of beer was being demanded by the Inspector of Police

himself. They had also told the informant that as his beer shop was closed that day that is why the policemen had gone to the house of the informant for that purpose. It was at the house of the informant that the policemen came to gather about the whereabouts of the informant and after coming to know that the informant had come to the vegetable mandi, that is why the aforesaid policemen had to follow his trail and that was how they had come to meet the informant at that place. It was at that point of time that the informant was asked by the policemen to open up the beer shop and hand them over a cartoon of beer as was demanded. The subsequent description of the incident has already been detailed herein before and does not need repetition. But it is so very clear from the version of the informant that the aforesaid prelude and the evolution of events which eventually led to the detention of applicant and his son in the lock up after lifting them from there and the criminal assault that was allegedly made upon them in the police station can hardly be reasonably connected with the discharge of any official duty. Even a most liberal construction of law would not permit us to construe their acts as having even a remote nexus, not to speak of having a proximate nexus, with their official duty and therefore, in the facts of the case the view adopted by the court below whereby the absence of sanction u/s 197 Cr.P.C. has also been made an additional ground for rejecting the application appears to be an unsound approach. The cases as have been cited in the order are factually so distinguishable that they cannot be successfully brought to the rescue of the private person. When a complaint was raised, the accused passed another order and recalled the earlier order. The allegation made against him was that the issuance of the earlier order constituted the ingredients proposed accused. In the case of **D.T. Virupakshappa vs. C. Subash, (2016)1 SCC (Crl.) 82** referred to in the impugned order, the allegations were to the effect that the victim was taken to the police station in connection with the investigation of some cases and the accused policeman of that case was said to have wrongfully detained the victim in the police station and had directed that the victim should not be let out till he revealed or confessed about his involvement in the murder of one Sannamma. Hon'ble Apex Court had arrived at the conclusion that the factual matrix of the case made it evident that the whole allegation was regarding the police excess in connection with the investigation of a criminal case. In the view of the Apex Court the said offensive conduct was reasonably connected with the performance of the official duty of the accused appellant of that case, and therefore, the act of taking cognizance in the matter without previous sanction of the State Government was found illegal. It is also worth taking note of that aforesaid case of D.T. Virupakshappa vs. C. Subash related to a private complaint filed by the complainant on which the learned Magistrate had taken cognizance and had issued summons to the accused and it was not a matter relating to an application moved u/s 156(3) Cr.P.C. Another case referred to in the impugned order is that of Anil Kumar and others vs. **M.K. Aiyappa and another, 2013(10)SCC 705** in which the facts were to the effect that the accused of that case with malafide intention had passed an order in connivance with other officers and restored valuable land in favour of a of several offences including the Indian Penal Code and also the ingredients of certain offences under the Prevention of Corruption Act. From the aforesaid facts of the case also it is so clear that the act of

passing the order which was said to be substratum giving rise to the various offences was an act done while discharging the official duty and if the duty was not rightly performed, such an act would be in dereliction of the official duty. The impugned conduct of the accused in Anil Kumar's case (supra) is so inextricably intertwined with his official duty that the same has to be termed either in excess or in dereliction of the same. It was in the particular background of this factual matrix that the need of the sanction was approved but as it has already been noted that so far as the facts of the present case under consideration is concerned, the allegations are relating to a conduct quite independent of any official act. Whether the allegations are true or false is a different question and which can only be discerned through a legitimate investigation only.

9. At any rate in the considered opinion of the Court the allegations made in the present application filed under Section 156 (3) Cr.P.C., which on the face of it do constitute cognizable offences, need a fair investigation in order to ascertain the truth and arrive at a just conclusion. The Magistrate has certainly committed error while he rejected the application moved under section 156(3) Cr.P.C.

10. In view of the above discussion, the impugned order cannot be sustained and the same deserves its quashing. Accordingly the application stands allowed and the impugned order dated 27.5.2019 stands quashed.

11. The matter is remanded back to the court below concerned for passing fresh orders in accordance with law keeping in view the observations made hereinabove.

12. In the last it may also be observed that as the accusations have been made against police personnel therefore it shall be in the fitness of the things that the S.S.P. concerned should appoint an officer of the higher rank, being an officer not below the rank of Deputy Superintendent of Police to investigate the case under his own supervision. The court below is therefore directed to communicate this direction to the S.S.P. concerned after passing fresh orders in the matter.

13. Office is also directed to communicate this order by fastest mode available both to the concerned court below and to the S.S.P. concerned.

(2019)12 ILR A154

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.09.2019

BEFORE
THE HON'BLE DINESH KUMAR SINGH-I, J.

Crl. Misc. Application (U/S 482 Cr. P.C.) No. 24529 of 2015

Jong Seuk Park President Korea Marine Transport Company Ltd. ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Anand Mohan Pandey, Sri Pankaj Jaiswal, Sri Varun Shankar Dwivedi

Counsel for the Opposite Party:
A.G.A., Sri Deepak Agarwal, Sri Shiv Sagar Singh

A. Criminal Law - Indian Penal Code 1860- Section 406/420-Cr.P.C, 1973- Section 468- The transporter cannot be

absolved of his liability if any item of the consignment is found lost/missing and would be jointly liable for the said loss with other co-accused involved in its transportation as well as in loading.- At the time when the consignment was loaded, the applicant was present and his seal was also affixed, which would be treated to be nothing but an entrustment of the consignment - Civil disputes or commercial disputes, in certain circumstances, may also contain ingredients of criminal offences - Notwithstanding that the dispute is of civil nature, such a dispute may have to be entertained on the criminal side - Section 468 Cr. P.C. - Since the accused has been summoned to face trial under Sections 406 and 420 IPC, same is punishable with imprisonment up to 7 years and fine, therefore the bar of 3 years would not be applicable in the present matter – Whether there was intention to cheat or not on the part of the applicant and other co-accused cannot be seen at this stage - The aspect of non-impleadment of the company, of which the accused applicant is stated to be president can be seen by the trial court at the stage of trial and the provision of Section 319 Cr. P.C. may be invoked, if so required, in order to implead the company of the accused applicant as well. But solely on the count of non-impleadment of the company,the prosecution of the accused cannot be quashed.

Criminal Application rejected. (Para 13,14,15,24,25,26)

Case Law cited/ discussed:-

1.M/s. Indian Oil Corp. Vs. M/s NEPC India Ltd. & Ors., 2006 (6) SCC 736

2.Harishchandra Prasad Mani & Ors Vs. St. of Jhar. & anr, 2007 (15) SCC 494.

3.Hira Lal & Ors. Vs. St. of U.P. & Ors. Crl. Appeal No.662 of 20.

4.Arun Bhandari Vs. St. of U.P. & ors, 2013 (2) SCC 801.

5.Anil Kohli Vs. State (NCT of Delhi), 95 (2002) DLT 173.

6.M/s. Zandu Pharma. works Vs. Md. Sharaful Haque & Anr.,2005 (1) SCC122

7.R. Kalyani Vs. Janak C. Mehta & Ors.2009(1) SCC 516

8.Maksud Saiyed Vs. State of Guj. & Ors. 2008 (5) SCCSCC 668.

9.S.K. Alagh Vs. St. of U.P. & Ors., 2008 (5) SCC 662.

10.State of Har. & ors. Vs. Ch. Bhajan Lal & ors, 1992 Suppl. (1) SCC 335.

11.Madhavrao Jiwahirao Scindia & ors. Vs. Sambhajirao Chandrajirao Angre & ors, (1988) 1 SCC 692.

12.St. of Kar. Vs. L.Muniswamy & ors (1977) 2 SCC 699.

13.Application U/S 482 No.-12977 of 2018, Usher Agro Ltd. Vs State of U.P. and Another decided on 09.07.2018. (Relied upon)

(Delivered by Hon'ble Dinesh Kumar Singh-I, J.)

1. Heard Sri Pankaj Jaiswal learned counsel for the applicant, Sri Shiv Sagar Singh, learned counsel for opposite party no.2 Sri Attreya Dutt Mishra, learned A.G.A. appearing for the State and perused the record.

2. This application under Section 482 Cr.P.C has been moved with a prayer to quash the entire criminal proceedings of the complaint case no.4182 of 2014 (G.K. Traders vs. Sudhir Kumar Shukla and others) under sections 406, 420 IPC, Police Station Fazalganj, District Kanpur Nagar and the summoning order dated 20.02.2015 passed by Additional Chief Metropolitan Magistrate 8th Kanpur

Nagar and also a prayer is made to stay the proceedings in this case till the disposal of this application.

3. Learned counsel for the applicant has mainly argued that the offences, which have been mentioned above, had been constituted against the accused-applicant because the material had only been transported in the ship of the applicant, which was about 23 metric tons of copper scrap. No entrustment of the said property was made to him. The matter is of civil nature. The opposite party no. 2 has also filed a claim petition for making good the loss of the goods. Further it was argued that the proceedings are barred by section 468 Cr.P.C. In criminal case no vicarious liability can be imposed against the accused applicant. The applicant was not Indian national. On the date of occurrence, the company of the applicant was not registered in India and even the address of the company of the applicant is shown wrong. The opposite party no. 2 has not made the company of the applicant as a party in this case but has only made the President of the said company to be an accused, which is illegal. Attention was drawn to page 24 of the paper book, which indicates that the same was bill of lading. The goods to be transported were in a sealed container, hence the applicant had no knowledge as to what was kept in them. On 26.9.2009 the ship had moved and had reached its destination on 29.9.2009 and on that date the opposite party no. 2 had gone for collecting the consignment then he came to know that the copper, which was transported, was missing. The complaint has been filed about five years after the occurrence, hence the same is barred by provision of section 468 Cr.P.C. The crime was not committed in India rather the same was committed in the ship. The jurisdiction of Kanpur Nagar has been falsely made in the present case and accordingly it is prayed that the criminal proceedings against the applicant need to be quashed. It was also argued that the bill of lading would indicate that the responsibility of the applicant was confined only upto custom yard to custom yard, which is indicated in the said bill. Therefore, if any of the goods were found less in weight, number and quantity after it had gone out of the custom yard, the accused-applicant cannot be treated to be responsible for the same. When a question was put to the learned counsel for the applicant as to how he was representing the applicant, who is stated to be foreign national, he replied that vakalatnama was got signed and obtained through courier from abroad. He has also relied upon the following case laws:

i). M/s. Indian Oil Corporation vs. M/s NEPC India Ltd. & Ors., Appeal (Crl.) No.834 of 2002.

ii). Harishchandra Prsad Mani & others vs. State of Jharkhand & another, Appeal (Crl.) No.124 of 2007.

iii). Hira Lal & Ors. vs. State of U.P. & Ors. Crl. Appeal No.662 of 2009.

iv) Arun Bhandari vs. State of U.P. and others, Crl. Appeal No.78 of 2013.

v). Anil Kohli vs. State (NCT of Delhi), 95 (2002) DLT 173.

(vi). M/s. Zandu Pharmaceutical works vs. Md. Sharaful Haque & Anr., Appeal (Crl.) No.1241 of 2004.

(vii).R. Kalyani vs. Janak C. Mehta & Ors. Crl. Appeal No.1694 of 2008.

(viii).Maksud Saiyed vs. State of Gujarat & Ors. Appeal (Crl.) No.1248 of 2007.

(ix). S.K. Alagh vs. State of U.P. & Ors., Appeal (Crl.) 317 of 2008.

4. On the other hand, learned counsel for the opposite party no. 2 has vehemently argued that the goods were sealed in the presence of the accused-applicant and number of seal was mentioned as KMB121561 and when the same was received by the opposite party no. 2, the same was found less in quantity/weight. In the present case along with civil liability, it cannot be said that the criminal liability is not made out. There is direct role of the accused-applicant and hence the company was not required to be impleaded as it had no role. It is further argued that the case is not time barred because the offence in which the accused-applicant has been summoned also comprised the offence under section 420 IPC which is punishable for seven years imprisonment, hence it would not be treated to be barred under section 468 Cr.P.C. The goods were to be carried to Kanpur Nagar, hence jurisdiction of Kanpur Nagar would be made out in the present case.

5. In order to appreciate the controversy involved in the present case, it would be appropriate to refer in brief the facts of the case, which are as follows.

6. The complaint was made by the opposite party no. 2 i.e. M/s G.K. Traders through its Proprietor Gopi Krishan Gupta against the accused-applicant (accused no. 3) in the said complaint and two others namely, Sudhir Shukla and Saham Siddiqui alleging therein that the firm of the complainant deals in wholesale business of scrap. The co-accused Sudhir Shukla was Computer Operator in the said firm, who used to deal in communication and business letters in respect of the sale and purchase of scrap on behalf of firm with other traders. The other co-accused Saham Siddiqui was friend of the co-accused Sudhir Shukla who used to come to meet him in the office. The co-accused Saham Siddiqui is expert in establishing contact in foreign countries with respect to business of scrap and he had inspired the complainant that if he begins the business of scrap with the company of accused-applicant namely K.M.T.C. Ship Company, he would earn huge profits. The said company does transportation work in entire world by reaching goods from one country to another and the said company was also registered in India having its office at Mumbai. Since the said company of the accused-applicant was registered in India, proceedings under section 188 (B) Cr.P.C against it can be drawn. The co-accused Sudhir Shukla and Saham Siddiqui in collusion with each other gave proposal to the opposite party no. 2 to purchase copper scrap from the First International Company Ltd., Seoul, Korea whose owner was Jeson Kim, who had copper scrap in large quantity. The co-accused Saham Siddiqui had sent e-mail in this regard to the complainant believing which, he gave consent for the said business and on 22.07.2009 co-accused Sudhir Shukla has sent e-mail to Jeson Kim indicating therein that the complainant wanted 99.9% pure copper and offered him 3500/- US$ per ton, on which it was agreed that at the rate of 3600/-US$ per ton copper scrap would be purchased from Manila Philippines and its sale contract was sent through e-mail in which the terms and conditions were stipulated that not less than 100 metric tons material would be purchased and that of the total material, 20% amount would have to be deposited in the account of

Jeson Kim. Thus, the co-accused Sudhir Shukla and Saham Siddiqui after having taken the complainant into confidence, reached Manila on 25.8.2009 and inspected the copper on 27.8.2009 and sent photograph through e-mail on 28.8.2009. The contract for sale of 20 metric tons was agreed upon and 20% amount i.e. 14400/- US$ were to be deposited in the bank of Korea and Rs.30,000/- was to be spent as other expenditure, which were requested to be sent by the opposite party no.2. The opposite party no.2/complainant accordingly deposited 14400/- US$ on 31.8.2009 as per terms and conditions. The co-accused Sudhir Shukla and Saham Siddiqui gave 600/- US$ on 4.9.2009 and 900/- US$ on 20.9.2009 to Jeson Kim in cash, which were sent by the firm of the complainant and remaining amount i.e. 80% of the copper scrap was also paid by way of advance to Jeson Kim. Thereafter, the copper scrap was loaded in the containers in the presence of co-accused Sudhir Shukla and Saham Siddiqui, the weight of which was found to be 23 metric tons, hence the total amount of the said 23 metric tons copper scrap came to be of 84300/- US$ out of which, 14400/- US$ on 31.8.2009 and 1500/- US$ according to the terms and conditions of paragraph nos. 10 and 11 and remaining 6800/- US$ were deposited in the account of Jeson Kim on 19.9.2009. Thus, the whole price of the copper scrap was paid by the complainant where-after the co-accused Sudhir Shukla and Saham Siddiqui had loaded the said scrap in containers and sealed & packed them. The applicant-accused had also affixed his seal on the said copper being seal no. KMP1212651 and thereafter the container of the copper scrap which was loaded in the ship of the accused-applicant was handed over to be reached at Kanpur address. On 26.9.2009 the copper container reached Mumbai and then the accused-applicant along with other co-accused told the opposite party no. 2 to get the delivery from Mumbai because if the said container was allowed to be kept there, hourly charges would have to be paid. In pursuance of that, the representative of the opposite party no. 2 namely, Sachin Gupta reached Mumbai and after having paid custom duty assessed on the weight of the container, bill of which is article-14, on weighing the said material, in place of 23 metric tons copper, the same turned out to be 6 metric tons. At this, on 3.11.2009 in the presence of representative of the accused-applicant, Insurance Surveyor, Custom Officer and the representative of the opposite party no. 2, seal of container was opened, out of which, in place of 23 metric tons copper scrap, only four bags of rubbish were taken out. Therefore, the accused-applicant along with other co-accused had caused loss to the complainant/opposite party no. 2 of having swindled of 84300/ US$, which would be equivalent to Rs.41,30,000/- in Indian currency. Apart from this, expenditure incurred by the accused-applicant nos. 1 and 2 Sudhir Shukla and Saham Siddiqui in having gone to Manila and their stay in hotel etc. was also to be borne by the opposite party no. 2 in addition to the rent of shipping company. Thus, over and above, the loss of Rs.10.00 lacs was also caused to the complainant. The opposite party no. 2 made various trips to Mumbai and Kanpur Nagar in order to get the copper scrap and also continued to make correspondence with the accused persons, therefore, delay had occurred in filing the complaint, which was not deliberate, hence the complaint is not time barred.

7. On this complaint, statement of opposite party no. 2 was recorded under

section 200 Cr.P.C on 2.8.2014 in which he has repeated the same version which has been given in the complaint and witness Sachin Gupta son of Gopi Krishan Gupta has also been examined as PW1 under section 202 Cr.P.C. and Ravi Gupta son of Gopi Krishan Gupta as PW2 under section 202 Cr.P.C. Both these witnesses have also narrated the same version which has been given in the FIR. Devendra Singh son of Hira Lal Singh has been examined as PW3 and after having considered the entire evidence, the trial court has passed the impugned summoning order dated 20.2.2015 whereby the accused-applicants along with other co-accused Sudhir Sharma and Saham Siddiqui have been summoned to face trial under section 406 and 420 IPC.

8. An affidavit in support of the application has been filed from the side of the applicant and it has been mentioned that there is a Shipping Company in the name and style of Korea Marine Transport Company Ltd. (KMTC) which is registered in South Korea having its registered office at 15th Floor, Hanjin Building 118 2-GA Nem Daem Un-Ro Jung-Gu Seoul Korea which is one of the leading line in South Korea offering total transportation since last 58 years, of which the applicant is President and a foreigner having citizenship of South Korea. The applicant has authorized Mr. Sridhan Subramaniam, General Manager, (deponent) since 2013 to look after the case in India and to file the present application. Copy of the authority letter issued in his favour is Annexure-1 to the affidavit. On 14.9.2009, the complainant/opposite party no. 2 through his shipper had booked his consignment with KMTC and during that period KMTC Lines agents in Nhava Sheva, Mumbai were Sea Horse Ship Agency Pvt. Ltd. who were to be approached for delivery of consignment at Nhava Sheva, Mumbai. Copy of the bill of lading is annexed as Annexure-2 to the Affidavit. On 26.9.2009 complainant's consignment had reached Nhava Sheva, Mumbai. On the same day it had gone to the custom bounded area in the Yard of Continental Warehousing Corporation (Nhava Sheva Mumbai) Pvt. Ltd. and as per report dated 29.9.2009 of the said Continental Warehousing Corporation (Nhava Sheva Mumbai) Pvt. Ltd, the consignment was delivered to Continental Warehousing Corporation (Nhava Sheva Mumbai) Pvt. Ltd. with normal wear and tear. Copy of the report of Continental Warehousing Corporation dated 29.9.2009 is annexed Annexure-3. As per bill of lading dated 14.9.2009 the consignment was loaded, counted and sealed by shipper at the shipper's place in Manila. Once the consignment is unloaded from ship/carrier and the same was handed over to the custom bounded area then the carrier would stand released from all his liability. The complainant/opposite party no. 2 has filed his bill of entry with the custom on 23.10.2009 and thereafter the consignment was examined and after weighing the consignment, it was found that it was weighing only 6 metric tons. Copy of the bill of entry dated 23.10.2009 is annexed as Annexure-4 to the affidavit. On 3.11.2009, the said consignment was presented for joint survey and as per surveyor report, the said container was found in normal wear and tear condition due to age and use and seal was found intact. Copy of the same is annexed as Annexure-5. The responsibility of the carrier ceased once, the container was discharged with the seal in intact condition. The complainant/opposite party

no. 2 through his counsel sent two notices dated 21.12.2009 and 25.3.310 to the agent of KMTC i.e. Sea Horse Ship Agency Pvt. Ltd. which were replied by the agent of KMTC vide replies dated 10.3.2010 and 6.5.2010. In both the notices of complainant, it has not been alleged that any criminal liability was made out against the applicant which shows that the present complaint is an after thought with a view to coerce the applicant. Copies of the said notices are annexed as Annexure-6. Law laid down by Supreme Court in **State of Haryana and others vs. Ch. Bhajan Lal and others, 1992 Suppl. (1) SCC 335,** in **Madhavrao Jiwahirao Scindia and others vs. Sambhajirao Chandrajirao Angre and others, (1988) 1 SCC 692, State of Karnataka vs. L.Muniswamy and others (1977) 2 SCC 699** are relied upon which have also been mentioned in the affidavit and citing them it is written that in the light of the principles of law laid down in these cases, no offence is made out against the applicant in the present case. Once consignment is unloaded from the ship/carrier and the same was handed over to the custom bounded area then carrier would be released of all his liabilities. The Indian Carriage of Goods by Sea Act, 1925, Article III(5) provides "The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity and weight as furnished by him and the shipper shall indemnify the carrier against all loss, damage and expenses arising or resulting from inaccuracies in such particulars. The right of carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper" Article III (6) says that unless notice, loss or damage and the general nature of such loss, damage be given in writing to the carrier or his agent at the port of discharge before or at the time of removal of the goods into the custody of the persons entitled to delivery thereof under the contract of carriage or if the loss or damage be not apparent, within 3 days, such removal would be prima-facie evidence of the delivery by the carrier of the goods as described in the bill of lading. Therefore, it is further mentioned that in any event, the carrier and the ship shall stand discharged from all the liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered. Article IV (2) (a) and (i) provides that neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from the neglect or default of the master mariner, pilot or the servants of the carrier in the navigation or in the management of ship, act or omission of the shipper or owner of the goods, his agent or representative. The doctrine of limitation is founded on considerations of public policy and expediency. The object of limitation is to compel the litigants to be diligent in seeking remedies in courts of law prohibiting state claims. In commercial dealings it is highly necessary that matters of title and rights in general should not be in state of constant uncertainly, doubt and suspense. Several other citations have also been mentioned which are not required to be reproduced here. Further it is mentioned that in the business circle, to convert purely civil dispute into criminal case, now it is growing tendency. This is obviously on account of a prevalent impression that civil law remedies are time consuming and do not adequately

protect interest of the complainant. As per section 188 Cr.P.C. Proviso which indicates that no such offence could be enquired into or tried in India except with previous sanction of the Central Government as accused-applicant is a person of foreign nation and also alleged incident occurred outside India during the voyage. The present matter is essentially of civil nature which has been given a cloak of criminal offence. Hence, it is lastly prayed that the said proceedings are liable to be quashed.

9. In rebuttal, a counter affidavit is filed on behalf of the opposite party no. 2 Gopi Krishan Gupta. It has been mentioned in it that the applicant had not mentioned the official address of the company situated in India in authority letter i.e. Annexure-1 of the affidavit. The applicant had affixed its seal copper number KMT 1212651 on the container and in the said bill of lading the gross weight of the container was shown 23,000 kilogram (23.000 metric tons) Copper Millberry Scrap (99% purity of Copper). The representative of the opposite party no. 2 had reached Mumbai for fulfillment and observing necessary formalities for release of the container. As per the bill of lading dated 14.9.2009, it was the obligation of the applicant to deliver and handover the consigned container to the consignee i.e. opposite party no. 2 at I.C.D. Kanpur, India. On weighing the container it was only approximately 06 metric tons instead of 23.00 metric tons. 1*20 FCL container number GLDU-52256399 STC net weight 23,000 kilogram Copper Millberry Scrap after discharge on 26.9.2009 from M.V. "Mare Internum" at J.N. Port Nhava Sheva was shifted to the nominated Continental Warehousing Corporation, CFS, Nhava Sheva, on weighbridge inside the CFS noted net weight 4,720 kilograms, hence the joint survey of the said container was made. Photocopy of the public weighing duplicate ticket dated 28.10.2009 issued by Continental Warehousing Corporation Limited, Navi Mumbai is annexed as Annexure-2. In pursuance of the examination order dated 03.11.20009 passed by Indian Customs EDI System-Imports (ICES/I) JNPT, Nhava Sheva Mumbai-400 707 it is found "------ bags found in the cabins containing with some rusty iron bags and sand-----." After the examination of container by the Custom Authority the joint survey of the aforesaid container was conducted on 03.11.2009 in the presence of six person, namely, (i) Mr. CRN Reddy of M/s. Scan Container Terminals Pvt. Ltd. (Surveyor appointed by CFS), (ii) Mr. Prashant Mathre of M/s. Pinnacle Marine Services (P) Ltd., (Surveyor appointed by Vessel Agents), (iii) Mr. Sachin Gupta for M/s. G.K. Traders (Consignee representative), (iv) Mr. P.K. Sinha, Appraiser Customs, (v) Mr. Bhaskar of M/s. Wilson Surveyors and Adjusters Pvt. Ltd., (vi) Pankaj Shipping and Transport Company and the report of joint survey specifically stated that " the seals were cut open in our presence when found 04 nos. jumbo bags, containing rusty iron wires and sand. All the nuts, locking the bolts from inside the door were sealed with a sealant. Only the sealant of the nut locking bolts with tampering marks of catch on door handle retainers of the right door were found resealed and repainted near the nut bolts." The Scan Container Terminals in its joint survey report dated 03.11.2009 stated that "the seals were cut open in our presence, then found 04 nos. jumbo bags out of 21 jumbo bags (23000 kilograms) containing rusty iron wires and sand. All the nuts

bolts locking the bolts inside the door were sealed with sealant. On the sealant of the nuts locking bolts with tampering marks on door handle retainers of the right door were found resealant and repaint near the nut bolts". Further it is mentioned that joint survey report dated 04.09.2009 submitted by Wilson Surveyors and Adjusters Private Limited, Mumbai also stated that "the seals were cut open in our presence when found only 04 nos. jumbo bags containing rusty iron wires and sand. One bag was found with the label marked with a Exporter name as Proctor and Gamble Distributing Co. Manila Philippines and an empty sachet of Palmolive Shampoo marked as Mukati City, Philippines in another bag. All the "nuts' locking the bolts from inside the door were sealed with a sealant. Only the sealant of the nut locking bolts with tampering marks of the catch and door handle retainers of the right door were found resealed and repainted near the nut". The Pinnale Marine Services Private Ltd. Mumbai in its joint survey report dated 09.11.2009 stated that "the seals were cut open in our presence when found only 04 nos. jumbo bags containing rusty iron wires and sand. One bag was found with the label marked with a Exporter name as Proctor and Gamble Distributing Co. Manila Philippines and an empty sachet of Palmolive Shampoo marked as Mukati City, Philippines in another bag. All the "nuts' locking the bolts from inside the door were sealed with a sealant. Only the sealant of the nut locking bolts with tampering marks of the catch and door handle retainers of the right door were found resealed and repainted near the nut". Photocopies of these reports are annexed as Annexures-3, 4, 5 and 6. On the discharge of the aforesaid container on 26.9.2009 the weight of the container was found much less than its actual weight on which the joint survey of the aforesaid container has been conducted and the fraud committed by the applicant along with the other accused persons with the opposite party no. 2 has been revealed. The applicant had received huge amount of 84,300 US$ (Rs.41,30,000/-INR) from the opposite party no. 2 for the sake of 23000 kilograms of Copper Millberry Scrap (99% purity of copper) but the applicant instead of supplying the same, supplied 04 nos. jumbo bags containing rusty iron wires and sand which amounts to cheating criminal breach of trust. In order to prove his complaint, the complainant and witnesses were examined before the court of A.C.M.M.-VIII, Kanpur Nagar which clearly makes out an offence to have been committed under sections 406 and 420 IPC. The applicant without appearing and seeking bail in Complaint Case NO.4182 of 2014, has presented the application dated 04.06.2015 for cancellation of bailable warrant. The cited case laws are not related and applicable to the present case. There is no lacuna in the summoning order. Further, it is mentioned that normal wear and tear does not mean that it would cover the lost of 23,0000 kilograms of goods i.e Copper Millberry Scrap (99% purity of copper) from the aforesaid consigned container which was shipped by the applicant. The description and quantity of goods mentioned in the bill of lading dated 14.09.2009 were not found in the consigned container because of which joint survey of the consigned container had been made. Article III (4) of the Schedule i.e. Rules relating to Bill of Lading in the Indian Carriage of Goods by Sea Act, 1925, it is provided that a bill of lading shall be prima-facie evidence of the receipt by the carrier of the goods as

therein described in accordance with paragraph 3(a), (b) and (c) and Article III (3) states that after receiving the goods into his charge, the carrier or the master or agent of the carrier, shall on demand of the shipper, issue to the shipper a bill of lading showing among other things i.e. (a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on cases coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage; (b) either the number of package or pieces, or the quantity or weight, as the case may be, as furnished in writing by the shipper; (c) the apparent order and condition of the goods. It is further mentioned that one year limitation is not applicable in criminal cases. The act of the applicant and other co-accused attract criminal liability and the case is covered under the purview of definition of criminal conspiracy, criminal breach of trust and cheating punishable under section 120-B, 406 and 420 IPC. The provision of the Indian Carriage of Goods by Sea Act, 1925 is applicable in civil proceedings. It is further mentioned that the accused Sudhir Shukla and accused no. 2 Saham Siddiqui both are residents of Kanpur Nagar which is situated within the local territorial jurisdiction of the trial court, who conspired the commission of the act with the applicant. The accused applicant no. 3's office was situated in Mumbai and New Delhi. As per provision of section 181 (4) of Cr.P.C.. the offence of criminal breach of trust punishable under section 406 IPC may be inquired into or tried by a Court within whose local jurisdiction the offence was committed or any part of the property which is the subject of the offence, was required to be returned or accounted for, by the accused person. In the present case the accused were required to return or account for the aforesaid Copper Millberry Scrap to the opposite party no.2 at its office/godown situated in Kanpur Nagar. In the present case offence of cheating punishable under section 420 IPC has been committed through letters or telecommunication messages between accused persons which attracts the provision of section 182 of Cr.P.C. which states that in cheating, if the deception is practiced by means of letters or telecommunication messages, the same be inquired into or tried by any court within whose local jurisdiction such letters or messages were sent or were received. In the present case, the communications between the accused persons has been sent from and received at Kanpur Nagar, hence the trial court has jurisdiction to try the present complaint case.

10. I have heard the arguments of both the sides and have given thoughtful consideration to the entire material on record.

11. It is apparent from the facts of the case that the applicant Jong Seuk Park (A-3), President, Korea Machine Transport Company Ltd (KMTC) is the third accused in the complaint made by the opposite party no. 2, in which it is mentioned that co-accused no. 1 Sudhir Shukla (A-1) and co-accused no. 2 Saham Siddique (A-2) had persuaded the opposite party no. 2 to deal in copper scrap business, regarding which the deal was finalized for purchase of the said scrap from Jason Kim of the First International company Ltd. Seoul, Korea, quantity of which was 23 metric ton of the

value of 84300 US$ which was to be transported from Manila, Philippines, for which the company of A-3 was engaged which was dealing in transportation business. The said consignment was to be delivered at Kanpur. At the time of loading the consignment and it's being sealed, A-3 (applicant) was present who had affixed his copper seal no. KMP 121 2651 upon the said container. The said consignment instead of reaching Kanpur, had reached Mumbai on 26/09/2009, where the opposite party no. 2 had gone to take the delivery on being informed from the side of the accused, but when the same was weighed, instead of 23 metric ton copper, the concerned consignment weighed only 6 metric ton. When the seal of the container was opened, only four bags of rubbish were found, therefore it was mentioned in the said complaint that the opposite party no. 2 was cheated of a sum of rupees 41, 30, 000/- in terms of Indian currency which was the value of 23 metric ton copper scrap, hence forgery was committed by the applicant. On the complaint being filed before court, the accused - applicant along with 2 other co-accused named above were summoned to face trial under Sections 406, 420 IPC.

12. The main thrust of the learned counsel for the applicant was that the bill of lading would show that the responsibility of the accused applicant was only from shipyard to shipyard, to reach the consignment safely and in this case the consignment was reached Nhava Sheva, India by his ship from Manila, Philippines, therefore applicant could not be imposed any liability for loss of goods/container once they were reached the destination port.

13. I am not convinced with the above argument of the learned counsel for the applicant because the transporter cannot be absolved of his liability if any item of the consignment is found lost/missing. He would be jointly liable for the said loss with other co-accused if any, involved in its transportation as well as in loading.

14. It was argued in this case that there was no entrustment of the property to the applicant, therefore the ingredient of Section 406 IPC would not be made out. I do not buy this argument of the learned counsel the applicant because it is the case of the opposite party no. 2 that at the time when the consignment was loaded, the applicant was present and his seal was also affixed, which would be treated to be nothing but an entrustment of the said consignment which was due to arrive in India (Kanpur Nagar) but instead the same was delivered at Nhava Sheva, where it was found that the material/consignment which was loaded was not the same which actually was loaded.

15. It was also argued by the learned counsel the applicant that the criminal complaint would be barred because of the provisions of Section 468 Cr. P.C., which provides the limitation of only 3 years while in the present case the occurrence is stated to have taken place on 29/10/2009, when the representative of opposite party no. 2 had gone for taking delivery of the consignment while the complaint has been filed on 21/07/2014, that is after about 5 years. I have gone through the said provision and find that for offences punishable with more than 3 years there is no such limitation prescribed of 3 years and in present case since the accused has been summoned to face trial under Sections 406 and 420 IPC, it is apparent

that the offence in recession 420 IPC is punishable with imprisonment up to 7 years and fine, therefore the bar of 3 years would not be applicable in the present matter.

16. It was next argued that the matter is of civil nature, therefore the criminal complaint preferred by the accused applicant would not be maintainable. If at all any loss had occurred in the present kind of commercial transaction, the option to the opposite party no. 2 was available to file a claim petition in Civil court and get the claim/compensation decreed for the loss suffered by him, but instead of doing that, with malafide intention, the present criminal proceedings have been preferred, which need to be quashed. To substantiate his argument reliance has been placed by the applicant upon **Appeal (Crl.) 834 of 2002 M/S Indian oil Corp vs M/S NEPC India Ltd,** and others, decided on 20 July, 2006 in which in Para 10 following is held by Hon'ble Supreme Court:

"..... It is to be seen if a matter, which is essentially of Civil nature, has been given a cloak of criminal offence. Criminal proceedings are not a shortcut of other remedies available in law. Before issuing process a criminal court has to exercise a great deal of caution. For the accused it is a serious matter. This court has laid certain principles on the basis of which High Court is to exercise its jurisdiction under Section 482 of the Code. Jurisdiction under the Section has to be exercised to prevent abuse of process of any court or otherwise to secure the ends of justice....."

17. Reliance is also placed on **Appeal (Crl.) 124 of 2007 Harish Chandra Prasad Mani vs State of Jharkhand and another** decided on 31 January, 2007, in which following is held:

"We have carefully perused the entire record placed before us and find that there is not even an iota of evidence or any material on record against the appellants. It is true that at this stage it is not necessary that complainant or prosecution must prove its case beyond reasonable doubt, but at least there must be some material on the basis of which cognizance is taken and summon is issued. Cognizance cannot be taken merely on suspicion as has evidently been done in this case."

18. Further, reliance is placed on **Criminal Appeal No. 662 of 2009, Hira Lal and others vs State of U.P. and others** decided on April 8, 2009:

"10 . The parameters of interference with a criminal proceeding by the High Court in exercise of its jurisdiction under Section 482 of the Code are well-known. One of the grounds on which such interference is permissible is that the allegations contained in the complaint petition even if given face value and taken to be correct in their entirety, commission of an offence is not disclosed. The High Court may also interfere where the action on the part of the complainant is malafide"

".....In the State of Haryana and others vs Ch. Bhajan Lal and others (1992 Supp (1) SCC 335, this court, relying on Pratibha Rani vs Suraj Kumar and another, (1985) 2 SGC 370), stated that the purpose of exercising its power under Section 482 of the Code of Criminal Procedure to quash a FIR or a complaint, the High Court would have to proceed entirely on the basis of

allegations made in the complaint or the documents accompanying the same.

.....

One of the paramount duties of the Superior Courts is to see that a person who is apparently innocent is not subjected to prosecution and humiliation on the basis of a false and wholly untenable complaint."

19. Further, reliance is placed on **Criminal Appeal No. 78 of 2013 Arun Bhandari vs State of U.P. and others** decided on January 10, 2013:

"11 . Mr. Chetan Sharma, learned senior counsel, resisting the aforesaid contentions, canvassed that mere presence of the respondent no. 2 at the time of signing of the agreement to sell does not amount to an offence under Section 420 of IPC as she did not sign the document nor did she endorse the same as a witness. It is urged by him that no criminal liability can be fastened on her, for the sine qua non for attracting criminality is to show dishonest intention right from the very inception which is non-existent in the case at hand. It is submitted by him that if the criminal action is allowed to continue against her that would put a premium on a commercial strategy adopted by the appellant in roping a lady only to have more bargaining power in the matter to arrive at the settlement despite the breach of contract by him. The learned senior counsel would further contend that the appellant has taken contradictory stands inasmuch as in one way he had demanded the forfeited amount and the other way lodged an F.I.R. to set the criminal law in motion which is impermissible. To bolster the said contentions reliance has been placed on the judgements rendered in Hridya Rajan Pd. Verma and others vs State of Bihar and another , Murari Lal Gupta vs Gopi Singh and B. Suresh Yadav vs Sharifa Bee and another."

"14 . As advised at present we are inclined to discuss the decisions which have been commended to us by the learned senior counsel for the respondent. In Hridya Rajan Pd. Verma (supra) a complaint was filed that the accused persons therein had deliberately and intentionally diverted and induced the respondent society and the complainant by suppressing certain facts and giving false and concocted information and assurances to the complainant so as to make him believe that the deal was a fair one and free from troubles. The further allegation was that the accused person did so with the intention to acquire wrongful gain for themselves and to cause wrongful loss to the society and the complainant and they had induced the complainant to enter into negotiations and get advance consideration money to them. The two Judge Bench referred to the judgment in the State of Haryana vs Bhajan Lal, wherein this court has enumerated certain categories of cases by way of illustration wherein the extraordinary power under Article 226 or the inherent powers under sec. 482 of Cr. P.C. could be exercised either to prevent abuse of the process of the court or otherwise to secure the ends of justice....."

"16 . In determining the question it has to be kept in mind that the distinction between mere breach of contract and the offence of cheating is a fine one. It depends upon the intention of the accused at the time of inducement which may be judged by his subsequent conduct but for this subsequent conduct is not the sole test. Mere breach of contract cannot give rise to criminal prosecution or

cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction, that is, the time when the offence is said to have been committed. Therefore, it is the intention which is the gist of the offence. To hold a person guilty of cheating it is necessary to show that he had fraudulent or dishonest intention at the time of making the promise. From his mere failure to keep the promise subsequently such a culpable intention right at the beginning, that is, when he made the promise cannot be presumed."

"16 . From the aforesaid decision it is quite clear that this court recorded a finding that there was no averment in the complaint that intention to deceive on the part of the accused was absent right from the beginning of the negotiation of the transaction as the said allegation had neither been expressly made nor indirectly suggested in the complaint. This court took note of the fact that only nondisclosure was that one of their brothers had filed a partition suit which was pending and the allegations that such disclosure was not made intentionally to deceive the complainant was absent....."

17 . In **Murari Lal Gupta (supra) 2** Judge Bench quashed the criminal complaint instituted under Section 406 and 420 of the IPC on the following analysis: -

The complaint does not make any averment so as to infer any fraudulent or dishonest inducement having been made by the petitioner pursuant to which the respondent parted with the money. It is not the case of respondent that the petitioner does not have the property or that the petitioner was not competent to enter into an agreement to sell or could not have transferred title in the property to the respondent. Merely because an agreement to sell was entered into which agreement the petitioner failed to honour, it cannot be said that the petitioner has cheated the respondent. No case for prosecution under Section 420 or Section 406 IPC is made out even prima facie. The complaint filed by the respondent and that too at Madhepura against the petitioner, who is a resident of Delhi, seems to be an attempt to pressurize the petitioner for coming to terms with the respondent. In our considered opinion the factual position in the aforesaid case is demonstrably different, hence we have no hesitation in stating that the said decision is not applicable to the case at hand."

"20 . In **GV Rao vs L.H.V. Prasad and others,** this court has held thus:

7. As mentioned above, Section 415 has two parts. While in the 1st part, the person must dishonestly or fraudulently induce the complainant to deliver any property; in the second part, the person should intentionally induce the complainant to do or omit to do a thing. That is to say, in the first part, inducement must be dishonest or fraudlunt. In the second part, the inducement should be intentional. As observed by this court in Jaswantrai Manilal Akhaney vs State of Bombay, a guilty intention is an essential ingredient of the offence of cheating. In order, therefore, to secure conviction of a person for the offence of cheating, mens rea on the part of that person, must be established. It was also observed in Madhadeo Prasad vs State of West Bengal that in order to constitute the offence of cheating, the intention to deceive should be in existence at the time when the inducement was offered.

21 . In **S.N. Palanitkar and others vs State of Bihar and another,** it

has been laid down that in order to constitute an offence of cheating, the intention to deceive should be in existence at the time when the inducement was made. It is necessary to show that a person had fraudulent or dishonest intention at the time of making the promise, to say that he committed an act of cheating. A mere failure to keep a promise subsequently cannot be presumed as an act leading to cheating.

22 . In the said case while dealing with the ingredients of criminal breach of trust and cheating, the Bench observed thus: -

9. The ingredients in order to constitute a criminal breach of trust are: (i) entrusting a person with property or with any dominion over property (ii) a person interested (a) dishonestly misappropriating or converting that property to his own use; or (b) dishonestly using or disposing of that property or wilfully suffering any other person so to do in violation (i) of any direction of law prescribing the mode in which such trust is to be discharged, (ii) of any legal contract made, touching the discharge of such trust.

10. The ingredients of an offence of cheating are: (i) there should be fraudulent or dishonest inducement of a person by deceiving him, (ii) (a) the person so deceived should be induced to deliver any property to any person, or to consent that any person shall retain any property; or (b) the person so deceived should be intentionally induced to do or omit to do anything which he would not do or omit if he were not so deceived; and

(iii) in cases covered by (ii) (b), the act of omission should be one which causes or is likely to cause damage or harm to the person induced in body, mind, reputation or property."

.....

24 . At this stage, we usefully note that sometimes a case may apparently look to be of civil nature or may involve a commercial transaction but such civil disputes or commercial disputes in certain circumstances may also contain ingredients of criminal offences and such disputes have to be entertained notwithstanding they are also civil disputes. In this context, we may reproduce a passage from Mohammed Ibrahim and others vs State of Bihar and another: -

8. This court has time and again drawn attention to the growing tendency of complainants attempting to give the cloak of criminal offence to matters which are essentially and purely civil in nature, obviously either to apply pressure on the accused, or out of enmity towards the accused, or to subject the accused to harassment. Criminal courts should ensure that proceedings before it are not used for settling scores or to pressurise parties to settle civil disputes. But at the same time, it should be noted that several disputes of civil nature may also contain the ingredients of criminal offences and if so, will have to be tried as criminal offences, even if they also amount to civil disputes. (See G. Sagar Suri vs State of U.P. and Indian Oil Corp vs NEPC India Ltd).

25 . In this context we may usefully refer to a paragraph from All Cargo Movers (I) Private Limited vs Dhanesh Badarmal Jain and another, where a civil suit is pending and the complaint petition has been filed one year after filing of the civil suit, we may for

the purpose of finding out as to whether the said allegations are prima facie cannot notice the correspondence exchanged by the parties and other admitted documents. It is one thing to say that the court at this juncture would not consider the defence of the accused but it is another thing to say that for exercising the inherent jurisdiction of this court, it is impermissible also to look to the admitted documents. Criminal proceedings should not be encouraged, when it is found to be malafide or otherwise an abuse of process of the court. Superior courts while exercising this power should also strive to serve the ends of justice.

26 . In Rajesh Bajaj vs State NCT of Delhi and others, while dealing with the case where High Court had quashed an F.I.R., this court opined that the facts narrated in the complaint petition may reveal a commercial transaction or money transaction, but that is hardly a reason for holding that the offence of cheating would elude from such a transaction. Proceeding further, the Bench observed thus:

11. The crux of the postulate is the intention of the person who induces the victim of his representation and not the nature of the transaction which would become decisive and discerning whether there was commission of the offence or not. The complainant has stated in the body of the complaint that he was induced to believe that the respondent would honour payment on receipt of invoices, and that the complainant realized later that the intentions of the respondent were not clear. He also mentioned that the respondent after receiving the goods had sold them to others and still he did not pay the money. Such averments would prima facie make out a case for investigation by the authorities.

28 . In R. Kalyani vs Janak C. Mehta and others, after referring to the decisions in Hamida vs Rashid and the State of Orissa vs Saroj Kumar Sahoo, this court eventually culled out the following propositions:

15. Propositions of law which emerged from the said decisions are:

a. 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.

b. For the said purpose the court, save and except in very exceptional circumstances, would not look to any document relied upon by the defence.

c. Such power should be exercised very sparingly. If the allegations made in the F.I.R. disclosed 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.

d. If the allegations discloses a civil dispute, the same by itself may not be a ground to hold that the criminal proceeding should not be allowed to continue.

30. Recently in **Gian Singh vs State of Punjab and another,** a three Judge Bench has observed that: -

"55. In the very nature of its constitution, it is the judicial obligation of the High Court to undo the wrong in course of administration of justice or to prevent continuation of unnecessary judicial process. This is founded on the legal maxim quando lex aliquid alicui concedit, conceditur et id sine qua res ipsa esse non protest. The full import of which is whenever anything is authorised, and

especially if, as a matter of duty, required to be done by law, it is found impossible to do that thing unless something else not authorised in express terms be also done, may also be done, then that something else will be supplied by a necessary intendement. Ex debito justitiae is inbuilt in such exercise; the whole idea is to do real, complete and substantial justice for which it exists. The power possessed by the High Court under sec. 482 of the court is of wide amplitude but requires exercise with great caution and circumspection."

20. Next, reliance has been placed upon **Anil Kohli vs State (NCT of Delhi), 1995 (2002) DLT 173,** in which the Delhi High Court held that in the case in hand there was nothing to show that the respondents had dishonest or fraudulent intention at the time the agreement took place to supply goods. Business transaction continued for almost seven years, letters exchanged admitted liabilities and dues by the complainant to Arun Kohli and vice versa. These transactions by no stretch of imagination could be called dishonest inducements. It was purely business transaction of civil nature. It was found that the ingredients of cheating were missing and therefore merely because payment was not made or accounts were not settled, it could not be said that offence punishable under secs. 420/406/34 IPC would be made out.

21. Further, reliance is placed on **Appeal (Crl.) 1241 of 2004 (M/s Zandu Pharmaceuticals Works vs Md Sharaful Haque and another,** decided on 1 November, 2004. The facts of the case were that respondent no. 1 (complainant) filed a complaint on 09/08/2002 alleging that the appellants had committed offences punishable under Sections 406 and 409 IPC. The date of occurrence was indicated to be between 12/07/1995 to 08/05/2002. The basic allegations in the complaint were that an advertisement was issued by the appellant no. 1 seeking applications for appointment to the post of area manager. The complainant, who was then working in another concern, applied for the post, was called for the interview on 14/07/1995 and was asked to report at Bombay office of the appellant no. 1 company on 01/08/1995 for training. After completion of the training period, the complainant was asked to report to the Patna depot. He was given appointment from 09/09/1995 by letter dated 01/09/1995, wherein it was indicated that he was appointed as field officer and not area manager. According to the respondent, on receipt of the appointment letter, the complainant asked the concerned official that is, the other accused persons as to how he was being appointed as field officer, when he had appeared at the interview for the post of area manager. He was assured that the letter for the post of area manager will be issued in the 1st week of April, 1996. But no such letter came to be issued and he was not appointed as area manager. Grievance was, therefore, made that the accused persons had initially deceived him by appointing as Field Officer and not as Area Manager, though he was assured that appointment letter in that regard would be issued. Therefore, they were liable to face trial for offences punishable under Section 406 and 409 IPC. The learned Magistrate had issued process in respect of offence under Section 418 IPC, punishment provided for which was imprisoned for 3 years. The limitation period in terms of Section 468 (2) (c) was 3 years. Therefore it was held

that unfortunately the High Court did not take note of the guiding principles as laid down in Bhajan's Singh's case (1992 Suppl (1) 335), thereby rendering the judgment indefeasible and accordingly the judgment of High Court was set aside and the complaint lodged was quashed.

22. Next, reliance has been placed on the Criminal Appeal No. 1694 of 2008 arising out of SLP (Crl.) No. 5672 of 2004, R Kalyani vs Janak C. Mehta and others decided on 24 October, 2008. In this case a first information report was lodged by the appellant against the respondents on or about 04/01/2003 under Sections 409 , 420, 468 read with Section 34 IPC. The first and second respondent approached the High Court for quashing of the said F.I.R. as well as the investigation, which was allowed by the impugned order dated 24/04/2004. From the side of the appellant it was argued that the High Court passed an erroneous order as it did not have jurisdiction to enter into disputed questions of fact in regard to the involvement of the respondents as the F.I.R. disclosed an offence of cheating and criminal breach of trust and forgery. The investigation was admittedly did not complete and hence the High Court could not have relied upon the documents furnished by the defendants either for the purpose of finding out absence of mens rea on the part of the applicants for their involvement in the case. The respondent no. 1 and 2 being high-ranking officers of the M/S Shares and Securities Ltd, a company dealing in shares, whether were vicariously liable for commission of the offence being in day-to-day charge of affairs thereof. In view of the fact that the respondent no. 2 forwarded a letter purporting to authorise the accused no. 3 to transfer shares to the National Stock Exchange, he must be held to have requisite intention to commit the said offence along with the respondent no. 3. The respondent no. 3, not being an applicant before the High Court, the entire Criminal prosecution could not have been quashed. From the side of the respondents it was argued that it was admitted fact that the F.I.R. had been lodged by the respondents as against the appellant herein on 20/12/2002, that is, much prior to the lodging of F.I.R. by the appellants, herein, the same was done with mala fide intention. In view of the fact that the appellant herself owed a sum of Rs. 13.28 lakhs to the company and her group, a sum of Rs. 45.00 lakhs which is evident from the balance sheet of the appellants, continuation of the criminal proceedings initiated against the respondents would be an abuse of process of court. The appellants having not entered into any individual transaction with the company as the accounts held by her together with members of the family were treated as group accounts and only because respondent no. 2 had forwarded a letter of the appellant dated 10/01/2002, which is alleged to be forged, to the National Stock Exchange, the same by itself does not show that he was a party to the forgery. In respect of the offences under general law, vicarious liability cannot be fastened on an individual. It was held that if a person, thus, has to be proceeded with as being vicariously liable for the acts of the company, the company must be made an accused. In any event, it would be a fair thing to do so, as legal fiction is raised both against the company as well as the person responsible for the acts of the company. Therefore, for the reasons aforesaid the Supreme Court did not find any infirmity in the impugned judgment, however it was clarified that the

respondent no. 3, arrayed as accused no. 3 in the first information report, had not filed any Application under Section 482 of the Criminal Procedure Code, therefore it could not be known as to under what circumstances the High Court directed service of notice to be effected upon him. Nowhere in the impugned judgment, the High Court found that the allegations contained in the F.I.R. against the respondent no. 3 also did not disclose commission of any cognizable offence. It was one thing to say that he had not committed the same but it was another thing that the High Court' s jurisdiction under sec. 482 Cr. P.C. could have been invoked at this stage. It was further held that there was no option but to hold that the High Court in its judgment cannot be said to have covered the case of respondent no. 3. The investigation against him, therefore, shall continue. However, it will be open to him to take the appropriate defenses at appropriate stages as are permissible in law.

23. Next, the reliance is placed upon Appeal (Crl.) 317 of 2008, S.K. Alagh vs State of U.P. and others decided on 15 February, 2008. In this case the short question which arose for consideration was whether the complaint petition, even if given face value and was taken to be correct in its entirety, whether it discloses an offence against the appellant under Section 406 IPC. The appellant no. 1 was the Managing Director of the Company. Respondent no. 3 was its General Manager. Indisputably, the company is a juristic person. The demand drafts were issued in the name of the company. The company was not made an accused. The dealership agreement was by and between M/S Akash Traders and the company. In support of the impugned order it was argued that prima facie, the appellant was in charge of and was in control of the business of the company, he therefore, would be deemed to be liable for the offence committed by the company. It was held that admittedly, drafts were drawn in the name of the company, even if appellant was its Managing Director, he cannot be said to have committed any offence under Section 406 IPC. If and when a statute contemplates creation of such a legal fiction, it provides specifically therefor. In absence of any provision laid down under the statute, Director of the company or an employee cannot be held to be vicariously liable for any offence committed by the company itself. Therefore, the High Court had committed a manifest error in passing the impugned judgment.

24. The citations which have been relied upon by the learned counsel for the applicant mainly hammer on two points that is, that sometimes it may appear that the dispute between the parties is that of civil nature or may involve a commercial transaction, but such civil disputes or commercial disputes, in certain circumstances, may also contain ingredients of criminal offences. In such situation, notwithstanding that the dispute is of civil nature, such a dispute may have to be entertained on the criminal side as has been held in the case of Arun Bhandari (Supra). Although this court would have to see as to whether the ingredients of Section 406 and 420 IPC are made out in the present case or not, on the basis of the averments made in the complaint. Secondly the above offences being of IPC, which is general provision of law and not any specific statute providing for not impleading the company, it was essential that the

applicant-accused could not be made an accused vicariously in the present case without impleadment of his company as has been held in S. K. Alagh's case (supra). This aspect is also required to be analysed in the present case as to whether the applicant could not be made an accused in the present case but for impleadment of his company.

25. In the light of the facts in the present case which have been cited above I am of the view that it emerges from the facts that consignment of 23 metric ton of copper scrap was loaded on the shape of the applicant in presence of the accused applicant and seal on the container was also fixed of the accused applicant, the details of which are mentioned above, but when the said consignment reached Mumbai, the same was not found to have been delivered there rather, in its place four bags of rubbish were found, which resulted in huge loss to the applicant. In such a situation whether there was intention to cheat or not on the part of the applicant and other co-accused cannot be seen at this stage. Certainly in my opinion, the entrustment of the said consignment would be found to have been made of the said consignment to the accused applicant which was to be delivered to the applicant at Kanpur Nagar, but the same was not done. The version of the accused applicant that his liability was only to reach the consignment to the shipyard and that it would extend only from shipyard to shipyard, beyond that he would not bear any liability, is also to be seen only after evidence and not at the preliminary stage when there is no evidence recorded as yet. To say, as argued on behalf of the learned counsel for the applicant that, the applicant had nothing to do with the transaction, would not be appropriate to exonerate him on that count only, because the role of transporting the consignment to the destination as per the bill of lading was that of the applicant. Therefore his involvement cannot be ruled out till the same is found not proved after appreciation of evidence to be adduced at the trial. At this stage it cannot be said that the prima-facie offence is made out against the accused applicant.

26. As regards non-impleadment of the company, of which the accused applicant is stated to be president, in the light of the law laid down in Application U/S 482 No.-12977 of 2018, Usher Agro Ltd. Vs State of U.P. and Another decided on 09.07.2018 I am of the view that this aspect can be seen by the trial court at the stage of trial and the provision of Section 319 Cr. P.C. may be invoked, if so required, in order to implead the company of the accused applicant as well. But solely on the count that the impleadment of the company is not done, the prosecution of the accused should be quashed, does not appeal to reason. In Usher Agro Ltd. Vs State of U.P. (supra) reliance is placed upon the judgment of Madhya Pradesh High Court that is, Manish Kalani and another vs Housing and Development Corp Ltd (HUDCO) and another, M.Cr.C. No. 16285 of 2016 decided on 30. 1. 2018 the relevant paragraphs 22 to 26 of which are reproduced herein below:

"22. The complainant is entitled to amend his complaint filed under Section 138 of the Act as held by this Court in the case of Pandit Gorelal (supra) and also by Hon'ble Apex Court in the case of S.R.Sukumar Vs. S. Sunaad Raghuram, (2015) 9 SCC 609, wherein

Hon'ble Apex Court held that "what is discernible from U.P. Pollution Control Board case [(1987) 3 SCC 684 : 1987 SCC (Cri) 632] is that an easily curable legal infirmity could be cured by means of a formal application for amendment. If the amendment sought to be made relates to a simple infirmity which is curable by means of a formal amendment and by allowing such amendment, no prejudice could be caused to the other side, notwithstanding the fact that there is no enabling provision in the Code for entertaining such amendment, the court may permit such an amendment to be made.

23. Although, non-applicant No.1 filed the application before the trial Court under Section 319 of the Cr.P.C read with Section 141 of the Act, wherein neither in Section 141 of the Act, nor in Section 319 of the Cr.P.C provisions for permitting complainant to amend the complaint are mentioned, but it is a settled position of law that a mere non-mentioning or wrong mentioning of a provision in an application is not a ground to reject an application as held by the Hon'ble Apex Court in the case of Adv. Kaptan on Challamance Huchha Gowda v. M.R. Tirumala,2004) 1 SCC 453.

24. Although there is no provision in the Act and Code of Criminal Procedure to permit the applicant to amend the complaint, but there is no bar in the Code of Criminal Procedure as well as in the Negotiable against permitting the complainant to amend his complaint. Where, there is no bar in the Act and in the Code of Criminal Procedure, this Court in the interest of justice may permit the complainant to amend the complaint, as held by the Hon'ble Apex Court in the case of S.R. Sukumar Vs. S. Sunaad Raghuram (Supra).

25. Although, it is admitted that non-applicant No.1 had not sent notice to the Company before filing of the complaint, but prima facie it appears that before filing the complaint non-applicant No.1 gave notice to the applicant No.1 Manish Kalani, the Managing Director of the Company, who issued the questioned cheque on behalf of the company. So, the notice sent by non-applicant No.1 to applicant No.1 Manish Kalani is also notice to the company as held by the Hon'ble Apex Court in the case of M/s Bilakchand Gyanchand Co.(supra) wherein Hon'ble Apex Court held that notice under Section 138 of the Act sent to the Managing Director of the Company who is signatory of the cheque in question, the complaint is not liable to be quashed on the ground that the notice was not served upon the company. Similarly, Hon'ble Apex Court in the case of Rajneesh Agrawal (supra) also held that the demand notice issued in the name of Director, who has signed the cheque is notice to the drawer Company, therefore the prosecution of non-applicant No.2 Company for the offence under Section 138 of the Act would not be invalid for the reason that the notice was not served upon the Company.

26. The judgment of Hon'ble Apex Court passed in the case of N. Harihara Krishnan Vs. J. Thomas (supra) relied by the learned counsel for the applicants also does not help much to the applicant.

In this case Hon'ble Apex Court in pera 32 and 33 of judgement observed as thus :-

32. The scheme of the prosecution in punishing under Section

138 of THE ACT is different from the scheme of the Cr.P.C. Section 138 creates an offence and prescribes punishment. No procedure for the investigation of the offence is contemplated. The prosecution is initiated on the basis of a written complaint made by the payee of a cheque. Obviously such complaints must contain the factual allegations constituting each of the ingredients of the offence under Section 138. Those ingredients are: (1) that a person drew a cheque on an account maintained by him with the banker; (2) that such a cheque when presented to the bank is returned by the bank unpaid; (3) that such a cheque was presented to the bank within a period of six months from the date it was drawn or within the period of its validity whichever is earlier; (4) that the payee demanded in writing from the drawer of the cheque the payment of the amount of money due under the cheque to payee; and (5) such a notice of payment is made within a period of 30 days from the date of the receipt of the information by the payee from the bank regarding the return of the cheque as unpaid. It is obvious from the scheme of Section 138 that each one of the ingredients flows from a document which evidences the existence of such an ingredient. The only other ingredient which is required to be proved to establish the commission of an offence under Section 138 is that in spite of the demand notice referred to above, the drawer of the cheque failed to make the payment within a period of 15 days from the date of the receipt of the demand. A fact which the complainant can only assert but not prove, the burden would essentially be on the drawer of the cheque to prove that he had in fact made the payment pursuant to the demand.

33. By the nature of the offence under Section 138 of THE ACT, the first ingredient constituting the offence is the fact that a person drew a cheque. The identity of the drawer of the cheque is necessarily required to be known to the complainant (payee) and needs investigation and would not normally be in dispute unless the person who is alleged to have drawn a cheque disputes that very fact. The other facts required to be proved for securing the punishment of the person who drew a cheque that eventually got dishonoured is that the payee of the cheque did in fact comply with each one of the steps contemplated under Section 138 of THE ACT before initiating prosecution. Because it is already held by this Court that failure to comply with any one of the steps contemplated under Section 138 would not provide "cause of action for prosecution". Therefore, in the context of a prosecution under Section 138, the concept of taking cognizance of the offence but not the offender is not appropriate. Unless the complaint contains all the necessary factual allegations constituting each of the ingredients of the offence under Section 138 , the Court cannot take cognizance of the offence. Disclosure of the name of the person drawing the cheque is one of the factual allegations which a complaint is required to contain. Otherwise in the absence of any authority of law to investigate the offence under Section 138, there would be no person against whom a Court can proceed. There cannot be a prosecution without an accused. The offence under Section 138 is person specific. Therefore, the Parliament declared under Section 142 that the provisions dealing with taking cognizance contained in the Cr.P.C should give way to the procedure prescribed under Section 142. Hence the opening of non-obstante clause under Section 142. It must also be remembered that Section 142 does not either contemplate a report to the police

or authorise the Court taking cognizance to direct the police to investigate into the complaint".

27. While in the instant case in the complaint above-mentioned all the five ingredients are pleaded regarding applicant No.2 company and name of the applicant No.2 company is also mentioned as discussed above.

31. So, in the peculiar facts and circumstances of the case the application filled by the applicants for taking cognizance against applicant No.2 company comes under the purview of Section 190 (1)(a) of the Cr.P.C. and not under Section 319 of Cr.P.C. Because the name of the applicant No.2/company as an accused and the basis of its accusation were already mentioned in the complaint at the time of its filling. It is the fault of the trial Court which only took cognizance against the Director and did not take cognizance against the company, which can be cured by the trial Court at any time. There is no bar under Section 190 of the Cr.P.C. that once the process is issued against some accused, on the next date, the Magistrate cannot issue process to some other person against whom there is some material on record."

27. Though in Usher Agro Ltd.'s case (supra) matter related to Section 138 of NI Act, in which the question involved was whether prosecution of the Director of the company could be done without impleadment of the company of which he was Director, which had issued the cheque which got dishonoured and whether during course of the proceedings company could be impleaded either under the provisions of Section 190 (1) (a) or under 319 Cr. P.C. and it was held in Para 44. as below:

"44. So, in the peculiar facts and circumstances of the case the application filled by the applicants for taking cognizance against applicant No.2 company comes under the purview of Section 190 (1)(a) Cr.P.C. because the name of the applicant No.2/company as an accused and the basis of its accusation were already mentioned in the complaint at the time of its filling. It is the fault of the trial Court which summoned the Director alone and left the company. Such defect is not an incurable defect and can be cured by the trial Court at any time. There is no bar under Section 190 Cr.P.C. that once the process is issued against some accused, on the next date, the Magistrate cannot issue process to some other person against whom there is some material on record."

28. In view of above this court is of the view that the impugned order does not suffer from any infirmity and this application deserves to be dismissed, and is accordingly, dismissed.

(2019)12 ILR A176

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.11.2019
BEFORE
THE HON'BLE RAM KRISHNA GAUTAM, J.

Crl. Misc. Application (U/S 482 Cr. P.C.) No. 28860 of 2019

Smt. Indresh & Anr. ...Applicants
Versus
State of U.P.& Anr. Respondents

Counsel for the Applicants:
Sri Krishna Dutt Tiwari

Counsel for the Respondents:
A.G.A.

A. Criminal Law - Code of Criminal Procedure, 1973- Section 482 & Indian Penal Code,1860- Sections 323, 504, 420, 506-challenge to –summoning

order- in exercise of inherent power, under Section 482 of Cr.P.C., is not expected to make meticulous analysis of evidence, because the same is course of trial. (Para 6)

While exercising jurisdiction under section 482 of the Code, the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable apprehension of it accusation would not be sustained. That is the function of the trial Judge/Court. To prevent abuse of the process of the Court, High Court in exercise of its inherent powers under section 482 could quash the proceedings but there would be justification for interference only when the complaint did not disclose any offence or was frivolous vexatious or oppressive. (Para 7)

Application u/s 482 Cr.P.C. dismissed. (E-6)

List of cases cited: -

1. St. of A.P. Vs Gour Sheety Mahesh J.T. 2010 (6) SCC 588

2. Hamida Vs Rashid (2008) 1 SCC 474,

3. Monika Kumar Vs St. of U.P. (2008) 8 SCC 781

4. Popular Muthiah Vs State, Represented by Inspector of Police, (2006) 7 SCC 296

5. Dhanlakshmi Vs R.Prasana Kumar, (1990) Cr LJ 320 (DB): AIR 1990 SC 494

6. St. of Bih. Vs Murad Ali Khan, (1989) Cr LJ 1005: AIR 1989 SC 1

7. Amrawati and anr.Vs. St.of U.P. r 2004 (57) ALR 290

8. Lal Kamlendra Pratap Singh Vs. St. of U.P. 2009 (3) ADJ 322 (SC)

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. This Application, under Section 482 of Code of Criminal Procedure, 1973, has been filed by the Applicants, Smt. Indresh and Lekhraj, against State of U.P. and another, with a prayer for setting aside summoning order, dated 5.7.2019, passed by the Court No.9 of Additional Sessions Judge, Moradabad, alongwith order dated 26.7.2018 of Court No.5 of Additional Chief Judicial Magistrate, V, Moradabad, with entire criminal proceeding of Complaint Case No.1082 of 2012, under Sections 323, 504, 420, 506 of Indian Penal Code (IPC), Police Station- Civil Lines, District Moradabad.

2. Learned counsel for applicants argued that, on the basis of statements recorded, under Sections 200 and 202 of Code of Criminal Procedure, 1973 (Cr.P.C.), applicants were summoned for offences, punishable, under Sections 323 and 504 of IPC. Subsequently, on the basis of same evidence, which was recorded under Section 244 of Cr.P.C., Magistrate opined to frame charges for offences, punishable, under Sections 420 and 506 of IPC. This order was challenged before the Court of Revision, wherein, Court of Additional Sessions Judge, Court No.9, Moradabad, in Criminal Revision No. 123 of 2018, Lekhraj and another vs. State of U.P. and another, dismissed revision and, thereby, confirmed order of the Magistrate, which was abuse of process of law. Hence, this proceeding, under Section 482 of Cr.P.C., with above prayer.

3. Learned AGA, representing State of U.P., has vehemently opposed this Application.

4. Heard learned counsel for both sides and gone through materials on record.

5. From very perusal of materials on record, it is apparent that an Application,

under Section 156 (3) of Cr.P.C. was filed by Smt. Anjlina against Lekhraj and his wife, Indresh, with this contention that accused persons entered in a negotiation with her for sale of a plot of area, admeasuring to 7770.11 Squire ft. of Gata No. 761, situated at Sonapur, Milak Bhola Singh, in the year 2004, for which documents of ownership were shown and Lekhraj said himself to be power of attorney-holder of recorded owner Dharam Singh and is competent to sell it. Complainant entered into sale, which was executed on 17.5.2004, by Lekhraj, in favour of complainant, for a sale consideration of Rs.71,000/-. subsequently, another plot, admeasuing 25 Squire Yard, adjacent to above plot, was also agreed to be sold to the complainant, by way of registered agreement to sale, for a consideration of Rs.45,000/-. Lateron, it was found that above land was acquired land of Moradabad Development Authority and accused persons were not competent to make sale of the same. On enquiry being made by the complainant, they abused and did assault, with extending threat of dire consequences. Hence, this Application, with a prayer for direction for registration of case crime number for investigation of the same. This was treated to be a complaint case by the Magistrate, wherein, complainant was examined, under Section 200 and her one witness, Charan Singh was examined, under Section 202 of Cr.P.C. After hearing, the Magistrate, vide order, dated 19.3.2013, summoned Lekhraj and his wife for offences, punishable, under Sections 323 and 504 of Cr.P.C. After it, prosecution witness was examined, under Section 244 of Cr.P.C., thenafter, under Section 245 of Cr.P.C., the Magistrate opined for framing of charge for additional Sections of 420 and 506 of IPC also. This order was challenged in Criminal Revsion, Under Section 397 of Cr.P.C., wherein, learned Additional Sessions Judge, Court No.9, Moradabad, passed impugned judgment, dated 5.7.2019, dismissing Criminal Revision. Hence allegations, levelled, in complaint, since beginning, were having ingredients for offences, under Sections 323, 504, 420 and 506 of IPC, though summoning was made for offence, under Section 323 and 504 of IPC, but at the time of framing of charge, when appreciation of evidence was made, then the Magistrate found ground for levelling of additional sections of 420 and 506 of Indian Penal Code, which were added by the Magistrate and this order, after having been challenged, in revision, stood confirmed. Hence, there was sufficient ground for adding of these offences.

6. This Court, in exercise of inherent power, under Section 482 of Cr.P.C., is not expected to make meticulous analysis of evidence, because the same is course of trial, but, apparently, there is no misuse of process of law, or, any requirement for grant of any indulgence by this Court.

7. Apex Court in **State of Andhra Pradesh v. Gaurishetty Mahesh, JT 2010 (6) SC 588: (2010) 6 SCALE 767: 2010 Cr. LJ 3844** has propounded that *"While exercising jurisdiction under section 482 of the Code, the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable apprehension of it accusation would not be sustained. That is the function of the trial Judge/Court"*. In another subsequent **Hamida v. Rashid, (2008) 1 SCC 474,** hon'ble Apex Court propounded that *"Ends of justice would be better served if valuable time of the Court is spent in hearing those appeals rather than entertaining petitions under Section 482 at an interlocutory stage which after filed with some oblique motive in order to circumvent the prescribed procedure, or to delay the trial*

which enable to win over the witness or may disinterested in giving evidence, ultimately resulting in miscarriage of Justice". In again another subsequent **Monica Kumar v. State of Uttar Pradesh, (2008) 8 SCC 781**, the Apex Court has propounded "Inherent jurisdiction under Section 482 has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself." While interpreting this jurisdiction of High Court Apex Court in **Popular Muthiah v. State, Represented by Inspector of Police, (2006) 7 SCC 296** has propounded *"High Court can exercise jurisdiction suo motu in the interest of justice. It can do so while exercising other jurisdictions such as appellate or revisional jurisdiction. No formal application for invoking inherent jurisdiction is necessary. Inherent jurisdiction can be exercised in respect of substantive as well as procedural matters. It can as well be exercised in respect of incidental or supplemental power irrespective of nature of proceedings".*

8. Regarding prevention of abuse of process of Court, Apex Court in **Dhanlakshmi v. R.Prasana Kumar, (1990) Cr LJ 320 (DB): AIR 1990 SC 494** has propounded *"To prevent abuse of the process of the Court, High Court in exercise of its inherent powers under section 482 could quash the proceedings but there would be justification for interference only when the complaint did not disclose any offence or was frivolous vexatious or oppressive"* as well as in **State of Bihar v. Murad Ali Khan, (1989) Cr LJ 1005: AIR 1989 SC 1,** Apex Court propounded *"In exercising jurisdiction under Section 482 High Court would not embark upon an enquiry whether the allegations in the complaint are likely to be established by evidence or not".*

9. Meaning thereby, exercise of inherent jurisdiction under Section 482 Cr.P.C. is within the limits, propounded as above.

10. In view of what has been discussed above, this Application, under Section 482 of Cr.P.C., being devoid of merits, dismissed.

11. However, it is directed that if the applicants appear and surrender before the court below within 30 days from today and apply for bail, their prayer for bail shall be considered and decided in view of the settled law laid by this Court in the case of **Amrawati and another Vs. State of U.P. reported in 2004 (57) ALR 290** as well as judgement passed by Hon'ble Apex Court reported in **2009 (3) ADJ 322 (SC) Lal Kamlendra Pratap Singh Vs. State of U.P.**

12. For a period of 30 days from today, no coercive action shall be taken against the applicants. However, in case, the applicants do not appear before the Court below within the aforesaid period, coercive action shall be taken against them.

(2019)12 ILR A179

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.09.2019

BEFORE
THE HON'BLE DINESH KUMAR SINGH-I, J

Crl. Misc. Application (U/S 482 Cr. P.C.) No. 28862 of 2014

Vijay Kumar Chaturvedi ...Applicant
Versus
State of U.P.& Anr. ...Opposite Parties

Counsel for the Applicant:

Sri Rajesh Pathik, Sri Aditya Kumar Singh

Counsel for the Opposite Parties:
Govt. Advocate, Sri Pradeep Kumar VI

A. Criminal Law - The Prevention of Corruption Act, 1988 - Sanction u/s 19 of the Prevention of Corruption Act held mandatory - The cognizance of the offence which has been taken by the trial court, appears to be in violation of the established principle of law as laid down in Anil Kumar Vs. N. K. Aiyappa without the complainant having obtained the sanction from the appropriate authority, the accused-applicant being a Government Servant.

Application u/s 482 Cr.P.C allowed. (E-3)

List of cases cited: -

1. Subramanyam Swami Vs. Manmohan Singh & ors. 2012 1 SCC (Crl.) 1041

2. Anil Kumar Vs. N. K. Aiyappa 2014 (84) ACC 695 SC

3. Nanhe Lal & ors. Vs. St. of U.P. 2014 (84) ACC 944

(Delivered by Hon'ble Dinesh Kumar Singh-I, J.)

1. Heard Sri Rajesh Pathik, learned counsel for the applicant and Sri S. K. Rajbhar, learned A.G.A. for the State and perused the record.

2. None appeared from the side of Opposite Party No. 2, although *Vakalatnama* has been traced out by the office and has been placed on record.

3. This Application under Section 482 Cr.P.C. has been filed with a prayer to quash the impugned order dated 21.07.2014 passed in Complaint (Special) Case No. 2 of 2013 (Puran Prasad Gupta Vs. Vijay Kumar Chaturvedi) pending before Additional Session Court-I, Maharajganj as well as prayer is made to stay the further proceedings of the above said case.

4. In order to understand the dispute involved in this case, it would be appropriate to give in brief facts of the case, which are as follows:

An Application under 156(3) Cr.P.C. was moved by Opposite Party No. 2/complainant of this case Puran Prasad Gupta stating therein that he had applied for a loan of an amount of Rs. 5,00,000/- by Poorwanchal Gramin Bank, Branch Nichlaul on 01.05.2012, which was to be sanctioned under "Mukhyamantri Gramodoyog Rojgar Yojna". After sanction of loan file of the same was made available to the accused-applicant on 25.05.2012. At the instance of the accused, Chartered Accountant had submitted project report and the valuation of the residential plot of the guarantor was also made available on the basis of registered deed by the Engineer. Tehsildar had also made evaluation. Necessary documents were also prepared by the authorized advocate of the Bank and for completing all these formalities approximately an amount of Rs. 15,000/- was spent by Opposite Party No. 2 apart from Rs. 5,000/- which were also spent by the Opposite Party No. 2 on other expenditure. After having completed all the formalities when the Opposite Party No. 2 sought information from the Assistant Branch Manager of Poorwanchal Gramin Bank, Branch Nichlaul, he made him run again and again on one pretext or the other and ultimately, on 04.09.2012, he demanded 10 % of the sanctioned loan amount

before he would release the funds which were sanctioned as loan. At this, the Opposite Party No. 2 asked him to provide him the receipt of the said amount pursuant to which he had promised to pay the 10% amount but it was told by the applicant that he would not be able to give the said amount of loan without the payment of the 10% of sanctioned loan amount. This act of the applicant was covered in corrupt practices and hence he was told that he would make a complaint against him in this regard. Thereafter, the applicant refused, left the place after abusing the Opposite Party No. 2 in a huff/anger and gave threat that he would get him implicated in false case of loot. A complaint was given to higher authorities against the applicant but to no avail. An application was also given at the police station concerned but nothing was done. Hence, a registered complaint was sent to the Superintendent of Police, Maharajganj on 23.01.2013 but even then no action was taken. The present case was registered by the trial court as a complaint case as Special Case No. 2 of 2013. After its registration, the statement of the complainant was recorded under Section 200 Cr.P.C. on 06.06.2013 in which the said facts have been narrated as were mentioned in the complaint and in support of his case, the Opposite Party No. 2 got examined two other witnesses also under Section 202 Cr.P.C. namely Sudhanshu Tiwari S/o late Jagdish Narayan and Govind Kumar S/o Ram Avtar and both of them have supported the version of the complainant to the effect that the applicant was asking 10% of the sanctioned loan amount from Opposite Party No. 2 for release of amount of loan by way of commission and when the same was not given then it was told that a complaint would be made against him. The accused left the place in a great anger abusing the Opposite Party No. 2 and also threatening that he would implicate the Opposite Party No. 2/complainant in a false case.

5. In the present application under Section 482 Cr.P.C. the order dated 21.07.2014 has been assailed whereby application 47-Kha moved by the accused-applicant has been rejected in which it was mentioned that the accused was summoned under Section 7 & 13 of the Prevention of Corruption Act, for which cognizance could not have been taken against him unless sanction to prosecute him had been taken from the competent authority as per the provisions of Section 19 of the Prevention of Corruption Act and therefore he had sought to be discharged under Section 245 (2) Cr.P.C. The said application was dismissed by the said impugned order.

6. In the impugned order it is mentioned that against the said application 47-kha, the complainant/Opposite Party No. 2 had filed an objection stating that cognizance had already been taken on the complaint moved by him and against the summoning order writ petition was preferred by the accused-applicant, which was dismissed upholding the summoning order. It is further mentioned in the impugned order that from the side of the accused- applicant it was argued that without proper sanction to prosecute him, given by the competent authority, no prosecution can be initiated against the applicant and hence he should be discharged under the provisions of 245 (2) Cr.P.C.

7. Reliance was placed upon three judgments i.e. (i) **Subramanyam Swami Vs. Manmohan Singh and others 2012**

1 SCC (Crl.) 1041; (ii) **Anil Kumar Vs. N. K. Aiyappa 2014 (84) ACC 695 SC**; and (iii) **Nanhe Lal and others Vs. State of U.P. 2014 (84) ACC 944 Allahabad High Court.**

8. After consideration the above said judgments, the trial court had recorded in the impugned order that after having taken into consideration the statement of the complainant and two other witnesses under Section 200 and 202 Cr.P.C., a prima-facie case was found to have been made out under the above mentioned Sections against the accused-applicant and he was summoned to face trial for those offences, against which a revision had been preferred before the High Court and even revision was dismissed and summoning order was found to be rightly passed. It is further mentioned that earlier an application was also moved by the applicant under 245 (2) Cr.P.C. for discharge but even that was also dismissed vide order 15.02.2014, therefore, in these circumstances, the present application 245(2) Cr.P.C. for being discharged on a new ground, cannot be disposed of and accordingly dismissed the same.

09. In the affidavit in support of the application it is mentioned by the applicant that earlier a Criminal Misc. Application under Section 482 Cr.P.C. was preferred by the applicant against the order dated 16.12.2013 which was numbered Application under Section 482 Cr.P.C. as 1205/14 (Vijay Kumar Chaturvedi Vs. State of U.P. and another) which was disposed of vide order dated 15.01.2014 with the direction that the applicant shall move discharge application through counsel within 30 days before the court concerned and for a period of 30 days no coercive action was directed to be taken against him in the said Special Case No. 2 of 2013 pending before the Trial Court.

10. In compliance of the said order discharge application was moved by him, which was rejected vide order dated 15.02.2014 against which a Criminal Revision No. 635 of 2014 (Vijay Kumar Chaturvedi Vs. State of U.P.) was filed before the High Court which was also rejected summarily vide order dated 25.03.2014 without hearing the arguments of the counsel for the applicant which is annexed as annexure no. 2. Further it is mentioned that the applicant/his counsel were not aware as to whether the sanction to prosecute the applicant was taken under Section 19 of the Prevention of Corruption Act or not. Therefore, the said point could not be raised earlier while moving application No. 1205 of 2014 or in Criminal Revision No. 635 of 2014. It is settled law that for fresh cause of action an application under Section 482 Cr.P.C. can be filed by aggrieved person to prevent abuse of process of Court and to secure the ends of justice, hence, present application has been moved.

11. The case of the applicant is squarely covered by judgment of **Subramanyam Swami (Supra) and Anil Kumar (Supra)** as well as Judgment in **Nanhe Lal (Supra)** and the trial court has not made appropriate interpretation of those judgments and has erroneously passed the impugned order rejecting the application of the accused-applicant. Further it is mentioned that the applicant is not empowered to grant loan under the Scheme of **Pradhanmantri Gramodyog Yojna** because the applicant had not even the target given by the Regional Office

and in support thereof he has enclosed a list sent by the Regional Office Poorvanchal Bank dated 12.07.2012 which is annexed as annexure no. 5. In absence of the target, the applicant returned the loan application of Opposite Party No. 2 to Zila Gramodyog Adhikari, Maharajganj twice, first on 24.09.2012 and thereafter on 16.12.2012, true copies of the orders are annexed to the affidavit as annexure 6-A and 6-B.

12. The applicant is a Senior Bank Officer working as Senior Assistant Manager (Advance) in Poorvanchal Bank and has unblemished record of last 37 years of service. The Opposite Party No. 2 is a local press reporter of Hindustan newspaper who after his application was returned, tried to blackmail the applicant and has filed false complaint. Firstly, he had moved District Consumer Forum, Maharajganj before which his application was rejected on 11.09.2013, copy of order is annexed as annnexure no. 7 to the affidavit. After losing the case there, he filed the present false complaint which was registered as Special Case (complaint) no. 2 of 2013 which is nothing but an abuse of process of court and deserves to be quashed as in absence of sanction to prosecute under Section 19 of the Prevention of the Corruption Act by the competent authority, he cannot be relegated to of disadvantageous position to face prosecution. Hence, the impugned order dated **21.07.2011** needs to be set-aside along with entire proceedings in complaint case.

13. From the side of Opposite Party No. 2, in rebuttal, it appears that no Counter-Affidavit has been filed, however, from the side of learned A.G.A. Counter-Affidavit has been filed in which it is mentioned that the present case is arising out of a complaint case, hence, the police has nothing to do with the same.

14. Reliance has been placed by the learned counsel for the applicant on **Subramanian Swamy Vs. Manmohan Singh 2012 1 SCC (Crl.) 1041**. In this case it has been held that there is no provision either in P.C. Act 1988 or in Cr.P.C. which bars a citizen from filing a complaint for prosecution of a Public Servant who is alleged to have committed an offence. The appellant, a private citizen, has a right to file a complaint for prosecution of respondent no. 2 being a cabinet minister in respect of the commission of offence committed by the respondent no. 2 under the 1988 Act. It is further held in this case that in paragraph 58 of the judgment of **Vineet Narain's case (1998) 1 SCC 326**, the Supreme Court gave several directions in relation to C.B.I., the C.V.C, and Enforcement Directorate. In para 58(I)(15), the Supreme Court gave following directions:

"58.(I)(15): Time-limit of three months for grant of sanction for prosecution must be strictly adhered to. However, additional time of one month may be allowed where consultation is required with the Attorney General (A.G.) or any other Law Officer in the A.G.'s Office."

In future, every competent authority shall take appropriate action on the representation made by a citizen for sanction of the prosecution of a public Servant strictly in accordance with the direction contained in **Vineet Narain's** case (Supra) and the guidelines framed by the C.V.C. Sanction Prosecution Guidelines, 2005.

15. The above citations which has been relied upon by the learned counsel for the applicant clearly laid down that every citizen of the country has a right to make a complaint if he comes across a Government Servant who indulged in corruption and that if any such complaint is moved against him there is time limit prescribed for grant of sanction to prosecute him as laid down in Vineet Narayan's case (Supra).

16. The argument of the learned counsel for the applicant is that since the applicant in the present case is a Branch Manager of the Pooranchal Gramin Bank, who is qualifying to be treated a Government Servant and therefore before initiating his prosecution it was essential to seek prior approval for his prosecution from the appropriate authority which has not been taken in the present case by the Opposite Party No. 2. Hence, preliminary proceedings against him need to be quashed.

17. Reliance has been placed by the learned counsel for the applicant on **Anil Kumar Vs. M. K. Aiyappa 2014 (84) ACC 695 SC**. in In this case, the appellant filed a private complaint against the first respondent, a public Servant, under Section 200 Cr.P.C. alleging commission of offence punishable under Section 406, 409, 420, 426, 463, 465, 468, 471, 474 read with Section 120-B and Section 149 of I.P.C. and Section 8, 13(1)(c), 13(1)(d), 13(1)(e), 13(2) read with Section 12 of the Prevention of Corruption Act, 1988.

18. On receipt of this complaint, the Special Judge for Prevention of Corruption passed an order referring the matter for investigation to the Deputy Superintendent of Police, Lokaayukt, in exercise of his powers under Section 156(3) Cr.P.C.. The High Court in a Writ Petition filed by the first respondent quashed the order passed by the Special Judge as well as the complaint on the ground that the Special Judge could not have taken notice of the private complaint against a public Servant unless the same was accompanied by a sanction order against a public Servant under Section 19(1) of the P.C. Act, whether the Court was acting at a pre-cognizance stage or a post-cognizance stage. Aggrieved by the same the, complainant had filed the present appeal, dismissing the appeal, the Supreme Court held that where jurisdiction is exercised on a complaint filed in terms of Section 156(3) Cr.P.C. or Section 200 Cr.P.C., the Magistrate is required to apply his mind, and in such a case, the Special Judge/Magistrate cannot refer the matter under Section 156(3) for investigation against a public Servant without a valid sanctioned order under Section 19(1) of the Prevention of Corruption Act 1988. The application of mind by the Magistrate should be reflected in the order. The mere statement that he has gone through the complaint, documents, and heard the complainant, as such, as reflected in the order, will not be sufficient. After going through the complaint, documents and hearing the complainant, what weighed with the Magistrate to order investigation under Section 156(3) Cr.P.C., should be reflected in the order, though a detailed expression of his views is neither required nor warranted. The Special Judge/Magistrate in the present case, has stated no reasoning for ordering further investigation. It is apparent from the above citation that in a complaint case where the trial court takes cognizance of the offence under the procedure of

complaint case and records statement under Section 202 Cr.P.C., it would be mandatory before taking cognizance against the accused to seek prior prosecution sanction. It would be appropriate for the complainant to seek prior permission for prosecution of the public Servant without such prior permission from the competent authority no cognizance on the said complaint can be taken by the court.

19. In the present case, I find that the applicant being Assistant Branch Manager of Poorvanchal Gramin Bank has been stated to have demanded 10% of the amount of sanctioned loan from the Opposite Party no. 2 before he would release the same, which was refused to be given, hence the complainant moved the present complaint. It is apparent that the Opposite Party no. 2 ought to have sought the sanction to prosecute the accused-applicant from appropriate authority before moving the complaint before the trial court. Apparently, it appears that the cognizance of the offence which has been taken in this matter by the trial court, appears to be in violation of the established principle of law as laid down in **Anil Kumar (supra)** that in this case of alleged corruption, in which summoning order has been passed under Section 7 and 13 of the Corruption Act, the cognizance has been taken by the trial court without the complainant having obtained the sanction from the appropriate authority, the accused-applicant being a Government Servant.

20. As regards the fact that the accused-applicant has already approached this Court twice earlier and each time his application was rejected, who initially approached this Court by preferring application No. 1205 of 2014 in which he was directed to appear before the trial court to seek discharge but his application has been rejected and thereafter, he approached this court in Revision No. 635 of 2014 but the same was also summarily rejected, in each of above mentioned two orders, the present point of prosecution sanction not having been obtained against the accused-applicant, had not been taken into consideration which to me appears to be mandatory in the present case. In view of the above, I am of the view, the impugned order along with the summoning order in the present case deserve to be quashed with liberty to the complainant to approach the Court again after having obtained prior sanction to prosecute the applicant from appropriate authority.

The present Application under Section 482 Cr.P.C. deserves to be allowed and is accordingly, allowed.

(2019)12 ILR A185

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.11.2019

BEFORE
THE HON'BLE RAM KRISHNA GAUTAM, J.

Crl. Misc. Application (U/S 482 Cr. P.C.) No. 36324 of 2019

Shankar Prasad Agrahari ...Applicant
Versus
State of U.P.& Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Kamal Dev Singh Chanchal

Counsel for the Opposite Parties:
A.G.A.

A. Criminal Law - Code of Criminal Procedure, 1973 - Section 482 & Indian Penal Code, 1860 - Section 420 - challenge to – summoning order- Factual correctness or incorrectness or appreciation of same cannot be made, under Section 482, in exercise of inherent power. (Para 4)

While exercising jurisdiction under section 482 of the Code, the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable apprehension of it accusation would not be sustained. That is the function of the trial Judge/Court. To prevent abuse of the process of the Court, High Court in exercise of its inherent powers under section 482 could quash the proceedings but there would be justification for interference only when the complaint did not disclose any offence or was frivolous vexatious or oppressive. (Para 4 & 5)

Application u/s 482 Cr.P.C. dismissed. (E-6)

List of cases cited: -

1. St. of A.P. Vs Gour Sheety Mahesh J.T. 2010 (6) SCC 588

2. Hamida Vs Rashid (2008) 1 SCC 474,

3. Monika Kumar Vs St. of U.P. (2008) 8 SCC 781

4. Popular Muthiah Vs State, Represented by Inspector of Police, (2006) 7 SCC 296

5. Dhanlakshmi Vs R.Prasana Kumar, (1990) Cr LJ 320 (DB): AIR 1990 SC 494

6. St. of Bih. Vs Murad Ali Khan, (1989) Cr LJ 1005: AIR 1989 SC 1,

7. Amrawati and anr.Vs. St.of U.P. r 2004 (57) ALR 290

8. Lal Kamlendra Pratap Singh Vs. St. of U.P. 2009 (3) ADJ 322 (SC)

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. Heard learned counsel for the applicant over this Application, moved under Section 482 of Code of Criminal Procedure, 1973, by the applicant, Shankar Prasad Agrahari, against State of U.P. and Vijai Bahadur Saini, challenging summoning order, dated 29th August, 2019, passed by the Additional Chief Judicial Magistrate, Varanasi, in Complaint Case No. 2278 of 2018, under Section 420 of Indian Penal Code of Police Station-Sarnath, District-Varanasi, pending in the court of Additional Chief Judicial Magistrate, Varanasi.

2. Learned counsel for the applicant argued that the impugned summoning order has been passed without any evidence on record. Very contention of the complainant was not substantiated by the witnesses as there were many contradictions in the statements. More so, alleged payment being said to have been made in 6th and 7th instalments when there was period of ***Notebandi*** and it was not possible to withdraw such huge amount. This itself shows falsity of the complainant. Witnesses of the complainant are his relatives and their statements are full of inconsistency. Complainant himself was a Principal Peon of the Bank, concerned, and as such he was fully aware of the functioning of the Bank, even then, this accusation is there. Hence, this Application, under Section 482 of Cr.P.C., before this Court for exercise of inherent power, with a prayer for setting aside impugned summoning order.

3. Learned AGA, representing State of U.P., has vehemently opposed this Application.

4. From very perusal of the impugned summoning order, it is apparent that the same has been passed by the

Magistrate on the basis of the statements recorded, under Sections 200 and 202 of Cr.P.C., in enquiry made by the Magistrate and in all those statements, there is corroboration of contention of complaint. There is nothing against those statements before the Magistrate and on the basis of those statements above impugned summoning order was passed. Factual correctness or incorrectness or appreciation of same cannot be made, under Section 482, in exercise of inherent power by this Court because the Apex Court, in **State of Andhra Pradesh v. Gaurishetty Mahesh, JT 2010 (6) SC 588: (2010) 6 SCALE 767: 2010 Cr. LJ 3844,** has propounded that *"While exercising jurisdiction under section 482 of the Code, the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable apprehension of it accusation would not be sustained. That is the function of the trial Judge/Court".* In another subsequent **Hamida v. Rashid, (2008) 1 SCC 474,** hon'ble Apex Court propounded that *"Ends of justice would be better served if valuable time of the Court is spent in hearing those appeals rather than entertaining petitions under Section 482 at an interlocutory stage which after filed with some oblique motive in order to circumvent the prescribed procedure, or to delay the trial which enable to win over the witness or may disinterested in giving evidence, ultimately resulting in miscarriage of Justice".* In again another subsequent **Monica Kumar v. State of Uttar Pradesh, (2008) 8 SCC 781,** the Apex Court has propounded "Inherent jurisdiction under Section 482 has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself." While interpreting this jurisdiction of High Court Apex Court in **Popular Muthiah v. State, Represented by Inspector of Police, (2006) 7 SCC 296** has propounded *"High Court can exercise jurisdiction suo motu in the interest of justice. It can do so while exercising other jurisdictions such as appellate or revisional jurisdiction. No formal application for invoking inherent jurisdiction is necessary. Inherent jurisdiction can be exercised in respect of substantive as well as procedural matters. It can as well be exercis*ed in respect of incidental or supplemental power irrespective of nature of proceedings".

5. Regarding prevention of abuse of process of Court, Apex Court in **Dhanlakshmi v. R.Prasana Kumar, (1990) Cr LJ 320 (DB): AIR 1990 SC 494** has propounded *"To prevent abuse of the process of the Court, High Court in exercise of its inherent powers under section 482 could quash the proceedings but there would be justification for interference only when the complaint did not disclose any offence or was frivolous vexatious or oppressive"* as well as in **State of Bihar v. Murad Ali Khan, (1989) Cr LJ 1005: AIR 1989 SC 1,** Apex Court propounded *"In exercising jurisdiction under Section 482 High Court would not embark upon an enquiry whether the allegations in the complaint are likely to be established by evidence or not".*

6. Meaning thereby, exercise of inherent jurisdiction under Section 482 Cr.P.C. is within the limits, propounded as above.

7. In view of what has been discussed above, there is no ground of any indulgence to be granted by this Court.

Accordingly, this Application, under Section 482 of Cr.P.C. deserves dismissal, being devoid of merits, and it stands dismissed accordingly.

8. However, it is directed that if the applicant appears and surrenders before the court below within 30 days from today and applies for bail, his prayer for bail shall be considered and decided in view of the settled law laid by this Court in the case of **Amrawati and another Vs. State of U.P. reported in 2004 (57) ALR 290** as well as judgement passed by Hon'ble Apex Court reported in **2009 (3) ADJ 322 (SC) Lal Kamlendra Pratap Singh Vs. State of U.P.**

9. For a period of 30 days from today, no coercive action shall be taken against the applicant. However, in case, the applicant does not appear before the Court below, within the aforesaid period, coercive action shall be taken against them.

(2019)12 ILR A188

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.10.2019
BEFORE
THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Crl. Misc. Application (U/S 482 Cr. P.C.) No. 36782 of 2019

Talif ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Ajay Kumar Pathak

Counsel for the Opposite Parties:
A.G.A., Sri Pankaj Kumar Sharma

A. Criminal Law - Indian Penal Code, 1860- Section 354-Compounding of non - compoundable offence or offences on basis of mutual compromise does not conclude in quashing of criminal proceedings Code of Criminal Procedure, 1973 - Section 482 - Inherent jurisdiction - Indian Penal Code, 1860 – Section 354 - non-compoundable offence - The protection of children from sexual offences act,2012 - Section 7 & 8 (Sexual assault & Punishment for sexual assault) – non-compoundable offence – category of heinous and serious offences - treated as crime against the society and not against the individual alone - Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz.: (i) to secure the ends of justice, or (ii) to prevent abuse of the process of any court.(Para-11)

Applicant is an accused - obscene activity with the minor girl who is victim – father (complainant) of victim entered into mutual compromise with the accused.

HELD**:-** In view of the facts and circumstances of the present case , the quashing of the entire criminal proceedings by compounding of non- compoundable offences on the basis of mutual compromise , shall not be justified under the powers conferred by section 482 criminal procedure code.(Para-18)

Application u/s 482 Cr.P.C. dismissed. (E-7)

LIST OF CASES CITED:-

1. State of M.P. Vs. laxmi Narayan , (2019) 5 SCC 688

2. State of Maharashtra Vs. Vikram Anantrai Doshi, (2014)15 SCC 29

3. Gian Singh vs. State of Punjab, (2012) 10 SCC 303

4. State of Madhya Pradesh vs. Deepak , (2014) 10 SCC 285

5. State of Madhya Pradesh vs. Manish, (2015) 8 SCC 307

6. Narinder Singh vs. State of Punjab, (2014) 6 SCC 466

7. P arbatbhai Aahir vs. State of Gujarat, (2017) 9 SCC 641

8. Shiji @ Pappu and others vs. Radhika and another, (2011) 10 SCC 705

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

1. प्रार्थी ने वर्तमान आवेदन जो दंड प्रक्रिया संहिता, 1973 की धारा 482 के अंतर्गत दायर किया है, के द्वारा इस न्यायालय से प्रार्थना की है कि, पारस्परिक समझौते के आधार पर अशमनीय अपराधो का शमन करके, प्राथमिकी सं0 918/2018 थाना कोतवाली, जिला हाथरस, अंतर्गत धारा 354 भारतीय दंड संहिता व धारा 7 एवं 8 लैगिंग अपराधो से बालको का संरक्षण अधिनियम 2012 (संक्षिप्त में 'अधिनियम 2012') के अंतर्गत समस्त दाण्डिक कार्यवाही (आरोप पत्र दिनांक 12.01.2019 व सत्र परीक्षण 13/2019 मे पारित प्रसंज्ञान आदेश दि0 07.02.2019) जो अतिरिक्त जिला व सत्र न्यायाधीश, कोर्ट सं0 1, हाथरस मे विचाराधीन है को निरस्त करे।

2. आवेदन में वर्णित तथ्य जैसा प्राथमिकी जो प्रथ्यार्थी क्रमांक संख्या 2 में दर्ज करायी थी, इस प्रकार है।

''प्रार्थी जमील पुत्र मोहम्मद खां निवासी ब्लाक नं0–72 काशीराम कालोनी थाना कोतवाली नगर हाथरस में मय परिवार के रह रहा हूं। दिनांक 09.11.18 को समय लगभग 11:30 बजे मेरी पुत्री नेहा उम्र लगभग 13 वर्ष मेरे मकान के बाहर छज्जे पर खड़ी थी तभी मेरे पड़ोस में रहने वाला तालिफ पुत्र पप्पू निवासी ब्लाक नं0–72 काशीराम कालोनी मेरी लड़की के पास आया और उसके साथ अश्लील हरकत करने लगा मेरी पुत्री ने मुझे आवाज लगाई मै बाहर आया तब तक तालिफ वहां से भाग गया था मैने भागते हुए देखा। महोदय से निवेदन है कि मेरी रिपोर्ट लिखकर कानूनी कार्यवाही करने की कृपा करें।''

3. उपरोक्त प्राथमिकी पर अनुसंधान हुआ जिसमे पीड़िता का बयान धारा 164 दां प्र सं के अंतर्गत अभिलेखित किया गया जो निम्न है।

''बयान अन्तर्गत धारा 164 द.प्र.सं. :– ''मै पढ़ी लिखी नही हूं घटना 09.11.18 की है रात का 11:00 से 11:30 बजे था उस समय मै छज्जे पर खड़ी थी मैने अपनी बहन व भाई का स्कूल ड्रेस धोये थे उसे उठाने के लिए गई थी तालिव नाम का लड़का अपने छज्जे से उतर कर आ रहा था वह हमारे घर के अन्दर रहता है। उसने मेरा हाथ भी पकड़ा और छेड़छाड़ की मैने पापा को आवाज मारी तो वह भाग गया।''

4. अन्तः आरोप पत्र दिनॉक 13.01.2019, धारा 354 भा.द.सं. व धारा 7/8 'अधिनियम 2012' के अन्तर्गत प्रार्थी के विरूद्ध दाखिल किया गया। जिस पर जिला एवं सत्र न्यायालय हाथरस, ने दि0 07.02.2019 को प्रसंज्ञान लिया। सत्र न्यायालय के अभिलेख जो प्रार्थी ने अनुसंलग्नक सं0 6 के अंतर्गत आवेदन के साथ लगाये है, से विदित है कि प्रार्थी (अपराधी) के विरूद्ध गैर जमानती वांरट प्रेषित किया जा चुका है।

5. प्रार्थी ने इस आवेदन के साथ एक समझौता (अनुलग्नक संख्या 7) जो एक आवेदन के रूप में है संलग्न किया है, जिसमे वर्णित है कि:–

''न्यायालय श्रीमान् अपर सत्र न्यायाधीश कोर्ट सं0 प्रथम हाथरस

एस0टी0 सं0–13/2019

राज्य बनाम् तालिफ

धारा – 354 प्च्ण्ब् व 7/8 पॉस्को एक्ट

थाना – कोतवाली हाथरस

श्रीमान् जी,

निवेदन कि प्रार्थी उपरोक्त मुकद्दमा में वादी है और प्रार्थी का उपरोक्त मुकद्दमा में अब विपक्षी (मुल्जिम पक्ष) से मौहल्ले व समाज के संभ्रान्त व्यक्तियों द्वारा अब समझौता करा दिया गया है, अब हम दोनों पक्षों में कोई विवाद शेष नहीं रहा है। उपरोक्त मुकद्दमा व्यक्तिगत प्रकृति का है जिससे समाज का कोई लेना–देना नहीं है। अब मैं और मेरी पुत्री आगे कोई पैरवी करना नहीं चाहते है, ऐसी स्थिति में उपरोक्त मुकद्दमा को समाप्त किया जाना न्यायहित में आवश्यक है।

अतः श्रीमान् जी से प्रार्थना है कि मेरे एवं मेरी पुत्री

द्वारा दाखिल समझौतानामा पत्रावली पर लिया जावे एवं समझौते के आधार पर उपरोक्त मुकद्दमा निस्तारित किया जावे।

दिनांकः–

विपक्षी वादी

ह0 तालिफ

ह0 जमील

1. जमील पुत्र मौहम्मद खान,

ह0 नेहा

2. नेहा पुत्री जमील

निवासीगण–ब्लॉक 72, काशीराम कॉलोनी,

थाना–कोतवाली हाथरस, जिला–हाथरस।''

इस समझौते पर अभियुक्त (प्रार्थी), पीड़िता के पिता (प्रथ्यार्थी क्रमॉक सं0 2) व पीड़िता के हस्ताक्षर है।

6. प्रथ्यार्थी क्रमांक 2 ने अल्प जवाबी हल्फनामा दाखिल किया है, जिसके द्वारा उपरोक्त वर्णित समझौते की पुष्टि की है, व कहा है कि उपरोक्त समझौता बिना किसी दबाव से लिया गया है। प्रथ्यार्थी क्रमांक 2 ने आवेदन में की गयी प्रार्थना का भी समर्थन किया है।

7. प्रार्थी व प्रत्यार्थी क्रमांक 2 के विद्वान अधिवक्ताओ ने निवेदन किया की दंड प्रक्रिया संहिता की धारा 482 के अंतर्गत इस न्यायालय को वो अन्तनिहित शक्ति प्राप्त है, जिसके द्वारा न्याय के उद्देश्यो की प्राप्ति को सुनिश्चित करने लिए कुछ आपराधिक मामलों मे पारस्परिक समझौते के आधार पर अशमनीय अपराधो का भी शमन किया जा सकता है एवं समस्त दाण्डिक कार्यवाही को निरस्त किया जा सकता है। वर्तमान तथ्यो व परिस्थितियों मे उक्त शक्ति का प्रयोग किया जाना न्यायसंगत होगा।

8. इसके विपरीत उत्तर प्रदेश के स्थाई अधिवक्ता ने इस न्यायालय के सामने कथन किया कि वर्तमान मामले के तथ्यों व परिस्थितियो मे जहाँ अभियुक्त के खिलाफ गंभीर आरोप है, इस न्यायालय द्वारा उसकी अंतनिहित शक्तियो का प्रयोग नही करना चाहिये। दांडिक कार्यवाही को पूर्ण हो जाने देना चाहिये तथा दाण्डिक प्रक्रिया को अचानक शिथिल नही करना चाहिये।

9. प्रार्थी, अप्रार्थी नं0 1 व 2 के विद्वान अधिवक्ता को सुना व आवेदन व आवेदन के संलग्नो का ध्यानपूर्वक अध्ययन किया। प्रार्थी व अप्रार्थी के अधिवक्ताओं की सहमति से वर्तमान आवेदन पर अंतिम निर्णय इस आवेदन की वर्तमान स्तर पर ही लिया जा रहा है।

10. वर्तमान वाद में यह निर्णीत करना है कि ''क्या वर्तमान वाद के तथ्यों व परिस्थितयो को ध्यान में रखते हुए पारस्परिक समझौते के आधार पर अशमनीय अपराधो का शमन करके, समस्त दांडिक कार्यवाही का निरस्तीकरण, धारा 482 द.प्र. सं. द्वारा प्रदत्त शक्तियों के अंतर्गत किया जाना न्यायोचित होगा ?

11. इस विधिक विषय का निर्धारण करने लिए यह देखना आवश्यक की इस विषय पर कानूनी स्थिति क्या है। इस विषय पर उच्चतम न्यायालय द्वारा हाल में दिया गया निर्णय (मध्य प्रदेश शासन बनाम लक्ष्मी नारायण और अन्य आपराधिक अपील सं0 349/2019 निर्णय दि0 5 मार्च 2019 जो 2019 (5) एस.सी.सी. 688 में प्रकाशित भी है।) का उल्लेख करना प्रासंगिक व उपयुक्त है। इस निर्णय के प्रमुख अंश निम्न है (स्त्रोत *https: /sci.gov.in/supremecourt_vernacular2014 / 22779/22779201421506129 87judgement05-Mar-2019HIN pdf½*

"9. आरंभ मे यह ध्यान देना आवश्यक है कि वर्तमान मामले मे उच्च न्यायालय ने द.प्र.सं. की धारा 482 की अपनी शक्तियों का उपयोग करते हुए केवल फरियादी एवं अभियुक्त के मध्य समझौता हो जाने के आधार पर धारा 307 और 34 भा.द.सं. के तहत अपराधों की प्रथम सूचना रिपोर्ट को रद्द किया है। कि समझौते को ध्यान मे रखते हुए और फरियादी द्वारा लिये गये पक्ष, इस न्यायालय के शिजी के मामले के निर्णय पर विचार करते हुए, उच्च न्यायालय का मानना है कि आरोपीगण के विरूद्ध दोषसिद्धी करने का कोई अवसर नहीं है और सम्पूर्ण विचारण करना

निरर्थक होगा, उच्च न्यायालय ने एफ.आई.आर. को रद्द किया है।.

9.1 यद्यपि, उच्च न्यायालय ने इस तथ्य पर बिल्कुल भी विचार नहीं किया है कि अभिकथित अपराध धारा 320 द.प्र.सं. के अनुसार अशमनीय थे। आलोच्य निर्णय से ऐसा प्रतित होता है कि उच्च न्यायालय ने सुसंगत तथ्यों तथा मामले की परिस्थितियो जिसमें विशेष रूप से अपराधों की गंभीरता और इसके सामाजिक प्रभाव पर बिल्कुल भी विचार नहीं किया है। उच्च न्यायालय द्वारा पारित आदेश और आलोच्य निर्णय से ऐसा प्रतित होता है कि उच्च न्यायालय ने धारा 482 द.प्र.सं. के अंर्तगत शक्तियों के प्रयोग में एफ.आई.आर. को यंत्रिक रूप से रद्द किया है। उच्च न्यायालय ने व्यक्तिगत और निजी दोष के बीच अंतर तथा सामाजिक दोष और सामाजिक प्रभाव पर बिल्कुल भी विचार नहीं किया है। जैसा कि इस न्यायालय ने महाराष्ट राज्य बनाम विक्रम अनंतराय दोशी, (2014) 15 एस.सी.सी. 29, इस मामले में अवलोकन किया, धारा 482 द.प्र.सं. के अंतर्गत शक्तियों का प्रयोग करते हुए आपराधिक कार्यवाहीयों को रद्द करते हुए न्यायालय का प्रमुख कर्तव्य होना चाहिए कि वह सारे तथ्यों का विश्लेषण कर अरोपो के रूझान और समझौता के मर्म का पता करे। जैसा कि देखा गया है, यह न्यायाधीश का अनुभव है जो उसकी सहायता के लिए आता है और उक्त अनुभव का उपयोग सावधानी, सतर्कता, एहतियात और साहसी विवेक के साथ करना चाहिए। वर्तमान मामले में उच्च न्यायालय ने उचित परिप्रेक्ष्य में सभी तथ्यों का विश्लेषण करने का तनिक भी कष्ट नहीं किया है और आपराधिक कार्यवाहियां यांत्रिक रूप से रद्द कर दी है। यहां तक कि वर्तमान मामले में उच्च न्यायालय द्वारा धारा 482 द.प्र.सं. के तहत शक्तियों का प्रयोग करना और धारा 307 तथा 34 भा.द.सं. के तहत दण्डनीय अपराध की एफ.आई.आर. को रद्द करना, एक प्रकार से इस न्यायालय के निर्णयो द्वारा प्रतिपादित विधि के प्रतिकूल है।

9.2 ज्ञान सिंह (उपरोक्त) मामले के खण्ड–61 में इस न्यायालय ने महसूस किया और निम्न अनुसार प्रतिपादित किया :–

''61. उपरोक्त चर्चा से जो स्थिति बनती है उसे इस प्रकार संक्षेप में प्रस्तुत किया जा सकता है : उच्च न्यायालय को आपराधिक कार्यवाही या एफ.आई.आर. या परिवाद को रद्द करने की शक्तियां अपनी अंर्तनिहित क्षेत्राधिकार का प्रयोग करते हुए और आपराधिक न्यायालय को दी गई धारा 320 के तहत अपराध को शमन करने की शक्ति से भिन्न है। अंर्तनिहित शक्तियां व्यापक स्तर पर बिना किसी वैधानिक सीमा के साथ होती है लेकिन इस शक्ति को पैवंद दिशा निर्देशों के अनुसार ऐसे प्रयोग करना चाहिए : ;पद्ध न्याय के हितों की सुरक्षा हेतु, या ;पपद्ध किसी न्यायालय की प्रक्रिया के दुरूपयोग को रोकने हेतु। किन मामलो में आपराधिक कार्यवाही या परिवाद या एफ.आई.आर. को रद्द करने की शक्तियों का प्रयोग किया जा सकता है, जहां अपराधी और पीड़ित ने अपना विवाद सुलझा लिया है, यह प्रत्येक मामले के तथ्यों और परिस्थितियों पर निर्भर करेगा और कोई श्रेणी विहित नहीं की जा सकती है। यद्यपि, इस प्रकार की शक्ति का प्रयोग करने से पहले उच्च न्यायालय को अपराध की प्रकृति और गंभीरता के बारे में यथोचित ध्यान होना ही चाहिए। जघन्य और मानसिक अवसाद के गंभीर अपराधों या हत्या, बलात्कार, डकैती इत्यादि जैसे अपराधों को रद्द नही किया जा सकता है यहां तक कि पीड़ित या पीड़िता के परिवार और अभियुक्त ने विवाद को सुलझा लिया है। इस प्रकार के अपराध प्रकृति में निजी नही है और समाज पर गंभीर प्रभाव डालते है। इसी प्रकार, पीड़िता और अपराधी के बीच विशेष कानून के तहत अपराधों के संबंध में कोई समझौता जैसे कि भ्रष्टाचार निवारण अधिनियम या उस क्षमता में काम करते समय लोक सेवकों द्वारा किए गए अपराधे आदि; ऐसे अपराधों को शामिल करने वाली आपराधिक कार्यवाही को रोकने के लिए कोई आधार प्रदान नहीं कर सकता है। लेकिन आपराधिक मामलों में बड़े पैमाने पर और पूर्वव्यापी दीवानी प्रकृति से खारिजी के उद्देश्यो के लिए अलग–अलग आधार पर खड़े होते है, विशेष रूप से वाणिज्यिक, वित्तीय, व्यापारिक, दीवानी, साझेदारी या इस तरह के सम्यव्यवहार या दहेज संबंधित वैवाहिक आदि संबंधित से उत्पन्न अपराधों या पारिवारिक विवाद जहां मूल रूप से दोष व्यक्तिगत या निजी प्रकृति का है और पक्षकारों ने अपने संपूर्ण मामले को हल कर लिया है। इस श्रेणी के मामलों में, उच्च न्यायालय आपराधिक कार्यवाहियों को रद्द कर सकता है यदि उसके विचार में, अपराधी और पीड़ित के बीच समझौता होने के कारण, दोषी

होने की संभावना दूरस्थ और धूमिल है और आपराधिक मामलों की निरंतरता अभियुक्त को गंभीर उत्पीड़न और प्रतिकूलता में डालेगी और पीड़ित के साथ समझौता पूर्ण और सम्पूर्ण निपटारा होते हुए भी आपराधिक मामले को रद्द न करके उसके साथ गंभीर अन्याय कारित होगा। दूसरे शब्दों में, उच्च न्यायालय को इस बात पर विचार अवश्य करना चाहिए कि क्या यह न्याय के हित के लिए अनुचित या न्यायसंगत होगा या आपराधिक कार्यवाही जारी रखने के लिए या पीड़ित तथा दोषकर्ता के बीच समझौता होने के बावजूद आपराधिक कार्यवाही जारी रखने से कानून की प्रक्रिया का दुरूपयोग होगा और क्या न्याय के उद्देश्य को सुरक्षित करने हेतु, यह उचित है कि आपराधिक मामले को समाप्त कर दिया जाए और यदि उपरोक्त प्रश्न का उत्तर सकारात्मक है, तो उच्च न्यायालय आपराधिक कार्यवाही को रद्द करने के अपने क्षेत्र अधिकार मे होगा।

9.3 ज्ञान सिंह (उपरोक्त), के मामले के निर्णय के विचार करने के बाद नरेंद्र सिंह बनाम पंजाब राज्य (2014) 6 एस.सी.सी. 466 के मामले के पैराग्राफ 29 में, इस न्यायालय ने निम्न रूप से अभिव्यक्त किया :

''29 उपरोक्त चर्चा को दृष्टिगत रखते हुए, हम सरांशता और निम्नलिखित सिद्धांतों को प्रतिपादित करते है जिसके द्वारा उच्च न्यायालय को मार्गदर्शित किया जाएगा पक्षकारों के मध्य हुए समझौते को उचित उपचार देने में और धारा 482 द.प्र.सं. के अंतर्गत अपनी शक्ति का प्रयोग करते हुए कार्यवाही को रद्द करते हुए और समझौते को स्वीकार करते हुए या समझौते को मानने से इनकार करते हुए आपराधिक कार्यवाहियों के जारी रहने का निर्देश देगा।

29.1 द.प्र.सं. की धारा 482 के तहत प्रदत्त शक्ति को उस शक्ति से अलग किया जाना चाहिए जो न्यायालय को संहिता की धारा 320 के अंर्तगत अपराधों के शमन करने के लिए दी जाती है। निसंदेह संहिता की धारा 482 के अंर्तगत उच्च न्यायालय को उन मामलों में भी आपराधिक कार्यवाहियों को रद्द करने की अंर्तनिहित शक्ति है जो शमनीय नहीं हैं, जहां पक्षकारों ने आपस में मामला सुलझा लिया है। हालांकि, इस शक्ति का प्रयोग संयम से और सावधानी के साथ किया जाना है।

29.2 जब पक्षकार निपटारे पर पहुंच गए हैं और उस आधार पर आपराधिक कार्यवाहीको रद्द करने के लिए याचिका दायर की जाती है, तो ऐसे मामलों में मार्गदर्शक कारक ;पद्ध न्याय के उद्देश्य की पूर्ति के लिए या ;पपद्ध किसी भी न्यायालय की प्रक्रिया का दुरूपयोग रोकने के लिए को सुरक्षित करना होगा।

उच्च न्यायालय को अपनी शक्ति का प्रयोग करते समय पूर्वोक्त दो उद्देश्यों में से किसी एक पर राय बनानी होती है।

29.3 ऐसी शक्ति का उन अभियोगों में प्रयोग नहीं किया जाना है जिनमें जघन्य और मानसिक अवसाद के गंभीर अपराध या अपराध जैसे हत्या, बलात्कार, डकैती इत्यादि शामिल हैं। ऐसे अपराध निजी प्रकृति के नहीं है और समाज पर गंभीर प्रभाव डालते है। इसी प्रकार विशेष कानून के तहत कारित किये गए अभिकथित अपराध जैसे कि भ्रष्टाचार निवारण अधिनियम या उस क्षमता में काम करते समय लोक सेवकों द्वारा किए गए अपराध मात्र इस आधार पर रद्द नहीं किये जाने है कि पीड़ित और अपराधी के बीच कोई समझौता हो गया है।

29.4 दूसरी तरफ, उन आपराधिक मामलों में जो बड़े पैमाने पर और पूर्वव्यापी दीवानी प्रकृति के होते है, विशेष रूप से वे जो वाणिज्यिक संव्यवहार से उत्पन्न होते है या वैवाहिक संबंध से उत्पन्न होते है, या पारिवारिक विवादों को समाप्त किया जाना चाहिए, जब पक्षकारों ने अपने विवाद को आपस में खुद से हल कर लिया हो।

29.5 अपनी शक्तियों का प्रयोग करते समय उच्च न्यायालय को इस बात की जांच करनी है कि क्या दोषसिद्धि की संभावना दूरस्थ और धूमिल है और आपराधिक मामलों की निरंतरता अभियुक्तों को बहुत उत्पीड़न और पक्षपात में डालेगी और आपराधिक मामलों को समाप्त नहीं करने से उसके साथ अत्यधिक अन्याय होगा।

29.6 भा.द.सं. की धारा 307 के तहत अपराध जघन्य और गंभीर अपराधों की श्रेणी में आयेगें और इसलिए इन्हें आमतौर पर समाज के विरूद्ध अपराध माना जाता है और न कि केवल अकेले व्यक्ति के विरूद्ध। हांलाकि उच्च न्यायालय अपने निर्णय को केवल इसलिए बहाल नही करेगा क्योंकि एफ.आई.आर. में धारा 307 भा.द.सं. का उल्लेख है या इस प्रावधान के तहत आरोप तय

किया गया है। उच्च न्यायालय को यह परीक्षण करने के लिए खुला रहेगा कि क्या धारा 307 भा. द.सं. को मात्र इसमें शामिल करने के लिए या अभियोजन पक्ष ने पर्याप्त साक्ष्य एकत्र किये है, जो यदि साबित हुआ, को धारा 307 भा.द.सं. के तहत आरोप साबित करने के लिए प्रेरित करेगा। इस प्रयोजन के लिए, उच्च न्यायालय को यह खुला रहेगा, चोट लगने की प्रकृति के साथ जाए क्या इस तरह की चोट शरीर के महत्वपूर्ण/प्रतिनिधि भागों पर कारित की गई हैं, हथियारों की प्रकृति जो इस्तेमाल किये गये है, पीड़ित को कारित चोटों के संबंध में चिकित्सीय रिपोर्ट सामान्यतः मार्गदर्शक कारक हो सकते है। इस प्रथम दृष्टया विश्लेषण के आधार पर, उच्च न्यायालय इस बात की जांच कर सकता है कि क्या दोषी ठहराए जाने की प्रबल संभावना है या दोषी ठहराए जाने की संभावनाए दुरस्थ और धूमिल है। पूर्व मामले में यह निपटारे को स्वीकार करने से इनकार कर सकता है और आपराधिक कार्यवाहियों को रद्द कर सकता है जबकि बाद के मामले में उच्च न्यायालय के लिए पक्षकारों के बीच पूर्ण निपटारा अभिवाक् समझौते पर आधारित अपराध को स्वीकार करने के लिए यह स्वीकार्य होगा। इस स्तर पर, न्यायालय को इस तथ्य से भी प्रभावित किया जा सकता है कि पक्षकारों के बीच समझौता करने से उनके बीच सदभाव हो सकता है जिससे उनके भविष्य के रिश्ते में सुधार हो सकता है।

29.7 संहिता की धारा 482 के तहत अपनी शक्ति का प्रयोग करना है या नही, यह तय करते समय निपटारे की समय–सीमा एक महत्वपूर्ण भूमिका निभाती है। जिन मामलों का निपटारा कथित अपराध के तुरन्त बाद हो जाता है और मामला अन्वेषणाधीन है, उच्च न्यायालय आपराधिक कार्यवाही/जांच को रद्द करने के लिए समझौता स्वीकार करने में उदार हो सकता है। यह इस कारण से है कि इस स्तर पर जांच अभी भी जारी है और यहां तक की चार्जशीट भी पेश नहीं की गई है। इसी तरह, उन मामलों में जहां आरोप लगाया गया है लेकिन साक्ष्य को शुरू करना अभी बाकी है या साक्ष्य अभी भी प्रारंभिक अवस्था में है, उच्च न्यायालय अपनी शक्तियों को अनुकूल तरीके से उपयोग करने में उदारता दिखा सकता है, लेकिन ऊपर उल्लेखित परिस्थितियों/साम्रगी का प्रथम दृष्टया मूल्यांकन करने के बाद। दूसरी ओर, जहां अभियोजन साक्ष्य लगभग पूर्ण हैं या प्रकरण साक्ष्य के निष्कर्ष के बाद तर्क की अवस्था पर है, आमतौर पर उच्च न्यायालय को संहिता की धारा 482 के तहत अपनी शक्तियों का प्रयोग करने से बचना चाहिए, जैसा कि ऐसे मामलों में विचारण न्यायालय मामले को गुणागूण पर निर्णित करने की स्थिति में होगा और इस निष्कर्ष पर पहुंचने के लिए कि क्या धारा 307 के तहत अपराध किया गया है या नहीं। इसी तरह, उन मामलों में जहां दोषसिद्धि विचारण न्यायालय द्वारा पहले से ही दर्ज की जाती है और मामला उच्च न्यायालय के समक्ष अपील की अवस्था पर है, केवल पक्षकारों के बीच समझौता एक ही आधार को स्वीकार करने का आधार नहीं होगा जिसके परिणाम स्वरूप अपराधी को दोषमुक्त किया जायेगा जो कि विचारण न्यायालय द्वारा पहले से ही दोषसिद्ध किया गया है। यहां धारा 307 भा.द.सं. के तहत आरोप साबित हो जाता है और दोषसिद्धि पहले से ही जघन्य अपराध के रूप में दर्ज की जाती है और इसलिए, इस तरह के अपराध के लिए दोषी पाए गए अपराधी को बख्शने का कोई सवाल ही नहीं है।

9.4 परबतभाई अहीर (उपरोक्त) के मामले में, न्यायालय के पास फिर से इस पर विचार करने का अवसर है कि क्या उच्च न्यायालय द.प्र.सं. की धारा 482 के तहत अंर्तनिहित क्षेत्राधिकार के उपयोग में एफ.आई.आर./परिवाद/आपराधिक कार्यवाहियों को रद्द कर सकता है, इस बिंदु पर इस न्यायालय के निर्णयों की श्रृखंला पर विचार करते हुए, इस न्यायालय ने निम्नलिखित प्रस्तावों को संक्षेप में प्रस्तुत किया :

1ण द.प्र.सं. की धारा 482 उच्च न्यायालय की अंर्तनिहित शक्तियों को संरक्षित करता है कि किसी भी न्यायालय की प्रक्रिया का दुरूपयोग रोकने के लिए या न्याय के उद्देश्यों को सुरक्षित करने के लिए। यह प्रावधान नई शक्तियों को प्रदान नहीं करता है। यह केवल उन शक्तियों को मान्यता देता है और संरक्षित करता है जो उच्च न्यायालय में अंर्तनिहित है।

2ण उच्च न्यायालय के क्षेत्राधिकार का आह्वान प्रथम सूचना रिपोर्ट या आपराधिक कार्यवाही को इस आधार पर रद्द करने के लिए कि अपराधी और पीड़ित के बीच समझौता हो गया है, एक समान नहीं है जहां क्षेत्राधिकार का आह्वान अपराध के शमन करने के उद्देश्य से

किया जाता है। अपराध का शमन करते समय, न्यायालय की शक्ति द.प्र.सं. की धारा 320 के प्रावधानों के द्वारा शासित होती है। धारा 482 के तहत रद्द करने की शक्ति आर्कषित होती है चाहे अपराध अशमनीय हो।

3ण एक राय बनाने में कि क्या धारा 482 द.प्र.सं. के तहत अपने अधिकार क्षेत्र के उपयोग में एक आपराधिक कार्यवाही या परिवाद को रद्द किया जाना चाहिए, उच्च न्यायालय को यह मूल्याकंन करना चाहिए कि क्या न्याय के उद्देश्यों की पूर्ति में निहित शक्ति का प्रयोग किया जाना उचित होगा।

4ण जबकि उच्च न्यायालय की अंर्तनिहित शक्ति की व्यापक परिधि और पूर्णता है, उसे प्रयोग करने की आवश्यकता है ;पद्ध न्याय के उद्देश्यों को सुरक्षित करने के लिए, या ;पपद्ध किसी न्यायालय की प्रक्रिया के दुरूपयोग को रोकने के लिए।

5ण इस निर्णय में कि क्या परिवाद या प्रथम सूचना रिपोर्ट को इस आधार पर खारिज किया जाना चाहिए कि अपराधी और पीड़ित ने विवाद को निपटा लिया है, अंततः प्रत्येक मामला उसके तथ्यों और परिस्थितियों पर घुमता है और सिद्धांतों का कोई विस्तृत विस्तार तैयार नही किया जा सकता है।

6ण धारा 482 के तहत शक्ति के प्रयोग में और इस अभिवाक् से निपटाने के दौरान कि विवाद सुलझा लिया गया है, उच्च न्यायालय को अपराध की प्रकृति और गंभीरता का सम्यक ध्यान रखना चाहिए। जघन्य और गंभीर अपराधों जिनमें मानसिक अवसाद या अपराध जैसे हत्या, बलात्कार, डकैती शामिल है को उचित रूप से समाप्त नहीं किया जा सकता यद्यपि पीड़ित या पीड़ित के परिवार ने विवाद को सुलझा लिया है। ऐसे अपराध वास्तव में निजी प्रकृति के नहीं है बल्कि समाज पर गंभीर प्रभाव डालते है ऐसे मामलों में मुकदमें को जारी रखने का निर्णय गंभीर अपराधों के लिए व्यक्तियों को दण्डित करने में लोगहित के अविरोही तत्व पर स्थापित किया गया है।

7ण गंभीर अपराधों से अलग, ऐसे अपराधिक मामले हो सकते है जिनमें किसी सिविल विवाद का भारी या प्रमुख तत्व होता है। जहां तक कि रद्द करने की अंर्तनिहित शक्ति के प्रयोग से संबंधित है, वे अलग–अलग पायदान पर खड़े होते है।

8ण आपराधिक मामले जो वाणिज्यिक, वित्तीय, व्यापारिक, साझेदारी या समान संव्यवहार जो अनिवार्य रूप से सिविल प्रकृति के साथ उत्पन्न होते है, वे रद्द करने के लिए उपयुक्त परिस्थितियों में आ सकते है जहां पक्षकारो ने विवाद सुलझा लिया हो।

9ण ऐसे मामले में उच्च न्यायालय आपराधिक कार्यवाही को रद्द कर सकता है यदि विवादियो के बीच समझौते को ध्यान में रखते हुए, दोषसिद्धि की संभावना काफी दुरस्थ है और आपराधिक कार्यवाही की निरंतरता उत्पीड़न और प्रतिकूलता कारित करेगा; और

10ण उपरोक्त प्रस्ताव 8 और 9 में निर्धारित सिद्धांत का एक अपवाद है। आर्थिक अपराधो में राज्य का आर्थिक और वित्तीय हित निहित होता है जो कि निजी विवादियों के बीच मामले की परिधि से परे प्रभाव होता है। उच्च न्यायालय के लिए कार्यवाही को रद्द करने से मना करना उचित होगा जहां अभियुक्त वित्तीय या आर्थिक कपट या कदाचार से संबंधित गतिविधि में लिप्त है। शिकायत किये गए कृत्य के परिणाम को वित्तीय या आर्थिक प्रणाली के संतुलन में तोलना होगा।

9.5 मनीष (उपरोक्त) के मामले में इस न्यायालय ने विशेष रूप से अवलोकन और अभिनिर्धारित किया कि, जब धारा 307, 294 और 34 भा.द.सं. के अर्न्तगत अपराध (जैसा कि अपील / एस.एल.पी. (आप.) क्रमांक 9859/2013) सहित धारा 25 और 27 आयुध अधिनियम (जैसा कि अपील / एस.एल.पी. (आप.) क्रमांक 9860/2013) के शमन का प्रश्न आता है, बिना किसी कल्पना के, क्या इसे निजी पक्षकारों के बीच एक समान्य अपराध माना जा सकता है। यह महसूस किया गया है कि ऐसे अपराधों का समाज पर बड़े पैमाने पर गंभीर प्रभाव पड़ेगा। आगे यह भी महसूस किया गया है कि जहां अभियुक्तगण धारा 307, 294 सहपठित धारा 34 भा.द.सं. के साथ–साथ आयुध अधिनियम की धारा 25 और 27 के अंर्तगत विचारण का सामना कर रहे हो चूंकि अपराध निश्चित रूप से समाज के विरूद्ध है, अभियुक्तों को आवश्यक रूप से विचारण का सामना करना पड़ेगा और अपनी पूरी बेगुनाही साबित करके बाहर आना होगा।

9.6 दीपक (उपरोक्त) के मामले में इस न्यायालय ने विशेष रूप से महसूस किया कि धारा 307 भा.द.सं. के तहत अशमनीय अपराध है और धारा 307 के तहत अपराध पक्षकारों के बीच परस्पर एक निजी विवाद नहीं है किंतु समाज के विरूद्ध एक अपराध है, एक समझौते के आधार पर कार्यवाहीं को रद्द करना अनुज्ञेय नहीं है। इसी प्रकार इस न्यायालय ने वर्तमान में कल्याण सिंह (उपरोक्त) और ध्रुव गुर्जर (उपरोक्त) के मामले के निर्णय में यह राय दी है।

10. अब जहां तक नरिन्दर सिंह (उपरोक्त) के मामले का इस न्यायालय के निर्णय से संबंध है, इस न्यायालय ने पैराग्राफ 29.6 में स्वीकार किया है कि धारा 307 भा.द.सं. के तहत किया गया अपराध जघन्य और गंभीर अपराधों की श्रेणी में आएगा और इसलिये इन्हें समान्यतः समाज के विरूद्ध अपराध की तरह माना जाता है न कि अकेले व्यक्ति के विरूद्ध। यद्यपि, इस न्यायालय ने आगे अवलोकन किया कि उच्च न्यायालय अपने निर्णय को केवल इसलिए बहाल नहीं करेगा क्योकि एफ.आई.आर. में धारा 307 का उल्लेख है या अन्य आरोप लगाया गया है। इसके आगे चिकित्सीय साक्ष्य या अन्य साक्ष्य के साथ सम्पोषण को देखा जाना, जो केवल परीक्षण के दौरान संभव है। नरिन्दर सिंह के मामले का निर्णय इस न्यायालय के वर्तमान निर्णय में अभियुक्तों के लिए कोई सहायक नही होगा।

11. अब जहां तक इस न्यायालय के शिजी (उपरोक्त) के मामले के निर्णय पर भरोसा करते हुए, एफ.आई.आर. को रद्द करते समय यह महसूस करते हुए कि फरियादी ने अभियुक्त के साथ समझौता किया है, वह दोषसिद्धि दर्ज करने की कोई संभावना नहीं है, और/या आगे का विचारण करने की प्रक्रिया निरर्थकता से संबंधित होगी, हमारी राय यह है कि उच्च न्यायालय ने उपरोक्त वर्णित आधार पर एफ.आई.आर. को रद्द करने में स्पष्ट रूप से भूल की है। ऐसा प्रतीत होता है कि उच्च न्यायालय ने इस मामलों के तथ्यों पर कथित निर्णय को गलत तरीके से पढ़ा या गलत तरीके से लागू किया है। उच्च न्यायालय को इस बात की सराहना करना चाहिए की प्रत्येक मामले में जहां फरियादी ने आरोपी के साथ समझौता कर लिया है, वहां कोई दोषी नहीं हो सकता है। ऐसे अवलोकन काल्पनिक है और कई बार राय देना जल्दबाजी है। वर्तमान प्रकरण में यह हो सकता है कि अभियोजन अभी भी ठोस साक्ष्य और अन्य गवाहों का परीक्षण कराकर दोषसिद्ध कर सकता है और सुसंगत साक्ष्य/वस्तु, अधिक विशेष रूप से जब विवाद एक वाणिज्यिक लेनदेन का नहीं है, और/या दीवानी प्रकृति, और/या एक निजी दोष नहीं है। शिजी (उपरोक्त) मामले में इस न्यायालय ने यह पाया कि मामले की उत्पत्ति पक्षकारों के मध्य दीवानी विवाद से हुई थी, जो विवाद उनके द्वारा हल कर लिया गया और इसलिए इस न्यायालय ने कहा कि, ''ऐसा होना, अभियोजन की निरंतरता, जहां फरियादी आरोपो का समर्थन करने के लिए तैयार नहीं है..... एक निरर्थक अभ्यास होगा जो किसी उद्देश्य की पूर्ति नहीं करेगा। उपरोक्त वर्णित मामले में यह भी महसूस किया गया 'कि यद्यपि दोनो कथित चश्मदीद गवाह फरियादी से निकट संबंधित थे हांलाकि वे अभियोजन संस्करण का समर्थन नहीं कर रहे थे' और इस न्यायालय ने महसूस और अभिनिर्धारित किया, 'कार्यवाहियों की निरंतरता एक खाली औपचारिकता के अलावा और कुछ नहीं है और द.प्र.सं. की धारा 482 के अंर्तगत ऐसी परिस्थितियों में उच्च न्यायालय द्वारा उचित रूप से न्याय की प्रक्रिया के दुरूपयोग को रोकने के लिए और जिसके द्वारा अधीनस्थ न्यायालयों की फिजूल प्रक्रिया को रोकने के लिए किया जा सकता है। उक्त निर्णय के पैराग्राफ 18 में निम्नलिखित रूप से यहा तक महसूस किया है :

''18. ऐसा कहने के बाद, हमें यह शीघ्रता से जोड़ना चाहिए कि द.प्र.सं. की धारा 482 के तहत अपने आप में प्रचुर शक्तियां है, यह उच्च न्यायालय के लिए अंत्यत सावधानी और सतर्कता के साथ प्रयोग करने के लिए बाध्यकर बनाती है। शक्ति की विस्तृतता और प्रकृति स्वंय यह मांग करती है कि उच्च न्यायालय को इनका प्रयोग केवल अल्प रूप से और उन मामलों में करना चाहिए जिनके कारणों को लेखबद्ध कर इस स्पष्ट मत पर हो की अभियोजन की निरंतरता कानून की प्रक्रिया का एक दुरूपयोग मात्र के अलावा कुछ नहीं होगा। न तो यह हमारे लिए आवश्यक है और न ही उपयुक्त है कि उन स्थितियों का उल्लेख करें जिनमें धारा 482 के तहत शक्ति का प्रयोग न्यायोचित हो सकता है। कुल मिलाकर हमें यह कहने की आवश्यकता है कि शक्ति का प्रयोग न्याय के उद्देश्यों को सुरक्षित करने के लिए होना चाहिए और केवल

उन मामलों में जहां उस शक्ति का प्रयोग करने के इनकार से विधि की प्रक्रिया का दुरूपयोग होने का परिणाम हो सकता है। उच्च न्यायालय को हस्तक्षेप में इनकार करने को न्यायोचित ठहराया जा सकता है यदि उसे साक्ष्य के मूल्यांकन के लिए कहा जाये तो वह धारा 482 द.प्र.सं. के तहत याचिका से निपटने के दौरान एक अपीलीय न्यायालय की भूमिका ग्रहण नही कर सकता है उपरोक्त के अधीन, उच्च न्यायालय को यह ज्ञात करने के लिए प्रत्येक मामले के तथ्यों और परिस्थितियों पर विचार करना होगा, क्या यह एक उचित मामला है जिसमें अंर्तनिहित शक्तियों को लागू किया जा सकता है।''

11.1 इसलिए उपरोक्त निर्णय ऐसे मामले में लागू हो सकता है जिसका मूल पक्षकारों केबीच सिविल विवाद है; पक्षकारो ने विवाद को सुलझा लिया है; कि अपराध व्यापक रूप से समाज के विरूद्ध नहीं है और/या उसी का सामाजिक प्रभाव नहीं हो सकता है; विवाद एक परिवार/वैवाहिक विवाद आदि है। पूर्वोक्त निर्णय उन मामलों में लागू नहीं हो सकता है जिनमें अभिकथित अपराध बहुत गंभीर और घोर अपराध है, जिनके धारा 307 भा.द.सं. के तहत अपराध जैसे सामाजिक प्रभाव होते है। इसलिए सुसंगत तथ्यों और परिस्थितियों पर उचित विचार किये बिना हमारे विचार में उच्च न्यायालय ने एफ.आई. आर. को यांत्रिक रूप से रद्द करने में तात्विक त्रुटि की है, यह अवलोकन करते हुए कि समझौते को ध्यान में रखते हुए, दोषसिद्धि अभिलिखित करने की कोई संभावना नहीं है और/या आगे का विचारण निरर्थता का एक प्रयोग होगा। उच्च न्यायालय ने शिजी (उपरोक्त) के मामले में, मामले के सुसंगत तथ्यों और परिस्थितियों पर विचार किये बिना इस न्यायालय के पूर्वोक्त निर्णय पर यांत्रिक रूप से विचार किया है।

12. अब जहां तक नरिन्दर सिंह (उपरोक्त) और शम्भू केवट के निर्णयों के बीच पारस्परिक विरोध का सम्बध है, शम्भू केवट (उपरोक्त) के प्रकरण में इस न्यायालय ने उच्च न्यायालय को धारा 482 द.प्र.सं. द्वारा प्रदत्त आपराधिक कार्यवाहियों को रद्द करने की शक्ति और न्यायालय को धारा 320 द.प्र.सं. के अतंर्गत अपराधों का शमन करने की प्रदत्त शक्ति से भिन्न है। उक्त निर्णय में, इस न्यायालय ने आगे अवलोकन किया कि अपराधों के शमन में, न्यायालय की शक्ति धारा 320 द.प्र.सं. के प्रावधानो द्वारा परिचालित होती है और न्यायालय को पूरी तरह से और स्पष्ट रूप से निर्देशित किया जाता है। जबकि, दूसरी और धारा 482 द. प्र.सं. के तहत आपराधिक परिवाद या आपराधिक कार्यवाहियों को रद्द करने के लिए उच्च न्यायालय द्वारा राय दिया जाना, अभिलेख सामाग्री द्वारा निर्देशित किया जाता है कि क्या ऐसी शक्ति के प्रयोग से न्याय के उद्देश्य की पूर्ति होगी, यद्यपि अंतिम परिणाम दोषमुक्ति या अभियोग का खारिज होना हो सकता है। यद्यपि, नरिन्दर सिंह (उपरोक्त) के पश्चातवर्ती निर्णय में, इसी पीठ ने पैरा 29 में अंतिम रूप से जैसा कि नीचे निष्कर्ष निकाला :–

''29. उपरोक्त चर्चा को दृष्टिगत रखते हुए, हम सरांशता और निम्नलिखित सिद्धांतों को प्रतिपादित करते है जिसके द्वारा उच्च न्यायालय को मार्गदर्शित किया जाएगा पक्षकारों के मध्य हुए समझौते को उचित उपचार देने में और धारा 482 द.प्र.सं. के अंतर्गत अपनी शक्ति का प्रयोग करते हुए कार्यवाही को रद्द करते हुए और समझौते को स्वीकार करते हुए या समझौते को मानने से इनकार करते हुए आपराधिक कार्यवाहीयों के जारी रहने का निर्देश देगा।

29.1 द.प्र.सं. की धारा 482 के तहत प्रदत्त शक्ति को उस शक्ति से अलग किया जाना चाहिए जो न्यायालय को संहिता की धारा 320 के अंर्तगत अपराधों के शमन करने के लिए दी जाती है। निसंदेह संहिता की धारा 482 के अंर्तगत उच्च न्यायालय को उन मामलों में भी आपराधिक कार्यवाहियों को रद्द करने की अंर्तनिहित शक्ति है जो शमनीय नहीं है, जहां पक्षकारों ने आपस में मामला सुलझा लिया है। हालांकि, इस शक्ति का प्रयोग संयम से और सावधानी के साथ किया जाना है।

29.2 जब पक्षकार निपटारे पर पहुंच गए हैं और उस आधार पर आपराधिक कार्यवाही को रद्द करने के लिए याचिका दायर की जाती है, तो ऐसे मामलों मे मार्गदर्शक कारक ;पद्ध न्याय के उद्देश्य की पूर्ति के लिए या ;पपद्ध किसी भी न्यायालय की प्रक्रिया का दुरूपयोग रोकने के लिए को सुरक्षित करना होगा।

उच्च न्यायालय को अपनी शक्ति का प्रयोग करते समय पूर्वोक्त दो उद्देश्यों में से किसी एक पर राय बनानी होती है।

29.3 ऐसी शक्ति का उन अभियोगों में प्रयोग नहीं किया जाना है जिनमें जघन्य और मानसिक अवसाद के गंभीर अपराध या अपराध जैसे हत्या, बलात्कार, डकैती इत्यादि शामिल है। ऐसे अपराध निजी प्रकृति के नहीं है और समाज पर गंभीर प्रभाव डालते है। इसी प्रकार विशेष कानून के तहत कारित किये गए अभिकथित अपराध जैसे कि भ्रष्टाचार निवारण अधिनियम या उस क्षमता में काम करते समय लोक सेवकों द्वारा किए गए अपराध मात्र इस आधार पर रद्द नहीं किये जाने है कि पीड़ित और अपराधी के बीच कोई समझौता हो गया है।

29.4 दूसरी तरफ, उन आपराधिक मामलों में जो बड़े पैमाने पर और पूर्वव्यापी दीवानी प्रकृति के होते है, विशेष रूप से वे जो वाणिज्यिक संव्यवहार से उत्पन्न होते है या वैवाहिक संबंध से उत्पन्न होते है, या पारिवारिक विवादों को समाप्त किया जाना चाहिए, जब पक्षकारों ने अपने विवाद को आपस में खुद से हल कर लिया हो।

29.5 अपनी शक्तियों का प्रयोग करते समय उच्च न्यायालय को इस बात की जांच करनी है कि क्या दोषसिद्धि की संभावना दूरस्थ और धूमिल है और आपराधिक मामलों की निरंतरता अभियुक्तों को बहुत उत्पीड़न और पक्षपात में डालेगी और आपराधिक मामलों को समाप्त नहीं करने से उसके साथ अत्यधिक अन्याय होगा।

29.6 भा.द.सं. की धारा 307 के तहत अपराध जघन्य और गंभीर अपराधों की श्रेणी में आयेगें और इसलिए इन्हें आमतौर पर समाज के विरूद्ध अपराध माना जाता है और न कि केवल अकेले व्यक्ति के विरूद्ध। हांलाकि उच्च न्यायालय अपने निर्णय को केवल इसलिए बहाल नही करेगा क्योंकि एफ.आई.आर. में धारा 307 भा.द.सं. का उल्लेख है या इस प्रावधान के तहत आरोप तय किया गया है। उच्च न्यायालय को यह परीक्षण करने के लिए खुला रहेगा कि क्या धारा 307 भा. द.सं. को मात्र इसमें शामिल करने के लिए या अभियोजन पक्ष ने पर्याप्त साक्ष्य एकत्र किये है, जो यदि साबित हुआ, को धारा 307 भा.द.सं. के तहत आरोप साबित करने के लिए प्रेरित करेगा। इस प्रयोजन के लिए उच्च न्यायालय को यह खुला रहेगा, चोट लगने की प्रकृति के साथ जाए क्या इस तरह की चोट शरीर के महत्वपूर्ण/प्रतिनिधि भागों पर कारित की गई है, हथियारों की प्रकृति जो इस्तेमाल किये गये है, पीड़ित को कारित चोटों के संबंध में चिकित्सीय रिपोर्ट सामान्यतः मार्गदर्शक कारक हो सकते है। इस प्रथम दृष्टया विश्लेषण के आधार पर, उच्च न्यायालय इस बात की जांच कर सकता है कि क्या दोषी ठहराए जाने की प्रबल संभावना है या दोषी ठहराए जाने की संभावनाए दुरस्थ और धूमिल है। पूर्व मामले में यह निपटारे को स्वीकार करने से इनकार कर सकता है और आपराधिक कार्यवाहियों को रद्द कर सकता है जबकि बाद के मामले में उच्च न्यायालय के लिए पक्षकारों के बीच पूर्ण निपटारा अभिवाक् समझौते पर आधारित अपराध को स्वीकार करने के लिए यह स्वीकार्य होगा। इस स्तर पर, न्यायालय को इस तथ्य से भी प्रभावित किया जा सकता है कि पक्षकारों के बीच समझौता करने से उनके बीच सदभाव हो सकता है जिससे उनके भविष्य के रिश्ते में सुधान हो सकता है।

29.7 संहिता की धारा 482 के तहत अपनी शक्ति का प्रयोग करना है या नही, यह तय करते समय निपटारे की समय–सीमा एक महत्वपूर्ण भूमिका निभाती है। जिन मामलों का निपटारा कथित अपराध के तुरन्त बाद हो जाता है और मामला अन्वेषणाधीन है, उच्च न्यायालय आपराधिक कार्यवाही/जांच को रद्द करने के लिए समझौता स्वीकार करने में उदार हो सकता है। यह इस कारण से है कि इस स्तर पर जांच अभी भी जारी है और यहां तक की चार्जशीट भी पेश नहीं की गई है। इसी तरह, उन मामलों में जहां आरोप लगाया गया है लेकिन साक्ष्य को शुरू करना अभी बाकी है या साक्ष्य अभी भी प्रारंभिक अवस्था में है, उच्च न्यायालय अपनी शक्तियों को अनुकूल तरीके से उपयोग करने में उदारता दिखा सकता है, लेकिन ऊपर उल्लेखित परिस्थितियों/सामग्री का प्रथम दृष्टया मूल्यांकन करने के बाद। दूसरी ओर, जहां अभियोजन साक्ष्य लगभग पूर्ण है या प्रकरण साक्ष्य के निष्कर्ष के बाद तर्क की अवस्था पर है, आमतौर पर उच्च न्यायालय को संहिता की धारा 482 के तहत अपनी शक्तियों का प्रयोग करने से बचना चाहिए, जैसा कि ऐसे मामलों में विचारण न्यायालय मामले को गुणागूण पर निर्णित करने की स्थित में होगा और इस निष्कर्ष पर पहुंचने के लिए कि क्या धारा 307 के तहत अपराध किया गया है या नहीं। इसी तरह, उन मामलों मे जहां दोषसिद्धि विचारण न्यायालय द्वारा पहले से ही दर्ज की जाती है और मामला उच्च न्यायालय के समक्ष अपील की अवस्था पर है, केवल पक्षकारों के बीच समझौता एक

ही आधार को स्वीकार करने का आधार नहीं होगा जिसके परिणाम स्वरूप अपराधी को दोषमुक्त किया जायेगा जो कि विचारण न्यायालय द्वारा पहले से ही दोषसिद्ध किया गया है। यहां धारा 307 भा.द.सं. के तहत आरोप साबित हो जाता है और दोषसिद्धि पहले से ही जघन्य अपराध के रूप में दर्ज की जाती है ओर इसलिए, इस तरह के अपराध के लिए दोषी पाए गए अपराधी को बख्शने का कोई सवाल ही नहीं है।

13. विधि के बिंदु पर और इस न्यायालय के अन्य निर्णयों के बिंदुओं पर विचार करते हुए, उपरोक्त वर्णित से संबंधित, नीचे यह अवलोकन और अभिनिर्धारित किया गया है :

;पद्ध कि संहिता की धारा 320 के अंर्तगत अशमनीय अपराधों के लिए संहिता की धारा 482 के अंर्तगत आपराधिक कार्यवाहियों को रद्द करने की प्रदत्त शक्ति का प्रयोग दीवानी स्वरूप के मामलों में जोरदार तरीके से और प्रबलता से किया जा सकता है, विशेषकर उनमें जो वित्तीय संव्यवहार से उत्पन्न हो या वैवाहिक संबंधों से उत्पन्न हो या पारिवारिक विवादों से उत्पन्न हो और जब पक्षकारों ने सम्पूर्ण विवाद आपस में सुलझा लिया है;

;पपद्ध ऐसी शक्ति का प्रयोग उन अभियोगो मे नही किया जाता है जिनमें जघन्य और मानसिक भ्रष्टता के गंभीर अपराध शामिल है या अपराध जैसे हत्या, बलात्कार, डकैती आदि। ऐसे अपराध निजी प्रकृति के नहीं है और समाज पर गंभीर प्रभाव डालते है;

;पपपद्ध इसी तरह से, ऐसी शक्ति का प्रयोग भ्रष्टाचार निवारण अधिनियम जैसे विशेष कानून के अंर्तगत अपराधों में नही किया जाना चाहिए या लोक सेवक द्वारा अपने पदीय हैसियत में कोई अपराध किये जाने पर केवल इस आधार पर कि पीड़ित और अपराधी ने समझौता कर लिया है, रद्द नहीं किया जाना चाहिए;

;पअद्ध धारा 370 भा.द.सं. और आयुध अधिनियम आदि के अंर्तगत अपराध जघन्य और गंभीर अपराधों की श्रेणी में आएंगे और इसलिए इन्हें समाज के विरूद्ध अपराधों की तरह माना जाता है और न केवल किसी अकेले व्यक्ति के विरूद्ध, और इसलिए, धारा 307 भा.द.सं. के अंर्तगत आपराधिक कार्यवाहियों और/या आयुध अधिनियम आदि जो समाज पर गंभीर प्रभाव डालते है, को संहिता की धारा 482 के तहत शक्ति के प्रयोग में रद्द नहीं किया जा सकता है, इस आधार पर कि पक्षकारों ने अपने सम्पूर्ण विवाद को पारस्परिक सुलझा लिया है। यद्यपि, उच्च न्यायालय अपने निर्णय को मात्र इस कारण से बहाल नही करेगा कि एफ.आई.आर. में धारा 307 भा.द.सं. का उल्लेख है या इस प्रावधान के अंर्तगत आरोप विरचित किया जाता है। उच्च न्यायालय के लिए यह परीक्षण करना खुला होगा कि कहने मात्र के लिए धारा 307 भा.द.सं. को शामिल करे या अभियोजन ने पर्याप्त साक्ष्य एकत्रित कर लिया है, जो यदि साबित होता है, तो धारा 307 भा.द.सं. के अंर्तगत आरोप विरचित करने को अग्रसर होगे। इस प्रयोजन के लिए उच्च न्यायालय के लिए कारित चोट की प्रकृति पर जाना खुला होगा, क्या ऐसी चोट शरीर के नाजुक/मुख्य भाग पर पहुंचाई गई है। हथियारों की प्रकृति से जो उपयोग किये गये है आदि। हांलाकि उच्च न्यायालय द्वारा ऐसा प्रयोग करना केवल तब अनुज्ञेय होगा जब अन्वेषण के उपरांत साक्ष्य एकत्रित कर लिए जाते है और आरोप पत्र दायर कर दिया जाता है/आरोप विरचित कर दिया जाता है और/या विचारण के दौरान। ऐसा प्रयोग अनुज्ञेय नहीं है जब मामला अन्वेषण के अधीन है। इसलिए, इस न्यायालय के नरिन्दर सिंह (उपरोक्त) के मामले के पैरा 29.6 और 29.7 के अंतिम निष्कर्ष को सांमजस्यपूर्ण पढ़ा जाना चाहिए और सम्पूर्ण की तरह पढ़ा जाए और ऐसी परिस्थितियों में जो ऊपर वर्णित है;

;अद्ध अशमनीय अपराधों के संबंध में आपराधिक कार्यवाहियों को समाप्त करने की संहिता की धारा 482 के तहत शक्ति का प्रयोग करते समय, जो निजी प्रकृति की है और जिसका समाज पर गंभीर प्रभाव नहीं पड़ता है, इस आधार पर कि पीड़ित और अपराधी के बीच निपटारा/समझौता हो गया है, उच्च न्यायालय को अभियुक्त के पूर्वपद पर विचार करना आवश्यक है; अभियुक्त का आचरण, अर्थात, क्या अभियुक्त फरार था और वह फरार क्यो था, उसने फरियादी को समझौता आदि करने के लिए कैसे तैयारकिया था।"

(त्रोतhttps:/sci.gov.in/supremecourt_vernacular 2014/22779/22779201421506129 87judgement 05-Mar2019HINpdf½ "

12. उपरोक्त उल्लेखित निर्णय को ध्यानपूर्वक पढ़ने से यह स्पष्ट है कि दंड प्रक्रिया संहिता की धारा 482 के अंतर्गत समझौते के

आधार पर किसी अशमनीय अपराध या अपराधो का शमन, एवं समस्त दाण्डिक कार्यवाही को निरस्त करने से पूर्व निम्न बिन्दुओ पर विशेष ध्यान रखकर ही निर्णय लेना सुनिश्चित करना चाहिये।

(क) ऐसे प्रकरणो मे उच्च न्यायालय को दंड प्रक्रिया संहिता की धारा 482 के द्वारा प्रदत्त अंतनिहित शक्ति का प्रयोग संयम से और सावधानी पूर्वक करना चाहिये तथा इस शक्ति का प्रयोग यांत्रिक रूप में नहीं किया जाना चाहिये।

(ख) ऐसे प्रकरणो मे उच्च न्यायालय को वाद मे तथ्यो व परिस्थितियो को ध्यान मे रखते हुए अंतनिहित शक्ति के निम्न उद्देश्यो मे से किसी एक पर राय बनानी चाहिये। ;पद्ध न्याय के उद्देश्य की पूर्ति के लिए व ;पपद्ध किसी भी न्यायालय की प्रक्रिया का दुरूपयोग रोकने के लिए एवं उसके उपरान्त ही उक्त शक्ति का प्रयोग करना चाहिये।

(ग) ऐसे अपराध जो गंभीर हो, निजी प्रकृति के नही हो और समाज पर गंभीर प्रभाव डालते हो, या विशेष कानून में अभिकथित अपराध हो तो, ऐसे अपराधों की दाण्डिक प्रक्रिया सामान्यतः आपसी समझौते के आधार पर निरस्त नही किया जाना चाहिये।

(घ) यह भी विचारणीय रहेगा कि अभियुक्त का पूर्वपद व आचरण क्या रहा व उसने फरियादी व पीड़िता को समझौता करने के लिए कैसे तैयार किया। समझौते की समय सीमा भी एक महत्वपूर्ण कारक रहेगा।

(ङ) इस बात की जॉच भी कर लेनी चाहिए कि क्या दोष सिद्धि की संभावना दूरस्थ और धूमिल है।

13. प्रस्तुत वाद मे ऊपर वर्णित विषयो के अतिरिक्त एक और विषय है जो बहुत विचारणीय है कि पीड़िता नाबालिग है व समझौता उसके पिता ने किया है। तो क्या भविष्य में इस समझौते का पीड़िता पर कोई प्रतिकूल प्रभाव तो नही होगा।

14. वर्तमान मामले मे अभियुक्त पर निम्न अपराधो में मुकदमा दायर किया है।

धारा 354, भारतीय दंड संहिता :– यदि कोई व्यक्ति किसी महिला की मर्यादा को भंग करने के लिए उस पर हमला या जोर जबरदस्ती करता है तो उस पर आईपीसी की धारा 354 लगाई जाती है जिसके तहत आरोपी पर दोष सिद्ध हो जाने पर दो साल तक की कैद या जुर्माना या फिर दोनो की सजा हो सकती है।

धारा 7, अधिनियम 2012 :– जो कोई, लैंगिक आशय से बालक की योनि, लिंग, गुदा या स्तनों को स्पर्श करता है या बालक से ऐसे व्यक्ति या किसी अन्य व्यक्ति की योनि, लिंग, गुदा या स्तन का स्पर्श कराता है या लैंगिक आशय से ऐसा कोई अन्य कार्य करता है जिसमें प्रवेशन किए बिना शारीरिक संपर्क अंतर्ग्रस्त होता है, लैंगिक हमला करता है, यह कहा जाता है।

धारा 8, अधिनियम 2012 :– जो कोई, लैंगिक हमला करेगा वह दोनों मे से किसी भांति के कारावास से जिसकी अवधि तीन वर्ष से कम की नहीं होगी किन्तु जो पांच वर्ष तक की हो सकेगी, दंडित किया जाएगा और जुर्माने से भी दंडनीय होगा।

दं. प्र. सं. 1973 की धारा 320 की तालिका के अनुसार धारा 354 भा.द.सं. में वर्णित अपराध एक शमनीय अपराध है। परन्तु लैंगिग अपराधो से बालको का संरक्षण अधिनियम 2012 मे विचिरित अपराध अशमनीय है।

15. वर्तमान आवेदन के निस्तारण के लिए लैंगिग अपराधो से बालको का संरक्षण अधिनियम 2012 का उद्देश्य भी उल्लेखनीय है। जो निम्न है :–

''लैगिंक हमला, लैंगिक उत्पीड़न और अश्लील साहित्य के अपराधों से बालकों का संरक्षण करने और ऐसे अपराधों का विचारण करने के लिए विशेष न्यायालयों की स्थापना तथा उनसे संबंधित या आनुषंगिक विषयों के लिए उपबंध करने के लिए अधिनियम।''

16. भारत में सामान्तया बालकों पर होने वाले लैंगिक अपराधो की घटनाओ को छुपाया जाता है, विशेष रूप से ग्रामीण क्षेत्र में घटने वाली घटनाये को। ऐसा देखा गया है कि पिडिता के परिवार की समाज में बेज्जती न हो, इस कारण से ऐसी घटनाओं पर परदा डाल दिया जाता है

या छुपाया जाता है, जिसका सीधे तरह से मनोविज्ञानी असर पीड़ित या पिड़िता पर आता है। ऐसा होना दुभाग्यपूर्ण है।

17. वर्तमान प्रकरण में, उपरोक्त निर्धारित वैधानिक माप दण्डो को लागू करने पर निम्न निष्कर्ष आता है।

(i) लैंगिग अपराधो से बालको का संरक्षण अधिनियम 2012 की धारा 7 एवं 8 में वर्णित अपराध निजी प्रकृति के नही है, बल्कि ये अपराध समाज के विरूद्ध है। ऐसे अपराध इस नाते संगीन अपराध की श्रेणी में आते है।

(ii) वर्तमान परिस्थितियों में यह नही कहा जा सकता कि परीक्षण (ट्रायल) ने अन्त में अपराधी की दोष सिद्धि की संभावना धूमिल है।

(iii) लैगिंग अपराध से बालको का सरंक्षण अधिनियम 2012 एक विशेष अधिनियम है जिसका उद्देश्य भी विशिष्ठ है कि *''संविधान के अनुच्छेद 15 का खंड (3), अन्य बातों के साथ राज्य को बालकों के लिए विशेष उपबंध करने के लिए सशक्त करता है;*

संयुक्त राष्ट्र की महासभा द्वारा अंगीकृत बालकों के अधिकारों से संबंधित अभिसमय को, जो बालक के सर्वोत्तम हितों को सुरक्षित करने के लिए सभी राज्य पक्षकारों द्वारा पालन किए जाने वाले मानकों को विहित करता है, भारत सरकार ने तारीख 11 दिसम्बर, 1992 को अंगीकृत किया है;

बालक के उचित विकास के लिए यह आवश्यक है कि प्रत्येक व्यक्ति द्वारा उसकी निजता और गोपनीयता के अधिकार का सभी प्रकार से तथा बालकों को अंतर्वलित करने वाली न्यायिक प्रक्रिया के सभी प्रक्रमों के माध्यम से संरक्षित और सम्मानित किया जाए;

यह अनिवार्य है कि विधि ऐसी रीति से प्रवर्तित हो कि बालक के अच्छे शारीरिक, भावात्मक, बौद्धिक और सामाजिक विकास को सुनिश्चित करने के लिए प्रत्येक प्रक्रम पर बालक के सर्वोत्तम हित और कल्याण पर सर्वोपरि महत्व के रूप में ध्यान दिया जाए;

बालक के अधिकारों से संबंधित अभिसमय के राज्य पक्षकारों से निम्नलिखित का निवारण करने के लिए सभी समुचित राष्ट्रीय, द्विपक्षीय या बहुपक्षीय उपाय करना अपेक्षित है–

(क) किसी विधिविरूद्ध लैंगिक क्रियाकलाप में लगाने के लिए किसी बालक को उत्प्रेरित या प्रपीड़न करना;

(ख) वेश्यावृत्ति या अन्य विधिविरूद्ध लैंगिक व्यवसायों में बालकों का शोषणात्मक उपयोग करना;

(ग) अश्लील गतिविधियों और सामग्रियों में बालकों का शोषणात्मक उपयोग करना;

बालकों के लैंगिक शोषिण और लैंगिक दुरूपयोग जघन्य अपराध हैं, और उन पर प्रभावी रूप से कार्रवाई करने की आवश्यकता है।''

पारस्परिक समझौते के आधार पर दांडिक कार्यवाही को रद्द करना, इस प्रक्रिया को आकस्मिक मृत्यु देना जैसा होगा व उपरोक्त उद्देश्य की भावना से विपरीत भी होगा। ऐसा करना किसी भी प्रकार से न्याय के उद्देश्यो की प्रप्ति को सुनिश्चित करना नही हो सकता है।

(iv) वर्तमान मुकदमे के संदर्भ में अभिभावक द्वारा पीड़िता की ओर से समझौता करना भी एक नकारात्मक पहलू है।

18. वर्तमान वाद के तथ्यो, कानूनी पहलू, विधिक निर्णयो, संलग्न प्रपत्रो व विद्वान अधिवक्ताओ के कथनो व उपरोक्त चर्चा का गहन अध्ययन के बाद मै इस निष्कर्ष पर पहुॅचा हूॅ कि वर्तमान तथ्यो व परीस्थितियो में पारस्परिक समझौते के आधार पर अभियुक्त के विरूद्ध संस्थित दाण्डिक कार्यवाही को रद्द करना न्यायोचित नही है। अतः वर्तमान वाद में दाण्डिक प्रक्रिया संहिता की धारा 482 के अंतर्गत प्राप्त अंतनिहित शक्ति का प्रयोग करना न्याय के हित में व न्यायसंगत नही है।

19. अतः वर्तमान आवेदन निरस्त करने योग्य है, तदनुसार ***निरस्त*** किया जाता है।

(2019)12 ILR A200

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.11.2019
BEFORE

THE HON'BLE RAM KRISHNA GAUTAM, J.

Crl. Misc. Application (U/S 482 Cr. P.C.) No. 36839 of 2019

Raghvendra & Ors. ...Applicants
Versus
State of U.P.& Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Nanhe Lal Tripathi

Counsel for the Opposite Parties:
A.G.A.

A. Criminal Law - Code of Criminal Procedure, 1973 – Section 482 – Summoning Order - Impugned summoning order passed by the Presiding Judge on the basis of evidences collected on an enquiry being made by him, factual analysis of which cannot be made by this Court at thisstage by exercise of power, under Section 482 of Cr.P.C. in view of law propounded by the Apex Court. (Para 4)

Application u/s 482 Cr.P.C rejected. (E-3)

List of cases cited: -

1. St. of A.P Vs. Gaurishetty Mahesh, JT 2010 (6) SC 588: (2010) 6 SCALE 767: 2010 Cr. LJ 3844

2. Hamida v. Rashid, (2008) 1 SCC 474

3. Monica Kumar Vs. St. of U.P, (2008) 8 SCC 781

4. Popular Muthiah Vs. St., Rep. by Insp. of Police, (2006) 7 SCC 296

5. Dhanlakshmi Vs. R.Prasana Kumar, (1990) Cr LJ 320 (DB): AIR 1990 SC 494

6. St. of Bih. Vs. Murad Ali Khan, (1989) Cr LJ 1005: AIR 1989 SC 1

7. Amrawati & anr. Vs. St. of U.P., 2004 (57) ALR 290

8. Lal Kamlendra Pratap Singh Vs. St. of U.P. 2009 (3) ADJ 322 (SC)

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. Heard learned counsel for the applicants over this Application, moved under Section 482 of Code of Criminal Procedure, 1973, by the applicants, against State of U.P. and another, with a prayer for quashing of summoning order, dated 7th September, 2019, passed by the Additional District & Sessions Judge/Special Judge (Dacoity Affected Area), Lalitpur, in Complaint Case No. 48 of 2019, under Sections 395 and 397 of Indian Penal Code, Police Station-Kotwali Lalitpur, District-Lalitpur, and to stay further proceedings, in above case.

2. Learned counsel for the applicant s argued that the above complaint case was a counter-blast, which was got registered in response to a complaint case, got filed by the applicants, on 28.3.2019, for an occurrence of 8.3.2019, wherein, present complainant side has been named, and as such, above case with these accusations was got lodged, implicating entire family members of the applicants and they have been summoned by the Presiding Judge, whereas, there is inconsistency in the statements of complainant and his witnesses, recorded, under Sections 200 and 202 of Cr.P.C.

3. Learned AGA, representing State of U.P., has vehemently opposed this Application.

4. From very perusal of the impugned summoning order, it is apparent that the occurrence was said to be of 8.3.2019, wherein, accused persons, applicants (herein), alongwith others, were said to have come at the home of complainant, by Tractor and Trolley,

wherein complainant's mother, Rasrani, was present. They tookaway 50 quintal of grains, worth about Rs.2,00000/-, and on being protested, they used force with abuse. Complainant rushed to his home and he too was assaulted. This was witnessed by Lokendra, Sonu Tanay, and nand Kishore, Information of this incident was sent to the Police Station, Kotwali, Lalitpur, but to no avail, then, it was submitted before the Superintendent of Police, Lalitpur, and after that this complaint was lodged for offences, punishable under Sections 395 and 397 of IPC, upon which, learned Additional District & Sessions Judge/Special Judge (D.A.A.), Laliput, took cognizance and got complaint examined, under Sections 200 and 202 of Cr.P.C. Complainant, Hariom, in his statement, has reiterated contention of complaint. Further enquiry was made by the Presiding Judge, wherein, witness Lokendra and Sonu etc. were examined, who two supported version of the complainant and on the basis of statements of the complainant and other witnesses, impugned summoning order, dated 7th September, 2019 was passed in which applicants were summoned for offences, punishable, under Section 395 and 397 of Cr.P.C. The impugned summoning order was came to be passed by the Presiding Judge on the basis of evidences collected on an enquiry being made by him, factual analysis of which cannot be made by this Court at this stage by exercise of power, under Section 482 of Cr.P.C. in view of law propounded by the Apex Court, in **State of Andhra Pradesh v. Gaurishetty Mahesh, JT 2010 (6) SC 588: (2010) 6 SCALE 767: 2010 Cr. LJ 3844,** *has propounded that "While exercising jurisdiction under section 482 of the Code, the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable apprehension of it accusation would not be sustained. That is the function of the trial Judge/Court".* In another subsequent **Hamida v. Rashid, (2008) 1 SCC 474,** hon'ble Apex Court propounded that *"Ends of justice would be better served if valuable time of the Court is spent in hearing those appeals rather than entertaining petitions under Section 482 at an interlocutory stage which after filed with some oblique motive in order to circumvent the prescribed procedure, or to delay the trial which enable to win over the witness or may disinterested in giving evidence, ultimately resulting in miscarriage of Justice".* In again another subsequent **Monica Kumar v. State of Uttar Pradesh, (2008) 8 SCC 781,** the Apex Court has propounded "Inherent jurisdiction under Section 482 has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself." While interpreting this jurisdiction of High Court Apex Court in **Popular Muthiah v. State, Represented by Inspector of Police, (2006) 7 SCC 296** has propounded *"High Court can exercise jurisdiction suo motu in the interest of justice. It can do so while exercising other jurisdictions such as appellate or revisional jurisdiction. No formal application for invoking inherent jurisdiction is necessary. Inherent jurisdiction can be exercised in respect of substantive as well as procedural matters. It can as well be exercised in respect of incidental or supplemental power irrespective of nature of proceedings".*

5. Regarding prevention of abuse of process of Court, Apex Court in **Dhanlakshmi v. R.Prasana Kumar,**

(1990) Cr LJ 320 (DB): AIR 1990 SC 494 has propounded *"To prevent abuse of the process of the Court, High Court in exercise of its inherent powers under section 482 could quash the proceedings but there would be justification for interference only when the complaint did not disclose any offence or was frivolous vexatious or oppressive"* as well as in **State of Bihar v. Murad Ali Khan, (1989) Cr LJ 1005: AIR 1989 SC 1,** Apex Court propounded *"In exercising jurisdiction under Section 482 High Court would not embark upon an enquiry whether the allegations in the complain are likely to be established by evidence or not"*.

6. Meaning thereby, exercise of inherent jurisdiction under Section 482 Cr.P.C. is within the limits, propounded as above.

7. In view of what has been discussed above, there is no ground of any indulgence to be granted by this Court. Accordingly, this Application, under Section 482 of Cr.P.C. deserves dismissal, being devoid of merits, and it stands dismissed accordingly.

8. However, it is directed that if the applicants appear and surrender before the court below within 30 days from today and apply for bail, prayer for bail shall be considered and decided in view of the settled law laid by this Court in the case of **Amrawati and another Vs. State of U.P. reported in 2004 (57) ALR 290** as well as judgement passed by Hon'ble Apex Court reported in **2009 (3) ADJ 322 (SC) Lal Kamlendra Pratap Singh Vs. State of U.P.**

9. For a period of 30 days from today, no coercive action shall be taken against the applicants. However, in case, the applicants do not appear before the Court below, within the aforesaid period, coercive action shall be taken against them.

(2019)12 ILR A203

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.10.2019

BEFORE
THE HON'BLE RAM KRISHNA GAUTAM, J.

Crl. Misc. Application (U/S 482 Cr. P.C.) No. 37354 of 2019

Devendra Singh & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Dharmendra Kumar Singh

Counsel for the Opposite Parties:
A.G.A.

A. Criminal Law - Code of Criminal Procedure, 1973 – Section 482 - Complaint Case - Sections 200 and 202. Perusal of statements recorded under show that they support the summoning order. High Court in exercise of its inherent jurisdiction, vested under Section 482 of Cr. P.C., would not interfere, unless there is abuse of process of law.

Criminal Application u/s 482 Cr.Pc rejected. (E-2)

List of cases cited: -

1. St. of A.P Vs. Gaurishetty Mahesh, JT 2010 (6) SC 588: (2010) 6 SCALE 767: 2010 Cr. LJ 3844

2. Hamida Vs. Rashid, (2008) 1 SCC 474

3. Monica Kumar Vs. St. of U.P, (2008) 8 SCC 781

4. Popular Muthiah Vs. St., Rep. by Insp. of Police, (2006) 7 SCC 296

5. Dhanlakshmi Vs. R.Prasana Kumar, (1990) Cr LJ 320 (DB): AIR 1990 SC 494

6. St. of Bih. v. Murad Ali Khan, (1989) Cr LJ 1005: AIR 1989 SC 1

(Delivered by Hon'ble Rm Krishna Gautam, J.)

1. This proceeding, under Section 482 of the Code of Criminal Procedure, 1973 (In Short 'Cr.P.C.), has been filed by the applicants, Devendra Singh and three others, against State of U.P. and Lalta Prasad, Opposite party no.2, with a prayer for setting aside, entire criminal proceeding of Complaint Case No. 511 of 2018 (Lalta Prasad vs. Devendra Singh and others), under Sections 406, 323, 504 and 506 of Indian Penal Code, Police Station Mau Darwaja, District Farrukhabad, pending before the court of Civil Judge (Junior Division)/Judicial Magistrate, City Farrukhabad.

2. Learned counsel for the applicants argued that the applicants have been falsely implicated and have been summoned for above offences, in above complaint case, under above Sections of IPC, whereas, complainant, Lalta Prasad, was having no Bank Account nor any means for crediting Rs.50,000/- in the Account of Devendra Singh nor any question arises of usurping above amount by the applicants nor any such offence ever took place. It was a concocted complaint wherein summoning order has been passed. Hence, this proceeding, with above prayer.

3. Learned AGA, representing State of U.P., has vehemently opposed this proceeding.

4. From very perusal of of the summoning order, it is apparent that a complaint was filed by Opposite party no.2, Lalta Prasad, against applicants with a contention that complainant's son has deposited Rs.50,000/-, in the Account of Devendra Singh and it was usurped by Devendra Singh. On 3.12.2018, at 9.30 AM, while complainant was present infront of his house, Devendra Singh, Son of Mangli Prasad, Amit, Son of Devendra Singh, Sabal Singh, Son of Devendra Singh, Malti, wife of Devendra Singh, all Residents of Beni Nagla, Police Station-Mau Darwaja, District Farrukhabad, in joint mensrea, came there and started abusing in filthy language and extended threat in case of demanding back of above money. When complainant tried to save himself, by hiding inside the house, all of them trespassed and assaulted him and his son, who came to rescue him, by Lathi and Danda, also misbehaved with his daughter-in-law, and upon rescue call being made by the complainant, Narvir, Son of Sohan Lal, Upendra, Son of Lalta Prasad and other villagers gathered there. After seeing gathering of villagers, accused persons ran away from the spot by extending threat of dire consequences, in case of opening of lips to the Police. An Application was moved before the Superintended of Police, but of no avail. Hence, instant complaint was filed, wherein, complainant was examined, under Section 200 of the Cr.P.C., and the same reiteration was made in the statement, as was narrated in the complaint, under Section 200 of Cr.P.C. Two of witnesses, namely, PW-1, Rani and PW-2, Maharam were examined,

under Section 202 of Cr.P.C. They too have said the same version as was there in the statement of complainant and on the basis of it, there was prima facie evidence for summoning for cognizable offence, punishable, under Sections 406, 323, 504 and 506 of IPC. Hence, accused persons, Devendra Singh, Amit, Sabal Singh and Malti were summoned for offences, punishable, under Sections 406, 323, 504 and 506 of IPC.

5. Perusal of statement, recorded under Sections 200 and 202 of Cr.P.C. shows that it supports finding of the summoning order and this Court, in exercise of inherent power, vested, under Section 482 of Cr. P.C., is not supposed to interfere, unless there is abuse of process of law or evidence on record was otherwise.

6. Saving of inherent power of High Court, as given under Section 482 Cr.P.C, provides that nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice. Meaning thereby this inherent power is with High Court (I) to make such order as may be necessary to give effect to any other order under this Code (II) to prevent abuse of the process of any Court (III) or otherwise to secure the ends of justice. But Apex Court in **State of Andhra Pradesh v. Gaurishetty Mahesh, JT 2010 (6) SC 588: (2010) 6 SCALE 767: 2010 Cr. LJ 3844** has propounded that *"While exercising jurisdiction under section 482 of the Code, the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable apprehension of it accusation would not be sustained. That is the function of the trial Judge/Court".* In another subsequent **Hamida v. Rashid, (2008) 1 SCC 474,** hon'ble Apex Court propounded that *"Ends of justice would be better served if valuable time of the Court is spent in hearing those appeals rather than entertaining petitions under Section 482 at an interlocutory stage which after filed with some oblique motive in order to circumvent the prescribed procedure, or to delay the trial which enable to win over the witness or may disinterested in giving evidence, ultimately resulting in miscarriage of Justice".* In again another subsequent **Monica Kumar v. State of Uttar Pradesh, (2008) 8 SCC 781,** the Apex Court has propounded "Inherent jurisdiction under Section 482 has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself." While interpreting this jurisdiction of High Court Apex Court in **Popular Muthiah v. State, Represented by Inspector of Police, (2006) 7 SCC 296** has propounded *"High Court can exercise jurisdiction suo motu in the interest of justice. It can do so while exercising other jurisdictions such as appellate or revisional jurisdiction. No formal application for invoking inherent jurisdiction is necessary. Inherent jurisdiction can be exercised in respect of substantive as well as procedural matters. It can as well be exercised in respect of incidental or supplemental power irrespective of nature of proceedings".*

7. Regarding prevention of abuse of process of Court, Apex Court in **Dhanlakshmi v. R.Prasana Kumar,**

(1990) Cr LJ 320 (DB): AIR 1990 SC 494 has propounded *"To prevent abuse of the process of the Court, High Court in exercise of its inherent powers under section 482 could quash the proceedings but there would be justification for interference only when the complaint did not disclose any offence or was frivolous vexatious or oppressive"* as well as in **State of Bihar v. Murad Ali Khan, (1989) Cr LJ 1005: AIR 1989 SC 1,** Apex Court propounded *"In exercising jurisdiction under Section 482 High Court would not embark upon an enquiry whether the allegations in the complaint are likely to be established by evidence or not"*.

8. Meaning thereby, exercise of inherent jurisdiction under Section 482 Cr.P.C. is within the limits, propounded as above.

9. In view of what has been discussed above, this Application, filed under Section 482 of Cr.P.C., being devoid of merits, stands dismissed.

(2019)12 ILR A206

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.10.2019

BEFORE
THE HON'BLE RAM KRISHNA GAUTAM, J.

Crl. Misc. Application (U/S 482 Cr. P.C.) No. 37442 of 2019

Vinod & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Amrit Shanker Dubey

Counsel for the Opposite Parties:
A.G.A.

A. Criminal Law - Code of Criminal Procedure, 1973 – Summoning order - Complaint Case - it is apparent that the accused persons have been summoned for offences, punishable, under Sections 354, 323 and 504 of IPC for which there is no precedent of having medico legal report because the ingredient of physical assault with complainant was there, and a complaint can be made without there being any medico legal report-The applicants cannot seek indulgence of this Court, for exercise of inherent power, under Section 482 of Cr.P.C. - It is not expected from this Court to meticulously analyze evidences at this juncture, rather it is a question to be decided at the time of trial by the Trial court.

Application u/s 482 Cr.P.C rejected. (E-3)

List of cases cited: -

1. St. of A.P Vs. Gaurishetty Mahesh, JT 2010 (6) SC 588: (2010) 6 SCALE 767: 2010 Cr. LJ 3844

2. Hamida Vs. Rashid, (2008) 1 SCC 474

3. Monica Kumar Vs. St. of U.P, (2008) 8 SCC 781

4. Popular Muthiah Vs. St., Rep. by Insp. of Police, (2006) 7 SCC 296

5. Dhanlakshmi Vs. R.Prasana Kumar, (1990) Cr LJ 320 (DB): AIR 1990 SC 494

6. St. of Bih. v. Murad Ali Khan, (1989) Cr LJ 1005: AIR 1989 SC 1

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. Heard learned counsel for the applicants over this Application, moved under Section 482 of Code of CriminalProcedure, 1973 (In short 'Cr.P.C.'), by the applicants, with a prayer for quashing of impugned summoning

order, dated 1.7.2019, passed by the Additional Chief Judicial Magistrate, Firozabad, thereby, entire criminal proceeding of Criminal Complaint Case No. 03181 of 2018, Smt. Guddi Devi vs. Indrapal & others, under Sections 354, 323 and 504 of Indian Penal Code (In short 'IPC'), Police Station Narkhi, District Firozabad, as well as learned AGA, representing State of U.P., and perused the record.

2. Learned counsel for the applicants argued that there is no injury nor any such occurrence ever occurred, but this complainant, by way of an application, under Section 156 (3) of Cr.P.C., was treated as complaint, wherein, above summoning order was passed. Occurrence was said to be of 28.7.2018, at 2.00 PM, and this delayed report was filed on 26.9.2018, under Section 156 (3) of Cr.P.C and this summoning order was passed against fact on record. Applicants have already filed a case against the complainant and her family members, wherein, this accusation was levelled that some money was advanced and when demanded back this false accusation was threatened and subsequently was got lodged. Hence, this was misuse of process of law and as such by means of this Application, under Section 482, a prayer for exercise of inherent power by this Court for setting aside summoning order as well s entire criminal proceeding of complaint case, aforesaid, has been made by the applicants.

3. Learned AGA, representing State of U.P., has opposed this Application.

4. From very perusal of the summoning order, it is apparent that the accused persons have been summoned for offecnces, punishable, under Sections 354, 323 and 504 of IPC for which there is no precedent of having medico legal report because the ingredient of physical assault with complainant was there, and a complaint can be made without there being any medico legal report. The complainant, in her application, under Section 156(3) of Cr.P.C., has categorically said when the complainant was sleeping in her house and her younger son had gone somewhere, Indrapal, did criminally trespass into the house, and caught-hold the complainant, committed rape with her, extending threat of life by putting Tamancha (country made pistol) on her and on making rescue call, shut her mouth and threatened of killing all family members, in case of making any complaint of the incident, thenafter, ran away from the spot. She made a complaint to her husband, but owing to family reputation, matter was not reported to the police. Indrapal, taking benefit of above situation, continued to extend threat to the complainant by using different numbers by Cell Phones. Thenafter, an application, under Section 156 (3) of Cr.P.C. was moved, wherein complainant was examined, under Section 200 of Cr.P.C. and two witnesses, were examined, under Section 202 of Cr.P.C, who have corroborated and reiterated the contentions, made in the complaint, on the basis of which impugned summoning order was passed. Previous proceeding filed by the accused persons reveals that there were intimate relation between the parties, but because of demanding back of money, advanced, this case was came to be filed. Meaning thereby, both sides were acquainted with each other, but merely taking a ground of demanding back of money advanced, the applicants cannot seek indulgence of this Court, for

exercise of inherent power, under Section 482 of Cr.P.C. Moreso, it is not expected from this Court to meticulously analyze evidences at this juncture, rather it is a question to be decided at the time of trial by the Trial court.

5. Saving of inherent power of High Court, as given under Section 482 Cr.P.C, provides that nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice. Meaning thereby this inherent power is with High Court (I) to make such order as may be necessary to give effect to any other order under this Code (II) to prevent abuse of the process of any Court (III) or otherwise to secure the ends of justice. But Apex Court in State of Andhra Pradesh v. Gaurishetty Mahesh, JT 2010 (6) SC 588: (2010) 6 SCALE 767: 2010 Cr. LJ 3844 has propounded that "While exercising jurisdiction under section 482 of the Code, the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable apprehension of it accusation would not be sustained. That is the function of the trial Judge/Court". In another subsequent Hamida v. Rashid, (2008) 1 SCC 474, hon'ble Apex Court propounded that "Ends of justice would be better served if valuable time of the Court is spent in hearing those appeals rather than entertaining petitions under Section 482 at an interlocutory stage which after filed with some oblique motive in order to circumvent the prescribed procedure, or to delay the trial which enable to win over the witness or may disinterested in giving evidence, ultimately resulting in miscarriage of Justice". In again another subsequent Monica Kumar v. State of Uttar Pradesh, (2008) 8 SCC 781, the Apex Court has propounded "Inherent jurisdiction under Section 482 has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself." While interpreting this jurisdiction of High Court Apex Court in Popular Muthiah v. State, Represented by Inspector of Police, (2006) 7 SCC 296 has propounded "High Court can exercise jurisdiction suo motu in the interest of justice. It can do so while exercising other jurisdictions such as appellate or revisional jurisdiction. No formal application for invoking inherent jurisdiction is necessary. Inherent jurisdiction can be exercised in respect of substantive as well as procedural matters. It can as well be exercised in respect of incidental or supplemental power irrespective of nature of proceedings".

6. Regarding prevention of abuse of process of Court, Apex Court in Dhanlakshmi v. R.Prasana Kumar, (1990) Cr LJ 320 (DB): AIR 1990 SC 494 has propounded "To prevent abuse of the process of the Court, High Court inexercise of its inherent powers under section 482 could quash the proceedings but there would be justification for interference only when the complaint did not disclose any offence or was frivolous vexatious or oppressive" as well as in State of Bihar v. Murad Ali Khan, (1989) Cr LJ 1005: AIR 1989 SC 1, Apex Court propounded "In exercising jurisdiction under Section 482 High Court would not embark upon an enquiry whether the allegations in the complaint are likely to be established by evidence or not".

7. Meaning thereby, exercise of inherent jurisdiction under Section 482 Cr.P.C. is within the limits, propounded as above.

8. In view of what has been discussed above, this Application, being devoid of merits, deserves dismissal and stands dismissed accordingly

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(2019)12 ILR A209

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.10.2019

BEFORE
THE HON'BLE RAM KRISHNA GAUTAM, J.

Crl. Misc. Application (U/S 482 Cr. P.C.) No. 37504 of 2019

Shiv Sahai & Ors. ...Applicants
Versus
State of U.P.& Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Anurag Kumar Pandey

Counsel for the Opposite Parties:
A.G.A.

A. Criminal Law - Code of Criminal Procedure, 1973- Section 482 & Indian Penal Code,1860- Sections 148, 149, 452, 380 and 506-challenge to-summoning order-counter-blast case- In exercising jurisdiction under Section 482 High Court would not embark upon an enquiry whether the allegations in the complaint are likely to be established by evidence or not. (Para 6)

High Court can exercise jurisdiction suo motu in the interest of justice. It can do so while exercising other jurisdictions such as appellate or revisional jurisdiction. No formal application for invoking inherent jurisdiction is necessary. Inherent jurisdiction can be exercised in respect of substantive as well as procedural matters. It can as well be exercised in respect of incidental or supplemental power irrespective of nature of proceedings. (Para 5)

Application u/s 482 Cr.P.C. dismissed. (E-6)

List of cases cited: -

1. St. of A.P. Vs Gour Sheety Mahesh J.T. 2010 (6) SCC 588

2. Hamida Vs Rashid (2008) 1 SCC 474

3. Monika Kumar Vs St. of U.P. (2008) 8 SCC 781

4. Popular Muthiah Vs State, Represented by Inspector of Police, (2006) 7 SCC 296

5. Dhanlakshmi Vs R.Prasana Kumar, (1990) Cr LJ 320 (DB): AIR 1990 SC 494

6. St. of Bih. Vs Murad Ali Khan, (1989) Cr LJ 1005: AIR 1989 SC 1

7. Amrawati and anr.Vs. St.of U.P. r 2004 (57) ALR 290

8. Lal Kamlendra Pratap Singh Vs. St. of U.P. 2009 (3) ADJ 322 (SC)

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. Heard learned counsel for the applicants over this Application, moved by the applicants, under Section 482 of the Code of Criminal Procedure, 1973, (In short 'Cr.P.C.'), with a prayer for setting aside summoning order, dated 26.10.2018, passed by the court of Ist Additional Chief Judicial Magistrate, Shahjahanpur, in Criminal Complaint Case No. 5201 of 2016, Kallu vs. Shiv Sahai and others, under Sections 148, 149, 452, 380 and 506 of Indian Penal Code (In short 'IPC'), Police Station-Panaur, District Shahjahanpour , thereby, quashing entire criminal proceeding of above case, as

well as learned AGA, representing the State of U.P. and perused the record.

2. Learned counsel for the applicants argued that this was a malicious prosecution and misuse of process of law. A complaint case was filed by the applicants' side against the present complainant side as Complaint Case No. 354 of 2016, wherein, on the date of occurrence, i.e., 21.4.2016, at about 07:00 AM, there occurred some quarrel between the kids and when the complainant went there to get the matter settled, Kallu, Sonelal, Natthu, Sudesh and Raju, armed with Lathi and Danda, came there. They abused complaint and did assault. They have been summoned for offences, punishable, under Sections 323, 504, 506 IPC and in counter-blast, present complaint has been filed by the other side, wherein, there was variance in the statements of complainant and his witnesses. There was no medico legal report nor any injury report, even then, impugned summoning order was passed. Hence, this Application, with above prayer.

3. Learned AGA, representing State of U.P., opposed this Application.

4. Perusal of the complaint and summoning order reveals that for the occurrence of 21.4.2016, already a case was got registered as NCR upon the report of the present applicants' side, wherein order for investigation has been passed and for same occurrence Criminal Complaint Case No. 354 of 2016 was filed in which above summoning order was passed. Meaning thereby, it is the contention that for occurrences of the same date, there were two cases against each other. Hence, this case is being said to be counter-blast of other case, which is against fact, as this occurrence is said to be of 15.7.2016, at about 8.00 PM, while, the complainant was at his home, Shiv Sahai, Sukhram , Shivram, Bhure @ Dinne @ Dinesh, Raju, Vimlesh, Ramnath, Mukesh, Jasant and Ramnath, armed with single barrel gun, by making unlawful assembly, came at the home of the complainant, wherein a riot was committed, then after, above occurrence was said to have been committed, which was punishable, under Sections 148, 149, 452, 380 and 506 IPC. Complainant, in his statement, recorded, under Section 200 Cr.P.C., and his two witnesses, examined by the Magistrate, under Section 202 of Cr.P.C., have reiterated the same version, as was mentioned in the complaint. Complainant's statement was supported by PW-1, Asha, PW-2, Dharam Singh and PW-3, Natthu, on the basis of which upon enquiry, the Magistrate passed impugned summoning order against Shiv Sahai, Sukhram , Shivram, Bhure @ Dinne @ Dinesh, Raju, Vimlesh, Ramnath, Mukesh, Jasant and Ramnath, for offences, punishable, under Sections 148, 149, 452, 380 and 506 IPC. Hence, prima facie there was sufficient evidence for passing above summoning order. At the time of summoning order, there required no meticulous analysis of evidences, rather a prima facie evidence was deemed to be sufficient for passing summoning order and it was there. Meticulous analysis of the evidence is not to be made by this Court, in exercise of inherent power, under Section 482 of Cr.P.C., while entertaining this Application, moved, under Section 482 of the Cr.P.C., rather this is to be seen by the trial court, at the time of trial.

5. Saving of inherent power of High Court, as given under Section 482 Cr.P.C, provides that nothing in this Code shall be

deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice. Meaning thereby this inherent power is with High Court (I) to make such order as may be necessary to give effect to any other order under this Code (II) to prevent abuse of the process of any Court (III) or otherwise to secure the ends of justice. But Apex Court in **State of Andhra Pradesh v. Gaurishetty Mahesh, JT 2010 (6) SC 588: (2010) 6 SCALE 767: 2010 Cr. LJ 3844** has propounded that *"While exercising jurisdiction under section 482 of the Code, the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable apprehension of it accusation would not be sustained. That is the function of the trial Judge/Court".* In another subsequent **Hamida v. Rashid, (2008) 1 SCC 474**, hon'ble Apex Court propounded that *"Ends of justice would be better served if valuable time of the Court is spent in hearing those appeals rather than entertaining petitions under Section 482 at an interlocutory stage which after filed with some oblique motive in order to circumvent the prescribed procedure, or to delay the trial which enable to win over the witness or may disinterested in giving evidence, ultimately resulting in miscarriage of Justice".* In again another subsequent **Monica Kumar v. State of Uttar Pradesh, (2008) 8 SCC 781**, the Apex Court has propounded "Inherent jurisdiction under Section 482 has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself." While interpreting this jurisdiction of High Court Apex Court in **Popular Muthiah v. State, Represented by Inspector of Police, (2006) 7 SCC 296** has propounded *"High Court can exercise jurisdiction suo motu in the interest of justice. It can do so while exercising other jurisdictions such as appellate or revisional jurisdiction. No formal application for invoking inherent jurisdiction is necessary. Inherent jurisdiction can be exercised in respect of substantive as well as procedural matters. It can as well be exercised in respect of incidental or supplemental power irrespective of nature of proceedings".*

6. Regarding prevention of abuse of process of Court, Apex Court in **Dhanlakshmi v. R.Prasana Kumar, (1990) Cr LJ 320 (DB): AIR 1990 SC 494** has propounded *"To prevent abuse of the process of the Court, High Court in exercise of its inherent powers under section 482 could quash the proceedings but there would be justification for interference only when the complaint did not disclose any offence or was frivolous vexatious or oppressive"* as well as in **State of Bihar v. Murad Ali Khan, (1989) Cr LJ 1005: AIR 1989 SC 1,** Apex Court propounded *"In exercising jurisdiction under Section 482 High Court would not embark upon an enquiry whether the allegations in the complaint are likely to be established by evidence or not".*

7. Meaning thereby, exercise of inherent jurisdiction under Section 482 Cr.P.C. is within the limits, propounded as above.

8. In view of the discussed, herein above, this Application, under Section

482 of Cr.P.C., being devoid of merits, deserves to be dismissed and is dismissed accordingly.

9. However, it is directed that if the applicants appear and surrender before the court below within 30 days from today and apply for bail, their prayer for bail shall be considered and decided in view of the settled law laid by this Court in the case of **Amrawati and another Vs. State of U.P. reported in 2004 (57) ALR 290** as well as judgement passed by Hon'ble Apex Court reported in **2009 (3) ADJ 322 (SC) Lal Kamlendra Pratap Singh Vs. State of U.P.**

10. For a period of 30 days from today, no coercive action shall be taken against the applicants. However, in case, the applicants do not appear before the Court below within the aforesaid period, coercive action shall be taken against them.

(2019)12 ILR A212

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.09.2019

BEFORE
THE HON'BLE RAJIV JOSHI, J.

Crl. Misc. Application (U/S 482 Cr. P.C.) No. 38531 of 2018

Shyamdhani Gupta & Ors. ...Applicants
Versus
State of U.P.& Anr. Opposite Parties

Counsel for the Applicants:
Sri Kameshwar Singh, Sri Rajesh Kumar, Sri Vijay Bhan

Counsel for the Opposite Parties:
A.G.A., Sri Rajesh Kumar, Sri Vijay Bhan Singh

A. Criminal Law - Code of Criminal Procedure – Discharge - Sections 204, 244, 245(2) & 482 - Discharge application rejected as not maintainable -The power of the Magistrate to discharge the accused could be invoked during the trial but to reach the stage of Section 245 Cr.P.C, it is mandatory that trial must begin in view of Section 244 Cr.P.C, when the accused appears or is brought before the Magistrate in pursuance of the order passed under Section 204 Cr.P.C.- When the accused has not appeared or is not brought before the Magistrate, the question of discharge does not arise at all -Mere pendency of civil litigation between the parties cannot be a ground to allow the discharge application of the accused.
(Para 12,12,15,16 & 21)

Application u/s 482 Cr.P.C rejected. (E-3)

List of cases cited: -

1. Rajiv Thapar & Ors Vs. Madan Lal Kapoor, 2013 LawSuit (SC) 69

2. Arvind Kejriwal Vs. State of U.P. & Ors, 2015 LawSuit (AII) 3281

3. Ajai Pal Vs. State of U.P. and anr., 2013 LawSuit (AII) 531

(Delivered by Hon'ble Rajiv Joshi, J.)

1. Heard Sri Kameshwar Singh and Sri Rajesh Kumar, learned counsel for the applicants, Sri Vijay Bhan Singh, learned counsel for the opposite party no.2 and learned AGA for the State.

2. The present application under Section 482 Cr.P.C. has been filed for quashing the order dated 19.5.2018 passed by Additional Chief Judicial Magistrate, Court No. 9, Varanasi in Case

No. 4009 of 2016 (Bithula Devi Vs. Awadhesh Kumar Kaushik and others) under Sections 452, 323, 504, 506 IPC as well as the order dated 17.9.2018 passed by IVth Additional Sessions Judge, Varanasi in Criminal Revision No. 147 of 2018 (Awadhesh Kumar Kaushik and others Vs. Smt. Bithula Devi and others), whereby the revision filed by the applicants was dismissed affirming the order of Additional Chief Judicial Magistrate dated 19.5.2018, rejecting the application for discharge of the accused-applicants.

3. Relevant facts for the consideration of the present case are that opposite party no.2 filed a complaint, registered as Case No. 1557 of 2016 on 5.3.2016 alleging that there was some dispute between the complainant and the applicants; that on 20.2.2016 at 3.00 pm, the accused-applicants entered into the road side food stall (dhaba) run and owned by the family of the complainant; that they used abusive language for the husband and son of the complainant and also slapped her husband, whereupon the persons, who were present there, namely Pintoo, Shankar, Raju and Vijay, anyhow saved the husband of the complainant. After filing of the complaint, statement of the complainant was recorded on 11.3.2016 under Section 200 Cr.P.C., while the statements of her two witnesses, namely Bhagwan Das and Pintoo were recorded under Section 202 Cr.P.C. on 5.4.2016 and 14.4.2016 respectively. The Magistrate concerned after considering the statements of the complainant as well as her witnesses, summoned the accused-applicants under Section 204 Cr.P.C. for facing the trial for the offence under Sections 452, 323, 504, 506 IPC vide summoning order dated 30.11.2016.

4. Challenging the said summoning order, an application under Section 482 Cr.P.C. being Application No. 2238 of 2017 was filed by the applicants for quashing the entire proceedings pursuant to the said order dated 30.11.2016, which was rejected by this Court vide order dated 23.1.2017 with the observation that prima facie a case for the offences under Sections 452, 323, 504, 506 IPC is made out against the applicants and no ground existed for quashing the entire proceedings as well as the summoning order. However, considering the facts and circumstances of the case, this Court observed that in case the applicants appear before the court concerned within thirty days from the date of the order and apply for bail, the same shall be heard and disposed of in accordance with law expeditiously. It is also on the record that the accused-applicants simultaneously filed a revision against the summoning order dated 30.11.2016 before the Additional Sessions Judge, Court No. 14, Varanasi, under Section 397 Cr.P.C., registered as Revision No. 17 of 2017, which too was finally dismissed on 25.7.2017.

5. The accused-applicants instead of appearing before the Magistrate concerned for bail, filed another application under Section 245 (2) Cr.P.C through counsel on 30.6.2017 for their discharge, which was rejected by the IXth Additional Chief Judicial Magistrate, Varanasi vide order dated 19.5.2018. The accused-applicants challenged the said order by means of filing Criminal Revision No. 147 of 2018 before the Sessions Judge, Varanasi, which was later on transferred to the court of Vth Additional Session Judge, Varanasi, who dismissed the same vide order dated 17.9.2018.

6. Both these orders i.e. order dated 19.5.2018 passed by the Magistrate as well as the revisional order dated 17.9.2018 passed by the Additional Sessions Judge, Varanasi are impugned in the present application.

7. Contention of learned counsel for the applicants is that the entire prosecution is false and malicious and no case against the accused-applicants is made out, and therefore, the applicants be discharged in view of Section 245 (2) of Cr.P.C. It is further contended by learned counsel for the applicants that a civil litigation between the parties is already pending and they have been falsely implicated in the present case.

8. Learned counsel for the applicants in support of his arguments has placed reliance on paragraph 23 of the judgment of the Apex Court in the case of ***Rajiv Thapar & Ors vs. Madan Lal Kapoor, 2013 LawSuit (SC) 69.***

9. On the other hand, learned counsel for the opposite party no.2 as well as learned AGA while supporting the impugned orders, submitted that earlier the accused-applicants challenged the summoning order dated 30.11.2017 before this Court in an application under Section 482 Cr.P.C, which was dismissed on 23.1.2017 recording a finding that prima facie against the applicants for the offence in question was made out and the accused-applicants failed to comply with the direction of this Court in the said 482 application as they did not appear before the court concerned and apply for bail before the court concerned and therefore, the provisions of Section 245 Cr.P.C. are not attracted at all and both the courts below have rightly passed the impugned orders rejecting their prayer for discharge by the orders impugned.

10. I have considered the rival submissions so raised by learned counsel for the parties and perused the record.

11. Before considering the argument so raised by learned counsel for the applicants, it would be appropriate to have a look upon the provisions of Section 244 Cr.P.C, which deal with the cases instituted otherwise than on a police report. Section 244 Cr.P.C. reads thus:

"244. Evidence for prosecution.

(1) When, in any warrant- case instituted otherwise than on a police report, the accused appears or is brought before a Magistrate, the Magistrate shall proceed to hear the prosecution and take all such evidence as may be produced in support of the prosecution.

(2) The Magistrate may, on the application of the prosecution, issue a summons to any of its witnesses directing him to attend or to produce any document or other thing."

12. From a reading of Section 244 Cr.P.C, it is apparent that first stage towards start of warrant trial is the appearance of the accused before the Magistrate concerned, as the clear mandate of Section 244 is "when accused appears or is brought before the Magistrate". Section 245 Cr.P.C. comes after Section 244 Cr.P.C., which is quoted hereunder:

"245. When accused shall be discharged.

(1) If, upon taking all the evidence referred to in section 244, the Magistrate considers, for reasons to be recorded, that no case against the accused has been made out which, if unrebutted, would warrant his conviction, the Magistrate shall discharge him.

(2) Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless."

13. From the aforesaid Sections, it is apparent that Magistrate after fulfilling the requirements of Section 244 Cr.P.C. shall proceed further to consider the prosecution case taking into consideration all such evidence as may be produced by prosecution in support of its case. Section 245 Cr.P.C. has two parts. First part relates to when evidence under Section 244 Cr.P.C. has been recorded and the second part relates to the power of Magistrate to discharge any accused at any previous stage of the case if for reasons to be recorded, he considers the charge to be groundless. The power of the Magistrate to discharge the accused undisputedly could be invoked during the trial. To reach the stage of Section 245 Cr.P.C, it is necessary that trial must begin in view of Section 244 Cr.P.C, when the accused appears or is brought before the Magistrate.

14. How the accused shall appear or brought before the Magistrate is to be considered in the light of provisions contained in Code of Criminal Procedure. But the fact remains that in spite of clear direction issued by this Court in their application under Section 482 Cr.P.C. No.2238 of 2017 vide order dated 23.01.2017, the accused-applicants failed to appear before the Court.

15. It is true that in view of Section 245 (2) Cr.P.C. the Magistrate is empowered to pass the order of discharge for the reasons to be recorded after appearance of the accused and before the evidence Section 244 Cr.P.C. or during the course of the day proceedings for recording the evidence under Section 244 Cr.P.C, but the Magistrate is not empowered to entertain any application under Section 245 (2) Cr.P.C. unless the accused has appeared or is brought before the court in terms of Section 244 Cr.P.C. Therefore, it cannot be said that accused without putting his appearance before the court may participate in any proceedings or trial pending before a competent court.

16. All these sections make it mandatory that the trial could only begin when the accused appears or is brought before the court in pursuance of the order passed under Section 204 Cr.P.C. and it is the part of the procedure relating to the trial of warrant cases as is clear from the heading of Chapter XIX of Cr.P.C itself. Therefore, this Court is of the firm view that the accused cannot invoke the jurisdiction under Section 245 (2) Cr.P.C. unless he appears or is brought before the Magistrate.

17. This Court in the cases of ***Arvind Kejriwal Vs. State of U.P. & Ors, 2015 LawSuit (AII) 3281*** and ***Ajai Pal Vs. State of U.P. and another, 2013 LawSuit (AII) 531*** has also taken the same view.

18. Paragraph 23 of the judgment of the Apex Court in the case of ***Rajiv Thapar (supra)*** relied upon by the learned

counsel for the applicant, is quoted hereunder:

"23. 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."

19. The guidelines issued by the Apex Court in the aforesaid judgment are with regard to the steps to determine the veracity of prayer for quashing, raised by an accused by invoking the power vested in this Court under Section 482 Cr.P.C. There is no dispute with regard to the aforesaid proposition of law as laid down by the Apex Court.

20. Here in the present case, the order of Magistrate as well as the revisional order is under challenge, whereby the discharge application of the accused was rejected as not maintainable which was affirmed by the revisional court.

21. So far as the contention of learned counsel for the applicants that since civil proceeding is pending, the entire prosecution is vitiated, is concerned, the same has no substance. Mere pendency of civil litigation between the parties cannot be a ground to allow the discharge application of the accused. There is no such proposition of law that if the civil proceeding is pending between the parties, then on the same ground, the criminal proceeding between them shall be taken as groundless. Thus, the argument so raised, has no force and therefore repelled.

22. Earlier, this Court while rejecting the accused-applicants petition under section 482,Cr.P.C. vide order dated

23.1.2017, had observed that in case the applicants appear before the court within thirty days and apply for bail, their prayer for bail shall be considered in accordance with law expeditiously. Instead of appearing before the court concerned in compliance of the said direction, the accused applicants through counsel filed the application under section 245(2),Cr.P.C. for discharge. The stage of section 245 will come into play after the stage of section 244, Cr.P.C. When the accused has not appeared or not brought before the Magistrate, the question of discharge does not arise at all. The accused-applicants will have to adhere to the provisions of law as provided in the Code of Criminal Procedure.

23. Taking into account the entire facts and circumstances of the case and upon perusal of the record, there appears to be no illegality or infirmity in the orders impugned passed by the courts below and no ground is made out warranting interference under section 482,Cr.P.C.

24. In view of the above, the present application lacks merit and is, accordingly, rejected.

(2019)12 ILR A217

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 26.07.2019

BEFORE
THE HON'BLE DINESH KUMAR SINGH-I, J.

Crl. Misc. Application (U/S 482 Cr. P.C.) No. 48396 of 2014

Mohammad Yaqoob Ansari ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Salman Ahmad

Counsel for the Opposite Parties:
Govt. Advocate, Sri Diwakar Mishra

A. Criminal Law - The Negotiable Instruments Act, 1881 - Section 138 (b) /Proviso to Section 142(b) - Second Notice/Reminder - Though the complaint is required to be submitted within one month from the date on which the cause of action arises but by adding the provision/proviso, vide amendment w.e.f 06.02.2003, cognizance of the complaint may be taken by the court even after the prescribed period of 30 days, if the complainant satisfies the Court about the reason for not making the complaint within said period- The trial court would, after parties have led evidence before it, judge whether there was sufficient reason shown by the complainant or not for having moved the complaint beyond 30 days. Section 138 (b) of the Act - On facts, the second notice (reminder) would fall within the time limit prescribed under section 138 (b) of the Act. Nowhere has it been laid-down that in case of non-payment of the cheque, if notice is issued to the defaulting accused, its reminder is barred-The opposite party no. 2 cannot be put to disqualification only because he issued reminder within 17 days, instead of the statutorily laid-down period of 30 days, therefore, the complaint should be treated well within time.

Application u/s 482 Cr.P.C rejected. (E-3)

List of cases cited: -

1. MSR Leathers Vs. S. Palaniappan & anr. ((2013) 1 Supreme Court Cases 177,

2. Neerja Parekh Vs. Amit Enterprises, 2012 Law Suit (Del) 474

3. Kapil Upadhyay vs. Milana Auto, 2006 Lawsuit (MP) 140.

(Delivered by Hon'ble Dinesh Kumar Singh-I, J.)

1. Heard Sri Salman Ahmad, learned counsel for the applicant, Sri Diwakar Mishra, learned counsel for the opposite party no. 2 and Sri A.D. Mishra, learned A.G.A. appearing for the State and perused the record.

2. This application under Section 482 Cr.P.C has been moved with a prayer to quash the impugned summoning order dated 04.02.2012 passed by Chief Judicial Magistrate, Jalaun at Orai in Complaint Case No.2646 of 2013 (Anil Babu Niranjan vs. Mohammad Yaquoob Mansoori) under section 138 Negotiable Instrument Act, P.S. Kotwali Orai, District Jalaun at Orai and the entire proceedings of complaint case and also a prayer is made to stay the proceedings in this case till the disposal of this application.

3. In the affidavit filed in support of the stay application it is stated that as per the version contained in the complaint, the opposite party no. 2 runs an Electronic shop in Gandhi Market, Orai and the applicant is a proprietor of M/s. N.I. Purse Belt Store on main road, Orai. He does business by the said name. As per prosecution case, both the businessmen i.e. the applicant as well as the opposite party no. 2 were having good relation and since the applicant needed money for enhancement of his business, the applicant borrowed Rs.3.00 lacs from opposite party no. 2. On 7.10.2013 a cheque bearing no.038386 of Union Bank Branch, Orai was issued by the applicant for returning the said amount, which was presented by opposite party no. 2 before the Bank on 9.10.2013 but the same was returned with an endorsement that there was no sufficient balance in the account. As per allegation in the complaint, the said information of dishonouring of cheque was given to the applicant and the said amount of Rs.3.00 lacs was asked to be paid but the same was refused by the applicant where-after on 21.10.2013 the opposite party no. 2 issued notice under section 138 of Negotiable Instrument Act through his counsel but after passing of 15 days time when the money was not paid back, on 26.11.2013 opposite party no. 2 again sent a notice through his counsel to the applicant which did not return and thereafter on 18.12.2013 opposite party no. 2 filed a complaint under section 138 of Negotiable Instrument Act. The complainant/opposite party no. 2 had given statement under section 200 Cr.P.C. repeating the same version as were mentioned in the complaint, copy of the same has been annexed as Annexure-2.

4. The Magistrate without taking into account the facts and circumstances of the case, illegally passed the impugned order dated 4.2.2014, which is annexed as Annexure-3. In fact the applicant had not given any cheque to the opposite party no. 2 rather opposite party no. 2 fraudulently obtained the cheque regarding which the applicant could not know and when opposite party no. 2 issued notice on 21.10.2013 which was received by him, he came to know about the fraud and cheating committed by opposite party no. 2. It is further mentioned that no witness has been examined in respect of amount of Rs.3.00 lacs having been paid by the opposite party no. 2 to the applicant nor any date or time or place has been disclosed when the said amount was lent. The complaint was barred under section 142 of Negotiable Instrument Act which

provides that it should be moved within one month of the date on which the cause of action arises while in the present case notice was sent on 21.10.2013 and the complaint has been filed on 18.12.2013 i.e. after 58 days. It is further mentioned that it is settled law that where two demand notices were served on the accused, the cause of action would arise only on expiry of 15 days time from the date of first notice. The subsequent notice would not give rise to any fresh cause of action. It is beyond imagination that the opposite party no. 2 would lend amount of Rs.3.00 lacs to the applicant without there being relationship between them. In fact, no such incident has happened as suggested by the opposite party no. 2. Neither any amount was taken by the applicant nor any cheque was issued by him in favour of the opposite party no. 2. So far as the cheque in question is concerned, it was dishonestly taken by the opposite party no. 2 from the applicant in which subsequently he filled up the amount; hence the summoning order deserves to be quashed. Reliance has been placed from the side of the learned counsel for the applicant on **MSR Leathers vs. S. Palaniappan and another ((2013) 1 Supreme Court Cases 177,** the relevant paragraphs are reproduced below.

"2. After entering appearance, the drawer filed an application seeking discharge on the ground that the payee could not create more than one cause of action in respect of a single cheque and the complaint in question having been filed on the basis of the second presentation and resultant second cause of action was not maintainable. The Magistrate accepted that contention relying upon a Division Bench decision of Kerala High Court in Kumaresan v. Ameerappa (1991) 1 Ker L.T. 893 and dismissed the complaint. The order passed by the Magistrate was then questioned before the High Court of Kerala who relying upon Kumaresan's case (supra) upheld the order passed by the Magistrate. The matter was eventually brought up to this Court by special leave. This Court formulated the following question for determination:

"Whether payee or holder of cheque can initiate proceeding of prosecution under Section 138 of Negotiable Instrument Act, 1881 for the second time if he has not initiated any action on earlier cause of action?"

3. Answering the question in the negative this Court held that a combined reading of Sections 138 and 142 of the Act left no room for doubt that cause of action under Section 142(b) can arise only once. The conclusion observed by the court is supported not only by Sections 138 and 142 but also by the fact that the dishonour of cheque gives rise to the commission of offence only on the failure to pay money when a notice is served upon the drawer in accordance with clause (b) of the proviso to Section 138. The Court further held that if the concept of successive causes of action were to be accepted the same would make the limitation under Section 142(b) otiose. The Court observed:

7. Besides the language of Sections 138 and 142 which clearly postulates only one cause of action, there are other formidable impediments which negate the concept of successive causes of action. One of them is that for dishonour of one cheque, there can be only one offence and such offence is committed by the drawer immediately on his failure to make the

payment within fifteen days of the receipt of the notice served in accordance with clause (b) of the proviso to Section 138. That necessarily means that for similar failure after service of fresh notice on subsequent dishonour, the drawer cannot be liable for any offence nor can the first offence be treated as non est so as to give the payee a right to file a complaint treating the second offence as the first one. At that stage, it will not be a question of waiver of the right of the payee to prosecute the drawer but of absolution of the drawer of an offence, which stands already committed by him and which cannot be committed by him again."

He has also relied upon the judgment of High Court of Delhi in the case of **Neerja Parekh vs. Amit Enterprises, 2012 Law Suit (Del) 474** and the judgment of High Court of Madhya Pradesh in the case of **Kapil Upadhyay vs. Milana Auto, 2006 Lawsuit (MP) 140.**

5. From the side of the opposite party no. 2 counter affidavit has been filed in which it is stated that the applicant and the opposite party no. 2 were having good relation in the business because of which he had lent Rs.3.00 lacs to him when the same was demanded to enhance his business. When the said amount was demanded by the opposite party no. 2, the applicant had issued cheque no. 038386 of Union Bank Branch, Orai which was presented by him before the said Bank on 9.10.2013 but the same was returned by the Bank with an endorsement that there was no sufficient balance in the account of the applicant. The opposite party no. 2 thereafter sent information on 10.10.2013 in this regard to the applicant but the applicant refused to pay the said amount then he gave notice through his counsel demanding the said amount on 21.10.2013 but even then the applicant did not pay back the said amount thereafter the opposite party no. 2 sent second notice through his counsel on 26.11.20013 but in spite of that the said amount was not returned, hence he had filed the present complaint. It is further mentioned that his statement was recorded under section 200 Cr.P.C by CJM, Orai and the summoning order against the applicant has been rightly issued under section 138 of Negotiable Instrument Act. The opposite party no. 2 had informed the applicant through notice dated 21.10.2013 but he did not take any care to make the payment of the amount which was mentioned in the notice, hence reminder was issued but even then the said amount was not paid. The cause of action has arisen on **26.11.2013** and the complaint was filed within time. Therefore, the complaint is not barred under section 142 of Negotiable Instrument Act. Therefore, the offence is made out against the accused-applicant. The impugned judgment deserves to be upheld and the application deserves to be dismissed.

6. During oral argument, learned counsel for the applicant has mainly argued that as per the case of the complainant, the cheque was presented on 9.10.2013 and on the same day it got dishonoured, where-after first notice was sent to the applicant on 21.10.2013 and its reminder was sent on 26.11.2013 while the complaint was moved on 18.12.2013, therefore, the cause of action should not be taken to have arisen on 26.11.2013 rather the same should be taken to have arisen on 21.10.2013 when the first notice was sent and therefore, from the said date, the complaint is apparently filed beyond 30 days which makes it time barred. He further argued that the date of giving money by the opposite party no. 2 to the

applicant and the witness before whom the said money was given, have not been disclosed which clearly casts doubt upon the said payment of amount.

7. Both the above points raised by the learned counsel for the applicant have been rebutted by the learned counsel for the opposite party no. 2 stating that the cause of action could be treated to have arisen on 26.11.2013 and from that date, the complaint would be well within time of 30 days as per statutory provision.

8. After having heard learned counsel for the both the parties, I am of the opinion that the accused-applicant has not taken notice of proviso of section 142 of Negotiable Instrument Act, which provide as under:

"142. Cognizance of offences.- Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974).

(a) No court shall take cognizance of any offence punishable under section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque;

(b) Such complaint is made within one month of the date on which the cause of action arises under clause (c) of the proviso to section 138:

[Provided that the cognizance of a complaint may be taken by the Court after the prescribed period, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within such period.]

(c) No court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under section 138].

(2) The offence under section 138 shall be inquired into and tried only by a court within whose local jurisdiction-

(a) if the cheque is delivered for collection through an account the branch of the bank where the payee or holder in due course, as the case may be, maintains the account, is situated; or

(b) if the cheque is presented for payment by the payee or holder in due course, otherwise through an account, the branch of the drawee bank where the drawer maintains the account, is situated.

Explanation- For the purposes of clause (a), where a cheque is delivered for collection at any branch of the bank of the payee or holder in due course, then, the cheque shall be deemed to have been delivered to the branch of the bank in which the payee or holder in due course, as the case may be, maintains the account.

9. It is very much clear by the above-mentioned proviso that though the complaint is required to be submitted within one month from the date on which the cause of action arises but by adding the provision/proviso stated above, by bringing amendment with effect from 06.02.2003, cognizance of the complaint may be taken by the court even after the prescribed period of 30 days, if the complainant satisfies the Court that he has sufficient cause for not making the complaint within said period.

10. It would be pertinent to refer here to section 138 of the said Act also, which is reproduced herein below.

"138. Dishonour of cheque for insufficiency, etc., of funds in the account. *--Where any cheque drawn by a*

person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may be extended to two years, or with fine which may extend to twice the amount of the cheque, or with both: Provided that nothing contained in this section shall apply unless--

(a)the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b)the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c)the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation.-- For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability."

11. The above quoted sub-clause (b) of the said section lays down that payee or the holder in due course of the cheque, may make a demand for payment of money by giving a notice in writing to the drawer of cheque within 30 days of the receipt of information by him from the bank regarding return of the cheque as unpaid. In the case in hand, it is apparent that the cheque which is alleged by the opposite party no. 2 to have been handed over by the accused-applicant, was presented before the Bank on 9.10.2013 which was returned by the bank with an endorsement that there was no sufficient balance in the account of the applicant and information regarding this was sent by the opposite party no. 2 immediately to the accused-applicant on 10.10.2013 but the applicant refused to make the payment, pursuant to which opposite party no. 2 issued notice through counsel for demanding Rs.3.00 lacs on 21.10.2013 i.e. within 12 days from the information being given by the Bank about dishonour of the cheque. Thereafter, the opposite party no. 2 sent another notice through his counsel on 26.11.2013 to the applicant, which was within 17 days of the information give by the bank with respect to dishonour of the cheque. It is apparent from the said date that from 9.10.2013 when the cheque was presented before the bank and was returned unpaid, the reminder notice dated 26.11.2013 was given within 17 days, however, the same could have been given within upto 30 days. Therefore, the second notice (reminder) would fall within the time limit prescribed under section 138 (B) of the Act. Nowhere has it been laid-down that in case of non-payment of the cheque, if notice is issued to the defaulting accused, its reminder is barred. In the present case, in my view the opposite

party no. 2 cannot be put to disqualification only because he issued reminder on 26.11.2013 with respect to the accused-applicant not having paid the amount and asking for the same to be paid. I have already held that the said reminder was within 17 days, sent to the applicant instead of the statutorily laid-down period of 30 days.

12. Now, I would like to draw attention to the proviso to section 142 of the abovementioned Act which clearly lays down that the complaint is required to be submitted within one month from the date on which cause of action arises. However, the said complaint can also be preferred even after the statutory time period of 30 days, if the complainant satisfies the Court that there was sufficient cause for not moving the complaint within the said time limit. This provision can be interpreted to mean that the trial court would, after parties have led evidence before it, judge whether there was sufficient reasons shown by the complainant/opposite party no. 2 or not for having moved the complaint beyond 30 days. In the present case, if the time period is calculated from the first date of notice being sent to the accused-applicant i.e. 21.10.2013, the complaint would appear to fall beyond 30 days limit but in that case also the trial court would be expected to assess the reasons why the said delay was committed on the basis of evidence, which would be adduced by the complainant. However, in the present case, in my view, I have already held that the reminder dated 21.10.2013 of the notice would certainly be treated to be a date on which the cause of action has arisen because the same being within 30 days of the information being given by the bank regarding dishonour of cheque, therefore, the complaint should be treated well within time. Therefore, in neither situation whether the complaint be treated to have been filed beyond limit of statutory period or within the limit, the entire matter has to be decided by the trial court on the basis of evidence to be led by both the sides and it would be highly improper to disqualify the opposite party no. 2 from proceeding with the complaint only because a technical flaw is being raised that the cause of action would be treated to have arisen on the date of first notice i.e. 21.10.2013.

13. The rulings which have been relied upon by the learned counsel for the applicant which have been cited above, do not appear to deal with this issue as to whether, in case a reminder notice is issued, date of issuance of the same could be treated to be the date on which the of cause of action would be treated to have arisen.

14. In view of above, I am of the view that this application deserves to be dismissed and it is accordingly dismissed. The interim order, if any stands vacated.

(2019)12 ILR A223

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 05.12.2019

BEFORE
THE HON'BLE AJIT KUMAR, J.

Service Single No. 703 of 1995

R.P. Agnihotri ...Petitioner
Versus
U.P.Coop Federation Ltd. ...Respondent

Counsel for the Petitioner:
Sri A.A. Rizvi, Sri H.K. Misra

Counsel for the Respondent:

Smt. Pushpa Saxena, Sri A.R. Siddiqui, Sri Abhishek Kumar Pandey, Sri Anil Tewari, Sri Shireesh Kumar

A. Service/Administrative Law – Natural Justice Reply to show cause notice - must be considered by authority - passing major penalty - procedure with no discussion and no opportunity of hearing while considering reply to show cause-is arbitrary-impugned order quashed.

Held - The consideration of the reply to the show cause notice, in the considered opinion of the Court, is a must, an exercise without which the disciplinary authority cannot be said to have independently applied its mind while even agreeing with the findings returned by the Inquiry Officer. (Para 10)

A primary authority that has to pass order of punishment after considering explanation to the show cause notice must pen down its own independent consideration in respect of the explanation submitted. (Para 12)

Writ Petition allowed. (E-9)

List of cases cited: -

1. State of West Bengal Vs. Atul Krishna Shaw and another 1991 Supp. (1) SCC 414

2. Devendra Bhai Shankar Mehta Vs. Rameshchandra Vithal Das Sheth (1992) 3 SCC 473

3. State Bank of Bikaner & Jaipur Vs. Nemi Chand Nalwaya (2011) 4 SCC 584,

4. Managing Director, Ecil, Hyderabad Vs. B. Karunakar (1993) 4 SCC 727

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

1. Sri H.K. Misra, learned counsel for the petitioner, Sri Shireesh Kumar, learned counsel for the respondent and perused the record.

2. By means of this petition under Article 226 of the Constitution, the petitioner has challenged the order dated 05.09.1994, whereby, the petitioner hasbeen dismissed from service and has been saddled with the liability of Rs. 4,46,559/- as a loss caused to the Corporation.

3. The petitioner has assailed the order impugned on the ground that though the petitioner was a Depot Incharge at the relevant time but the sole liability to supply and manage coal was of the Private Company engaged for the said purpose under the agreement reached between U.P. Cooperative Federation with private company namely M/s. Radhe Vallabh Traders.

4. Briefly stated facts of the case are that the petitioner, who was Depot Incharge, was issued with a charge sheet as the coal in the stock in the open yard was found much less than the delivery registered in the stock register resulting in huge loss to the Corporation. Initially when the charge sheet was issued, there was a loss mentioned in the charge no. 1 of Rs. 1.62 lacs and odd besides other charges regarding negligence in duty and connivance of the petitioner with certain elements that have virtually lifted the material and no intimation in that regard was made to the respondent Federation. The petitioner did submit reply to the charge rejecting the charges and submitted that he had no such liability, however, a supplementary charge sheet was also issued subsequently which the petitioner also replied. An inquiry was got conducted in the matter with due participation of the petitioner in the inquiry. The material placed before the Inquiry Officer and the reply of the petitioner submitted in that regard were duly considered and the Inquiry Officer in his ultimate analysis has found all the charges proved against the petitioner. The petitioner

was thus issued with a show cause notice dated 18.10.1993 accompanied by the inquiry report to which the petitioner submitted a detailed reply/ explanation again annexing therewith a number of documents. The disciplinary authority however, did not get convinced with the reply of the petitioner and agreeing with the report, held the petitioner guilty in view of the findings returned by the Inquiry Officer and imposed the penalty of dismissal from service with liability to compensate the loss as well to the extent he was held liable.

5. Assailing the order impugned it has been vehemently argued on behalf of the petitioner that the findings returned by the Inquiry Officer were perverse as no correct material was placed before the Inquiry Officer and the documents appended with the reply of the petitioner were not duly considered. It is submitted that all this had been highlighted in his reply to the show cause notice dated 30.10.1993 annexing therewith all the documents in support thereof questioning the findings returned by the Inquiry Officer, however, the same has not been considered by the disciplinary authority and in three lines it has only recorded that the *reply/ explanation submitted by the petitioner dated 29.10.1993 was perused and from the perusal nothing was found worth for reconsideration*. He submits that the disciplinary authority even while agreeing with the inquiry report is to discuss at least the issues that led him to agree with the findings returned by the Inquiry Officer and that too after proper evaluation of the explanation of delinquent employee given to the show cause notice.

6. *Per contra* learned counsel for the respondent argued that the findings of fact have come to be returned in the inquiry report and therefore, this Court may not exercise power to review the findings of the inquiry officer in exercise of power under Article 226 of the Constitution. It is submitted that no procedural flaw is detectible in the conduct of the disciplinary proceedings and therefore, no interference is warranted.

7. Having heard learned counsels for the parties and their arguments across the bar and having perused the record, the only question that requires determination is whether there was a valid consideration of reply of the petitioner submitted to the show cause notice, by the disciplinary authority while agreeing with the inquiry report and awarding the maximum punishment of dismissal from service. The consideration of the reply of the petitioner therefore, has to be seen in the light of explanation submitted and the documents appended therewith.

8. To find an answer to the above question, it is necessary to go through reply submitted by the petitioner and the charges in respect of the which the findings have been returned by the Inquiry Officer. The Inquiry Officer in his ultimate conclusion has held the petitioner to be seriously guilty of negligence and that too a deliberate one in discharge of his duties while looking after the depot where the stock of the coal was stored and on verification and inspection was found much less than the one recorded in the register at the time of delivery. The Inquiry Officer has relied upon the submissions of the respondent Federation that the peons were provided to delinquent employee to carry out regular verification of the stock, the unloading of the material, following the truck which is

used for carrying the coal and unloading, the quantity of the same and if the petitioner has failed to discharge his duty, no one else can be held to be liable for the loss of corporation but the petitioner in the first instance and to that extent he is guilty.

9. In his reply, the petitioner has questioned the correctness of the findings returned by the Inquiry Officer on the ground that he had written several letters in the past regarding state of affairs in the depot and the involvement of the trading companies M/s. Radhe Vallabh Traders and even the show cause notice issued to the company by the corporation in the past and the documents of such nature had also been filed by which the permission was granted by the Senior Manager, Coal to the other party to lift the coal from the depot. Further, he has referred to the letter written by the corporation to M/s. Radhe Vallabh Traders in which the accounting of the company was not found to be proper and the agency was terminated on that count on 18.10.1985. He has also brought on record the registered notice given to M/s. Radhe Vallabh Traders in past holding guilty for the loss caused to the Corporation. He has also referred to the agreement bearing terms and conditions entered by the respondent with Radhe Traders and under which not only supply of coal was to be done by the private company but even the company was to manage stock as well through its agent. He has also filed certain more documents in support of his defence and thus questioned the findings recorded by the Inquiry Officer.

10. However, from perusal of the order impugned, it is clearly revealed that all these above material have not been looked into by the disciplinary authority while passing the order. The consideration of the reply to the show cause notice, in the considered opinion of the Court, is a must, an exercise without which the disciplinary authority cannot be said to have independently applied its mind while even agreeing with the findings returned by the Inquiry Officer. The findings of the Inquiry Officer can only be questioned by means of explanation submitted before the disciplinary authority and obviously the reason being that while the inquiry is conducted in presence of delinquent employee, the report is submitted subsequently and so the evaluation of the reply, oral testimony, if any, has not been properly done, the opportunity is available to the delinquent employee to question the same and if the disciplinary authority does not consider the explanation by referring to the points raised in the explanation, rejection of the same in three lines cannot be appreciated nor, can be approved of.

11. In the present case, the findings returned by disciplinary authority while agreeing with the inquiry report imposing the order of dismissal from service upon the petitioner runs like thus:

''अतएव श्री अग्निहोत्री द्वारा प्रस्तुत कारण बताओ नोटिस के स्पष्टीकरण दिनांक 29.10.93 का परीक्षण किया गया जिसके परीक्षणोपरान्त कोई विचारणीय तथ्य नहीं पाया गया जिस पर पुनः विचार किया जाय।''

Thus, the explanation to the show cause notice submitted by Sri Agnihotri dated 29.10.1993 was examined and after examination nothing was found to be worth for reconsideration.

(Translation by Court)

12. This above finding *sans* reason is not sustainable. A primary authority that has to pass order of punishment after considering explanation to the show cause notice must pen down its own independent consideration in respect of the explanation submitted.

13. Disciplinary authority, therefore, needs to record reason on its own. An authority that fails to consider the reply to show cause notice while dealing with the procedure of disciplinary proceedings in the matter of major penalty, is to be held to have failed to discharge its primary duty. Such a procedure where there is no discussion and no opportunity of hearing by disciplinary authority while considering the reply to the show cause, is liable to be rendered as arbitrary one.

14. The doctrine of fairness has emerged as a bedrock of administrative decision making process and coupled with natural justice form due process, the basic ingredient of rule of law. Whatever is arbitrary, is against the rule of law and arbitrariness means an action opposed to natural law, a concept of justice i.e. impartial dealing (and taking decision after) listening to both sides of dispute **(P. Jackson: Natural Justice, 2nd Edn. 1979 115).** The authority when required to act in a procedurally fair manner means it has to conform to the principles of natural justice.

15. **Mullan in Natural Justice and Fairness:**

".....This did not go far enough; the old law relating to natural justice was too rigidly entrenched. More importantly, the issues were now somewhat more sophisticated, and it was recognized that it was not a case of all or nothing. Some decision making functions, while not requiring full adjudicative hearings, might nevertheless have usefully had certain participatory obligations or perhaps simply an obligation of "proper" consideration attached to them.

Out of this predicament emerged the new vocabulary of the duty to act fairly. This was not in any sense the result of a growing feeling on the part of the courts that the time had come to assert a general review power over the wisdom of administrative decision-making, even though the subsequent conduct of one of the principal proponents of procedural "fairness" review, Lord Denning M.R., might suggest that this was indeed the case. It can best be viewed as a reaction to a particular problem in a particular area of judicial review. Hence it is ironic, though not perhaps surprising, to now see the emergence of fairness in the substantive law of judicial review as a standard for judging the merits of administrative decision-making..... . ***(1982) 27 McGill L.J. 273.***

16. Besides above, the order to be passed by disciplinary authority while awarding major penalty, must record cogent and convincing reasons or in other words the order passed by the disciplinary authority imposing major penalty, should be a speaking order. It has been held in the case of **State of West Bengal Vs. Atul Krishna Shaw and another 1991 Supp. (1) SCC 414** by the Apex Court that:

"Giving of reasons is an essential element of administration of justice. A right to reason is, therefore, an indispensable part of sound system of judicial review. Reasoned decision is not only for the purpose of showing that the

citizen is receiving justice, but also a valid discipline for the Tribunal itself. Therefore, statement of reasons is one of the essentials of justice."

17. In the case of **Devendra Bhai Shankar Mehta Vs. Rameshchandra Vithal Das Sheth (1992) 3 SCC 473,** the Apex Court has held that the decision of disciplinary authority must appear to reflect that such authority was alive to various aspects of charge and defence pleaded. In such proceedings while an ultimate decision is taken of imposing penalty by the authority, the requirement of proof must be fulfilled in such proceedings and while an ultimate decision is taken by the authority, it should appear that the requirement of proof was fulfilled substantially. In a nut shell, the disciplinary authority should view that inquiry officer has taken due care in meticulously scrutinizing and analyzing the evidence on record and materials. Therefore, there must be an independent application of mind by the disciplinary authority to the findings of the inquiry officer. There should be no cut and paste of the finding of the inquiry officer by the disciplinary authority or the appellate authority otherwise, such an order is liable to be rendered illegal and such a decision is unsustainable. In the case of **State Bank of Bikaner & Jaipur Vs. Nemi Chand Nalwaya (2011) 4 SCC 584,** the Apex Court has held that where findings are based on no evidence or there is an absence of any findings, such an order is liable to go.

18. In the case of **Managing Director, Ecil, Hyderabad Vs. B. Karunakar (1993) 4 SCC 727** the court observed thus:

"The reason why the right to receive the report of the Inquiry Officer is considered an essential part of the reasonable opportunity it the first stage and also a principle of natural justice is that the findings recorded by the Inquiry Officer form an important material before the disciplinary authority which along with the evidence is taken into consideration by it to come to its conclusions. It is difficult to say in advance, to what extent the said findings including the punishment, if any, recommended in the report would influence the disciplinary authority while drawing its conclusions. The findings further might have been recorded without considering the relevant evidence on record, or by misconstruing it or unsupported by it. If such a finding is to be one of the documents to be considered by the disciplinary authority, the principles of natural justice require that the employee should have a fair opportunity to meet, explain and controvert it before he is condemned. It is the negation of the tenets of justice and a denial of fair opportunity to the employee to consider the findings recorded by a third party like the Inquiry Officer without giving the employee an opportunity to reply to it. Although it is true that the disciplinary authority is supposed to arrive at its own findings on the basis of the evidence recorded in the inquiry, it is also equally true that the disciplinary authority takes into consideration the findings recorded by the Inquiry Officer along with the evidence on record. In the circumstances, the findings of the Inquiry Officer do constitute an important material before the disciplinary authority which is likely to influence its conclusions. If the Inquiry Officer were only to record the evidence and forward

the same to the disciplinary authority, that would not constitute any additional material before the disciplinary authority of which the delinquent employee has no knowledge. However, when the Inquiry Officer goes further and records his findings, as stated above, which may or may not be based on the evidence on record or are contrary to the same or in ignorance of it, such findings are an additional material unknown to the employee but are taken into consideration by the disciplinary, authority while arriving at its conclusion. Both the dictates of the reasonable opportunity as well as the principles of natural justice, therefore, require that before the disciplinary, authority comes to its own conclusions, the delinquent employee should have an opportunity to reply to the Inquiry Officer's findings. The disciplinary authority is then required to consider the evidence, the report of the Inquiry Officer and the representation of the employee against it."

19. In view of the above, the order dated 05.09.1994 deserves to be quashed and matter needs to be revisited by the disciplinary authority and the order dated 05.09.1994 is accordingly hereby quashed. The matter is remitted to the disciplinary authority to reconsider the reply/ explanation of the petitioner dated 29/30.10.1993 and pass order afresh in accordance with law. Needless to say the order shall be reasoned and speaking.

20. Writ petition is **allowed** with the aforesaid observations and directions with no order as to costs.

(2019)12 ILR A229

ORIGINAL JURISDICTION
CIVIL SIDE

DATED: LUCKNOW 16.12.2019

BEFORE
THE HON'BLE ABDUL MOIN, J.

Service Single No. 23674 of 2019

Pradeep Kumar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Brijesh Kumar Singh

Counsel for the Respondents:
C.S.C., Sri S.K. Upadhyay

A. Service Law - U.P. Intermediate Education Act, 1921- Post falling under promotional quota– Petitioner appointed on direct recruitment basis as Assistant Clerk – Post cannot be treated as a direct recruitment post, instead, it be treated as promotional post.

Held **-** as the case has been argued threadbare, the Court proceeds to consider whether with the promotion of a person appointed on compassionate ground, the promotee would be considered a direct recruit. It is not the case of the petitioner that post of Head Clerk has been filled in by direct recruitment rather it is admitted that the post has been filled in by promotion of Sri Rajiv Saxena. Thus, it can safely be said that when the said post of Head Clerk was filled in on account of promotion of Sri Rajiv Saxena then the said post would go towards the promotion quota. Admittedly, the other two posts were also filled in by promotes leaving two posts against direct recruit quota. Once it was the post meant for direct recruitment quota which was filled in with the promotion of the petitioner against which complaints were made and thereafter it was found that the approval which had been granted to the promotion of the petitioner against the direct recruitment post was illegally granted. (Para 12)

Writ Petition dismissed. (E-9)

List of cases cited: -

1. Ramji Singh Vs. District Inspector of Schools, Ballia and Ors, 2006 (2) ESC 1015 (All) (distinguished)

2. Jai Kumar Singh Vs. The District Inspector of Schools and Ors (2001) 2 UPLBEC 1517

(distinguished)

3. In re: State of U.P and Ors Vs. Santosh Kumar Mishra & ors, Special Appeal Defective No. 577 of 2017 (distinguished)

4. M.C. Mehta vs. UOI & ors, (1999)6 SCC 237
5. Roshan Lal Tandon vs. Union of India AIR 1967 SC 1889

6. State of J & K vs. Triloki Nath Khosa (1974) 1 SCC 19

7. B. Manmad Reddy and others vs. Chandra Prakash Reddy and others (2010) 3 SCC 314

(Delivered by Hon'ble Abdul Moin, J.)

1. Heard learned counsel for the petitioner, learned Standing counsel appearing for the State-respondents and Sri S.K.Upadhya, learned counsel appearing as an Intervenor.

2. Under challenge is the order dated 19.08.2019 passed by the Joint Director of Education, Lucknow i.e respondent no. 2 by which it has been found that the appointment of the petitioner as Assistant Clerk and the subsequent approval granted by the District Inspector of Schools is vitiated and consequently the respondent no. 2 has directed for initiation of inquiry against the guilty employees after cancelling the promotion of the petitioner.

3. Learned counsel for the petitioner contends that a recommendation for promotion of the petitioner who was working on a Class IV post in the Institution to the post of Assistant Clerk was made on 10.11.2016. As on 10.11.2016, there were five posts in the Institution. i.e one post of Head Clerk and four posts of Assistant Clerks whereby taking the total to five posts. In terms of Regulation 2 (2) of Chapter III of Regulations framed under U.P. Intermediate Education Act, 1921 (hereinafter referred to as "Act, 1921"), the post of Head Clerk and Assistant Clerk are clubbed so as to arrive at the quota for promotion or direct recruitment per which the appointments or promotions are to take place on the said posts. The said Regulation provides that 50 percent posts out of total sanctioned post of Head Clerk and clerical cadre shall be filled by promotion of Clerks and Class IV employees working in the organization. In terms of Note to Regulation 2, it is provided that while computing 50% of the post, the number of post less than half should be ignored and half or more than half should be treated as one, as such, in this case, it would be 2.5 or three posts for promotion.

4. Learned counsel for the petitioner contends that the petitioner belongs to reserve category. There is one sanctioned post of Head Clerk and four sanctioned posts of Assistant Clerks i.e. total five in the Institution. As per the aforesaid Rules, three posts would fall against the promotion quota i.e. to be filled in by promotion. It is contended that two posts of Assistant Clerks have been filled in with the promotion of two Class IV employees namely Sri Prem Lal and Sri Rajesh Singh. A post of Assistant Clerk fell vacant with the promotion of the said Assistant Clerk as Head Clerk and as three posts are meant for promotees, consequently the third post should have

gone to the promotee i.e. the petitioner. The said post was lying vacant since 31.08.2013 and considering that the petitioner was working on a Class IV post since 22.05.2010, he was promoted as Assistant Clerk and on 25.11.2016 the District Inspector of Schools (II) granted approval to the promotion of the petitioner as Assistant Clerk. A copy of the order dated 25.11.2016 has been filed as Annexure-6 to the writ petition. The petitioner was issued with an appointment letter dated 18.03.2017, a copy of which is Annexure-7 to the writ petition, and he also joined on 21.03.2017 as Assistant Clerk and his pay fixation was also made on 11.08.2017. Subsequent thereto, the impugned order dated 19.08.2019 was passed, a copy of which is Annexure-1 to the writ petition, by the Joint Director of Education cancelling the promotion of the petitioner w.e.f. the date of promotion itself and directing for initiation of inquiry against the guilty officials. Learned counsel for the petitioner argues that the ground taken in the impugned order is that the Institution in the meeting of the Management Committee dated 10.11.2016 had recommended for promotion of the petitioner although, on the date of proposal, the post of Head Clerk and two Assistant Clerks were already occupied by the promotees and consequently the promotion of the petitioner on the post of Assistant Clerk was erroneously done as the said post fell under the direct recruitment quota and was to be filled in through direct recruitment.

5. Learned counsel for the petitioner has placed reliance on a Division Bench judgment of this Court passed in Special Appeal Defective No. 577 of 2017 Inre; State of U.P and Ors Vs. Santosh Kumar Mishra and Ors, a copy of which has been filed as annexure RA 4 to the rejoinder affidavit to contend that the post of Head Clerk has to be treated to be filled in by direct recruitment inasmuch as one Sri Rajiv Saxena had initially been appointed as Assistant Clerk through order dated 24.03.1995, a copy of which is annexure RA 3 to the rejoinder affidavit on compassionate grounds. On the post of Head Clerk falling vacant, Sri Rajiv Saxena had been promoted and consequently once any compassionate appointment can only be made against a direct recruitment quota, consequently the promotion of Sri Saxena has also to be treated as a promotion made on direct recruitment basis and, as such the respondents have patently erred in the impugned order in contending that as the post of Head Clerk was filled in through promotion as such, the same has to be treated as against promotee quota. It is also argued that in case the analogy given by the petitioner is accepted then the impugned order would become vitiated in the eyes of law as there would be only two promotees as the post of Head Clerk occupied by Sri Rajiv Saxena would be treated as a post for Direct Recruit leaving one post to be filled in through the promotion quota which has correctly been made with the promotion of the petitioner. Another ground taken to challenge the said order is that the Joint Director of Education, Lucknow has no jurisdiction to pass the impugned order as the competent authority for granting approval is District Inspector of Schools and thus the impugned order is patently without jurisdiction.

6. This Court after considering the facts of the case had summed up the issue on 29.11.2019 as per the aforesaid

arguments raised by the learned counsel for the petitioner which order, for the sake of convenience, is reproduced below:-

"Heard learned counsel for the petitioner, learned Standing counsel appearing for the State-respondents and Sri S.K. Upadhyay, learned counsel appeared as an intervenor.

Under challenge is the order dated 19.08.2019 passed by the Joint Director of Education, Lucknow i.e respondent no. 2 by which it has been found that the appointment of the petitioner as Assistant Clerk and the subsequent approval granted by the District Inspector of Schools is vitiated and consequently the respondent no. 2 has directed for initiation of inquiry against the guilty employees.

From a perusal of records it comes out that the recommendation for promotion of the petitioner to the post of Assistant Clerk took place on 10.11.2016. As on 10.11.2016, there were five posts in the Institution with which the present controversy is concerned i.e one post of Head Clerk and four posts of Assistant Clerks whereby taking the total as five posts. In terms of Regulation 2 (2) of Chapter III of Regulations framed under U.P. Intermediate Education Act, 1921 (hereinafter referred to as "Act, 1921"), the post of Head Clerk and Assistant Clerk are clubbed so as to arrive at the quota i.e promotion or direct recruitment with which the appointments or promotions are to take place. The said quota provides that 50 percent posts out of total sanctioned post of Head Clerk and clerical cadre shall be filled by promotion of Clerks and Class IV employees working in the organization. From a perusal of the averments made in paragraph 6 of the counter affidavit it comes out that one post of Head Clerk and two posts of Assistant Clerks were already filled as on 10.11.2016 in by persons who had been promoted leaving two posts to be filled in by direct recruitment. It is contended that the petitioner had been promoted against the quota manned for direct recruitment and his promotion was thus found to be irregular and consequently the impugned order has been passed.

Learned counsel for the petitioner has placed reliance on a Division Bench judgment of this Court passed in Special Appeal Defective No. 577 of 2017 Inre; State of U.P and Ors Vs. Santosh Kumar Mishra and Ors, a copy of which has been filed as annexure RA 4 to the rejoinder affidavit to contend that the post of Head Clerk has to be treated to be filled in by direct recruitment inasmuch as one Sri Rajiv Saxena has initially been appointed as Assistant Clerk through order dated 24.03.1995, a copy of which is annexure RA 3 to the rejoinder affidavit on compassionate grounds. On the post of Head Clerk falling vacant, Sri Rajiv Saxena had been promoted and consequently once any compassionate appointment can only be made against a direct recruitment quota, consequently the promotion of Sri Saxena has also to be treated as a promotion made on direct recruitment basis and consequently the respondents have patently erred to contend that the post of Head Clerk was filled in through a promotion and the same has to be treated as direct recruitment and thus in case the analogy given by the petitioner is accepted then the impugned order would become vitiated in the eyes of law as there would be only two promotees and one direct recruit i.e Sri Rajiv Saxena leaving one

post to be filled in through the promotion quota which has correctly been made with the promotion of the petitioner.

Having heard the learned counsel for the petitioner, the point in issue would be that where a person has been appointed as Assistant Clerk on compassionate grounds meaning thereby that his appointment would be treated to be against the direct recruitment quota then whether his promotion as Head Clerk would also be treated to have been made against direct recruitment quota.

Learned counsel for the petitioner prays for some time to address the Court on the aforesaid issue. As such, on his request, list this case after ten days as fresh."

7. Today, Sri B.K.Singh, learned counsel appearing for the petitioner has placed reliance on a Division Bench judgment of this Court in the case of **Ramji Singh Vs. District Inspector of Schools, Ballia and Ors** reported in **2006 (2) ESC 1015 (All)** as well as a judgment of this Court in the case of **Jai Kumar Singh Vs. The District Inspector of Schools and Ors** reported in **(2001) 2 UPLBEC 1517** to contend that the aforesaid query of this Court stands answered in both the judgments.

8. On the other hand, learned Standing counsel on the basis of averments contained in the counter affidavit argues that through letter dated 10.11.2016 sent by the Management/Principal of the Institution, a recommendation/proposal for promotion of the petitioner, a Class IV employee on the vacant post of Clerk which was vacant after promotion of Sri Nankau on the post of Head Clerk on 31.08.2013, was made. The promotion of the petitioner was approved by the then District Inspector of Schools vide order dated 25.11.2016. Complaints were received in the office of Joint Director of Education, Lucknow against the said promotion but to no avail. Subsequent thereto, through letter dated 10.04.2019 issued by the Joint Director of Education, the petitioner and the Manager/Principal of the Institution were called for hearing on 23.04.2019 on which date the petitioner and Principal of the Institution submitted their case. Records were also produced and after perusal of the file it was revealed that when the petitioner was promoted, the promotion quota of the college in the clerical cadre was complete and accordingly next promotion could only be made as direct recruitment. It is admitted that there are five posts in the clerical cadre in the Institution namely one post of Head Clerk and four posts of Assistant Clerk. The post of Assistant Clerk had fallen vacant on 31.08.2013 on account of Promotion of Sri Nankau on the post of Head Clerk and the resultant vacancy was sought to be filled in with the promotion of Sri Pradeep Kumar but on the said date one Head Clerk and two Assistant Clerks were already working in the College in question in the promotion quota and consequently the promotion of the petitioner had been done against the direct recruitment quota which was patently illegal and the approval thereto was also done illegally by the District Inspector of Schools through his order dated 25.11.2016. Taking all this into consideration, the impugned order was passed by the Joint Director of Education.

9. Sri Vinod Shukla, learned Standing counsel submits that when the promotion of the petitioner was itself illegal, consequently even if an order was

passed by the Joint Director of Education who had no jurisdiction to do so and the said order is to be set aside on the ground of technicality raised by the petitioner yet as the petitioner has argued his case threadbare, the Court may itself, considering the aforesaid facts, pass suitable orders in this regard instead of remanding the said matter on technicality. Placing reliance on the judgment of **M.C. Mehta vs. Union of India and others** reported in **(1999)6 SCC 237** it is contended that futile writs may not be issued and the Court may itself go into the merits of the case.

10. Sri S.K.Upadhyay, learned counsel appearing for the Intervenor also adopts the arguments of learned Standing counsel.

11. Heard learned counsel appearing for the contesting parties and perused the records.

12. From a perusal of the records and the arguments advanced by the learned counsels for the contesting parties it comes out that there are five posts in clerical cadre in the Institution of which one post is for Head Clerk and four posts are for Assistant Clerk. In terms of the relevant regulation, the quota would be three posts for promotion quota while two posts are meant for direct recruits. The controversy revolves around the post which fell vacant on account of Sri Rajiv Saxena, Assistant Clerk who was appointed on compassionate grounds having been promoted as Head Clerk. The name of Sri Rajiv Saxena being promoted as Head Clerk has come for the first time in the Rejoinder affidavit while in the writ petition, it had been stated by the petitioner that Sri Nankau Prasad, an Assistant Clerk had been promoted as Head Clerk and thus the post of Assistant Clerk fell vacant. The official respondents have also indicated about the post of Assistant Clerk having fallen vacant on account of promotion of Sri Nankau Prasad. Thus, it is apparent that the petitioner is trying to set up a new case through rejoinder affidavit which is legally impermissible. However, as the case has been argued threadbare, the Court proceeds to consider whether with the promotion of a person appointed on compassionate ground, the promotee would be considered a direct recruit. It is not the case of the petitioner that post of Head Clerk has been filled in by direct recruitment rather it is admitted that the post has been filled in by **promotion** of Sri Rajiv Saxena. Thus, it can safely be said that when the said post of Head Clerk was filled in on account of promotion of Sri Rajiv Saxena then the said post would go towards the promotion quota. Admittedly, the other two posts were also filled in by promotes leaving two posts against direct recruit quota. Once it was the post meant for direct recruitment quota which was filled in with the promotion of the petitioner against which complaints were made and thereafter it was found that the approval which had been granted to the promotion of the petitioner against the direct recruitment post was illegally granted and considering these facts, the impugned order has been passed by the Joint Director of Education after perusal of the records by invalidating the promotion of the petitioner from the date of his promotion itself and action has also been directed to be initiated against the guilty officials then taking into consideration the aforesaid facts, this Court does not find any illegality or infirmity in the impugned order issued by the Joint Director of Education, Lucknow.

13. So far as the judgment of **Jai Kumar Singh (supra)** is concerned, the facts were that in the Institution in question there were three sanctioned posts of Class III employees. Relevant

Regulations of Chapter III of the Act, 1921 provided that 50 percent of the total sanctioned strength of Head Clerk and Clerk should be filled in by promotion. The Note of Regulation 2 further provides that while computing 50 percent of the post, the number less than half should be ignored and half or more than half should be treated as one. The total number of sanctioned strength being three, promotion quota according to Regulation 2 (2), comes to 1.5 and by virtue of Note, two posts were to be treated under promotion quota. The first post fell vacant on 31.12.1994 on the retirement of Sri Basudeo Singh. One Sri Triloki Nath, a Class IV employee staked his claim for promotion under Chapter III, Regulation II of the Intermediate Education Act on the ground that the said post is under promotional quota. The management instead of promoting Sri Triloki Nath, appointed Sri Kunwar Tribuwan Singh on direct recruitment basis which led to litigation. Meanwhile one Sri Baij Nath Prasad who was working as Assistant Clerk was promoted as Head Clerk on the retirement of Sri Achhaybar Nath Mishra. On account of Sri Baij Nath Prasad being promoted, his post had fallen vacant and again the Management appointed one Sri Jai Kumar Singh as a direct recruit. As the appointment of Sri Jai Kumar Singh was not approved he filed Writ Petition No. 10891 of 1996 praying for approval of his appointment. The claim of Jai Kumar Singh and Kunwar Tribhuwan Singh were considered and an order dated 04.05.1998 was passed whereby the appointment of Jai Kumar Singh was held to be bad and the appointment of Kunwar Tribhuwan Singh was approved. In such circumstances, this Court held that the post which had fallen vacant due to retirement of Sri Basudeo Singh was against promotion quota and had to be filled in by promotion and the appointment of Kunwar Tribhuwan Singh as direct recruit was done wrongly by the District Inspector of Schools and on the post of Baij Nath the promotion of Sri Triloki Nath ought to have been considered. The said decision does not deal with the point in issue.

14. So far as the judgment of **Ramji Singh (supra)** is concerned, the said judgment too does not deal with the question as has been raised by this Court in the order dated 29.11.2019.

15. So far as the judgment of **Santosh Kumar Mishra (supra)** is concerned, suffice to state that a categoric averment was made in the said case on behalf of the State Government that the post of Head Clerk was occupied by direct recruitment. However, in the instant case, the respondents themselves have stated that the post of Head Clerk was occupied by a promotee. Thus, the said judgment in the case of **Santosh Kumar Mishra (supra)** is distinguishable on its own facts and will not be applicable in the facts of the instant case.

16. In this regard, though no assistance has been rendered by either learned counsel for the petitioner or the learned Standing Counsel yet the Court has itself come across certain judgments which have a direct bearing on the issue in question.

17. Hon'ble Supreme Court in the case of **Roshan Lal Tandon vs. Union of India - AIR 1967 SC 1889** has held that where the promotees and direct recruits form one class in Grade D they could not be thereafter classified again depending

upon the source from which they are drawn for the purpose of promotion to the next higher grade. For the sake of convenience, relevant observations of Hon'ble Supreme Court are reproduced as under:-

"5.....In our opinion, the constitutional objection taken by the petitioner to this part of the notification is well-founded and must be accepted as correct. At the time when the petitioner and the direct recruits were appointed to Grade 'D', there was one class in Grade 'D' formed of direct recruits and the promotees from the grade of artisans. The recruits from both the sources to Grade 'D' were integrated into one class and no discrimination could thereafter be made in favour of recruits from one source as against the recruits from the other source in the matter of promotion to Grade 'C'. To put it differently, once the direct recruits and promotees are absorbed in one cadre, they form one class and they cannot be discriminated for the purpose of further promotion to the higher Grade 'C'."

18. Likewise, a Constitution Bench of the Apex Court in the case of **State of J & K vs. Triloki Nath Khosa-(1974) 1 SCC 19** after considering the judgment of **Roshan Lal Tandon (supra)** has held as under:-

"44. The key words of the judgment are: "The recruits from both the sources to Grade 'D' were integrated into one class and no discrimination could thereafter be made in favour of recruits from one source as against the recruits from the other source in the matter of promotion to Grade 'C', (emphasis supplied). By this was meant that in the matter of promotional opportunities to Grade 'C', no discrimination could be made between promotees and direct recruits by reference to the source from which they were drawn. That is to say, if apprentice train examiners who were recruited directly to Grade 'D' as train examiners formed one common class with skilled artisans who were promoted to Grade 'D' as train examiners, no favoured treatment could be given to the former merely because they were directly recruited as train examiners and no discrimination could be made as against the latter merely because they were promotees. This is the true meaning of the observation extracted above and no more than this can be read into the sentence next following: "To put it differently, once the direct recruits and promotees are absorbed into one cadre, they form one class and they cannot be discriminated for the purpose of further promotion to the higher Grade 'C'." In terms, this was just a different way of putting what had preceded."

19. Recently, the Apex Court in the case of **B. Manmad Reddy and others vs. Chandra Prakash Reddy and others - (2010) 3 SCC 314** after considering the judgments of **Triloki Nath Khosa (supra) and Roshan Lal Tandon (supra)** has held as under:-

"The short question that falls for consideration and that was argued at considerable length before us by learned Counsel for the parties is whether persons drawn from different sources and integrated into one class/cadre/category can be classified into separate categories for purposes of promotion on the basis of the source from which they were drawn. The question is, in our opinion, squarely covered by the decisions of this Court to

which we shall presently refer but before we do so, we may briefly set out the factual backdrop in which controversy arises.....The integration of promotees and direct recruits into one class would wipe out their birth marks with the result that the same can not be made a basis for a valid classification. Any such classification would amount to classifying equals in the matter of further promotion based solely on the source from which they were drawn. Relying upon the decisions of this Court, the Tribunal and the High Court have held that inasmuch as Note 6 to Rule 3 classifies the promotees and direct recruits for the purpose of future promotion, even after their integration into one cadre the same was discriminatory hence ultra vires of Articles 14 and 16 of the Constitution ..... Such a classification based on the birth mark that stood obliterated after integration of officers coming from different source into a common cadre/category would be wholly unjustified and discriminatory."

20. Accordingly, when the facts of the instant case are tested at the touchstone of law laid down by the Apex Court in the cases of **Roshan Lal Tandon, Triloki Nath Khosa and B. Manmad Reddy (supra)** what clearly comes out is that a direct recruit on being appointed in one class would loose his birth mark and on being promoted would not retain his original source of being a direct recruit rather the integration of such persons into one class i.e. Assistant Clerk would wipe out their birth marks with the result that any such classification for further promotion based on the source from which they are drawn could not be made a basis for valid classification. Thus, once a person was appointed on direct recruitment basis as Assistant Clerk, his promotion as Head Clerk, as in the instant case, would not be treated to be a direct recruitment rather has to be treated as promotion. Viewed in this manner, it is apparent that the impugned order dated 19.08.2019 indicating that three posts i.e. one post of Head Clerk and two posts of Assistant Clerks were filled in by promotees and the promotion of the petitioner was made against direct recruitment basis thus requires no interference by this Court.

21. So far as the ground taken by the learned counsel for the petitioner that no such order could have been passed by the Joint Director of Education, suffice to state that this Court has itself gone in detail into the facts of the case whereby the Court finds that the impugned order is justified. Consequently relegating this matter on the basis of technicality to the competent authority would be a useless formality.

22. In this regard, the Apex Court in the case of **M.C.Mehta (supra)** has held as under:-

"12. On the above submissions, the following points arise for consideration:

(1) Whether this Court, in exercise of powers under Article 32 (or the High courts, generally under Article 226) is bound to declare an order of government passed in breach of principles of natural justice as void or whether the court can refuse to grant relief on the ground that the facts of the case do not justify exercise of discretion to interfere or because de facto prejudice has not been shown?

(2) Whether the court is not bound under Article 32 (or High Courts

under Article 226) to quash an order of government on ground of breach of natural justice if such an action will result in the restoration of an earlier order of government which was also passed in breach of natural justice or which was otherwise illegal?"

15. It is true that, whenever there is a clear violation of principles of natural justice, the Courts can be approached for a declaration that the order is void or for setting aside the same. Here the parties have approached this Court because the orders of the department were consequential to orders of this Court. Question however is whether the Court in exercise of its discretion under Article 32 or Article 226 can refuse to exercise discretion on facts or on the ground that no de facto prejudice is established. On the facts of this case, can this Court not take into consideration the fact that any such declaration regarding the 10.3.1999 order will restore an earlier order dated 30.7.1997 in favour of Bharat Petroleum Corporation which has also been passed without notice to HPCL and that if the order dated 10.3.1999 is set aside as being in breach of natural justice, Bharat Petroleum will be getting two plots rather than one for which it has no right after the passing of the latter order of this Court dated 7.4.98?

16. Courts are not infrequently faced with a dilemma between breach of the rules of natural justice and the Court's discretion to refuse relief even though rules of natural justice have been breached, on the ground that no real prejudice is caused to the affected party.

17. We shall initially refer to two cases where discretion was exercised not to grant relief and the first one was a case where relief was refused even though there was breach of natural justice. The first one is Gadde Venkteswara Rao v. Government of Andhra Pradesh and Ors. MANU/SC/0020/1965 : [1966]2SCR172 . There the Panchayat Samithi, in exercise of its statutory powers passed a resolution on 25.8.1960 to locate a primary health center at Dharmajigudem. Later, it passed another resolution on 29.5.1961 to locate it at Lingapalem. On a representation by villagers of Dharmajigudem, government passed orders on 7.3.1962 setting aside the second resolution dated 29.5,1961 and thereby restoring the earlier resolution dated 25.8.1960. The result was that the health center would continue at Dharmajigudem. Before passing the orders dated 7.3.62, no notice was given to the Panchayat Samithi. This Court traced the said order of the government dated 7.3.1962 to Section 62 of the Act and if that were so, notice to the Samithi under Section 62(1) was mandatory. Later, upon a review petition being filed, government passed another order on 18.4.1963 cancelling its order dated 7.3.62 and accepting the shifting of the primary center to Lingapalem. This was passed without notice to the villagers of Dharmajigudem. This order of the government was challenged unsuccessfully by the villagers of Dharmajigudem in the High Court. On appeal by the said villagers to this Court, it was held that the latter order of the government dated 18.4.1963 suffered from two defects, it was issued by Government without prior show cause notice to the villagers of Dharmajigudem and government had no power of review in respect of government orders passed under Section 62(1). But that there were other facts which disentitled the quashing of the order dated 18.4.63 even though it

was passed in breach of principles of natural justice. This Court noticed that the setting aside of the latter order dated. 18.4.63 would restore the earlier order of Government dated 7.3.62 which was also passed without notice to the affected party, namely, the Panchayat Samithi. It would also result in the setting aside of a valid resolution dated 29.5.61 passed by the Panchayat Samithi. This Court refused relief and agreed that the High Court was right in not interfering under Article 226 even if there was violation of natural justice. Subba Rao, J (as he then was) observed (p. 189) as follows:

Both the orders of the government, namely, the order dated March 7, 1962 and that dated April 18, 1963, were not legally passed : the former, because it was made without giving notice to the Panchayat Samithi and the latter, because the Government had no power under Section 72 of the Act to review an Order made under Section 62 of the Act and also because it did not give notice to representatives of Dharmajigudem village.

His Lordship concluded as follows:

In those circumstances, was it a case for the High Court to interfere in its discretion and quash the order of the government dated April 18, 1963? If the High Court had quashed the said order, it would have restored an illegal order it would have given the Health center to a village contrary to the valid resolutions passed by the Panchayat Samithi. The High Court, therefore, in our view, rightly refused to exercise its extraordinary discretionary power in the circumstances of the case.

18. The above case is clear authority for the proposition that it is not always necessary for the Court to strike down an order merely because the order has been passed against the petitioner in breach of the natural justice. The Court can under Article 32 or Article 226 refuse to exercise its discretion of striking down the order if such striking down will result in restoration of another order passed earlier in favour of the petitioner and against the opposite party, in violation of principles of natural justice or is otherwise not in accordance with law"

22. Taking into consideration the aforesaid discussion, no case for interference is made out with the impugned order. The writ petition is dismissed.

(2019)12 ILR A239

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 02.12.2019

BEFORE
THE HON'BLE RAJESH SINGH CHAUHAN, J.

Service Single No. 32015 of 2019

Rajesh Chaudhary ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sri Neel Kamal Mishra

Counsel for the Respondents:
C.S.C.

A. Service Law - U.P. Government Servant (Discipline and Appeal) Rules,1999-Rule 9- Inquiry report rejected by disciplinary authority-without assigning valid and cogent reason-re-enquiry ordered against the Petitioner-for the 4th time in 10 years-order for *denovo* inquiry illegal, arbitrary and uncalled.

Held, Rule 9(1) clearly mandates that the disciplinary authority may, for the reasons to be recorded in writing, remit case for reinquiry to the same, meaning thereby if the disciplinary authority remits the matter for re-inquiry the reasons to that effect must be recorded. (Para 6)

Writ Petition allowed. (E-9)

List of Cases cited: -

1. in re: Vijay Shankar Pandey vs. Union of India and another (2014)10 SCC 589

2. Dr. Atul Darbari vs. State of U.P. and others- Writ-A No. 10552/2016

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri Upendra Nath Mishra, learned Senior Advocate assisted by Sri Neel Kamal Mishra, learned counsel for the petitioner and Sri Ran Vijay Singh, learned Additional Chief Standing Counsel for the State-respondents.

2. By means of this petition the petitioner has assailed the validity of the order dated 14.10.2019 passed by the respondent no. 1 whereby the inquiry report submitted by the inquiry officer vide letter dated 23.7.2019 has been rejected by the disciplinary authority in a mechanical and routine manner without assigning any valid or cogent reasons and a re-inquiry for the 4th time in a span of 10 years, have been ordered against the petitioner.

3. On the first date of admission this Court passed order dated 21.11.2019 as under :

"Heard Sri Upendra Mishra, learned Senior Counsel assisted by Sri Neel Kamal Mishra, learned counsel for petitioner and learned State Counsel appearing on behalf of opposite parties.

Under challenge is order dated 14.10.2019 whereby inquiry report dated 23.07.2019 submitted in third inquiry proceedings against petitioner have been disbelieved and directions have been issued for holding a fresh inquiry with regard to the same.

Learned counsel for petitioner submits that earlier two inquiries were initiated against petitioner with regard to similar charges. In the first inquiry, petitioner had been exonerated from charges levelled against him on the ground that charges could not be proved against him although recommendation was made by inquiry officer for issuance of fresh charge-sheet to petitioner specifically indicating charges against him. In pursuance of same, a second charge-sheet was issued to petitioner on 08.06.2010 containing similar charges. In the said proceedings, inquiry report were submitted on 18.01.2011 where after punishment order was passed on 19.06.2013.

Said punishment order was challenged by petitioner before the U.P. Public State Service Tribunal in which punishment was quashed granting liberty to authorities for initiating fresh inquiry proceedings against petitioner which was concluded within a period of four months. However it has been submitted that re-inquiry was directed after expiry of period of four months. However the aforesaid inquiry was permitted to be concluded within a further period of three months in petition filed by petitioner.

It has been submitted that in pursuance thereof, third inquiry proceedings on the basis of same charge-sheet ensued and in which the inquiry report dated 23.07.2019 has been

submitted which has been rejected by means of order dated 14.10.2019 which is impugned herein.

Learned counsel for petitioner submits that the impugned order ordering re-inquiry has been passed without indicating any reasons for disagreement with the inquiry report and in violation of Rule 9(1) of U.P. Government Servant (Discipline and Appeal) Rules 1999 and various judgments on the said aspect as such it has been submitted that the order impugned is clearly non-speaking in nature and indicates non-application of mind by authority concerned.

Learned State Counsel seeks time to obtain instructions in this matter.

Prima facie, the submissions advanced by learned counsel for petitioner require consideration since a perusal of order impugned does not indicate any reasons or disagreement being recorded by the authority concerned.

As such opposite parties are granted three days' time to seek instructions.

List on 28.11.2019 as a fresh case in the additional cause list. On the said date, learned State Counsel shall also produce the inquiry report submitted vide letter dated 23.07.2019."

4. In compliance of the aforesaid order Sri Ran Vijay Singh has produced the copy of the letter dated 27.11.2019 preferred by Special Secretary of the Department addressed to the Chief Standing Counsel, High Court, Lucknow Bench, Lucknow enclosing therewith the copy of the inquiry report dated 18.7.2018 submitted on 23.7.2019, the same are taken on record. The findings of the inquiry officer reveals that the charge no. 1 has, however, not proved against the petitioner but he has been held responsible for supervisory control. Charge nos. 2,3 and 4 has not been proved against the petitioner. It appears that this is a detailed inquiry report which runs in 23 pages.

5. Considering the stand of the department, evidences of the department and the submission of the petitioner this is a peculiar case wherein the third inquiry has been conducted and concluded against the petitioner for the reasons indicated in the order dated 21.11.2019 passed by this Court. It would be apt to reproduce Rule 9 of the U.P. Government Servant (Discipline and Appeal) Rules, 1999 as under :

"**9. Action on Inquiry Report.** - (1) The disciplinary authority may, for reasons to be recorded in writing, remit the case for re-inquiry to the same or any other Inquiry Officer under intimation to the charged Government servant. The Inquiry Officer shall thereupon proceed to hold the inquiry from such stage as directed by the disciplinary authority, according to the provisions of Rule 7.(2) The disciplinary authority shall, if it disagrees with the findings of the Inquiry Officer on any charge, record its own findings thereon for reasons to be recorded.(3) In case the charges are not proved, the charged Government servant shall be exonerated by the disciplinary authority of the charges and inform him accordingly;(4) If the disciplinary authority having regard to its findings on all or any of charges is of the opinion that any penalty specified in Rule 3 should be imposed on the charged Government servant, he shall give a copy of the inquiry report and his findings recorded under sub-rule (2) to the charged

Government servant and require him to submit his representation if he so desires, within a reasonable specified time. The disciplinary authority shall, having regard to all the relevant records relating to the inquiry and representation of the charged Government servant, if any, and subject to the provisions of Rule 16 of these rules, pass a reasoned order imposing one or more penalties mentioned in Rule 3 of these rules and communicate the same to the charged Government servant."

6. Rule 9(1) clearly mandates that the disciplinary authority may, for the reasons to be *recorded in writing*, remit case for re-inquiry to the same, meaning thereby if the disciplinary authority remits the matter for re-inquiry the reasons to that effect must be recorded. What the impugned order dated 14.10.2019 reveals that no reasons as such has been explained and only this much has been indicated that the inquiry officer has conducted the inquiry in a cursory manner. For the brevity the impugned order dated 14.10.2019 is being reproduced as under:

" उत्तर प्रदेश शासन
लोक निर्माण अनुभाग–13
संख्या – 1974/23–13–19–02(सी0पी0)/14
लखनऊ : दिनांक 14 अक्टूबर, 2019

कार्यालय–ज्ञापन

श्री राजेश चौधरी, तत्कालीन सहायक अभियन्ता, प्रान्तीय खण्ड, लोक निर्माण विभाग, जौनपुर की उक्त तैनाती अवधि में केन्द्रीय भण्डार में पायी गयी कम सामग्रियों के कारण हुई शासकीय क्षति के लिए शासन के कार्यालय ज्ञाप संख्या–2884/23–13–09–12(6)ईएम/09, दिनांक 13.7.2009 द्वारा उनके विरूद्ध उ0प्र0 सरकारी सेवक (अनुशासक एवं अपील) नियमावली–1999 के नियम–7 के अन्तर्गत अनुशासिक कार्यवाही संस्थित करते हुए मुख्य अभियन्ता (मु0–1), लोक निर्माण विभाग, लखनऊ को जांच अधिकारी नामित किया गया। कालान्तर में शासन के कार्यालय आदेश संख्या–2337/23–13–10–12(6)ईएम/09, दिनांक 7.6.2010 द्वारा मुख्य अभियन्ता (मु0–1), लोक निर्माण विभाग, लखनऊ के स्थान पर मुख्य अभियन्ता (परिवाद), लोक निर्माण विभाग, लखनऊ को जांच अधिकारी नामित किया गया।

2– प्रश्नगत अनुशासनिक कार्यवाही में श्री चौधरी के विरूद्ध आरोप सिद्ध पाये जाने के दृष्टिगत शासन के कार्यालय आदेश संख्या–1259/23–13–13–12(6)ईएम/09, दिनांक 19.6.2013 द्वारा उन्हें सहायक अभियन्ता के निम्नतर प्रक्रम पर पदावनत किये जाने एवं प्रकरण में कारित की गयी कुल शासकीय क्षति रू0 63,17,025.00 की वसूली किये जाने का दण्ड दिया गया।

3– उक्त दण्डादेश दिनांक 19.6.2013 के विरूद्ध निर्देश याचिका संख्या–1788/2013 राजेश चौधरी बनाम उ0प्र0 राज्य व अन्य योजित की गयी, जिसमें मा0 अधिकरण द्वारा पारित आदेश दिनांक 19.01.2017 के अनुपालन में श्री राजेश चौधरी, तत्कालीन सहायक अभियन्ता, प्रान्तीय खण्ड, लोक निर्माण विभाग, जौनपुर के विरूद्ध निर्गत दण्डादेश दिनांक 19.6.2013 को निरस्त करते हुए, कार्यालय ज्ञाप सं0–1537/23–13–17–2(सी0पी0)/14, दिनांक 27.6.2017 द्वारा आरोप पत्र का उत्तर दिये जाने के स्तर से अनुशासनिक कार्यवाही रि–ओपेन की गयी तथा मुख्य अभियन्ता (मु0–1), लोक निर्माण विभाग, लखनऊ को जांच अधिकारी नामित किया गया।

4– इस संबंध में जांच अधिकारी/मुख्य अभियन्ता (मु0–1), लोक निर्माण विभाग, लखनऊ के पत्रांक–296 कैम्प मु0अभि0(मु0–1)जांच/19, दिनांक 23.7.2019 के माध्यम से जांच आख्या उपलब्ध करायी गयी है। जांच आख्या एवं प्रकरण में उपलब्ध अन्य सुसंगत अभिलेखों के परीक्षणोपरान्त पाया गया कि जांच अधिकारी द्वारा नितान्त सतही तौर पर प्रकरण की जांच कर जांच आख्या उपलब्ध करायी गयी है, जो स्वीकार योग्य नहीं है।

5– वर्णित स्थिति में सम्यक विचारोपरान्त श्री राजेश चौधरी, तत्कालीन सहायक अभियन्ता, प्रान्तीय खण्ड, लोक निर्माण

विभाग, जौनपुर के विरूद्ध जांच अधिकारी/मुख्य अभियन्ता (मु0–1), लोक निर्माण विभाग, लखनऊ के उक्त सन्दर्भित पत्र दिनांक 23.7.2019 द्वारा उपलब्ध करायी गयी जांच आख्या को अस्वीकार करते हुए प्रश्नगत जांच कार्यवाही में मुख्य अभियन्ता (मु0–1), लोक निर्माण विभाग, लखनऊ के स्थान पर मुख्य अभियन्ता, इण्डो–नेपाल बार्डर, लोक निर्माण विभाग, लखनऊ को जांच अधिकारी नामित किया जाता है।

अधिशासी अभियन्ता, प्रान्तीय खण्ड, लोक निर्माण विभाग, जौनपुर प्रस्तुतकर्ता अधिकारी होंगे।

श्री राज्यपाल की आज्ञा से,

नितिन रमेश गोकर्ण

प्रमुख सचिव।

संख्या–1974(1)/23–13–2019–तद्दिनांक

प्रतिलिपि निम्नलिखित को सूचनार्थ एवं आवश्यक कार्यवाही हेतु प्रेषित :–

1– प्रमुख अभियन्ता (विकास) एवं विभागाध्यक्ष, लोक निर्माण विभाग, उ0प्र0 लखनऊ।

2– मुख्य अभियन्ता (परिवाद), लो0नि0वि0, लखनऊ को एक अतिरिक्त प्रति सहित इस आशय से प्रेषित कि संबंधित अधिकारी की प्रति तामील कराकर तामीली की सूचना शासन को एक सप्ताह में उपलब्ध कराने का कष्ट करें।

3– मुख्य अभियन्ता (मु0–1), लोक निर्माण विभाग, लखनऊ को इस आशय से प्रेषित कि उक्त जांच से संबंधित समस्त अभिलेख मुख्य अभियन्ता, इण्डो–नेपाल बार्डर, लोक निर्माण विभाग, लखनऊ (नवीन जांच अधिकारी) को अविलम्ब उपलब्ध कराना सुनिश्चित करें।

4– मुख्य अभियन्ता, इण्डो–नेपाल बार्डर, लोक निर्माण विभाग, लखनऊ (नवीन जांच अधिकारी) को इस निर्देश के साथ प्रेषित कि वे पूर्व जांच अधिकारी से जांच संबंधी समस्त अभिलेख प्राप्त कर, शासन के कार्यालय ज्ञाप दिनांक 13.7.2009 द्वारा दिये गये निर्देशों के क्रम में आरोप पत्र का उत्तर दिये जाने के स्तर से रि–ओपेन अनुशासनिक कार्यवाही में श्री राजेश चौधरी, तत्कालीन सहायक अभियन्ता, प्रान्तीय खण्ड, लोक निर्माण विभाग, जौनपुर को सुनवाई का पूर्ण अवसर देते हुए समयान्तर्गत जांच आख्या शासन को उपलब्ध करायें।

5– मुख्य अभियन्ता, वाराणसी क्षेत्र, लोक निर्माण विभाग, वाराणसी।

6– अधिशासी अभियन्ता, प्रान्तीय खण्ड, लोक निर्माण विभाग, जौनपुर (प्रस्तुतकर्ता अधिकारी)।

7– सम्बन्धित अधिकारी द्वारा मुख्य अभियन्ता (परिवाद), लोक निर्माण विभाग, लखनऊ।

8– लोक निर्माण अनुभाग–4

9– विभागीय पुस्तिका।

आज्ञा से,

हस्ताक्षर – अपठनीय

(राजेश कुमार पाण्डेय)

अनु सचिव।

7. Para 4 of the impugned order is satisfaction of the disciplinary authority which is against Rule 1 of the Disciplinary Rules, 1999. The disciplinary authority must have indicated the specific reasons as to why he is not agreeable with the findings of the inquiry officer and what are the flaws and lapses in the inquiry report which convinced him to issue direction for re-inquiry. Therefore, the subjective satisfaction of the disciplinary authority is not in conformity with Rule 9(1) of the Rules, 1999. The Division Bench of this Court in the identical facts and circumstances has passed the judgment and order dated 5.4.2016 i Writ-A No. 10552/2016 (Dr. Atul Darbari vs. State of U.P. and others) allowing the said writ petitions quashing the impugned order directing the disciplinary authority to pass appropriate order on the basis of inquiry report. Para 5 of the said judgment indicates the impugned order of that writ petition dated 4.2.2016 and paras 8,13,16,17,19,20,22,23,25,27,28,29 clarifies the factual and legal matrix of the issue, therefore, for the brevity the

impugned order of that writ petition dated 4.2.2016 and other relevant paras are being reproduced as under :

" उत्तर प्रदेश शासन
श्रम अनुभाग–6
संख्या – 85/36–6–2016–6 रिट/2010

लखनऊ, दिनांक 4 फरवरी, 2016

डा0 अतुल दरबारी, चिकित्सा अधिकारी का0रा0बी0 चिकित्सालय, नैनी, इलाहाबाद के विरूद्ध नोडल अधिकारी कोर्टकेस का0रा0बी0 योजना, श्रम चिकित्सा सेवाएँ इलाहाबाद के रूप में रिट याचिका संख्या 8350/1991 में दिनांक 12.3.2004 को मा0 उच्च न्यायालय, इलाहाबाद द्वारा पारित आदेश की प्रमाणित प्रति निदेशालय में उपलब्ध न कराने के कारण मा0 न्यायालय द्वारा दिए गए आदेश का क्रियान्वयन अतिविलम्ब से करते हुए नियुक्ति हेतु अपात्र श्री विजय नारायन यादव इ0सी0जी0 टैक्नीशियन व श्री राम लखन सैनी, ओ0टी0 टैक्नीशियन की सेवा दिनांक 11.5.2010 को समाप्त की गयी। इस प्रकार अपात्र कर्मचारियों को दिनांक 12.2.2004 से 11.5.2010 तक सेवा में रखकर वेतन के रूप में सरकार का अनावश्यक रूप से रू0 17,41,755/ का अधिक भुगतान करना पड़ा तथा आयोग्य कर्मियों से मरीजों के उपचार में सहयोग लेने का खतरा उठाना पड़ा। डा0 दरबारी के कर्तव्य के प्रति उदासीनता व लापरवाही के कारण सरकार को रू0 17,41,755/ की क्षति पहुंचाने तथा मरीजों के उपचार को खतरे में डालने के लिये आरोपित करते हुये कार्यालय ज्ञाप संख्या 642/30–6–2012–6 रिट/2010, दिनांक 24.8.2012 द्वारा अनुशासनिक कार्यवाही संस्थित करते हुए आरोप–पत्र अनुमोदित कर प्रश्नगत मामले की जांच हेतु श्री रूद्र कुमार गुप्ता, विशेष सचिव, श्रम विभाग, उत्तर प्रदेश शासन को जांच अधिकारी नामित किया गया था।

2. प्रकरण में नामित जांच अधिकारी श्री रूद्र कुमार गुप्ता द्वारा दिनांक 29.9.2014 एवं 14.10.2014 को जांच आख्या प्रस्तुत की गयी। जांच अधिकारी द्वारा प्रस्तुत जांच आख्या से असहमत होकर प्रकरण की पुनः जांच का निर्णय लिया गया है, अतः डा0 अतुल दरबारी, चिकित्सा अधिकारी का0रा0बी0चिकित्सालय, नैनी, इलाहाबाद के विरूद्ध कार्यालय–ज्ञाप दिनांक 24.8.2012 द्वारा संस्थित अनुशासनिक कार्यवाही को एतदद्वारा निरस्त करते हुए प्रकरण की पुनः जांच हेतु श्री योगेश कुमार, विशेष सचिव, श्रम, उ0प्र0 शासन को जांच अधिकारी नामित किया जाता है।

3. जांच अधिकारी से अपेक्षित है कि प्रकरण की 01 माह में जांच पूर्ण कर आख्या प्रस्तुत की जाये।

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डा0 अनिता भटनागर जैन,
प्रमुख सचिव

8. Be that as it may, the question is whether the disciplinary authority could have resorted to such a practice of abandoning the Inquiry already undertaken and resort to appointment of a fresh enquiring officer.

13. The controversy in hand has been subjected to detailed scrutiny by a Constitution Bench of the Supreme Court in K. R. Deb V/s. the Collector of Central Excise, Shillong AIR 1971 SC 1447 in which Hon'ble Apex Court has proceeded to examine the question in the context of Rule 15 (1) Rule 15(1) of the Central Civil Services (Classification, Control and Appeal) Rules, 1957. It was a case where an enquiry was ordered against a sub-Inspector, Central Excise. The inquiry officer held that the charge was not proved. Thereafter the disciplinary authority appointed another inquiry officer "to conduct a supplementary open inquiry". Such supplementary inquiry was conducted and a report that there was "no conclusive proof" to "establish the charge" was made. Not satisfied, the disciplinary authority thought it fit that "another inquiry officer should be appointed to inquire afresh into the charge". In K.K. Deb's case (supra) Hon'ble Supreme Court observed that an Enquiry Officer may be asked by the

Disciplinary Authority to record further evidence if there had been no proper enquiry because of some serious defect or because some important witnesses were not examined. The Court categorically held therein that the previous enquiry could not be set aside on the ground that the report of the Enquiry Officer did not appeal to the disciplinary Authority. Relevant paragraphs 12 and 13 of the judgement are reproduced hereinafter:-

"12. It seems to us that Rule 15, on the face of it, really provides for one inquiry but it may be possible if in a particular case there has been no proper enquiry because some serious defect has crept into the inquiry or some important witnesses were not available at the time of the inquiry or for some other reason, the Disciplinary Authority may ask the Inquiry Officer to record further evidence. But there is no provision in Rule 15 for completely setting aside previous inquiries on the ground that the report of the Inquiring Officer or Officers does not appeal to the Disciplinary Authority. The Disciplinary Authority has enough powers to reconsider the evidence itself and come to its own conclusion under Rule 9.

13. In our view the rules do not contemplate an action such as was taken by the Collector on February 13, 1962. It seems to us that the Collector, instead of taking responsibility himself, was determined to get some officer to report against the appellant. The procedure adopted was not only not warranted by the rules but was harassing to the appellant."

16. It appears that the respondent no.1 dissatisfied with such earlier enquiry reports, ordered a de novo enquiry under the impugned order dated 4.2.2016 and appointed Shri Rudra Kumar Gupta, Special Secretary, Labour Department, Government of UP as Enquiry Officer. This practice of the respondent no.1 in carelessly and callously discarding enquiry reports, which are not to its liking and ordering for denovo enquiry without even disclosing the reasons, which weighed with it for rejecting the findings of the previous enquiry Officer, is a clear transgression of the law and requires to be deprecated in the strongest terms.

17. In Union of India V/s. M. L. Capoor and others AIR 1974 SC 87, the Supreme Court observed:

"28. . . . Reasons are the links between the materials on which certain conclusions are based and the actual conclusions. They disclose how the mind is applied to the subject matter for a decision whether it is purely administrative or quasi-judicial. They should reveal a rational nexus between the facts considered and the conclusions reached. Only in this way can opinions or decisions recorded be shown to be manifestly just and reasonable. . . . "

19. 'Reasons' are the milestones which chart the journey of the 'decision-maker' in reaching his destination. Absence of reasons thus leaves the decision-making process without a rudder and open to arbitrariness. Viewed in this light, the approach of respondent no.1 in instituting denovo enquiry by appointing Enquiry Officer afresh without even setting aside the findings recorded by the earlier Enquiry Officer, giving due reasons therefore, is clearly unsustainable in law.

20. In the present matter, it has been urged that the impugned order is in teeth of Rules 8 and 9 of Rules 1999. For ready reference, Rules 8 and 9 of Rules 1999 are extracted:-

"8. Procedure for imposing major penalties - (1) No order imposing any of the major penalties specified in Rule 6 shall be made except after an inquiry is held as far as may be, in the manner provided in this rule and Rule 10, or, provided by the Public Servants (Inquiries) Act, 1850 (37 of 1850) where such inquiry is held under that Act.

(2) Whenever the disciplinary authority is of the opinion that there are grounds for inquiring into the truth of any imputation of misconduct or misbehaviour against a member of the Service, it may appoint under this rule or under the provisions of the Public Servants (Inquiries) Act, 1850, as the case may be, an authority to inquire into the truth thereof.

(3) Where a Board is appointed as the inquiring authority it shall consist of not less than two senior officers provided that at least one member of such a Board shall be an officer of the service to which the member of the service belongs.

9. Action on Inquiry Report.-- (1) The Disciplinary Authority may, for reasons to be recorded in writing, remit the case for re-inquiry to the same or any other Inquiry Officer under intimation tot he charged Government servant. The Inquiry Officer shall thereupon proceed to hold the inquiry from such stage as directed by the Disciplinary Authority, according to the provisions of Rule 7.

(2) The Disciplinary Authority shall, if it disagrees with the findings of the Inquiry Officer on any charge, record its own findings thereon for reasons to be recorded.

(3) In case the charges are not proved, the charged Government servant shall be exonerated the Disciplinary Authority of the charges and informed him accordingly.

(4) If the Disciplinary Authority, having regard to its findings on all or any of charges is of the opinion that any penalty specified in Rule 3 should be imposed on the charged Government servant, he shall give a copy of the inquiry report and his findings recorded under sub-rule (2) to the charged Government servant and require him to submit his representation if he so desires, within a reasonable specified time. The Disciplinary Authority shall, having regard to all the relevant records relating to the inquiry and representation of the charged Government servant, if any, and subject to the provisions of Rule 16 of these rules, pass a reasoned speaking order imposing one or more penalties mentioned in Rule 3 of these rules and communicate the same to the charged Government servant."

22. Rule 9 prescribes action on the enquiry report. Rule 9 (1) provides that the Disciplinary Authority may, for reasons to be recorded in writing, remit the case for re-inquiry to the same or any other Inquiry Officer under intimation to the charged Government servant. The Inquiry Officer shall thereupon proceed to hold the inquiry from such stage as directed by the Disciplinary Authority, according to the provisions of Rule 7. Rule 9 (2) provides that the Disciplinary Authority shall, if it disagrees with the findings of the enquiry Inquiry Officer on any charge, record its own findings thereon for reasons to be recorded. Rule 9 (3) provides that in case the charges are not proved, the charged Government servant shall be exonerated the Disciplinary Authority of the charges and informed him accordingly. Rule 9 (4) provides that If the Disciplinary Authority,

having regard to its finding on all or any of charges is of the opinion that any penalty specified in Rule 3 should be imposed on the charged Government Servant, he shall give a copy of the inquiry report and his finding recorded under sub-rule (2) of Rule 9 to the charged Government Servant and require him to submit his representation if he so desires, within a reasonable specified time. The Disciplinary Authority shall having regard to all the relevant records relating to the inquiry and representation of the charged Government Servant, if any, and subject to the provisions of Rule 16 of these rules, passes a reasoned order imposing one or more penalties mentioned in Rule 3 of these and communicate the same to the charged Government Servant.

23. It can be seen from the above that the normal rule is that there can be only one enquiry. Hon'ble Apex Court has also recognized the possibility of a further enquiry in certain circumstances enumerated therein. The decision, however, makes it clear that the fact, that the report submitted by the enquiring authority is not acceptable to the disciplinary authority, is not a ground for completely setting aside the enquiry report and ordering a fresh denovo enquiry. Therefore, we are of the considered opinion that the principle laid down in K.R. Deb's case, would squarely apply to the case in hand.

25. In our opinion, on general principles, there can be only one enquiry in respect of charges for a particular misconduct and that is also what the Rules usually provide. If, for some technical or other good ground, procedural or otherwise the first enquiry or punishment or exoneration is found bad in law, there is no principle that a second enquiry cannot be initiated. Therefore, when a completed enquiry proceedings is set aside by a competent forum on a technical or on the ground of procedural infirmity, fresh proceedings on the same charges is permissible.

27. A bare perusal of the order impugned and the record in question this much is accepted position that at no point of time the disciplinary authority had proceeded to give any reason for disagreeing with the earlier enquiry reports in question. Therefore, in these circumstances there is no justification for conducting a second enquiry on the very same charges. Law is clear on the subject, and permits only disciplinary proceedings and same cannot be approved as harassment and allowing such practice is not in the interest of public service. Same view has also been approved by Hon'ble Apex Court in Nand Kumar Verma vs. State of Jharkhand and others (2012) 3 SCC 580 and Vijay Shankar Pandey vs. Union of India and another (2014) 10 SCC 589.

28. We, therefore, have no hesitation in holding that the impugned order dated 4.2.2016 for denovo/ a fresh enquiry against the petitioner on the same charges, which were subject matter of the enquiry reports dated 29.9.2014 and 14.10.2014, is illegal and arbitrary; and hence, is liable to be set aside. The impugned order dated 4.2.2016 is consequently set aside.

29. The writ petition is accordingly allowed and the respondent no.1 is directed to take appropriate decision in the light of the enquiry reports dated 29.9.2014 and 14.10.2014 within a period of two months from the date of production of a certified copy of this order before him. There shall be no order as to costs."

8. Not only the above Hon'ble Apex Court in re: Vijay Shankar Pandey vs. Union of India and another reported in (2014)10 Supreme Court Cases 589, vide para 32 has explained the word 'cursory'. As per the view of Hon'ble Apex Court indicating the word that the inquiry officer has made inquiry in cursory manner would not suffice but as to how the findings of the inquiry officer are cursory should be explained. Para 32 is being reproduced as under :

"32. Coming to the first reason- that the report is a cursory report. A copy of the report is not made available to the appellant. The content of the said report is not known. The only admitted fact about the report is that the appellant was exonerated of all the charges made against him. If such a conclusion is otherwise justified, whether the report is cursory or elaborate, should make no difference to the legality of the report. What matters is the correctness of the conclusions recorded, not the length or the elegance of the language of the report which determines the legality of the conclusions recorded in it. Therefore, this ground is equally untenable."

9. Sri Ran Vijay Singh has however, tried to justify the office memo dated 14.10.2019 by submitting that the disciplinary authority has found that the inquiry officer has conducted cursory inquiry, therefore, the direction for re-inquiry may be issued as this is the domain and prerogative of the disciplinary authority but on being confronted in the light of the dictum of Hon'ble Apex Court in re: Vijay Shankar Pandey (supra) wherein the term 'cursory' has been explained and defined, Sri Ran Vijay Singh has nothing to defend. Further, on being confronted regarding the judgment in re: Dr. Atul Darbari (supra) wherein the similar facts and circumstances have been considered by the Division Bench of this Court and the said matter was allowed considering the various judgments of Hon'ble Apex Court besides the judgment of Constitution Bench of Hon'ble Supreme Court in re: K.R Deb's (supra), Sri Ran Vijay Singh could not properly justify the office memo dated 14.10.2019 whereby the direction of re-inquiry has been issued that too 4th time in a span of 10 years.

10. Considering the rival submissions of learned counsel for the parties and considering the relevant material available on record viz. a viz. the dictum of Hon'ble Apex Court and the Division Bench of this Court in the case of Dr. Atul Darbari (supra) I am of the considered opinion that the office memo dated 14.10.2019 is illegal, arbitrary and uncalled for and liable to be quashed. I have also no hesitation in holding that impugned order dated 14.10.2019 for de-novo and fresh inquiry against the petitioner by the authorities which were subject matter of inquiry report dated 18.7.2017 is illegal and arbitrary.

11. Therefore, a writ in the nature of certiorari is issued quashing the office memo dated 14.10.2019 passed by the opposite party no. 1, Annexure no. 1 to the writ petition.

12. A writ in the nature of mandamus is issued directing the disciplinary authority to take appropriate decision in the light of the inquiry report dated 18.7.2019 within a period of two months from the date of production of the certified copy of the order of this Court.

13. Writ petition is ***allowed.***

14. No order as to costs.

(2019)12 ILR A249

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.11.2019

BEFORE
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Writ-C No. 27906 of 2019

Committee of Management Angoori Devi Inter College Aurangabad Bulandshahar & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Pradip Kumar Srivastava

Counsel for the Respondents:
C.S.C., A.S.G.I., Sri Brijesh Kumar, Sri Jagdish Pathak, Sri Sachindra Upadhyay

A. Civil Law - Employees' Provident Funds and Miscellaneous Provisions Act, 1952 – Section 7A and 7I – Employees' Provident Fund Appellate Tribunal (Procedure) Rules, 1997 – Rule 7 – Limitation – Appeal may be preferred within 60 days from the date of issue of the order, provided that the Tribunal may, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal within the prescribed period, extend the said period by a further period of 60 days. (Para 30)

Held –37. The time limit is prescribed by the rule making authority for filing an appeal and also the extended period having been provided, and no further extension thereof having been envisaged or contemplated, the Appellate Authority could not have granted any further extension. In view of the aforesaid, the order passed by the Appellate Authority recording its conclusion that the appeal was filed beyond the statutory period of limitation, cannot be faulted with.

B. Limitation Act, 1963 – Applicability – Principle of implied exclusion of Act, 1963 by Special law – EPF Act, 1952 is a special law – In terms of the rules framed thereunder a certain period of limitation for filing an appeal having been provided for in clear terms and a further provision having been made for extension of such period only upto a specified time period and no further, the Appellate Tribunal would have no jurisdiction to treat within limitation, an appeal filed before it beyond such maximum time limit specified in terms of the statutory rules – The provisions contained under the Act, 1963 would therefore not be applicable for seeking extension of time beyond the statutory time period of 60 days from the date of issue of the notification/order, extendable by a further period of 60 days. (Para 31 & 32)

C. Interpretation of statute – Where the statute confers power on the authority to condone the delay only to a limited extent the same cannot be stretched or extended beyond what has been provided under the statute. (Para 33)

Writ Petition dismissed. (E-1)

List of cases cited: -

1. M/s Port Shramik Cooperative Enterprises Ltd. Vs. Employees Provident Fund Organisation 2018 (156) FLR 363 (Cal.H.C.)

2.Assistant Regional Provident FundCommissioner, Meerut Vs. Employees Provident Fund Appellate Tribunal & Ors. 2006 (108) FLR 35 (Del.H.C.)

3. Mohd. Ashfaq Vs. State Transport Appellate Tribunal U.P. & Ors. (1976) 4 SCC 330

4. Dr. A.V. Joseph Vs. Assistant Provident Fund Commissioner & Anr. 2009 (122) FLR 184 (Ker.H.C.)

5. C.B. Sharma Vs. Employees' Provident Funds Appellate Tribunal & Ors. 2012 (135) FLR 637 (P&H H.C.)

6. Saint Soldier Modern Senior Secondary School Vs. Regional Provident FundCommissioner 2014 (142) FLR 730 (Del.H.C.)

7. Lotus Chemicals Pvt. Ltd. Vs. Assistant Provident Fund Commissioner, (Compl.) Rourkela 2018 (157) FLR 440 (Ori.H.C.)

8. Bihar Shiksha Pariyojna Parishad Vs. Regional Provident Fund Commissioner, Employees' Provident Fund Organzation & Anr. 2017 (155) FLR 657 (Pat.H.C.)

9. Bihar State Industrial Development Corporation Vs. Employees Provident Fund Organization & Anr. 2017 (154) FLR 88 (Pat.H.C.)

10. Bihar State Industrial Development Corporation Vs. Employees Provident Fund Organization, Patna & Anr. 2017 (154) FLR 537 (Pat.H.C.)

11. Commissioner of Customs and Central Excise Vs. Hongo India Private Limited & Anr. (2009) 5 SCC 791

12. M/s Kushang Security and House Keeping Private Ltd. Vs. Presiding Officer Central Government Industrial Tribunal cum Labour Court & Anr. 2019 (8) ADJ 805

13. Commissioner of Sales Tax, Uttar Pradesh, Lucknow Vs. Parson Tools and Plants, Kanpur (1975) 4 SCC 22

14. Consolidated Engineering Enterprises Vs. Principal Secretary, Irrigation Department & Ors. (2008) 7 SCC 169

15. Patel Brothers Vs. State of Assam & Ors. (2017) 2 SCC 350

16. Patel Brothers Vs. State of Assam & Ors. 2016 SCC OnLine Gau 124

17. Hukumdev Narain Yadav Vs. Lalit Narain Mishra (1974) 2 SCC 133

18. Himachal Pradesh and others Vs. Tritronics India Private Ltd. 2018 SCC OnLine 757

19. Bengal Chemists and Druggists Association Vs. Kalyan Chowdhury (2018) 3 SCC 41

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

1. Heard Sri Pradip Kumar Srivastava, learned counsel for the petitioners, Sri Mata Prasad, learned Standing Counsel appearing for the first respondent, Sri Brijesh Kumar, learned counsel for the second respondent and Sri Jagdish Pathak, learned counsel appearing for the third respondent.

2. The present writ petition has been filed seeking to assail the order dated 28.12.2019 passed by the third respondent/Assistant Provident Fund Commissioner Regional Office, Meerut in proceedings under Section 7-A of the Employees' Provident Funds and Miscellaneous Provisions Act, 19521 and also the order dated 15.07.2019 passed by the fourth respondent/Presiding Officer Central Government Industrial Tribunal-cum-Labour Court, Kanpur whereunder the appeal filed thereagainst has been rejected on the ground of delay.

3. The records of the case reflect that in proceedings for assessment of dues for the period 08/2012 to 12/2012, under Section 7-A of the EPF Act, 1952, an order dated 28.12.2018 was passed determining an amount against the petitioners.

4. A writ petition, Writ-C No.5308 of 2019, was filed seeking quashing of the aforementioned order dated 28.12.2018 which was dismissed on 18.02.2019 with liberty to the petitioners to avail the statutory remedy of appeal. Thereafter, the petitioners preferred an appeal before the fourth respondent, registered as Appeal No.06 of 2019 which has been dismissed vide order dated 15.07.2019 on the ground that the appeal is barred by time and has been filed after "60 days +

60 days" from the date of passing of the order dated 28.12.2018.

5. Contention of the counsel for the petitioners is that the delay in filing of the appeal having been caused due to wrong advice of the counsel and lack of communication of the order dated 18.02.2019 passed by the High Court, the delay ought to have been condoned, and the Appellate Authority has illegally rejected the appeal on the ground of delay. It is also contended that the benefit of extension of prescribed period under Section 5 of the Limitation Act, 19632 and of exclusion of time under Section 14 thereof, would be available to the petitioners and therefore the limitation in filing an appeal ought to have been extended.

6. Sri Jagdish Pathak, learned counsel appearing for the third respondent has submitted that as per the provisions of Section 7-I of the EPF Act, 1952 read with Rule 7 of the Employees' Provident Fund Appellate Tribunal (Procedure) Rules, 19973 the limitation for filing of an appeal is 60 days from the date of issuance of the order with a further discretion to the Tribunal to extend the prescribed period by a further time period of 60 days upon recording its satisfaction that the appellant was prevented by sufficient cause from preferring appeal within the prescribed period. It is submitted that the maximum period for filing of the appeal is "60 days + 60 days" from the date of issuance of the order and there is no power conferred on the Appellate Authority to condone the delay beyond the said time period.

7. The question which thus falls for consideration is as to whether the provisions of the Limitation Act, 1963 would be applicable so as to extend the period of limitation prescribed for filing an appeal under Section 7-I of the EPF Act, 1952 read with Rule 7 of the Rules, 1997 which provides for a period of 60 days for filing an appeal with a provision for extension of the said time period by a further period of 60 days.

8. In order to appreciate the rival contentions the relevant statutory provision with regard to filing of appeal under Section 7-I of the EPF Act, 1952 may be adverted to:-

"**7-I. Appeals to Tribunal.**--(1) Any person aggrieved by a notification issued by the Central Government, or an order passed by the Central Government or any authority, under the proviso to sub-section (3), or sub-section (4), of Section 1, or Section 3, or sub-section (1) of Section 7-A, or Section 7-B(except an order rejecting an application for review referred to in sub-section (5) thereof), or Section 7-C, or Section 14-B, may prefer an appeal to a Tribunal against such notification or order.

(2) Every appeal under sub-section (1) shall be filed in such form and manner, within such time and be accompanied by such fees, as may be prescribed."

9. The power to make rules including the power to make rules in respect of the form and the manner in which, and the time within which, an appeal shall be filed before a Tribunal and the fees payable for filing such appeal is provided for under Section 21 of the EPF Act, 1952. The relevant provision is being extracted below:-

"21. **Power to make Rules.**--(1) The Central Government may, by notification in the Official Gazette, make rules to carry 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:-

x x x x x

(b) the form and the manner in which, and the time within which, an appeal shall be filed before a Tribunal and the fees payable for filing such appeal."

10. In exercise of powers conferred under sub-section (1) of Section 21 of Act No.19 of 1952 "The Employees Provident Fund Appellate Tribunal (Procedure) Rules, 1997" have been made. The procedure including the time period for filing an appeal is provided under Rule 7 of the aforementioned Rules, 1997.

"**7. Fee, time for filing appeal, deposit of amount due on filing appeal.**-- (1) Every appeal filed with the Registrar shall be accompanied by a fee of Rupees five hundred to be remitted in the form of Crossed Demand Draft on a nationalized bank in favour of the Registrar of the Tribunal and payable at the main branch of that Bank at the station where the seat of the said Tribunal situate.

(2) Any person aggrieved by a notification issued by the Central Government or an order passed by the Central Government or any other authority under the Act, may within 60 days from the date of issue of the notification/order, prefer an appeal to the Tribunal:

Provided that the Tribunal may if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal within the prescribed period, extend the said period by a further period of 60 days:

Provided further that no appeal by the employer shall be entertained by a Tribunal unless he has deposited with the Tribunal (a Demand Draft payable in the Fund and bearing) 75 per cent of the amount due from him as determined under Section 7-A:

Provided also that the Tribunal may for reasons to be recorded in writing, waive or reduce the amount to be deposited under Section 7-O."

11. A plain reading of the aforementioned statutory provisions indicates that in terms of sub-section (2) of Section 7-I every appeal under sub-section (1) is to be filed in such form and manner, within such time and is to be accompanied by such fees, as may be prescribed. Further, Rule 7 of the Rules, 1997 provides that the appeal may be preferred within 60 days from the date of issue of the order, provided that the Tribunal may, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal within the prescribed period, extend the said period by a further period of 60 days.

12. It is seen that the initial period for filing of appeal is 60 days which can be extended by the EPF Appellate Tribunal for another 60 days only when there is sufficient cause and not otherwise. In this regard, reference may be made to the judgment in the case of **M/s Port Shramik Co-operative Enterprises Ltd. Vs. Employees Provident Fund Organisation**4. The relevant observations made in the judgment are as follows:-

"3. ...The period of limitation for filing an appeal against an order passed under Section 7-A or Section 14-B of the Employees' Provident Funds and Miscellaneous Provisions Act is 60 days. If the appellant satisfies the Tribunal that it was prevented by sufficient cause from not filing the appeal within the said period of 60 days, in appropriate case, the Tribunal has the power to condone the delay of another 60 days. Thus, even if the Tribunal wanted to condone the delay it could not condone it beyond a period of 60 days."

13. In the case of **Assistant Regional Provident Fund Commissioner, Meerut Vs. Employees Provident Fund Appellate Tribunal & Ors.**5, an appeal to the Appellate Tribunal was filed after 165 days from the date of the order of the EPF Authority and the delay was condoned by the Appellate Authority in view of the provisions under Section 5 of the Act, 1963. Upon a challenge being raised the order condoning the delay was set aside and it was held that when the period of 60 days was provided under Rule 7(2) and a further period of 60 days for condoning the delay is allowed under the proviso to the said rule only then that much period could be condoned. It was held that applicability of Section 5 of the Act, 1963 was specifically excluded. The relevant observations made in the judgment are as follows:-

"8. ...On behalf of the Assistant Provident Fund Commissioner before the Tribunal, a preliminary objection was raised to the effect that the appeal is barred by time. The appeal was preferred after more than 160 days and the Tribunal had no jurisdiction to condone the delay beyond 60 days. The appeal was presented on 11.1.1999 though the order dated 10.7.1998 was received by the appellant on 20.7.1998. Thus it took 165 days in preferring the appeal. In view of the provisions contained in Section 7-I(2) of the Act read with Rule 7(2) of the Rules, the appeal was required to be preferred within 60 days to the Tribunal. It was submitted that the Tribunal on being satisfied that the appellant was prevented by sufficient cause in preferring the appeal within the prescribed period of 60 days, may extend the said period by a further period of 60 days and thus in all the appeal was required to be preferred maximum within a period of 120 days and not beyond that.

x x x x x

11. It is in view of the aforesaid provisions, it was contended that the appeal was hopelessly time barred and after the period of 60 days granted for preferring an appeal, if there is a delay of 60 days then such delay can be condoned and no further.

12. The Tribunal expressed an opinion that the power of the Tribunal to condone the delay under Section 5 of the Indian Limitation Act, 1963, is not curtailed by the Legislature..Therefore, the provisions under the Employees' Provident Funds Appellate Tribunal (Procedure) Rules, 1997, only to condone a delay of 60 days is ultra vires and is void. Therefore, it held that the Tribunal has jurisdiction to condone any delay, if it is satisfactorily explained…

13. Learned counsel for the Company submitted that sub-clause (b) of sub-section (1) of Section 21 provides the rule making authority to prescribe time limit within which an appeal shall be filed before the Tribunal. Legislature only authorized the rule making authority to

make a provision for prescribing a period for preferring an appeal, however, the rule also provided a further period of 60 days by proviso to sub-rule (2) of Rule 7 of the Rules. In view of this, it was contended that proviso is ultra vires the provisions contained in the Act. It was further submitted that if the proviso is ultra vires the provisions contained in the Act, then the Limitation Act, 1963 will apply. In the submission of learned counsel for the Company, the Tribunal has rightly held that the law of limitation is applicable. It was submitted that Section 7-I of the Act, if read it becomes very clear that sub-section (2) of Section 7-I also refers such time within which the appeal is to be filed.

14. The Act is a labour legislation wherein provision is made for provident funds to be deposited by the employer. Section 7-D to 7-H provide for the Appellate Tribunal, the term of the office of the Presiding Officer of Tribunal, salary, allowances and other terms and conditions of Presiding Officer and the staff of the Tribunal. Section 7-I provides for appeals to the Tribunal. The Chapter further provides procedure before the Tribunal, assistance of a legal practitioner, right of hearing or rectification of an order, finality of orders of the Tribunal, deposit of amount due on filing an appeal, transfer of cases, the manner of recovery, recovery certificate, validity of the certificate and such other things. It provides penalties, offences by companies, enhanced punishment in certain cases and offences under the Act to be cognizable. It also provides the Court which shall try the offences. Thus a special mechanism is indicated in the Act itself.

15. With a view to see that the proceedings are disposed of as early as possible, it was left by the Legislature to fix "such time" for preferring an appeal. Section 21(2)(b) refers to the time within which an appeal shall be filed and in view of this it was submitted that in absence of any power, it was not open to prescribe a specific period for condonation of delay in sub-rule (2) of Rule 7 of the Act in exercise of the powers conferred under sub-section (1) of Section 21 of the Act.

16. The Legislature left it open to the rule making authority to prescribe time for preferring an appeal. However, at the same time the rule making authority while prescribing the period of limitation for preferring an appeal also provided a period during which if there is a delay, the same can be condoned if the Tribunal is satisfied that the appellant was prevented by sufficient cause from preferring the appeal within the prescribed period. However, the limitation was placed that that can be done if there is a delay of a further period of 60 days.

17. In our opinion, it cannot be said that the rule making authority has exceeded its limit while prescribing the period of limitation. Like the provisions in other statutes for condoning the delay, the rule making authority thought it fit to provide some period if there is a sufficient cause and the Tribunal is satisfied that the applicant was prevented from preferring the appeal on such cause to extend the period of limitation. This provision is an enabling provision. It does not take away the right of a person of preferring an appeal but on the contrary it enables a party who could not prefer an appeal within the prescribed period for sufficient reasons. However, at the same time, keeping in mind that that provision is made for a weaker section, disputes must be resolved at the earliest, therefore, restricted the period, i.e. that if the delay

is of 60 days then to that extent delay can be condoned. Therefore, in our opinion, the provision cannot be said to be ultra vires of the provisions of the Act as the provision for condonation of delay is made to help the litigant who might be facing genuine difficulties. It is difficult to say that the proviso to sub-rule (2) of Rule 7 is bad. If that is declared as bad or ultra vires Section 7-I or Section 21(1)(b) of the Act, it can be said that the period of limitation prescribed is bad for want of not providing extended period in case of difficulty.

18. It is required to be noted that in case of Delta Impex v. Commissioner of Customs, decided on 13.2.2004, this Court had an occasion to examine the question raised by the applicant which reads as under:

"Whether the provision of Section 128 of the Customs Act, 1962 completely bars the Commissioner (Appeals) from condoning the delay beyond the period of 30 days even in a deserving case and that despite the order made by the Commissioner (Appeals) is it incumbent upon the Tribunal to consider the appeal on merits?"

19. There also it was submitted that considering the provisions contained in section 29(2) of the Indian Limitation Act, 1963 (hereinafter referred to as 'the Limitation Act') read with section 5 thereof, irrespective of the fact that the matter was under the Customs Act, the appellate authority ought to have condoned the delay, examined the matter on merits and it could not have dismissed the appeal on the ground that the Commissioner (Appeals) can only condone the delay, if an appeal is presented within a period of 30 days after the statutory period of 60 days in view of section 128 of the Act.

20. In case of Collector of C.E. Chandigarh v. Doaba Co-operative Sugar Mills, Supreme Court pointed out that the authorities functioning under the Act are bound by the provision of the Act. If the proceedings are taken under the Act by the Department, the provisions of limitation prescribed in the Act will prevail. In the case of Miles India Limited v. Assistant Collector of Customs, the Court observed that the Customs Authorities acting under the Act were not justified in disallowing the claim as they were bound by the period of limitation provided there in the relevant provisions of the Customs Act, 1962.

21. The Court in the aforesaid case pointed out that the period of limitation prescribed by the Act for filing an application being different from the period prescribed under the Limitation Act, by virtue of Section 29(2) of the said Act, it shall be deemed as if the period prescribed by the different Act is the period prescribed by the schedule to the Limitation Act. However, it would be difficult to say that section 5 of the Limitation Act is intended to be made applicable in view of the proviso to section 128 of the Customs Act.

22. The Court is required to examine the scheme of the special law, and the nature of the remedy provided therein. Considering these aspects, the Court will have to find out whether the Legislature intended to provide a complete code by itself which along should govern the matters provided by it. On examination of the relevant provisions, if it becomes clear that the provisions of section 5 of the Limitation Act are necessarily excluded, then the said provisions cannot be called in aid to supplement the provisions of the Act. It is

open to the Court to examine whether and to what extent the nature of the provisions contained in the Limitation Act in comparison with the scheme of the special law are excluded from operation. When a specific period is provided and a further period of 60 days by way of extended period only then that much period can be condoned.

23. In the instant case, a separate period of limitation is provided, as also the period for which delay can be condoned. The Legislature was aware about the provisions contained in section 5 of the Limitation Act, yet with an intention to curb the delay in labour matters, Legislature left it to the Rule making authority to make a provision for limitation. Rule making authority under the Statute has specifically provided that after the statutory period, if there is delay of 60 days, on showing sufficient grounds for delay of 60 days, that can be condoned. Thus applicability of section 5 of the Limitation Act is specifically excluded.

24. The expression "expressly excluded" in sub-section (2) of section 29 of the Limitation Act means an exclusion by express words, i.e. by express reference and not exclusion as a result of logical process of reasoning. In the instant case, there is no question of implied exclusion but, it specifically provides a different period of limitation, as also the period during which, if delay has occurred, it could be condoned.

25. With regard to the applicability of sections 4 to 24 of the Limitation Act (inclusive) one will have to refer to sub-section (2) of section 29 of the Limitation Act, 1963. It specifically states that these provisions shall apply only so far as and to the extent to which, they are not expressly excluded by special or local law. Reading the language of Rule 7 of the Rules and section 5 of the Limitation Act, it is very clear that extension of time for a period 60 days only can be condoned subject to satisfaction and not beyond that. From an examination of Rule 7 of the Rules, it is very clear that section 5 of the Limitation Act is expressly excluded as a specific provision is made in Rule 7.

x x x x x

38. In the instant case, there is clear intention of the Legislature for asking the rule making authority to prescribe the time during which an appeal shall be filed. When the time is to be prescribed, it is open for the rule making authority to prescribe extended period also. If the extended period is provided, the provisions would not become bad or ultra vires the provisions contained in the Act, as it is only an enabling provision.

39. It is also clear that an opinion was expressed before the Legislature, that in the opinion of the Government the provision should be made for granting provident fund facilities not only to the employees in industrial establishments, but also to the employees in commercial and other undertakings. An assurance was given that the Government would take appropriate measures. It is thereafter the Act came to be enacted. Reading the provisions contained in the Act, it covers large number of employees. Employer, as indicated in the Act, has to make contributions to the fund in the manner indicated in section 6. Section 7-A of the Act empowers the authority to decide a dispute about the applicability of the Act if raised and to determine the amount due from any employer, as indicated in sub-clause (b) of sub-section (1) of section 7-

A of the Act. The officer empowered to conduct an inquiry under sub-section (2) of section 7-A of the Act in this behalf having the powers as are vested in Code under the Civil Procedure Code, 1908 for trying a suit in respect of the matters indicated therein. How the order is to be reviewed is indicated under section 7-B. Section 7-C refers to determination of escaped amount. An order made by authority was challenged before the Appellate Tribunal known as "Employees Provident Funds Appellate Tribunal". Thus it is a special statute to determine the liability of employer to make his contribution and to pass further orders by the authorities which are to be examined by the Tribunal in case of an appeal. It is in this background the provisions of the Act are to be examined.

40. Considering the language of the Act and the rules, the Scheme, which is meant for weaker section and from the intention of the Legislature, it is clear that the Legislature left it to the Rule making authority to prescribe the time by specifically referring that an appeal under sub-section (1) shall be filed within such time as also specifically referring in section 21 about the form and the time within which an appeal shall be filed. It is clear that the Legislature left it to the Rule Making Authority to prescribe total period during which an appeal can be filed, which includes extended period. This being an enabling provision and in consonance with the provision contained in the Act cannot be said to be ultra vires the provisions contained in the Act."

14. In the aforementioned case of **Assistant Regional Provident Fund Commissioner, Meerut** (supra) reference was made to the judgment in the case of **Mohd. Ashfaq Vs. State Transport Appellate Tribunal U.P. & Ors.**6, where in the context of the provisions under the Motor Vehicles Act, 1939, it was held as follows:-

"8. ...This clearly means that if the application for renewal is beyond time by more than 15 days, the Regional Transport Authority shall not be entitled to entertain it, or in other words, it shall have no power to condone the delay. There is thus an express provision in sub-section (3) that delay in making an application for renewal shall be condonable only if it is of not more than 15 days and that expressly excludes the applicability of Section 5 in cases where an application for renewal is delayed by more than 15 days…"

15. Rule 7(2) of the Rules, 1997 again came up for consideration in the case of **Dr. A.V. Joseph Vs. Assistant Provident Fund Commissioner & Anr.**7 and it was held that the maximum period for filing an appeal is only 120 days from the date of the impugned order. The relevant observations made in the judgment are as follows:-

"10. Section 7-I(2) of the Act provides that every Appeal under sub-section (1) shall be filed in such form and manner, within such time and be accompanied by such fees, as may be prescribed. Rule 7(2) of the Employees' Provident Funds Appellate Tribunal (Procedure) Rules, 1997 states that any person aggrieved by a notification issued by the Central Government or an order passed by the Central Government or any other authority under the Act, may within 60 days from the date of issue of the notification/order, prefer an appeal to the Tribunal. The 'first proviso' thereunder

further stipulates that the Tribunal may, if it is satisfied that the appellant was prevented by sufficient cause from preferring the Appeal within the prescribed period, extend the said period by a further period of 60 days. In short, the maximum period for filing the Appeal is only 120 days from the date of the impugned proceedings/order (60+60). When the statute confers the power on the Authority to condone the delay only to a limited extent, it can never be widened by any Court contrary to the intention of the law makers…"

16. In the case of **C.B. Sharma Vs. Employees' Provident Funds Appellate Tribunal & Ors.**8, the appeal filed nine months after the date of the order passed by the Commissioner was dismissed and the challenge raised to the order passed by the Tribunal was turned down with the following observations:-

"9. In terms of the rule, period of 60 days has been provided for filing the appeal before the Tribunal. For sufficient reasons the Tribunal can extend the period for further 60 days. Once the petitioner undisputedly had the knowledge of the order passed by the Commissioner on 16.2.2009, the appeal filed nine months thereafter had rightly been dismissed by the Tribunal as time barred."

17. The question as to whether the Appellate Tribunal was vested with any power to condone the delay in filing the appeal beyond the prescribed period again came up for consideration in the case of **Saint Soldier Modern Senior Secondary School Vs. Regional Provident Fund Commissioner**9 and it was held that there was no such power with the Appellate Tribunal. The observations made in the judgment are as follows:-

"8. A perusal of the section 7-I of the Act and Rule 7 of the Rules would reveal that the time period for filing an appeal is within 60 days from the date of issue of the notification/order, provided, the Tribunal, if satisfied that for certain sufficient cause, the appeal could not be preferred within the period of 60 days, then, the period to file appeal can be extended to 60 days thereafter. Suffice to state, the provision does not vest any power with the Tribunal to condone a delay beyond that period…

9. From the above decision of the Supreme Court, even in the case in hand, it is clear from the provisions of the Act, which is a special statute, a certain period of limitation is prescribed for filing the appeal. In the eventuality, the appeal is not filed within the said period, the power to condone the delay is for a further period of 60 days and no more…"

18. A similar view was again taken in the case of **Lotus Chemicals Pvt. Ltd. Vs. Assistant Provident Fund Commissioner, (Compl.) Rourkela**10, wherein it was held as follows:-

"8. ...The procedure for filing of appeal has been provided under the provision of Rule 7 of the Employees Provident Fund Appellate Tribunal (Procedure) Rules, 1997, wherein it has been provided under Regulation 7(2) that the appeal may be filed within 60 days from the date of issuance of notification/order, provided that the Tribunal may, if it is satisfied that the appellant was prevented by sufficient cause from preferring appeal within the prescribed period, may extend the said period by a further period of 60 days, meaning thereby the appeal is to be filed before the appellate Tribunal within a maximum period of 120 days subject to

its condonation and beyond that it cannot be extended. It is settled that if any legislation has been provided, it has to be followed in its strict sense and if there is specific time period framed in the legislation to entertain an appeal, the authorities concerned are not supposed to extend that period by assuming the power conferred under the Limitation Act, 1963. Here in the instant case, the maximum period of filing an appeal is 60 days, subject to its condonation for a further period of 60 days, hence the condonation is only to be done for maximum period of 60 days, which suggests that the provision of Limitation Act, 1963 will not be applicable.

9. It is settled position of law that the court of law or the Tribunal is supposed to follow the statutory provision and it cannot be interpreted, if there is no ambiguity and it is settled that the things is to be done as per the statutory provision, hence applying the said principle, it is the considered view of this Court that the Tribunal has not committed any error in passing the order under Section 7-I by rejecting it, since appeal was preferred after delay of 260 days, hence the Tribunal is having no power to condone the said delay period, in view of the provision of Rule 7 of the Employees Provident Fund Appellate Tribunal (Procedure) Rules, 1997 as discussed herein above."

19. Reiterating a similar view, in the case of **Bihar Shiksha Pariyojna Parishad Vs. Regional Provident Fund Commissioner, Employees' Provident Fund Organzation & Anr.**11, it was held that condonation of delay has to be considered within the purview of the statutory provision and the provisions of the Act, 1963 cannot be imported or made applicable into the EPF Act, 1952 and the Rules, 1997. The relevant observations made in the judgment are extracted below:-

"18. Thus, in view of the fact that the limitation is prescribed by specific Rule 7(2) of 'the Rules' as also in view of the ratio laid down by the Supreme Court in Commissioner of Customs and Central Excise v. Hongo India Private Limited & Anr. (supra) and M/s. Patel Brothers v. State of Assam & Ors. (supra), condonation of delay has also to be considered within the purview of the statutory provision and the provisions of the Limitation Act cannot be imported or made applicable into 'the Act' and 'the Rules'. In that view of the matter, no illegality can be found with the order impugned passed by the Tribunal."

20. A similar view has been taken in the case of **Bihar State Industrial Development Corporation Vs. Employees Provident Fund Organization & Anr.12** and again in **Bihar State Industrial Development Corporation Vs. Employees' Provident Fund Organization, Patna & Anr.**13.

21. The question with regard to condonation of delay by applying Section 5 of the Act, 1963, in the context of filing an appeal and reference under the Central Excise Act, came up for consideration in the case of **Commissioner of Customs and Central Excise Vs. Hongo India Private Limited & Anr.**14, and taking into consideration that the Central Excise Act is a special law and a complete code by itself, it was held that the time limit prescribed for making a reference thereunder is absolute and unextendable by the Court under Section 5 of the Act,

1963. The relevant observations made in the judgment are as follows:-

"30. In the earlier part of our order, we have adverted to Chapter VI-A of the Act which provides for appeals and revisions to various authorities. Though Parliament has specifically provided an additional period of 30 days in the case of appeal to the Commissioner, it is silent about the number of days if there is sufficient cause in the case of an appeal to the Appellate Tribunal. Also an additional period of 90 days in the case of revision by the Central Government has been provided. However, in the case of an appeal to the High Court under Section 35-G and reference application to the High Court under Section 35-H, Parliament has provided only 180 days and no further period for filing an appeal and making reference to the High Court is mentioned in the Act.

31. In this regard, it is useful to refer to a recent decision of this Court in Punjab Fibres Ltd, (2008) 3 SCC 73. The Commissioner of Customs, Central Excise, Noida was the appellant in this case. While considering the very same question, namely, whether the High Court has power to condone the delay in presentation of the reference under Section 35-H(1) of the Act, the two-Judge Bench taking note of the said provision and the other related provisions following Singh Enterprises v. CCE [(2008) 3 SCC 70] concluded that: (Punjab Fibres Ltd. Case [(2008) 3 SCC 73] , SCC p. 75, para 8)

"8. ...the High Court was justified in holding that there was no power for condonation of delay in filing reference application."

32. As pointed out earlier, the language used in Sections 35, 35-B, 35-EE, 35-G and 35-H makes the position clear that an appeal and reference to the High Court should be made within 180 days only from the date of communication of the decision or order. In other words, the language used in other provisions makes the position clear that the legislature intended the appellate authority to entertain the appeal by condoning the delay only up to 30 days after expiry of 60 days which is the preliminary limitation period for preferring an appeal. In the absence of any clause condoning the delay by showing sufficient cause after the prescribed period, there is complete exclusion of Section 5 of the Limitation Act. The High Court was, therefore, justified in holding that there was no power to condone the delay after expiry of the prescribed period of 180 days.

33. Even otherwise, for filing an appeal to the Commissioner, and to the Appellate Tribunal as well as revision to the Central Government, the legislature has provided 60 days and 90 days respectively, on the other hand, for filing an appeal and reference to the High Court larger period of 180 days has been provided with to enable the Commissioner and the other party to avail the same. We are of the view that the legislature provided sufficient time, namely, 180 days for filing reference to the High Court which is more than the period prescribed for an appeal and revision.

x x x x x

36. The scheme of the Central Excise Act, 1944 supports the conclusion that the time-limit prescribed under Section 35-H(1) to make a reference to the High Court is absolute and

unextendable by a court under Section 5 of the Limitation Act. It is well-settled law that it is the duty of the court to respect the legislative intent and by giving liberal interpretation, limitation cannot be extended by invoking the provisions of Section 5 of the Limitation Act."

22. The position of law with regard to applicability of Section 5 of the Limitation Act, 1963 has been considered in a recent judgment of this Court in M/s **Kushang Security and House Keeping Private Ltd. Vs. Presiding Officer Central Government Industrial Tribunal-cum-Labour Court & Anr.**15.

23. The scope and applicability of Section 14(2) of the Act, 1963 in the context of proceedings under the U.P. Sales Tax Act, 1948 came up for consideration in the case of **Commissioner of Sales Tax, Uttar Pradesh, Lucknow Vs. Parson Tools and Plants, Kanpur**16 wherein it was held that the authorities, irrespective of whether they exercise original appellate or revisional jurisdiction under the Sales Tax Act are merely "Administrative Tribunals" and not "Courts" within the contemplation of Section 14(2) and therefore Section 14 of the Act, 1963 does not in terms apply to proceedings before such Tribunals. The Court laid down the principle that if a legislature in a special statute prescribes a certain period of limitation for filing an application thereunder and provides in clear terms that such period on sufficient cause being shown, may be extended, in the maximum, only upto a specified time-limit and no further, then the tribunal concerned has no jurisdiction to treat within limitation, an application filed before it beyond such maximum time-limit specified in the statute, by excluding the time spent in prosecuting in good faith and due diligence any prior proceeding on the analogy of Section 14(2) of the Act, 1963. The relevant observations made in the judgment are as follows:-

"5. Sub-section (2) of Section 14, Limitation Act, runs thus:

In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceedings, whether in a Court of first instance or of. appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a Court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it."

6. If will be seen that this sub-section will apply only if:

(1) both the prior and subsequent proceedings are civil proceedings prosecuted by the same party;

(2) the proceedings had been prosecuted with due diligence and in good faith;

(3) the failure of the prior proceedings was due to a defect of jurisdiction or other cause of a like nature;

(4) both the proceedings are proceedings in a Court.

x x x x x

22. Thus the principle that emerges is that if the Legislature in a special statute prescribes a certain period of limitation for filing a particular application thereunder and provides in clear terms that such period on sufficient cause being shown, may be extended, in the

maximum, only upto a specified time-limit and no further, then the tribunal concerned has no jurisdiction to treat within limitation, an application filed before it beyond such maximum time-limit specified in the statute, by excluding the time spent in prosecuting in good faith and due diligence any prior proceeding on the analogy of Section 14(2) of the Limitation Act."

24. The policy underlying and the conditions precedent to applicability of Section 14 have been explained in **Consolidated Engineering Enterprises Vs. Principal Secretary, Irrigation Department & Ors.**17 and it was held that on analysing the provisions contained under Section 14 certain conditions must be satisfied before the aforesaid section could be pressed into service. The observations made in the judgment in this regard are as follows:-

"21. Section 14 of the Limitation Act deals with exclusion of time of proceeding bona fide in a court without jurisdiction. On analysis of the said section, it becomes evident that the following conditions must be satisfied before Section 14 can be pressed into service:

(1) Both the prior and subsequent proceedings are civil proceedings prosecuted by the same party;

(2) The prior proceeding had been prosecuted with due diligence and in good faith;

(3) The failure of the prior proceeding was due to defect of jurisdiction or other cause of like nature;

(4) The earlier proceeding and the latter proceeding must relate to the same matter in issue and;

(5) Both the proceedings are in a court.

x x x x x

31. To attract the provisions of Section 14 of the Limitation Act, five conditions enumerated in the earlier part of this judgment have to co-exist. There is no manner of doubt that the section deserves to be construed liberally. Due diligence and caution are essential prerequisites for attracting Section 14. Due diligence cannot be measured by any absolute standards. Due diligence is a measure of prudence or activity expected from and ordinarily exercised by a reasonable and prudent person under the particular circumstances. The time during which a court holds up a case while it is discovering that it ought to have been presented in another court, must be excluded, as the delay of the court cannot affect the due diligence of the party. Section 14 requires that the prior proceeding should have been prosecuted in good faith and with due diligence. The definition of good faith as found in Section 2(h) of the Limitation Act would indicate that nothing shall be deemed to be in good faith which is not done with due care and attention. It is true that Section 14 will not help a party who is guilty of negligence, lapse or inaction…"

25. The judgment in the case of **Commissioner of Customs and Central Excise Vs. Hongo India Private Limited & Anr.**, referred to earlier, also considered the question as to whether the express exclusion of Limitation Act in a local or special law is a mandatory requirement and the factors to be considered for determining if the Limitation Act was excluded even in the absence of express exclusion. It was also held that the applicability of the

Limitation Act is to be judged by the terms of the special law and not from terms of the Limitation Act and that the period of limitation cannot be extended by giving a liberal interpretation. The observations made in this regard are as follows:-

"34. Though, an argument was raised based on Section 29 of the Limitation Act, even assuming that Section 29(2) would be attracted, what we have to determine is whether the provisions of this section are expressly excluded in the case of reference to the High Court.

35. It was contended before us that the words "expressly excluded" would mean that there must be an express reference made in the special or local law to the specific provisions of the Limitation Act of which the operation is to be excluded. In this regard, we have to see the scheme of the special law which here in this case is the Central Excise Act. The nature of the remedy provided therein is such that the legislature intended it to be a complete code by itself which alone should govern the several matters provided by it. If, on an examination of the relevant provisions, it is clear that the provisions of the Limitation Act are necessarily excluded, then the benefits conferred therein cannot be called in aid to supplement the provisions of the Act. In our considered view, that even in a case where the special law does not exclude the provisions of Sections 4 to 24 of the Limitation Act by an express reference, it would nonetheless be open to the court to examine whether and to what extent, the nature of those provisions or the nature of the subject-matter and scheme of the special law exclude their operation. In other words, the applicability of the provisions of the Limitation Act, therefore, is to be judged not from the terms of the Limitation Act but by the provisions of the Central Excise Act relating to filing of reference application to the High Court.

x x x x x

37. In the light of the above discussion, we hold that the High Court has no power to condone the delay in filing the "reference application" filed by the Commissioner under unamended Section 35-H(1) of the Central Excise Act, 1944 beyond the prescribed period of 180 days and rightly dismissed the reference on the ground of limitation."

26. The principle of implied exclusion of the Act, 1963 by a special law was reiterated in the case of **Patel Brothers Vs. State of Assam & Ors.**18, where in the context of the provision for filing a revision under the Assam Value Added Tax Act, 2003 it was held that even if there exists no express exclusion in the special law, the court has right to examine the provisions of the special law to arrive at a conclusion as to whether the legislative intent was to exclude the operation of the Act, 1963. The judgment of the High Court rendered in the case of Patel Brothers Vs. State of Assam & Ors.19 was affirmed. The relevant observations made in the judgment are as follows:-

"22. The High Court has rightly pointed out the well-settled principle of law that: (Patel Bros. v. State of Assam, 2016 SCC OnLine Gau 124, SCC OnLine Gau para 19)

"19. ..."the courts cannot interpret a statute the way they have developed the common law "which in a

constitutional sense means judicially developed equity". In abrogating or modifying a rule of the common law the courts exercise "the same power of creation that built up the common law through its existence by the Judges of the past". The court can exercise no such power in respect of statutes. Therefore, in the task of interpreting and applying a statute, Judges have to be conscious that in the end the statute is the master not the servant of the judgment and no Judge has a choice between implementing the law and disobeying it.' [Ed.: See Principles of Statutory Interpretation, 14th Edn., p. 26 by Justice G.P. Singh.]"

What, therefore, follows is that the court cannot interpret the law in such a manner so as to read into the Act an inherent power of condoning the delay by invoking Section 5 of the Limitation Act, 1963 so as to supplement the provisions of the VAT Act which excludes the operation of Section 5 by necessary implication."

27. On the point of implied exclusion of the Act, 1963 by a special law reference may be had to an earlier judgment in the case of **Hukumdev Narain Yadav Vs. Lalit Narain Mishra**20, wherein while examining whether the Act, 1963 would be applicable to the provisions of the Representation of the People Act, it was observed as follows:-

"17. ...what we have to see is whether the scheme of the special law, that is in this case the Act, and the nature of the remedy provided therein are such that the legislature intended it to be a complete code by itself which alone should govern the several matters provided by it. If on an examination of the relevant provisions it is clear that the provisions of the Limitation Act are necessarily excluded, then the benefits conferred therein cannot be called in aid to supplement the provisions of the Act. In our view, even in a case where the special law does not exclude the provisions of Sections 4 to 24 of the Limitation Act by an express reference, it would nonetheless be open to the Court to examine whether and to what extent the nature of those provisions or the nature of the subject-matter and scheme of the special law exclude their operation."

28. The aforementioned legal position has been reiterated in the case of the State of **Himachal Pradesh and others Vs. Tritronics India Private Ltd.**21, where the issue involved was as to whether a revision under the Himachal Pradesh Value Added Tax Act, 2005 which was beyond the period of limitation prescribed under the statute could be entertained by applying Section 5 of the Act, 1963, and it was stated as follows:-

"28. ...taking into consideration the fact that Himachal Pradesh Value Added Tax Act, 2005, is a complete code in itself, which, in other words, is both a substantive as well as a procedural law and as there is no provision contained in the Act, making the provisions of Limitation Act applicable to the proceedings which are to originate from the Act, we hold that this Court has no inherent power to condone the delay in entertaining a Revision Petition which stands filed beyond the period of limitation prescribed in the Act."

29. In a recent judgment in the case of **Bengal Chemists and Druggists**

Association Vs. Kalyan Chowdhury22, it was held in the context of the Companies Act, 2013, that the limitation for filing an appeal to the Appellate Tribunal which is 45 days under Section 421 (3) plus additional 45 days grace period in terms of its proviso, are mandatory in nature and no further time can be granted beyond this total period.

30. In view of the foregoing discussion, the legal position which emerges that in terms of Section 7-I(2) every appeal is to be filed in such form and manner, within such time and be accompanied by such fees, as may be prescribed. Rule 7(2) of the Rules, 1997 provides for filing of the appeal within 60 days from the date of issuance of the order. The first proviso thereunder further stipulates that the Tribunal may, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal within the prescribed period, extend the said period by a further period of 60 days.

31. It is thus seen that the EPF Act, 1952 is a special law providing for institution of provident funds, pension fund and deposit-linked insurance fund for employees in factories and other establishments and in terms of the rules framed thereunder a certain period of limitation for filing an appeal having been provided for in clear terms and a further provision having been made for extension of such period only upto a specified time period and no further, the Appellate Tribunal would have no jurisdiction to treat within limitation, an appeal filed before it beyond such maximum time limit specified in terms of the statutory rules.

32. Moreover, in terms of the scheme and the intent of the provisions contained in the EPF Act, 1952 it is seen that the legislature intended it to be a complete code by itself. As a consequence, even if the provisions of the Act, 1963 may be held to have not been expressly excluded the principle of implied exclusion would apply in terms of the nature of the subject matter, the purpose and the scheme of the Act. The provisions contained under the Act, 1963 would therefore not be applicable for seeking extension of time beyond the statutory time period of 60 days from the date of issue of the notification/order, extendable by a further period of 60 days, upon the Tribunal being satisfied that the appellant was prevented by sufficient cause from preferring the appeal within the prescribed period. The maximum period for filing the appeal would be thus 120 (60+60) days from the date of the issuance of the notification/order which is sought to be challenged.

33. It is a well settled principle of statutory interpretation that where the statute confers power on the authority to condone the delay only to a limited extent the same cannot be stretched or extended beyond what has been provided under the statute.

34. As regards the applicability of the provisions under Section 14 of the Limitation Act, 1963, it may be seen that the necessary conditions as prescribed in the judgment in the case of **Commissioner of Sales Tax, Uttar Pradesh, Lucknow Vs. Parson Tools and Plants, Kanpur** and also in the judgment in the case of **Consolidated Engineering Enterprises Vs. Principal Secretary, Irrigation Department & Ors.**, referred to above, must be satisfied before Section 14 can be pressed into

service. Moreover, the provisions contained under Section 14 have been held to be applicable before the Courts and not to proceedings before the Tribunals.

35. Further, the EPF Act, 1952 being a special statute and having prescribed a certain period of limitation for filing a particular application thereunder and also having provided in clear terms that such period on sufficient cause being shown, may be extended, in the maximum, only upto a specified time-limit, the Tribunal concerned would have no jurisdiction to treat within limitation, an application filed before it beyond such maximum time-limit specified in the statute, by excluding the time spent in prosecuting in good faith and due diligence any prior proceeding on the analogy of Section 14(2) of the Act, 1963.

36. It may be noticed that in the instant case against the order dated 28.12.2018 passed under Section 7-A of the EPF Act, 1952 a writ petition, Writ-C No.5308 of 2019, was filed and the same was dismissed at the threshold vide order dated 18.02.2019 with liberty to the petitioners to avail the statutory remedy of appeal under Section 7-I of the EPF Act, 1952. A copy of the aforesaid order which has been filed as Annexure-9 to the writ petition indicates that a certified copy of the order dated 18.02.2019 was applied for on 10.06.2016 and the same was issued on 12.06.2019. It appears that only thereafter the appeal bearing Appeal A.T.A. No.06 of 2019 was filed which came to rejected as time barred vide order dated 15.07.2019 passed by the Appellate Authority/Presiding Officer, Central Government Industrial Tribunal-cum-Labour Court, Kanpur. These facts also go to show that the necessary requirement under Section 14 that the prior proceeding should have been prosecuted in good faith and with due diligence also does not stand fulfilled.

37. The time limit is prescribed by the rule making authority for filing an appeal and also the extended period having been provided, and no further extension thereof having been envisaged or contemplated, the Appellate Authority could not have granted any further extension. In view of the aforesaid, the order passed by the Appellate Authority recording its conclusion that the appeal was filed beyond the statutory period of limitation, cannot be faulted with.

38. Counsel for the petitioners has not been able to dispute the aforesaid factual and legal position nor has been able to point out any material error or irregularity in the order dated 15.07.2019 so as to warrant interference in exercise of the extraordinary powers under Article 226 of the Constitution of India.

39. The writ petition is accordingly held to be devoid of merits and is dismissed.

(2019)12 ILR A266

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.10.2019

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE VIRENDRA KUMAR SRIVASTAVA, J.

Writ C. No. 29495 of 2018 connected with Writ C No. 29547 of 2018, 30884 of 2018, 40395 of 2018, 40399 of 2018, 40401 of 2018

Smt. Prakati Rai & Ors. ...Petitioners

Versus

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

Counsel for the Petitioners:

Sri Ravi Kant, Sri Kartikeya Saran, Sri Anand Prakash Paul, Sri Brij Bhushan Paul, Sri Pramod Kumar Srivastava, Sri Tarun Agrawal

Counsel for the Respondents:

C.S.C., Sri Ajit Kumar Singh, Sri Nimai Das & Sri Sudhanshu Srivastava, Sri Tarun Agrawal, Sri M.D. Singh Shekhar, Sri Amit Verma

A. Civil Law - Transfer of Property Act, 1882- Section 116 - Effect of holding over - Applicability of section 116.

Twin conditions to attract principle of holding over under Section 116 of TP Act, 1882, which need to be satisfied are:(i) After determination of lease, lessor or his representative has accepted rent from lessee or under lessee or assented to his continuing in possession; and (ii) Lessee or under-lessee has remained in possession .

Held: **-** Section 116 is not applicable - It is not the case of any of the petitioners that after expiry of lease in 1986, they have been permitted to remain in possession of disputed Nazul land and rent has been accepted by respondents or they have paid rent. (Para 222 & 223)

B. Nazul - Nazul is land owned by Government having vested by escheat, bona vacantia or lapse.

The terms and conditions of 'Grant' a Nazul would govern relation of lessor and lessee - any other statute providing otherwise has no application.- Grantee cannot transfer property, which was transferred to it by way of 'Grant' except the manner in which it is permitted by such 'Grant' - Any transfer otherwise will be illegal and would not confer any right upon Transferree. (Para 95 & 96)

Writ petitions dismissed. (E-7)

List of cases cited: -

1. Dyke v. Walford 5 Moore PC 434= 496-13 ER 557 (580)

2. Pierce Leslie and Co. Ltd. Vs. Miss Violet Ouchterlony Wapsnare, AIR 1969 SC 843

3. Collector of Masulipatam v. C. Vencata Narainapah 8 MIA 500, 525;

4.Ranee Sonet Kowar v. Mirza Himmut Bahadoor (2) LR 3 IA 92, 101,

5.Bombay Dyeing and Manufacturing Co. Ltd. v. State of Bombay [1958] SCR 1122, 1146,

6.Superintendent and, Legal Remembrancer v. Corporation of Calcutta (1967) 2 SCR 170.

7.Cook v. Sprigg (1899) AC 572

8.Raja Rajinder Chand v. Mst. Sukhi, AIR 1957 SC 286.

9.Nayak Vajesingji Joravarsingji v. Secretary of State for India in Council AIR 1924 PC 216

10.Dalmia Dadri Cement Co. Ltd. v. CIT [1958] 34 ITR 514 (SC) : AIR 1958 SC 816,

11.Promod Chandra Deb v. State of Orissa AIR 1962 SC 1288

12.Amarsarjit Singh v. State of Punjab AIR 1962 SC 1305

13.Thakur Amar Singhji v. State of Rajasthan AIR 1955 SC 504

14.State of Rajasthan vs. Sajjanlal Panjawat AIR 1975 SC 706

15.Director of Endowments, Govt. of Hyderabad vs. Akram Ali, AIR 1956 SC 60,

16.Sarwarlal vs. State of Hyderabad, AIR 1960 SC 862.

17.Promod Chandra Deb vs. State of Orissa AIR 1962 SC 1288

18.Biswambhar Singh vs. State of Orissa 1964 (1) SCJ 364.

19.State of U.P. vs. Zahoor Ahmad, 1973(2) SCC 547

20.Hajee S.V.M. Mohamed Jamaludeen Bros. & Co. vs. Government of Tamil Nadu (1997) 3 SCC 466

21.Azim Ahmad Kazmi and others vs. State of U.P. and Another (2012) 7 SCC 278

22.State of U.P. and others vs. United Bank of India and others (2016) 2 SCC 757

23.Mohsin Ali vs. State of M.P. AIR 1975 SC 1518

24.Pradeep Oil Corporation vs. Municipal Corporation of Delhi and others (2011) 5 SCC 270

25. Shakira Khatoon Kazmi vs. State of U.P., AIR 2002 All 101.

26.Writ Petition No. 44517 of 1998, Sayed Shah Khursheed Ahmad Kashmi vs. State of U.P.

27.State of U.P. vs. Zahoor Ahmad, 1973(2) SCC 547

28.The State of U.P. vs. Zahoor Ahmad and Another, 1973(2) SCC 547

29.Delhi Development Authority Vs. Anant Raj Agencies Pvt. Ltd. (2016) 11 SCC 406

30.Purushottam Dass Tandon and others vs. State of U.P., Lucknow and others AIR 1987 All 56

31.State of U.P. and others vs. Purshottam Das Tandon and others 1989 Supp.(2) SCC 412

32.Shanti Prasad Devi and others vs. Shankar Mahto and others (2005) 5 SCC 543

33.Ashoka Marketing Ltd. And another vs. Punjab National Bank and others, (1990) 4 SCC 406

34.Sarup Singh Gupta vs. S. Jagdish Singh and others (2006) 4 SCC 205

35.Anand Kumar Sharma vs. State of U.P. and others 2014(2) ADJ 742

36.Writ Petition No.62588 of 2010, M/s Madhu Colonizers Pvt. Ltd. vs. State of U.P. & Ors.,

37.Bishan Das and others Vs. State of Punjab and others AIR 1961 SC 1570,

38.Express Newspapers Pvt. Ltd. and others Vs. Union of India (1986) 1 SCC 133,

39.Yar Mohammad and another vs. Lakshmi Das and others AIR 1959 Allahabad 1

40. Lallu Yeshwant Singh (dead) by his legal representative vs. Rao Jagdish Singh and others, AIR 1968 SC 620

41.Bishan Das and others Vs. State of Punjab and others AIR 1961 SC 1570

42.Thakoor Chunder Parmanick Vs. Ramdhone Bhuttacharjee (1866) 6 W.R. 228

43.Lala Beni Ram Vs. Kundan Lall (1899) L.R. 26 I.A. 58

44. Narayan Das Khettry Vs. Jatindranath (1927) L.R. 54 I.A. 218

45.Wazir Chand Vs. The State of Himachal Pradesh AIR 1954 SC 415

46.Express Newspapers Pvt. Ltd. and others Vs. Union of India (1986) 1 SCC 133

47.State of Orissa Vs. Ram Chandra Dev AIR 1964 SC 685

48.Mohammed Hanif Vs. State of Assam (1969) 2 SCC 782

49.Yar Mohammad and another vs. Lakshmi Das and others AIR 1959 Allahabad 1

50.Lallu Yeshwant Singh (dead) by his legal representative vs. Rao Jagdish Singh and others, AIR 1968 SC 620

51.Jnanendra Nath Nanda vs. Jadu Nath Banerji AIR 1938 Cal 211

52.Secretary of State for India in Council vs. Lal Mohan Chaudhuri, AIR 1935 Cal 746

53.Lala Kishun Chand vs. Sheo Dutta, AIR 1958 All. 879

54.Bhawanji Lakhanishi vs. Himatlal Jamnadas AIR 1972 SC 819

55.Gordhan vs. Ali Bux AIR 1981 Raj 206
56.Ratan Lal vs. Farshi Bibi (1907) ILR 34 Cal 396;

57.Madras High in Govindaswami vs. Ramaswami (1916) 30 Mad LJ 492;

58.Patna High Court in Christian vs. Hari Prasad AIR 1955 Pat 158

59.Pritilata Devi vs. Banke Bihari Lal AIR 1962 Pat 446

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

1. All these writ petitions relate to Nazul Plot No. 21/17, Chikatpur, Nasibpur Bakhtiyari, Allahabad, area 11906 square meter, and, therefore they are being decided by this common judgment. However, for better understanding, it would be appropriate to refer brief facts stated by petitioners in different writ petitions, separately.

Writ Petition No. 29495 of 2018

2. Writ Petition No. 29495 of 2018 *(hereinafter referred to as "WP-1")* has been filed by seven petitioners, namely, Smt. Prakati Rai, Smt. Sangita Shukla, Smt. Vandana Rai, Smt. Rachna Rai, Km. Shakti Saran Singh, Km. Samapika Saran Singh and Km. Shivangi Saran Singh, daughters of late Sureshwari Saran Singh, praying for issue of a writ of certiorari quashing notice/ order dated 14.08.2018 (Annexure-13 to writ petition) passed by District Magistrate, Allahabad and also State Government's order dated 19.06.2018, published in official gazette dated 09.08.2018. Petitioners have also sought a writ of mandamus commanding respondent-authorities to consider petitioners' application dated 30.01.1999 for grant of freehold rights over property in dispute in accordance with law and to restrain Respondents-1, 2 and 3 from evicting petitioners from property in dispute.

3. A lease in respect of Nazul land, Bungalow No. 17, Thornhill Road, area 2 acres and 4561 sq. yards was executed by Governor of United Provinces in favour of Rai Bahadur Bindeshwari Saran Singh on 22.04.1890 with effect from 01.10.1886, for a period of 50 years, on monthly rent of Rs. 90/-. A renewal Lease Instrument was executed for a further period of 50 years commencing from 01.10.1936 in favour of Sureshwari Saran Singh, Jagdambika Saran Singh, Brijeshwari Saran Singh and Badreshawari Saran Singh on the same terms as stated in original lease deed dated 22.04.1890. Sri Bindeshwari Saran Singh died in 1942. After his death, property in dispute devolved upon his four sons namely, Maheshwari Saran Singh, Jagdishwari Saran Singh, Bisheshwari Saran Singh and Jagdambika Saran Singh and each got 1/4 share. Maheshwari Saran Singh died on 15.2.1960 and his son Sureshwari Saran Singh died on 28.05.1979. His wife Smt. Smriti Saran Singh moved an application on 06.02.1995 for mutation of her name in place of late Sureshwari Saran Singh in respect of plot in dispute alongwith her daughters, i.e., petitioners. Reminders were given on 01.05.1995, 05.07.1995, 06.07.1995, 14.07.1995, 03.08.1995, 19.04.1996 and 09.06.1998. District Magistrate, Allahabad made an inquiry and found family tree of Sri Bindeshwari Saran Singh as under:

Siddh Narain Singh Bindeshwari Sharan Singh (Died on 27.10.42)
Maheshwari Saran Singh Bhuvneshwari Saran Singh Bishweshari Saran Singh

Jagdishwari Saran Singh Jagdambika Saran Singh

(Died on 15.02.60) (Died in 1929) (Died on 18.11.43) (Died on 01.03.44) (Died on 03.10.84)

(Wife Smt. Ratenshwari) (Wife Smt. Rukmani) (Wife Smt. Lalita Kunwari) (Wife Smt. Annapurna) (Wife Smt. Maheshwari)
(Issueless) (Issueless)

Sureshwari Saran Singh | | |

(died on 28.05.79) Shanker Prasad Prakash Narain Chandrashekhar

(Wife Smt. Smriti Saran Singh)

| |

Brijeshwari Saran Singh Badreswari Saran Singh

(Wife Smt. Pushpa Devi) (Died on 14.09.07)

(Daughter Sandya Singh) (P in WP-4) (Wife Kumud Singh) (P in WP-3)

|
Akash Saran Singh alias Lov Mandeshwari Saran Singh (P in WP-2)

Mandleshwari Saran Singh Sarveshwari Saran Singh Bireshwari Saran Singh Amreshwari Saran Singh
(P in WP 5 & 6)

Smt. Prakrati Rai Smt. Sangita Shukla Smt. Vandana Rai Smt. Rachna Rai Km Shakti Km. Samapika Km Shivangi (Wife Shivji Rai) (Wife Akhilesh Shukla) (Wife Shashi Rai) (Wife Alok Rai) Saran Singh Saran Singh Saran Singh

P in WP-1 P in WP-1 P in WP-1 P in WP-1 P in WP-1 P in WP-1 P in WP-1

4. Collector passed an order dated 21.01.1999 directing to delete names of Smt. Annapurna Devi, Sri Jagdishwari Saran Singh, Sri Jagdambika Saran Singh and Sri Sureshwari Saran Singh and enter names of Smt. Smriti Saran Singh wife of late Sureshwari Saran Singh and her daughters, namely, Smt. Prakati Rai, Smt. Sangita Shukla, Smt. Vandana Rai, Smt. Rachana Rai, Km. Shakti Saran Singh, Km. Samapika Saran Singh, Km. Shivangi Saran Singh; and, Smt. Maheshwari Devi wife of late Jagdambika Saran Singh and Shanker Prasad, Prakash Narain and Chandra Shekhar, all sons of late Jagdambika Saran Singh.

5. Petitioners also alleged to have applied for renewal of lease in 1985 but nothing was done by respondents. It is also said that there was a family settlement in 1942 between heirs of Bindeshwari Saran Singh which was reduced in writing as a family settlement deed dated 01.08.2015 dividing disputed land amongst the parties as per said settlement.

6. State Government came out with a policy to convert Nazul land into freehold and issued various Government Orders dated 23.05.1992, 02.12.1992, 03.10.1994, 17.02.1996, 29.03.1996, 02.4.1996, 29.8.1996, 25.10.1996, 28.02.1997 and 26.09.1997. All these Government Orders were reviewed and thereafter modifications and amendments were made in earlier policy vide

Government Orders dated 01.12.1998, 10.12.2002, 31.12.2002, 04.08.2006, 21.10.2008, 26.05.2009, 29.01.2010, 17.02.2011, 01.08.2011 and 28.09.2011. Comprehensive amendments again were made vide Government Order *(hereinafter referred to as "G.O.")* dated 04.03.2014 and 15.01.2015. Petitioners have placed on record G.Os. dated 01.12.1998, 04.03.2014 and 15.01.2015 as Annexures-5, 6 and 7 to WP-1. Petitioners applied for conversion of their leasehold right into freehold vide application dated 30.01.1999 before District Magistrate, Allahabad which was in accordance with G.O. dated 01.12.1998. A similar application is said to have been submitted by Smt. Kumud Singh wife of Sri Badreshwari Saran Singh on 16.09.1999. In para 19 of writ petition, the said applicant is referred as respondent 3rd set but we find that in the array of parties there are no respondent(s) 3rd set.

7. One more application is said to have been filed by Sri Brijeshwari Saran Singh but no date or other details are given in para 20 of writ petition.

8. Petitioners, after waiting for some time, i.e., about 16 years, regarding disposal of their application for conversion of lease right into freehold, came to this Court in Writ Petition No. 18068 of 2015 which was disposed of vide judgment dated 02.04.2015, directing District Magistrate, Allahabad to take a decision within six months. The order reads as under:

"The petitioners claim to have ***filed an application on 30 January 1999 for grant of freehold rights in respect of a land admeasuring 3968.97 sq. mts. on a portion of Nazul Plot No.21/17,*** *Nasib Pur Bakhtiyari, Allahabad. The grievance of the petitioners is that* ***till date the District Magistrate, Allahabad has not taken any decision on the said application.***

Learned Standing Counsel appearing for the respondents states that the District Magistrate, Allahabad shall take a decision expeditiously after hearing the parties.

This writ petition is, accordingly, ***disposed of*** *with a* ***direction to the District Magistrate, Allahabad to take a decision on the application filed by the petitioners after hearing the parties concerned expeditiously and preferably within a period of six months*** *from the date a certified copy of this order is filed by the petitioners.*

It is made clear that the Court has not adjudicated on the merits of the case which shall be examined by the District Magistrate in accordance with law." (Emphasis added)

9. The application was rejected by District Magistrate, Allahabad vide order dated 23.05.2015. It is said that a recall application was filed by petitioners on 15.07.2015 which is pending.

10. Another writ petition was filed by co-sharers, i.e., Writ Petition No. 64059 of 2014 seeking direction to District Magistrate, Allahabad to implement orders and instructions issued by Government for conversion of lease rights into freehold on Nazul land. The said petition is pending.

11. Suddenly District Magistrate, Allahabad has served upon petitioners notice dated 14.08.2018 informing that State Government has exercised right of resumption/ re-entry over land in dispute and petitioners should handover the same

within 15 days whereafter possession shall be taken forcibly. It has been stated in the order dated 14.08.2018 that land in dispute is required for public purpose for erection of buildings for Group Housing by Allahabad Development Authority *(hereinafter referred to as "A.D.A.").*

12. This notice dated 14.08.2018 has been challenged on the ground that Government Grants Act, 1895 *(hereinafter referred to as "GG Act, 1895")* has been repealed by Government of India vide notification dated 05.01.2018 and thereafter rights of petitioners, who are in possession of property in dispute, would be governed by provisions available in common law and no forcible possession can be taken; Government cannot evict petitioners without following procedure laid down in Transfer of Property Act, 1882 *(hereinafter referred to as "TP Act, 1882");* Government already took a decision for grant of freehold rights over Nazul land and applications were submitted by petitioners in 1999 but no decision was taken, matter was kept pending for almost one and half decade and now abruptly, by impugned notice, without deciding petitioners' right of freehold, Government cannot exercise power of resumption/ re-entry; lease expired in 1986 and Government treated petitioners continuously as "lessees" over land in dispute; in similar circumstances State Government has granted freehold rights to some others, namely, Sri Subhash and Sri Vikas Chandra on 03.05.2018 but petitioners have been discriminated; exercise of right to resumption/ re-entry is nothing but a colourable exercise on the part of State and is wholly arbitrary; and lastly, after repeal of GG Act, 1895, unfettered right of Government for resumption/ re-entry is now under check and eviction is permissible only in accordance with law and State Government and its authorities cannot forcibly evict petitioners.

13. A counter affidavit has been filed on behalf of Respondents-2 and 3, collectively, which has been sworn by Sri Gore Lal Shukla, Additional District Magistrate (Nazul), Allahabad. It is stated therein that Nazul Plot No. 21 (Bungalow No. 17), Thornhill Road, situated in Mauja Nasirpur Bakhtiyari, Paragana Chail, Allahabad was initially demised by an Indenture of lease, dated 22.04.1890 (with effect from 01.10.1886); subsequently renewing the lease, a fresh lease was executed for a period of 50 years on 01.10.1936; lease was governed by provisions of GG Act, 1895 hence provisions of TP Act, 1882 were /are not applicable to such leases in view of Sections 2 and 3 of GG Act, 1895, as amended by U.P. Act 13 of 1960; the renewed lease deed gives an option to Government to take over land, buildings, erections etc. upon expiration of period of lease; there was a clause for re-entry and forfeiture and it was also provided that no compensation or payment shall be claimable by lessee, his executors, administrators or assigns etc; it is true that in terms of Repealing and Amending (Second) Act, 2017 *(hereinafter referred to as "Repeal Act, 2017)*, GG Act, 1895, has been repealed but Section 4 has provided for savings of rights, consequences etc. under the instruments governed by Act, 1895 and they are not affected; in view thereof, right of resumption/ re-entry vested in Government by virtue of earlier lease deed read with GG Act, 1895 remained unaffected and can be exercised despite

repeal of GG Act, 1895 due to saving clause contained in Section 4 of Repeal Act, 2017; lease in the case in hand expired on 30.09.1986 and petitioners and occupants on the land in dispute thereafter have no authority to continue possession over property in dispute; for public purpose of planned development, land in dispute is needed by A.D.A.; proposal was submitted to State Government on 19.06.2018 and approved by Government on 09.08.2018 and accordingly notice for resumption/ re-entry was issued by District Magistrate on 14.08.2018; a supplementary notice was also issued on 24.08.2018 giving reference of different clauses of lease deed dated 01.10.1936 which provide forfeiture in terms whereof Government can resume land in dispute and no compensation would be payable to lessee, his executors, administrators or assigns etc.; repeal of GG Act, 1895 does not affect right of resumption/ re-entry of Government, as the consequences has to be considered in the light of Section 6 of General Clauses Act, 1897 *(hereinafter referred to as "GC Act, 1897")* read with Section 4 of Repeal Act, 2017; the portion of Nazul land of disputed property over which petitioners are claiming possession, in fact, is lying vacant and petitioners are not residing thereat; mere filing of application for freehold did not confer any vested right upon petitioners; in any case, application for freehold was already rejected vide order dated 23.05.2015 and the same has attained finality as having not been challenged in the present writ petition or before any other forum; order/ notice dated 14.08.2018 for resumption/ re-entry over land in dispute is perfectly valid and in accordance with law; resumption of a particular land is based on utility and requirement of State and different land cannot be equated in order to make allegations of arbitrariness and discrimination, inasmuch as, different land have different utility and cannot be treated to be similarly placed for all purposes including need of development for particular purposes.

Writ Petition No. 29547 of 2018

14. Writ Petition No. 29547 of 2018 *(hereinafter referred to as "WP-2")* has been filed by sole petitioner, Lov Mandeshwari Saran Singh son of late Badreshwari Saran Singh. Family tree of Sri Badreshwari Saran Singh has already been given while narrating facts relating to WP-1. This petitioner has relied on the family arrangement for division of property in dispute among the heirs of family tree of late Bindeshwari Saran Singh. This petitioner has also challenged notice dated 14.08.2018 issued by District Magistrate, Allahabad exercising right of resumption/ re-entry over land in dispute but here some more facts with regard to inter se dispute of family members have been stated and we find it necessary to mention the same in brief.

15. Total area of plot in dispute is 14241 sq. yards i.e., 11906.90 sq. meters. The erstwhile lessee Bindeshwari Saran Singh constructed two bungalows over disputed land, one is numbered as 17 Thornhill Road and another as 11A Sarojini Naidu Marg, Allahabad. After death of Sri Bindeshwari Saran Singh on 27.10.1942, his property and other rights were succeeded by his four sons, Maheshwari Saran Singh, Jagdishwari Saran Singh, Bisheshwari Saran Singh and Jagdambika Saran Singh. In 1948 all four sons separated through a family arrangement, executed between them. Jagdambika Saran Singh, father of

Respondents-11, 12 and 13, i.e., Sri Shanker Kumar Singh, Sri Prakash Chandra Sharma and Sri Ashutosh Sinha got exclusive possession over part of Nazul land occupied by Bungalow No. 11, Queens Road, Allahabad and land appurtenant thereto in terms of family arrangement. In order to satisfy decretal amount Jagdambika Saran Singh transferred his entire share in Bungalow No. 11A, Queens Road, Allahabad and land appurtenant thereto, to Smt. Lalita Devi, grandmother of petitioner through a registered sale deed dated 20.12.1950. Consequently, name of Smt. Lalita Devi was mutated in Revenue record with regard to Bungalow No. 11A, Queens Road, Allahabad. One Rameshwar Prasad Agrawal filed Original Suit No. 74 of 1949 against Jagdambika Saran Singh for recovery of money which was decreed on 07.11.1950 for Rs. 7579/-. An Execution Case No. 43 of 1953 was filed by Rameshwar Prasad Agrawal wherein Execution Court on 22.10.1953 passed order under Order 21 Rule 54(2) C.P.C. for attachment of property in dispute. In 1959, property in dispute and Bungalow No. 11A, Queens Road, Allahabad was auctioned and purchased by Munni Lal Bhargava, predecessor of proforma respondents-6 and 7, namely, Master Dev Raj Bhargava and Master Aditya Bhargava. Similarly, Bungalow No. 17 Thornhill Road, Allahabad was purchased by Sri Niwas Agrawal, father of proforma respondents-8 to 10, namely, Indresh Kumar Agrawal, Dinesh Agrawal and Naresh Agrawal. The above sale and purchase through auction was a sham transaction being result of a fraud played upon Court. Auction purchasers never got possession over property in dispute. Jagdambika Saran Singh had only 1/4 share in total Nazul plot measuring 11906.90 sq. meter, therefore, his share comes to 2976 sq. meter. Share of Jagdambika Saran Singh stood transferred to Smt. Lalita Devi, as already said, through registered sale deed dated 20.12.1950. The auction purchaser claimed to have purchased 1/4 share of Sri Jagdambika Saran Singh. Further, Smt. Annapurna Devi, one of the co-sharer died in 1990 and her share upto 2976 sq. meter in Nazul plot devolved upon remaining heirs, as a result whereof 992 sq. meter stood devolved upon legal heirs of Jagdambika Saran Singh, who had already died in 1986. Co-sharers, other than legal heirs of late Jagdambika Saran Singh, applied for freehold rights, of land coming to their share, but legal heirs of Jagdambika Saran Singh neither deposited any money nor applied for freehold and they have permanently settled in Gaya (State of Bihar). One of the auction purchaser, Munni Lal Bhargava filed a partition suit in 1973 which was contested by Smt. Lalita Devi. The said suit was dismissed in default on 09.08.2010. Proforma respondents-8, 9 and 10, i.e., Indresh Kumar Agrawal, Dinesh Agrawal and Naresh Agrawal, all, sons of late Shriniwas Agrawal also filed suit for partition being Original Suit No. 100 of 1973 in the Court of Civil Judge, Allahabad in respect of Bungalow No. 17 Thornhill Road, without disclosing the fact that said bungalow is standing on Nazul land and title is vested in Government. Partition suit was decreed. Preliminary decree was passed on 18.07.1984 and final decree in 2002. Proforma respondents-8, 9 and 10 thereafter raised a boundary wall which has been demolished by District Magistrate, Allahabad, treating said respondents as Trespassers. State Government has also taken necessary

steps and filed application under Order 9 Rule 13 C.P.C. in the Court of Civil Judge (Senior Division), Allahabad, for recall of ex parte decree in Original Suit No. 100 of 1973 and said application is pending. Smt. Lalita Devi, who purchased share of late Jagdambika Saran Singh, has bequeathed her share in favour of Smt. Kumud Singh, mother of petitioner through 'Will' dated 28.07.1994. Smt. Lalita Devi died on 30.09.1997. Father and mother of petitioner applied for freehold by depositing 25% money in terms of G.O. dated 01.12.1998. No demand notice has been issued to petitioner. On a representation made by petitioner's father, State Government sent a letter dated 08.11.1995 directing District Magistrate, Allahabad to take appropriate steps on the application of petitioner's father and reminders were also given by letters dated 16.02.1996, 16.10.2001 and 17.01.2005. Petitioner's father, late Badreshwari Saran Singh died on 14.09.2007 and thereafter petitioner submitted representation dated 29.08.2011 for conversion of lease rights into freehold. Bungalow No. 11A, Sarojini Naidu Marg, Allahabad, built upon Nazul plot No. 21/17, Thornhill Road, Allahabad is in exclusive possession of petitioner. Auction purchasers, Indresh Kumar Agrawal and Munni Lal Bhargava filed Writ Petitions No. 66803 of 2006 and 14267 of 2007 seeking direction to District Magistrate to recognize their rights. Aforesaid writ petitions were disposed vide order dated 20.08.2010 directing competent authority to pass appropriate order, whereupon Additional District Magistrate (Nazul), Allahabad has passed order on 25.08.2011. Petitioner also filed Writ Petition No. 64059 of 2014 seeking direction to Collector to give effect to policy of Government of conversion of lease right into freehold wherein counter was invited and the writ petition is pending. Relief prayed in Writ Petition No. 64059 of 2014 reads as under:

"i. issue a writ, order in the nature of mandamus directing the respondent Nos 2 and 3 to implement the order and instructions of the respondent no. 1 (Annexure No. 6 and 7 to the writ petition) and ***convert the share of the petitioner in the Nazul Plot No. 21/17, Naseebpur Bakityari, Allahabad into freehold in view of the petitioner application No. 2882*** *pending before them.*

ii. issue any other suitable writ, order or direction as this Hon'ble Court may deem fit and proper in the circumstances of the case.

iii. issue award cost of the petition to the petitioner."

(Emphasis added)

16. District Magistrate vide letter dated 06.01.2018 made a recommendation to Government proposing resumption/ re-entry on Nazul land in dispute. Same has been accepted by State Government whereafter impugned notice dated 14.08.2018 has been issued by District Magistrate, Allahabad. It appears that a supplementary notice has also been served by District Magistrate, Allahabad upon petitioner on 24.08.2018 and placing the same on record, a supplementary affidavit has been filed by petitioner.

17. Rest of the pleadings are similar to WP-1, hence we are avoiding repetition.

Writ Petition No. 30884 of 2018

18. Writ Petition No. 30884 of 2018 *(hereinafter referred to as "WP-3")* has been filed by Smt. Kumud Singh, wife of late Badreshwari Saran Singh and the facts stated in writ petition are similar as stated in WP-1 and WP-2, therefore, the same are not being repeated. However, some additional facts stated in the writ petition may be stated hereat. As already said, auction purchasers filed Writ Petitions No. 14267 of 2007 and 6680 of 2006 which were disposed of on 20.08.2010, pursuant whereto, Additional District Magistrate (Nazul), Allahabad passed order on 25.08.2011. The same was challenged by petitioner-Smt. Kumud Singh in Writ Petition No. 56367 of 2011 and it is pending. Further, in order to consider demand of various authorities of land for development, District Magistrate, Allahabad constituted a committee vide order dated 30.12.2017 constituting:

1. Vice Chairman, Allahabad Development Authority, Allahabad.
2. Nagar Ayukt, Nagar Nigam, Allahabad.
3. Additional District Magistrate (Nazul), Allahabad
4. City Magistrate, Allahabad
5. Sri Sat Shukla, Officer on Special Duty, A.D.A., Allahabad

19. The aforesaid Committee was required to examine Nazul land available in Allahabad City, its suitability and applicability in the light of demand made by various Government Departments and Institutions for resumption. In respect of land in dispute, Committee submitted its recommendation vide letter dated 06.01.2018 and the same was forwarded by Collector, Allahabad to State Government for resumption vide letter dated 06.01.2018. Writ Petition No. 40395 of 2018

20. Writ Petition No. 40395 of 2018 (hereinafter referred to as "WP-4") has been filed by Smt. Sandhya Singh, daughter of (late) Brijeshwari Saran Singh challenging order/ notice dated 14.08.2018/ 24.08.2018 issued by District Magistrate, Allahabad.

21. Facts stated in this writ petition are common to the facts stated in WPs-1 and 2, therefore, we are not repeating the same. It is said that application for freehold was filed by petitioner's father in 1994 and a similar application for freehold was submitted by petitioner alongwith others on 05.11.2011. It is also stated in paras 70 and 71 that an order has been passed on 09.08.2018 rejecting the application but copy of order has not been made available to petitioner.

Writ Petitions No. 40399 of 2018 & 40401 of 2018

22. Writ Petitions No. 40399 of 2018 and 40401 of 2018 *(hereinafter referred to as "WP-5" and "WP-6" respectively)* have been filed by Sarvesh Singh son of (late) Brijeshwari Saran Singh and Mandaleshwari Saran Singh. Here also, facts are same as stated in WPs- 1 to 4, therefore are not being repeated.

23. On behalf of Respondents-2 and 3 counter affidavits have been filed in WPs-2 to 6 also with pleadings similar as stated in counter affidavit filed by State-respondents in WP-1, therefore, we are not repeating the same.

24. In WP-1 Sri Ravi Kant, learned Senior Advocate assisted by Sri Tarun Agarwal, Advocate has advanced his submission on behalf of petitioners while Sri Ajit Kumar Singh, Additional Advocate General assisted by Sri Nimai Das and Sri

Sudhanshu Srivastava, learned Additional Chief Standing Counsels for State of U.P. and its authorities and Sri M.D. Singh Shekhar, learned Senior Advocate assisted by Sri Amit Verma, Advocate, for Prayagraj Development Authority have advanced their submissions.

25. In WPs-2 to 6, Sri Harihar Prasad Srivastava, Advocate has put in appearance on behalf of petitioners and adopted arguments advanced by Sri Ravi Kant, learned Senior Advocate appearing for petitioners in WP-1. Counsel for respondents are same as in WP-1 and their arguments are also common.

26. Sri Ravi Kant, learned Senior Advocate, who has led arguments in all these cases (since in other writ petitions counsel for petitioners have adopted argument of Sri Ravi Kant), contended:

i. Lease deed which was going to expire in 1986 sought to be renewed by petitioners by submitting application in 1985 but no order was passed therein and unless an order is passed on petitioners' application for renewal of lease, petitioners' rights could not have been affected otherwise that too, by exercising right of resumption after more than 30 years.

ii. Petitioners' possession over property in dispute after expiry of lease was never obstructed and no action was taken for eviction or ejectment of petitioners from land in dispute. Meaning thereby respondents by conduct admitted lease rights of petitioners and valid possession over land in dispute. That being so, land in dispute could not have been resumed by exercising power with reference to GG Act, 1895 which was already repealed before impugned order was passed.

iii. State Government framed policy of conversion of lease into freehold and pursuant thereto petitioners submitted application for freehold of lease land but the said application was not decided for long. Petitioners are entitled to have lease rights converted into freehold as per relevant G.Os.

iv. In any case, if petitioners continued possession after expiry of lease in 1986 was unauthorized in view of provisions of Uttar Pradesh Public Premises (Eviction of Unauthorised Occupants) Act, 1972 (hereinafter referred to as "U.P. Act, 1972"), petitioners cannot be evicted or ejected from disputed land without following procedure prescribed in the said Act.

v. Right of resumption exercised by respondents under lease-deed, which has expired long back is illegal since in 2018 no deed was operating and resumption by State vide impugned order cannot be read in continuation with lease deed which had already expired in 1986.

vi. State Government has granted approval for resumption of land in dispute on proposal made by Collector without giving any opportunity to petitioners, therefore, impugned order including approval order granted by State Government is in violation of principles of natural justice.

27. Per contra, learned Additional Advocate General appearing for State of U.P. and Senior Counsel appearing on behalf of A.D.A. advanced argument virtually in the light of pleadings and objections raised in the counter affidavit, which we have already given in detail hereinabove and will further elaborate while discussing issues raised in these writ petitions.

28. From rival submissions, issues which, in our view, required to be adjudicated in these writ petitions are :

i. What is "Nazul"?

ii. What is/are Statute(s) governing Crown (late, "Government") Grant of land owned by Crown (Government) i.e. Nazul? Its status and effect.

iii. Whether lease right governed by instruments of lease read with GG Act, 1895 is transferrable and if so, whether it is subject to any condition and any transfer made not consistent with such conditions, whether would be valid and confer an actionable right upon Transferree?

iv. What is the status of a person, in possession of Nazul land, after expiry of period of lease, or of a person who is transferred land by Lessee?

v. Whether right of resumption exercised by State is in accordance with law?

vi. Whether petitioners can be evicted by State Government by giving a notice and following the condition and procedure prescribed in the lease deed or State should follow procedure laid down under U.P. Act, 1972?

vii. Whether impugned notice and order of approval of State Government for resumption/re-entry over land in dispute is invalid on account of lack of opportunity to petitioners. In other words, whether principles of natural justice are applicable when State Government chose to exercise right of resumption/re-entry in respect of land owned by it?

29. We have framed above questions in the light of the fact that it is admitted by all the parties that land in dispute is 'Nazul' and owned by State Government.

30. Questions (i) and (ii), in our view, can be taken together hence we proceed to discuss both these questions (i) and (ii) together.

31. Every land owned by State Government is not termed as 'Nazul' and therefore it has become necessary to understand, what is 'Nazul', and in this context we have framed question (i).

32. State Government may own land by having acquired and vested in various ways, which includes vesting of land in the capacity of a sovereign body and having right of bona vacantia. Property may also be acquired and owned by State by way of acquisition under the Statute relating to acquisition of land or by purchase through negotiation or gift by an individual or in similar other manners. All such land, which is owned and vested in State Government results in making the State owner of such land, but in legal parlance, the term "Nazul" is not applicable to all such land.

33. It is only such land which is owned and vested in the State on account of its capacity of sovereign, and application of right of bona vacantia, which is covered by the term 'Nazul', as the term is known for the last more than one and half century.

34. In Legal Glossary 1992, fifth edition, published by Legal Department of Government of India, at page 589, meaning of the term 'Nazul' has been given as 'Rajbhoomi, i.e., Government land'.

35. Nazul is an Arabic word. It refers to a land annexed to Crown. During British Regime, immoveable property of individuals, Zamindars, Nawabs and Rajas when confiscated for one or the other reason, it was termed as 'Nazul

property'. The reason being that neither it was acquired nor purchased after making payment. In the old record, when such land was referred in Urdu, this kind of land was shown as 'Jaidad Munzabta'.

36. For dealing with such property, under the authority of Lt. Governor of North Western Provinces, two orders were issued in October, 1846 and October, 1848. Therein, after the words "Nazul property", its english meaning was given as 'Escheats to the Government'. Sadar Board of Revenue on May 20, 1845 issued a circular order in reference to "Nazul land" and in para 2 thereof it mentioned, "The Government is the proprietor of those land and no valid title to them can be derived but from the Government". Nazul land was also termed as "Confiscated Estate". Under Circular dated July 13, 1859, issued by Government of North Western Provinces, every Commissioner was obliged to keep a final confiscation statement of each District and lay it before Government for orders.

37. Right of King to take property by 'escheat' or as 'bona vacantia' was recognized by common law of England. Escheat of property was Lord's right of re-entry on real property held by a tenant, dying intestate, without lawful heirs. It was an incident of Feudal Tenure and based on the want of a tenant to perform Feudal services. On the tenant dying intestate without leaving any lawful heirs, his estate came to an end and Lord, by his own right and not by way of succession or inheritance from the tenant, re-entered real property as owner. In most cases, land escheated to Crown as the 'Lord Paramount', in view of gradual elimination of Intermediate or Mesne lords since 1290 AD. Crown takes as 'bona vacantia' goods in which no one else can claim property. In **Dyke v. Walford 5 Moore PC 434= 496-13 ER 557 (580)** it was said 'it is the right of the Crown to bona vacantia to property which has no other owner'. Right of the Crown to take as "bona vacantia" extends to personal property of every kind. The escheat of real property of an intestate dying without heirs was abolished in 1925 and Crown thereafter could not take such property as bona vacantia. The principle of acquisition of property by escheat, i.e., right of Government to take on property by 'escheat' or 'bona vacantia' for want of a rightful owner was enforced in Indian territory during the period of East India Company by virtue of Statute 16 and 17 Victoria, C. 95, section 27.

38. We may recollect, having gone through history, that prior to 1857, several Estates were taken over by British Company i.e. East India Company by way of annexation. Doctrine of lapse applied in Jhansi was another kind of above mentioned two principles.

39. The above provisions had continued by virtue of Section 54 of Government of India Act, 1858, section 20(3)(iii) of Government of India Act, 1915 and section 174 of Government of India Act, 1935. After enactment of Constitution of independent India, Article 296 now continues above provision and say :

'Subject as hereinafter provided, ***any property in the territory of India which,*** *if this Constitution had not come into operation,* ***would have accrued to His Majesty or, as the case may be, to the Ruler of an Indian State by escheat or lapse, or as bona vacantia for want of a rightful owner, shall if it is property situate in a State, vest in such State,*** *and*

shall, in ***any other case, vest in the Union.'*** (Emphasis added)

40. Article 296, therefore, has retained power of State to get ownership of such land, in respect whereof principle of 'escheat', 'lapse' or 'bona vacantia' would have been applicable prior to enforcement of Constitution of India. The above power continued to apply after enactment of Constitution with the only modification that if such land is situate within the territory of State Government, it will vest in State and in other cases, it will vest in Union of India. Vesting of land and giving ownership to State Government or Union of India under Article 296 is clearly in respect of a land, which will come to it by way of 'escheat', 'lapse' or 'bona vacantia' and not by way of acquisition of land under some statute or purchase etc.

41. Supreme Court in **Pierce Leslie and Co. Ltd. Vs. Miss Violet Ouchterlony Wapsnare, AIR 1969 SC 843** has considered the above principles in the context of 'Sovereign India' as it stands under Constitution after independence, and, has observed :

"....in this country the ***Government takes by escheat immoveable as well as moveable property for want of an heir or successor.*** *In this country escheat is not based on artificial rules of common law and is not an incident of feudal tenure.* ***It is an incident of sovereignty and rests on the principle of ultimate ownership by the State of all property within its jurisdiction".***

(Emphasis added)

42. Court placed reliance on **Collector of Masulipatam v. C. Vencata Narainapah 8 MIA 500, 525; Ranee Sonet Kowar v. Mirza Himmut Bahadoor (2) LR 3 IA 92, 101, Bombay Dyeing and Manufacturing Co. Ltd. v. State of Bombay [1958] SCR 1122, 1146, Superintendent and, Legal Remembrancer v. Corporation of Calcutta (1967) 2 SCR 170.**

43. Judicial Committee in Cook v. Sprigg (1899) AC 572 while discussing, 'what is an act of State', observed :

"The taking possession by Her Majesty, whether ***by cession or by any other means by which sovereignty can be acquired,*** *was an act of State." (Emphasis added)*

44. This decision has been followed in **Raja Rajinder Chand v. Mst. Sukhi, AIR 1957 SC 286.**

45. In **Nayak Vajesingji Joravarsingji v. Secretary of State for India in Council AIR 1924 PC 216**, Lord Dunedin said :

"When ***a territory is acquired by a sovereign State for the first time, that is an act of State.*** *It matters not how the acquisition has been brought about. It may be* ***by conquest, it may be by cession following on treaty, it may be by occupation of territory hitherto unoccupied by a recognised ruler. In all cases the result is the same.*** *Any inhabitant of the territory can make good in the municipal courts established by the new sovereign only such rights as that sovereign has, through his officers, recognised. Such* ***rights as he had under the rule of predecessors avail him nothing."***

46. In **Dalmia Dadri Cement Co. Ltd. v. CIT [1958] 34 ITR 514 (SC) :**

AIR 1958 SC 816, Court said (page 523 of 34 ITR) :

*"The **expression 'act of State'** is, it is scarcely necessary to say, not limited to hostile action between rulers resulting in the occupation of territories. It **includes all acquisitions of territory by a sovereign State for the first time, whether it be by conquest or cession."***
(Emphasis added)

47. In **Promod Chandra Deb v. State of Orissa AIR 1962 SC 1288,** Court said, 'Act of State' is the taking over of sovereign powers by a State in respect of territory which was not till then a part of its territory, either by conquest, treaty or cession, or otherwise'.

48. To the same effect was the view taken by a Constitution Bench in **Amarsarjit Singh v. State of Punjab AIR 1962 SC 1305**, where in para 12, Court said :

"It is settled law that conquest is not the only mode by which one State can acquire sovereignty over the territories belonging to another State, and that the same result can be achieved in any other mode which has the effect of establishing its sovereignty."

49. In **Thakur Amar Singhji v. State of Rajasthan AIR 1955 SC 504**, in para 40, Court said :

*"The **status of a person must be either that of a sovereign or a subject.** There is no tedium quid. The law does not recognise an intermediate status of a person being partly a sovereign and partly a subject and when once it is admitted that the Bhomicharas had acknowledged the sovereignty of Jodhpur their status can only be that of a subject.*

A subject might occupy an exalted position and enjoy special privileges, but he is none the less a subject..."

(Emphasis added)

50. In **State of Rajasthan vs. Sajjanlal Panjawat AIR 1975 SC 706** it was held that Rulers of the erstwhile Indian States exercised sovereign powers, legislative, executive and judicial. Their firmans were laws which could not have been challenged prior to the Constitution. Court relied on its earlier two decisions in **Director of Endowments, Govt. of Hyderabad vs. Akram Ali, AIR 1956 SC 60, and Sarwarlal vs. State of Hyderabad, AIR 1960 SC 862.**

51. In **Promod Chandra Deb vs. State of Orissa AIR 1962 SC 1288 "**act of the State" was explained in the following words :

*"an "act of State" may be the taking over of sovereign powers either **by conquest or by treaty or by cession or otherwise.** It may have happened on a particular date by a public declaration or proclamation, or it may have been the result of a historical process spread over many years, and sovereign powers including the right to legislate in that territory and to administer it may be acquired without the territory itself merging in the new State."*

52. This decision has been followed later in **Biswambhar Singh vs. State of Orissa 1964 (1) SCJ 364.**

"16. Thus, ***a territory acquired by a sovereign State is an Act of State but the land comprising territory does not become the land owned by State.*** *The* ***land owned by State may come to it in various ways, like confiscation, purchase, escheat or bona vacantia, gift, etc.*** *In such a case the ownership vests in State, like any other individual and* ***State is free to deal with the same in a manner like any other owner may do so.***

*17. Thus '****Nazul****' is a land* ***vested in State for any reason whatsoever that is cession or escheat or bona vacantia, for want of rightful owner or for any other reasons and once land belong to State,*** *it will be difficult to assume that State would acquire its own land. It is per se impermissible to acquire such land by forcible acquisition under Act, 1894, since there is no question of any transfer of ownership from one person to another but here State already own it, hence there is no question of any acquisition."*

(Emphasis added)

53. Thus the land in question which is admittedly 'Nazul', belonged to the category as discussed above i.e. it came to be vested and owned by State in its capacity of sovereign and right of bona vacantia. When acquisition is made under the provisions of a Statute, purpose of acquisition is already known and State pay its price but when land is owned by State, which is Nazul, objective of use of such land is not predetermined but it can be utilized by State for larger public welfare and its benefit, as necessitated from time to time. In other words 'Nazul' land forms the assets owned by State in trust for the people in general who are entitled for its user in the most fair and beneficial manner for their benefit. State cannot be allowed to distribute such largesse by pick and choose manner or to some selected groups etc.

54. Historical documents, records as also authorities discussed above show that earlier Government i.e. East India Company upto 1858 and thereafter British Government used to allot "Nazul land" to various persons, who had shown their alliance to such Government in various ways, sometimes by deceiving their Indian counter parts who had raised voice against British Ruler, or otherwise remained faithful to British regime and helped them for their continuation in ruling this country. Sometimes land was given on lease without any condition and sometimes restricted for certain period etc., but in every cases, lease was given to those persons who were faithful and shown complete alliance to British Ruler and their reign. The reason was that in respect of Nazul, no predetermined objective was available as was the case in respect of land acquired by State by way of acquisition under Statute of Acquisition after paying compensation or purchase. Such allocation of land by English Rulers used to be called "Grant".

55. In other words, we can say that initially land owned by State used to be allotted in the form of 'Grant' by the then British Government. No specific statutory provisions were available to govern it. TP Act, 1882 was enacted to govern transfer of immovable property. Sections 10 - 12 of TP Act, 1882 made provisions invalidating, with certain exceptions, all conditions for forfeiture of transferred property on alienation by transferee and all limitations over consequent upon any such alienation or any insolvency of or attempted alienation by him.

56. Apprehending that above provisions of TP Act, 1882, may be construed as a fetter upon discretion of the Crown in creation of inalienable Jagirs in 'Grants', and acting upon that advice that it would not be competent for Crown to create an inalienable and impartible estate in the land comprised in the Crown Grant, unless such land has heretofore descended by custom as an impartible Raj, it was sought to make a separate statute to give supremacy to the provisions contained in Crown's Grant, notwithstanding any other law including TP Act, 1882. With this object, 'GG Act 1895' was enacted.

57. Preamble of GG Act, 1895 gives purpose of its enactment stating that doubts have arisen to the extent and operation of TP Act, 1882 and to the power of Crown (later substituted by word "Government") to impose limitations and restrictions upon grants and other transfers of land made by it or under its authority, hence to remove such doubts, GG Act, 1895 was enacted.

58. Section 2 of GG Act, 1895, as it was initially enacted, read as under :

"Transfer of Property Act, 1882, not to apply to Government grants.- ***Nothing in the Transfer of Property Act, 1882, contained shall apply or be deemed ever to have applied to any grant or other transfer of land*** *or of any interest therein heretoforce made or hereafter to be made by or on behalf of Her Majesty the Queen Empress, Her heirs or successors, or by or on behalf of the Secretary of State for India in Council to, or in favour of, any person whomsoever; but every such grant and transfer shall be construed and take effect as if the said Act had not been passed."*

(Emphasis added)

59. The above provision was amended in 1937 and 1950 and the amended provision read as under :

"2. Transfer of Property Act, 1882, not to apply to Government grants.- ***Nothing in the Transfer of Property Act, 1882,*** *contained* ***shall apply or be deemed ever to have applied to any grant or other transfer of land or of any interest therein*** *heretoforce made or hereafter to be made by or on behalf of the Government to, or in favour of, any person whomsoever; but* ***every such grant and transfer shall be construed and take effect as if the said Act had not been passed."***

(Emphasis added)

60. Section 3 of GG Act, 1895 read as under :

"Government grants to take effect according to their tenor.- ***All provisions, restrictions, conditions*** *and* ***limitations*** *over* ***contained in any such grant*** *or* ***transfer*** *as aforesaid* ***shall be valid*** *and the* ***effect according to their tenor,*** *any* ***rule of law, statute or enactment of the Legislature to the contrary notwithstanding."***

61. In State of Uttar Pradesh, vide Government Grants (U.P. Amendment) Act, 1960 (U.P. Act No.XIII of 1960) *(hereinafter referred to as "U.P. Amendment, 1960")*, Sections 2 and 3 of GG Act, 1895, were substituted by Section 2, as under :

"2. (1) Transfer of Property Act, 1882, not to apply to Government Grants.- ***Nothing contained in the Transfer of Property Act, 1882, shall apply*** *or* ***be deemed ever to have applied to any grant*** *or other transfer of land or*

of any interest therein, heretoforce made or hereafter to be made, by or on behalf of the Government to or in favour of any person whomsoever; and ***every such grant and transfer shall be construed and take effect as if the said Act had not been passed."***

(2) U.P. Tenancy Act, 1939 and Agra Tenancy Act, 1926 not to affect certain leases made by or on behalf of the Government.- ***Nothing contained in the U.P. Tenancy Act, 1938, or the Agra Tenancy Act, 1926, shall affect, or be deemed to have ever affected any rights, created, conferred or granted,*** *whether before or after the date of the passing of the Government Grants (U.P. Amendment) Act, 1960,* ***by leases of land by,*** *or on behalf of, the Government in favour of any person; and* ***every such creation, conferment or grant shall be construed and take effect, notwithstanding anything to the contrary contained in the U.P. Tenancy Act, 1939, or the Agra Tenancy Act, 1926.***

(3) Certain leases made by or on behalf of the Government to take effect according to their tenor.- ***All provisions, restrictions, conditions and limitations*** *contained in any such creation, conferment or grant referred to in Section 2,* ***shall be valid*** *and* ***take effect according to their tenor,*** *any decree or direction of* ***a court of law or any rule of law, statute or enactment of the Legislature, to the contrary notwithstanding :***

Provided that nothing in this section shall prevent, or be deemed ever to have prevented, ***the effect of any enactment relating to the acquisition of property, land reforms or the imposition of ceiling on agricultural land."***

(Emphasis added)

62. A perusal of Section 2 of GG Act, 1895 shows two things :

i. A declaration is made that any grant or other transfer of land or of any interest therein, made by or on behalf of Government, in favour of any person, on and after enactment of GG Act, 1895, would not be governed by provisions of TP Act, 1882 i.e. nothing contained in TP Act, 1882 shall apply to such Grant, transfer or interest.

ii. A clarification that a Grant or Transfer, referred to in Section 2, when is to be construed and given effect, it shall be done in such manner and by treating as if TP Act, 1882 has not been passed.

63. Thus, the first declaration is in respect of Grant or transfer of land or creation of any interest, as the case may be, to exclude TP Act, 1882 for all purposes and the second part of Section 2 clarifies that while construing and giving effect to a Grant or Transfer, referred to in Section 2, it will be presumed that TP Act, 1882 has not been passed at all.

64. In Section 2(1) of GG Act, 1895, as amended in Uttar Pradesh, we do not find any distinction vis a vis what has been said in Section 2 of GG Act, 1895. There is an addition in GG Act, 1895 in its application to Uttar Pradesh, by inserting sub-section (2) in Section 2, a provision in respect of U.P. Tenancy Act, 1939 and Agra Tenancy Act, 1926 also, making a similar declaration, as made in sub section (1) in respect of TP Act, 1882.

65. Sub-section (3) of Section 2 of GG Act, 1895 protect certain leases, already made, declaring the same to be valid in the light of insertion of sub-section(1) of Section 2 in the State of Uttar Pradesh and that is

why, notwithstanding any decree or direction of Court of law, leases already made, were validated, which otherwise might have been affected by the provisions of U.P. Tenancy Act, 1938 or Agra Tenancy Act, 1926.

66. Proviso to sub-section (3) of Section 2 of GG Act, 1895 further declare that all provisions of Section 2 of GG Act, 1895 will have no effect when land is sought to be acquired under the provisions of Statute relating to acquisition or for giving effect to a Statute relating to land reforms or imposition of ceiling on agricultural land.

67. Section 3 of GG Act, 1895 is not available in State of U.P. after U.P. Amendment Act, 1960 since Sections 2 and 3 of Principal Act virtually got amalgamated in the form of Section 2, by U.P. Amendment Act, 1960. However, intent, effect and declaration by legislature is almost pari materia with the only addition that in State of U.P., U.P. Tenancy Act, 1939 and Agra Tenancy Act, 1926 are also excluded in the same manner as was done in respect of TP Act, 1882.

68. Sections 2 and 3 of GG Act, 1895 were considered in **State of U.P. vs. Zahoor Ahmad, 1973(2) SCC 547** and in para 16, Court said :

*"**Section 3** of the Government Grants Act **declares the unfettered discretion of the Government to impose such conditions and limitations as it thinks fit, no matter what the general law of the land be.** The meaning of Sections 2 and 3 of the Government Grants is that the scope of that Act is not limited to affecting the provisions of the Transfer of Property Act only. **The Government has unfettered discretion to impose any conditions, limitations, or restrictions in its grants, and the right, privileges and obligations of the grantee would be regulated according to the terms of the grant, notwithstanding any provisions of any statutory or common law."*** (Emphasis added)

69. Again in **Hajee S.V.M. Mohamed Jamaludeen Bros. & Co. vs. Government of Tamil Nadu (1997) 3 SCC 466,** Court said that combined effect of two sections of GG Act, 1895 is that terms of any Grant or terms of any transfer of land made by a Government would stand insulated from tentacles of any statutory law. Section 3 places terms of such Grant beyond reach of any restrictive provision contained in any enacted law or even equitable principles of justice, equity and good conscience adumbrated by common law, if such principles are inconsistent with such terms. Court said :

*"The two provisions are so framed as to **confer unfettered discretion on the government to enforce any condition or limitation or restriction in all types of grants made by the government to any person.** In other words, the rights, privileges and obligations of any grantee of the government would be **completely regulated by the terms of the grant, even if such terms are inconsistent with the provisions of any other law."*** (Emphasis added)

70. In **Azim Ahmad Kazmi and others vs. State of U.P. and Another (2012) 7 SCC 278** observations made in para 16 in **State of U.P. vs. Zahoor Ahmad (supra)** have been reproduced and followed.

71. In **State of U.P. and others vs. United Bank of India and others (2016) 2 SCC 757,** in para 30 of the judgment, Court said :

"Indisputably, the lease of nazul land is governed by the Government

Grants Act, 1895. Sections 2 and 3 of the Government Grants Act, 1895 very specifically provide that the ***provisions of the Transfer of Property Act do not apply to government lands .....****"*

(Emphasis added)

72. Thus, a 'Grant' of a Nazul will be governed by terms and conditions contained in the instrument/deed if Grant, wholly unaffected by any Statute providing otherwise. It cannot be doubted that the lease granted in the case in hand is/was a 'Grant' governed by GG Act, 1895. Broadly, Grant includes lease.

73. The term "Grant" has not been defined in GG Act, 1895. What a 'Grant' would mean is of importance for the reason that GG Act, 1895 has used the term "Grant". Therefore, it has to be seen "whether a lease executed by State in respect of land owned by it and covered by the term "Nazul", through a lease deed or instrument of lease or indenture of lease, whatever the term used, will constitute a "Grant" of State or it is something else".

74. In **Black's Law Dictionary, Eighth Edition, at page 719,** the word "Grant" has been defined as under :

*"**Grant,** n. 1. An agreement that creates a right of any description other than the one held by the grantor.* ***Examples include leases,*** *easements, charges, patents, franchises, powers,and licenses. 2. The formal transfer of real property. 3. The document by which a transfer is effectd; esp., DEED. 4. The property or property right so transferred."*

75. Interestingly, in **Black's Law Dictionary,** 'Grant' has been said to be of various kinds and it has enumerated seven types of 'Grant' as under:

*"**Community grant.** A grant of real property made by a government (or sometimes by an individual)* ***for communal use,*** *to be held in common with no right to sell. A community grant may set out specific, communal uses for the p roperty, such as for grazing animals or a playground. Cf. Private grant.*

Escheat grant. A government's grant of escheated land to a new owner. - *Also termed escheat patent.*

imperfect grant. *1. A grant that requires the grantee to do something before the title passes to another. Cf. Perfect grant. 2. A grant that* ***does not convey all rights and complete title against both private persons and government, so that the granting person or political authority may later disavow the grant.*** *See Paschal v. Perex, 7 Tex. 368 (1851).*

inclusive grant. *A deed or grant that describes the boundaries of the land conveyed and excepts certain parcels within those boundaries from the conveyance, usu. Because those parcels of land are owned or claimed by others.- Also termed inclusive deed.*

office grant. *A grant made by a legal officer because the owner is either unwilling or unable to execute a deed to pass title, as in the case of a tax deed. See tax deed under DEED.*

Perfect grant. *A grant for which the grantor has done everything required to pass a complete title, and the grantee has done everything required to receive and enjoy the property in fee. Cf. Imperfect grant*

private grant. *A grant of real property made to an individual for his or*

her private use, including the right to sell it. Private grants made by a government are often found in the chains of title for land outside the original 13 states, esp. in former Spanish and Maxican possession."

76. In **Corpus Juris Secundum,** A Complete Restatement of the Entire American Law, as developed by All Reported Cases, Volume XXXVIII, word "Grant" has been defined at page 1066-1070, as under :

*"**Grant** - In General - A word which has a peculiar and appropriate meaning in the law, and is to be construed and understood according to such meaning; but its signification, in particular cases is to be determined from its connection and the manner of its use.*

As a Noun

*In General. **The act of granting;** a bestowing or conferring; a boon, a concession, a gift; also the thing granted or bestowed. As **applied to grants by public authority,** the word "grant" implies the conferring by the sovereign power of some valuable privilege, franchise, or other right of like character on a corporation, person, or class of persons; an act evidenced by letters patent under the great seal, **granting something from the king to a subject.** In a somewhat different sense, an admission of something as true.*

***As a Contract.** A grant is said to be a contract executed, that is, one in which the object of the contract is performed. Ordinarily, the essential elements of a contract are necessary to constitute a grant, such as competent parties and a subject matter, a legal consideration, a mutuality of agreement and of obligation. As in the case of other contracts in writing, it ordinarily comprehends something more than the mere execution of the instrument; it includes a delivery of it. It is not indispensable, however, that technical words be used.*

***Transfer of Property.** As a technical term, originally used to signify a conveyance of an incorporeal hereditament whereof livery could be had, but now of far more extended application, see Deeds (1 c notes 54 - 63). While the term is commonly used to denote private conveyances, it has been characterized as a nomen generalissimum, applicable to all sorts of conveyances, and in this sense has been defined as a **transfer of property, real or personal, by deed or writing.** The following notes contain examples of what, under particular circumstances and according to the subject matter and the context, the term may be applied to, or be held to include or what the term may be held not to include.*

...

Transferring property. An operative word of transfer, technically applicable to real estate, although not necessarily so. It is made use of in deeds of conveyance of lands to import a transfer; and in this application has been defined as meaning to convey; to make conveyance of; to transfer property by an instrument in writing.

As used in a will, to devise or to bequeath."

77. In Words and Phrases, Permanent Edition, Volume 18A Gone-Gyrotiller, word "Grant" has been defined at page 379, as under :

" ...

To grant means to give over, to make conveyance of, to give the

possession or title to, to convey-usually in answer to petitioner; to confer or bestow, with or without compensation, particularly in answer to prayer or request; to admit as true when disputed or not satisfactorily proved; to yield belief to; to allow; to yield; to concede. Grant is usually regarded as synonymous with give, confer, bestow, convey, transfer, admit, allow, concede. As a noun, the term signifies: (1) The act of granting; a bestowing or conferring; concession; admission of something as true. (2) The thing granted or bestowed; a gift; a boon. (3) a transfer of property by deed or writing, especially an appropriation or conveyance made by the government, as a grant of land."

78. In **Jowitts Dictionary of English Law, Second Edition by John Burke (Volume 1),** word "Grant" has been defined at page 870, as under:

"Grant :a common law conveyance.

This deed was originally confined to the transfer of incorporeal hereditaments and expectant estates, of which livery of seisin could not be given. But the distinction between property lying in livery and in grant, as regards the conveyance of the immediate freehold, was abolished by the Real Property Act, 1845, s. 2, which provided that all corporeal hereditaments should, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery. The Law of Property Act, 1925, s. 51, replacing the Real Property Act, 1845, s. 6, enacts that all lands and interests therein shall lie in grant and not in livery of seisin. The operative verb was "grant," which, by the Real Property Act, 1845, s. 4, replaced by the Law of Property Act, 1925, s. 59, is not to imply any covenant in law in respect of any hereditaments except by force of any Act of Parliament, and by the Conveyancing Act, 1881, s. 49, replaced by the Law of Property Act, 1925, s. 51, the use of the word "grant" it not necessary to convey land or any interest in land.

...

The sovereign's grants are matters of record, and are either letters patent or writs close.

"Grant" is the term commonly applied to rights created or transferred by the Crown, *e.g., grants of pensions, patents, charters, franchises. It is also used in reference to public money devoted to special purposes. See Exchequer Grants."*

79. In **Biswas Encyclopedic Law Dictionary (Legal & Commercial) Third Edition 2008,** word "Grant" has been defined at page 737, as under :

*"**GRANT.** The act of granting; something granted, especially a gift for a particular purpose;* ***a transfer of property by deed or writing; the instrument by which such a transfer is made; also the property so transferred.***

A grant may be defined generally as the transfer of property by an instrument in writing without the deliverty of possession of any subject-matter *thereof. Mozley & Whiteley's Law Dictionary, 8th edn."*

80. In **P Ramanatha Aiyar's "The Law Lexicon", Fourth Edition 2017**, word "Grant" has been defined at page 762-763, as under :

"...

An operative word of conveyance, *particularly appropriate to deeds of grant, properly so called, but used in other conveyances also, such as deeds of bargain and sale,* ***and leases.***

...

"This word is taken largely where any thing is granted or passed from one to another, and in this sense it doth comprehend feofments, bargains and sales, gifts, leases, charges, and the like; for he that doth give, or sell, doth grant also and ***thus it is sometimes in writing or by deed,*** *and sometimes it is by word without writing. But the word* ***being taken more strictly and properly, it is the grant, conveyance, or gift, by writing of such an Incorporeal thing as lieth in grant, and not in livery, and cannot be given or granted by word only without deed,*** *or it is the grant by such persons as cannot pass anything from them but by deed, as the King, bodies corporate, &c. And this albeit it may be made by other most proper to this purpose"*

The word "grant" in sec. 5 connotes transfer of property and mining leases are property. Biswanath Prasad v. Union of India, AIR 1965 SC 821, 825. [Mines and Minerals (Regulation and Developments) Act (67 of 1957), S. 5(1)]

The expression "grant" is wide enough to take within its sweep a grant by the government to the Girasdar and is not limited to a grant by the Girasdar to the tenant. Digvijaysingh Ji v. Manji Savda, AIR 1969 SC 370, 372. [Saurashtra Land Reforms Act (25 of 1951), S. 18]

"GRANT, BESTOW, CONFER. Honours, distinctions, favours, privileges are conferred. Goods, gifts, endowments are bestowed. Requests, prayers, privileges, favours, gifts, allowances, opportunities are granted. ***A peculiar sense attaches to the word Grant as a legal term, as a piece of land granted to a noble or religious house.*** *So Blackstone speaks of "the transfer of property by sale, grant, or conveyance." (Smith. Syn. Dis.)"*

81. Under Indian Easements Act, 1882, *(hereinafter referred to as "IE Act, 1882"),* definition of "licence" in Section 52 says that it is the Grant of a right made by the Grantor. Sections 53 and 54 of IE Act, 1882 also refer to grant of licence. Thus, without a "Grant" in general sense, licence cannot be created. This is how definition of "licence" under IE Act, 1882 vis a vis the term "Grant" was considered by Supreme Court in **Hajee S.V.M. Mohamed Jamaludeen Bros. & Co. (supra).**

82. Court also said that though the term "Grant" is not defined in GG Act, 1895, but it is quite evident that this word has been used in GG Act, 1895 in its ethnological sense and therefore, it should get its widest import.

83. In **Mohsin Ali vs. State of M.P. AIR 1975 SC 1518,** Court said :

*"in the widest sense '****grant****' may* ***comprehend everything that is granted or passed from one to another by deed.*** *But commonly the term is applied to rights created or transferred by the Crown e.g. grants of pensions, patents, charters, franchise."*

(Emphasis added)

84. Court in **Hajee S.V.M. Mohamed Jamaludeen Bros. & Co. (supra)**, in para 16, said that word "Grant" used in GG Act, 1895 could envelop within it, everything granted by the government to any person. A licence obtained by a person by virtue of

agreement would also fall within the ambit of "Grant" envisaged in GG Act, 1895.

85. In **Pradeep Oil Corporation vs. Municipal Corporation of Delhi and others (2011) 5 SCC 270,** Court said that GG Act, 1895 is a special statute and will prevail over general statute i.e. TP Act, 1882. It says:

*"In the **present case grant has been made by the President of India in terms of Section 2 of the Government Grants Act, 1895 and the Transfer of Property Act, 1882 may have little bearing in the instant case. The former,** i.e. the Government Grants Act, 1895 being **a special statute** would **prevail over the general statute,** i.e. the **Transfer of Property Act, 1882.** Accordingly, the rights and obligations of the parties would be governed by the terms of the provisions of Government Grants Act, 1895 whereunder the Government is entitled to impose limitations and restrictions upon the grants and other transfer made by it or under its authority."* (Emphasis added)

86. Therefore, where 'Nazul' is let out to a person by Government under agreement of lease i.e. Grant, it is governed by GG Act, 1895 and rights of parties therefore have to be seen in the light of stipulations contained in the document of 'Grant'. 'Grant' includes a property transferred on lease though in some cases, 'Grant' may result in wider interest i.e. transfer of title etc. Whatever may be nature of document of transfer i.e. instrument of 'Grant', the fact remains that terms and conditions of 'Grant' shall be governed by such document and it shall prevail over any other law including TP Act 1882. One cannot take resort to TP Act, 1882 to wriggle out of any condition or limitation etc. imposed in terms of document of 'Grant'.

87. In the State of Uttar Pradesh, management of 'Nazul', in absence of statutory provisions, is governed by various administrative orders compiled in a Manual called "Nazul Manual". Here Government has made provisions of management of 'Nazul' through its own authorities namely District Magistrate or Commissioner, or, in some cases, through local bodies.

88. Nature of orders compiled in "Nazul Manual" in the context of 'Nazul' have been considered recently in **State of U.P. vs. United Bank of India (supra)** where Court has said that land and building in question is "Nazul" being property of Government, maintained by State authorities in accordance with 'Nazul Rules' but not administered as a 'State property'. Court has also observed that lease of "Nazul" land is governed in accordance with GG Act, 1895. Sections 2 and 3 thereto very specifically provide that provisions of TP Act, 1882 do not apply to Government land. Section 3 says that all provisions, restrictions, conditions and limitations contained in any such 'Grant' or 'Transfer', as aforesaid, shall be valid and take effect according to their tenor, any rule of law statute or enactment of the Legislature to the contrary notwithstanding. Thus the stipulations in "lease deed" shall prevail and govern the entire relations of State Government and lessee.

89. Superiority of the stipulations of Grant to deal the relations between

Grantor and Grantee has been reinforced in **Azim Ahmad Kazmi and others (Supra).** Therein dispute related to Plot No. 59, Civil Station, Allahabad, area 1 acre and 4272 sq. yard, i.e., 9112 sq. yard or 7618 sq. meter. Initially a lease deed was executed on 11.01.1868 by Secretary of State for India in Council in favour of one, Thomas Crowby, for a period of 50 years and it was signed by Commissioner, Allahabad Division on behalf of Secretary of State for India in Council. After expiry of lease, a fresh lease was executed for another period of 50 years on 12.04.1923 w.e.f. 01.01.1918. Lease holder with permission of Collector, Allahabad transferred lease rights to Purshottam Das in 1945. The legal heirs of Sri Purshottam Das, on 31.10.1958, transferred leasehold rights in favour of Smt. Shakira Khatoon Kazmi, Smt. Sabira Khatoon Kazmi and Smt. Maimoona Khatoon Kazmi. After the death of Smt. Maimoona Khatoon Kazmi her legal heirs, namely, Azim Ahmad Kazmi, Omar Ahmad Kazmi, Shamim Ahmad Kazmi, Alim Ahmad Kazmi and Maaz Ahmad Kazmi also claimed lease rights by succession. Lease granted on 12.04.1923 w.e.f. 01.01.1918 expired on 31.12.1967. It was renewed on 19.03.1996 for a period of 30 years w.e.f. 01.01.1968 which period expired on 31.12.1997. Again on 17.07.1998 it was renewed for a further period of 30 years w.e.f. 01.01.1998. While lease was continuing, vide Government Order dated 15.12.2000, right of resumption was exercised by State Government. It directed resumption of possession of plot in question and lease deed was cancelled. District Magistrate, Allahabad served a notice dated 11.01.2001 to lease holders intimating them that in view of State Government's order dated 15.12.2000 cancelling lease and resuming possession of land in question, same was required for public purpose. Notice also directed lease holders to remove structures standing on plot, failing which possession would be taken in accordance with Clause 3(c) of lease deed. Lease holders filed objection against notice District Magistrate and also stated that they have sent representation/ objection to Chief Minister praying for revocation of Government Order dated 15.12.2000. District Magistrate passed order on 24.08.2001 rejecting objection of lease holders and sent a cheque of Rs. 10 lacs representing compensation for the building standing over plot. State authorities claimed that they took possession of open land on 01.09.2001. Lease holders filed writ petition which was dismissed vide judgment dated 07.12.2001, **Shakira Khatoon Kazmi vs. State of U.P., AIR 2002 All 101.** Lease holders challenged judgment dated 07.12.2001 passed by this Court in Supreme Court to the extent they failed. State Government filed appeal against part of order of this Court wherein an observation was made that State Government is not entitled to take forcible possession though it may take possession of demised premises in accordance with procedure established by law. After considering Clause 3(c) of lease deed which provides for resumption of land for public purpose after giving a month's clear notice to lessee to remove any building standing at the time on demised premises and within two months of receipt of notice to take possession thereof on expiry of that period, and Sections 2 and 3 of GG Act, 1895, Court said that Clause 3(c) of lease deed confers power upon State Government that plot in question, if required by State Government for its own purpose or for any public purpose, it shall have the right to give one

month's notice in writing to lessees to remove any building standing on the plot and to take possession thereof on expiry of two months from the date of service of notice. Court said that land, if required for any public purpose, State Government has absolute power to resume leased property and under the terms of Grant it is absolute, therefore, order of resumption is perfectly valid and cannot be said to be illegal. It also refers to an earlier occasion where Nazul Plot No. 13, Civil Station, Allahabad situate in Civil Lines area was resumed by State Government for the purpose of construction of a 'Bus Stand' by exercising similar power, without initiating any proceeding under Land Acquisition Act, 1894. Resumption in that case was also challenged in **Writ Petition No. 44517 of 1998, Sayed Shah Khursheed Ahmad Kashmi vs. State of U.P. and said writ petition was dismissed on 16.12.1999** by a Division Bench of this Court, whereagainst Special Leave Petition No. 4329 of 2000 was dismissed by Supreme Court on 07.09.2001. First question, therefore, was answered in negative and in favour of Government.

90. With respect to procedure for taking possession, Supreme Court, while considering Question-2, said that in absence of any specific law, State Government may take possession by filing a suit. When a land is acquired under Land Acquisition Act, 1894, Government can take possession in accordance with provisions of said Act and in case of urgency, Collector can take possession after publication of notice under Section 9 and no separate procedure is required to be followed. Court said that similarly where a lease has been granted under the terms of GG Act, 1895, then what procedure has to be followed is provided by Section 3 of GG Act, 1895 which says that all provisions, restrictions, conditions and limitations contained in any such creation, conferment or Grant referred to in Section 2, shall be valid and take effect according to their tenor; any decree or direction of a Court of Law or any rule of law, statute or enactments of the Legislature, to the contrary. It relied on its earlier judgment in **State of U.P. vs. Zahoor Ahmad, 1973(2) SCC 547** holding that Section 3 of GG Act, 1895 declares unfettered discretion of Government to impose such conditions and limitation as it thinks fit, no matter what the general law of land be. Then Court construing Clause 3(C) of lease deed said that it provides procedure for taking possession of demised premises when State Government re-enter or resume possession of demised land. Court in para 30 and 32 of judgment said:

*"30. In the case of **The State of U.P. vs. Zahoor Ahmad and Another, 1973(2) SCC 547,** this Court held that the Section 3 of the Act declares the unfettered discretion of the Government to impose such conditions and limitation as it thinks fit, no matter what the general law of land be. From Clause 3(C) of the deed, it is clear that the **State of U.P. while granting lease made it clear that if the demised premises are at any time required by the lessor for his or for any public purpose, he shall have the right to give one month's clear notice to the lessee to remove any building standing at the time of the demised property and within two months' of the receipt of the notice to take possession thereof on the expiry of that period** subject to the condition that the lessor is willing to purchase the property on the demised premises, the lessee shall be paid for such*

amount as may be determined by the Secretary to the Government of U.P. in the Nagar Awas Department."

"32. Under Clause 3(C) of the lease deed, the respondent-State was permitted resumption of the land which required for its own use or for public purpose and after giving one month's clear notice in writing is entitled to remove any building standing at the time on the demised premises and within two months of the receipt of the notice to take possession thereof subject to the condition that if the lessor is willing to purchase the building of the demised premises required to pay the lessee the amount for such building as may be determined by the Secretary to Government of U.P. in the Nagar Awas Department...."

(Emphasis added)

91. Having said so, Court said,

"we are of the view that there is no other procedure or law required to be followed, as a ***special procedure for resumption of land has been laid down under the lease deed."***

92. Supreme Court then set aside direction of this Court that State will not take possession forcibly except in accordance with procedure established by any other law, by holding, that since special procedure for resumption is prescribed under lease deed, no direction otherwise could have been issued to State Government.

93. The above discussion makes it clear that 'Nazul' is a land owned and vested in State. It is such land which has vested in State by virtue of its 'Sovereignty' and incidence of 'Sovereignty' i.e. annexation, lapse and bona vacantia. Further, 'Grant' means transfer of property by a deed in writing and includes within its ambit, an instrument of lease/lease deed. Such 'Grant' is governed by provision of GG Act, 1895, which were applicable to 'Grants' executed on and after enforcement of GG Act, 1895 and rights and entitlement of private parties in respect of land, which was transferred to such person under such 'Grant' would be governed by terms and conditions contained in such 'Grant' and not by provisions of TP Act, 1882 or any other Statute. Moreover, in State of U.P., wherever applicable, U.P. Tenancy Act, 1939 and Agra Tenancy Act, 1926 will also be inapplicable to such 'Grant'.

94. For the purpose of resumption/ re-entry of land, State Government can follow procedure prescribed in the terms of lease as it is a special procedure for such purpose and it is not necessary to look into any other procedure prescribed in law.

95. We, therefore, answer questions (i) and (ii) and hold that Nazul is land owned by Government having vested by escheat, bona vacantia or lapse. Further the terms and conditions of 'Grant' a Nazul would govern relation of lessor and lessee and any other statute providing otherwise has no application.

96. The answer to **questions (i) and (ii),** in effect, gives answer to question (iii) also, inasmuch as, Grantee cannot transfer property, which was transferred to it by way of 'Grant' except the manner in which it is permitted by such 'Grant' and any transfer otherwise will be illegal and would not confer any right upon Transferree.

97. Here, we remind ourselves with the principle that a person can transfer only such rights and interest which he or she possess and not beyond that. If a Grantee did not possess any right of transfer or such right is subject to any restriction like prior permission of owner etc., it means that Grantee himself has no right of transfer and/or his right is restricted in a particular manner and such restriction is to be observed in words and spirit to validate such transfer, else the transfer shall be illegal and will not result in bestowing any legal right upon the Transferee. In other words, any otherwise transfer by such Grantee, of land subjected to Grant, will not confer any valid right or interest upon the person to whom Grantee had transferred property under 'Grant' in violation of stipulations contained in Grant.

98. In **Delhi Development Authority Vs. Anant Raj Agencies Pvt. Ltd. (2016) 11 SCC 406** Court said :

"It is well settled position of law that the person having no right, title or interest in the property cannot transfer the same by way of sale deed."

99. In **State of U.P. and others vs. United Bank of India and others (supra)** considering a similar situation, Court held that any transfer without sanction of lessor will be invalid. In paras 39 and 40 of the judgment Court said as under :

"39. This "within written lease" is the original lease deed as mentioned in the Form 2 of the Nazul Manual. Form 2 of lease of Nazul land for building purposes it is one of the condition between the lessor and the lessee that " the lessee will not in any way transfer or sublet the demised premises or buildings erected thereon without the previous sanction in writing of the lessor".

*40. In the present case t**here was nothing on the record to show that the lessee i.e. (ABP) has obtained any written sanction from the lessor i.e. Government before mortgaging his leasehold interest in the Nazul Land. Meaning thereby the mortgage done by the lessee in favour of the Bank itself is bad in law, which was done in clear violation of the terms of the lease deed i.e. mortgage of the Nazul land without previous sanction in writing of the State."*(Emphasis added)

100. Further, any such invalid transfer can also be construed as breach of terms of Grant and would empower and enable principal Grantor i.e. State, owner of property, to take such steps including resumption/re-entry to the property under Grant, to itself, besides claiming damages, compensation, as the case may be, and law permits.

101. Applying above principles to the facts of writ petitions in question, we find that two Indentures of leases were executed :

(i) Dated 22.4.1890 with effect from 01.10.1886 for a period of 50 years in favour of Rai Bahadur Bindeshwari Saran Singh.

(ii) Deed executed with effect from 01.10.1936 for a period of 50 years in favour of Sureshwari Saran Singh (Grandson of Bindeshwari Sharan Singh and son of Maheshwari Saran Singh), Jagdambika Saran Singh, Brijeshwari Saran Singh (grandson of Bindeshwari

Saran Singh and son of Bishweshari Saran Singh) and Badreshwari Saran Singh (grandson of Bindeshwari Saran Singh and son of Bishweshwari Saran Singh).

102. The second deed was executed in favour of three grand sons of Bindeshwari Sharan Singh, (original Lessee), though sons of Bindeshwari Sharan Singh and father of subsequent Lessees were alive but second lease contain name of only one son of Bindeshwari Sharan Singh i.e. Jagdambika Sharan Singh.

103. We may notice that other two sons of Bindeshwari Sharan Singh died issueless i.e. Bhuvneshwari Saran Singh died in 1929 i.e. before second deed was executed and Jagdishwari Saran Singh died on 01.03.1944. Bindeshwari Sharan Singh died on 27.10.1942, prior whereto lease was executed w.e.f. 01.10.1936 hence Bindeshwari Sharan Singh ceased to be Lessee and at the time of his death on 27.10.1942 there was no lease existing in his favour in respect of land in dispute. Therefore, question of devolution of any right in respect of disputed Nazul land upon all legal heirs of Bindeshwari Sharan Singh, on and after 27.10.1942 would not have arisen. His other property may have devolved upon his legal heirs but disputed Nazul land went out thereof in view of lease deed executed with effect from 01.10.1936 in favour of three grandsons and one son of Bindeshwari Sharan Singh, which was never objected by anybody. This lease, which commenced on 01.10.1936 was for a period of 50 years, thus expired, by efflux of time, on 30.09.1986. In the meantime, one of the Lessees i.e. Sureshwari Sharan Singh died on 28.5.1979 and another, Jagdambika Sharan Singh died on 03.10.1984.

104. Though, it is stated in WP-1 that an application for renewal of lease was submitted in 1985 by petitioners, but, neither any such document has been placed on record nor any exact date has been given nor we could appreciate as to how petitioners of WP-1 could have submitted such an application since they were offshoots of one of the four Lessees only, and, other co-lessees have not stated anywhere that they also filed an application in 1985 for renewal of lease though daughter of Brijeshwari Sharan Singh is petitioner in WP-4, wife of Badreswari Sharan Singh is petitioner in WP-3 and son of Badreswari Sharan Singh is petitioner in WP-2. They have also not placed any such document on record.

105. In WP-2, there is reference of family arrangement between four sons of Bindeshwari Sharan Singh, since fifth son had already died in 1929. It is said that in 1948, all four sons separated through a family arrangement executed between them, but this fact is patently false for the reason that in 1948, two sons of Bindeshwari Sharan Singh i.e. Bishweshari Sharan Singh and Jagdishwari Sharan Singh had died and hence they could not have been a party to family arrangement in 1948. Therefore, facts stated in WP-2 with respect to alleged family arrangement in 1948 between four sons of Bindeshwari Sharan Singh is patently incorrect.

106. Moreover, even if in respect of Nazul property in dispute, any private arrangement may have been made by Lessees or their offshoots, they could have confined only to the lease rights over land in dispute and not title of land. Land never belong either to Bindeshwari

Sharan Singh or his sons or grandsons as it being a 'Nazul property', owned by State Government and title vested in State. Lessees could have only lease rights and that too till lease rights subsist and not beyond that.

107. Thus, as stated in WP-2 that Jagdambika Sharan Singh transferred his share in Bungalow No.11A, Queens Road, Allahabad and land appurtenant thereto to Smt. Lalita Devi, grandmother of petitioner through a registered sale deed dated 20.12.1950 in order to satisfy a decretal amount could have been read only to extent of transfer of lease rights and not land and its title itself and that too only for the period lease subsists. However, there is nothing to show that transfer was made after taking permission of Lessor, which is condition in lease-deed. The above transfer was illegal.

108. Similarly, subsequent litigation comprising of Original Suit No.74 of 1949 filed by Rameshwar Prasad Agrawal against Jagdambika Saran Singh for recovery of money and auction of property of Bungalow No.11A, Queens Road, Allahabad could have been confined only to building standing on disputed Nazul land since building could have been owned by Lessee who constructed it but it will not include within its ambit "disputed Nazul land" as it was not owned by Lessees/ Judgement Debtor. Therefore, whatever could have been purchased by Decree Holder, pursuant to decree passed in Original Suit No.74 of 1949, would have confined to the structure standing on 'disputed Nazul land' and not 'Nazul land' itself.

109. Even if we assume that lease rights in disputed Nazul land also could have been auctioned and purchased by Decree Holder still that will not result in transfer of title in the land itself since land did not belong either to Judgment Debtor or Grantees or other Transferors. Moreover, in entire petition wherever such transfer has been referred to in one or the other way, we do not find any reference of consent or permission granted by lessor i.e. State Government or its authority for such transfer. Therefore, every alleged transfer was/is illegal and would not result in transferring right to transferee.

110. Petitioners have placed on record Lease-deed dated 22.4.1890 (w.e.f. 01.10.1886) as Annexure 1 to WP-1, Annexure-4 to WP-2 and Annexure-10 to WP-3, WP-4, WP-5 and WP-6. On page 95 of WP-6, Form of Renewal of lease submitted in 1936 has also been placed on record showing that renewal of lease was prayed in the same terms and conditions as contained in earlier lease dated 22.04.1890, which was with effect from 01.10.1886 and 50 years expired on 30.09.1936. Thus, it is not in dispute that renewal of lease was granted in the same terms. The two terms and conditions of lease, relevant for present said of writ petitions, are as under :

"PROVIDED FURTHER and it is hereby agreed that the said lessee, his Executors, Administrators and Assigns ***shall not assign or underlet or otherwise part with the possession of the said premises or any part thereof without the permission of the said Governor United Provinces his Successors or*** *Assigns (which permission may be signified by the said Collector or by such other person as the Government of the North-Western Provinces or the said Governor United*

Provinces may appoint in that behalf) for that express purpose had and obtained"

"PROVIDED ALWAYS that ***if the said lessee,*** *his Executors, Administrators or Assigns* ***shall assign or transfer these presents, or the lease or term hereby granted or created, or the unexpired portion of the said term or shall underlet the said premises or any part thereof with such permission as aforesaid*** *unto any other person or persons of whom the said Collector shall approve, and if such person or persons shall engage any bind themselves to observe all the conditions, agreements and provisions of these presents in respect of such portion of the said term or of the said premises as shall have been so assigned or underlet to him as aforesaid and shall procure such assignments or sublease to be registered in such manner as shall be appointed by the said Governor United Provinces for the purpose of registering leases and other instruments of or relating to lands situate within the local limits of Allahabad (and for the registry of which assignments or subleases a fee of not more than Rs. 16 shall be paid by the person or persons tendering such assignments of sublease for registry)* ***then and not otherwise*** *the liability of the said lessee his Heirs, Executors and Administrators for the purpose or subsequent observance and performance of the covenants on the lessee's part herein contained, so far as relates to the portion of the said term or of the said premises so assigned or underlet as aforesaid, but not further* ***or otherwise, shall cease and determine,*** *but without prejudice however to the right of auction of the said Governor United Provinces his Successors or Assigns in respect or on account of any previous breach of any covenant or covenants herein contained."* (Emphasis added)

111. Above conditions clearly show that no transfer without permission was permissible. Any violation of such conditions would result in cessation and determination of lease without any further notice etc. Thus, rights claimed by petitioners on the basis of transfer of original lease without permission of Lessor i.e. State Government or its authorities, competent for said purpose, was void ab initio and would confer no right or interest in property in dispute to such transfer.

112. In taking above view, we are fortified by judgment of Supreme Court in **Azim Ahmad Kazmi and others (supra)** and **State of U.P. and others vs. United Bank of India and others (supra)** wherein Court has said that as per terms and conditions contained in lease-deed, when procedure is prescribed for seizure of land, that will prevail and no other procedure or law is required to be followed. Only, transfer after permission is protected but where such permission is not obtained, it is clearly provided that part of Nazul land, transferred without permission, will cause lease ceased and determined.

113. **Question (iii) is answered accordingly against petitioners** and it is held that transfer made without permission of lessor i.e. State Government or its authorities namely Collector or Commissioner, as the case may be, would not confer any right upon transferee and will cause lease of transferred Nazul land ceased and determined.

114. Now, we proceed to answer question (iv). This question again has to

be considered in the light of stipulations contained in 'Grant'. If the 'Grant' itself does not contemplate any continuance of 'Grantee' over land subjected to 'Grant' and requires Grantee to hand over or surrender possession on expiry of period of 'Grant', Grantee is obliged to do so and mere fact that he/she had continued possession over land subjected to 'Grant', will not confer any legal status upon him/her or legality to such possession after expiry of period of Grant.

115. Lot of argument at this stage has been made that despite expiry of lease right on 30.9.1986, since Lessee(s) did not hand over possession of 'disputed Nazul land' and State Government and its authorities did not take any action for taking possession of land in dispute, therefore, petitioners' possession had implied sanction of Lessor. However, no such law has been placed before us. When lease deed itself contemplate sanction, it is actual and not fictional.

116. We are informed that with regard to renewal of lease, Government circulated its policy through various G.Os. as stated in detail in **Purushottam Dass Tandon and others vs. State of U.P., Lucknow and others AIR 1987 All 56.** The first being G.O. issued in March, 1958 whereby Chief Minister directed that case for renewal of leases may be taken individually and possession may be taken only if lessee surrender or lease stood terminated in absence of any request from lessee for grant of fresh lease. Thereafter, on 23.04.1959, a G.O. was issued to grant fresh lease in cases where lease has already expired but has not been renewed so far, or which is likely to expire within the next 5 or 6 years, on the terms and conditions given in the said G.O. The proposed premium in the said G.O. was objected by Lease Holders, whose leases were already expired or likely to expire. Several representations were sent to the Government. Some house-owners met the then Prime Minister Late Pt. Jawahar Lal Nehru, who had visited Allahabad in November or December, 1959. It resulted in issue of G.O. dated 07.07.1960 whereby rate of premium on first three acres was reduced to Rs.2,000/- in each slab. It also permitted payment of premium in five instalments and reduced ground rent to Rs.100/- per acre. In the earlier G.O., there was an insistence on construction of Community latrines till sewer lines were laid but this insistence was given up in G.O. dated 07.07.1960. Lessees were granted further three months' time to get leases renewed. Still lease-holders did not comply and made representations to Government. On 21.03.1963, again a G.O. was issued declaring rates of premium for commercial sites. On 3.12.1965 a G.O. was issued indicating terms and conditions for renewal of leases for commercial and residential purposes and it was said that rates of premium and annual rent shall be as fixed by G.O. dated 07.07.1960. Payment in five equal yearly instalments was continued but in special cases, Commissioner, Allahabad Division, Allahabad, was authorized to make recommendations to Government for enhancing number of instalments. This G.O. further insisted for renewal of existing leases on payment of at least one instalment, within one month of receipt of intimation by Lessee from Collector, or within three months of the date of expiry of lease, whichever is earlier. Deposit was to be deemed to be proper step on the part of Lessee to get a fresh lease executed by the Lessor. The G.O. of 1965 itself made

a distinction between those whose leases had expired and others by describing them as sitting and existing lessees.

117. There was a second phase which covered period from 1966 to 1981. On 16.02.1966, U.P. Awas Vikas Parishad Adhiniyam, 1965 *(hereinafter referred to as "U.P. Act, 1965")* was enacted for providing house sites and construction of building. G.O. dated 03.12.1965, thus was modified by G.O. dated 04.11.1968, and it was directed that leases of joint lessees should be renewed as far as possible for one acre only. Sub-division was permitted only where sub-divided plot was not less than 800 sq. yards. Concession in payment of lease money and ground rent was allowed on same terms and conditions as it was in G.O. dated 03.12.1965 but time was extended for payment of first instalment for those who had not received any intimation from Collector by a further period of one month from the date of intimation by Collector. Clause (c) of G.O. dated 04.11.1968 categorically said that where steps have been taken for renewal of leases, as stated in earlier G.Os., fresh leases shall be sanctioned according to terms offered by Competent Authority.

118. In March, 1970, a G.O. was issued banning grant of renewal of leases all over the State, since Government was contemplating to bring out legislation on Urban Ceiling. This ban was lifted on 12.01.1972 but leases henceforth were to be sanctioned by State Government only. Commissioner and Collector could make recommendations only. Aforesaid G.O., however, provided that in all those cases where Government had sanctioned grant of leases but it could not be executed or registered because of ban imposed in 1970, steps may be taken immediately for its execution. Clause (ii) of G.O. provided that all those cases in which Collector or Commissioner had approved renewal but it could not be executed because of 1970 order, should be sent to Government immediately for acceptance. On 09.05.1972 Urban Building Ceiling Bill was introduced and on 11.07.1972 Uttar Pradesh Ceiling of Property (Temporary Restriction on Transfer), Ordinance, 1972 was promulgated in pursuance of Article 398 of Constitution of India. The Ordinance continued till it was replaced by Urban Land (Ceiling and Regulation) Act, 1976 *(hereinafter referred to as "Act, 1976")*. The said Act was enacted to prevent concentration of Urban Property and discourage construction of luxurious houses. On 19.12.1972, provisions pertaining to Nazul were amended providing for maximum area permissible for renewal of leases of 2000 sq. yards plus land on which building was constructed. Remaining area was to be surrendered to Housing Board and Lessees were prohibited from sub-dividing or transferring any land. On 10.12.1976, Government issued an order superseding all previous orders in respect of renewal of leases of Civil Lines, Allahabad in view of Act, 1976 and laid down fresh terms and conditions for renewal of leases.

119. Here leases were to be renewed in the light of Sections 2 and 4 of U.P. Act, 1976 and while doing so, all residents in one house were to be treated as one unit. This again resulted in representations of Lease-Holders to Government requesting for reduction in rate of premium and ground rent. A G.O. was issued on 17.09.1979 superseding all

previous orders and it provided for submission of details about extent and type of construction, utilisation of vacant land etc. Again representations, which culminated in G.O. dated 19.04.1981, which superseded all previous Orders and provided for renewal of leases on fresh and new terms. It said that Leaseholders and their heirs shall be treated as one Unit. They were supposed to file details about land, constructed area, its user, time when it was taken on lease etc. before 30.06.1981. List of residents including out-houses dwellers was to be prepared by District Magistrate. Heirs of deceased lease-holders were to be treated as one unit. Area for which renewal could be made was reduced to building with 500 sq. metre of land appurtenant and 500 sq. metre open land or 1500 sq. metre whichever was more. Area of building for commercial purpose was fixed at 2000 sq. metres. Premium was fixed at 50 paisa per sq. metre. Thus, from 1976 onwards for the purpose of renewal, area was reduced from acre to square metre and unit for premium and ground rent became square feet instead of acre. All heirs of Lessees became one unit for renewal. Land covered by outhouses were to be excluded. Lessees could not even opt for it.

120. However, there is nothing on record to show that petitioners ever applied and sought renewal or fresh lease either before actual expiry of lease term or thereafter, hence petitioners cannot claim any benefit under the above mentioned Government Orders.

121. Lease Holders, whose lease had already expired or those who were sitting Lease Holders and leases were going to expire in a short period, came to this Court in various writ petitions. This entire bunch was decided in **Purushottam Dass Tandon and others vs. State of U.P., Lucknow and others (supra).** In this bunch of writ petitions, facts, we have noted above with respect to various Government Orders, have been given in detail.

122. There were two categories of writ petitioners, before this Court, in **Purushottam Dass Tandon and others (supra)** as under :

(i) Those, to whom notices were given by Collector and who had complied with terms and conditions as laid down in various G.Os. issued from time to time prior to 1965; and

(ii) Those, to whom no notice was sent and till matter filed before the Court, no steps were taken and no order was passed in their favour.

123. Court held :

(I) A Lessor may, after expiry of period for which lease is granted, renew the same or resume i.e. re-enter. But if out of the two i.e. re-entry or resumption, the two divergent courses, he chooses to grant fresh lease or at least creates that impression by his conduct spread over long time, it results in abandonment.

(II) If the land is needed or building has to be demolished in public interest for general welfare, probably no exception can be taken as the interest of individual has to be sacrificed for the society. But asking Lessee to vacate land or remove Malba for no rhyme or reason but because State is the owner, cannot be accepted to be in consonance with present day philosophy and thinking about role of State.

(III) After Act, 1976, no person can successfully or validly claim to hold land more than the Ceiling limit.

(IV) Some part of G.O. of 1981 was not consistent with Act, 1976. The rules contained in Nazul Manual are set of Administrative Orders or collections of guidelines issued by Government for the authorities to deal with Government property.

(V) When a G.O. was issued and its conditions are complied with, mere for bureaucratic delay, performance under the said G.O. cannot be denied. Therefore, Lessee, who had deposited first instalment, as directed in G.O. of 1965, were entitled for renewal of their lease.

(VI) After enactment of ceiling law, a Lessee cannot hold land more than the provided limit.

(VII) If leases were renewed in respect of those, who had acquired social or political status, whose names are given in para 15 of judgment, which includes, Dr. K. N. Katju, ex-Central Law Minister, Chief Minister and Governor, Dr. S. K. Verma, ex-Chief Justice and Governor, Sri B.L. Gupta, ex-Judge High Court, J. D. Shukla, I.C.S., O. N. Misra, I.A.S., when there was no justification not to give same benefit to others, similar benefit must be given since most of them were also distinguished persons namely S.N. Kacker, ex-Central Law Minister, Solicitor General of India and Advocate General of the State, Sri S. S. Dhavan, ex-Judge, High Court and Governor and High Commissioner, Sri Lal Ratnakar Singh I.A.S. Ex-Member of Board of Revenue, M.L.Chaturvedi, ex-Judge, High Court and member of Union Public Service Commission, W. Broome, I.C.S. etc.

124. Aforesaid judgment was confirmed by Supreme Court by dismissing appeals preferred by State of U.P. and others i.e. **State of U.P. and others vs. Purshottam Das Tandon and others 1989 Supp.(2) SCC 412**. Supreme Court clarified that renewal of leases shall be subject to the provisions of Act, 1976 and High Court's judgment shall apply to all the leases to whom G.O. dated 23.04.1959, 02.07.1960 and 03.12.1965 were applicable and all those claiming under them. The order of Supreme Court reads as under :

"We have heard the learned counsel for both the parties at length. We do not find any infirmity in the judgment and order passed by the High Court against which these special leave petitions are preferred. We, however, make it clear that the leases that are going to be granted pursuant to the writ issued by the High Court will be subject to the provisions of the Urban Land (Ceiling and Regulation) Act, 1976. On the leases being granted, the Competent Authority under the Act shall be at liberty to apply the provisions of the Act and in particular section 15 thereof to all the leases and take away all the surplus lands in their hands after determining the surplus lands in accordance with law. The ***directions issued by the High Court can be availed of by all the lessees to whom the G.O. dated 23rd April, 1959, 2nd July, 1960 and 3rd December, 1965 were applicable and all those claiming under them.***

All the Special Leave Petitions are dismissed accordingly with these observations. If any further directions are needed, the persons interested may approach the High Court." (Emphasis added)

125. Though, in the present case also reliance has been placed on the

aforesaid judgment, but, we do not find that aforesaid judgment is applicable to petitioners or that petitioners have applied for renewal of lease in terms of relevant G.O., applicable at the relevant point of time. Hence, their status is of 'occupant' without any authority, inasmuch as, lease having already expired, possession over disputed Nazul land of petitioners or anybody else under them is without any authority of law.

126. It is contended that even if lease expired on 30.09.1986, possession of petitioners having continued on disputed Nazul land and State has not taken any step for their eviction or dispossession, it amounts to 'tacit approval' or 'sanction' by Government or Lessor recognizing petitioners' aforesaid possession to be valid and for this purpose reference is made to Section 116 of TP Act, 1882. It is also said that even if aforesaid right under Section 116 TP Act, 1882 could not have been made applicable in 1986 since at that time GG Act, 1895 was operating but the time at which impugned notice has been issued, GG Act, 1895 has already been repealed and thereafter petitioners' right are entitled to be considered in terms of TP Act, 1882 and they are entitled to take recourse to Section 116 of Act, 1882.

127. We will discuss effect of Repeal Act, 2017 at a later stage but at this stage, suffice it to mention that Section 116 TP Act, 1882 is wholly inapplicable in the case in hand. In order to attract Section 116 of TP Act, 1882, it is necessary to obtain assent of landlord for continuation of lease after expiry of lease period. Mere acceptance of rent by Lessor, in absence of any agreement to the contrary, for subsequent months where Lessee continued to occupy lease premises, has been held that it cannot be treated to be a conduct signifying 'assent' on its part. This has been held in **Shanti Prasad Devi and others vs. Shankar Mahto and others (2005) 5 SCC 543** and followed in **Delhi Development Authority vs. Anant Raj Agencies Pvt. Ltd. (supra).**

128. In the present case, even this fact is missing that petitioners while continuing in possession, paid lease rent and premium etc. to Lessor. Section 116 of TP Act, 1882, therefore, has no application either immediately after expiry of lease merely on the ground that petitioners continued in possession over disputed Nazul land or thereafter or even after repeal of GG Act, 1895 by Repeal Act, 2017.

129. We may further notice that on account of provision of 'Savings' made in Section 4 of Repeal Act, 2017, the effect of expiry of lease continued. However, this aspect in further detail we shall deal, in a bit later, in the judgment.

130. There is one more aspect which may be considered at this stage. In State of U.P., a special Statute was enacted in 1972 i.e. U.P. Act, 1972. It also deals with a situation where a person has continued in possession over Government owned land after expiry of period for which he was authorized to remain in possession of such land and thereunder he is declared as 'Unauthorized Occupant'. We find that similar provision was also made by Parliament in Public Premises (Eviction of Unauthorised Occupants) Act, 1971 (hereinafter referred to as "Act, 1971").

131. In U.P. Act, 1972, Section 2(g) and 2(e) define "unauthorised occupation"

and "public premises", and the same read as under :-

"2(g) "unauthorised occupation", in relation to any public premises, means the occupation by any person of the public premises ***without authority*** *for such occupation, and* ***includes the continuance in occupation*** *by any person of the public premises* ***after the authority*** *(whether by way of grant or any other mode of transfer)* ***under which or the capacity in which he was allowed*** *to hold or occupy the premises* ***has expired*** *or has been determined for any reason whatsoever and also includes continuance in occupation in the circumstances specified in sub-section (1) of Section 7 and a person shall not, merely by reason of the fact that he had paid any amount as rent, be deemed to be in authorised occupation."*

"2(e) "public premises" means ***any premises belonging to or taken*** *on lease or requisitioned by or on behalf of the* ***State Government, and includes*** *any premises belonging to or taken on lease by or on behalf of-.*

(i) any company as defined in Section 3 of the Companies Act, 1956, in which not less than fifty-one per cent of the paid-up share capitals held by the State Government: or

(ii) any local authority; or

(iii) any Corporation (not being a company as defied in Section 3 of the Companies Act, 1956 or a local authority) owned or controlled by the State Government: or

(iv) any society registered under the Societies Registration Act, 1860, the governing body whereof consists, under the rules or regulations of the society, wholly of public officers or nominees of the State Government or both:

and also includes-

(i) ***Nazul land or any other premises entrusted to the management of local authority*** *(including any building built with Government funds on land belonging to the State Government after the entrustment of the land to that local authority, not being land vested in or entrusted to the management of a Gaon Sabha or any other local authority, under any law relating to land tenures):*

(ii) any premises acquired under the Land Acquisition Act, 1894 with the consent of the State Government for a company (as defined in that Act) and held by that company under an agreement executed under Section 41 of that Act providing for re-entry by the State Government in certain conditions:"

(Emphasis added)

132. Definition of "unauthorized occupation" clearly includes occupation of a public premises by a person after expiry of authority to occupy such land which includes a person whose period of lease has expired and still he or she is continuing in possession. "Public Premises" includes any premises belonging to or taken on lease including "nazul land".

133. Considering provisions of U.P. Act, 1972, in **Ashoka Marketing Ltd. And another vs. Punjab National Bank and others, (1990) 4 SCC 406,** a Constitution Bench held that U.P.Act, 1972 being a special Act will override a general statute and a person who may have entered tenancy legally may become "unauthorized occupant" subsequently, after expiry of lease period.

134. A similar issue in the context of 'Nazul', managed by Delhi Development Authority and Government under

provisions of Act, 1971 was considered in **Delhi Development Authority Vs. Anant Raj Agencies Pvt. Ltd. (supra).** In that case land belonged to Delhi Improvement Trust. It had executed a lease deed dated 6.1.1951 in favour of Balraj Virmani *(hereinafter referred to a "original lessee")*. After enactment of Delhi Development Act, 1957, Development Authority was constituted thereunder, namely, Delhi Development Authority(hereinafter referred to as "DDA"). Lease was initially for a period of 20 years i.e. from 11.8.1948 to 10.8.1968, liable for extension/renewal for further period of 20 years at the option of lessee. Original lessee on 23.2.1967 approached DDA for renewal of lease. DDA served notice on 16.2.1968 alleging breach of terms and conditions of lease deed. DDA vide notice dated 1.9.1972 terminated lease which was challenged by original lessee in Original Suit No. 47 of 1975 before Sub Judge, Delhi seeking restraint order against DDA. Suit was decreed by Sub Judge holding that notice dated 1.9.1972 terminating lease was illegal. DDA preferred appeal which was dismissed by Additional District Judge vide judgment dated 29.9.1982. DDA preferred Second Appeal in Delhi High Court, being RSA No. 06 of 1983. During pendency of second appeal, an application under Order 22 Rule 10 of Code of Civil Procedure *(hereinafter referred to as "CPC")* was filed alleging that original lessee has sold disputed property through sale deed to M/s. Anant Raj Agencies Pvt. Ltd.(hereinafter referred to as "subsequent purchaser"). This sale deed was claimed to have been executed between original lessee and subsequent purchaser pursuant to some compromise decree dated 22.6.1988 passed by High Court in a matter between original lessee and subsequent purchaser. The application of subsequent purchaser for substituting as respondent in second appeal filed by DDA was allowed by High Court. Further subsequent purchaser also applied to DDA for conversion of lease land to freehold and deposited a sum of Rs.96,41,892/- towards conversion charges. DDA rejected the said application of subsequent purchaser. Aggrieved thereof, subsequent purchaser preferred writ petition no. 10015 of 2005 in Delhi High which was disposed of vide order dated 19.7.2007, directing DDA to decide subsequent purchase's request for conversion of premises from lease hold to freehold. Thereafter, High Court also dismissed DDA's second appeal holding that act of demand and acceptance of rent tantamounts to renewal of lease of disputed property. It is this judgment passed in second appeal which came to be considered before Supreme Court in the aforesaid matter. One of the contentions raised on behalf of DDA was that original lessee created interest in the disputed property in favour of subsequent purchaser during the period when original lessee itself was not a lease holder since lease stood terminated by efflux of time. It was contended that original lessee had no title or interest in property which could have been transferred to subsequent purchaser and said transfer is void and not binding on DDA. Next ground was that deposit of rent by original lessee and acceptance by office of DDA is something administrative in nature and would not be construed as estoppel or waiver on the part of DDA with regard to property unless a specific intention to this effect is communicated to original lessee. Supreme Court formulated following two questions:-

"1. Whether original lessee has acquired any right in respect of property

*in question **after termination of lease by efflux of time on 10.8.1968** and also by termination notice dated 1.9.1972, in the absence of renewal of lease by DDA in writing as provided under Clause iii(b) of lease deed, by virtue of payment of rent in the office of the DDA?*

2.WhetherRespondent(subsequent purchaser) acquires any right in respect of property in question by getting substituted in place of original lessee by virtue of a compromise decree, between original lessee and Respondent based on a sale deed dated 14.10.1998 executed by original lessee, by invoking Order 22 Rule 10 of CPC during pendency of appeal before High Court?"

135. While answering question no.1, Court held that there was no renewal of lease by DDA in favour of original lessee. Court also held that a lease if has expired, it would not be necessary for lessor to terminate the same since original lease stands terminated by efflux of time after expiry of period of lease. Court said that Principle of "holding over" under Section 116 of Act, 1882 would not be applicable since there was no assent of landlord and mere acceptance of rent by lessor, in absence of an agreement to the contrary, would not render possession of lessee valid. In this regard, Court relied on its earlier decision in **Shanti Prasad Devi and Another vs. Shanker Mahto and others (supra) and Sarup Singh Gupta vs. S. Jagdish Singh and others (2006) 4 SCC 205.** There could not be an implied renewal to attract "holding over" on mere acceptance of rent offered by lessee.

136. In **Delhi Development Authority vs. Anant Raj Agencies Pvt. Ltd. (supra)** Court also held that land vested in DDA is a public premises and that being so, it is governed by Act, 1971, which shall prevail over TP Act, 1882, a general law governing landlord and tenant's relationship. Referring to definition of "Public Premises", Court said, "It can be concluded that Act, 1882 is not applicable in respect of Public premises". Court held :-

"Therefore, in the instant case, as per Clause iii(b) of the lease deed and Sections 21 and 22 of the DD Act read with Rule 43 of the Nazul Land Rules and in the light of Shanti Prasad Devi, Sarup Singh Gupta and Ashoka Marketing Ltd. Cases (supra), there cannot be an automatic renewal of lease in favour of the original lessee once it stands terminated by efflux of time and also by issuing notice terminating the lease. Merely accepting the amount towards the rent by the office of the DDA after expiry of the lease period shall not be construed as renewal of lease of the premises in question in favour of the original lessee, for another period of 20 years as contended by the Respondent."

(Emphasis added)

137. In **Delhi Development Authority vs. Anant Raj Agencies Pvt. Ltd. (supra)** Court also considered that land vested in DDA was a 'Nazul land' and that being so, power has been conferred upon DDA to grant lease which includes renewal of lease but in absence of said renewal of lease of property as required in law, original lessee cannot claim an automatic renewal in his favour. Court held as under:-

"Thus, it is abundantly clear from the aforesaid legal statutory provisions of the DD Act and terms and conditions of the lease deed and the case

law referred supra that there is no automatic renewal of lease of the property in question in favour of the original lessee" (Emphasis added)

138. Having said so, Court held that in absence of renewal of lease, status of original lessee in relation to disputed property was that of an "unauthorized occupant" in terms of Section 2(g) of U.P. Act, 1972.

139. It also said that any act on the part of DDA in respect of other communication would make no difference, since a "Public Premises" is to be dealt with by relevant statutory provisions including Act, 1971, Nazul Land Rules and DDA Act, 1957. Thus question-1 was answered by Court as under:-

"30. Without examining the case in the proper perspective that the property in question being a Public Premises in terms of Section 2(e) of the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 and that ***after expiry of lease period the original lessee has become unauthorized occupant*** *in terms of Section 2(g) of the said Act in the light of relevant statutory provisions and Rules referred to supra and* ***law laid down by the Constitution Bench of this Court in the Case of Ashoka Marketing Ltd. and Another (supra),*** *the concurrent findings of the courts below on the contentious issue is not only erroneous but also suffers from error in law and therefore, liable to be set aside.*

31.The grant of perpetual injunction by the Trial Court in favour of original lessee, restraining the DDA from taking any action under the said termination notice dated 01.09.1972, on the ground that the termination notice dated 01.09.1972 being illegal, arbitrary and without jurisdiction and the affirmation of the same by both the first appellate court, i.e. by the learned ADJ and further by the High Court by its impugned judgment and order are not only erroneous but also suffers from error in law. Thus, Point No.1 is answered in favour of the Appellant."

140. Thereafter, question-2 was considered by Court. It was held that compromise decree between original lessee and subsequent purchaser was void ab initio in law for the reason that original lessee in absence of renewal of lease in his favour himself has no right, title or interest at the time of execution of sale deed in respect of disputed property. Court said:

"It is well settled position of law that the ***person having no right, title or interest in the property cannot transfer the same by way of sale deed."*** (Emphasis added)

141. Thus, original lessee could not transfer a valid right to subsequent purchaser since itself had no right whatsoever in respect of land in dispute. Further, fact that subsequent purchaser deposited conversion charges in the office of DDA, also would make no difference. Original lessee in absence of renewal of lease, himself having become an "unauthorized occupant" of property, a transaction between original lessee and subsequent purchaser would have no legal consequence. Thus anything done between DDA and original lessee will also have no consequence. Court therefore, answered second question as under:-

"The instant case having peculiar facts and circumstances, namely,

after 10.08.1968 the lease stands terminated by efflux of time, which is further evidently clear from the termination notice dated 01.09.1972 and thereafter, the original lessee becomes an unauthorised occupant in terms of Section 2(g) of the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 and consequently, not entitled to deal with the property in question in any manner. The very concept of conversion of leasehold rights to freehold rights is not applicable to the fact situation." (Emphasis added)

142. In the backdrop of above discussion and relevant Statute, we may now examine status of present petitioners vis-a-vis land in dispute.

143. The lease in respect of disputed Nazul land i.e. Nazul Plot Bungalow No.17, Thornhill Road, area 2 acres and 4561 sq. yards (about 11906 sq.meters) was executed on 22.4.1890 with effect from 01.10.1886 for a period of 50 years on a monthly rent of Rs.90/-. An instrument of renewal of lease was executed on 01.10.1936 for a period of 50 years on the same terms and conditions, as stated in lease deed dated 22.4.1890. Admittedly, lease expired on 30.09.1986.

144. There is no document and it is also not the case of petitioners that lease was renewed or any fresh Grant was made on and after 30.09.1986. Though it is stated in WP-1 that petitioners applied for renewal of lease in 1985 but this fact has been denied by respondents and petitioners have not placed any document on record to support their averment that they applied for renewal of their lease in 1985. It is also not the case of petitioners that after expiry of lease, while they continued in possession, they also paid lease rent to respondents in respect of disputed land. Thus, status of original Lessee or their legal heirs became that of occupant without any authority or unauthorised occupants after expiry of term of lease and they ceased to have any valid right or interest in property in dispute. Consequently, no right was available to them to be transferred to any third party.

145. We also find that lease land i.e. Nazul land, which is owned by State has been dealt with by Lessees and others including petitioners as if it was their own property and they had title though it was not. Original Lessee was Rai Bahadur Bindeshwari Saran Singh son of Siddh Narain Singh. He was granted lease vide lease deed dated 22.04.1890 with effect from 01.10.1886 for a period of 50 years. While he was alive, a renewal lease deed was executed for a further period of 50 years with effect from 01.10.1936. This time lessees were Jagdambika Saran Singh son of Bindeshwari Saran Singh and Sureshwari Saran Singh, Brijeshwari Saran Singh and Badreshawari Saran Singh, all grandsons of Bindeshwari Saran Singh. Brijeshwari Saran Singh and Badreshawari Saran Singh were real brothers and sons of Vishweshari Saran Singh, who died on 18.11.1943 while Bindeshwari Saran Singh died on 27.10.1942. Bindeshwari Sharan Singh had five sons but only one of them i.e. Jagdambika Saran Singh joined lease deed executed with effect from 01.10.1936, as Lessee and other three were grandsons of Bindeshwari Saran Singh though Maheshwari Saran Singh father of Sureshwari Saran Singh was alive. Similarly, Bishweshari Saran Singh father of Brijeshwari Saran Singh and Badreswari Saran Singh was also alive.

146. We need not go into the question why all legal heirs of Bindeshwari Sharan Singh did not join, but the fact remains, that lease deed, which was renewed with effect

from 01.10.1936 had four lessees, as named above. All the petitioners in WP-1 are daughters of one of the Lessee Sureshwari Saran Singh while other petitioners are offshoots, and, from the line of Brijeshwari Saran Singh and Badreswari Saran Singh.

147. Lease was granted for a period of fifty years to the above Lessees. They had only tenancy rights over land since land continued to be owned by State Government. Lessees and their other legal heirs however treated land as their own and made it subject to Will, family settlement and even sale-deed. These kinds of conveyance at the best can be treated as if lease rights were subjected to such conveyance since land was not owned by lessees. The land itself could not have been subjected to such conveyance by transferring title to the beneficiaries or transferees. So long as lease was subsisting and lease rights were available to lessees, any instrument of Conveyance whether sale-deed or Will or even alleged family settlement can be said to be valid only to the extent of transferring lease rights over land in dispute and nothing more than that.

148. However, any transfer of even lease right would have been valid only if made in accordance with procedure provided in lease-deed. It says that no transfer shall be made without permission of Lessor. No such permission was obtained. Thus, even aforesaid transfer is not consistent with stipulations of lease-deed, which require prior sanction of Lessor hence all such transfer were invalid.

149. Where transfer is made contrary to conditions provided in lease-deed requiring sanction of Lessor, transfer is bad and this is what has been said by Supreme Court in **State of U.P. and others vs, United Bank of India and others (supra)** observing as under :

"The mortgage so created by the Company in favour of the Bank in respect of nazul land without the sanction of the State of Uttar Pradesh in terms of the lease, is ab initio void, hence, no right was created in favour of the Bank by reason of the said mortgage."

150. Thus, any transfer made by Lessees without following procedure i.e. terms and conditions of lease-deed was illegal, invalid and as said by Supreme Court in **State of U.P. and others vs, United Bank of India and others (supra),** void ab initio. Moreover, at the best transfer could have resulted in transferring any such right or interest as possessed by Lessee i.e. lease rights and no title of land in dispute. Since land was owned by State of U.P. and there was no transfer of title by owner to anyone.

151. Counsel for petitioners at this stage sought to argue that if petitioners are to be treated as 'unauthorized occupant' in view of definition of term 'unauthorized occupant' provided in Section 2(g) of U.P.Act, 1972, in that case they can be evicted from premises in question only in accordance with procedure prescribed therein and not otherwise.

152. Here also we find no substance in the submission. Provisions of lease-deed, as we have already said, provide a procedure for re-entry. Besides relevant clauses of lease-deed which we have already quoted, there is another provision

in lease-deed providing for re-entry by Government at any time and the said clause of lease deed reads as under :

"PROVIDED also that ***if the Government shall at any time require to re-enter on this site it can do so, on paying the value of all buildings that may be on this site, plus 10 per cent, as recompence for resumption of lease and that the lessee shall have no further claim of any sort against the Government."*** (Emphasis added)

153. Supreme Court has already said that terms of lease shall govern Nazul land in view of provisions of GG Act, 1895 and being a special procedure prescribed in lease deed, it shall prevail over any other law and no other procedure is required to be followed.

154. Therefore, State Government, when avail its right under terms of lease, cannot be compelled to chose another procedure. Moreover, under U.P.Act, 1972, State may proceed if it also has to recover the amount of damage, compensation etc. for unauthorized possession over public premises, which has to be ascertained by Prescribed Authority, which is not the case in hand. Therefore, it cannot be said that State Government is bound to follow procedure of U.P. Act, 1972 and cannot resort to the procedure prescribed for re-entry provided in lease-deed itself. This argument is contrary to what has been said by Supreme Court in **Azim Ahmad Kazmi and others (supra),** hence rejected.

155. In this context and to justify possession of petitioners over land in dispute, it is also contended that in 1992, policy of conversion of Nazul land into freehold was adopted by Government and petitioners having applied for freehold, were entitled to continue for possession till their application is decided, hence State Government could not have re-entered or resumed land in dispute. Instead, petitioners are entitled for conversion of lease into freehold. Reliance is placed on G.O. dated 23.05.1992 and subsequent ones.

156. The first such G.O. is dated 23.05.1992. The aforesaid G.O. was applicable to permanent leases given for **'residential purposes'** and 'current leases', given for residential purposes. Para 1 of aforesaid G.O. reads as under :

''मुझे यह कहने का निर्देश हुआ है कि सम्यक विचारोपरान्त शासन द्वारा नजूल भूमि के प्रबन्ध एवं निस्तारण आदि की वर्तमान व्यवस्था में परिवर्तन करते हुए ***शाश्वत एवं चालू पट्टों के अन्तर्गत उपलब्ध नजूल भूमि का स्वैच्छिक आधार पर फ्री–होल्ड घोषित करने एवं शेष रिक्त नजूल भूमि*** *का निस्तारण इस शासनादेश में निधारित प्रक्रिया के अनुसार करने का निर्णय लिया गया है। तद्नुसार नजूल भूमि के प्रबन्ध एवं निस्तारण आदि के सम्बन्ध में निम्नलिखित व्यवस्था तात्कालिक रूप से लागू होगी।''*

"I am directed to say that after due consideration the government has while changing the extant policy of management and disposal of the Nazul land, decided to declare ***Nazul land available under the perpetual and current leases*** *to be freehold on voluntary basis and to dispose remaining vacant Nazul land as per procedure prescribed in this Government Order. Accordingly, in respect of the management and disposal, etc. of the Nazul land, the following policy shall come into force with immediate effect."*

(English Translation by Court)

(Emphasis added)

157. Those, who are governed by aforesaid G.O., were directed to submit their option for freehold within one year from the date of issue of G.O. and only they would be entitled for benefit under the said G.O. It also restrained any transfer of property if under lease deed. No transfer was permissible without permission. It also directed that where unauthorized possession is found, action for eviction shall be taken in accordance with law. Paras 7 and 8 of said G.O. read as under :

''(7) ***जिन पट्टों मे यह शर्त है कि पट्टाधिकारी बिना पट्टादाता की अनुमति के पट्टागत भूमि का हस्तान्तरण कर सकता है, वहॉ पट्टे की शर्त के विपरीत कोई हस्तक्षेप नही किया जाएगा,*** *किन्तु जहॉ बिना पट्टादाता की अनुमति के पट्टेदार द्वारा भूमि हस्तान्तरण करने का निषेध है वहॉ इस शासनादेश के लागू होने की तिथि से किसी भी प्रकार के हस्तान्तरण पर एक वर्ष तक के लिए रोक लगा दी जाएगी। यह योजना शासनादेश जारी होने की तिथि से लागू होगी।*

(8) इस बात का व्यापक प्रचार किया जाएगा कि उपरोक्त नीति अनधिकृत कब्जो के मामलों में लागू नहीं होगी और ***अनधिकृत कब्जों के मामलों में विधिक प्रक्रिया के अनुसार बेदखली आदि की कार्यवाही की जाएगी।''***

"(7) In leases where leaseholder can transfer lease land without permission of the lessor, in such a case no interference shall be made contrary to the terms and conditions of the lease. *But where transfer of land without permission of the lessor is prohibited, any transfer of land shall be stopped for a year from the date of enforcement of this Government Order. This policy shall come into force from the date of issue of the Government Order.*

(8) It shall be widely circulated that the aforesaid policy shall not be applicable to the cases related to unauthorized possessions ***and eviction proceedings, etc. in relation to the unauthorized possessions shall be held in accordance with the legal procedure."***

(English Transaction by Court)
(Emphasis added)

158. The second G.O. was issued on 02.12.1992 dividing Lease-Holders in two categories. One, who had not violated conditions of lease, and, another, who had violated conditions of lease. Those, who had not violated conditions, were required to pay for conversion to freehold an amount equal to 50 percent of Circle Rate for residential purpose while those who had violated conditions of lease, are to pay 100 percent. Same was in respect of Group Housing and Commercial use with the difference of amount to be paid for freehold. Para 4 thereof also provided that such current leases where 90 years period had expired, if Lease-holder had not violated any conditions of lease and wants freehold, that can be allowed as per aforesaid G.O.. However, if he wants fresh lease, that can also be allowed for 30 years on payment of 20 percent of Circle rate as premium and 1/60th part of premium towards annual rent. Clause 4 of aforesaid G.O. reads as under :

''4. ***ऐसे चालू पट्टे जिनके 90 वर्ष की सम्पूर्ण अवधि समाप्त हो गई है*** *यदि कोई पूर्व पट्टाधारक* ***जिन्होंने पट्टे की शर्तों का उल्लंघन नहीं किया है,*** *भूमि फ्री–होल्ड कराना चाहता है तो ऐसी दशा में निर्धारित दरों के अनुसार फ्री–होल्ड कर दिया जाएगा। यदि वह फ्री–होल्ड नही कराना चाहते है बल्कि नया पट्टा लेना चाहते है तो ऐसी दशा में 30 वर्ष के लिए एक नया पट्टा वर्तमान शर्तों के आधार पर दिया जा सकता है जिसके लिए प्रीमियम की धनराशि प्रचलित सर्किल रेट की निर्धारित दर की 20 प्रतिशत होगी और वार्षिक किराया, प्रीमियम का 1/60वां भाग प्रतिवर्ष के हिसाब से भी लिया जाएगा।''*

*"4 . **In case of those current leases whose entire lease period of 90 years has expired, if any previous leaseholder who has not violated lease conditions,** wants to get the land converted into freehold, in such a circumstance it shall be converted into freehold against the payment of the prescribed rates. If he does not want to convert it into freehold and wants to get a new lease, in such a circumstance a new lease may be awarded for 30 years under the extant terms and conditions, for which premium amount @ 20 percent of the existing circle rates and annual rent @ 1/60 of the premium shall be paid."*

(English Translation by Court)

(Emphasis added)

159. The third is G.O. dated 03.10.1994 again making amendment in earlier two G.Os. Relevant aspect is that vide para 2, provision made for execution of 30 years lease, where 90 years period had expired, was deleted. Para 2 of G.O. dated 03.10.1994 reads as under :

*"2. शासनादेश संख्या 3632/9–आ–4–92–293–एन/90, 2–12–1992 में ऐसे चालू पट्टे जिनके 90 वर्ष की सम्पूर्ण अवधि समाप्त हो चुकी है तथा पूर्व पट्टाधारक द्वारा पट्टे की शर्तों का उल्लंघन नहीं किया गया है, के सम्बन्ध में 30 वर्षीय पट्टा स्वीकृत किये जाने की व्यवस्था की गई थी। **इस व्यवस्था को तात्कालिक प्रभाव से समाप्त किया जाता है। अब ऐसे मामले में नया पट्टा स्वीकृत नहीं किया जाएगा बल्कि ऐसे मामले में जिनमें पट्टे की सम्पूर्ण अवधि समाप्त हो चुकी है उसको उपरोक्त निर्धारित दरों पर पूर्व पट्टेदार के पक्ष में फ्री–होल्ड में परिवर्तित करने की कार्यवाही की जाएगी।"***

*"2. A provision had been made in Government Order No. 3632/9-Aa-4-92-293-N/90, dated 02.12.1992 for grant of lease for 30 years for the current leases where 90 years' tenure has expired and the terms and conditions of the lease have not been violated by the former lease holder. **This provision is annulled with immediate effect. Now in such cases, no new lease shall be granted; rather, in cases where entire period of lease has expired, proceedings shall taken for converting such leases into freehold in favour of the former lease holders at the aforesaid prescribed rates." (English Translation by Court)*** (Emphasis added)

160. Para 8 of aforesaid G.O. further provides that policy for freehold will be effective only upto 31.03.1995.

161. Considering that some very poor persons were also in occupation of 'Nazul land' and their eviction may result in serious problem of accommodation to such persons, another G.O. dated 01.01.1996 was issued making amendments in earlier three G.Os. stating that those persons whose monthly income is Rs.1,250/- or less, unauthorized possession of such persons on vacant Nazul land upto 01.01.1992 or prior thereto for residential purposes, shall be allowed freehold on payment of 25 percent premium and Rs.60/- annual rent for the said area upto 45 Sq. Meter and for more than 45 Sq.Meter but upto 100 Sq.Meter, 40 percent and Rs.120 annual rent. It clearly says that no regularization of unauthorized possession shall be made beyond 100 Sq.Meter and amount of premium shall be allowed to be paid in 10 years' interest free 6 monthly installments. Such unauthorized possession shall be regularized by approving 30 years' lease. Clauses 1, 2, 3 and 4 of aforesaid G.O. reads as under :

*"(1) **किसी भी दशा में 100 वर्ग मीटर से अधिक क्षेत्रफल पर किये गये अवैध कब्जों का विनियमितीकरण नहीं किया जायेगा** तथा दिनांक*

30.11.1991 की सर्किल रेट पर आंकलित सम्पूर्ण मूल्य पर निर्धारित यथास्थिति 25ः या 40ः नजराने की धनराशि 10 वर्षीय ब्याज रहित छमाही किस्तों में लिया जायेगा, परन्तु यदि कोई व्यक्ति सम्पूर्ण धनराशि या बकाया किस्तों की धनराशि एकमुश्त जमा करना चाहता है तो वह देय धनराशि जमा कर सकता है।

(2) उपरोक्त प्रकार के मामले में विनियमितीकरण की कार्यवाही 30 वर्षीय पट्टा स्वीकृत करके की जायेगी। स्वीकृत पट्टे में 30–30 वर्षीय दो नवीनीकरण के प्राविधान सहित सम्पूर्ण पट्टे की कुल अवधि दो नवीनीकरण के प्राविधान सहित सम्पूर्ण पट्टे की कुल अवधि अधिकतम 90 वर्ष की होगी। ***जिसमें यह शर्त होगी कि सम्बन्धित व्यक्ति भूमि का पट्टाधिकार 30 वर्ष तक किसी व्यक्ति को हस्तानान्तरित नहीं कर सकता है पट्टा शासन द्वारा निर्धारित प्रारूप पर जारी किया जायेगा।***

(3) ***अनाधिकृत कब्जों के विनियमितीकरण की समस्त कार्यवाही जिलाधिकारी, की अध्यक्षता में गठित समिति की संस्तुति पर जिलाधिकारी द्वारा की जायेगी।*** *लखनऊ एवं देहरादून में समस्त कार्यवाही उपाध्यक्ष, विकास प्राधिकरण की अध्यक्षता में गठित समिति की संस्तुति पर उपाध्यक्ष द्वारा की जायेगी।*

(4) ***विनियमितीकरण हेतु परिवार को एक इकाई के रूप में माना जायेगा*** *तथा पट्टा परिवार के मुखिया के पक्ष में स्वीकृत किया जायेगा।''*

"(1) Under no circumstances, ***illegal possessions over an area measuring over 100 square metres shall be regularised*** *and an amount of earnest money, 25% or 40% as the case may be, on the entire amount calculated as per the circle rate as on 30.11.1991 shall be taken in half yearly interest free instalments over the period of 10 years. However, if any person wishes to deposit entire money or the amount of remaining instalments in lump sum, he/she may deposit the payable amount.*

(2) In the aforesaid type of cases, regularisation proceedings shall be done by granting a lease for a period of 30 years. The total period of the entire lease shall at most be 90 years with provision of two renewals, for 30 years each, in the lease so granted, subject to a restriction ***that the person concerned cannot transfer the lease rights to anybody until 30 years. The lease shall be issued on a format prescribed by the government.***

(3) ***All the proceedings of regularisation of unauthorised possessions shall be done by the District Magistrate on recommendation of a committee constituted under his/her chairmanship.*** *All the proceedings in Lucknow and Dehradun shall be done by the Vice Chairman, Development Authority, on recommendation of a committee constituted under his/her chairmanship.*

(4) ***For the purpose of regularisation, a family shall be deemed to be a unit*** *and lease shall be granted in the name of the head of the family." (English Translation by Court)*

(Emphasis added)

162. Then vide G.O. dated 17.02.1996 again some amendments were made in respect of amount payable for freehold but earlier policy of categories of persons, who can claim freehold, was not changed. Vide G.O. dated 29.03.1996, period for giving benefit of freehold was extended from 01.4.1996 to 30.09.1996. G.O. dated 02.04.1996 only made some corrigendum in earlier G.O. dated 17.02.1996.

163. On 29.08.1996, G.O. was issued in furtherance of G.O. dated 17.02.1996 stating that under G.O. dated 17.02.1996, freehold rights to Nominees of Lease-Holders were allowed and in

reference thereto, rates on which such Nominees shall be allowed freehold, were mentioned.

164. We find that G.O. dated 17.02.1996 nowhere permits conversion of Nazul land into freehold in favour of Nominees of Lessee and thus we have no manner of doubt that G.O. dated 29.08.1996, insofar as it refers to G.O. dated 17.02.1996, has erred in law and it is a clear misreading. If G.O. dated 17.02.1996 itself had not permitted freehold rights to Nominee(s) of Lessee, question of rights determined by G.O. dated 29.08.1996 is of no legal consequence and would remain inoperative.

165. Then vide G.O. dated 25.10.1996, implementation of freehold policy was extended upto 31.12.1996. Then G.O. dated 31.12.1996 was issued to clarify G.O. dated 17.02.1996 in respect of applicability of rate, where land use at the time of grant of lease was changed in Master plan.

166. G.O. dated 26.09.1997 made amendments in all earlier G.Os. in respect of rates for Nazul land being used for hospital and other charitable purposes. It also clarifies as to which contravention of lease deed will be treated as violation to attract higher rate. It also provides in para 6(2) that Government has got right of re-entry due to violation of any conditions of lease and lease had already expired, and such Lease-Holder may be informed of Nazul policy and be given an opportunity to apply for freehold whereafter action for dispossession will be taken. The policy of conversion of freehold was extended upto 25.12.1997.

167. Then comes G.O. dated 01.12.1998. Thereunder only two categories were made i.e. residential and non-residential. Restriction was also imposed on certain Nazul land in respect whereto conversion of freehold shall not be allowed.

168. Vide G.O. dated 10.12.2002, it was clarified that freehold conversion shall not be allowed to nominee of Lessee or his legal heirs. G.O. dated 31.12.2002 relates to rates and clarification hence are not relevant for the purpose of present case.

169. Vide G.O. dated 04.08.2006, provision for regularization of Nazul land which was in unauthorized possession, was deleted. It is also said that in all the matters, where freehold document has not been registered, application shall be cancelled. Vide G.O. dated 15.02.2008 clarification was given in respect of G.O. dated 04.08.2006 and it was reiterated that in all those matters where freehold document has not been registered, application shall be rejected.

170. Vide G.O. dated 21.10.2008, Clause 3 of G.O. dated 10.10.2002, whereby provision for conversion of freehold to Nominee of Lessee or his legal heirs was ceased, was restored. It was also clarified that decision to convert freehold of Nazul land will apply only when such land is not found necessary for Government use.

171. G.O. dated 26.05.2009 made an amendment in para 2(6) of G.O. dated 21.10.2008 and substituted following paras therein :

*"**ऐसे नजूल भूमियां** जो भू–धारक या पट्टाधारक या उनके विधिक उत्तराधिकारी / **नामित की भूमि के साथ स्थित है तथा उनके***

लिए उपयोगी सिद्ध हो सकती हैं तथा किसी अन्य के उपयोग की सम्भावना नहीं प्रतीत होती है। ऐसी भूमि का विनियमितीकरण भू–धारक या पट्टाधारक या उनके विधिक उत्तराधिकारी / नामित के पक्ष में वर्तमान सर्किल रेट शत प्रतिशत प्राप्त कर फ्री–होल्ड कर दिया जायेगा। ***ऐसे मामलों में शासन की अनुमति आवश्यक होगी।''***

*"**Those nazul l**ands which are lying adjacent to the land of land holder or lease holder or his legal successor/**his nominee, and which can be of utility to them and do not appear to have the potential of being used by any other person,** shall be regularised and converted into freehold in favour of the land holder or lease holder or his legal successor/nominee after receiving cent percent current circle rate. **In such matters, the permission of the government shall be necessary."***

(English Translation by Court)

(Emphasis added)

172. Further time for conversion into freehold was extended upto 31.12.2009.

173. G.Os. dated 29.01.2010, 17.02.2011 and 01.8.2011 were issued making minor amendments hence not discussed further.

174. Then comes G.O. dated 28.09.2011. It talks of policy of conversion of Nazul land into freehold, which was not listed at any point of time but has been occupied unauthorizedly and occupants have raised their construction and using land prior to 01.12.1998. However, land of public places, park, side-lanes of road and other Government uses was excluded and maximum area for such freehold was confined to 300 Sq.Meter. The incumbent had to apply within three months whereafter they have to be evicted. With respect to 'Nominees of Lessees', para 5 of said G.O. reads as under :

*''5. नामित व्यक्ति के पक्ष में नजूल भूमि को फ्रीहोल्ड किये जाने की व्यवस्था को समाप्त किया जाना– नजूल भूमि के पट्टेदार द्वारा **नामित व्यक्ति के पक्ष में नजूल भूमि को फ्रीहोल्ड किये जाने की व्यवस्था सर्वप्रथम** शासनादेश संख्या : 1300/9–आ–4–96–629एन/95, टी.सी. दिनांक 29–8–1996 के प्रस्तर–1 (3) (4) **में की गयी थी** और शासनादेश संख्या 2873/9–आ–4–2002–152–एन/2002, टी.सी. दिनांक 10–12–2002 के प्रस्तर 3 **द्वारा उक्त व्यवस्था समाप्त कर दी गयी** तथा शासनादेश संख्या : 1956/आठ–4–08–266एन/08, दिनांक **21–10–2008** के प्रस्तर– 2 (4) द्वारा उक्त व्यवस्था **पुनः बहाल कर दी गयी है।** इस व्यवस्था के सम्बन्ध में मा0 उच्च न्यायालय में विचाराधीन रिट याचिका (जनहित याचिका) संख्या : 35248/2010–जयसिंह बनाम उत्तर प्रदेश राज्य व अन्य में पारित अन्तरिम आदेश दिनांक 16–07–2010 में दिये गये निर्देशों के दृष्टिगत उपर्युक्त **शासनादेश दिनांक 21–10–2008 का प्रस्तर 2 (4) जिसके द्वारा नामिनी के पक्ष में नजूल भूमि को फ्रीहोल्ड किये जाने की व्यवस्था बहाल की गयी है, को समाप्त करते हुए अब ऐसे व्यक्ति जिनके पक्ष में क्रय की जा रही सम्पत्ति (नजूल भूमि) को पट्टेदार द्वारा रजिस्टर्ड एग्रीमेंट टू सेल किया गया हो और पूर्ण स्टाम्प शुल्क अदा किया गया हो, उसी व्यक्ति के पक्ष में ही नजूल भूमि को फ्रीहोल्ड किया जायेगा।''*

*"5. Cessation of the provision of converting the nazul land into freehold in favour of the nominee:- **The provision of converting nazul land into freehold in favour of nominee by the lease holder of the land had first been provided in the para- 1 (3)(4)** of the Government Order No. 1300/9-Aa-4-96-629N/95, TC dated 29-08-1996; and by para 3 of the Government Order No. 2873/9-Aa-4-2002-152-N/2002, TC dated 10.12.2002, **the aforesaid provision was annulled;***

*and through para 2(4) of the Government Order No. 1956/VIII-4-08-266N/08, dated 21.10.2008, the afore-said provision has been restored again. Pursuant to the instructions, with respect to this provision, given in the interim order dated 16.07.2010 passed by the Hon'ble High Court in Writ Petition (Public Interest Litigation) No. 35248/2010 titled as Jai Singh Vs State of Uttar Pradesh and others, which is pending, t**he provision of para 2(4) made in the aforesaid Government Order dated 21.10.2008 through which converting nazul land into freehold in favour of the nominee was restored, is being annulled; and the nazul land shall be converted in freehold in favour of the person with whom the lease holder has entered in registered agreement of sale and who has paid the whole stamp duty."***

(English Translation by Court)
(Emphasis added)

175. Aforesaid G.Os. thus clearly show that eligibility of leases of Nazul land, as initially laid down in G.O. of 1992 underwent some changes but in respect of land found suitable or needed by Government, no freehold was permissible. With respect to violation of terms and conditions of lease etc., some relaxation has been given.

176. Lastly there are two more G.Os. i.e. 04.03.2014 and 15.01.2015 wherein policy of freehold has been virtually given a relook and substantial amendments have been made in earlier policy.

177. It is no doubt true that Government has promulgated policy of conversion of lease land into freehold even in those cases where lease has expired, but then question is "whether mere submission of application for freehold will confer a vested right upon petitioners to get Nazul land converted into freehold, which will override even power of re-entry of Lessor. A Full Bench of this Court in **Anand Kumar Sharma vs. State of U.P. and others 2014(2) ADJ 742** has considered this aspect and held in para 42 of judgment that merely by making an application for grant of freehold right, petitioner did not acquire a vested right. Para 42 of the judgment reads as under :

*"We after considering the relevant Government Orders on the subject and pronouncements of the Apex Court as noted above, are of the view that **merely by making an application for grant of right, petitioner did not acquire a vested right."*** (Emphasis added)

178. A Division Bench of this Court in **Writ Petition No.62588 of 2010, M/s Madhu Colonizers Pvt. Ltd. vs. State of U.P. & Ors.,** decided on 02.04.2013 has held that if Government exercises right of re-entry, question of a person to claim freehold would not arise and where such a right cannot be claimed by Lessee, right of nominee cannot survive over such lessee. Court has said as under :

*"It is also found that **as nominee of the lessee, the petitioner-Company cannot have any larger rights than the lessee and once the order of the District Magistrate for resumption the land in exercise of power under Clause 3(c) of the lease deed is held to be valid, the petitioner-Company, as a nominee, cannot have any surviving right to claim conversion of the lease hold rights into freehold. Infact, on valid resumption***

order being passed, the lease hold rights cease to exist *and there can be no occasion for conversion of lease hold rights into freehold rights in such circumstances."* (Emphasis added)

179. Moreover, it is also evident from record that application of petitioner in WP-1 for conversion of leasehold right into freehold has been rejected vide order dated 23.5.2015 and that order is not under challenge. Lastly, scheme of G.Os. makes it clear wherever Nazul is required by Government for public purposes or own use, freehold shall not be allowed. Thus, claim set up on the basis of aforesaid G.Os. also have no force and is rejected.

180. **Question (iv), therefore, is answered accordingly** and we hold that after expiry of period of lease, none of the petitioners had any legal, contractual or otherwise right in respect of land in dispute and they were not holding possession of land validly. Further once State exercise right of re-entry, question of conversion of lease right into freehold would not arise.

181. Before proceeding further, we find it difficult to desist from observing that freehold policy, commenced in 1992, took care of a limited category of occupants of Nazul land i.e. Lessees, who had perpetual lease or where lease was continuing and there was no violation of conditions of lease. Meaning thereby, Leaseholders, who had faithfully abided to the terms and conditions of lease, were chosen as a class by themselves and provision was made to convert lease rights into freehold in such cases. One may not dispute about such policy in the light of fact that these leases are several decades old and people holding such leases had developed some kind of possessory right in property and recognizing such interest of Lessees, howsoever weak it was, if State Government chose to confer upon them benefit of conversion of lease right into freehold, one may not validly object to that and probably such policy may satisfy constitutional test of fairness, non-discrimination, non-arbitrariness etc.

182. But with the passage of time, in the garb of improvement in the policy, amendments were made by numerous Government Orders issued from time to time, which we have referred hereinabove and that opened on unrestricted area of beneficiaries, i.e. wholly strangers namely mere Nominees of Lessee, who had no prior interest in property in question; and flagrant defaulters and violators of terms of lease etc. Such provisions, in our view, are difficult to sustain as to satisfy constitutional validity of policy of freehold under aforesaid Government Orders. In our view, it is *ex facie* arbitrary and violative of Article 14 of Constitution of India. One cannot lose sight and ignore historical backdrop of allotment of Nazul land. Persons who were sympathetic to Britishers and for services rendered by individuals in the interest of Colonial Forces, helping them in their administration; or some otherwise highly resourceful people, were given such allotment. After independence, if State wanted to distribute its largesse/assets, we can understand, if a scheme would have been evolved to distribute Nazul land, by terminating lease, to weaker and poor people or landless people or if objective was to augment revenue, then State largesse/assets instead of distributing in a clandestine manner by confining such

benefit to certain individuals, appropriate mode of auction of land to general public should have been adopted. We do not know what prevailed with State Government in making policy, which was initially not so apparently erratic, to become a boon to defaulters and also give opportunity to certain individuals in trading of land after getting land freehold on much lesser amount than what actually market value of land is. In the present case itself, petitioners have said that they paid money to Harihar Nath Dhar and therefore, Harihar Nath Dhar actually benefited himself of the property owned by State without giving any return to State and this had continued for decades together. Thus, Prima facie, we are satisfied that policy of freehold, as it stands today, helps scrupulous, resourceful land dealers, Land Mafias and similar other persons. It is neither in public interest nor satisfies test of public policy nor consistent with constitutional test, in particular, Article 14 of Constitution of India.

183. However, we are not expressing any final opinion on this aspect but this Court desires that it is high time and sooner is the better, that State Government must re-examine entire policy and if purpose is only to augment revenue, Government should sell public land by auction so that it may get best price or policy should be confined for the benefit of have-nots i.e. poor landless and weaker sections of the Society.

184. Now we deal with questions (v), (vi) and (vii) together.

185. Learned Senior Counsel has founded his submissions on the basis of Section 106 read with 116 TP Act, 1882 that petitioners having continued in possession after expiry of period of lease, are entitled to be treated as 'holding over' and could not have been evicted without following procedure prescribed under TP Act, 1882 since when impugned order was passed, GG Act, 1895 stood already repealed as a result whereof TP Act, 1882 would apply and for this purpose he also placed reliance on Supreme Court's judgment in **The State of U.P. vs. Zahoor Ahmad and another (supra).** He also said that even if possession is unauthorized, petitioner cannot be evicted arbitrarily but State is bound to follow procedure consistent with law and principles of natural justice and for this purpose, reliance is placed on Supreme Court's judgments in **Bishan Das and others Vs. State of Punjab and others AIR 1961 SC 1570, Express Newspapers Pvt. Ltd. and others Vs. Union of India (1986) 1 SCC 133, Yar Mohammad and another vs. Lakshmi Das and others AIR 1959 Allahabad 1 and Lallu Yeshwant Singh (dead) by his legal representative vs. Rao Jagdish Singh and others, AIR 1968 SC 620.**

186. On this aspect, we have already considered the matter substantially while considering issues (iii) and (iv). Here we will consider the matter further in the light of Repeal Act, 2017 and authorities cited and relied by petitioners, as noted above.

187. It is not in dispute that GG Act, 1895 has been repealed by Repeal Act, 2017. However, Section 4 thereof provides for saving of certain aspect and read as under :

"4. Savings.- *The repeal by this Act of any enactment shall not affect any other enactment in which the repealed*

enactment has been applied, incorporated or referred to;

and this Act shall not affect the validity, invalidity, ***effect or consequences or anything already done or suffered,*** *or* ***any right,*** *title,* ***obligation*** *or* ***liability*** *already acquired, accrued or* ***incurred,*** *or any remedy or proceeding in respect thereof, or any release or discharge of or from any debt, penalty, obligation, liability, claim or demand, or any indemnity already granted, or the proof of any past act or thing;*

nor shall this Act affect any principle or rule of law, or established jurisdiction, form or course of pleading, practice or procedure, or existing usage, custom, privilege, restriction, exemption, office or appointment, notwithstanding that the same respectively may have been in any manner affirmed or recognized or derived by, in or from any enactment hereby repealed;

nor shall the repeal by this Act of any enactment revive or restore any jurisdiction, office, custom, liability, right, tittle, privilege, restriction, exemption, usage, practice, procedure or other matter or thing not now existing or any force."

188. Section 4 of Repeal Act, 2017 clearly protects effect or consequences or anything already done or suffered, which includes effect of expiry of lease and obligation of Lessee to surrender possession of leased land to State. Further, Lessee had already agreed that State can re-enter land at any point of time. They are bound by said clause of lease-deed. This is an obligation as also liability of petitioners and right of State incurred, acquired and accrued in view of terms of lease-deed. Mere fact that it has been exercised after repeal of GG Act, 1895 would make no difference since all earlier situations/aspect have been protected by Section 4 of Repeal Act, 2017. Therefore, it cannot be said that after repeal of GG Act, 1895 by Repeal Act, 2017, petitioners' status would stood changed vis-a-vis disputed Nazul land in respect whereof State is entitled to re-entry and resume land in terms of conditions of lease.

189. The judgment cited by learned counsel for petitioners, in our view, are not at all applicable to the facts of this case as demonstrated hereinafter.

190. In **Bishan Das and others Vs. State of Punjab and others AIR 1961 SC 1570,** a Constitution Bench had an occasion to consider fundamental right of property vis-a-vis infringement therewith by executive orders. Therein, one Lala Ramji Das , carrying on a joint family business in the name and style of Faquir Chand Bhagwan Das, desired to construct a Dharmasala on a Nazul property of the then State of Patiala. In 1909, he sought permission of Government to construct a Dharmasala on the said land, since it situate near Barnala Railway Station, and therefore would have been convenient to Travellers who come to that place. It appears that initially for the same purpose, Patiala Government had granted permission to Choudhuris of Barnala bazar, but they could not do so for want of funds. Therefore when Ramji Das sought permission in the name of firm Faquir Chand Bhagwan Das in May, 1909, same was granted and communicated by Assistant Surgeon in-charge of Barnala Hospital, who was presumably in-charge of public health arrangements at Barnala. The sanction was subject to certain conditions, namely, no tax shall be taken

for the land; shopkeepers will arrange 'Piao' for the passengers; plans of the building shall be presented before sanctioning authority; cleanliness and sanitary rules shall be followed by the persons maintaining Dharmasala and no permission to construct any shop will be granted and if any condition is violated, State shall dispossess them from the land in dispute.

191. Dharmasala was constructed in 1909 and inscription on the stone to the following effect was made:

"Dharmasala Lala Faquir Chand Bhagwan Das, mahajan, 1909."

192. Though a condition was imposed for not permitting construction of any shop, but as a matter of fact, a number of shops were later constructed, with the permission of authorities concerned, for meeting expenses of maintenance of Temple and Dharmasala. A complaint was made in 1911 against Ramji Das that he was utilizing Dharmasala for his private purpose but it remained unheeded. On the complaint made, some inquiry was also conducted by Tehsildar wherein Ramji Das got his statement recorded in January, 1925. On 07.04.1928, Revenue Minister, Patiala State, passed an order stating that though land on which Dharmasala had been built, was originally Government land (nazul property), it would not be proper to declare it as such and Dharmasala should continue to exist for the benefit of the public. Ramji Das or any other person will not be competent to transfer land and if such transfer is made, it would be unlawful and invalid and in such event, Government will escheat. Some further inquiry were also made and it appears that Ramji Das was given permission to make a raised platform and other extensions etc. On 10.09.1954, one Gopal Das, Secretary, Congress Committee, Barnala, filed a petition to the Revenue Minister, Patiala, making various allegations against Ramji Das. Thereupon an inquiry was conducted by Tahsildar, who found that Dharmasala was constructed by Ramji Das on Government lands, that Dharmasala was for public benefit; and, that Ramji Das had been its Manager throughout. He, however, said that Ramji Das was bound to render accounts which he failed considering that property belong to him and, therefore, he should be removed and past accounts be called for. When the matter went for opinion of Legal Remembrancer of State Government, it was pointed out that Dharmasala and Temple, though built on Government land, but not Government property. It also said that though Ramji Das was repudiating the existence of a public trust, he was working as Trustee of a trust created for public purposes of a charitable or religious nature and could be removed by State only under Section 92 Civil Procedure Code. Ramji Das died on 10.12.1957. Petitioner Bishan Das and others came to manage Dharmasala, Temple and the shops etc. On 23.12.1957, Gopal Das and some others describing themselves as members of public, made an application that since Ramji Das was dead, new arrangements should be made for proper management of Dharmasala which is used for the benefit of the public. Again a search of old papers was made and this time Sub-Divisional Officer, Barnala, recommended that in the interest of Government, Municipal Committee, Barnala, should take immediate charge of the management of Dharmasala. This recommendation was affirmed by the

Deputy Commissioner, Sangrur, and pursuant to the said order, Kanungo presumably dispossessed Bishan Das and others from part of Dharmasala on 07.01.1958 and charge thereof was given to Municipal Committee, Barnala. These orders were challenged by petitioners alleging that the same were without any authority of law and violative of fundamental rights enshrined under Articles 14, 19 and 31 of the Constitution.

193. The defence taken was that property is trust property of a public and charitable character, hence Bishan Das and others were not entitled to claim any property rights in respect thereof.

194. Supreme Court observed in Para-10 that even if it is assumed that the property is trust property, no authority of law authorizing State or its Executive Officers to take action against Bishan Das and others in respect of Dharmasala was shown. Government counsel sought to argue that Bishan Das and others were trespassers and land on which Dharmasala situate belong to Government, hence Government was entitled to use minimum of force to eject trespassers. But this defence was also rejected by Supreme Court holding that it is a clear case of violation of fundamental right of Bishan Das and others. Supreme Court said that nature of sanction granted in 1909 in respect of land whether it was a lease or licence, with a Grant or an irrevocable licence are questions of fact, need not be gone into by it but admitted position is that land belonged to the Government who granted permission to Ramji Das on behalf of joint family firm to build a Dharmasala, Temple and Shops and manage the same during his life time. After his death his family members continued with management. Thus, they were not trespassers at all in respect of Dharmasala, Temple and Shops; nor could it be held that Dharmasala, Temple and Shops belong to the State. The question whether trust created was public or private is irrelevant. Court said that a Trustee, even of a public trust, can be removed only by procedure known to law. He cannot be removed by an executive fiat. The maxim, what is annexed to the soil goes with the soil, has not been accepted as an absolute rule of law in India and in this regard, Supreme Court referred to decision in **Thakoor Chunder Parmanick Vs. Ramdhone Bhuttacharjee (1866) 6 W.R. 228; Lala Beni Ram Vs. Kundan Lall (1899) L.R. 26 I.A. 58 and Narayan Das Khettry Vs. Jatindranath (1927) L.R. 54 I.A. 218.** Court said that a person who bona fide puts up constructions on land belonging to others with their permission would not be a trespasser, nor would the buildings so constructed vest in the owner of the land by application of maxim quicquid plantatur solo, solo credit. It said:

"It is, therefore, ***impossible to hold that in respect of the dharmasala, temples and shops, the State has acquired any rights whatsoever merely by reason of their being on the land belonging to the State.*** *If the State thought that the constructions should be removed or that the condition as to resumption of the land should be invoked, it was open to the State to take appropriate legal action for the purpose."*

(Emphasis added)

195. Court said that even if State proceeded on the assumption that there was a public trust, it could have taken appropriate legal action for removal of

Trustees by way of Suit under Section 92 C.P.C. and not otherwise. Constitution Bench then said:

*" .. that **does not give the State or its executive officers the right to** take the law into their own hands and **remove the trustee by an executive order."*** **(Emphasis added)**

196. Court concluded its findings in Para-14 of the judgment as under:

"The facts and the position in law thus clearly are (1) that the buildings constructed on this piece of Government land did not belong to Government, (2) that the petitioners were in possession and occupation of the buildings and (3) that by virtue of enactments binding on the Government, the petitioners could be dispossessed, if at all, only in pursuance of a decree of a Civil Court obtained in proceedings properly initiated."

197. Court passed serious stricture against State authorities holding that the executive action taken by State and its Officers is destructive of the basic principle of the rule of law. Hence action of Government in taking law into their hands and dispossessing petitioners by display of force, exhibits a callous disregard of normal requirements of rule of law, apart from what might legitimately and reasonably be expected from a Government functioning in a society governed by a Constitution which guarantees to its citizens against arbitrary invasion by Executive of peaceful possession of property. Supreme Court reiterated what was said in its earlier judgment in **Wazir Chand Vs. The State of Himachal Pradesh AIR 1954 SC 415** that State or its executive officers cannot interfere with the rights of others unless they can point out some specific rule of law which authorizes their acts. Supreme Court seriously deprecated State and said:

*"We have **here a highly discriminatory and autocratic act which deprives a person of the possession of property without reference to any law or legal authority.** Even if the property was trust property it is difficult to see how the Municipal Committee, Barnala, can step in as trustee on an executive determination only."* (Emphasis added)

198. Aforesaid decision has no application in the case in hand, inasmuch as, here State has exercised its power following terms and conditions laid down under lease-deed itself, which were made to prevail over any Statute providing otherwise including TP Act, 1882 vide Section 2 of GG Act, 1895. Further, respondents, in exercise of right of resumption/re-entry, have not straightway went to dispossess petitioners but notice in question has been given to them giving time to vacate the premises whereafter respondents proposed to take further action for taking possession. Therefore, it cannot be said that no notice has been given to petitioners in the present case.

199. **Express Newspapers Pvt. Ltd. and others Vs. Union of India (1986) 1 SCC 133** is a matter which was decided in a Writ Petition filed under Article 32 of Constitution by the aforesaid Newspaper Company having its Establishment in Express Buildings at 9-10, Bahadurshah Zafar Marg, New Delhi, which was a land on perpetual lease from Union of India, under a registered Indenture of Lease, dated 17.03.1958. Five petitioners, who filed above Writ

Petition before Supreme Court included Indian Express Newspaper (Bombay) Private Limited of which Express Newspapers Private Limited was a subsidiary and petitioners-3, 4 and 5, namely, Sri Ram Nath Goenka was Chairman of the Board of Directors, Nihal Singh was the Editor-in-chief of the Indian Express and Romesh Thapar was the Editor of the Seminar published from the Express Buildings. Union of India; Lt. Governor of Delhi, Sri Jagmohan; Municipal Corporation of Delhi; Zonal Engineer (Buildings) and Land and Development Officer were impleaded as respondents-1 to 5. The validity of notice of re-entry upon forfeiture of lease issued by Engineer Officer, Land and Development Office, New Delhi on 10.03.1980 was challenged. The notice required petitioners to show cause why Union of India should not re-enter upon and take possession of the demised premises i.e. plots nos. 9 and 10, Bahadurshah Zafar Marg, together with Buildings built thereon under Clause 5 of Indenture of Lease, dated 17.03.1958, for committing breach of Clauses 2(14) and 2(5) of lease-deed. Another notice was issued earlier on 01.03.1980 by Zonal Engineer (Buildings), Municipal Corporation, City Zone, Delhi requiring Express Newspapers Pvt. Ltd., New Delhi to show cause why aforesaid buildings being unauthorized be not demolished under Sections 343 and 344 of the Delhi Municipal Corporation Act, 1957 (hereinafter referred to as "DMC Act, 1957"). A challenge was made, besides others, on the ground of personal vendetta against Express Group of Newspapers and also being violative of Articles 14, 19(1)(a) and 19(1)(g) of the Constitution. The questions posed by Supreme Court, to be of far reaching consequence for maintenance of federal structure of Government, were:

(1) Whether the Lt. Governor of Delhi could usurp the functions of the Union of India, Ministry of Works and Housing and direct an investigation into the affairs of the Union of India i.e. question the legality and propriety of the action of the then Minister for Works and Housing in the previous Government at the center in granting permission to Express Newspapers Pvt. Ltd. to construct new Express Building with an increased FAR of 360 with a double basement for installation of a printing press for publication of a Hindi Newspaper on the western portion of the demised premises i.e. Plots No. 9 and 10, Bahadurshah Zafar Marg, New Delhi with the Express Buildings built thereon?

(2) Whether the grant of sanction by the then Minister for Works and Housing and the consequential sanction of building plans by him of the new Express Building was contrary to the Master Plan and the Zonal Development Plans framed under the Delhi Development Act, 1957 and the municipal bye-laws, 1959 made under the DMC Act, 1957 and therefore the lessor i.e. the Union of India had the power to issue a notice of re-entry upon forfeiture of lease under Clause 5 of the indenture of lease dated March 17, 1958 and take possession of the demised premises together with the Express Buildings built thereon and the Municipal Corporation had the authority to direct demolition of the said buildings as unauthorized construction under Sections 343 and 344 of the DMC Act, 1957?

(3) Whether the threatened action which the petitioners characterise as arbitrary, illegal and irrational was

violative of Article 19(1)(a) read with Article 14 of the Constitution?

200. Thereafter Court analyzed the facts of case in detail and respective arguments and from Para-45 to 47 we find that Government of India and Lt. Governor of Delhi were head on to each other and even Council's role was not appreciated by Court. In the light of arguments advanced by parties, in para-59 of judgment, Court formulated eight questions. The issue of maintainability of writ petition under Article 32 was also raised and it was considered by Supreme Court in the judgment from para-66 onwards and it was held that building in question was necessary for running press. Any statutory or executive action to pull it down or forfeit the lease, would directly impinge on the right of freedom of speech and expression under Article 19(1)(a) and therefore, writ petition was maintainable. Court said:

"... impugned notices of re-entry upon forfeiture of lease and of the threatened demolition of the Express Buildings are intended and meant to silence the voice of the Indian Express. It must logically follow that the impugned notices constitute a direct and immediate threat to the freedom of the press and are thus violative of Article 19(1)(a) read with Article 14 of the Constitution."

201. Since, land in dispute was Government land, provisions of GG Act, 1985 were also relied on by Government and, therefore, Supreme Court examined provisions thereof also. It held that GG Act, 1895 is an explanatory or declaratory act. It said:

"Doubts having arisen as to the extent and operation of the Transfer of Property Act, 1882 and as to the power of the Government to impose limitations and restrictions upon grants and other transfers of land made by it or under its authority, the ***Act was passed to remove such doubts as is clear from the long title and the preamble.*** *The Act contains two sections and provides by Section 2 for the exclusion of the Transfer of Property Act, 1882 and, by Section 3 for the exclusion of, any rule of law, statute or enactment of the Legislature to the contrary."* (Emphasis added)

202. In **Express Newspapers Pvt. Ltd. and others Vs. Union of India (supra)** Court further said:

"It is plain upon the terms that Section 2 excludes the operation of the Transfer of Property Act, 1882 to Government grants. While Section 3 declares that all provisions, restrictions, conditions and limitations contained over any such grant or transfer as aforesaid shall be valid and shall take effect according to their tenor, notwithstanding any rule of law, statute or enactment of the Legislature to the contrary. A series of judicial decisions have determined the overriding effect of Section 3 making it amply clear that ***a grant of property by the Government partakes of the nature of law since it overrides even legal provisions which are contrary to the tenor of the document. "*** (Emphasis added)

203. Having said so, Supreme Court found that the stand taken on behalf of Union of India that there was non compliance of mandatory requirement of Clause-6, therefore notice of re-entry was valid, is not correct.

204. Court then noted some contradictions in Constitution Bench

judgment in **Bishan Das and others Vs. State of Punjab and others (supra)** and **State of Orissa Vs. Ram Chandra Dev AIR 1964 SC 685.**

205. In State of Orissa Vs. Ram Chandra Dev (supra), Constitution Bench observed:

"Ordinarily, where property has been granted by the State on condition which make the grant resumable, after resumption it is the grantee who moves the Court for appropriate relief, and that proceeds on the basis that the ***grantor State which has reserved to itself the right to resume may, after exercising its right, seek to recover possession of the property without filing a suit. "***

(Emphasis added)

206. It was observed that existence of a right is the foundation for a petition under Article 226 of the Constitution. In Para-84 Court said that in cases involving purely contractual issues, the settled law is, where statutory provisions of public law are involved, writs will be issued and referred to its earlier judgment in **Mohammed Hanif Vs. State of Assam (1969) 2 SCC 782**. Thereafter it also considered the provisions of Act, 1971 and observed that Express building was constructed with the sanction of lessor, i.e., Union of India on plots demised on 'perpetual lease' by registered lease-deed dated 17.03.1958 hence cannot be regarded as 'public premises' belonging to the Central Government under Section 2(e). That being so, Act, 1971 has no application.

207. Court then considered other provisions of power of Lt. Governor, and Central Government and factual aspects involved in the matter, and, in our view, the same are not relevant for the purpose of this Case. Court also examined applicability of doctrine of estoppel but that has also not been raised in these matters, hence it is not necessary to examine them.

208. One aspect we may notice hereat that detailed judgment has been written by Hon'ble A.P. Sen, J. Justice E.S. Venkataramiah has agreed with the judgment of Hon'ble A.P. Sen, J in relation to the aspect that Lt. Governor of Delhi, Sri Jagmohan, has taken undue interest in getting notices issued to Express Newspapers and this action is not consistent with normal standards of administration and issued under pressure of Lt. Governor of Delhi, notices were violative of Article 14, suffers with arbitrariness and non application of mind. His Lordship said that it was not necessary to express any opinion on the contention based on Article 19(1)(a) of Constitution. Hon'ble Venkataramiah further said that question relating to civil rights of the parties flowing from the lease deed cannot be disposed of in a petition under Article 32 of the Constitution since questions whether there has been breach of the covenants under the lease, whether lease can be forfeited, whether relief against forfeiture can be granted etc. are foreign to the scope of Article 32 of the Constitution which should be tried in a regular civil proceeding. His Lordship further said in Para-202 of judgment as under:

"One should remember that the property belongs to the Union of India and the rights in it cannot be bartered away in accordance with the sweet will of

*an Officer or a Minister or a Lt. Governor but they should be dealt with in accordance with law. At the same time a person who has acquired r*ights in such property cannot also be deprived of them except in accordance with law."

209. Having said so, while agreeing with ultimate order of quashing of notices, Hon'ble Venkataramiah, J. said:

"I express no opinion on the rights of the parties under the lease and all other questions argued in this case. *They are left open to be decided in an appropriate proceeding."*(Emphasis added)

210. Hon'ble R.B. Misra, J. also agreed with Hon'ble A.P. Sen and E.S. Venkataramiah, JJ that the notice challenged in writ petition is invalid, having no legal consequences and must be quashed for reasons detailed in both the judgments. His Lordship, however, said that other questions involved in the case are based upon contractual obligations between the parties and can be satisfactorily and effectively dealt with in a properly instituted suit and not by way of writ petition on the basis of affidavits which are so discrepant and contradictory in this case. Hon'ble R.B. Misra, J. in para 207 of judgment said:

"207. The ***right to the land and to construct buildings*** *thereon for running a business is not derived from Article 19(1)(a) or 19(1)(g) of the Constitution* ***but springs from terms of contract between the parties*** *regulated by other laws governing the subject, viz., the Delhi Development Act, 1957, the Master Plan, the Zonal Development Plan framed under the Delhi Municipal Corporation Act and the Delhi Municipal Bye-laws, 1959 irrespective of the purpose for which the buildings are constructed.* ***Whether there has been a breach of the contract of lease or whether there has been a breach of the other statutes regulating the construction of buildings are the questions which can be properly decided by taking detailed evidence involving examination and cross-examination of witnesses."*** (Emphasis added)

211. The above judgment also has no application to the facts of present case. On the contrary, majority view expressed in above judgment is that right to land and to construct building is not derived from Articles 19(1)(a) or 19(1)(g) of Constitution but springs from promise of contract between the parties. Whether there has been breach of contract of lease or there has been breach of any provision regulating lease rights and construction of building etc. are such questions which can be properly decided by taking detailed evidence involving examination and cross examination of witnesses and therefore, such rights can be enforced in common law proceedings by filing suit.

212. In **Yar Mohammad and another vs. Lakshmi Das and others AIR 1959 Allahabad 1,** a Full Bench of this Court considered following question :

"Whether the jurisdiction of the Civil Court is barred by virtue of Section 242 of the U. P. Tenancy Act in respect of suit filed under Section 9 of the Specific Relief Act for obtaining possession over agricultural land from which the plaintiff alleged his illegal dispossession within six months of the date of the-suit".

213. Therein plaintiffs instituted suit on 30.11.1948 for possession under

Section 9 of Specific Relief Act, 1877 *(hereinafter referred to as "Act, 1877")* alleging that they were in actual possession of land in dispute (land was admittedly an agricultural land) but wrongfully dispossessed by defendants in November 1948. Defendants contested the suit and disputed correctness of above allegations of plaintiffs and pleaded that they were in possession of land as tenants of plaintiffs for more than 12 years, hence, plaintiffs cannot eject them. They also pleaded that suit was filed under Section 9 of Act, 1877 only to evade jurisdiction of Revenue Court. Trial Court i.e. learned Munsif rejected plea of lack of jurisdiction raised by defendants, accepted the case set up by plaintiffs and decreed the suit. Defendants then filed revision no.461 of 1952, which resulted in Reference, to a Larger Bench. The issue was with respect to applicability of Section 242 of U. P. Tenancy Act, 1939. Court said that Section 242 confers exclusive jurisdiction on Revenue Court and takes away jurisdiction of Civil Court only in respect of two kinds of actions.

(i) suits or application of the nature specified in the Fourth Schedule of the Act; and

(ii) suits or applications based on a cause of action in respect of which any relief can be obtained by means of a suit or application specified in that schedule.

214. It was held that in order to attract Section 242, one has to demonstrate that action would fall under either of the above-mentioned two categories and if does not, jurisdiction of Civil Court is not ousted and Revenue Court will have no jurisdiction to entertain the action.

215. Then construing the cases, which may resort to Section 9 of Act, 1877, Court said that Section 9 gives a special privilege to persons in possession who take action promptly. In case they are dispossessed, Section 9 entitles them to succeed simply by proving:

(1) that they were in possession,

(2) that they have been dispossessed by the defendant,

(3) that dispossession is not in accordance with law, and

(4) that dispossession took place within six months of the suit.

216. No question of title either of plaintiffs or of defendants can be raised or gone into in an action brought under Section 9 of Act, 1877. Plaintiffs will be entitled to succeed without proving any title on which he can fall back upon and defendant cannot succeed even though he may be in a position to establish the best of all titles. Restoration of possession under Section 9 is however subject to a regular suit and person who has real title or even better title cannot be prejudiced in any way by a decree of a suit under Section 9. A person having real or better title always has a right to establish his title in a regular suit and get the possession back. The objective and idea behind Section 9, as the Court observed is that law does not permit any person to take law in his own hands and to dispossess a person in actual possession without having recourse to a Court or Institution, in an illegal manner. In other words, objective of Section 9 is to discourage people from taking law in their own hands, how-ever good title they may have. In the interest of public order that self-help is not permitted so far as possession over Immovable property is concerned,

Section 9 is intended to discourage and prevent proceedings which might lead to serious breaches of peace. It does not allow a person who has acted high-handedly by wrongfully dispossessing a person in possession from deriving any benefit from his own unjustified act. Section 9, infact, provides for a summary and quick remedy for a person who is in possession but illegally ousted therefrom without his consent. Court observed that 'Possession' is prima facie evidence of title and if a person who is in possession is dispossessed, he has a right to claim back possession from the person who dispossesses him. In an ordinary common law proceedings, a person who has a title, is entitled to possession and cannot be deprived of his right of possession by a person, who has no title or inferior to the former. Court said that for Section 9, claim of title is not allowed to be set up and possession wrongfully taken, has to be restored. Full Bench therefore, answered question formulated above in negative.

217. In our view, above judgment has no application to the facts of this case for the reason that title of land is not in dispute, inasmuch as, it is admitted case of all the petitioners that land in dispute is 'Nazul', hence it is owned and vested in Government. It is also not in dispute that petitioners got possession of land in dispute being legal heirs of original Lessees. Petitioners have not been evicted so far, hence Section 9 of Act, 1877 has no application. In the present case right of re-entry is being exercised by respondent-State in terms of lease-deed, pursuant whereto possession was given to Lessees and petitioners have derived their interest from such Lessees, and now are bound to restore possession in terms of lease whereunder even original lessees were obliged to surrender/hand over possession to State Government.

218. We may also note hereat that in the case in hand, lease was governed by provisions of GG Act, 1895 and Section 2, as amended in State of U.P., has excluded provisions of U.P. Tenancy Act, 1939 for governing rights etc. of parties. Only provisions contained in lease-deed shall apply and have to be given effect to as if U.P. Tenancy Act, 1939 was not passed. Therefore also reliance placed on aforesaid judgment in the case in hand is of no consequence.

219. **Lallu Yeshwant Singh (dead) by his legal representative vs. Rao Jagdish Singh and others, AIR 1968 SC 620** is a judgment which came before two Judges Bench of Supreme Court from a dispute raised under Qanoon Mal Riyasat Gwalior Samvat, 1983 *(hereinafter referred to as "Qanoon Mal")* that is from Madhya Pradesh. Under Section 326 of Qanoon Mal, a suit was filed by Yeshwant Singh and others i.e. plaintiffs against Rao Jagdish Singh and others (defendants) in the Court of Tehsildar for possession of some agricultural land. Plaintiffs set up a case that they were in possession of land and forcibly dispossessed by defendants, therefore, should be restored their possession. Tehsildar decreed the suit and order was affirmed in appeal by Collector as well as Commissioner. Revision was also dismissed by Board of Revenue and decree passed by Tehsildar was maintained. Section 326 of Qanoon Mal broadly provided summary remedy as is provided in Section 9 of Act, 1877. In para 7 of the judgment, Supreme Court has referred to both the provisions and said that both are broadly similar. High

Court took a different view holding that it was not necessary for a Lessor to resort to Court for obtaining possession and if there is default by plaintiff, it could have been dispossessed by defendants. Supreme Court said that no person can take law in its own hand and in such matter, where provisions providing summary procedure for restoration of illegal dispossession of land have been made, the same can be resorted to by the person who has been illegally dispossessed. Supreme Court affirmed Full Bench judgment of this Court in **Yar Mohammad (supra)**. Here also we do not find applicability of this judgment to the case in hand for the reasons we have already said in respect of judgment in **Yar Mohammad (supra).**

220. **The State of U.P. vs. Zahoor Ahmad and another (supra)** was a matter which came up before two Judges Bench of Supreme Court arising from action by State in respect of certain land falling within Reserved Forest in State of Uttar Pradesh. Zahoor Ahmad was granted lease of a plot of land at Chandan Chowki, Sonaripur Range in North Kheri Forest Division for an annual rent of Rs.100/-. The aforesaid land was part of reserved forest of which State of U.P. is the proprietor. Lease for Industrial purpose was granted for one year commencing from 18.03.1947. It was renewed on 10.06.1948 with effect from 18.03.1948 for one year and again in 1949 for further one year. Ultimately lease expired on 18.03.1950. State of U.P., after termination of lease, allowed Zahoor Ahmad to continue in possession of land on condition settled between the parties that Licensee i.e. Zahoor Ahmad would pay Rs.1,000/- as annual rent for occupation till 15.07.1950. Even after determination of lease on 15.7.1950, Zahoor Ahmad i.e. Licensee continued in possession and State of U.P. allowed him to remain in possession for three years beyond 15.07.1950 though for this period Zahoor Ahmad did not agree to give any undertaking of making payment of annual rent of Rs.1,000/-. A letter dated 04.12.1951 was issued to Zahoor Ahmad asking him to pay Rs.3,000/- for the year 1950-51. Letter further provided that if Zahoor Ahmad did not agree to pay Rs.3,000/- for the year 1950-51, amount of rent would be reduced to Rs.1800/- but he would not be allowed lease in future in any circumstance. The fact remains that Zahoor Ahmad was allowed to continue in occupation of land without any agreement as to the amount of rent payable for 1950-51. On 29.10.1952, Conservator of Forests sent a letter that Zahoor Ahmad can be allowed to run the mill beyond 15.07.1950 for three years if he pays Rs.3,000/- per annum, and for one year only, if he is ready to pay Rs.1,800/- but thereafter lease would not be renewed. Notice also said that he was only Licensee and should remove his plant and vacate the premises within one month and pay Rs.6,000/- as damages for use and occupation. Zahoor Ahmad did not pay the amount hence a suit for recovery of damages was filed by State of U.P. High Court came to the conclusion that Licensee (Zahoor Ahmad) was allowed to continue with the consent of State of U.P. though there was no written agreement about rate of rent and lease was granted for industrial purposes. Under Section 106 of TP Act, 1882, such lease is for year to year basis. The lease could have been terminated by six months notice and since no such notice was given, therefore, tenancy was not validly terminated. With respect to amount of rent, Court took the

view that under Section 116, renewal would mean the same terms and conditions as made applicable in previous lease. High Court therefore decreed the suit for payment of rent of Rs.3,000/-. Possession was allowed by State with its consent. Thus, High Court took the view that 'holding over' was applicable under Section 116. State Government bye-passing provision of TP Act, 1882 sought to rely on GG Act, 1895. Whether the kind of above lease, granted by State could have been brought within the purview of GG Act, 1895, Supreme Court examined this issue by referring to two judgments. In one, lease of forest land of Sunderbans was held to be a 'Grant' while, in another, Grant of Khas Mahal was not held to be as 'Grant'. In **Jnanendra Nath Nanda vs. Jadu Nath Banerji AIR 1938 Cal 211** two leases of two lots were granted by Sunderban Commissioner on behalf of Secretary of State. The land comprised in the lots were 'waste lands' of the Government. 'Waste lands' of Sunderbans were not property of any subject. Sunderbans was vast impenetrable forest. It was the property of East India Company and later on vested in Crown by virtue of an Imperial Statute. Court found that history of legislation showed that grants of Sunderbans lands were treated to be 'Crown Grants' within meaning of 'Crown Grants Act'. In another matter i.e. **Secretary of State for India in Council vs. Lal Mohan Chaudhuri, AIR 1935 Cal 746** in respect of Khas Mahal, lease was granted by Government. It was held that lease of Khas Mahal does not come within the category of 'Grant' as contemplated in GG Act, 1935. Having said so, in para 13 of judgment, Court said that lease granted to Zahoor Ahmad was for the purpose of erecting a temporary rice mill and for no other purpose. The mere fact that State is the lessor will not by itself make above lease a 'Government Grant' within the meaning of GG Act, 1895. We may reproduce para 13 of the judgment in State of U.P. vs. Zahoor Ahmad (supra) as under :

"The lease in the present case was for the purpose of erecting a temporary rice mill and for no other purpose. The mere fact that the State is the lessor will not by itself make it a Government grant within the meaning of the Government Grants Act. There is no evidence in the present case in the character of the land or in the making of the lease or in the content of the lease to support the plea on behalf of the State that it was a grant within the meaning of the Government Grants Act." (Emphasis added)

221. When a question arose whether High Court has rightly applied Section 116 of TP Act, 1882, Supreme Court, in this context, referred to a judgment of this Court in **Lala Kishun Chand vs. Sheo Dutta, AIR 1958 All. 879** wherein after expiry of lease of Nazul land, Licensee was permitted by Board of Revenue to continue in occupation as tenant and rent was also realized from him and held that in these facts, Section 116 TP Act, 1882 was rightly applied. Then in paras 15 and 16, Court said as under:

"15. In the present case the High Court correctly found on the facts that the respondent after the determination of the lease held over. Even if the Government Grants Act applied Section 116 of the Transfer of Property Act was not rendered inapplicable. The effect of Section 2 of the Government

Grants Act is that in the construction of an instrument governed by the Government Grants Act the court shall construe such grant irrespective of the provisions of the Transfer of Property Act. It does not mean that all the provisions of the Transfer of Property Act are inapplicable. To illustrate, in the case of a grant under the Government Grants Act Section 14 of the Transfer of Property Act will not apply because Section 14 which provides what is known as the rule against perpetuity will not apply by reason of the provisions in the Government Grants Act. The grant shall be construed to take effect as if the Transfer of Property Act does not apply.

16. Section 3 of the Government Grants Act declares the unfettered discretion of the Government to impose such conditions and limitations as it thinks fit, no matter what the general law of the land be. The meaning of Sections 2 and 3 of the Government Grants is that the scope of that Act is not limited to affecting the provisions of the Transfer of Property Act only. The Government has unfettered discretion to impose any conditions, limitations, or restrictions in its grants, and the right, privileges and obligations of the grantee would be regulated according to the terms of the grant, notwithstanding any provisions of any statutory or common law. "

222. In the present case, it is not the case of any of the petitioners that after expiry of lease in 1986, they have been permitted to remain in possession of disputed Nazul land and rent has been accepted by respondents or they have paid rent. Even if what is said by petitioners is taken to be correct, we do not find that Section 116 is applicable in the case in hand at all. Section 116 of TP Act, 1882 reads as under :

"116. Effect of holding over.- *If a lessee or under-lessee of property remains in possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee or under lessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased, as specified in section 106."*

223. Twin conditions to attract principle of holding over vide Section 116 of TP Act, 1882, which need by satisfied are:

(i) After determination of lease, lessor or his representative has accepted rent from lessee or under lessee or assented to his continuing in possession; and

(ii) Lessee or under-lessee has remained in possession.

224. In the present case, none of the above conditions are satisfied.

225. In **Bhawanji Lakhanishi vs. Himatlal Jamnadas AIR 1972 SC 819,** Court said that basis of Section 116 is a bilateral contract between erstwhile landlord and erstwhile tenant. It has been held that assent of lessor cannot be inferred merely from his delay in taking steps to evict lessee. We may also refer to Calcutta High Court decision in **Ratan Lal vs. Farshi Bibi (1907) ILR 34 Cal 396; Madras High in Govindaswami vs.**

Ramaswami (1916) 30 Mad LJ 492; Patna High Court in **Christian vs. Hari Prasad AIR 1955 Pat 158** and **Pritilata Devi vs. Banke Bihari Lal AIR 1962 Pat 446**; and Rajsthan High Court in **Gordhan vs. Ali Bux AIR 1981 Raj 206**, holding that to attract Section 116, therefore, it has to be shown that there was a bilateral act creating a new tenancy. There is no implication of holding over. In our view, there is neither any material nor pleading to attract Section 116 and therefore, judgment in **Zahoor Ahmad (supra)** on this aspect does not help petitioners. On the contrary, what has been said in para 16 of the judgment, quoted above, the conditions of 'Grant' would prevail over every law including TP Act, 1882.

226. Moreover, in respect of Section 116 TP Act, 1882, we have already discussed the matter earlier to demonstrate that it is not attracted in the present case.

227. So far as validity of resumption of land for 'public purpose' is concerned, it could not be disputed that land has been sought to be required by State for 'public purpose'. Allahabad City has been selected for development as a 'Smart City' and respondents have pleaded that demand of lot of land has been made by various Government departments since various Offices, Workshops, Parks, Parking places etc. have to be constructed. The land in dispute has been found suitable for erection of building for 'Group Housing' by A.D.A. and development of 'Group Housing' has also been held to be a public purpose in catena of authorities dealing with acquisition of land under Land Acquisition Act, 1894 *(hereinafter referred to as "Act, 1894")*. In fact, on this aspect, no substantial argument has been made and in our view, resumption of land by State is in 'public interest'.

228. No provision could be shown by counsel for petitioners which requires an opportunity of hearing to petitioners before resumption of land. In any case, by means of impugned notice, petitioners have been given enough time to vacate the land and thereafter only State shall take steps for possession, if vacant possession is not given by petitioners.

229. One aspect, which has been pointed out by learned Additional Advocate General as also learned Senior counsel appearing for ADA is that most of petitioners are not in actual possession of disputed land but they are residing elsewhere and only on the basis of 'constructive' or 'deemed possession' the present writ petition has been filed. Entire litigation edifies petitioners' claim based on 'constructive' or 'deemed possession' which cannot be assumed in favour of a person who has no legal right over land in dispute against owner of land, in whose favour presumption of possession always exists. He drew our attention to address given by petitioners in WP-1 itself.

230. Petitioners in WP-1 are all residents of 23/47/48, North Allahpur, Allahabad, as is evident from address given in description of petitioners. Thus, so far as petitioners in WP-1 is concerned, we find substance in the contention advanced by learned Additional Advocate General. The entire claim of petitioners in WP-1 is founded on possession of land in dispute even after expiry of lease-deed, while they were/are not in actual possession. Thus, entire argument against

alleged dispossession does not stand, inasmuch as, all arguments which have been considered hereinabove, and, in the facts of the case, have been answered considering petitioners in actual possession of land in dispute. If a person is not in actual possession, there is no question of any 'constructive' or 'deemed possession' in his favour since land owner is always treated to be in possession of property owned by him even if he has no actual possession.

231. Argument was advanced that actual physical possession does not mean that incumbent must keep the property in control but in the context of immoveable property, it is described as legal relationship of a person to a thing. If some of lease holders are in possession, they represent other Lessees also and therefore, it cannot be said that petitioners of WP-1 are not in possession. Property is a legal concept that grants and protects a person's exclusive right to own, possess, use and dispose of a thing. The term property does not suggest a physical item but describes a legal relationship of a person to a thing. Real property consists of lands, tenements and hereditaments. Land refers to ground, the air above, the area below the Earth's surface and everything that is erected on it. Tenements include land and certain intangible rights recognized by municipal laws related to lands. A hereditaments embraces every tangible or intangible interest in real property that can be inherited. An interest describes any right, claim or privilege that an individual has towards real property. Law recognizes various types of interests in real property which may justify possession over property of person concerned. A non-possessory interest in land is right of one person to use or restrict use of land that belongs to other persons such as easementary rights. Non-possessory interest do not constitute ownership of land itself. Holders of a non-possessory interest in real property do not have title and owner of land continues to enjoy full rights of ownership, subject to any encumbrances. An encumbrance is a burden, claim or charge on real property that can affect the quality of title and value and/or use of property. Encumbrances can represent non-possessory interests in real property.

232. Possession is also of two kinds namely, (a) de facto possession, and (b) *de jure possession.* De facto possession is when a person being in actual physical possession and de jure possession is a possession in law. Constructive possession would be a possession through a representative, agent, tenant or a trustee. A person in de facto possession could be in adverse possession. In a civilized society some protection of possession is essential. The methods of protection recognized are :

(i) Possessor can be given certain legal rights, such as a right to continue in possession free from interference by others; and

(ii) Protective possession by prescribing criminal penalties for wrongful interference and wrongful dispossession.

233. When certain legal right are given to a person, one of the mode is that possessory right in rem are supported by various rights in personam against those who violate possessor's right; he can be given a right to recover compensation for interference and for dispossession, and a right to have his possession restored to

him. But, whenever such a person invoked such remedies, one of the impugned question which has to be examined would be whether a person invoking them actually has any possession to be protected. In other words, it has to be examined whether a person is in possession of an object? However, legal concept of possession is not restricted to commonsense concept of possession, namely physical control. Possession in fact is not a simple notion. Whether a person is in possession of an article is dependent on various factors namely nature of article itself and attitudes and activities of other persons.

234. Possession may be 'lawful' or 'unlawful' or even 'legal' or 'illegal'. Acquisition of legal possession would obviously be lawful and would of necessity involve occurrence of some event recognized by law whereby subject matter falls under the control of the possessor. Problem, however, arises where duration for which possession is recognized is limited by Grantor or law. Continuance of possession beyond prescribed period by is not treated as a 'lawful possession'. If a landlord does not consent to lease being continued, possession of tenant would not be a lawful unless there is some Statute providing otherwise. Nature of possession being not lawful would entitle the landlord to regain possession. Thus, a lawful possession is state of being a possessor in the eyes of law. Possession must be warranted or authorized by the law; having qualifications prescribed by law and not contrary to nor forbidden by the law. However, law recognizes possession as a substantive right or an interest. Continued possession of a person is recognized by law as a sufficient interest capable of being protected by possessor, right being founded on mere fact of possession. Possession is a good title of right against anyone who cannot show a better title. However, when a person in possession may not be lawful, recovery of possession by owner must have sanction of law and it cannot proceed to dispossess the other in a forcible manner not recognized in law. In some authorities, possession of a person, who has entered therein initially validly but subsequently become unlawful has been given a different meaning i.e. juridical possession. A tenant holding over without consent of landlord would be a juridical possession though his possession is not lawful. It is said that possession of tenant, post efflux of lease period would not be treated as lawful possession still he would not be treated as a rank trespasser. Thus, here possession is a juridical possession which has been introduced.

235. The concept of possession, therefore, has various shades, but, in the present case, where entire litigation is founded on possession over property in dispute, if any of petitioners are not in actual possession of property and had no otherwise legal right over property in dispute then such petitioners cannot restrain respondents from resuming land in dispute being owner of land. Therefore, petitioners in WP-1 have an additional reason for non-suiting of their claim.

236. In the circumstances, **questions (v), (vi) and (vii) are answered** by holding that right of resumption exercised by State is in accordance with law. State is not bound to follow procedure prescribed under U.P. Act, 1972 in view of the fact that it is proceeding in accordance with terms and conditions of lease-deed, which constitute a special

procedure and can be followed excluding requirement of any other procedure and principles of natural justice are not attracted in the case in hand.

237. Before parting, we may also observe that litigation initiated by petitioners on the one hand has given enough time to petitioners to continue to hold and enjoy land in dispute and simultaneously has denied opportunity to respondent authorities to take possession of land in question for the purpose of carrying out developmental activities where time is a matter of essence. The impugned notice was issued on 18.06.2018 and for more than fifteen months petitioners have already availed benefit of possession of land in dispute and enjoyed the same without spending even a single penny towards rent, damages, compensation for such enjoyment. Land in question is required for developmental activities in furtherance of developing Prayagraj City as "Smart City". Developmental activities required an early action, but, by indulging in litigation, petitioners have already delayed it sufficiently,therefore, even if what petitioners' claim that they should have been given notice or sufficient time to vacate, the same has already been achieved as petitioners had already enough time with them. It is, thus, a fit case where we do not find that any other technicality should be allowed to intervene and, earliest is the better that possession of land is transferred to respondents so that developmental activities may proceed without any further delay.

238. In view of above discussion, we do not find any merit in all the petitions. All the writ petitions are accordingly dismissed.

239. However, considering the facts and circumstances and also the fact that petitioners already enjoyed interim order passed by this Court and continued in possession over land in dispute for the last almost more than a year, we direct petitioners to vacate disputed land within one month from the date of delivery of judgment.

240. Let a copy of this judgment be forwarded to Chief Secretary, U.P. Lucknow and Principal Secretary, Urban Development, U.P. Lucknow, for considering policy of freehold in the light of observations made in paras 181 to 183 of judgment and take appropriate decision.

(2019)12 ILR A334

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.11.2019

BEFORE
THE HON'BLE YASHWANT VARMA, J.

Writ-C No. 33606 of 2019
&
Writ-C No. 33176 of 2019

Hemant Kumar & Anr. ...Petitioners
Versus
Presiding Officer Motor Accident Claims Tribunal Meerut & Ors. ...Respondents

Counsel for the Petitioners:
Sri Komal Mehrotra

Counsel for the Respondents:

A. Civil Law - U.P. Motor Vehicles Rules 1998 – Rule 220-B – Susamma Thomas Guidelines – Securitization of amount to safeguard interest of minors, illiterate claimants and widow – Applicabilty – Sufficient discretion has been given to the Tribunal not to insist on investment of the compensation amount in long

term fixed deposit and to release even the whole amount in the case of literate persons – Lok Adalat appears to continue to harbor the impression that the amounts which are decided and are liable to be paid upon claims being compromised or settled must necessarily and in all situations be securitized – Course adopted by the Lok Adalat evidences a total lack of consideration upon the true intent and purpose underlying the statutory provision as well as the guidelines framed by the Supreme Court in Susamma Thomas and the exposition of the law in Padma. (Para 8 & 9)

Writ Petition allowed. (E-1)

List of cases cited: -

1. General Manager, Kerala S.R.T.C vs Susamma Thomas (1994) 2 SCC 176

2. A.V. Padma and others Vs. R. Venugopal and others (2012) 3 SCC 378

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

1. Affidavits of service have been filed by the petitioners which are taken on record. From the averments made therein it is evident that the Insurance Company stands duly served.

2. Both these petitions impugn orders passed by the Lok Adalat proceeding to direct the securitization and placement in deposit of substantial sums that had come to be settled and agreed to be paid by the Insurance Company in respect of a claim that came to be settled inter partes.

3. In **Writ-C No. 33606 of 2019**, out of the total sum agreed between the parties, of Rs. 4,50,000 the Lok Adalat has proceeded to direct that a sum of Rs. 100,000/- be placed in a fixed deposit of a Nationalised Bank for a period of five years and a sum of Rs. 1,50,000/- be released. Insofar as the claimant No. 2 is concerned, it has provided that a sum of Rs. 2,00,000/- awarded shall be placed in a fixed deposit of a Nationalised Bank for a period of five years. The petitioner No. 1 is the father of the deceased. The petitioner No 2 is the son who, though a minor at the time when the incident occurred, had admittedly attained majority and was a signatory and a party to the compromise that was placed on the record of the Lok Adalat.

4. In **Writ-C No. 33176 of 2019**, the petitioner No. 1 is the mother while the petitioner No. 2 is the father of the deceased. Both the petitioners are the parents of Abhishek Dixit, the deceased son. In this case also the Lok Adalat has made arrangements on similar lines and directed placement of a major part of the sum which was agreed to inter partes to be placed in a fixed deposit of a Nationalised Bank.

5. The procedure which the Tribunal is obliged to follow in order to secure the interest of a person under a legal disability or where some of the claimants are minors has been provided for in Rule 220-B of the **U.P. Motor Vehicles Rules 1998** which reads thus:-

"**220B-. Securing the interest of Claimants**-(1) Where any lump-sum amount of compensation, deposited with the Claims Tribunal is payable to a woman or a person under legal disability, such sum may be invested, applied or otherwise dealt with for the benefit of the women or such person during his disability in such manner as the Claims Tribunal may direct to be paid to any

dependent of the injured or heirs of the deceased or to any other person whom the Claims Tribunal thinks best fitted to provide for the welfare of the injured or the heir of the deceased.

(2) Where an application made to the Claims Tribunal in this behalf otherwise, the Claims Tribunal is satisfied that on account of neglect of the children on the part of the parents, or on account of the variation of the circumstances of any dependent, or for any other sufficient cause, an order of the Claims Tribunal as to the distribution of any sum paid as compensation or as to the manner in which any sum payable to any such dependent is to be invested applied or otherwise dealt with, ought to be varied, the Claims Tribunal may make such further orders for the variation of the former order as it thinks just in the circumstances of the case.

(3) The Claims Tribunal shall, in the case of minor, order that amount of compensation awarded to such minor be invested in the fixed deposits till such minor attains majority. The expenses incurred by the guardian or the next friend may be allowed to be withdrawn by such guardian or the next fiend from such deposits before it is deposited.

Provided that the interest payable on such deposits may be allowed to be utilized for education, maintenance and development of the minor with the permission of the Claims Tribunal.

(4) The Claims Tribunal shall, in the case of illiterate claimants, order that the amount of compensation awarded be invested in fixed deposits for a minimum period of three years, but if any amount is required for effecting purchase of any movable or immovable property for improving the income of the claimant, the Claims Tribunal may consider such a request after being satisfied that the amount would be actually spent for the purpose and the demand is not a ruse to withdraw money.

(5) The Claims Tribunal shall, in the case of semi-literate person resort to the procedure for the deposit of award amounts set out in sub-rule (4) unless it is satisfied, for reasons to be recorded in writing that the whole or part of the amount is required for the expansion of any existing business or for the purchase of some property as specified and mentioned, in sub-rule (4) in which case the Claims Tribunal shall ensure that the amount is invested for the purpose for which it is prayed for and paid.

(6) The Claims Tribunal may in the case of literate persons also resort to the procedure for deposit of awarded amount specified in sub-rules (4) and (5) if having regard to the age, fiscal background and state of society to which the claimant belongs and such other consideration, the Claims Tribunal in the larger interest of the claimant and with a view to ensure the safety of the compensation awarded, thinks it necessary to order.

(7) The Claims Tribunal, may in personal injury cases, if further treatment is necessary, on being satisfied which shall be recorded in writing, permit the withdrawal of such amount as is necessary for the expenses of such treatment.

(8) The Claims Tribunal may, in the matter of investment of money, have regard to maximum return by ways of periodical income to the claimant, deposit with public sector undertaking of the State or Central Government which offers higher rate of interest.

(9) The Claims Tribunal shall, in investing money, direct that the interest

on the deposits be paid directly to the claimants or the guardian of the minor claimants by the institution holding the deposits under intimation to the Claims Tribunal."

7. The Supreme Court had in the matter of **General Manager, Kerala S.R.T.C vs Susamma Thomas**1 framed the following guidelines which were to guide Tribunals in the matter of securing the interests of parties:-

"(i). The claims Tribunal should, in the case of minors, invariably order amount of compensation awarded to the minor invested in long term fixed deposited at least till the date of the minor attaining majority. The expenses incurred by the guardian or next friend may however, be allowed to be withdrawn.

(ii). In the case of illiterate claimants also the Claims Tribunal should follow the procedure set out in (i) above, but if lump sum payment is required for effecting purchases of any movable or immovable property such as agricultural implements, rickshaw, etc. to earn a living the Tribunal may consider such a request after making sure that the amount is actually spent for the purpose and the demand is not a ruse to withdraw money.

(iii). In the case of semi-literate persons the Tribunal should ordinarily resort to the procedure set out in (i) above unless it is satisfied for reasons to be stated in writing, that the whole or part of the amount is required for expending any existing business or for purchasing some property as mentioned in (ii) above for earning his livelihood in which case the Tribunal will ensure that the amount is invested for the purpose for which it is demanded and paid.

(iv). In the case of literate persons also the Tribunal may resort to the procedure indicated in (i) above subject to the realization set out in (ii) and (iii) above, if having regard to the age, fiscal background and strata of society to which the claimant belongs and such other considerations, the Tribunal in the larger interest of the claimant and with a view to ensuring the safety of the compensation awarded to him thinks it necessary to so order.

(v). In the case of widows the claims Tribunal should invariably follow the procedure set out in (i) above.

(vi). In personal injury cases, if further treatment is necessary the Claims Tribunal on being satisfied about the same, which shall be recorded in writing, permit withdrawal of such amount as is necessary for incurring the expenses for such treatment.

(vii). In all cases in which investment in long term fixed deposits is made it should be an condition that the bank will not permit any loan or advance on the fixed deposit and interest on the amount invested is paid monthly directly to the claimant or his guardian, as the case may be.

(viii). In all cases Tribunal should grant to the claimants liberty to apply for withdrawal in case of an emergency. To meet with such a contingency if the amount awarded is substantial the Claims Tribunal may invest it in more than one fixed deposit so that if need be one such F.D.R. can be liquidated."

7. Those guidelines were noticed again in a subsequent decision rendered by two learned Judges of the Supreme Court in **A.V. Padma and others Vs. R.**

Venugopal and others2 where the following observations came to be made:-

"4. In the case of Susamma Thomas (supra), this Court issued certain guidelines in order to "safeguard the feed from being frittered away by the beneficiaries due to ignorance, illiteracy and susceptibility to exploitation". Even as per the guidelines issued by this Court, long term fixed deposit of amount of compensation is mandatory only in the case of minors, illiterate claimants and widows. In the case of illiterate claimants, the Tribunal is allowed to consider the request for lump sum payment for effecting purchase of any movable property such as agricultural implements, rickshaws etc. to earn a living. However, in such cases, the Tribunal shall make sure that the amount is actually spent for the purpose and the demand is not a ruse to withdraw money. In the case of semi-illiterate claimants, the Tribunal should ordinarily invest the amount of compensation in long term fixed deposit. But if the Tribunal is satisfied for reasons to be stated in writing that the whole or part of the amount is required for expanding an existing business or for purchasing some property for earning a livelihood, the Tribunal can release the whole or part of the amount of compensation to the claimant provided the Tribunal will ensure that the amount is invested for the purpose for which it is demanded and paid. In the case of literate persons, it is not mandatory to invest the amount of compensation in long term fixed deposit. The expression used in guideline No. (iv) issued by this Court is that in the case of literate persons also the Tribunal may resort to the procedure indicated in guideline No. (i), whereas in the guideline Nos. (i), (ii), (iii) and (v), the expression used is that the Tribunal should. Moreover, in the case of literate persons, the Tribunal may resort to the procedure indicated in guideline No. (i) only if, having regard to the age, fiscal background and strata of the society to which the claimant belongs and such other considerations, the Tribunal thinks that in the larger interest of the claimant and with a view to ensure the safety of the compensation awarded, it is necessary to invest the amount of compensation in long term fixed deposit.

5. Thus, sufficient discretion has been given to the Tribunal not to insist on investment of the compensation amount in long term fixed deposit and to release even the whole amount in the case of literate persons. However, the Tribunals are often taking a very rigid stand and are mechanically ordering in almost all cases that the amount of compensation shall be invested in long term fixed deposit. They are taking such a rigid and mechanical approach without understanding and appreciating the distinction drawn by this Court in the case of minors, illiterate claimants and widows and in the case of semi-literate and literate persons. It needs to be clarified that the above guidelines were issued by this Court only to safeguard the interests of the claimants, particularly the minors, illiterates and ors. whose amounts are sought to be withdrawn on some fictitious grounds. The guidelines were not to be understood to mean that the Tribunals were to take a rigid stand while considering an application seeking release of the money. The guidelines cast a responsibility on the Tribunals to pass appropriate orders after examining each case on its own merits. However, it is seen that even in cases when there is no possibility or chance of the feed being frittered away by the

beneficiary owing to ignorance, illiteracy or susceptibility to exploitation, investment of the amount of compensation in long term fixed deposit is directed by the Tribunals as a matter of course and in a routine manner, ignoring the object and the spirit of the guidelines issued by this Court and the genuine requirements of the claimants. Even in the case of literate persons, the Tribunals are automatically ordering investment of the amount of compensation in long term fixed deposit without recording that having regard to the age or fiscal background or the strata of the society to which the claimant belongs or such other considerations, the Tribunal thinks it necessary to direct such investment in the larger interests of the claimant and with a view to ensure the safety of the compensation awarded to him. The Tribunals very often dispose of the claimant's application for withdrawal of the amount of compensation in a mechanical manner and without proper application of mind. This has resulted in serious injustice and hardship to the claimants. The Tribunals appear to think that in view of the guidelines issued by this Court, in every case the amount of compensation should be invested in long term fixed deposit and under no circumstances the Tribunal can release the entire amount of compensation to the claimant even if it is required by him. Hence a change of attitude and approach on the part of the Tribunals is necessary in the interest of justice."

8. Despite the lucid explanation in **Padma** in respect of the underlying intent of the guidelines framed by the Supreme Court, the Lok Adalat appears to continue to harbor the impression that the amounts which are decided and are liable to be paid upon claims being compromised or settled must necessarily and in all situations be securitized. That clearly is neither the intent of Rule 220-B nor does that provision mandate or command such recourse.

9. As this Court reads the orders impugned in these two writ petitions, it is manifest that the provisions made in Rule 220-B have neither been alluded to nor considered. The course adopted by the Lok Adalat evidences a total lack of consideration upon the true intent and purpose underlying the statutory provision as well as the guidelines framed by the Supreme Court in **Susamma Thomas** and the exposition of the law in **Padma**.

10. The Lok Adalat also does not ascribe a single reason in support of the directions as framed. At least the orders passed do not establish the conferment of any consideration as to why the amounts as settled by way of compromise were not liable to be released in favour of the claimants. It becomes pertinent to note that the rigidity of the attitude which has been adopted by the Lok Adalat and as is evident from the orders passed in these two writ petitions mirrors what fell for adverse comment in **Padma**. The Lok Adalat therefore would be well advised to bear the principles enunciated both in **Susamma Thomas** and **Padma** in mind before passing orders for securitization of the amounts that are settled. In any case, making of such arrangements must adhere to the provisions which are made in Rule 220-B and which has been referred to hereinabove. Since the orders impugned fail to abide by the directions issued and the law as declared by the Supreme Court, the Court finds itself unable to sustain the impugned orders.

11. Before parting the Court deems it apposite to place the following advisory note for the consideration of Lok Adalats in general on record. On being asked by the Court to place the compromise terms on record, it was submitted that the same has not been made available to parties. It was stated by learned counsels that although compromise terms are placed on the record and bear the signatures of all respective parties, copies thereof have not been provided to the claimants. It was submitted that Lok Adalats in general are adopting this procedure and that copies of the compromise/settlement are not provided. The Court finds no justification or logic behind the procedure so adopted. If the compromise terms are part of the record, there can be no justifiable reason or cause for copies thereof not being provided to parties. This issue would assume added significance in situations where orders of the Lok Adalat are assailed before Courts or other judicial fora and the Courts or Tribunals are required to ascertain as to which of the parties had in fact agreed to the compromise terms. Consequently the Secretary of the Legal Services Authorities of the State is directed to instruct all Lok Adalats to ensure that copies of the settlement terms are provided to parties on an application in that respect being made. The Registrar General is requested to place a copy of this order before the Secretary of the Legal Services Authority for further compliance.

12. Accordingly the writ petitions are **allowed**. The impugned orders dated 14 September 2019 and 9 October 2019 passed in Writ-C Nos. 33606 of 2019 and 33176 of 2019 respectively insofar as they direct for placement of the amounts in a fixed deposit of a Nationalised Bank are quashed. The matter shall stand remitted to the Lok Adalat for passing a decision afresh in light of the observations entered above. The exercise of reconsideration shall be concluded with expedition and in any case not later than within two months from the date of presentation of a certified copy of this order.

(2019)12 ILR A340

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.11.2019

BEFORE
THE HON'BLE BISWANATH SOMADDER, J.
THE HON'BLE AJAY BHANOT, J.

Writ C. No. 35706 of 2019

Insilco Limited ...Petitioner
Versus
Uttar Pradesh Pollution Control Board & Anr. ...Respondents

Counsel for the Petitioner:
Sri Vikas Singh, Sri Abhimanyu Chopra, Sri Varun Singh, Sri Ram Kaushik, Sri Tanmay Sharma, Priyanka Midha, Sri Ram M. Kaushik

Counsel for the Respondents:
-

A. Civil Law - Air (Prevention and Control of Pollution) Act, 1981- Section 21 and 22- Water (Prevention and Control of Pollution) Act, 1974 - Section 25 and 26 - Uttar Pradesh Pollution Control Board - application for the purpose of seeking consent to operate - application rejected.

The unit has not yet evolved any methodology for achieving prescribed standard of Sodium Absorption Ratio (SAR) value of 26 without dilution with fresh water. It has also been specifically stated by the Chief Environment Officer that the Uttar Pradesh Pollution Control

Board had decided the "Consent to Operate' applications after giving sufficient opportunity to the concerned unit by way of query letters and invitation for presentation of the case - the concerned unit has contested the merit of the two letters dated 22nd October, 2019, rejecting the "Consent to Operate' applications, without exhausting the alternative remedy provided under the two statutes. (Para 4)

B. Constitution of India - Article 226 - power of judicial review - availability of statutory alternative remedy not being an absolute bar for a Constitutional Court to exercise its power of judicial review under Article 226 of the Constitution of India and step in to intervene in certain exceptional situations such as arbitrary or mala fide exercise of power or gross violation of the established principles of natural justice or exercise of power without jurisdiction and so on and so forth - any decision of any Court is an authority for a proposition based on certain set of facts and even a single distinction of any fact or an additional fact can alter the applicability of its ratio. (Para 5 & 6)

Held:- The situation is not so exceptional so as to allow the writ Court to intervene, exercising its extraordinary high prerogative discretionary jurisdiction under Article 226 of the Constitution of India - Statutory alternative remedy is available to the writ petitioner to approach the statutory appellate authority in respect of both the orders dated 22nd October, 2019. (Para 6)

Writ Petition dismissed. (E-7)

(Delivered by Hon'ble Biswanath Somadder, J.)

1. This is an application under Article 226 of the Constitution of India filed by a Limited Company - Insilco Limited - seeking this Court's intervention in respect of two orders; both dated 22nd October, 2019, passed by the Chief Environment Officer of Uttar Pradesh Pollution Control Board. One order was rendered in an application of the writ petitioner / company seeking consent to operate under section 21 / 22 of Air (Prevention and Control of Pollution) Act, 1981, as amended. The other order was passed in an application for the purpose of seeking consent to operate under section 25 / 26 of the Water (Prevention and Control of Pollution) Act, 1974, as amended.

2. This writ petition was initially moved on 5th November, 2019, when the following order was passed:-

"Having heard learned advocates for the parties and upon perusing the instant writ petition, we are of the view that the only issue which falls for consideration in the facts and circumstances of the case is whether the two orders (both dated 22nd October, 2019) were passed by the Uttar Pradesh Pollution Control Board without giving any opportunity of hearing to the writ petitioner. In order to get an answer to this issue, we direct the learned advocate representing the Uttar Pradesh Pollution Control Board to obtain specific instructions from his client and also bring before us the relevant records of the instant case in order to substantiate that the two orders were passed consequent upon giving adequate notice to the writ petitioner.

Put up this case on 13.11.2019 in the Additional Cause List."

3. Today, when the matter is taken up for further consideration, pursuant to the direction of this Court as contained in the order dated 5th November, 2019, the learned advocate appearing on behalf of

Uttar Pradesh Pollution Control Board hands-over an "Instruction Note", which may be kept on record. This instruction note reveals certain facts which are relevant and are, therefore, setout hereinbelow:

"1. M/s Insilco Ltd, Gajraula, Amroha is engaged in production of Precipitated Silica - 21000 TPA from Sodium Silicate - 80 TPD, Suphuric Acid 31.5/day, Ammonia 30 kg/day.

2. Unit has earlier obtained Consent To operate Water under the provisions of Water (Prevention and Control of Pollution) Act, 1974 vide letter dated 08.05.2018 and valid upto 31-12-2018. Consent To operate Air under the provisions of Air (Prevention and Control of Pollution) Act, 1981 was issued vide letter dated 11-05-2018 valid upto 31-12-2018. The said Consent to Operate was issued with the specific condition that unit shall ensure Zero Liquid Discharge by 31-12-2018 through recycling of treated effluent or other methodology recommended by IIT, Roorkee and approved by CPCB.

3. Unit has obtained NOC dated 02.1.2018 from CGWA for ground water extraction of 4900 kl/day. The NOC from CGWA is valid upto 07.12.2019.

4. Unit has Effluent Treatment plant and treated effluent is diluted with fresh water to meet the norms of SAR (Sodium Absorption Ratio).

5. Hon'ble Supreme Court in PIL NO. 418/98 Imtiaz Ahmad vs. UOI, Directed UPPCB to prescribed SAR Limit for the industry. UPPCB in compliance imposed SAR value of 26 for treated effluent of the unit.

6. The matter of unit was taken up by Hon'ble NGT in O.A. No. 200/2014 M.C. Mehta vs. Union of India and Ors., Hon'ble NGT in its order dated 26.4.2017 considered the inspection report dated 25.4.2017 of High Power inspection team constituted by Hon'ble NGT wherein the inspection team found that M/s Insilco Ltd. has been prescribed with the norms of SAR which the unit is achieving not by treatment but by dilution with fresh water and such practice is nothing but fraud.

7. Hon'ble NGT in its order dated 26.4.2017 issued closure order against M/s Insilco Ltd. Hon'ble NGT in O.A. No. 200/2014 M.C. Mehta vs. Union of India and Ors. vide order dated 8.5.2017 allowed operation of unit subject to payment of Rs. 15 Lakh. Unit deposited the said amount. Hon'ble NGT also directed that as regards ZLD through dilution, the industry would put forward its case before joint inspection team which shall offer its comments and place the report before tribunal. The joint Committee of CPCB and UPPCB inspected the unit on 23.5.2017 and made following recommendations:

i. The Unit required to recalculate the dosing of magnesium sulphate to meet the SAR standard.

ii. In a time bound manner the unit shall discontinue the present chemical addition (10 Tons of MgSO4) and further dilution of ground water (1800 to 2000 KLD) to meet the prescribed SAR value (26). Instead unit may switch over to complete ZLD (Zero Liquid Discharge technology) system to save ground water and wastage of chemicals for neutralization. Presence of Fluoride (5 to 6 mg/1) also indicates that rather than dilution, ZLD may be the only option for achieving and continuity of the unit.

iii. Presence of inorganic pollutants in the storm water indicates

poor operation and maintenance of the plant and suspected partial diversion of effluent or negligent handling of sludge by the unit, which may require further investigation.

iv. The Unit shall operate STPs continuously.

v. Closure of the unit may be considered, if the unit failed to provide the time bound action plan for achieving ZLD.

8. The unit vide letter 6.11.2017 communicated that agreement has been signed with IIT, Roorkee for assessment of possibility to recycle / reuse treated effluent in economic viability mode and development activity for investigation of alternative remedies to mitigate the high sulfate / high TDS in the effluent.

9. Board has issued directions on dated 12.1.2018 to the unit to ensure the compliance of recommendation of the joint inspection team.

10. The unit vide its letter dated 19.1.2018 submitted compliance of the directions and informed that the unit has appointed IIT, Roorkee to carry on research and development activity for investigation of alternative remedies to mitigate the high sulfate / high TDS in the effluent.

11. The unit vide its letter dated 26.4.2018 addressed to CPCB and UPPCB submitted the progress of R & D of IIT, Roorkee and submitted the interim report of IIT, Roorkee regarding treatment of high sulphate bearing waste water.

12. Unit vide its letter dated 20.8.2019 has submitted the Final report of Department of Civil Engineering IIT, Roorkee. UPPCB gave unit the opportunity to present its case and the findings made by IIT, Roorkee. Unit was invited for a presentation on final report on 17.9.2019. Unit presented its case on the said date.

13. In the final report IIT, Roorkee has evaluated various technologies like Reverse Osmosis (found non-feasible), MEE (found not techno economically viable), Gypsum Precipitation followed by biological treatment (found non-feasible), Electrocoagulation followed by nono filteration (non-feasible), Membrane - based ZLD process consisting of RO followed by MEE and crystallization (non-feasible). The report of IIT, Roorkee further suggests that treated waste water of 120 KLD STP may be used for dilution of effluent and in future when Gajraula STP gets commissioned, the unit may seek permission for utilization of treated sewage for dilution of treated effluent. The report clearly states that there is no feasible technology available other than the present practice followed by unit for the treatment to maintain SAR.

14. Unit is using fresh water for dilution of effluent to achieve the norms of SAR 26. The study carried out by IIT, Roorkee has failed to arrive at any feasible method for the industry.

15. The process of dilution with fresh water cannot not be allowed. Keeping the facts in view the Consent To Operate Water & Air application has been rejected by UPPCB vide its letter dated 22.10.2019. UPPCB while processing the consent application has given opportunity to the unit by raising query on 27.11.2018 and again on 1.5.2019."

4. The Chief Environment Officer, Uttar Pradesh Pollution Control Board, in his "Instruction Note" has also stated that the unit has not yet evolved any methodology for achieving prescribed

standard of Sodium Absorption Ratio (SAR) value of 26 without dilution with fresh water. The Joint Committee, constituted by the Hon'ble National Green Tribunal (NGT), in its report has specifically mentioned that use of fresh water cannot be allowed for such purposes. It has also been specifically stated by the Chief Environment Officer that the Uttar Pradesh Pollution Control Board had decided the "Consent to Operate' applications after giving sufficient opportunity to the concerned unit by way of query letters and invitation for presentation of the case. It has also been further stated that in the present writ petition, the concerned unit has contested the merit of the two letters dated 22nd October, 2019, rejecting the "Consent to Operate' applications, without exhausting the alternative remedy provided under the two statutes.

5. We are alive to the settled proposition of law with regard to availability of statutory alternative remedy not being an absolute bar for a Constitutional Court to exercise its power of judicial review under Article 226 of the Constitution of India and step in to intervene in certain exceptional situations such as arbitrary or mala fide exercise of power or gross violation of the established principles of natural justice or exercise of power without jurisdiction and so on and so forth.

6. In the facts of the instant case, the writ petitioner-company participated all throughout the decision making process which led to passing of the two orders dated 22nd October, 2019. This is not a case where the two impugned orders strike the writ petitioner like a lightning bolt from the blue in an exceptional situation as enumerated above. Even if there might have been some technical/procedural infirmity, it is simply not so gross so as to allow the writ petitioner to get benefit of the extraordinary high-prerogative jurisdiction of this Court under Article 226 of the Constitution of India, which is essentially discretionary in nature. The two judgments which have been referred by the learned advocate representing the writ petitioner are both unreported. One is in respect of Writ - C No. 4462 of 2013 (H.M.A. Agri Industries Ltd. Versus State of U.P. through Secretary and others), being a judgment and order dated 28th January, 2013. The other judgment has been rendered more recently by another Division Bench of this Court on 31st May, 2019, in Writ - C No. 10259 of 2019 (H.M.A. Agro Industries Ltd. Versus State of U.P. and two others). We notice that the earlier judgment of this Court in Writ - C No. 4462 of 2013 has been followed in the latter judgment. So far as the earlier judgment rendered on 28th January, 2013, is concerned, in the facts of that case, a copy of an analysis report which was used against the writ petitioner had not been supplied to the writ petitioner. As such, in the considered opinion of the Division Bench, it was a lapse on the part of the concerned respondent which had to be rectified by them before the writ petitioner could be relegated out of the High Court on account of availability of statutory alternative remedy of appeal. Both the judgments referred by the learned advocate for the writ petitioner cannot be a blanket authority for the proposition that the writ Court is bound to entertain a writ petition in each and every case notwithstanding the existence and availability of statutory alternative

remedy. In fact, as stated earlier, in the case of H.M.A. Agri Industries in Writ - C No. 4462 of 2013, the issue was centered around non supply of a copy of an analysis report to the writ petitioner which was used against the writ petitioner by the concerned respondent authority. In the latter case, the fact situation was totally different. The allegation was in respect of non compliance of direction issued by the National Green Tribunal (NGT) with regard to pollution caused by the Abattoris. In both cases, the writ petitioner was H.M.A. Agri Industries Ltd., which was engaged in the business of state of the art Abattoirs, where frozen meat was packed and sold across the world. The writ petitioner company was directed by the Uttar Pradesh Pollution Control Board to ensure that ETP (Effluent Treatment Plant) was operational and the treated effluent conformed to parameters. Certain other directions were issued by the Uttar Pradesh Pollution Control Board, as contained in its communication dated 6th February, 2019, and considering such facts, the Division Bench had intervened. At this stage we must observe that any decision of any Court is an authority for a proposition based on certain set of facts and even a single distinction of any fact or an additional fact can alter the applicability of its ratio. In the facts of the instant case, as observed earlier, we do not find the situation to be so exceptional so as to allow the writ Court to intervene, exercising its extraordinary high prerogative discretionary jurisdiction under Article 226 of the Constitution of India. The writ petitioner, of course, is not without any remedy. Statutory alternative remedy is available to the writ petitioner in respect of both the orders dated 22nd October, 2019. The writ petitioner is always at liberty to approach the statutory appellate authority in respect of the two orders dated 22nd October, 2019, and take all points which are available in law. We make it clear that in the event the writ petitioner approaches the statutory appellate authority, the said authority shall not be influenced in any manner by any observation made herein and shall decide the appeals strictly in accordance with law.

7. The writ petition stands accordingly dismissed.

(2019)12 ILR A345

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.11.2019

BEFORE
THE HON'BLE PRADEEP KUMAR SINGH BAGHEL, J.
THE HON'BLE ROHIT RANJAN AGARWAL, J.

Writ C No: 36346 of 2014

Ikrar & Ors. ...Petitioners
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioners:
Sri Madhusudan Dixit

Counsel for the Respondents:
C.S.C., Sri Satyendra Pratap Singh, Sri S.P. Singh

A. Civil Law - Urban Land (Ceiling and Regulation) Act, 1976 – Section 10 (5) and (6) – Urban Land (Ceiling and Regulation) Repeal Act, 1999 – Section 3 and 4 – Possession over the vacant land has been taken over by the Tehsildar and not by the appropriate authority as envisaged under the Uttar Pradesh Urban Land Ceiling (Taking of Possession, Payment of Amount and

Allied Matters) Directions, 1983 – Held, in view of judgment of the Apex Court in Hari Ram and directions issued by State Government in Directions, 1983 as well as Government Order dated 29.09.2015, that possession has not been taken in terms of the Directions, 1983 and Government Order – Tehsildar and Lekhpal are not authorized to take possession – No material on record to demonstrate that actual possession was handed over to the Saharanpur Development Authority. (Para 16, 24 & 25)

Held –
28. In view of the above, we are of the considered opinion that if possession has not been taken in terms of Section 10(5) and 10(6) of the Act, 1976, petitioners are entitled for the benefit under Section 3 and 4 of the Repeal Act.

Writ Petition allowed. (E-1)

List of cases cited: -

1. Gajanan Kamlya v. Addl. Collector & Comp. Auth.& Ors. JT 2014 (3) SC 2112.

2. Rati Ram Vs. State of U.P. and Others, 2018 (4) ALJ 338

3. Writ C No. 31072 of 2009, Gayur and Another Vs. State of U.P. and Others, decided on 20.08.2019

(Delivered by Hon'ble Rohit Ranjan Agarwal, J.)

1. Present petition has been filed assailing the order dated 5.5.2014 passed by Collector, Saharanpur rejecting the representation of petitioners, as well as for seeking direction upon the respondents not to interfere in possesssion over Khasra No.12M and 19M measuring 11479.47 sq.mtr situated in Village Fatehpur Jat, District Saharanpur and also for direction to correct revenue records, and record names of petitioners over the land declared vacant in proceedings under the Urban Land (Ceiling and Regulation) Act, 1976 (for short "Act No.33 of 1976").

2. Brief facts which emerges from the material on record, are that petitioners who are 6 in numbers are sons of late Iqbal, who filed statement under Section 6(1) of the Act, stating that plot no.12 and 19 were his agricultural land and was outside the purview of Act of 1976. Notices under Section 8(3) of the Act was issued on 17.8.1978 stating that out of total area of land measuring 13479.47 sq. mtr., 11479.47 sq. mtr. was being declared surplus leaving behind 2000 sq. mtr. in khasra no.12M and 19M in village- Fatehpur Jat. On 26.10.1978, the competent authority declared the aforesaid land as vacant.

3. Notification under Section 10(1) was made on 29.11.1978 and under Section 10(3) on 20.02.1990. Notices u/s. 10(5) were issued on 15.04.1993, however, according to petitioners, the said notices were never served upon them. It is further averred that father of the petitioners till his death, sowed his crop over the land, which is evident from khasra of year 2010-11 and was in complete physical possession over the land. It has further been stated that no notice u/s. 10(6) of the Act was issued by respondents for forceful dispossession of their late father, nor he was dispossessed from the land in question, and they are in complete actual physical possession over the land in dispute till date.

4. Petitioners filed Writ Petition No. 3367 of 2007 before this Court, which was disposed of on 31.03.2010, with a direction to the petitioners to file a

representation before respondent no.2, who shall pass appropriate orders in accordance with law after giving opportunity of hearing. The representation was decided on 05.05.2014 by respondent no.2, who held that the possession of land had already been taken by Tehsildar, Sadar on 31.07.1993 and the land in question is recorded in the name of State Government in revenue records since 21.08.1993, and further on 19.02.2002, the land was transferred to Saharanpur Development Authority. The order of respondent no.2 is under challenge in present petition.

5. Respondent-State filed a counter affidavit stating that the possession of land has been taken on 31.07.1993 and the name of State Government has been recorded in the revenue records. Further, the possession memo has been brought on record as CA-2.

6. During the pendency of above writ petition, an Impleadment Application No.6 of 2019 was filed for impleading Saharanpur Development Authority as one of the respondent. On 22.04.2019, the amendment application was allowed and necessary correction in the array of parties was made. The matter was listed on 15.05.2019, thereafter on 16.05.2019. On 20.05.2019, learned Standing Counsel produced the original records of the case before the Court. This Court after perusal of the records passed following order:-

"Learned Standing Counsel has produced the original record.

We have perused the same.

The possession memo bears only signature of Tehsildar and Lekhpal, Chandrapal Sharma, there is no signatures of the petitioners and witnesses.

It is urged by learned counsel for petitioners that the Tehsildar is not appropriate Authority to take the possession of the land in view of Rules 1983.

Learned Standing Counsel has not disputed the said fact.

Our attention has been drawn to the impugned order passed by the District Magistrate dated 5th May, 2014, wherein it is mentioned that after issuance of notice dated 15th April, 1993 under Section 10 (5) of the Act, the Tehsildar Sadar has taken possession of the land on 31st July,1993.

On 17th July, 2014, all the respondents were granted four weeks time to file counter affidavit.

The State has filed its counter affidavit, which is taken on record.

The Saharanpur Development Authority has been impleaded on 22.04.2019 in the interest of justice six weeks time is granted to file counter affidavit.

Put up this case in the additional cause list before this Bench as a part heard on 19th July, 2019.

The original records are returned to learned Standing Counsel. "

7. Counsel for the Saharanpur Development Authority was granted six weeks time to file counter affidavit. When the matter was again listed on 19.07.2019, Counsel for the Saharanpur Development Authority was not present and the case was adjourned. Again, the matter was listed on 27.09.2019 and as a last opportunity, six weeks and no more time was granted to the counsel for

Development Authority to file counter affidavit and the matter was posted peremptorily for 24.10.2019. On the said date again Counsel for the Saharanpur Development Authority was not present, neither any counter affidavit was filed on behalf of the Development Authority, thus we had no option but to proceed and decide the matter.

8. Counsel for the petitioners submitted that after coming of the Repeal Act, proceedings under the Urban Ceiling Act in view of Section 3 stood abated. As no actual possession has been taken in terms of sub-section 5 of Section 10 and sub-section 6 of Section 10 of the Act, 1976. He further submitted that no notice under sub-section 5 of Section 10 was served on the petitioners, nor the tenure holders have handed over the possession to Collector, which is evident from the material on record. He further submitted that from pleadings of respondent-State in their counter affidavit, it is clear that no recourse to sub-section 6 of Section 10 has been taken for forcible possession by the State. Moreover, State has failed to point out any document in the original record showing taking over the physical possession.

9. He further invited the attention of the Court to the Dakhalnama, which has been brought on record by the State in their counter affidavit as well as in the original records, which shows that possession was taken over by Tehsildaar, which is not an appropriate authority to take possession of the land in view of Rules, 1983 and further it does not bear the signature or thumb impression of the tenure holder. This fact clearly demonstrates that petitioners have not handed over possession voluntarily to the State pursuant to notice issued under sub-section 5 of Section 10 of the Act, 1976, as such proceedings stood abated as tenure holders are still in possession over the land.

10. Sri Dixit had further relied upon judgment of Apex Court in cases of ***State of U.P. Vs. Hari Ram, 2013 (4) SCC 280*** and ***Banda Development Authority Vs. Moti lal Agarwal and Others, 2011 Law Suit (SC) 411*** and judgment of this Court in ***State of U.P. & Another Vs. Nek Singh, 2010 Law Suit (Alld.) 3581, Ram Chandra Pandey vs. State of U.P. & Others, 2010 (82) ALR 136, Ehsan Vs. State of U.P. & Others, Writ C No.21009 of 2012, Lalji Vs. State of U.P. & Others, 2018 (5) ADJ 566, Yaseen & Others Vs. State of U.P. & Others, 2014 (4) ADJ 305 (DB), Mohammad Suaif & Another Vs. State of U.P. & Others, Writ C No.12696 of 2009 decided on 07.05.2019, Mohammad Islam & Another Vs. State of U.P. & Others, Writ C No.15864 of 2015*** decided on 04.12.2017, ***State of U.P. Vs. Ruknuddin & Others, Writ C No.54830 of 2011*** decided on 03.10.2018.

11. Learned Standing Counsel defending the action of State Government as well as order passed by Collector, Saharanpur on 05.05.2014, submitted that possession of surplus land was taken on 31.07.1993, pursuant to notice under sub-section 5 of Section 10 issued on 15.04.1993, which was duly served upon wife of the tenure holder by process server on 24.08.1993, and name of the State Government was mutated in revenue records over the vacant piece of land. Subsequently, on 19.02.2002, land in question was transferred in favour of Saharanpur Development Authority, as such, claim of petitioner that pursuant to Repeal Act, proceedings stood abated,

cannot be accepted as possession was duly taken in accordance with law and vacant piece of land was transferred in favour of Saharanpur Development Authority.

12. We had summoned the original records as there was a serious dispute with regard to taking of physical possession of the surplus land.

13. We have perused the original records. From perusal of possession memo dated 31.07.1993, it is clear that the Tehsildar, Saharanpur and Chandrapal Sharma, Lekhpal has taken the possession of the land on 31.07.1993 but possession memo does not bear the signature of the person, who has transferred the land, nor of any witness.

14. We have heard Sri Madhusudan Dixit, learned counsel for the petitioners, learned Standing Counsel for respondent nos.1, 2 & 3 and have perused the material on record.

15. It is not in dispute that proceedings under Act No.33 of 1976 was initiated against father of petitioners in year 1978 for declaring surplus land. It is also not in dispute that notices u/s. 10(1) and 10(3) were issued. Notice under sub-section 5 of Section 10, which is alleged to have been issued on 15.04.1993, according to petitioners was not served upon the tenure holder, while State has categorically submitted that it was served upon wife of the tenure holder through process server on 24.08.1993. However, as per the State, possession was taken on 31.07.1993 by the Tehsildar Saharanpur, alongwith Lekhpal copy of dakhalnama has been brought on record, which demonstrates the fact that it does not bear the signature or thumb impression of the person, who has transferred the possession, nor of any witness, while it only bears the signature of the person receiving the possession.

16. Collector, Saharanpur, while passing the order impugned had held that possession has been taken over by the Tehsildar pursuant to notice under Section 10(5) of the Act on 31.07.1993, thus it is an accepted fact that the possession over the vacant land has been taken over by the Tehsildar and not by the appropriate authority as envisaged under the Uttar Pradesh Urban Land Ceiling (Taking of Possession, Payment of Amount and Allied Matters) Directions, 1983 (Directions issued by the State Government under Section 35 of the Act, 1976), which is reproduced below:-

"The Uttar Pradesh Urban Land Ceiling (Taking of Possession, Payment of Amount and Allied Matters) Directions, 1983 (Directions issued by the State Government under Section 35 of 1976 Act):

"In exercise of the powers under Section 35 of the Urban Land (Ceiling and Regulation) Act, 1976 (Act No.33 of 1976), the Governor is pleased to issue the following directions relating to the powers and duties of the competent authority in respect of amount referred to in Section 11 of the aforesaid Act to the person or persons entitled thereto:

1. Short title, application and commencement.-- *These Directions may be called the Uttar Pradesh Urban Land Ceiling (Taking of Possession, Payment of Amount and Allied Matters) Directions, 1983*

(2) The provisions contained in this direction shall be subjected to the provisions of any directions or rules or

orders issued by the Central Government with such directions or rules or orders.

(3) They shall come into force with effect from the date of publication in the gazette.

2. Definitions.--* * * *

3. Procedure for taking possession of vacant land in excess of ceiling limit.--*(1) The competent authority will maintain a register in Form No.ULC -1 for each case regarding which notification under sub-section (3) of Section 10 of the Act is published in the gazette.*

4. (1)* * * *

(2) An order in Form No. ULC-II will be sent to each land holder as prescribed under sub-section (5) of Section 109 of the Act and the date of issue and service of the order will be entered in Column 8 of Form No. ULC-I.

(3) On possession of the excess vacant land being taken in accordance with the provisions of sub-section (5) or sub-section (6) of Section 10 of the Act, entries will be made in a register in Form ULC-III and also in Column 9 of the Form No. ULC-1. The competent authority shall in token of verification of the entries, put his signatures in Column 11 of Form No. ULC-1 and Column 10 of Form No. ULC-III.

Form No. ULC-1
Register of notice under Sections 10(3) and 10(5)

(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)
Sl. No.	Sl. No. of register of receipt Sl. No. of register of taking possession	Case Number	Date of Notification under Section 10 (3)	Land to be acquired village Mohali	Date of taking over possession	Remarks	Signature of competent authority			

Form No. ULC-II
Notice order under Section 10(5)
[See clause (2) of Direction (3)]
In the court of competent authority

U.L.C.....

No..... Date .....

Sri/Smt.....

T/o .....

In exercise of the powers vested under Section 10(5) of the Urban Land (Ceiling and Regulation) Act, 1976 (Act No.33 of 1976), you are hereby informed that vide Notification No..... dated ..... under Section 10(1) published in Uttar Pradesh Gazette dated ..... following land has vested absolutely in the State free from all encumbrances as a consequence Notification under Section 10(3) published in Uttar Pradesh Gazette dated ..... Notification No..... dated .... With effect from ..... you are hereby ordered to surrender or deliver the possession of the land to the Collector of the District Authorised in this behalf under Notification No.324/II-27- U.C.77 dated February 9, 1977, published in the gazette, dated March 12, 1977, within thirty days from the date of receipt of this

order otherwise action under sub-section (6) of Section 10 of the Act will follow.

Description of vacant land

	Khasra No. identification	*Area*	*Remarks*
1	*2*	*3*	*4*

Competent Authority

.....

.....

No. .....

Dated.....

Copy forwarded to the Collector ..... with the request that action for immediate taking over of the possession of the above detailed surplus land and its proper maintenance may, kindly be taken an intimation be given to the undersigned along with the copy of certificate to verify.

Competent Authority

.....

....."

17. Thus, possession taken by the Tehsildar is against the directions issued by the State Government u/s. 35 of the Act, 1976, which envisages that it is the Collector, who is competent and authorized to take possession.

18. The Supreme Court in case of Hari Ram (Supra) had laid down detailed procedure for taking possession of the surplus land. The Supreme Court distinguished between voluntary surrender made under sub-section 3 of Section 10, peaceful dispossession under sub-section 5 of Section 10 and forceful dispossession made under sub-section 6 of Section 10, relevant paragraphs are extracted here as under:-

*"**30.** Vacant land, it may be noted, is not actually acquired but deemed to have been acquired, in that deeming things to be what they are not. Acquisition, therefore, does not take possession unless there is an indication to the contrary. It is trite law that in construing a deeming provision, it is necessary to bear in mind the legislative purpose. The purpose of the Act is to impose ceiling on vacant land, for the acquisition of land in excess of the ceiling limit thereby to regulate construction on such lands, to prevent concentration of urban lands in hands of few persons, so as to bring about equitable distribution. For achieving that object, various procedures have to be followed for acquisition and vesting. When we look at those words in the above setting and the provisions to follow such as sub-sections (5) and (6) of Section 10, the words "acquired" and "vested" have different meaning and content. Under Section 10(3), what is vested is de jure possession not de facto, for more reasons than one because we are testing the expression on a statutory hypothesis and such an hypothesis can be carried only to the extent necessary to achieve the legislative intent.*

Voluntary surrender

***31.** The "vesting" in sub-section (3) of Section 10, in our view, means vesting of title absolutely and not possession though nothing stands in the way of a person voluntarily surrendering or delivering possession. The Court in Maharaj Singh v. State of U.P.13, while interpreting Section 117(1) of the U.P. Zamindari Abolition and Land Reforms Act, 1950 held that "vesting" is a word of*

slippery import and has many meaning and the context controls the text and the purpose and scheme project the particular semantic shade or nuance of meaning. The Court in Rajendra Kumar v. Kalyan14 held as follows: (SCC p. 114, para 28)

*"**28**. ...We do find some contentious substance in the contextual facts, since vesting shall have to be a "vesting" certain. 'To "vest", generally means to give a property in.' (Per Brett, L.J. Coverdale v. Charlton15 : Stroud's Judicial Dictionary, 5th Edn. Vol. VI.) Vesting in favour of the unborn person and in the contextual facts on the basis of a subsequent adoption after about 50 years without any authorization cannot however but be termed to be a contingent event. To 'vest', cannot be termed to be an executor devise. Be it noted however, that 'vested' does not necessarily and always mean 'vest in possession' but includes 'vest in interest' as well."*

***32.** We are of the view that so far as the present case is concerned, the word "vesting" takes in every interest in the property including de jure possession and, not de facto but it is always open to a person to voluntarily surrender and deliver possession, under Section 10(3) of the Act.*

***33.** Before we examine sub-section (5) and sub-section (6) of Section 10, let us examine the meaning of sub-section (4) of Section 10 of the Act, which says that during the period commencing on the date of publication under sub-section (1), ending with the day specified in the declaration made under sub-section (3), no person shall transfer by way of sale, mortgage, gift or otherwise, any excess vacant land, specified in the notification and any such transfer made in contravention of the Act shall be deemed to be null and void. Further, it also says that no person shall alter or cause to be altered the use of such excess vacant land. Therefore, from the date of publication of the notification under sub-section (1) and ending with the date specified in the declaration made in sub-section (3), there is no question of disturbing the possession of a person, the possession, therefore, continues to be with the holder of the land.*

Peaceful dispossession

***34.** Sub-section (5) of Section 10, for the first time, speaks of "possession" which says where any land is vested in the State Government under sub-section (3) of Section 10, the competent authority may, by notice in writing, order any person, who may be in possession of it to surrender or transfer possession to the State Government or to any other person, duly authorized by the State Government.*

***35.** If de facto possession has already passed on to the State Government by the two deeming provisions under sub-section (3) to Section 10, there is no necessity of using the expression "where any land is vested" under sub-section (5) to Section 10. Surrendering or transfer of possession under sub-section (3) to Section 10 can be voluntary so that the person may get the compensation as provided under Section 11 of the Act early. Once there is no voluntary surrender or delivery of possession, necessarily the State Government has to issue notice in writing under sub-section (5) to Section 10 to surrender or deliver possession. Sub-section (5) of Section 10 visualizes a situation of surrendering and delivering possession, peacefully while sub-section (6) of Section 10 contemplates a situation of forceful dispossession.*

Forceful dispossession

36. *The Act provides for forceful dispossession but only when a person refuses or fails to comply with an order under sub-section (5) of Section 10. Sub-section (6) to Section 10 again speaks of "possession" which says, if any person refuses or fails to comply with the order made under sub-section (5), the competent authority may take possession of the vacant land to be given to the State Government and for that purpose, force - as may be necessary - can be used. Sub-section (6), therefore, contemplates a situation of a person refusing or fails to comply with the order under sub-section (5), in the event of which the competent authority may take possession by use of force. Forcible dispossession of the land, therefore, is being resorted only in a situation which falls under sub-section (6) and not under sub-section (5) to Section 10. Sub-sections (5) and (6), therefore, take care of both the situations, i.e. taking possession by giving notice that is "peaceful dispossession" and on failure to surrender or give delivery of possession under Section 10(5), than "forceful dispossession" under sub-section (6) of Section 10."*

19. Similar issue in regard to peaceful and forceful possession in terms of sub-section 5 and 6 of Section 10 of the Act cropped up before the Apex Court, which was considered by it in case of ***Gajanan Kamlya Patil Vs. Addl. Collector & Comp. Auth. & Ors, JT 2014 (3) SC 2011,*** which followed the earlier decision in case of Hari Ram (supra). In yet another case, in Special Leave Petition (C) No.17799 of 2015 (supra), the Apex Court held after perusing the original records that possession was not taken by the competent authority or his authorized representative by following procedure laid down under Section 10(5) and Section 10(6) of the Act, 1976 declined to interfere in the order impugned.

20. A Division Bench of this Court in case of Nek Singh (supra), Ruknuddin (supra), Ramchandra Pandey (supra), and Ehsan (supra) was also of the view that possession had been taken from tenure holder without complying provision of Section 10(5) and 10(6) of the Act, 1976.

21. Pertinently, in respect of Saharanpur Development Authority, same issue was considered in case of ***Rati Ram Vs. State of U.P. and Others, 2018 (4) ALJ 338,*** wherein this Court held as under:-

"8. The 'Dakhalnama' a certified copy whereof has been produced before us does not even bear the signatures of any attesting witness. We find this to be a lapse and patent illegality the benefit whereof has to be given to the land holder in view of the Division Bench judgment in the case of Mohd. Islam and 3 others v. State of U.P. and 2 others, Writ Petition No. 15864 of 2015 decided on 4th December, 2017. It was also a case of District- Saharanpur. We extract paragraph Nos. 44 to 47 of the said judgment which are as under:

"44. Since, in the present case, neither factum of taking actual physical possession by Competent Authority under Ceiling Act has been fortified by placing any document nor factum of possession of Development Authority at any point of time has been shown, therefore, argument advanced by learned Standing Counsel on the basis of State of Assam (supra) will not help.

45. Viewed from the above exposition of law we find in the present case that no such exercise of issuing notice under Section 10(6) of the Act, 1976 and thereafter execution of memo on the spot had taken place which is mandatory for ceiling authorities as admittedly the original tenure-holder and then his successors had never voluntarily surrendered the possession of land. In the absence of voluntary surrender of possession of surplus land, the authorities were required to proceed with forcible possession. The document of possession memo would not by itself evidence the actual taking of possession unless it is witnessed by two independent persons acknowledging the act of forcible possession. As discussed above in the earlier part of this. judgment we are not able to accept the alleged possession memo worth calling a document as such in the absence of certain requisites, nor does it bear the details of witnesses who signed the document. It bears mainly signatures of Chackbandi Lekhpal, a person taking possession and then the document has been directed to be kept on file. This is no way of taking forcible possession nor, a document worth calling possession memo. A mere issuance of notification under Section 10(3) and notice under Section 10(5) regarding delivery of possession does not amount to actual delivery of possession of land more especially in the face of the fact that the tenureholder had in fact not voluntarily made surrender of possession of surplus land and no proceeding under Section 10(6) had taken place.

46. Since, we have held that possession memo dated 20.06.1993 is not a possession memo and is a void document for want of necessary compliance under Section 10(6) of the Act, 1976, the petitioners are entitled to the benefit under Section 4 of the Repeal Act, 1999 that came into force w.e.f. 20.03.1999.

47. We may also place on record that respondents claim that possession of land in question was handed over to Saharanpur Development Authority pursuant to Government Order dated 29.12.1984 but here also we find that no material has been placed on record to show that any such actual physical possession was handed over to Saharanpur Development Authority and the said authority is in de facto possession of land in dispute. Except bare averment made in the counter-affidavit respondent have not chosen to place anything on record to support the stand that de facto possession over land in dispute is that of Saharanpur Development Authority. Therefore even this stand has no legs to stand and is rejected."

22. This Court in ***Writ C No. 31072 of 2009, Gayur and Another Vs. State of U.P. and Others,*** decided on 20.08.2019 faced with a similar situation, wherein respondent-State had only produced the memo of possession/dakhalnama and there was no other material to indicate that land was legally transferred to the Saharanpur Development Authority, held that the ceiling proceeding stood lapse and petitioners were entitled for land in question, which has been declared surplus land held as under:-

"Keeping in the mind the principle laid down by the Supreme Court and this Court, as indicated in the authorities referred herein-before, we find that in the counter affidavit the State has taken a very general and vague stand about the possession. In Paragraph-4 of

the counter affidavit of the State the only averment made in this regard is that the process server personally served the notice under Section 10(5) of the Act, 1976 on 20th November, 1987. It is also averred therein that "It is further stated that after adopting all proceeding according to law on the aforesaid declared surplus land the possession of the State Government has been taken on 31.11.1987". It is not mentioned in the counter affidavit that the petitioners have given voluntary possession after receiving the notice under Section 10(5) of the Act, 1976. From the original record it was evident that there was no material to show that the petitioners have given voluntary possession to the State authorities after receiving the notice under Section 10(5). If they had not given the voluntary possession then the only course open to the authorities was to take forceful possession under Section 10(6) of the Act, 1976. There is no material on the record or averment made in the counter affidavit to show that the forceful possession was taken from the petitioners under Section 10(6) of the Act, 1976. In the counter affidavit filed on behalf of the State, the name of the officer, who has taken the possession, is not disclosed. However, in the counter affidavit filed by the Saharanpur Development Authority it is stated that the Tehsildar has taken the possession. As mentioned above, the only document which is on the record to indicate taking over the possession is a memo dated 31st November, 1987. The said date has been mentioned in several paragraphs of the counter affidavits of the State and the Saharanpur Development Authority. The said document does not inspire any confidence. There are only thirty days in the month of November. So, apparently 31st November is a wrong date. As held by the Supreme Court in Hari Ram (supra) and the directions issued by the State Government in the Directions, 1983 as well as the Government Order dated 29th September, 2015, we find that the possession has not been taken in terms of the Directions, 1983 and the Government Order. The Revenue Inspector and the Lekhpal are not authorized to take possession as held in a large number of cases mentioned above.

As regards the stand of the State that the possession has been handed over to the Saharanpur Development Authority, we find that except the memo of possession/ Dakhalnama, there is no other material to indicate that the possession was legally handed over to the Saharanpur Development Authority. Pertinently, in the Dakhalnama it is recorded that the land is agricultural. We find merit in the submission of the petitioners that agricultural land cannot be declared surplus. But this issue was not raised seriously, hence we are not recording any finding on this issue. In the counter affidavit filed by the Saharanpur Development Authority the alleged possession is stated to have been taken on 29th January, 2002 but no detail has been mentioned regarding the construction, which has been raised. As regards the claim of the respondents that possession of the land was handed over to the Saharanpur Development Authority, we find that the proceedings stood abated in terms of section 4 of the Repeal Act, therefore, any subsequent transfer is non est. "

23. In case, in hand, only notice under Section 10(5) of the Act was issued to petitioners, but no voluntary possession was given by them, as is evident from

original record to the State authorities. If, voluntary possession was not given, then only recourse open to the authorities, was to take forcible possession under Section 10(6) of the Act, 1976. There is no material on record or averment made in the counter affidavit, nor it is case of the State functionaries that forcible possession was taken from petitioners under Section 10(6) of the Act, 1976. In the counter affidavit, name of the officers, who have taken possession, has not been disclosed, and it is only stand of the State that possession was taken by Tehsildar. While, from perusal of original memo of possession/dakhalnama, it is evident that possession was taken by Tehsildar and one Chandrapal Sharma, Lekhpal, and there is no signature of any attesting witness.

24. Thus, in view of judgment of the Apex Court in Hari Ram (supra) and directions issued by State Government in Directions, 1983 as well as Government Order dated 29.09.2015, we find that possession has not been taken in terms of the Directions, 1983 and Government Order. The Tehsildar and Lekhpal are not authorized person to take possession as held in large number of cases mentioned above.

25. In addition to above, as discussed above, there is no material on record to demonstrate that actual possession was handed over to the Saharanpur Development Authority on 19.02.2002 after possession having been taken by the State authorities, as claimed according to memo of possession/dakhalnama dated 31.07.1993 by the Tehsildar, who is not a competent authority or a person authorized to take possession in terms of Directions, 1983 and Government Order of 2015.

26. Further, the Development Authority has also not filed any counter affidavit despite being given sufficient opportunity, nor their Counsel turned up during the course of argument. The only stand taken by State functionaries are that notice u/s. 10(5) was served on wife of tenure holder by process server on 24.08.1993, except the said fact, the State had failed to establish that actual physical possession over the vacant piece of land was taken, as the memo of possession/dakhalnama clearly demonstrates that there is no signature of the person delivering the possession, nor of any attesting witness, which is in teeth of the procedure laid down in case of Hari Ram (supra) except this fact no averment in the counter affidavit nor any submission on behalf of the State has been made.

27. Collector, Saharanpur also, while deciding the representation of the petitioners has relied upon the possession taken by the Tehsildar in the year, 1993 and possession subsequently being transferred through Saharanpur Development Authority in the year 2002, except this, he has failed to adjudicate on the issue as to how Tehsildar was authorized or competent to take possession in terms of the Directions, 1983, which had been issued by the Government u/s. 35 of the Act, 1976 and has statutory flavour.

28. In view of the above, we are of the considered opinion that if possession has not been taken in terms of Section 10(5) and 10(6) of the Act, 1976,

petitioners are entitled for the benefit under Section 3 and 4 of the Repeal Act.

29. For the reasons stated above, we find that the ceiling proceedings stood lapse and petitioners are entitled for the land in question, which has been declared surplus. The order impugned dated 05.05.2014 is hereby quashed and writ petition stands **allowed**.

30. Petitioners may apply before the authorities for expunging name of State Government from the revenue records and mutating their names.

(2019)12 ILR A357

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.11.2019

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE VIRENDRA KUMAR SRIVASTAVA, J.

Writ C. No. 38597 of 2018

Smt. Usha Rani Gupta & Ors.
...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Ashish Kumar Singh, Manu Srivastava

Counsel for the Respondents:
C.S.C., Sri Bhanu Deo Pandey, Sri Devi Prasad Mishra, Sri Ajit Kumar Singh, Sri Nimai Das, Sri Amit Verma, Sri Brijendra Kumar, Sri B.D. Pandey

A. Civil Law - Nazul property – Nature and meaning – Nazul is an Arabic word. It refers to a land annexed to Crown. During British Regime, immoveable property of individuals, Zamindars, Nawabs and Rajas when confiscated for one or the other reason, it was termed as 'Nazul property' – It was neither acquired nor purchased after making payment – In Legal Glossary 1992 meaning of the term 'Nazul' has been given as 'Rajbhoomi' – It is only such land which is owned and vested in the State on account of its capacity of Sovereign, and application of right of bona vacantia. (Para 24, 25 and 26)

B. Constitution of India – Article 296 – Principle of escheat/ bona vacantia/ Doctrine of lapse – Empowering the king to take property – Recognized under common law of England – These principle would have been applicable prior to enforcement of Constitution of India – Article 296 has retained power of State to get ownership of such land, in respect whereof principle of 'escheat', 'lapse' or 'bona vacantia' applied – This power continued to apply after enactment of Constitution with the only modification that if such land is situate within the territory of State Government, it will vest in State and in other cases, it will vest in Union of India. (Para 28 and 31)

Held – Thus the land in question which is admittedly 'Nazul', belonged to the category as discussed above i.e. it came to be vested and owned by State in its capacity of Sovereign and right of bona vacantia. When acquisition is made under the provisions of a Statute, purpose of acquisition is already known and State pay its price but when land is owned by State, which is Nazul, objective of use of such land is not predetermined but it can be utilized by State for larger public welfare and its benefit, as necessitated from time to time. In other words 'Nazul' land forms the assets owned by State in trust for the people in general who are entitled for its user in the most fair and beneficial manner for their benefit. State cannot be allowed to distribute such largesse by pick and choose manner or to some selected groups, or in a whimsical manner etc.

C. Government Grant Act, 1895 – Preamble – Purpose of enactment – Doubts have arisen to the extent and operation of TP Act, 1882 and to the power of Crown (later substituted by word "Government") to impose limitations and restrictions upon grants and other transfers of land made by it or under its authority, hence to remove such doubts, GG Act, 1895 was enacted. (Para 48)

D. Government Grant Act, 1895 – Section 2 and 3 – Transfer of Property Act, 1882 – Grant of Nazul – Governing factor – Where 'Nazul' land is let out to a person by Government under agreement of lease i.e. Grant, it is governed by GG Act, 1895 and rights of parties therefore have to be seen in the light of stipulations contained in the document of 'Grant' – 'Grant' includes a property transferred on lease though in some cases, 'Grant' may result in wider interest i.e. transfer of title etc. – Whatever may be nature of document of transfer i.e. instrument of 'Grant', the fact remains that terms and conditions of 'Grant' shall be governed by such document and it shall prevail over any other law including TP Act 1882 – One cannot take resort to TP Act, 1882 to wriggle out of any condition or limitation etc. imposed in terms of document of 'Grant'. (Para 65)

E. Government Grant Act, 1895 – Section 3 – Nazul Land – Procedure to take possession – Where a lease has been granted under the terms of GG Act, 1895, then what procedure has to be followed is provided by Section 3 of GG Act, 1895 which says that all provisions, restrictions, conditions and limitations contained in any such creation, conferment or Grant referred to in Section 2, shall be valid and take effect according to their tenor – Any decree or direction of a Court of Law or any rule of law, statute or enactments of the Legislature, to the contrary notwithstanding. (Para 70)

Held – Above discussion, therefore, leaves no manner of doubt that Grant/Lease of Nazul land shall be exclusively governed by stipulations/conditions/terms contained in Grant/Indenture of Lease and no Statute can be resorted to govern rights of parties over Nazul land, which will be governed by aforesaid Grant/Indenture of Lease.

F. Lease of Nazul land – Right of lessee to transfer – Lessee has no right to transfer leased Nazul Land without prior permission. Meaning thereby, unless conditions are satisfied, Lesses had no right of transfer of interest at all. Therefore, any transfer in violation thereof will not result in creating any right or interest to the Transferee since Transferor himself has nothing which he can transfer at his own. (Para 78)

Held – If transfer is made without permission, as required in lease-deed, such transfer would be illegal, void and would not confer any right or interest upon Transferee in respect of land concerned. We, therefore, hold aforesaid nomination creating any right in favour of petitioner-1 patently illegal.

G. Repealing and Amending (Second) Act, 2017 – Section 4 – Effect to the lease of Nazul land – Right of lessor of re-entry for public purpose – Overriding effect of lease deed – Section 4 of Repeal Act, 2017 is very clear and need not much discussion for the reason that lease deed has been executed between the parties and being a Grant, admittedly, it was governed by provisions of GG Act, 1895 – Lessor had widest power to impose such conditions in lease deed as it thinks fit and they have to override any other Statute and that is an act done when deed was executed between the parties – All the terms and conditions of lease deed creating any obligation, right, duty, liberty etc. of parties are such, which have already been suffered or incurred. (Para 103)

Held – Lessee has suffered a condition of lease that Lessor shall have right of re-entry whenever land is required for 'public purpose', it can resume the land. This is a consequence, which has already incurred due to execution of

leasedeed. Right of re-entry whenever land is required for 'public purpose' stand acquired by Lessor when lease deed was executed and those has been saved by Section 4 of Repeal Act, 2017

H. Constitution of India – Article 14 – Application to contract entered privately – No advertisement while letting the Nazul land, in question and no opportunity to all intending parties – Petitioners entered into lease with private negotiation with Government and hence Article 14 of Constitution, in the case in hand, in our view, does not come into picture – A contract entered privately will remain a mere contract and parties are governed by the agreed stipulations. Here Article 14 of Constitution is not attracted. (Para 107)

I. Doctrine of Election – Validity of the some clause of agreement – An act is subject to certain conditions as a whole, and parties to the transaction once, have accepted all the conditions together, then subsequently, it is not open to retain some and leave another. It cannot choose some and leave other – This principle is based on doctrine of election, which postulates that no party can accept and reject the same instrument – A person cannot say at one time that a transaction is valid and thereby obtain some advantage to which he could only be entitled on the condition that it is valid in entirety and then turn round and say that it is void for the purpose of securing some other advantage. (Para 108)

J. Indian Evidence Act, 1872 – Section 116 – Rule of estoppel – A tenant who has been let into possession cannot deny his landlord's title, however defective it may be, so long as he has not openly restored possession by surrender to his landlord – Doctrine of election is based on the rule of estoppel. The doctrine of estoppel by election is one of the species of estoppel in pais (or equitable estoppel) which is a rule in equity. By that rule, a person may be precluded by his action or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had. (Para 111 and 112)

Held – We, therefore, find nothing arbitrary or illegal in resumption clause. State is the owner of land. If for public purpose, it wants to take back its land by way of resumption, there is nothing per se arbitrary. Secondly, condition of resumption is a part of contract between the parties and having accepted the same and contract having been carried out, and virtually completed its term, in order to wriggle out the rights, obligations and liabilities incurred and acquired thereunder, one of the party cannot contend that one of the conditions of such agreement is bad.

K. Nazul land – Conferment of right to freehold-Effect of pendency of application -Merely by making an application for grant of freehold right, applicant did not acquire a vested right. (Para 156)

Held – The above discussion makes it clear that Nazul Land, if required by State for public purpose and it exercises right of reentry/ resumption, the same cannot be defeated by any person on the ground that his individual right must prevail over such public purpose.

Writ Petition dismissed (E-1)

Cases relied on :-

1. Dyke v. Walford 5 Moore PC 434= 496-13 ER 557 (580)

2. Pierce Leslie and Co. Ltd. Vs. Miss Violet Ouchterlony Wapsnare, AIR 1969 SC 843

3. Collector of Masulipatam v. C. Vencata Narainapah 8 MIA 500, 525

4. Ranee Sonet Kowar v. Mirza Himmut Bahadoor (2) LR 3 IA 92, 101

5. Bombay Dyeing and Manufacturing Co. Ltd. v. State of Bombay [1958] SCR 1122, 1146

6. Superintendent and, Legal Remembrancer v. Corporation of Calcutta [1967] 2 SCR 170, 204

7. Cook v. Sprigg (1899) AC 572

8. Raja Rajinder Chand v. Mst. Sukhi, AIR 1957 SC 286

9. Nayak Vajesingji Joravarsingji v. Secretary of State for India in Council AIR 1924 PC 216

10. Dalmia Dadri Cement Co. Ltd. v. CIT [1958] 34 ITR 514 (SC) : AIR 1958 SC 816

11. Promod Chandra Deb v. State of Orissa AIR 1962 SC 1288

12. Amarsarjit Singh v. State of Punjab AIR 1962 SC 1305

13. Thakur Amar Singhji v. State of Rajasthan AIR 1955 SC 504

14. State of Rajasthan vs. Sajjanlal Panjawat AIR 1975 SC 706

15. Promod Chandra Deb vs. State of Orissa AIR 1962 SC 1288

16. Biswambhar Singh vs. State of Orissa 1964 (1) SCJ 364

17. State of U.P. vs. Zahoor Ahmad, 1973(2) SCC 547

18. Hajee S.V.M. Mohamed Jamaludeen Bros. & Co. vs. Government of Tamil Nadu (1997) 3 SCC 466

19. Azim Ahmad Kazmi and others vs. State of U.P. and Another (2012) 7 SCC 278

20. State of U.P. and others vs. United Bank of India and others (2016) 2 SCC 757

21. Pradeep Oil Corporation vs. Municipal Corporation of Delhi and others (2011) 5 SCC 270

22. Shakira Khatoon Kazmi vs. State of U.P., AIR 2002 All 101

23. State of U.P. vs. Zahoor Ahmad, 1973(2) SCC 547

24. Delhi Development Authority Vs. Anant Raj Agencies Pvt. Ltd. (2016) 11 SCC 406

25. Mohamadhusen Abdulrahim Kalota Shaikh Vs. Union of India (2009) 2 SCC 1

26. Mt. Bilas Kunwar v. Desraj Ranjit Singh and others, A.I.R. 1915 P.C. 96

27. Joint Action Committee of Air Line Pilots' Association of India (ALPAI) and others v. Director General of Civil Aviation and others, (2001) 5 SCC 435

28. Cauvery Coffee Traders, Mangalore v. Hornor Resources (International Company Limited), (2011) 10 SCC 420

29. V. Chandrasekaran and another v. Administrative Officer and others, (2012) 12 SCC 133

30. Rajasthan State Industrial Development and Investment Corporation and another v. Diamond & Gem Development Corporation Limited and another (2013) 5 SCC 470

31. State of Punjab and others v. Dhanjit Singh Sandhu (2014) 15 SCC 144

32. Bansraj Lalta Prasad Mishra v. Stanley Parker Jones, (2006) 3 SCC 91

33. Purushottam Dass Tandon and others vs. State of U.P., Lucknow and others AIR 1987 All. 56

34. State of U.P. and others vs. Purshottam Das Tandon and others 1989 Supp.(2) SCC 412

35. Anand Kumar Sharma vs. State of U.P. and others 2014(2) ADJ 742

36. Judgment dated 02.04.2013 of Allahabad High Court passed in Writ Petition No.62588 of 2010, M/s Madhu Colonizers Pvt. Ltd. vs. State of U.P. & Ors.

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

1. Five petitioners, namely, Smt. Usha Rani Gupta, wife of Sri R.P. Gupta, resident of 21/19, Mayo Road, Allahabad; Sri Mirza Amir Ullah Beg; Sri Mirza Tariq Ullah Beg; Sri Mirza Rashid Ullah

Beg, all sons of (Late) Mirza Hamid Ullah Beg and Smt. Amina Razia Rafat Naz Begum, daughter of (Late) Mirza Hamid Ullah Beg, have filed this writ petition under Article 226 of Constitution of India, praying for issue of a writ of certiorari quashing order dated 14.08.2018 issued by District Magistrate, Allahabad informing petitioners that State Government has resumed land in question and, therefore, petitioners should vacate the same, failing which possession shall be taken forcibly at the cost of petitioners. A writ of mandamus has also been prayed, directing District Magistrate, Allahabad to consider and dispose of application dated 29.01.1999, in respect of conversion of lease into free-hold of disputed land, in accordance with Government Orders dated 14.03.2014 and 15.01.2015. By way of an amendment, allowed vide order dated 30.05.2019, a further prayer has been added for issue of a writ of mandamus, commanding respondent-State of U.P. to restore and hand over physical possession of Nazul Site No. GG-1, Civil Station, Allahabad to petitioners.

2. Land in question, in the present writ petition, is a Nazul land bearing No. GG/1, Civil Station, Allahabad, area 7929.8 square metre, *(hereinafter referred to as "disputed Nazul land").*

3. Facts in brief, giving rise to present writ petition, are as under.

4. Lease of disputed Nazul land was executed on 12.12.1912 with effect from 01.01.1909 by Secretary of State for India in Council for a period of 50 years. Lease expired on 31.12.1958. It also appears that in the meantime, land was divided and numbered as GG-1 and GG-2. Lessees applied for renewal. In the light of relevant Government orders and Supreme Court's judgement in **State of U.P. and Others Vs. Purshottam Das Tandon and Others (1989) SUPP 2 SCC 412,** lease was renewed and a deed was executed on 26.09.1991/28.01.1992 between Governor of Uttar Pradesh through Collector, Allahabad and Smt. Kaniz Fatima Beg wife of (Late) Mirza Hamid Ullah Beg; Mirza Amir Ullah Beg; Mirza Tariq Ullah Beg and Mirza Rashid Ullah Beg, all sons of (Late) Mirza Hamid Ullah Beg, and Smt. Amina Razia Rafat Naz Begum daughter of (Late) Mirza Hamid Ullah Beg, all are residents of 24, New Barry Road, Lucknow, for a period of 30 years with effect from 01.01.1959, for which lease rent was paid. Clause-4 of lease deed provided that after expiry of term of 30 years, at the request of lessee, lessor may renew lease for another 30 years but maximum period of renewal shall be 90 years, including initial period of lease. Lease term expired on 31.12.1988. Some of the relevant conditions of lease deed are reproduced as under:-

"The lessees hereby covenant with the lessor as follows:

(4) That they ***shall not at any time without the written consent of such Collector, Allahabad alter or vary any part of the external elevation or plan of such dwelling house*** *and* ***out buildings*** *from the original elevation or plan thereof.*

(5) That, they ***shall not at any time without the written consent of such*** *Collector, Allahabad* ***erect any building or out buildings on*** *the demised premises.*

(7) That, ***they will not at any time carry on or permit to be carried on*** *upon the said premises* ***any trade or***

business whatsoever or use the same for any other purpose than as a private dwelling without the consent in writing *of such Collector first had and obtained."*

(Emphasis added)

5. Further conditions, agreed by parties, stated in para-3 of lease deed, relevant for our purpose are:-

"(a) That, if the said rent or any part thereof shall be in arrear and unpaid ***for the space of one calendar month whether the same shall have been lawfully demanded or not*** *if there shall be a breach or non-observance of any of the covenants by the Lessees herein contained then and in* ***any such case the Lessor, may, notwithstanding the waiver of any cause or right of re-entry, re-enter upon the said premises*** *and* ***expel the Lessees*** *and all occupiers of the same therefrom* ***and this demise shall absolutely determine*** *and the* ***Lessees shall forfeit all rights to remove or recover any compensation for any buildings erected by them*** *on the said premises AND ALSO the* ***installments of the said premium already paid shall become forfeited to the LESSOR.***

(b) That, notwithstanding anything contained in this deed, the Lessor shall be entitled to recover the arrears of rent reserved by this deed in the manner provided in the Land Revenue Act (U.P. Act III of 1901) for realising arrears of revenue.

(c) That, ***if the demised premises are at any time required by the lessor for his or for any public purpose he shall have the right to give one month's clear notice in writing to the lessees to remove any buildings standing at the time on the demised premises and within two months of the receipt of the notice to take possession thereof*** *on the expiry of that period subject however to the condition that if the Lessor is willing to purchase the buildings on the demised premises, the Lessees shall be paid for such buildings such amount as may be determined by the Secretary to Government, U.P. in Nagar Awas Department.*

(e) That, the ***Lessees will not in any way sub-divide or transfer the demised land or buildings thereon*** *(tenancy of buildings excluded)* ***without the previous sanction in writing of the U.P. Government*** *who may while according such sanction laid down and impose such further conditions as he may deem fit.* ***Any transfer or alienation made in contravention of the conditions contained in this clause shall be void.***

(h) That, on each transfer by succession, sale assignment or other wise, the Lessees and the person to whom the lease rights are to be transferred shall within two months of the same, deliver a notice in this behalf to the Collector setting forth the names and other particulars of the persons from whom and to whom the transfer takes place and the nature and description of the transfer."

(Emphasis added)

6. Renewed lease deed was executed again on 25.03.1996 for a period of 30 years with effect from 01.01.1990 for Nazul Plot No. GG/1, Civil Station, Allahabad (Area 1 acre and 4613 square yard) (residential). This document on behalf of lessees was signed by Dinesh Kumar, Power of Attorney Holder, on the same terms and conditions, (except change in lease rent) contained in earlier registered lease deed.

7. Smt. Kaniz Fatima Beg died and petitioners- 2 to 5 became lessees of

aforesaid land. They executed a nomination letter dated 18.01.1999 in favour of petitioner-1, Smt. Usha Rani Gupta giving consent and nominating her assigning right to get Nazul land GG/1, Civil Station, Allahabad, Area 1 acre and 4613 square yard i.e. 7584.26 square metre, freehold. Petitioner-1 moved an application dated 29.01.1999 for conversion of aforesaid land into freehold, in accordance with Government Order dated 01.12.1998. The said application was not decided for almost 20 years though Additional District Magistrate (Nazul), Allahabad granted approval to said conversion. Lease granted to petitioners-2 to 5 was governed by Government Grants Act, 1895 (hereinafter referred to as "GG Act, 1895"). Exercising right of re-entry under Clause-3 (c) of lease deed, District Magistrate issued letter dated 14.08.2018 for re-entry/resumption of land by State. It is stated in the aforesaid order that proposal for resumption of land was sent to State Government vide District Magistrate, Allahabad's letter dated 19.06.2018 and approval has been granted by Principal Secretary, Housing and Urban Planning Development vide letter dated 09.08.2018.

8. Resumption notice dated 14.08.2018 has been challenged on the ground that GG Act, 1895 has already been repealed by Repealing and Amending (Second) Act, 2017 (Act No. 4 of 2018) *(hereinafter referred to as "Repeal Act, 2017")*; resumption has been made by State of U.P and not by District Magistrate, Allahabad; Clause-3(c) of lease deed is violative of Article 14 of Constitution, inasmuch as, lease rights of petitioners could not have been acquired or resumed without payment of compensation at market value; respondents have adopted pick and choose policy for resumption; alleged requirement is artificial and not genuine and there is no public purpose involved in resumption.

9. Subsequently, by way of an amendment, para-88A has been added stating that actual physical possession of disputed Nazul land has been taken by respondents on 20.11.2018 from occupants i.e. Women's Polytechnic, behind back, and without knowledge of petitioners. Consequently a prayer for restoration of possession has also been added by way of amendment in writ petition. On behalf of petitioners, reliance has placed on **State of Maharashtra Vs. Vithalrao Ganpatrao Warhade 1998 (8) SCC 284; Binani Properties Private Ltd. Vs. M. Gulamali Abdul Hossain and Co. and Others AIR 1967 Cal 390; The State of U.P. Vs. Zahoor Ahmad and Another 1973 (2) SCC 547; Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another 1986 (3) SCC 156; Hindustan Times and Others Vs. State of U.P and another 2003 (1) SCC 591; Delhi Development Authority Vs. Durga Chand Kaushish 1973 (2) SCC 825; K.T. Plantation Private Limited and Another Vs. State of Karnataka 2011 (9) SCC 1; Tukaram Kana Joshi and Others vs. Maharashtra Industrial Development Corporation and Others 2013 (1) SCC 353, Raja Rajinder Chand Vs. Mst. Sukhi AIR (1957) SC 286; Smt. Bina Das Gupta and Others Vs. Sachindra Mohan Das Gupta and Others AIR (1968) SC 39; Mohan Agarwal Vs. Union of India AIR 1979 ALL 170 (FB); Women Education Trust and Another Vs. State of**

Haryana and Others 2013 (8) SCC 99 and Uddar Gagan Properties Ltd. Vs. Sant Singh and Others 2016 (11) SCC 378.

10. Respondent-4 has filed a counter affidavit stating that Nazul Plot No. GG/1, Civil Station, Allahabad was demised for a period of 30 years with effect from 01.01.1959 by an indenture of lease dated 26.09.1991 for an area measuring 1 acre and 4613 square yards (7929.8 square metre). The lease was executed on 26.09.1991 by District Magistrate, Allahabad on behalf of Governor of Uttar Pradesh in favour of Smt. Kaniz Fatima Beg, Sri Amir Ullah Beg, Sri Mirza Tariq Ullah Beg and Sri Mirza Rashid Ullah Beg. It was for a period of 30 years commencing from 01.01.1959 but renewable twice, each time for 30 years, but not exceeding 90 years and total period include initial period. After expiry of first 30 years, it was renewed on 25.03.1996. Lease was a 'Grant' under GG Act, 1895. In terms of Clause-3(c) of lease deed dated 26.09.1991 read 25.3.1996, State Government has exercised right of re-entry since land is required for Planned Development of Allahabad City which has been declared "Smart City" and disputed Nazul land has to be developed as 'Parking Place, Multi Purpose Open Space, Night Market and Amphitheater'. Further, disputed Nazul land was not in possession of petitioners or lessees or alleged nominee. It was occupied by Institute of Engineering and Rural Technology (IERT) as tenants and a Women's Polytechnic was being run on the said land. From the occupants, possession of land was taken on 20.11.2018 i.e. after expiry of notice period. Repeal of GG Act, 1895 by Repeal Act, 2017 has not affected rights and obligations of parties under lease deed in view of Saving provision contained in Section 4 of Repeal Act, 2017. On behalf of respondent-4, reliance is placed on **The State of Andhra Pradesh vs. Gathala Abhishekam and Ors, AIR 1964 AP 450; Union of India and Others Vs. Harish Chand Anand, AIR 1996 SC 203; Anand Kumar Sharma Vs. State of U.P. and Others 2014 (2) ADJ 742(FB); Smt. Shakira Khatoon Kazmi and Others Vs. State of U.P. and Others 2002 (1) AWC 226 and Azim Ahmad Kazmi and Others Vs. State of U.P. and Others 2012 (7) SCC 278.**

11. A supplementary affidavit has been filed by petitioners. It is stated that Rules for disposal of land in New Civil Station, Allahabad were notified by the then Officiating Commissioner, Allahabad namely, Sri C.B. Thornhill vide notification dated 05.05.1858. Copy of the same has been filed as Annexure-1 to supplementary affidavit. Subsequently, Rules were framed by Municipality of Allahabad for the purpose of Act VL, 1868 published in Government Gazette of North Western Provinces, Allahabad, dated 21.12.1870, called Municipal Bye-Laws, General Department Notification dated 13.12.1870. Aforesaid Municipal Bye-Laws were revised vide Notification dated 19.12.1877, published in Government Gazette, North Western Provinces and Oudh, Allahabad dated 22.12.1877 wherein it was mentioned that Municipal Committee is authorized to dispose of land, property of Government, in New Civil Station for building sites. Boundary of New Civil Station was given in para-I as under:-

"On the West, the new Cantonment; on the North, Muir Road

and Mayo Road; on the South, South road; and on the East, City Road and Phaphamau Road."

12. Para-II mentioned that aforesaid Bye-Laws shall not apply to land already reserved or to be hereinafter reserved by Government within the limits of Station. Petitioner has also given two Standardized Proforma of lease of 'Nazul' for building purpose contained in Nazul Manual published by Government Order dated 27.11.1940 and amended by Government Order dated 25.06.1952. The land use of Nazul site GG/1, Civil Station, Allahabad has been marked as "Multi-Level Parking" in Zonal Plan of Zone B-4, applicable with effect from 18.03.2011 in the Master Plan, 2021 of Allahabad under the land use category of "Traffic and Transportation". It is suggested that land being sought to be resumed for the purposes which is other than that provided in Master Plan, will result in change of use which is not legally permissible. Earlier lease deed, in respect of disputed Nazul land, was executed on 21.12.1912 by Secretary of State for India in Council in favour of Ram Charan Das. Area of land mentioned in the said lease deed was 2 Acres and 4723 Sq. Yards and purpose of 'Grant' was building a 'dwelling house'. Tenure of lease was 50 years. Period of lease commenced with effect from 01.01.1909. The stipulation giving right of 're-entry', contained in aforesaid lease deed, read as under:-

*"Provided always and it is hereby declared and agreed that no compensation or payment shall be claimable by the said Lessees, their Executors, Administrators or Assigns for any buildings, erections, or fixtures erected, affixed, or placed by him, them or any of them in or upon the said premises or any part thereof, i****n case these presents shall be determined by re-entry for forfeiture in which case the buildings, erections and fixtures shall rest absolutely in the said Secretary of State, his Successors and Assigns*** *as his own property without any compensation or payment in respect thereof provided further and* ***it is hereby agreed that the said Lessees, their Executors, Administrators and Assigns, shall not assign or underlet or otherwise part with the possession of the said premises or any part thereof without the permission of the said Secretary of State,*** *his Successors or Assigns (which permission may be signified by the said Collector or by such other person as the Government of the North Western Provinces or the said Secretary of State may appoint in that behalf) for that express purpose had and obtained."* (Emphasis added)

13. Since in the supplementary affidavit only some documents have been filed, therefore, respondents have not chosen to reply the same.

14. Sri Ashish Kumar Singh, learned counsel for petitioners has filed written submission and pressed the same in support of writ petition. Firstly, it is said that right of resumption under lease deed read with GG Act, 1895 ceased to be available to respondents after repeal of GG Act, 1895 by Repeal Act, 2017. Advancing submissions on the effect of repeal, it is said :-

A. The Effect of Repeal of GG Act, 1895 by Repeal Act, 2017 w.e.f. 05.01.2018 is to deliberate ALL rights, title, interests, etc. created in exercise of powers under GG Act, 1895, except those

expressly saved by Section 4 of Repeal Act, 2017.

B. The Government Grants (U.P. Amendment) Act, 1960 (amending Sections 2 and 3 of GG Act, 1895) immediately after promulgation of Repeal Act, 2017, render GG Act, 1895 ineffective and infructuous.

C. Through execution of Lease Deed in respect of Nazul Site No. GG/1, Civil Station, Allahabad, Rights(s) were Created and came into existence in favour of Lessees. At the same time, pre-existing right(s) possessed/reserved by Lessor/State of U.P. were acknowledged.

D. The pre-existing contingent right of State of U.P./Lessor to resume land was acknowledged in Clause 3(c) of Lease Deed.

E. The date of land being "Required by Lessor" as envisaged in Clause 3(c) of the Lease Deed, is the date of order of State of U.P./Lessor stipulating need of the land in question as necessary to be provided for State Government, itself, or for public purpose and directing District Magistrate to resume land in question.

F. Right of Resumption in accordance with Clause 3(c) of Lease Deed was not 'Anything Already Done' saved by Section 4 of Repeal Act, 2017.

G. The Right of Resumption in accordance with Clause 3(c) of Lease Deed was Neither a Right 'Already Accrued' nor a Right 'Already Acquired' in favour of State of U.P. which was saved by Section 4 of Repeal Act, 2017.

H. Right of Resumption in accordance with Clause 3 (c) of the Lease Deed does not stand saved by other proviso(s) of Section 4 of Repeal Act, 2017 and as such, Right of Resumption cannot be enforced by State of U.P. after repeal of GG Act, 1895 w.e.f. 05.1.2018.

I. The remaining rights and liabilities of Lessor and/ or Lessee, besides rights and liabilities already accrued or acquired or incurred in favour of Lessor/Lessees, prior to repeal of GG Act, 1895 w.e.f. 5.1.2018, shall be governed under common law including Transfer of Property Act, 1882 **(hereinafter referred to as "TP Act, 1882").**

15. Secondly, it is submitted that Clause-3(c) of lease deed is ultra vires of Constitution and cannot be enforced even if it is saved by Act, 2017 and on this aspect submissions are:-

A. Lease of Nazul Site No. GG/1, Civil Station, Allahabad was/ is given by the State of U.P. in favour of the Lessees for "Valuable Consideration".

B. The Clause 3(c) of lease deed is ultra-vires to Article 14 of Constitution of India.

C. The Clause 3(c) of the lease deed is ultra-vires to Article 300-A of Constitution of India.

D. The Clause 3(c) of lease deed may be struck down as being unconstitutional and ultra-vires to Articles 14 and 300-A, without effecting remaining lease deed.

16. Thirdly, it is submitted by Sri A.K.Singh, Advocate, that resumption notice issued by District Magistrate is defective, illegal, void and without jurisdiction. On this aspect, Sri Singh submitted:-

A. The alleged Public Purpose stated in the Resumption Notice dated 14.8.2018 is illegal, made up and not genuine. In fact has been concocted by concerned officials of State Government.

B. The concerned officials of State of U.P. have applied a pick-and-choose policy and decided to resume land in question in an arbitrary and malafide manner.

C. The Resumption Notice dated 14.8.2018 issued by District Magistrate, Allahabad is even otherwise defective, illegal, void and without jurisdiction.

17. On the contrary, learned counsel appearing for respondents submitted that rights and obligations of Lessees vis a vis disputed Nazul Land are governed by terms and conditions contained in lease deed; it specifically contains a condition conferring right upon Lessor to re-enter land at any point of time whenever it is required for 'public purpose' and Lessee is under an obligation to vacate the land on such exercise of right of re-entry exercised by Lessor; terms and conditions of lease deed shall prevail over any other statute and Repeal Act, 2017 does not affect aforesaid right of re-entry acquired by Lessor in terms of lease deed; and, it is not a contingent right, as contended by petitioners. He also submitted that terms and conditions of lease are strictly governed by lease-deed and it is not open to Lessee, having entered into agreement accepting all the terms and conditions, subsequently to choose some conditions and challenge other conditions. He further submitted that right exercised by Lessor in case in hand is strictly in accordance with conditions of lease and similar exercise of power has already been affirmed by this Court as well as Supreme Court in **Azim Ahmad Kazmi and Others Vs. State of U.P. and Others (supra).** He lastly contended that purpose for which lease has been acquired i.e. Parking place, Multi Purpose Open Space, Night Market and Amphitheater, is a 'public purpose' since land in question is situted in midst of Civil Lines area of Allahabad City where there is a huge problem of parking place. Therefore, Lessor has found it necessary to re-enter land exercising its right, which it had acquired in terms of lease-deed which was accepted and agreed by Lessees, who have enjoyed lease in terms of lease-deed for sufficiently long period.

18. We have heard Sri Ashish Kumar Singh, learned counsel for petitioners; Sri Ajit Kumar Singh, learned Additional Advocate General assisted by Sri Nimai Das, learned Additional Chief Standing Counsel for State of U.P. and its authorities; Sri Amit Verma and Sri Brijendra Kumar, Advocates for Prayagraj Development Authority; and Sri B.D.Pandey, Advocate, for respondent no.7.

19. Before entering upon adjudication of rival submissions and issues raised by parties, we find it appropriate to place certain dates and events in a chronological manner, which are admitted to parties and evident from record:

Sl.No.	Date	Events
1	12.12.1912/ 21.12.1912	With effect from 01.01.1909 a lease deed was executed by Secretary of State for India in Council in favour of Ram Charan Das for Nazul Plot No.GG/1, Civil Station, Allahabad area 2 Acres and 4723 Sq. Yards (14,403 Sq.Yards).
2.	----------	Period of lease was 50 years.
3.	----------	GG-2.

4.	31.12.1958	Lease expired.
5.	26.09.1991	Lease deed was executed with effect from 01.01.1959 for a period of 30 years by Governor through Collector, Allahabad in favour of Smt. Kaneez Fatima Beg, Mirza Amir Ullah Beg, Mirza Tariq Ullah Beg, Mirza Rashid Ullah Beg, Smt. Amina Razia Rafat Naz Begum, all resident on 23, New Benry Road, Lucknow, in respect of Nazul Plot No.GG/1, Civil Station, Allahabad area 1 Acre 4613 Sq.Yards. (9453 Sq.Yards).
6.	31.12.1988	Above lease expired. In effect lease deed **dated 26.09.1991** was executed in respect of period of 30 years commencing from 01.01.1959 and ended on 31.12.1988. This period had already expired on the date when the lease deed was executed.
7.	25.03.1996	Renewed lease deed was executed for a period of 30 years in respect of Nazul Land GG/1 Civil Station, Allahabad area 1 Acre 4613 Sq.Yard (Residential) (9553 Sq.Yards) with effect from 01.01.1990.
8.	.....	This deed was signed on behalf of Lessees by one Dinesh Kumar, holder of Power of Attorney of earlier Lessees.
9.	18.01.1999	Lessees issued nomination letter in favour of Smt. Usha Rani Gupta (petitioner-1) wife of R.P.Gupta, Partner Jagdish Housing Company, which says that Nominee may get lease land, freehold, in its own name and Lessees have no objection therein.
10.	29.01.1999	Petitioner-1 submitted application to Collector for freehold of land in dispute.
11.	14.08.2018	Impugned order of re-entry/resumption.

20. In the light of rival submissions, issues, which in our view required adjudication in this petition, are:

(i) What is Nazul ?

(ii) Whether lease of Nazul Land is governed by provisions of GG Act, 1895 or TP Act, 1882 or any other Statute and what is inter-relationship thereof?

(iii) Whether Lessee can transfer Nazul land itself to anyone or transfer, if any, made will result only transfer of lease rights or land itself; and, if transfer is not made in accordance with conditions of Indenture of Lease/Grant, what will be its effect and whether it will confer any valid right or interest on Nazul land, subjected to transfer, upon such Transferree?

(iv) Whether Repeal Act, 2017, whereby GG Act, 1895 has been repealed, has the effect of denying Lessor's right of re-entry provided in para 3(c) of lease deed?

(v) Whether Clause 3(c) is arbitrary, unreasonable and violative of Article 14 of Constitution?

(vi) Whether after repeal of GG Act, 1895 by Repeal Act, 2017, status of petitioners would be governed by TP Act, 1882?

(vii) Whether petitioner-1 on the basis of nomination by petitioners 2 to 5 is entitled for freehold of land in dispute and whether such right will override

Lessor's i.e. State Government's right of resumption?

(viii) Whether resumption of land in dispute is arbitrary and discriminatory on the ground that in many other cases, respondents have allowed conversion of lease rights into freehold but petitioners have been discriminated?

(ix) Whether resumption/ re-entry in question is valid and genuine?

(x) Whether re-entry over land in question will require compliance of procedure prescribed in U.P. Public Premises (Eviction of Unauthorised Occupants) Act, 1972 *(hereinafter referred to as "U.P. Act, 1972")*

21. Questions (i) and (ii), in our view, can be taken together.

22. Every land owned by State Government is not termed as 'Nazul' and therefore it has become necessary to understand, what is 'Nazul'.

23. State Government may own land by having acquired and vested in various ways, which includes vesting of land in the capacity of a Sovereign body and having right of bona vacantia. Property may also be acquired and owned by State by way of acquisition under the Statute relating to acquisition of land or by purchase through negotiation or gift by an individual or in similar other manners. All such land, which is owned and vested in State Government results in making the State owner of such land, but in legal parlance, the term "Nazul" is not applicable to all such land.

24. It is only such land which is owned and vested in the State on account of its capacity of Sovereign, and application of right of bona vacantia, which is covered by the term 'Nazul', as the term is known for the last more than one and half century.

25. In Legal Glossary 1992, fifth edition, published by Legal Department of Government of India, at page 589, meaning of the term 'Nazul' has been given as 'Rajbhoomi, i.e., Government land'.

26. Nazul is an Arabic word. It refers to a land annexed to Crown. During British Regime, immoveable property of individuals, Zamindars, Nawabs and Rajas when confiscated for one or the other reason, it was termed as 'Nazul property'. The reason being that neither it was acquired nor purchased after making payment. In old record, when such land was referred in Urdu, this kind of land was shown as 'Jaidad Munzabta'.

27. For dealing with such property, under the authority of Lt. Governor of North Western Provinces, two orders were issued in October, 1846 and October, 1848. Therein, after the words "Nazul property", its english meaning was given as 'Escheats to the Government'. Sadar Board of Revenue on May 20, 1845 issued a circular order in reference to "Nazul land" and in para 2 thereof it mentioned, "The Government is the proprietor of those land and no valid title to them can be derived but from the Government". Nazul land was also termed as "Confiscated Estate". Under Circular dated July 13, 1859, issued by Government of North Western Provinces, every Commissioner was obliged to keep a final confiscation statement of each District and lay it before Government for orders.

28. Right of King to take property by 'escheat' or as 'bona vacantia' was

recognized by common law of England. Escheat of property was Lord's right of re-entry on real property held by a tenant, dying intestate, without lawful heirs. It was an incident of Feudal Tenure and based on the want of a tenant to perform Feudal services. On the tenant dying intestate without leaving any lawful heir, his estate came to an end, and Lord, by his own right and not by way of succession or inheritance from the tenant, re-entered real property as Owner. In most cases, land escheated to Crown as the 'Lord Paramount', in view of gradual elimination of Intermediate or Mesne lords since 1290 AD. Crown takes as 'bona vacantia' goods in which no one else can claim property. In **Dyke v. Walford 5 Moore PC 434= 496-13 ER 557 (580)** it was said 'it is the right of the Crown to bona vacantia to property which has no other owner'. Right of the Crown to take as "bona vacantia" extends to personal property of every kind. The escheat of real property of an intestate dying without heirs was abolished in 1925 and Crown thereafter could not take such property as bona vacantia. The principle of acquisition of property by escheat, i.e., right of Government to take on property by 'escheat' or 'bona vacantia' for want of a rightful owner was enforced in Indian territory during the period of East India Company by virtue of Statute 16 and 17 Victoria, C. 95, section 27.

29. We may recollect, having gone through history, that prior to 1857, several Estates were taken over by British Company i.e. East India Company by way of annexation. Doctrine of lapse applied in Jhansi was another kind of above mentioned two principles.

30. The above provisions had continued by virtue of Section 54 of Government of India Act, 1858, section 20(3)(iii) of Government of India Act, 1915 and section 174 of Government of India Act, 1935. After enactment of Constitution of independent India, Article 296 now continues above provision and says:

"Subject as hereinafter provided, ***any property in the territory of India which,*** *if this Constitution had not come into operation,* ***would have accrued to His Majesty or, as the case may be, to the Ruler of an Indian State by escheat or lapse, or as bona vacantia for want of a rightful owner, shall if it is property situate in a State, vest in such State,*** *and shall,* ***in any other case, vest in the Union."*** (Emphasis added)

31. Article 296, therefore, has retained power of State to get ownership of such land, in respect whereof principle of 'escheat', 'lapse' or 'bona vacantia' would have been applicable prior to enforcement of Constitution of India. The above power continued to apply after enactment of Constitution with the only modification that if such land is situate within the territory of State Government, it will vest in State and in other cases, it will vest in Union of India. Vesting of land and giving ownership to State Government or Union of India under Article 296 is clearly in respect of a land, which will come to it by way of 'escheat', 'lapse' or 'bona vacantia' and not by way of acquisition of land under some Statute or purchase etc.

32. In **Pierce Leslie and Co. Ltd. Vs. Miss Violet Ouchterlony Wapsnare, AIR 1969 SC 843,** Court has considered the above principle in the context of 'Sovereign India' as stands under Constitution after independence, and, has observed :

"....in this country the Government takes by escheat immoveable as well as moveable property for want of an heir or successor. In this country escheat is not based on artificial rules of common law and is not an incident of feudal tenure. ***It is an incident of sovereignty and rests on the principle of ultimate ownership by the State of all property within its jurisdiction".***

(Emphasis added)

33. Court also placed reliance on **Collector of Masulipatam v. C. Vencata Narainapah 8 MIA 500, 525; Ranee Sonet Kowar v. Mirza Himmut Bahadoor (2) LR 3 IA 92, 101, Bombay Dyeing and Manufacturing Co. Ltd. v. State of Bombay [1958] SCR 1122, 1146, Superintendent and, Legal Remembrancer v. Corporation of Calcutta [1967] 2 SCR 170.**

34. Judicial Committee in **Cook v. Sprigg (1899) AC 572** while discussing, 'what is an act of State', observed :

"The taking possession by Her Majesty, whether by cession or by any other means by which sovereignty can be acquired, was an act of State." (Emphasis added)

35. This decision has been followed in **Raja Rajinder Chand v. Mst. Sukhi, AIR 1957 SC 286.**

36. In **Nayak Vajesingji Joravarsingji v. Secretary of State for India in Council AIR 1924 PC 216,** Lord Dunedin said :

"When ***a territory is acquired by a sovereign State for the first time, that is an act of State.*** *It matters not how the acquisition has been brought about. It may be* ***by conquest, it may be by cession following on treaty, it may be by occupation of territory hitherto unoccupied by a recognised ruler. In all cases the result is the same.*** *Any inhabitant of the territory can make good in the municipal courts established by the new sovereign only such rights as that sovereign has, through his officers, recognised. Such* ***rights as he had under the rule of predecessors avail him nothing."*** (Emphasis added)

37. In **Dalmia Dadri Cement Co. Ltd. v. CIT [1958] 34 ITR 514 (SC) : AIR 1958 SC 816,** Court said (page 523 of 34 ITR) :

"The ***expression 'act of State'*** *is, it is scarcely necessary to say, not limited to hostile action between rulers resulting in the occupation of territories. It* ***includes all acquisitions of territory by a sovereign State for the first time, whether it be by conquest or cession."***

(Emphasis added)

38. In **Promod Chandra Deb v. State of Orissa AIR 1962 SC 1288,** Court said, 'Act of State' is the taking over of sovereign powers by a State in respect of territory which was not till then a part of its territory, either by conquest, treaty or cession, or otherwise.

39. To the same effect was the view taken by a Constitution Bench in **Amarsarjit Singh v. State of Punjab AIR 1962 SC 1305,** where in para 12, Court said:

"It is settled law that ***conquest is not the only mode by which one State can acquire sovereignty over the territories belonging to another*** *State, and that the* ***same result can be achieved in any other mode*** *which has* ***the effect of establishing its sovereignty."***

(Emphasis added)

40. In **Thakur Amar Singhji v. State of Rajasthan AIR 1955 SC 504,** in para 40, Court said :

*"The **status of a person must be either that of a sovereign or a subject.** There is no tedium quid. The law does not recognise an intermediate status of a person being partly a sovereign and partly a subject and when once it is admitted that the Bhomicharas had acknowledged the sovereignty of Jodhpur their status can only be that of a subject. **A subject might occupy an exalted position and enjoy special privileges, but he is none the less a subject..."***

(Emphasis added)

41. In **State of Rajasthan vs. Sajjanlal Panjawat AIR 1975 SC 706** it was held that Rulers of the erstwhile Indian States exercised sovereign powers, legislative, executive and judicial. Their firmans were laws which could not have been challenged prior to the Constitution. Court relied on earlier decisions in **Director of Endowments, Govt. of Hyderabad vs. Akram Ali, AIR 1956 SC 60, and Sarwarlal vs. State of Hyderabad, AIR 1960 SC 862.**

42. In **Promod Chandra Deb vs. State of Orissa AIR 1962 SC 1288 "**act of the State" was explained in the following words :

*"an "act of State" may be the taking over of sovereign powers either **by conquest** or **by treaty** or **by cession or otherwise.** It may have happened on a particular date by a public declaration or proclamation, or it may have been the result of a historical process spread over many years, and sovereign powers including the right to legislate in that territory and to administer it may be acquired without the territory itself merging in the new State."*

43. This decision has been followed later in **Biswambhar Singh vs. State of Orissa 1964 (1) SCJ 364** wherein Court said:

*"16. Thus, **a territory acquired by a sovereign State is an Act of State but the land comprising territory does not become the land owned by State.** The **land owned by State may come to it in various ways, like confiscation, purchase, escheat or bona vacantia, gift, etc.** In such a case the ownership vests in **State, like any other individual and State is free to deal with the same in a manner like any other owner may do so.***

*17. Thus **'Nazul' is a land vested in State for any reason whatsoever that is cession or escheat or bona vacantia, for want of rightful owner or for any other reasons and once land belong to State,** it will be difficult to assume that State would acquire its own land. It is per se impermissible to acquire such land by forcible acquisition under Act, 1894, since there is no question of any transfer of ownership from one person to another but here State already own it, hence there is no question of any acquisition."* (Emphasis added)

44. Thus the land in question which is admittedly 'Nazul', belonged to the category as discussed above i.e. it came to be vested and owned by State in its capacity of Sovereign and right of bona vacantia. When acquisition is made under the provisions of a Statute, purpose of acquisition is already known and State

pay its price but when land is owned by State, which is Nazul, objective of use of such land is not predetermined but it can be utilized by State for larger public welfare and its benefit, as necessitated from time to time. In other words 'Nazul' land forms the assets owned by State in trust for the people in general who are entitled for its user in the most fair and beneficial manner for their benefit. State cannot be allowed to distribute such largesse by pick and choose manner or to some selected groups, or in a whimsical manner etc.

45. Historical documents, record as also authorities discussed above show that earlier Government i.e. East India Company upto 1858 and thereafter British Government used to allot "Nazul land" to various persons, who had shown their alliance to such Government in various ways, sometimes by deceiving their Indian counter parts who had raised voice against British Rule, or those who remained faithful to British regime and helped them for their continuation in ruling this country and similar other reasons. Sometimes land was given on lease without any condition and sometimes restricted for certain period etc., but in every case, lease was given to those persons who were faithful and had shown complete alliance to British Rule. The reason was that in respect of Nazul, no predetermined objective was available as was the case in respect of land acquired by State by way of acquisition under Statute of Acquisition after paying compensation or purchase. Further allocation of Nazul land by English Rulers used to be called "Grant".

46. In other words, we can say that initially land owned by State used to be allotted in the form of 'Grant' by British Government. No specific statutory provisions were available to govern it. TP Act, 1882 was enacted to govern transfer of immovable property. Sections 10 - 12 of TP Act, 1882 made provisions invalidating, with certain exceptions, all conditions for forfeiture of transferred property on alienation by transferee and all limitations over consequence upon such alienation or any insolvency of or attempted alienation by him.

47. Apprehending that above provisions of TP Act, 1882, may be construed as a fetter upon discretion of Crown in creation of inalienable Jagirs in 'Grants', acting upon advice that it would not be competent for Crown to create an inalienable and impartible Estate in the land comprised in the Crown Grant, unless such land has heretofore descended by custom as an impartible Raj, it was sought to make a separate Statute to give supremacy to the provisions contained in Crown's Grant, notwithstanding any other law including TP Act, 1882. With this object, i.e., 'GG Act 1895' was enacted.

48. Preamble of GG Act, 1895 gives purpose of its enactment stating that doubts have arisen to the extent and operation of TP Act, 1882 and to the power of Crown (later substituted by word "Government") to impose limitations and restrictions upon grants and other transfers of land made by it or under its authority, hence to remove such doubts, GG Act, 1895 was enacted.

49. Section 2 of GG Act, 1895, as it was initially enacted, read as under :

"Transfer of Property Act, 1882, not to apply to Government grants.-

Nothing in the Transfer of Property Act, 1882, contained shall apply or be deemed ever to have applied to any grant or other transfer of land *or of any interest therein heretoforce made or hereafter to be made by or on behalf of Her Majesty the Queen Empress, Her heirs or successors, or by or on behalf of the Secretary of State for India in Council to, or in favour of, any person whomsoever;* ***but every such grant and transfer shall be construed and take effect as if the said Act had not been passed."*** (Emphasis added)

50. The above provision was amended in 1937 and 1950. The amended provision read as under :

"Transfer of Property Act, 1882, not to apply to Government grants.- ***Nothing in the Transfer of Property Act, 1882, contained shall apply or be deemed ever to have applied to any grant or*** *other* ***transfer of land or of any interest therein*** *heretoforce made or hereafter to be made by or on behalf of the Government to, or in favour of, any person whomsoever; but* ***every such grant and transfer shall be construed and take effect as if the said Act had not been passed."*** (Emphasis added)

51. Section 3 of GG Act, 1895 read as under :

"Government grants to take effect according to their tenor.- ***All provisions, restrictions, conditions and limitations*** *over* ***contained in any such grant*** *or* ***transfer*** *as aforesaid* ***shall be valid*** *and the effect according to their tenor,* ***any rule of law, statute or enactment of the Legislature to the contrary notwithstanding."***

(Emphasis added)

52. In State of Uttar Pradesh, vide Government Grants (U.P. Amendment) Act, 1960 (U.P. Act No.XIII of 1960), Sections 2 and 3 of GG Act, 1895, were substituted by Section 2, as under :

"2(1) Transfer of Property Act, 1882, not to apply to Government Grants.- ***Nothing contained in the Transfer of Property Act, 1882, shall apply*** *or* ***be deemed ever to have applied to any grant*** *or other transfer of land or of any interest therein, heretoforce made or hereafter to be made, by or on behalf of the Government to or in favour of any person whomsoever; and* ***every such grant and transfer shall be construed and take effect as if the said Act had not been passed."***

(2) U.P. Tenancy Act, 1939 and Agra Tenancy Act, 1926 not to affect certain leases made by or on behalf of the Government.- ***Nothing contained in the U.P. Tenancy Act, 1938, or the Agra Tenancy Act, 1926, shall affect,*** *or be* ***deemed to have ever affected any rights, created, conferred or granted,*** *whether before or after the date of the passing of the Government Grants (U.P. Amendment) Act, 1960,* ***by leases of land by,*** *or on behalf of, the Government in favour of any person; and* ***every such creation, conferment or grant shall be construed and take effect, notwithstanding anything to the contrary contained in the U.P. Tenancy Act, 1939, or the Agra Tenancy Act, 1926.***

(3) Certain leases made by or on behalf of the Government to take effect according to their tenor.- ***All provisions, restrictions, conditions and limitations*** *contained in any such creation, conferment or grant referred to in Section 2,* ***shall be valid*** *and* ***take effect***

according to their tenor, *any decree or direction of* ***a court of law or any rule of law, statute or enactment of the Legislature, to the contrary notwithstanding :***

Provided that nothing in this section shall prevent, or be deemed ever to have prevented, ***the effect of any enactment relating to the acquisition of property, land reforms or the imposition of ceiling on agricultural land."***
(Emphasis added)

53. A perusal of Section 2 of GG Act, 1895 shows two things :

i. A declaration is made that any grant or other transfer of land or of any interest therein, made by or on behalf of Government, in favour of any person, on and after enactment of GG Act, 1895, would not be governed by provisions of TP Act, 1882 i.e. nothing contained in TP Act, 1882 shall apply to such Grant, transfer or interest.

ii. A clarification that a Grant or Transfer, referred to in Section 2, when is to be construed and given effect, it shall be done in such manner and by treating as if TP Act, 1882 has not been passed.

54. Thus GG Act, 1895 in fact was a declaratory statute. The first declaration is in respect of Grant or transfer of land or creation of any interest, as the case may be, to exclude TP Act, 1882 for all purposes. Second part of Section 2 clarified that while construing and giving effect to a Grant or Transfer, referred to in Section 2, it will be presumed that TP Act, 1882 has not been passed at all.

55. In Section 2(1) of GG Act, 1895, as amended in Uttar Pradesh, we do not find any distinction vis a vis what has been said in Section 2 of GG Act, 1895. There is an addition in GG Act, 1895 in its application to Uttar Pradesh, by inserting sub-section (2) in Section 2, a provision in respect of U.P. Tenancy Act, 1939 and Agra Tenancy Act, 1926 also, making a similar declaration, as made in sub section (1) in respect of TP Act, 1882.

56. Sub-section (3) of Section 2 of GG Act, 1895 protect certain leases, already made, declaring the same to be valid in the light of insertion of sub-section(1) of Section 2 in the State of Uttar Pradesh and that is why, notwithstanding any decree or direction of Court of law, leases already made, were validated, which otherwise might have been affected by U.P. Tenancy Act, 1938 or Agra Tenancy Act, 1926.

57. Proviso to sub-section (3) of Section 2 of GG Act, 1895 further declares that all provisions of Section 2 of GG Act, 1895 will have no effect when land is sought to be acquired under the provisions of Statute relating to acquisition or for giving effect to a Statute relating to land reforms or imposition of ceiling on agricultural land.

58. Section 3 of GG Act, 1895 is not available in State of U.P. after U.P. Amendment Act, 1960 since Sections 2 and 3 of Principal Act virtually got amalgamated in the form of Section 2, by Government Grants (U.P. Amendment) Act, 1960. However, intent, effect and declaration by legislature is almost pari materia with the only addition that in State of U.P., U.P. Tenancy Act, 1939 and Agra Tenancy Act, 1926 are also excluded in the same manner as was done in respect of TP Act, 1882.

59. Sections 2 and 3 of GG Act, 1895 were considered in **State of U.P. vs. Zahoor Ahmad, 1973(2) SCC 547** and in para 16, Court said:

*"**Section 3** of the Government Grants Act **declares the unfettered discretion of the Government to impose such conditions and limitations as it thinks fit, no matter what the general law of the land be.** The meaning of Sections 2 and 3 of the Government Grants is that the scope of that Act is not limited to affecting the provisions of the Transfer of Property Act only. The **Government has unfettered discretion to impose any conditions, limitations, or restrictions in its grants, and the right, privileges and obligations of the grantee would be regulated according to the terms of the grant, notwithstanding any provisions of any statutory or common law."***
(Emphasis added)

60. Again in **Hajee S.V.M. Mohamed Jamaludeen Bros. & Co. vs. Government of Tamil Nadu (1997) 3 SCC 466,** Court said that combined effect of two sections of GG Act, 1895 is that terms of any Grant or terms of any transfer of land made by a Government would stand insulated from tentacles of any statutory law. Section 3 places terms of such Grant beyond reach of restrictive provision contained in any enacted law or even equitable principles of justice, equity and good conscience adumbrated by common law, if such principles are inconsistent with such terms. Court said :

*"The two provisions are so framed as to **confer unfettered discretion on the government to enforce any condition or limitation or restriction in all types of grants made by the government to any person.** In other words, the rights, privileges and obligations of any grantee of the government would be **completely regulated by the terms of the grant, even if such terms are inconsistent with the provisions of any other law."***
(Emphasis added)

61. In **Azim Ahmad Kazmi and others vs. State of U.P. and Another (supra)** observations made in para 16 in **State of U.P. vs. Zahoor Ahmad (supra)** have been reproduced and followed.

62. In **State of U.P. and others vs. United Bank of India and others (2016) 2 SCC 757,** in para 30 of the judgment, Court said :

*"Indisputably, the lease of nazul land is governed by the Government Grants Act, 1895. Sections 2 and 3 of the Government Grants Act, 1895 very specifically provide that the **provisions of the Transfer of Property Act do not apply to government lands ....."*** (Emphasis added)

63. Thus, a 'Grant' of a Nazul will be governed by terms and conditions contained in the instrument/deed of Grant, wholly unaffected by any Statute providing otherwise.

64. It neither can be doubted nor actually so urged by petitioners that the lease granted in the case in hand is/was a 'Grant' governed by GG Act, 1895.

65. Broadly, 'Grant' includes 'lease'. In other words, where 'Nazul' is let out to a person by Government under agreement of lease i.e. Grant, it is governed by GG Act, 1895 and rights of parties therefore have to be seen in the light of stipulations

contained in the document of 'Grant'. 'Grant' includes a property transferred on lease though in some cases, 'Grant' may result in wider interest i.e. transfer of title etc. Whatever may be nature of document of transfer i.e. instrument of 'Grant', the fact remains that terms and conditions of 'Grant' shall be governed by such document and it shall prevail over any other law including TP Act 1882. One cannot take resort to TP Act, 1882 to wriggle out of any condition or limitation etc. imposed in terms of document of 'Grant'.

66. In the State of Uttar Pradesh, management of 'Nazul', in absence of statutory provisions, is governed by various administrative orders compiled in a Manual called "Nazul Manual". Here Government has made provisions of management of 'Nazul' through its own authorities namely District Magistrate or Commissioner, or, in some cases, through local bodies.

67. Nature of orders compiled in "Nazul Manual" in the context of 'Nazul' have been considered recently in **State of U.P. vs. United Bank of India (supra)** where Court has said that land and building in question is "Nazul", being property of Government, maintained by State authorities in accordance with 'Nazul Rules' but not administered as a 'State property'. Court has also observed that lease of "Nazul" land is governed in accordance with GG Act, 1895. Sections 2 and 3 thereto very specifically provide that provisions of TP Act, 1882 do not apply to Government land. Section 3 says that all provisions, restrictions, conditions and limitations contained in any such 'Grant' or 'Transfer', as aforesaid, shall be valid and take effect according to their tenor, any rule of law statute or enactment of the Legislature to the contrary, notwithstanding. Thus stipulations in "lease deed" shall prevail and govern the entire relation of State Government and lessee.

68. In **Pradeep Oil Corporation vs. Municipal Corporation of Delhi and others (2011) 5 SCC 270,** Court said that GG Act, 1895 is a special Statute and will prevail over general Statute i.e. TP Act, 1882. It says:

*"In the **present case grant has been made by the President of India in terms of Section 2 of the Government Grants Act, 1895 and the Transfer of Property Act, 1882 may have little bearing in the instant case. The former,** i.e. the Government Grants Act, 1895 being a special statute would **prevail over the general statute, i.e. the Transfer of Property Act, 1882.** Accordingly, the rights and obligations of the parties would be governed by the terms of the provisions of Government Grants Act, 1895 whereunder the **Government is entitled to impose limitations and restrictions upon the grants and other transfer made by it or under its authority."*** (Emphasis added)

69. Superiority of the stipulations of Grant to deal the relations between Grantor and Grantee has been reinforced in **Azim Ahmad Kazmi and others (Supra).** Therein dispute related to Plot No. 59, Civil Station, Allahabad, area 1 acre and 4272 sq. yard, i.e., 9112 sq. yard or 7618 sq. meter. Initially a lease deed was executed on 11.01.1868 by Secretary of State for India in Council, in favour of one, Thomas Crowby, for a period of 50 years and it was signed by Commissioner,

Allahabad Division on behalf of Secretary of State for India in Council. After expiry of lease, a fresh lease was executed for another period of 50 years on 12.04.1923 w.e.f. 01.01.1918. Lease holder with permission of Collector, Allahabad transferred lease rights to Purshottam Das in 1945. The legal heirs of Sri Purshottam Das, on 31.10.1958, transferred leasehold rights in favour of Smt. Shakira Khatoon Kazmi, Smt. Sabira Khatoon Kazmi and Smt. Maimoona Khatoon Kazmi. After the death of Smt. Maimoona Khatoon Kazmi, her legal heirs, namely, Azim Ahmad Kazmi, Omar Ahmad Kazmi, Shamim Ahmad Kazmi, Alim Ahmad Kazmi and Maaz Ahmad Kazmi also claimed lease rights by succession. Lease granted on 12.04.1923 w.e.f. 01.01.1918 expired on 31.12.1967. It was renewed on 19.03.1996 for a period of 30 years w.e.f. 01.01.1968 which period expired on 31.12.1997. Again on 17.07.1998 it was renewed for a further period of 30 years w.e.f. 01.01.1998. While lease was continuing, vide Government Order dated 15.12.2000, right of resumption was exercised by State Government. It directed resumption of possession of plot in question and lease deed was cancelled. District Magistrate, Allahabad served a notice dated 11.01.2001 to lease holders intimating them that State Government's order dated 15.12.2000 has cancelled lease and resumed possession of land in question, as the same was required for public purpose. Notice also directed lease holders to remove structures standing on plot, failing which possession would be taken in accordance with Clause 3(c) of lease deed. Lease holders filed objections against notice to District Magistrate and also stated that they have sent representation/ objection to Chief Minister praying for revocation of Government Order dated 15.12.2000. District Magistrate passed order on 24.08.2001 rejecting objection of lease holders and sent a cheque of Rs. 10 lacs representing compensation for the building standing over plot. State authorities claimed that they took possession of open land on 01.09.2001. Lease holders filed writ petition which was dismissed vide judgment dated 07.12.2001, **Shakira Khatoon Kazmi vs. State of U.P., AIR 2002 All 101.** Lease holders challenged judgment dated 07.12.2001 in Supreme Court to the extent they failed. State Government filed appeal against part of order of this Court wherein an observation was made that State Government is not entitled to take forcible possession though it may take possession of demised premises in accordance with procedure established by law. After considering Clause 3(c) of lease deed which provides for resumption of land for public purpose after giving a month's clear notice to lessee to remove any building standing at the time on demised premises and within two months of receipt of notice, to take possession thereof on expiry of that period, and Sections 2 and 3 of GG Act, 1895, Court said that Clause 3(c) of lease deed confers power upon State Government that plot in question, if required by Government for its own purpose or for any public purpose, it shall have the right to give one month's notice in writing to lessees to remove any building standing on the plot and to take possession thereof on expiry of two months from the date of service of notice. Court said that land, if required for any public purpose, State Government has absolute power to resume leased property. Under the terms of Grant, it is absolute, therefore, order of resumption is perfectly valid and cannot be said to be illegal. It

also refers to an earlier instance where Nazul Plot No. 13, Civil Station, Allahabad situate in Civil Lines area was resumed by State Government for the purpose of construction of a 'Bus Stand' by exercising similar power, without initiating any proceeding under Land Acquisition Act, 1894 *(hereinafter referred to as "L.A. Act, 1894")*. Resumption in that case was challenged in **Writ Petition No. 44517 of 1998, Sayed Shah Khursheed Ahmad Kashmi vs. State of U.P. and said writ petition was dismissed on 16.12.1999** by a Division Bench of this Court, whereagainst Special Leave Petition No. 4329 of 2000 was dismissed by Supreme Court on 07.09.2001. First question, therefore, was answered in negative and in favour of Government.

70. With respect to procedure for taking possession, Supreme Court, while considering Question-2, said that in absence of any specific law, State Government may take possession by filing a suit. When a land is acquired under L.A. Act, 1894, Government can take possession in accordance with provisions of said Act and in case of urgency, Collector can take possession after publication of notice under Section 9 and no separate procedure is required to be followed. Court said that similarly where a lease has been granted under the terms of GG Act, 1895, then what procedure has to be followed is provided by Section 3 of GG Act, 1895 which says that all provisions, restrictions, conditions and limitations contained in any such creation, conferment or Grant referred to in Section 2, shall be valid and take effect according to their tenor; any decree or direction of a Court of Law or any rule of law, statute or enactments of the Legislature, to the contrary notwithstanding. Court relied on its earlier judgment in **State of U.P. vs. Zahoor Ahmad, 1973(2) SCC 547** holding that Section 3 of GG Act, 1895 declares unfettered discretion of Government to impose such conditions and limitation as it thinks fit, no matter what the general law of land be. Then Court construing Clause 3(C) of lease deed said that it provides procedure for taking possession of demised premises when State Government re-enter or resume possession of demised land. Court in para 30 and 32 of judgment said:

*"30. In the case of **The State of U.P. vs. Zahoor Ahmad and Another, 1973(2) SCC 547,** this Court held that the Section 3 of the Act declares the unfettered discretion of the Government to impose such conditions and limitation as it thinks fit, no matter what the general law of land be. From Clause 3(C) of the deed, it is clear that the **State of U.P. while granting lease made it clear that if the demised premises are at any time required by the lessor for his or for any public purpose, he shall have the right to give one month's clear notice to the lessee to remove any building standing at the time of the demised property and within two months' of the receipt of the notice to take possession thereof on the expiry of that period** subject to the condition that the lessor is willing to purchase the property on the demised premises, the lessee shall be paid for such amount as may be determined by the Secretary to the Government of U.P. in the Nagar Awas Department."*

"32. Under Clause 3(C) of the lease deed, the respondent-State was permitted resumption of the land which required for its own use or for public

purpose and after giving one month's clear notice in writing is entitled to remove any building standing at the time on the demised premises and within two months of the receipt of the notice to take possession thereof subject to the condition that if the lessor is willing to purchase the building of the demised premises required to pay the lessee the amount for such building as may be determined by the Secretary to Government of U.P. in the Nagar Awas Department...."

(Emphasis added)

71. Having said so, Court said :

"we are of the view that there is no other procedure or law required to be followed, as a ***special procedure for resumption of land has been laid down under the lease deed.****"* (Emphasis added).

72. Supreme Court then set aside direction of this Court that State will not take possession forcibly except in accordance with procedure established by any other law, holding that since special procedure for resumption is prescribed under lease deed, no direction otherwise could have been issued to State Government.

73. The above discussion makes it clear that 'Nazul' is a land owned and vested in State. It is such land which has vested in State by virtue of its 'Sovereignty' and incidence of 'Sovereignty' i.e. annexation, lapse and bona vacantia. Further, 'Grant' means transfer of property by a deed in writing and includes within its ambit, an instrument of lease/lease deed. Such 'Grant' is governed by provision of GG Act, 1895, which were applicable to 'Grants' executed on and after enforcement of GG Act, 1895 and rights and entitlement of private parties in respect of land, which was transferred under such 'Grant' would be governed by terms and conditions contained in such 'Grant' and not by provisions of TP Act, 1882 or any other Statute. The terms and conditions of 'Grant' shall override any statute providing otherwise. Moreover, in State of U.P., wherever applicable, U.P. Tenancy Act, 1939 and Agra Tenancy Act, 1926 will also be inapplicable to such 'Grant'.

74. Above discussion, therefore, leaves no manner of doubt that Grant/Lease of Nazul land shall be exclusively governed by stipulations/conditions/terms contained in Grant/Indenture of Lease and no Statute can be resorted to govern rights of parties over Nazul land, which will be governed by aforesaid Grant/Indenture of Lease.

75. We, therefore, answer **questions (i) and (ii)** accordingly and hold that Nazul is land owned by Government having vested by escheat, bona vacantia or lapse. Further the terms and conditions of 'Grant' a Nazul would govern relation of lessor and lessee and any other statute providing otherwise has no application.

76. Now coming to **question (iii)**, we have already reproduced contents of lease deed construing terms and conditions to govern land in dispute. In every aspect, some restrictions had been imposed upon Lessee, which relate to any change or transfer etc. with regard to Nazul Land in question. Some of such instances are :

(I) Without written consent of Collector, Lessee shall not alter or vary

any part of external elevation or plan of dwelling house and out buildings from the original elevation or plan thereof.

(II) Without consent of Collector, Allahabad, Lessee shall not erect any building or out-buildings on the demised premises.

(III) Without consent in writing of Collector, Lessee neither shall carry on nor permit to be carried on upon the said premises any trade or business whatsoever or use the land in dispute for purpose other than private dwelling.

(IV) If lease rent fell due for the space of one calender month whether demanded or not, it shall be treated breach or non-observance of any of the covenants by Lessees then Lessor may notwithstanding the waiver of any cause or right of re-entry, re-enter upon the said premises and expel the Lessees and all occupiers of the same therefrom and this demise shall absolutely determine and Lessees shall forfeit all rights to remove or recover any compensation for any buildings erected. Lessee shall also forfeit instalments of premium already paid to the Lessor.

(V) If Lessor required demised premises at any time for public purposes, shall have right to give one month's clear notice in writing to Lessee to remove any buildings standing on the lease land and within tow months of receipt of such notice, Lessor shall be entitled to take possession. If Lessor is willing to purchase buildings on the demised land in case of re-entry, Lessee shall be paid such amount for the building, as may be determined by Secretary to Government, in Nagar Awas Department.

(VI) Lessee will not in any way sub-divide or transfer the demised land or building without previous sanction in writing of U.P. Government.

(VII) Any transfer or alienation made in contravention of conditions contained in para 3(e) shall be void.

77. Above stipulations makes it very clear that no transfer of land in any manner without sanction of Lessor is permissible and any such transaction is void. A similar aspect has been considered in **State of U.P. and others vs. United Bank of India and others (supra).** Court has held that any transfer without sanction of Lessor will be void and would not confer any valid right upon Transferee. In paras 39 and 40 of judgment, Court said :

"39. This "within written lease" is the original lease deed as mentioned in the Form 2 of the Nazul Manual. Form 2 of lease of Nazul land for building purposes it is one of the condition between the lessor and the lessee that " the l ***essee will not in any way transfer or sublet the demised premises or buildings erected thereon without the previous sanction in writing of the lessor.***

40. In the present case ***there was nothing on the record to show that the lessee i.e. (ABP) has obtained any written sanction from the lessor i.e. Government before mortgaging his leasehold interest in the Nazul Land. Meaning thereby the mortgage done by the lessee in favour of the Bank itself is bad in law, which was done in clear violation of the terms of the lease deed i.e. mortgage of the Nazul land without previous sanction in writing of the State."*** (Emphasis added)

78. It shows that Lessee has no right to transfer leased Nazul Land without prior permission. Meaning thereby, unless

conditions are satisfied, Lesses had no right of transfer of interest at all. Therefore, any transfer in violation thereof will not result in creating any right or interest to the Transferee since Transferor himself has nothing which he can transfer at his own.

79. Here, we remind ourselves with the principle that a person can transfer only such rights and interest which he or she possesses and not beyond that. If a Sub-Grantor did not possess any right of transfer or such right is subject to any restriction like prior permission of owner etc., it means that Sub-Grantor himself has no right of transfer and/or his right is restricted in a particular manner and such restriction is to be observed in words and spirit to validate such transfer, else transfer being illegal, will not result in bestowing any legal right upon Transferee. In other words, any otherwise transfer by Sub-Grantor, of land subjected to Grant, will not confer any valid right or interest upon the person to whom Grantee had transferred property under 'Grant' in violation of stipulations contained in Grant.

80. In **Delhi Development Authority Vs. Anant Raj Agencies Pvt. Ltd. (2016) 11 SCC 406** Court said :

"It is well settled position of law that the person having no right, title or interest in the property cannot transfer the same by way of sale deed."

81. Further, any such invalid transfer can also be construed as breach of terms of Grant and would empower and enable principal Grantor i.e. State, owner of property, to take such steps including resumption/re-entry to the property under Grant, to itself, besides claiming damages, compensation, as the case may be, as law permits.

82. In this case also there is a transfer made by respondents 2 to 5 (Lessees) in favour of petitioner-1 in the form of 'nomination'. Here nomination is not like giving Power of Attorney but here lease rights and interest possessed by petitioners 2 to 5 have been surrendered and assigned to petitioner-1 authorizing and entitling him to get land itself transferred in his name by conversion of leasehold rights into freehold. This nomination has the result of transfer of rights in immovable property possessed by petitioners 2 to 5 as lease-holders and therefore, it amounts to transfer of lease rights in land in dispute, in favour of petitioner -1 by petitioners 2 to 5 but without any permission of Lessor, which is one of the conditions of lease-deed. Therefore, this transfer by way of nomination is illegal.

83. As we have already said that in the case of **State of U.P. and others vs. United Bank of India and others (supra),** Supreme Court has clearly held that if transfer is made without permission, as required in lease-deed, such transfer would be illegal, void and would not confer any right or interest upon Transferree in respect of land concerned. We, therefore, hold aforesaid nomination creating any right in favour of petitioner-1 patently illegal.

84. Here we may also stress that alleged nomination in fact is an assignment and transfer of right and interest in immovable property from one person to another, but, document is unregistered and whether it is valid

document and admissible in evidence, is another question, which for the time being we are leaving it open as it is unnecessary to go into this question in the present case and this aspect may be examined whenever any occasion arise.

85. **Question (iii),** is therefore answered accordingly and against petitioners.

86. Now coming to **question (iv)**; at the pain of repetition, para 3(c) of lease deed dated 26.09.1991 is again reproduced :

"That, ***if the demised premises are at any time required by the lessor for his or for any public purpose he shall have the right to give one month's clear notice in writing to the lessees to remove any buildings standing at the time on the demised premises and within two months of the receipt of the notice to take possession thereof*** *on the expiry of that period subject however to the condition that if the Lessor is willing to purchase the buildings on the demised premises, the Lessees shall be paid for such buildings such amount as may be determined by the Secretary to Government, U.P. in Nagar Awas Department."* (Emphasis added)

87. The renewal lease-deed dated 25.03.1996 in para 1 clearly mentions that earlier terms and conditions of lease shall continue to apply. Paras 1 and 2 of lease deed dated 25.03.1996 read as under :

''1– पट्टादाता उस सब भूखण्ड को तथा उस पर निर्मित समस्त दाय योग्य सम्पत्ति को जो पूर्व लिखित पट्टे में सम्मिलित तथा उसके द्वारा हस्तान्तरित थी, उन्हीं अपवादों तथा संरक्षणों सहित जिसके अन्तर्गत पट्टेदार भूखण्ड का अधिकारी था, ***दिनांक 1.1.1990 से 30 वर्ष के लिए एतद्द्वारा हस्तान्तरित करत` है ;*** *किन्तु शर्त यह है कि वह उन्हीं दिनों पर और उसी ढंग से रूपया 492.78 पैसा का वार्षिक किराया देता रहेगा। ;इस हस्तान्तरण के अधीन भुगतान किया जा चुका है और यह भी शर्त है कि पट्टेदार तथा पट्टादाता के कमानुसार सम्नुबन्धों से तथा सब प्रकार के ऐसे ही* ***द ूसर` उपबन्धा` तथा प्रतिबन्धा` से ;जिसम` पुनः प्रव`श सम्बन्धी उपबन्ध सम्मिलित है ं द्ध जा` प्रथम लिखित पट्ट` म` दिय` गय` है ं वह बाध्य हा`गा और उनके लाभ। भ ी उसे प्राप्त हा`ग`।***

2– इस पट्टे द्वारा उत्पन्न दायित्व को एतद्द्वारा स्वीकृत अवधि में वहन करने के लिए और इस सम्पत्ति से सम्बन्धित अपने–अपने उत्तराधिकारियों को उसके बन्धन ग्रस्त करने के लिए पट्टादाता और पट्टेदार परस्पर यह प्रतिज्ञा करते हैं तथा यह निश्चित करते हैं कि ***प्रथम लिखित पट्ट` म` अभि व्यक्त*** *सम्नुबन्धा` उपबन्धा` और शता` का उसी प्रकार प ूण ा तया निष्पादन एव ं पालन कर`ग`, जैसे कि उन्ही ं अनुबन्धा`, उपबन्धा` और शता` की इस विलेख म` ए`से परिष्करा` सहित पुनरावृत्ति की गयी हा` जा` कि उन्ह` इस हस्तान्तरण पर लागू करन` के लिए आवश्यक है, और जैसे कि इस पट्टे के दोनों पक्षों के नाम उपर्युक्त लिखित पट्टे के पक्षों के नामों के स्थान में लिख दिये गये हैं।''*

"1- The lessor hereby transfers all the plots and all the inheritable property constructed thereon, which were mentioned in the previous written lease and were thereby transferable, to the lessee ***on 01.01.1990 for 30*** *years with the same exceptions and protections, under which the lease holder had entitlement to the plot; but the condition is that he would keep paying the annual rent of Rs. 492.78 in the same manner on the same days. {The payment has been made under this transfer and it is also a condition that he shall be bound by the terms and* ***such other provisions and conditions (which includes re-entry provision) that are mentioned in the written lease, and shall also have all the benefits there-from.}***

2- The lessor and the lease-holder, for the purpose of bearing the

liability arisen out of the lease during the approved period, and also for ensuring their respective successors to this property to be bound therefore, hereby pledge and settle together that ***they shall comply with the terms, conditions and provisions expressed in the first written lease as though such terms, conditions and provisions have been reiterated with such modifications as are necessary for the execution of this transfer deed,*** *and as though the names of both the parties are written in place of the parties mentioned in the aforesaid written lease."* (Emphasis added)

(English Translation by Court)

88. Now, we may examine whether State could have exercised right of re-entry under Clause 3(c) or not.

89. On this aspect it is not in dispute that GG Act, 1895 has been repealed by Repeal Act, 2017 with effect from 05.01.2018, when the aforesaid Act was enforced. However, Section 4 thereof provide certain Savings and it reads as under :

*"**4. Savings.**- The repeal by this Act of any enactment shall not affect any other enactment in which the repealed enactment has been applied, incorporated or referred to;*

and this Act shall not affect the validity, invalidity, ***effect or consequences or anything already done or suffered,*** *or* ***any right,*** *title,* ***obligation*** *or* ***liability*** *already* ***acquired, accrued*** *or* ***incurred,*** *or any remedy or proceeding in respect thereof, or any release or discharge of or from any debt, penalty, obligation, liability, claim or demand, or any indemnity already granted, or the proof of any past act or thing;*

nor shall this Act affect any principle or rule of law, or established jurisdiction, form or course of pleading, practice or procedure, or existing usage, custom, privilege, restriction, exemption, office or appointment, notwithstanding that the same respectively may have been in any manner affirmed or recognized or derived by, in or from any enactment hereby repealed;

nor shall the repeal by this Act of any enactment revive or restore any jurisdiction, office, custom, liability, right, tittle, privilege, restriction, exemption, usage, practice, procedure or other matter or thing not now existing or in force."

90. Counsel for petitioners placed reliance on **Mohamadhusen Abdulrahim Kalota Shaikh Vs. Union of India (2009) 2 SCC 1 (Paras 36, 37)** wherein Court has held that Parliament in its plenary power, can make an outright repeal which will not only destroy effectiveness of Repealed Act in future but also operate to destroy all existing inchoate rights and pending proceedings. This is because effect of repealing a Statute is to obliterate it completely from the record, except to the extent of savings.

91. Aforesaid law is well established and we are bound by aforesaid precedent. It also cannot be disputed that while competent legislature possesses power to repeal an enactment, it also possesses power to save certain transactions, proceedings etc. and this power of saving is also recognized in **Mohamadhusen Abdulrahim Kalota Shaikh Vs. Union of India (supra).**

92. We also do not dispute to the proposition that Saving provision to the extent deeming fiction is provided, while saving would strictly provide such saving and nothing more than that. However, contention of counsel for petitioner that in view of repeal of GG Act, 1895, entire lease deed executed stands obliterated is wholly incorrect. It shows lack of appreciation of GG Act, 1895.

93. GG Act, 1895, as we have already discussed above, shows that it was a declaratory statute and enacted so as to declare that terms and conditions of Grant shall prevail and override any other Statute providing to the contrary. 'Lease' itself was not executed under the said Act nor the said Act itself contemplate and provided for execution of any lease or Grant in common law rights exercised by lessor and lessee. GG Act, 1895 only declares that provisions of such lease i.e. Grant by Government would govern by terms of such lease and prevail over other statute and TP Act, 1882 will be treated as if not enacted. Contention, therefore, that entire lease stand obliterated amounts to cutting the tree over which Lessee is sitting and enjoying benefit of lease.

94. It is next submitted that the only thing saved is 'vested right of Lessor and Lessee', specifically, by Section 4 of Repeal Act, 2017. We find that no specific right, obligation etc. has been saved by Section 4 of Repeal Act, 2017 but saving is in respect of incidence of certain actions namely effect and consequence of anything done or suffered or any right, title, obligation or liability already acquired, accrued or incurred.

95. Much labour has been done by learned counsel for petitioner on explaining meaning of words 'accrued', 'acquired' and 'incurred'. He has read word 'accrued' with the term 'right' and has laboured to read 'right of re-entry' as 'contingent right' but we find above submission thoroughly misconceived and an attempt to misread terms and consequences of document of lease.

96. In **Black's Law Dictionary, Eighth Edition,** words 'accrue', 'acquire' and 'incur' have been defined, as under:

"accrue. 1. To come into existence as an enforceable claim or right."

"acquired-rights doctrine. The principle that once a right has vested, it may not be reduced by later legislation."

"incur. To suffer or bring on oneself (a liability or expense)."

97. In **Words and Phrases legally defined, Volume-2 D-J**, at page 418, word 'incur' has been defined, as under:

*"**Incur- Canada** [Paragraphs 35(d) and (e) of the Interpretation Act, RSC 1970, c 1-3 state that where an enactment is repealed the repeal does not 'affect . . . any penalty, forfeiture or punishment incurred under the enactment so repealed' or 'affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment' and the investigation, legal proceeding or remedy may be instituted, continued or enforced and the penalty, forfeiture or punishment may be imposed as if the enactment had not been so repealed.] 'The Shorter Oxford English Dictionary includes the following: "become liable or subject to; bring upon oneself" I rely upon these definitions and*

treat the word "incur" in s 35 of the Interpretation Act as being synonymous with "liable to" or "subject to". R v Allan (1979) 45 CCC (2d) 524 at 529, 530, Ont CA, per Lacourciere JA

New Zealand *[Expenditure 'incurred' is deducible from assessable income in terms of s 121 of the Land and Income Tax Act 1954.] 'A deduction may be allowed under that section in respect of "expenditure incurred" although there has been no actual disbursement if, in the relevant income year, the taxpayer is definitely committed to that expenditure.' King v Inland Revenue Comr [1974] 2 NZLR 190, per Wild CJ"*

98. In **P. Ramanatha Aiyar's The Law Lexicon, 2nd Edition, Reprint 2007,** meaning of words 'accrued', 'acquired', and 'incurred' has been defined as under :

"Accrue means to arise (as) cause of action accruing ; to grow ; or to be added to (as) accruing rent, accruing debt, accruing dividend. In the past tense the word "accrued" is used in the sense of due and payable ; vested ; and existed (as, rights accrued).

...

In past tense, in sense of due and payable ; vested. It means to increase ; to augment ; to come to by way of increase ; to be added as an increase, profit, or damage. Acquired ; falling due ; made or executed ; matured ; occurred ; received ; vested ; was created ; was incurred."

"Acquire. 'A Person who acquires a thing or property gets the right of ownership for the first time from some one else."

"incur. To become subject to or liable for by act or operation of law.

...

Incur. The word 'incur' is an inappropriate one, in connection with the word 'obligation,' if the latter word is limited to a case of contract. Men contract debts. They incur liabilities. In the one case they act affirmatively. In the other the liability is incurred or cast upon them by act or operation of law.

...

Incur. To entail; to become liable or subject to."

99. In **Cambridge International Dictionary of English,** words 'accrue', 'acquire' and 'incur' have been defined, as under:

"accrue-to increase in number or amount over a period of time..."

"acquire- to obtain (something). He acquired the firm in 1978. I was wearing a newly/recently acquired jacket. I seem to have acquired(=obtained by unknown means) two copies of this book. I acquired (=learnt) a little Spanish while I was in Peru. During this period he acquired a reputation for being a womanizer. She's acquired some very unpleasant habits recently. This wine is rather an acquired taste. (-Many people dislike it at first, but they gradually start to like it after they have tried it a few times.)

"incur. (of a person, group, etc.) to experience (esp. something unpleasant) as a result of actions they have taken. It's a long term investment, so you might expect to incur light losses in the early years. This production of the play has incurred the wrath/anger of both audiences and critics. Please detail any

costs/expenses incurred by you in attending the interview."

100. In Oxford English-English-Hindi Dictionary, words 'accrue', 'acquire' and 'incur' have been defined, as under:

"accrue- accrue (to sb) (from sth) to increase over a period of time; interest accruing to savers from their bank accounts; to allow a sum of money to debts to grow over a period of time."

"acquire- to obtain or buy; The company has acquired shares in a rival business.

"incur. To suffer the unpleasant results of a situation that you have caused." (Emphasis added)

101. In Collins Cobuild Advanced Learner's English Dictionary, words 'accrue', 'acquire' and 'incur' as defined, as under:

"accrue- If money or interest accrues or if you accrue it, it gradually increases in amount over a period of time."

"acquire- If you acquire something, you buy or obtain it for yourself, or someone gives it to you.

"incur. If you incur something unpleasant, it happens to you because of something you have done." (Emphasis added)

102. He has also laboured on the aspect that terms of lease and rights and obligations of parties, particularly with regard to re-entry, are not something which are already done or suffered.

103. In our view, Section 4 of Repeal Act, 2017 is very clear and need not much discussion for the reason that lease deed has been executed between the parties and being a Grant, admittedly, it was governed by provisions of GG Act, 1895. Lessor had widest power to impose such conditions in lease deed as it thinks fit and they have to override any other Statute and that is an act done when deed was executed between the parties. Therefore, all the terms and conditions of lease deed creating any obligation, right, duty, liberty etc. of parties are such, which have already been suffered or incurred. Lessor acquired right of re-entry and Lessee incurred duty to comply it whenever he is required to do so. Meaning thereby, parties have agreed to abide by those terms and conditions; and to regulate their relationship with respect to demised land with those terms and conditions. Lessee has suffered a condition of lease that Lessor shall have right of re-entry whenever land is required for 'public purpose', it can resume the land. This is a consequence, which has already incurred due to execution of lease-deed. Right of re-entry whenever land is required for 'public purpose' stand acquired by Lessor when lease deed was executed and those has been saved by Section 4 of Repeal Act, 2017.

104. Various authorities relied by learned counsel for petitioners to show what is 'act done' or what is a 'contingent right' etc., are not applicable in the case in hand. In our view, Section 4 of Repeal Act, 2017 very categorically and exclusively has saved all the rights, obligations, duties etc. of the parties including Lessor's right of re-entry under Clause 3(c) over the demised land.

105. We, therefore, answer **question (iv)** accordingly and against petitioners.

106. **Question (v),** relates to submission of learned counsel for

petitioner that Clause 3(c) is arbitrary and unreasonable, hence violative of Article 14 of Constitution.

107. An act of entering into an agreement for lease of land is within the realm of contract between the parties in respect of an immovable property. Parties with open eyes have entered into terms and conditions of lease and, therefore, they are bound by it. It is not the case of petitioners that while entering into agreement for lease of Nazul land in question, there was any advertisement published by Lessor for distribution of largesse in the form of enjoyment of lease so as to give an opportunity to all intending parties and there has any compliance of Article 14 of Constitution. Petitioners entered into lease with private negotiation with Government and hence Article 14 of Constitution, in the case in hand, in our view, does not come into picture. A contract entered privately will remain a mere contract and parties are governed by the agreed stipulations. Here Article 14 of Constitution is not attracted.

108. Even otherwise, once petitioners have already enjoyed all the terms and conditions of lease for several decades, it is not open to challenge validity of Clause 3(c), which is one of the several conditions on which lease has been granted. In other words, an act is subject to certain conditions as a whole, and parties to the transaction once, have accepted all the conditions together, then subsequently, it is not open to retain some and leave another. It cannot choose some and leave other. This principle is based on doctrine of election, which postulates that no party can accept and reject the same instrument. A person cannot say at one time that a transaction is valid and thereby obtain some advantage to which he could only be entitled on the condition that it is valid in entirety and then turn round and say that it is void for the purpose of securing some other advantage.

109. **Halsbury's Laws of England (4th Edition) Vol. 16 (Paragraph 1508)** says that after taking an advantage under an order a party may be precluded from saying that it is invalid and asking to set it aside.

110. Section 116 of Indian Evidence Act, 1872 (hereinafter referred to as "Act, 1872"), provides for 'estoppel' of tenant to deny title of landlord to immovable property. It reads under :

"116. Estoppel of tenant; and of licensee of person in possession-

"No tenant of immovable property, or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property, and no person who came upon any immovable property by the license of the person in possession thereof, shall be permitted to deny that such person had a title to such possession at the time when such license was given."

111. In Mt. Bilas Kunwar v. Desraj Ranjit Singh and others, A.I.R. 1915 P.C. 96, Privy Council explained Section 116 of Act, 1872 and said:

"Section 116 is perfectly clear on the point, and rests on the principle well established by many English cases, that a tenant who has been let into possession cannot deny his landlord's title, however defective it may be, so long

as he has not openly restored possession by surrender to his landlord."

112. In **Joint Action Committee of Air Line Pilots' Association of India (ALPAI) and others v. Director General of Civil Aviation and others, (2001) 5 SCC 435 (Paragraph-12),** Court referred to its earlier judgments in **Babu Ram alias Durga Prasad v. Indra Pal Singh, 1998(6) SCC 358, P.R. Deshpande v. Maruti Balaram Haibatti, 1998(6) SCC 507** and **Mumbai International Airport Private Limited v. Golden Chariot Airport and another, 2010 (10) SCC 422** and held that doctrine of election is based on the rule of estoppel. The doctrine of estoppel by election is one of the species of estoppel in pais (or equitable estoppel) which is a rule in equity. By that rule, a person may be precluded by his action or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had. However, taking inconsistent pleas by a party makes its conduct far from satisfactory. Further, parties should not blow hot and cold by taking inconsistent stand and prolong proceedings.

113. In **Cauvery Coffee Traders, Mangalore v. Hornor Resources (International Company Limited), (2011) 10 SCC 420 (Paragraph 34),** Court referred to its decisions in **Nagubai Ammal v. B. Shama Rao, AIR 1956 SC 593, CIT v. V. MR.P. Firm Muar AIR 1965 SC 1216, NTPC Ltd. v. Reshmi constructions, Builders & Contractors, (2004) 2 SCC 663, Ramesh Chandra Sankla v. Vikram Cement (2008)14 SCC 58 and Pradeep Oil Corpn. v. MCD (2011) 5 SCC 270,** and held, that a party cannot be permitted to "blow hot and cold", "fast and loose" or "approbate and reprobate". Where one knowingly accepts benefits of a contract or conveyance or an order, he is estopped to deny validity or binding effect on him of such contract or conveyance or order. This rule is applied to do equity. However, it must not be applied in a manner as to violate the principles of right and good conscience.

114. In **V. Chandrasekaran and another v. Administrative Officer and others, (2012) 12 SCC 133,** Court followed the law laid down in **Cauvery Coffee Traders, Mangalore (supra).**

115. In **Rajasthan State Industrial Development and Investment Corporation and another v. Diamond & Gem Development Corporation Limited and another (2013) 5 SCC 470,** Court again reiterated the law laid down in **Cauvery Coffee Traders, Mangalore (supra) and held, in paragraph 23**, as under :

"A party cannot claim anything more than what is covered by the terms of contract, for the reason that contract is a transaction between the two parties and has been entered into with open eyes and understanding the nature of contract. *Thus, contract being a creature of an agreement between two or more parties, has to be interpreted giving literal meanings unless, there is some ambiguity therein. The contract is to be interpreted giving the actual meaning to the words contained in the contract* ***and it is not permissible for the court to make a new contract,*** *however reasonable, if the parties have not made it themselves. It is to be interpreted in such a way that its terms may not be varied. The contract has to be interpreted without any outside aid.*

The terms of the contract have to be construed strictly without altering the nature of the contract, as it may affect the interest of either of the parties adversely".

(Emphasis added)

116. In **State of Punjab and others v. Dhanjit Singh Sandhu (2014) 15 SCC 144 (Paragraph Nos. 21, 22, 23, 24, 25 and 26)** Court reiterated the law laid down in **CIT v. MR. P. Firm Muar (supra), Maharashtra SRTC v. Balwant Regular Motor Service, AIR 1969 SC 329; R.N. Gosain v. Yashpal Dhir, (1992) 4 SCC 683 (Paragraph 10); and P.R. Deshpande v. Maruti Balaram Haibatti, (1998) 6 SCC 507** and held that defaulting allottees cannot be allowed to approbate and reprobate by first agreeing to abide by the terms and conditions of allotment and later seeking to deny their liability as per agreed terms. The doctrine of "approbate and reprobate" is only a species of estoppel. It is settled proposition of law that once an order has been passed, it is complied with, accepted by other party and he derived benefit out of it, he cannot challenge it on any ground.

117. In **Bansraj Lalta Prasad Mishra v. Stanley Parker Jones, (2006) 3 SCC 91 (Paragraph Nos. 13,14, 15 and 16),** Court considered Section 116 of Act, 1872 and held:

"13.The underlying policy of Section 116 is that where a person has been brought into possession as a tenant by the landlord and if that tenant is permitted to question the title of the landlord at the time of the settlement, then that will give rise to extreme confusion in the matter of relationship of the landlord and tenant and so the equitable principle of estoppel has been incorporated by the legislature in the said section.

14.The principle of estoppel arising from the contract of tenancy is based upon a healthy and salutary principle of law and justice that a tenant who could not have got possession but for his contract of tenancy admitting the right of the landlord should not be allowed to launch his landlord in some inequitable situation taking undue advantage of the possession that he got and any probable defect in the title of his landlord. It is on account of such a contract of tenancy and as a result of the tenant's entry into possession on the admission of the landlord's title that the principle of estoppel is attracted.

15.Section 116 enumerates the principle of estoppel which is merely an extension of the principle that no person is allowed to approbate and reprobate at the same time.

16.As laid down by the Privy Council in Kumar Krishna Prasad Lal Singha Deo v. Baraboni Coal Concern Ltd. : (IA p.318)-

It [Section 116] deals with one cardinal and simple estoppel, and states it first as applicable between landlord and tenant and then as between licensor and lincensee, a distinction which corresponds to that between the parties to an action for rent and the parties to an action for use and occupation."

(Emphasis supplied)

118. We therefore, find nothing arbitrary or illegal in resumption clause. State is the owner of land. If for public purpose, it wants to take back its land by way of resumption, there is nothing per se arbitrary. Secondly, condition of resumption is a part of contract between

the parties and having accepted the same and contract having been carried out, and virtually completed its term, in order to wriggle out the rights, obligations and liabilities incurred and acquired thereunder, one of the party cannot contend that one of the conditions of such agreement is bad.

119. Aforesaid argument therefore, has no merit. We also do not find that repeal of GG Act, 1895 by Repeal Act, 2017 takes away right of State of resumption, which is already acquired long back under the terms of lease and is saved by Section 4 thereof.

120. **Question (v)** therefore, is answered against petitioners.

121. **Question (vi),** in our view, is squarely covered by answer to question (iv) whereby we have held that by virtue of Section 4 of Repeal Act, 2017, all the rights, obligations etc., of Lessor and Lessee were saved and therefore, overriding effect of terms of lease will continue so long as parties are governed by aforesaid lease deed.

122. **Question (vi)** therefore is answered against petitioners.

123. Now, coming to **question (vii),** whether petitioner-1 on the basis of nomination by petitioners 2 to 5 is entitled to freehold of land in dispute and whether such right will override Lessor's i.e. State Government's right of resumption, on this aspect counsel for petitioners submitted that in past also this Court held that Lessee is entitled for renewal of lease. Similarly when policy of Government for freehold was initiated, Government would be bound to give effect the said policy and such Lessee, who has applied for freehold, would be entitled for conversion of lease rights into freehold. Hence, by exercising power of re-entry/resumption vide impugned order, Government cannot deprive/deny right of freehold, which has accrued to petitioners. On the issue of renewal of lease, reliance was placed on judgment in **Purushottam Dass Tandon and others vs. State of U.P., Lucknow and others AIR 1987 All 56** and with regard to freehold, various G.Os. Issued from time to time since 1992 have been placed before us.

124. In the present case, lease was renewed in 1996 with effect from 01.01.1990. Therefore, in our view, argument advanced founded on judgment of **Purushottam Dass Tandon and others vs. State of U.P., Lucknow and others (supra)** has no substance and reliance placed thereon, in our view, is superfluous and unnecessary. But, still not only to satisfy us but also to demonstrate hollowness of argument of petitioners, we proceed to discuss aforesaid judgment to demonstrate that said judgment has nothing to do with the facts of this Case.

125. Starting from March, 1958, on the issue of renewal of leases, State Government considered the matter and issued various G.Os. and principal G.Os., which came up for consideration in **Purushottam Dass Tandon and others vs. State of U.P., Lucknow and others (supra)** are dated 23.04.1959, 07.07.1960 and 03.12.1965. There are some other G.Os. Also, which alongwith above G.O.s would refer hereat.

126. The first G.O. considered in **Purushottam Dass Tandon and others vs. State of U.P., Lucknow and others (supra)** was issued in March, 1958

whereby Chief Minister directed that case for renewal of leases may be taken individually and possession may be taken only if lessee surrender or lease stood terminated in absence of any request from lessee for grant of fresh lease. Thereafter, on 23.04.1959, a G.O. was issued to grant fresh lease in cases where lease has already expired but has not been renewed so far, or which is likely to expire within the next 5 or 6 years, on the terms and conditions given in the said G.O. The proposed premium in the said G.O. was objected by Lease Holders, whose leases were already expired or likely to expire. Several representations were sent to the Government. Some house-owners met the then Prime Minister Late Pt. Jawahar Lal Nehru, who had visited Allahabad in November or December, 1959. It resulted in issue of G.O. dated 07.07.1960 whereby rate of premium on first three acres was reduced to Rs.2,000/- in each slab. It also permitted payment of premium in five instalments and reduced ground rent to Rs.100/- per acre. In the earlier G.O., there was an insistence on construction of Community latrines till sewer lines were laid but this insistence was given up in G.O. dated 07.07.1960. Lessees were granted further three months' time to get leases renewed. Still lease-holders did not comply and made representations to Government. On 21.03.1963, again a G.O. was issued declaring rates of premium for commercial sites. On 3.12.1965 a G.O. was issued indicating terms and conditions for renewal of leases for commercial and residential purposes and it was said that rates of premium and annual rent shall be as fixed by G.O. dated 07.07.1960. Payment in five equal yearly instalments was continued but in special cases, Commissioner, Allahabad Division, Allahabad, was authorized to make recommendations to Government for enhancing number of instalments. This G.O. further insisted for renewal of existing leases on payment of at least one instalment, within one month of receipt of intimation by Lessee from Collector, or within three months of the date of expiry of lease, whichever is earlier. Deposit was to be deemed to be proper step on the part of Lessee to get a fresh lease executed by the Lessor. The G.O. of 1965 itself made a distinction between those whose leases had expired and others by describing them as sitting and existing lessees.

127. There was a second phase which covered period from 1966 to 1981. On 16.02.1966, U.P. Awas Vikas Parishad Adhiniyam, 1965 *(hereinafter referred to as "U.P.Act, 1965")* was enacted for providing house sites and construction of building. G.O. dated 03.12.1965, thus was modified by G.O. dated 04.11.1968, and it was directed that leases of joint lessees should be renewed as far as possible for one acre only. Sub-division was permitted only where sub-divided plot was not less than 800 sq. yards. Concession in payment of lease money and ground rent was allowed on same terms and conditions as it was in G.O. dated 03.12.1965 but time was extended for payment of first instalment for those who had not received any intimation from Collector by a further period of one month from the date of intimation by Collector. Clause (c) of G.O. dated 04.11.1968 categorically said that where steps have been taken for renewal of leases, as stated in earlier G.Os., fresh leases shall be sanctioned according to terms offered by Competent Authority.

128. In March, 1970, a G.O. was issued banning grant of renewal of leases

all over the State, since Government was contemplating to bring out legislation on Urban Ceiling. This ban was lifted on 12.01.1972 but leases henceforth were to be sanctioned by State Government only. Commissioner and Collector could make recommendations only. Aforesaid G.O., however, provided that in all those cases where Government had sanctioned grant of leases but it could not be executed or registered because of ban imposed in 1970, steps may be taken immediately for its execution. Clause (ii) of G.O. provided that all those cases in which Collector or Commissioner had approved renewal but it could not be executed because of 1970 order, should be sent to Government immediately for acceptance. On 09.05.1972 Urban Building Ceiling Bill was introduced and on 11.07.1972 Uttar Pradesh Ceiling of Property (Temporary Restriction on Transfer), Ordinance, 1972 was promulgated in pursuance of Article 398 of Constitution of India. The Ordinance continued till it was replaced by Urban Land (Ceiling and Regulation) Act, 1976 *(hereinafter referred to as "Act, 1976")*. The said Act was enacted to prevent concentration of Urban Property and discourage construction of luxurious houses. On 19.12.1972, provisions pertaining to Nazul were amended providing for maximum area permissible for renewal of leases of 2000 sq. yards plus land on which building was constructed. Remaining area was to be surrendered to Housing Board and Lessees were prohibited from sub-dividing or transferring any land. On 10.12.1976, Government issued an order superseding all previous orders in respect of renewal of leases of Civil Lines, Allahabad in view of Act, 1976and laid down fresh terms and conditions for renewal of leases.

129. Here leases were to be renewed in the light of Sections 2 and 4 of U.P. Act, 1976 and while doing so, all residents in one house were to be treated as one unit. This again resulted in representations of Lease-Holders to Government requesting for reduction in rate of premium and ground rent. A G.O. was issued on 17.09.1979 superseding all previous orders and it provided for submission of details about extent and type of construction, utilisation of vacant land etc. Again representations, which culminated in G.O. dated 19.04.1981, which superseded all previous Orders and provided for renewal of leases on fresh and new terms. It said that Leaseholders and their heirs shall be treated as one Unit. They were supposed to file details about land, constructed area, its user, time when it was taken on lease etc. before 30.06.1981. List of residents including out-houses dwellers was to be prepared by District Magistrate. Heirs of deceased lease-holders were to be treated as one unit. Area for which renewal could be made was reduced to building with 500 sq. metre of land appurtenant and 500 sq. metre open land or 1500 sq. metre whichever was more. Area of building for commercial purpose was fixed at 2000 sq. metres. Premium was fixed at 50 paisa per sq. metre. Thus, from 1976 onwards for the purpose of renewal, area was reduced from acre to square metre and unit for premium and ground rent became square feet instead of acre. All heirs of Lessees became one unit for renewal. Land covered by outhouses were to be excluded. Lessees could not even opt for it.

130. Lease Holders, whose lease had already expired or those who were sitting Lease Holders and leases were going to

expire in a short period, came to this Court in various writ petitions. This entire bunch was decided in **Purushottam Dass Tandon and others vs. State of U.P., Lucknow and others (supra).** In this bunch of writ petitions, facts, we have noted above with respect to various Government Orders, have been given in detail.

131. There were two categories of writ petitioners, before this Court, in **Purushottam Dass Tandon and others (supra)** as under :

(i) Those, to whom notices were given by Collector and who had complied with terms and conditions as laid down in various G.Os. issued from time to time prior to 1965; and

(ii) Those, to whom no notice was sent and till matter filed before the Court, no steps were taken and no order was passed in their favour.

132. Court held :

(I) A Lessor may, after expiry of period for which lease is granted, renew the same or resume i.e. re-enter. But if out of the two i.e. re-entry or resumption, the two divergent courses, he chooses to grant fresh lease or at least creates that impression by his conduct spread over long time, it results in abandonment.

(II) If the land is needed or building has to be demolished in public interest for general welfare, probably no exception can be taken as the interest of individual has to be sacrificed for the society. But asking Lessee to vacate land or remove Malba for no rhyme or reason but because State is the owner, cannot be accepted to be in consonance with present day philosophy and thinking about role of State.

(III) After Act, 1976, no person can successfully or validly claim to hold land more than the Ceiling limit.

(IV) Some part of G.O. of 1981 was not consistent with Act, 1976. The rules contained in Nazul Manual are set of Administrative Orders or collections of guidelines issued by Government for the authorities to deal with Government property.

(V) When a G.O. was issued and its conditions are complied with, mere for bureaucratic delay, performance under the said G.O. cannot be denied. Therefore, Lessee, who had deposited first instalment, as directed in G.O. of 1965, were entitled for renewal of their lease.

(VI) After enactment of ceiling law, a Lessee cannot hold land more than the provided limit.

(VII) If leases were renewed in respect of those, who had acquired social or political status, whose names are given in para 15 of judgment, which includes, Dr. K. N. Katju, ex-Central Law Minister, Chief Minister and Governor, Dr. S. K. Verma, ex-Chief Justice and Governor, Sri B.L. Gupta, ex-Judge High Court, J. D. Shukla, I.C.S., O. N. Misra, I.A.S., when there was no justification not to give same benefit to others, similar benefit must be given since most of them were also distinguished persons namely S.N. Kacker, ex-Central Law Minister, Solicitor General of India and Advocate General of the State, Sri S. S. Dhavan, ex-Judge, High Court and Governor and High Commissioner, Sri Lal Ratnakar Singh I.A.S. Ex-Member of Board of Revenue, M.L.Chaturvedi, ex-Judge, High Court and member of Union Public Service Commission, W. Broome, I.C.S. etc.

133. Aforesaid judgment was confirmed by Supreme Court by

dismissing appeals preferred by State of U.P. and others i.e. **State of U.P. and others vs. Purshottam Das Tandon and others 1989 Supp.(2) SCC 412.** Supreme Court clarified that renewal of leases shall be subject to the provisions of Act, 1976 and High Court's judgment shall apply to all the leases to whom G.O. dated 23.04.1959, 02.07.1960 and 03.12.1965 were applicable and all those claiming under them. The order of Supreme Court reads as under :

"We have heard the learned counsel for both the parties at length. We do not find any infirmity in the judgment and order passed by the High Court against which these special leave petitions are preferred. We, however, make it clear that the leases that are going to be granted pursuant to the writ issued by the High Court will be subject to the provisions of the Urban Land (Ceiling and Regulation) Act, 1976. On the leases being granted, the Competent Authority under the Act shall be at liberty to apply the provisions of the Act and in particular section 15 thereof to all the leases and take away all the surplus lands in their hands after determining the surplus lands in accordance with law. The ***directions issued by the High Court can be availed of by all the lessees to whom the G.O. dated 23rd April, 1959, 2nd July, 1960 and 3rd December, 1965 were applicable and all those claiming under them.***

All the Special Leave Petitions are dismissed accordingly with these observations. If any further directions are needed, the persons interested may approach the High Court."(Emphasis added)

134. We have discussed above judgment since it was heavily referred and relied by petitioners but find no reason to apply the same in the present case since lease in question was already renewed on 25.03.1996 for a period of 30 years w.e.f. 01.01.1990 and this period would expire on 31.12.2019. Right of re-entry /resumption has been exercised by State by terminating lease and resuming land for public purpose in exercise of its right under Clause 3(c) of lease deed.

135. Now we come to the aspect of freehold, which has also been strongly argued and relied on behalf of petitioners.

136. The first G.O. in furtherance of State Government's policy of conversion of lease rights into freehold was issued on 23.03.1992. The aforesaid G.O. was applicable to permanent leases given for 'residential purposes' and 'current leases', given for residential purposes. Para 1 of aforesaid G.O. reads as under :

''मुझे यह कहने का निर्देश हुआ है कि सम्यक विचारोपरान्त शासन द्वारा नजूल भूमि के प्रबन्ध एवं निस्तारण आदि की वर्तमान व्यवस्था में परिवर्तन करते हुए ***शाश्वत एवं चालू पट्टों के अन्तर्गत उपलब्ध नजूल भूमि का*** *स्वैच्छिक आधार पर फ्री–होल्ड घोषित करने एवं शेष रिक्त नजूल भूमि का निस्तारण इस शासनादेश में निर्धारित प्रक्रिया के अनुसार करने का निर्णय लिया गया है। तद्नुसार नजूल भूमि के प्रबन्ध एवं निस्तारण आदि के सम्बन्ध में निम्नलिखित व्यवस्था तात्कालिक रूप से लागू होगी।''*

"I am directed to say that after due consideration the government has while changing the extant policy of management and disposal of the ***Nazul land, decided to declare Nazul land available under the perpetual and current leases*** *to be freehold on voluntary basis and to dispose remaining vacant Nazul land as per procedure prescribed in this Government Order. Accordingly, in*

respect of the management and disposal, etc. of the Nazul land, the following policy shall come into force with immediate effect."
(English Translation by Court)
(Emphasis added)

137. Those, who are governed by aforesaid G.O., were directed to submit their option for freehold within one year from the date of issue of G.O. and only they would be entitled for benefit under the said G.O. It also restrained any transfer of property if under lease deed. No transfer was permissible without permission. It also directed that where unauthorized possession is found, action for eviction shall be taken in accordance with law. Paras 7 and 8 of said G.O. read as under:

*''(7) **जिन पट्टों मे यह शर्त है कि पट्टाधिकारी बिना पट्टादाता की अनुमति के पट्टागत भूमि का हस्तान्तरण कर सकता है, वहॉ पट्टे की शर्त के विपरीत कोई हस्तक्षेप नही किया जाएगा,** किन्तु जहॉ बिना पट्टादाता की अनुमति के पट्टेदार द्वारा भूमि हस्तान्तरण करने का निषेध है वहॉ इस शासनादेश के लागू होने की तिथि से किसी भी प्रकार के हस्तान्तरण पर एक वर्ष तक के लिए रोक लगा दी जाएगी। यह योजना शासनादेश जारी होने की तिथि से लागू होगी।*

*(8) इस बात का व्यापक प्रचार किया जाएगा कि उपरोक्त नीति अनधिकृत कब्जो के मामलों में लागू नहीं होगी और **अनधिकृत कब्जों के मामलों में विधिक प्रक्रिया के अनुसार बेदखली आदि की कार्यवाही की जाएगी।''***

*"(7) **In leases where leaseholder can transfer lease land without permission of the lessor, in such a case no interference shall be made contrary to the terms and conditions of the lease.** But where transfer of land without permission of the lessor is prohibited, any transfer of land shall be stopped for a year from the date of enforcement of this Government Order. This policy shall come into force from the date of issue of the Government Order.*

*(8) It shall be widely circulated that the aforesaid policy shall not be applicable to the cases related to unauthorized possessions **and eviction proceedings, etc. in relation to the unauthorized possessions shall be held in accordance with the legal procedure."***
(English Transaction by Court)
(Emphasis added)

138. The second G.O. was issued on 02.12.1992 dividing Lease-Holders in two categories. One, who had not violated conditions of lease, and, another, who had violated conditions of lease. Those, who had not violated conditions, were required to pay for conversion to freehold an amount equal to 50 percent of Circle Rate for residential purpose while those who had violated conditions of lease, are to pay 100 percent. Same was in respect of Group Housing and Commercial use with the difference of amount to be paid for freehold. Para 4 thereof also provided that such current leases where 90 years period had expired, if Lease-holder had not violated any conditions of lease and wants freehold, that can be allowed as per aforesaid G.O.. However, if he wants fresh lease, that can also be allowed for 30 years on payment of 20 percent of Circle rate as premium and 1/60th part of premium towards annual rent. Clause 4 of aforesaid G.O. reads as under :

*''4. **ऐसे चालू पट्टे जिनके 90 वर्ष की सम्पूर्ण अवधि समाप्त हो गई है** यदि कोई पूर्व पट्टाधारक **जिन्होंने पट्टे की शर्तों का उल्लंघन नहीं किया है,** भूमि फ्री–होल्ड कराना चाहता है तो ऐसी दशा में निर्धारित दरों के अनुसार फ्री–होल्ड कर दिया जाएगा। यदि वह फ्री–होल्ड*

नही कराना चाहते है बल्कि नया पट्टा लेना चाहते है तो ऐसी दशा में 30 वर्ष के लिए एक नया पट्टा वर्तमान शर्तों के आधार पर दिया जा सकता है जिसके लिए प्रीमियम की धनराशि प्रचलित सर्किल रेट की निर्धारित दर की 20 प्रतिशत होगी और वार्षिक किराया, प्रीमियम का 1/60वां भाग प्रतिवर्ष के हिसाब से भी लिया जाएगा।''

*"4 . **In case of those current leases whose entire lease period of 90 years has expired,** if any previous leaseholder **who has not violated lease conditions,** wants to get the land converted into freehold, in such a circumstance it shall be converted into freehold against the payment of the prescribed rates. If he does not want to convert it into freehold and wants to get a new lease, in such a circumstance a new lease may be awarded for 30 years under the extant terms and conditions, for which premium amount @ 20 percent of the existing circle rates and annual rent @ 1/60 of the premium shall be paid."*

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(English Translation by Court)

(Emphasis added)

139. The third is G.O. dated 03.10.1994 again making amendment in earlier two G.Os. Relevant aspect is that vide para 2, provision made for execution of 30 years lease, where 90 years period had expired, was deleted. Para 2 of G.O. dated 03.10.1994 reads as under :

*''2. शासनादेश संख्या 3632/9–आ–4–92–293–एन/90, 2–12–1992 में ऐसे चालू पट्टे जिनके 90 वर्ष की सम्पूर्ण अवधि समाप्त हो चुकी है तथा पूर्व पट्टाधारक द्वारा पट्टे की शर्तों का उल्लंघन नहीं किया गया है, के सम्बन्ध में 30 वर्षीय पट्टा स्वीकृत किये जाने की व्यवस्था की गई थी। **इस व्यवस्था को तात्कालिक प्रभाव से समाप्त किया जाता है। अब ऐसे मामले में नया पट्टा स्वीकृत नहीं किया जाएगा बल्कि ऐसे मामले में जिनमें पट्टे की सम्पूर्ण अवधि समाप्त हो चुकी है उसको उपरोक्त निर्धारित दरों पर पूर्व पट्टेदार के पक्ष में फ्री–होल्ड में परिवर्तित करने की कार्यवाही की जाएगी।''*

*"2. A provision had been made in Government Order No. 3632/9-Aa-4-92-293-N/90, dated 02.12.1992 for grant of lease for 30 years for the current leases where 90 years' tenure has expired and the terms and conditions of the lease have not been violated by the former lease holder. **This provision is annulled with immediate effect. Now in such cases, no new lease shall be granted; rather, in cases where entire period of lease has expired, proceedings shall taken for converting such leases into freehold in favour of the former lease holders at the aforesaid prescribed rates."***

(English Translation by Court)

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(Emphasis added)

140. Para 8 of aforesaid G.O. further provides that policy for freehold will be effective only upto 31.03.1995.

141. Considering that some very poor persons were also in occupation of 'Nazul land' and their eviction may result in serious problem of accommodation to such persons, another G.O. dated 01.01.1996 was issued making amendments in earlier three G.Os. stating that those persons whose monthly income is Rs.1,250/- or less, unauthorized possession of such persons on vacant Nazul land upto 01.01.1992 or prior thereto for residential purposes, shall be allowed freehold on payment of 25 percent premium and Rs.60/- annual rent for the said area upto 45 Sq. Meter and for

more than 45 Sq.Meter but upto 100 Sq.Meter, 40 percent and Rs.120 annual rent. It clearly says that no regularization of unauthorized possession shall be made beyond 100 Sq.Meter and amount of premium shall be allowed to be paid in 10 years' interest free 6 monthly installments. Such unauthorized possession shall be regularized by approving 30 years' lease. Clauses 1, 2, 3 and 4 of aforesaid G.O. read as under :

''(1) किसी भी दशा में ***100 वर्ग मीटर से अधिक क्षेत्रफल पर किये गये अवैध कब्जों का विनियमितीकरण नहीं किया जायेगा*** *तथा दिनांक 30.11.1991 की सर्किल रेट पर आंकलित सम्पूर्ण मूल्य पर निर्धारित यथास्थिति 25ः या 40ः नजराने की धनराशि 10 वर्षीय ब्याज रहित छमाही किस्तों में लिया जायेगा, परन्तु यदि कोई व्यक्ति सम्पूर्ण धनराशि या बकाया किस्तों की धनराशि एकमुश्त जमा करना चाहता है तो वह देय धनराशि जमा कर सकता है।*

(2) उपरोक्त प्रकार के मामले में विनियमितीकरण की कार्यवाही 30 वर्षीय पट्टा स्वीकृत करके की जायेगी। स्वीकृत पट्टे में 30–30 वर्षीय दो नवीनीकरण के प्राविधान सहित सम्पूर्ण पट्टे की कुल अवधि दो नवीनीकरण के प्राविधान सहित सम्पूर्ण पट्टे की कुल अवधि अधिकतम 90 वर्ष की होगी। ***जिसमें यह शर्त होगी कि सम्बन्धित व्यक्ति भूमि का पट्टाधिकार 30 वर्ष तक किसी व्यक्ति को हस्तानान्तरित नहीं कर सकता है पट्टा शासन द्वारा निर्धारित प्रारूप पर जारी किया जायेगा।***

(3) ***अनाधिकृत कब्जों के विनियमितीकरण की समस्त कार्यवाही जिलाधिकारी, की अध्यक्षता में गठित समिति की संस्तुति पर जिलाधिकारी द्वारा की जायेगी।*** *लखनऊ एवं देहरादून में समस्त कार्यवाही उपाध्यक्ष, विकास प्राधिकरण की अध्यक्षता में गठित समिति की संस्तुति पर उपाध्यक्ष द्वारा की जायेगी।*

(4) ***विनियमितीकरण हेतु परिवार को एक इकाई के रूप में माना जायेगा*** *तथा पट्टा परिवार के मुखिया के पक्ष में स्वीकृत किया जायेगा।''*

"(1) Under no circumstances, ***illegal possessions over an area measuring over 100 square metres shall be regularised*** *and an amount of earnest money, 25% or 40% as the case may be, on the entire amount calculated as per the circle rate as on 30.11.1991 shall be taken in half yearly interest free instalments over the period of 10 years. However, if any person wishes to deposit entire money or the amount of remaining instalments in lump sum, he/she may deposit the payable amount.*

(2) In the aforesaid type of cases, regularisation proceedings shall be done by granting a lease for a period of 30 years. The total period of the entire lease shall at most be 90 years with provision of two renewals, for 30 years each, in the lease so granted, subject to a restriction ***that the person concerned cannot transfer the lease rights to anybody until 30 years. The lease shall be issued on a format prescribed by the government.***

(3) ***All the proceedings of regularisation of unauthorised possessions shall be done by the District Magistrate on recommendation of a committee constituted under his/her chairmanship.*** *All the proceedings in Lucknow and Dehradun shall be done by the Vice Chairman, Development Authority, on recommendation of a committee constituted under his/her chairmanship.*

(4) ***For the purpose of regularisation, a family shall be deemed to be a unit*** *and lease shall be granted in the name of the head of the family."*
(English Translation by Court)

(Emphasis added)

142. Then vide G.O. dated 17.02.1996 again some amendments were made in respect of amount payable for freehold but earlier policy of categories of persons, who can claim freehold, was not changed. Vide G.O. dated 29.03.1996, period for giving benefit of freehold was extended from 01.4.1996 to 30.09.1996. G.O. dated 02.04.1996 only made some corrigendum in earlier G.O. dated 17.02.1996.

143. On 29.08.1996, G.O. was issued in furtherance of G.O. dated 17.02.1996 stating that under G.O. dated 17.02.1996, freehold rights to Nominees of Lease-Holders were allowed and in reference thereto, rates on which such Nominees shall be allowed freehold, were mentioned.

144. We find that G.O. dated 17.02.1996 nowhere permits conversion of Nazul land into freehold in favour of Nominees of Lessee and thus we have no manner of doubt that G.O. dated 29.08.1996, insofar as it refers to G.O. dated 17.02.1996, has erred in law and it is a clear misreading. If G.O. dated 17.02.1996 itself had not permitted freehold rights to Nominee(s) of Lessee, question of rights determined by G.O. dated 29.08.1996 is of no legal consequence and would remain inoperative.

145. Then vide G.O. dated 25.10.1996, implementation of freehold policy was extended upto 31.12.1996. Then G.O. dated 31.12.1996 was issued to clarify G.O. dated 17.02.1996 in respect of applicability of rate, where land use at the time of grant of lease was changed in Master plan.

146. G.O. dated 26.09.1997 made amendments in all earlier G.Os. in respect of rates for Nazul land being used for hospital and other charitable purposes. It also clarifies as to which contravention of lease deed will be treated as violation to attract higher rate. It also provides in para 6(2) that Government has got right of re-entry due to violation of any conditions of lease and lease had already expired, and such Lease-Holder may be informed of Nazul policy and be given an opportunity to apply for freehold whereafter action for dispossession will be taken. The policy of conversion of freehold was extended upto 25.12.1997.

147. Then comes G.O. dated 01.12.1998. Thereunder only two categories were made i.e. residential and non-residential. Restriction was also imposed on certain Nazul land in respect whereto conversion of freehold shall not be allowed.

148. Vide G.O. dated 10.12.2002, it was clarified that freehold conversion shall not be allowed to nominee of Lessee or his legal heirs. G.O. dated 31.12.2002 relates to rates and clarification hence are not relevant for the purpose of present case.

149. Vide G.O. dated 04.08.2006, provision for regularization of Nazul land which was in unauthorized possession, was deleted. It is also said that in all the matters, where freehold document has not been registered, application shall be cancelled. Vide G.O. dated 15.02.2008 clarification was given in respect of G.O. dated 04.08.2006 and it was reiterated that in all those matters where freehold document has not been registered, application shall be rejected.

150. Vide G.O. dated 21.10.2008, Clause 3 of G.O. dated 10.10.2002,

whereby provision for conversion of freehold to Nominee of Lessee or his legal heirs was ceased, was restored. It was also clarified that decision to convert freehold of Nazul land will apply only when such land is not found necessary for Government use. Thus no provision existed from 10.10.2002 to 20.10.2008 permitting freehold to a nominee.

151. G.O. dated 26.05.2009 made an amendment in para 2(6) of G.O. dated 21.10.2008 and substituted following paras therein :

*''**ऐसे नजूल भूमियां** जो भू–धारक या पट्टाधारक या उनके विधिक उत्तराधिकारी / **नामित की भूमि के साथ स्थित है तथा उनके लिए उपयोगी सिद्ध हो सकती हैं तथा किसी अन्य के उपयोग की सम्भावना नहीं प्रतीत होती है।** ऐसी भूमि का विनियमितीकरण भू–धारक या पट्टाधारक या उनके विधिक उत्तराधिकारी / नामित के पक्ष में वर्तमान सर्किल रेट शत प्रतिशत प्राप्त कर फ्री–होल्ड कर दिया जायेगा। **ऐसे मामलों में शासन की अनुमति आवश्यक होगी।''*

*"**Those nazul lands** which are lying adjacent to the land of land holder or lease holder or his legal successor/**his nominee, and which can be of utility to them and do not appear to have the potential of being used by any other person,** shall be regularised and converted into freehold in favour of the land holder or lease holder or his legal successor/nominee after receiving cent percent current circle rate. **In such matters, the permission of the government shall be necessary."***

(English Translation by Court)

(Emphasis added)

152. Further time for conversion into freehold was extended upto 31.12.2009. G.Os. dated 29.01.2010, 17.02.2011 and 01.8.2011 were issued making minor amendments hence not discussed further. Then comes G.O. dated 28.09.2011. It talks of policy of conversion of Nazul land into freehold, which was not listed at any point of time but has been occupied unauthorizedly and occupants have raised their construction and using land prior to 01.12.1998. However, land of public places, park, side-lanes of road and other Government uses was excluded and maximum area for such freehold was confined to 300 Sq.Meter. The incumbent had to apply within three months whereafter they have to be evicted. With respect to 'Nominees of Lessees', para 5 of said G.O. reads as under :

*''5. नामित व्यक्ति के पक्ष में नजूल भूमि को फ्रीहोल्ड किये जाने की व्यवस्था को समाप्त किया जाना– नजूल भूमि के पट्टेदार द्वारा **नामित व्यक्ति के पक्ष में नजूल भूमि को फ्रीहोल्ड किये जाने की व्यवस्था सर्वप्रथम** शासनादेश संख्या : 1300/9–आ–4–96–629एन/95, टी.सी. दिनांक 29–8–1996 के प्रस्तर–1 (3) (4) **में की गयी थी** और शासनादेश संख्या 2873/9–आ–4–2002–152–एन/2002, टी.सी. दिनांक 10–12–2002 के प्रस्तर 3 **द्वारा उक्त व्यवस्था समाप्त कर दी गयी** तथा शासनादेश संख्या : 1956/आठ–4–08–266एन/08, दिनांक **21–10–2008** के प्रस्तर– 2 (4) द्वारा उक्त व्यवस्था **पुनः बहाल कर दी गयी है।** इस व्यवस्था के सम्बन्ध में मा0 उच्च न्यायालय में विचाराधीन रिट याचिका (जनहित याचिका) संख्या : 35248/2010–जयसिंह बनाम उत्तर प्रदेश राज्य व अन्य में पारित अन्तरिम आदेश दिनांक 16–07–2010 में दिये गये निर्देशों के दृष्टिगत उपर्युक्त **शासनादेश दिनांक 21–10–2008 का प्रस्तर 2 (4) जिसके द्वारा नामिनी के पक्ष में नजूल भूमि को फ्रीहोल्ड किये जाने की व्यवस्था बहाल की गयी है, को समाप्त करते हुए अब ऐसे व्यक्ति जिनके पक्ष में क्रय की जा रही सम्पत्ति (नजूल भूमि) को पट्टेदार द्वारा रजिस्टर्ड एग्रीमेंट टू सेल किया गया हो और पूर्ण स्टाम्प शुल्क अदा किया गया हो, उसी व्यक्ति के पक्ष में ही नजूल भूमि को फ्रीहोल्ड किया जायेगा।''*

"5. Cessation of the provision of converting the nazul land into freehold in favour of the nominee:- ***The provision of converting nazul land into freehold in favour of nominee by the lease holder of the land had first been provided in the para- 1 (3)(4)*** *of the Government Order No. 1300/9-Aa-4-96-629N/95, TC dated 29-08-1996; and by para 3 of the Government Order No. 2873/9-Aa-4-2002-152-N/2002, TC dated 10.12.2002,* ***the aforesaid provision was annulled;*** *and through para 2(4) of the Government Order No. 1956/VIII-4-08-266N/08, dated 21.10.2008, the afore-said provision has been restored again. Pursuant to the instructions, with respect to this provision, given in the interim order dated 16.07.2010 passed by the Hon'ble High Court in Writ Petition (Public Interest Litigation) No. 35248/2010 titled as Jai Singh Vs State of Uttar Pradesh and others, which is pending,* ***the provision of para 2(4) made in the aforesaid Government Order dated 21.10.2008 through which converting nazul land into in favour of the nominee was restored, is being annulled; and the nazul land shall be converted in freehold in favour of the person with whom the lease holder has entered in registered agreement of sale and who has paid the whole stamp duty."*** (Emphasis added)

(English Translation by Court)

153. Aforesaid G.Os. thus clearly show that eligibility of leases of Nazul land, as initially laid down in G.O. of 1992 underwent some changes but in respect of land found suitable or needed by Government, no freehold was permissible. With respect to violation of terms and conditions of lease etc., some relaxation has been given. G.O. dated 28.09.2011 finally annul the provision of allowing freehold to Nominee.

154. Lastly there are two more G.Os. i.e. 04.03.2014 and 15.01.2015 wherein policy of freehold has been virtually given a relook and substantial amendments have been made in earlier policy.

155. Thus, petitioner-1, as a Nominee is not entitled, as a matter of right to claim freehold of Nazul land in his favour. So far petitioners 2 to 5 are concerned they have never claimed freehold rights.

156. Moreover, it is no doubt true that Government has promulgated policy of conversion of lease land into freehold, but then question is "whether mere submission of application for freehold will confer a vested right upon petitioners to get Nazul land converted into freehold, which will override even power of re-entry of Lessor. A Full Bench of this Court in **Anand Kumar Sharma vs. State of U.P. and others 2014(2) ADJ 742** has considered this aspect and held in para 42 of judgment that merely by making an application for grant of freehold right, one will not acquire a vested right. Para 42 of the judgment reads as under :

"We after considering the relevant Government Orders on the subject and pronouncements of the Apex Court as noted above, are of the view that merely by making an application for grant of right, petitioner did not acquire a vested right." (Emphasis added)

157. A Division Bench of this Court in **Writ Petition No.62588 of 2010, M/s Madhu Colonizers Pvt. Ltd. vs. State of U.P. & Ors.,** decided on 02.04.2013 has held that if Government exercises right of re-entry, question of a person to claim freehold would not arise and where such a right cannot be claimed by Lessee, right

of nominee cannot survive over such lessee. Court has said as under :

"It is also found that as ***nominee of the lessee, the petitioner-Company cannot have any larger rights than the lessee and once the order of the District Magistrate for resumption the land in exercise of power under Clause 3(c) of the lease deed is held to be valid, the petitioner-Company, as a nominee, cannot have any surviving right to claim conversion of the lease hold rights into freehold. Infact, on valid resumption order being passed, the lease hold rights cease to exist*** *and there can be no occasion for conversion of lease hold rights into freehold rights in such circumstances."*

(Emphasis added)

158. The above discussion makes it clear that Nazul Land, if required by State for public purpose and it exercises right of re-entry/resumption, the same cannot be defeated by any person on the ground that his individual right must prevail over such public purpose.

159. One more aspect we propose to point out at this stage. As we have already stated in earlier part of judgment that petitioners 2 to 5, who were Lessees to renewed lease-deed, are not residing on the land in dispute and they are all residing elsewhere i.e. at Lucknow, which is the address they have given in writ petition also, it is evident that they do not require land in question for their own purpose. It appears that they have indulged in trading of land and earn profit at the cost of public exchequer, inasmuch as, conversion into freehold is on a very smaller amount comparing to market value at which property is being transacted in the area concerned. The disputed land is situated in most centrally located, posh, commercial area of Prayagraj City i.e. Civil Lines. Lessees i.e. petitioners 2 to 5 have issued a nomination letter in favour of petitioner-1, in respect of land in dispute, who is a partner of a Builder's Company. Petitioner-1 has no concern otherwise with land in dispute. She was not a person, who had any interest in property in dispute except that now looking to location and topography of land in dispute, she finds the land capable of development to a much more profitable venture and that is how she has indulged in trading of land with lessees i.e. petitioners 2 to 5 by getting a nomination in her favour and it is petitioner-1 only who has applied for freehold.

160. In this regard, this Court in the judgment dated 31.10.2019 passed in **Civil Misc. Writ Petition No.29495 of 2018 (Prakati Rai and 6 Others vs. State of U.P. and 20 others)** connected with other petitions, has already commented upon policy of lease as under :

"181. Before proceeding further, we find it difficult to desist from observing that freehold policy, commenced in 1992, took care of a limited category of occupants of Nazul land i.e. Lessees, who had perpetual lease or where lease was continuing and there was no violation of conditions of lease. Meaning thereby, Leaseholders, who had faithfully abided to the terms and conditions of lease, were chosen as a class by themselves and provision was made to convert lease rights into freehold in such cases. One may not dispute about such policy in the light of fact that these leases are several decades old and people

holding such leases had developed some kind of possessory right in property and recognizing such interest of Lessees, howsoever weak it was, if State Government chose to confer upon them benefit of conversion of lease right into freehold, one may not validly object to that and probably such policy may satisfy constitutional test of fairness, non-discrimination, non-arbitrariness etc.

182. But with the passage of time, in the garb of improvement in the policy, amendments were made by numerous Government Orders issued from time to time, which we have referred hereinabove and that opened on unrestricted area of beneficiaries, i.e. wholly strangers namely mere Nominees of Lessee, who had no prior interest in property in question; and flagrant defaulters and violators of terms of lease etc. Such provisions, in our view, are difficult to sustain as to satisfy constitutional validity of policy of freehold under aforesaid Government Orders. In our view, it is ex facie arbitrary and violative of Article 14 of Constitution of India. One cannot lose sight and ignore historical backdrop of allotment of Nazul land. Persons who were sympathetic to Britishers and for services rendered by individuals in the interest of Colonial Forces, helping them in their administration; or some otherwise highly resourceful people, were given such allotment. After independence, if State wanted to distribute its largesse/assets, we can understand, if a scheme would have been evolved to distribute Nazul land, by terminating lease, to weaker and poor people or landless people or if objective was to augment revenue, then State largesse/assets instead of distributing in a clandestine manner by confining such benefit to certain individuals, appropriate mode of auction of land to general public should have been adopted. We do not know what prevailed with State Government in making policy, which was initially not so apparently erratic, to become a boon to defaulters and also give opportunity to certain individuals in trading of land after getting land freehold on much lesser amount than what actually market value of land is. In the present case itself, petitioners have said that they paid money to Harihar Nath Dhar and therefore, Harihar Nath Dhar actually benefited himself of the property owned by State without giving any return to State and this had continued for decades together. Thus, Prima facie, we are satisfied that policy of freehold, as it stands today, helps scrupulous, resourceful land dealers, Land Mafias and similar other persons. It is neither in public interest nor satisfies test of public policy nor consistent with constitutional test, in particular, Article 14 of Constitution of India.

183. However, we are not expressing any final opinion on this aspect but this Court desires that it is high time and sooner is the better, that State Government must re-examine entire policy and if purpose is only to augment revenue, Government should sell public land by auction so that it may get best price or policy should be confined for the benefit of have-nots i.e. poor landless and weaker sections of the Society.

161. We are in entire agreement with aforesaid observations and reiterate that policy of freehold, prevailing presently, is ex facie arbitrary and discriminatory. It is not for benefit of poor, weaker and needy sections of Society. Instead it permits profiteering by

rich and resourceable people at the cost of public assets of which Government is custodian. Distribution of public largesse must be in a fair, reasonable and transparent manner and not by giving selective benefit to certain individuals, who had extra ordinary resources to enjoy the same and others are deprived of because of financial or other inequality. However, as already said in our view judgment in **Prakati Rai and 6 Others vs. State of U.P. and 20 others (supra),** noted above, on the question of validity of policy, our observations are not expression of final opinion but we recommend to Government to immediately relook and reconsider freehold policy and take appropriate decision, since it is high time that public assets must be dealt with in an apparent transparent manner, which is most beneficial to public at large.

162. In view of above discussion, **Question (vii)** is also answered against petitioners.

163. Now coming to question (viii), respondents have said that every land and its requirement, suitability etc. is different. It cannot be said that other lands, which have been made freehold are identically situated with petitioners' land. For the purpose petitioners' land has been re-entered/resumed, authorities have found it, to be, most suitable and that is how it has been selected. There is no question of any discrimination. Nothing otherwise has been placed before us to show that in all other aspects, land in question is identical with other land which have been made freehold. Therefore, in absence of any factual material and pleading, we do not find any substance in the plea of discrimination and it is accordingly rejected. **Question (viii),** as formulated above, is answered against petitioners.

164. Next **question (ix)**, is whether resumption/re-entry is valid and genuine. Here, it is not in dispute that Allahabad City has been selected to be developed as 'Smart City'. For this purpose, large scale development is required. However, contention of counsel for petitioner is that purpose mentioned in impugned order passed by Collector is neither genuine nor bona fide, therefore, resumption is bad. He has relied for the purpose of explaining 'public purpose' on the definition contained in Section 3(za) read with Section 2(1)(e) of "Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013" (hereinafter referred to as "Act, 2013"). Section 2(1)(e) and 3(za) of Act, 2013 are reproduced as under:-

"2(1) The provisions of this Act relating to land acquisition, compensation, rehabilitation and resettlement, shall apply, when the appropriate Government acquires land for its own use, hold and control, including for Public Sector Undertakings and for public purpose, and shall include the following purposes, namely:-

....

(e) project for planned development or the improvement of village sites or any site in the urban areas or provision of land for residential purposes for the weaker sections in rural and urban areas;"

"3(za) "public purpose" means the activities specified under sub-section (1) of Section 2;"

165. Definition Clause of Act, 2013 we do not find, relevant for the purpose of present case, inasmuch as, here it is

Government land which was given on lease to private individuals for residential purpose with a condition that whenever Government will require it for itself or public purpose, it can be resumed/re-entered.

166. Here 'public purpose' means that land is required not for benefit of any individual or set of individuals but for public at large. The reason may be numerous but here word 'public purpose' has to be understood in the context of individual interest vis-a-vis general public. We do not find that definition of Act, 2013, which is in the context of acquisition of individual's land can apply where Government's own land is being resumed by Government i.e. Owner. Re-entry and resumption of own land for 'own purpose' or for 'public purpose' i.e. public at large is per se valid and will override the individual right of Lessees. Therefore, entire submission based on Act, 2013 is misconceived.

167. It has not been disputed that land in question is situated in a very prime, busy and important commercial area i.e. Civil Lines of Allahabad. There is huge scarcity of parking place causing regular jams etc. Further, in order to develop the city as 'Smart City', various developmental activities have to be undertaken and the purpose mentioned in impugned order, in our view, does satisfy requirement as 'public purpose'.

168. We, therefore, answer **question (ix) against petitioners.**

169. Now last question i.e. **question (x),** is, whether re-entry over land in question will require compliance of procedure prescribed in U.P. Act, 1972.

170. It cannot be doubted that aforesaid Act also provides a procedure for resumption of public land where a person is occupying the same 'unauthorizedly' by eviction/ejectment through a summary procedure. In the present case, petitioners 2 to 5 being Lessee and lease has been continuing when impugned order was passed, it cannot be said that they were in possession 'unauthorizedly'. Therefore, aforesaid Act has no application.

171. However, respondents have pleaded and shown that land in dispute is not in actual possession of petitioners 2 to 5 but it is occupied by IERT and Women's Polytechnic was running thereon. Before creating such tenancy rights, whether petitioners 2 to 5 obtained any permission from Lessor, on this aspect, no material has been placed before us though such transfer is not permissible under the provisions of lease-deed without permission of Lessor, and it amounts to serious breach of conditions of lease. Such Transferee, therefore is covered by definition of "unauthorized occupation" as defined in Section 2(g) of U.P. Act, 1972. Aforesaid Statute provides an additional mode and method of eviction of such 'unauthorised' occupants besides procedure prescribed in lease deed, therefore exercising right of election, Lessor can follow and proceed in accordance with procedure prescribed in lease deed. It cannot be said that such exercise of power by Lessor would be illegal.

172. In similar circumstances, where by giving one month's notice, lease land during period of subsistence of lease was resumed/ re-entered by U.P. Government, matter came up for consideration in **Azim**

Ahmad Kazmi and Others Vs. State of U.P. and Others (supra) and Supreme Court upheld such re-entry. We have already discussed above judgment in detail above, and it is not necessary to repeat the same. Therefore **question (x) is also answered against petitioners.**

173. It is admitted case of petitioners that land in question has already been taken in possession by respondents. Since, we have not found resumption, contrary to law, hence nothing further is required to be done.

174. In view of above discussion, writ petition lacks merit. Dismissed. No costs.

175. Let a copy of this judgment be forwarded to Chief Secretary, U.P. Lucknow and Principal Secretary, Urban Development, U.P. Lucknow, for reconsidering policy of freehold in the light of observations made in paras 160 to 161 of judgment and take appropriate decision.

(2019)12 ILR A406

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.11.2019

BEFORE
THE HON'BLE CHANDRA DHARI SINGH, J.

Criminal Appeal No. 450 of 1998

Shyam Deo Yadav & Ors.
Appellants(In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri A.K. Awasthi, Sri Manish Tiwari, Sri V.C. Tiwary

Counsel for the Opposite Party:
A.G.A.

A. Criminal Law - The Schedule Castes And The Schedule Tribes (Prevention of Atrocities)Act , 1989 - Section 3(1) (X) - offences are punishable but non-compoundable in nature-parties compromised the matter amicably - Held - if the said compromise is allowed , the parties can lead a cordial life hereinafter - The said alleged offences are not punishable with death or imprisonment for life and both the complainants and the accused are intending to join their hands and compound the offence and no injuries have also been caused to the body of the complainant - more than 25 years have lapsed after the incident took place - the sentenced awarded by the trial court under Section 3(1)(X) of the SC & ST Act is quashed. (Para 13)

In the case of Gian Singh Vs. State of Punjab and another , wherein it has been observed that the Court can exercise the power under Section 482 of Cr.P.C. depending upon the facts and circumstances of each case and compound the offence - The criminal proceedings in a non- compoundable case be quashed when there is a settlement between the parties.(Para 10,11 & 12)

Criminal appeal allowed. (E-7)

List of cases cited: -

1. J.Ramesh Kamath and Others Vs. Mohana Kurupt and Others, (2016) 12 SCC 179

2.Gian Singh Vs. State of Punjab and another, (2012) 10 SCC 303

3.Narinder Singh and others Vs. State of Punjab and another, (2014) 6 SCC 466

(Delivered by Hon'ble Chandra Dhari Singh, J.)

1. Present Criminal Appeal is directed against the judgment and order

dated 04.03.1998 passed by IInd Additional Sessions Judge, Ghazipur in S.T. No.150 of 1996, by which the appellants-accused were convicted for offence punishable under Section 3(1) (X) of S.C. & S.T. Act. He was sentenced to undergo imprisonment for four years' R.I. and pay fine of Rs.2000/-, in default of payment of fine, the appellants have to undergo additional imprisonment for three months.

2. Brief facts of the case are that on 22.07.1995 at about 9:30 A.M., accused persons Dashrath, Shyamdev, Channer and Mukkhu were grazing their buffaloes in the filed of sugarcane of Vikram, informant. When mother of the informant saw, she opposed them for grazing their buffaloes. On her objection, all the accused persons started quarrelling with the mother of the informant and they started beating her with their respective weapons like lathi and danda. After hearing hue and cry of his mother, he and his brother Vishwanath came at the place of incident and tried to save their mother then all the accused persons had also beaten them. Thereafter after hearing hue and cry many people of their village came. All the accused persons had gone giving threat. The informant belongs to Scheduled Caste community. The informant lodged a first information report about the incident on the same day at 11:10 P.M. at police station. The informant Vikram, his brother Vishwanath and his mother Barti Devi were medically examined by Doctor on 22.07.1995 at 1:00 P.M. After completing investigation a chargesheet was filed against all the accused persons before court concerned.

3. The Second Additional Sessions Judge, Ghazipur framed charges for commission of offence under Sections 323, 504 and 506 I.P.C. and Section 3(1) (X) of S.C.& S.T. Act. All the accused persons denied charges levelled against them and pleaded for trial.

4. For proving the charges against the appellants the prosecution examined Vikram, the informant, P.W.1, Barti Devi P.W.2, Vishwanath P.W.3, Sofi P.W.4, Mohit P.W.5 as witnesses of facts.

5. The trial court has examined prosecution witnesses, statements of accused persons under Section 313 Cr.P.C. and evidences.

6. After examining the prosecution witnesses, statements of accused persons and perusing the evidences on record, the trial court has given finding that offences under Section 323 and 504 I.P.C. and Section 3(1) (X) S.C. & S.T. Act are proved but on the compromise as the offences punishable under Sections 323 and 504 I.P.C. are compoundable, therefore, all the appellants-accused were acquitted from the charges under Sections 323 and 504 I.P.C. The trial court has also given finding that since offence under Section 3(1) (X) S.C. & S.T. Act is not compoundable, therefore, all the appellants-accused persons were convicted under Section 3(1) (10) S.C.& S.T. Act and they were sentenced for four years R.I. with fine of Rs.2000/- from each appellants. In default of payment of fine of Rs.2000/- to undergo additional imprisonment for three months to each appellants. The trial court had given compensation of Rs.1000/- to all the injured persons.

7. Learned counsel for the appellants has submitted that the court below has not

considered the facts that main offence has been compromised and all the appellants were acquitted from the charges charges under Sections 323 and 504 I.P.C. on the ground that the parties entered into compromise then offence Section 3(1) (X) S.C. & S.T. Act ought to have been compromised. Therefore, conviction under Section 3(1) (X) S.C. & S.T. Act is bad in law.

8. Admittedly and undisputedly, appellants were charge-sheeted and charges were framed against them for offences punishable under Section 323, 504 IPC read with Section 3(1)(X)of SC & ST Act. An application under Section 320(2) was filed by the complainant for compounding the offence punishable under Section 323, 504 IPC read with Section 3(1)(X) of SC & ST Act on the basis of a compromise entered into between the complainant and the accused appellants. The Additional Sessions Judge, Ghazipur after considering the application and the compromise entered into betwen the parties allowed the said application vide order dated 04.03.1998 after satisfying himself that the application for compounding the offence has been made voluntarily and bona fidely and, therefore, it deserves to be granted but the court concerned refused to compound the sentence punishable under Section 3(1)(X) of SC & ST Act considering the provisions of Section 320 (8) of Cr.P.C., which provides that the composition of an offence shall have the effect of an acquittal of the accused with whom the offence has been compounded. The effect is automatic. Wherever composition of an offence takes place it has instantaneous effect of statutory acquittal of the accused. Hon'ble Supreme Court in the case of Rajinder Singh Vs. State; 1980 SC 1200 held that once permission is granted to compound the offence, effect would be acquittal of accused in respect of offence compounded, by virtue of Section 320(8) of Cr.P.C.

9. In the instant case, the trial court has refused to compound the offence punishable under Section 3(1)(X) of SC & ST Act on the ground that the said offence is not compoundable. At this juncture, it is worth to mention here itself a decision of the Hon'ble Apex Court in the case of ***J.Ramesh Kamath and Others Vs. Mohana Kurupt and Others, reported in (2016) 12 SCC 179,*** wherein the Hon'ble Apex Court has laid down certain principles as to under what circumstances the Court can quash the proceedings or compound the offences even in respect of a non-compoundable offences, wherein it has been held as under:

"Held, power vested in High Court under S.482 is not limited to quashing proceedings within ambit and scope of S.320 of Cr.P.C., - In Gian Singh, (2012) 10 SCC 303, it was clearly expounded that quashing of criminal proceedings under S.482 of Cr.P.C., could also be based on settlements between private parties, and could also be on a compromise between the offender and victim - Only that, the above power did not extend to crimes against the society - Further, jurisdiction vested in High Court under S.482 Cr.P.C., for quashing criminal proceedings was held to be exercisable in criminal cases having an overwhelming and predominatingly civil flavour, particular offences arising from commercial, financial, mercantile, civil, partnership, or such like transactions, or even offences arising out

of matrimony relating to dowry, etc., or family disputes where wrong is basically private or personal. In all such cases, parties should have resolved their entire dispute by themselves, mutually."

10. The Hon'ble Apex Court has reiterated the principles of law laid down in the case of ***Gian Singh Vs. State of Punjab and another reported in (2012) 10 SCC 303,*** wherein it has been observed that the Court can exercise the power under Section 482 of Cr.P.C. depending upon the facts and circumstances of each case and compound the offence. In the case of ***Narinder Singh and others Vs. State of Punjab and another reported in (2014) 6 SCC 466,*** it has been observed as under:

"8. We find that there are cases where the power of the High Court under Section 482 of the Code to quash the proceedings in those offences which are uncompoundable has been recognized. The only difference is that under Section 320(1) of the Code, no permission is required from the Court in those cases which are compoundable though the Court has discretionary power to refuse to compound the offence. However, compounding under Section 320(1) of the Code is permissible only in minor offences or in non-serious offences. Likewise, when the parties reach settlement in respect of offences enumerated in Section 320(2) of the Code, compounding is permissible but it requires the approval of the Court. Insofar as serious offences are concerned, quashing of criminal proceedings upon compromise is within the discretionary powers of the High Court. In such cases, the power is exercised under Section 482 of the Code and proceedings are quashed. Contours of these powers were described by this Court in B.S. Joshi Vs. State of Haryana which has been followed and further explained/elaborated in so many cases thereafter, which are taken note of in the discussion that follows hereinafter.

9. At the same time, one has to keep in mind the subtle distinction between the power of compounding of offences given to the Court under Section 320 of the Code and quashing of criminal proceedings by the High Court in exercise of its inherent jurisdiction conferred upon it under Section 482 of the Code. Once it is found that compounding is permissible only if a particular offence is covered by the provisions of Section 320 of the Code and the Court in such cases is guided solitarily and squarely by the compromise between the parties, insofar as power of quashing under Section 482 of the Code is concerned, it is guided by the material on record as to whether the ends of justice would justify such exercise of power, although the ultimate consequence may be acquittal or dismissal of indictment. Such a distinction is lucidly explained by a three-Judge Bench of this Court in Gian Singh v. State of Punjab. Lodha, J. speaking for the Court, explained the difference between the two provisions in the following manner: (SCC pp.340-41, paras 57 & 59).

"57. Quashing of offence or criminal proceedings on the ground of settlement between an offender and victim is not the same thing as compounding of offence. They are different and not interchangeable. Strictly speaking, the power of compounding of offences given to a court under Section 320 is materially different from the quashing of criminal proceedings by the High Court in exercise of its inherent jurisdiction. In compounding of offences, power of a

criminal court is circumscribed by the provisions contained in Section 320 and the court is guided solely and squarely thereby while, on the other hand, the formation of opinion by the High Court for quashing a criminal offence or criminal proceeding or criminal complaint is guided by the material on record as to whether the ends of justice would justify such exercise of power although the ultimate consequence may be acquittal or dismissal of indictment.

59. B.S.Joshi, Nikhil Merchant, Manoj Sharma and Shiji do illustrate the principle that the High Court may quash criminal proceedings or FIR or complaint in exercise of its inherent power under Section 482 of the Code and Section 320 does not limit or affect the powers of the High Court under Section 482. Can it be said that by quashing criminal proceedings in B.S.Joshi, Nikhil Merchant, Manoj Sharma and Shiji this Court has compounded the non-compoundable offences indirectly? We do not think so. There does exist the distinction between compounding of an offence under Section 320 and quashing of a criminal case by the High Court in exercise of inherent power under Section 482. The two powers are distinct and different although the ultimate consequence may be the same viz. acquittal of the accused or dismissal of indictment."

11. As to under what circumstances the criminal proceedings in a non-compoundable case be quashed when there is a settlement between the parties, the Court provided the following guidelines: (Gian Singh case, SCC pp.340-41. para 58):

"58. Where the High Court quashes a criminal proceeding having regard to the facts that the dispute between the offender and the victim has been settled although the offences are not compoundable, it does so as in its opinion, continuation of criminal proceedings will be an exercise in futility and justice in the case demands that the dispute between the parties is put to an end and peace is restored; securing the ends of justice being the ultimate guiding factor. No doubt, crimes are acts which have harmful effect on the public and consist in wrongdoing that seriously endangers and threatens the well-being of the society and it is not safe to leave the crime-doer only because he and the victim have settled the dispute amicably or that the victim has been paid compensation, yet certain crimes have been made compoundable in law, with or without the permission of the court. In respect of serious offences like murder, rape, dacoity, etc. or other offences of mental depravity under IPC or offences of moral turpitude under special statutes, like the Preventionof Corruption Act or the offences committed by public servants while working in that capacity, the settlement between the offender and the victim can have no legal sanction at all. However, certain offences which overwhelmingly and predominantly bear civil flavour having arisen out of civil, mercantile, commercial, financial, partnership or such like transactions or the offences arising out of matrimony, particularly relating to dowry, etc. or the family dispute, where the wrong is basically to the victim and the offender and the victim have settled all disputes between them amicably, irrespective of the fact that such offences have not been made compoundable, the High Court may within the framework of its inherent power, quash the criminal proceeding or criminal complaint or FIR if it is satisfied

that on the face of such settlement, there is hardly any likelihood of the offender being convicted and by not quashing the criminal proceedings, justice shall be casualty and ends of justice shall be defeated. The above list is illustrative and not exhaustive. Each case will depend on its own facts and no hard-and-fast category can be prescribed."

12. Thereafter, the Court summed up the legal position in the following words: (Gian Singh case, SCC pp.342-43, para 61)

"61. The position that emerges from the above discussion can be summarized thus: the power of the High Court in quashing a criminal proceeding or FIR or a complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide plentitude with no statutory limitation but it has to be exercised in accord with the guidelines engrafted in such power viz.: (i) to secure the ends of justice, or (ii) to prevent abuse of the process of any court. In what cases power to quash the criminal proceeding or complaint or FIR may be exercised where the offender and the victim have settled their dispute, would depend on the facts and circumstances of each case and no category can be prescribed. However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime. Heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. cannot be fittingly quashed even though the victim or victim's family and the offender have settled the dispute. Such offences are not private in nature and have a serious impact on society. Similarly, any compromise between the victim and the offender in relation to the offences under special statutes like the Prevention of Corruption Act, or the offences committed by public servants while working in that capacity, etc., cannot provide for any basis for quashing criminal proceedings involving such offences. But the criminal cases having overwhelmingly and predominatingly civil flavour stand on a different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, the High Court may quash the criminal proceedings if in its view, because of the compromise between the offender and the victim, the possibility of conviction is remote and bleak and continuation of the criminal case would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and the wrongdoer and whether to secure the ends of justice, it is appropriate that the criminal case is put to an end and if the answer to the above question(s) is in the

affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding." The Court in Gian Singh case was categorical that in respect of serious offences or other offences of mental depravity or offence of merely dacoity under special statute, like the Prevention of Corruption Act or the offences committed by Public Servant while working in that capacity. The mere settlement between the parties would not be a ground to quash the proceedings by the High Court and inasmuch as settlement of such heinous crime cannot have imprimatur of the Court."

13. Bearing in mind the above facts and circumstances and on perusal of the charge sheet material, though the offences are punishable under Section 3(1)(X) of SC & ST Act, the said offences are non-compoundable in nature. But as could be seen from the records, the parties have compromised the matter amicably. Therefore, in my opinion, if the said compromise is allowed by keeping in view the above said decision endorsed, the parties can lead a cordial life hereinafter. The said alleged offences are not punishable with death or imprisonment for life and both the complainants and the accused are intending to join their hands and compound the offence and no injuries have also been caused to the body of the complainant.

14. Therefore, keeping in view the above said facts and circumstances, I am of the opinion that the instant criminal appeal is allowed.

15. For the reasons stated above and the fact that the incident took place on 12.07.1995 and more than 25 years have lapsed, the sentenced awarded by the trial court under Section 3(1)(X) of the SC & ST Act is quashed.

16. Appellants are on bail. They need not surrender, in case they are not wanted in any other case. Their bail bonds are hereby cancelled. Sureties are discharged from their liability.

17. Record of the lower court, if summoned, shall be remitted back to the court concerned forthwith along with the copy of this order.

(2019)12 ILR A412

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.12.2019

BEFORE
THE HON'BLE DINESH KUMAR SINGH-I, J.

Criminal Appeal No. 792 of 1982

Kallectariya & Anr. ...Appellants (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Keshav Sahai, Sri Brijesh Sahai, Ms. Rashmi Srivastava (A.C.), Sri Sunil Kumar Yadav.

Counsel for the Opposite Party:
A.G.A.

A. Criminal Law - Indian Penal Code, 1860 – Conviction - Under Sections 363 I.P.C. (Punishment for kidnapping) & 366 I.P.C. (Kidnapping, abducting or inducing woman to compel her marriage, etc.) - prosecution has been able to prove its case to the extent that the accused appellant along with co-accused had taken the victim out of the guardianship of her father - she being less than 18 years was not competent to give consent to leave her father's house

without permission of her father - intention was to commit sexual assault upon her - ingredients of both the sections i.e. Sections 363 and 366 I.P.C. satisfied on the basis of evidence - no error committed by trial court in holding the accused appellant guilty under Sections 363 and 366 I.P.C. (Para 28 & 30)

B. Criminal Law - Probation of Offenders Act, 1958 - Section 4 – Power of the court to release certain offenders on probation of good conduct.

Any person 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. (Para 31)

Held: - Judgement of the trial court is upheld - sentence awarded to the appellant maintained- provision of Probation of Offenders Act, 1958 should be invoked and, hence instead of sending the accused appellant to jail, it is directed that he shall be released on probation. (Para 33)

Criminal Appeal dismissed. (E-7)

List of cases cited: -

(Delivered by Hon'ble Dinesh Kumar Singh-I, J.)

1. Heard Ms. Rashmi Srivastava, learned Amicus Curiae for the appellant and Sri B.A. Khan, learned A.G.A. for the State.

2. This Appeal has been filed by the appellants, Kalletariya and Bhola against the judgement and order dated 12.03.1982 passed by Additional Sessions Judge XI, Agra in S.T. No. 404 of 1979 convicting the appellants under Sections 363, 366 I.P.C. and sentencing them each to undergo three years R.I. for each offence and also to pay a fine of Rs. 500/- for each offence and in default of payment, the appellants have further been directed to undergo R.I. for three months and both the sentences are directed to run concurrently.

3. Out of the two appellants, Kalletariya and Bhola, Bhola has expired and his appeal has been abated vide this Court's order dated 5.01.2019, therefore before this Court, Appeal of Kalletariya remains which is being taken up.

4. As per prosecution version as narrated in F.I.R., the victim/first informant, Vidya aged about 16 years was living with her father, Dhanvaj under his guardianship in village Ram Nagariya, P.S. Jaitpur, District Agra who was earlier married to one Karua. She stayed in her matrimonial home only for four to five days, thereafter she returned to her father's house and was living there since then continuously. Her Gauna had not taken place. The accused, Kalletariya was a resident of village, Nagaria, P.S. Pattora, District Agra who was *jeth* of the victim and at the time of occurrence, he used to work at the place of Village *Pradhan*, Dhandhu and used to often visit the house of victim and the accused appellant no. 2, Bhola (deceased) was his companion. On 10.01.1978, at about 8:30 a.m. when she had gone to ease herself out, both the appellants had met her and gave her temptation that they would provide her good clothes and jewellery and thus, in this way they beguiled her.

On their said promise, the victim accompanied them whereafter the appellant along with co-accused took her to *sookhatal* where in the field of *arhar*, at the point of knife and giving her threat to kill, she was forcibly raped by both of them, thereafter appellants took her to Mauran where she was kept in the house of Bhola for about two and a half hours and from there, appellant along with co-accused took her to Kori Kuan and from there, she was taken in a bus to Etawah. When the said bus stopped at Oodi Mod, there, constables and an inspector came, whom she narrated the entire story and then both the appellants were arrested by police, thereafter the said police personnel had brought driver, conductor, Gambhir Singh and Ram Autar respectively along with informant to P.S. Badhpura where the victim narrated the entire story and on her oral statement, a report was lodged on 10.01.1978 at 6:30 p.m. at P.S. Badhpura, District Etawah on the basis of which chick F.I.R., Exhibit Ka-1 and G.D., Exhibit Ka-2 were prepared, thereafter police also took into possession victim's *petticoat* and the under-wear of Kalletariya, recovery memo of which is mentioned as Exhibit Ka-3. On the next day, i.e. on 11.01.1978 at about 6:00 p.m., medical examination of the victim was conducted by Dr. S. Bhatiya at Agra and medical examination report, Exhibit Ka-4 was prepared by her. Thereafter police brought the accused from Badhpura to P.S. Jaitpur and G.D., Exhibit-9 was prepared. The investigation of this case was assigned to I.O. who prepared site-plan as Exhibit Ka-5 and Exhibit Ka-6 and recorded statements of other witnesses and submitted charge-sheet, Exhibit Ka-8 against the appellants under Section 363, 366, 368 and 376 I.P.C.

5. Against the accused appellant, Kalletariya, charges under Sections 363, 366 and 376 I.P.C. were framed to which he pleaded not guilty and claimed to be tried.

6. From the side of prosecution, as many as seven witnesses have been examined. P.W. 1, Vasdev Singh is a witness of fact, P.W. 2, Constable Girish Chand of P.S. Badhpura has proved F.I.R., Exhibit Ka-1, G.D., Exhibit Ka-2, Recovery Memo, Exhibit Ka-3 and also Material Exhibits, *Petticoat* and under-wear, Material Exhibit-1 and Material Exhibit-2. P.W. 3 is Dr. S. Bhatiya who conducted the medical examination of the victim and has proved medical examination report, Exhibit Ka-4. The victim herself was examined as P.W.4. S.I., Sri Ratan Lal who has investigated the case was examined as P.W.5 and has proved site-plan, Exhibit Ka-5 to Exhibit Ka-7 and also charge-sheet, Exhibit Ka-8. Bharat Kishore, P.W. 6 was posted at P.S., Badhpura, Etawah as a constable and had come to the P.S. Jaitpur along with accused with other papers, has been examined. P.W. 7 is Head-Constable, Udal Singh who was posted at P.S. Jaitpur as Head Moharrir and has proved G.D. as Exhibit Ka-9.

7. Thereafter prosecution evidence was closed and statement of accused was recorded under Section 313 Cr.P.C. in which he has stated that he was falsely implicated in this case. He lived in village, Nagaria, District Etawah with his sister and he did not make frequent visit to the house of victim. The victim was married to his cousin brother. He had not abducted or kidnapped her nor did he commit any rape upon her. He was going from Vahvah to Chamarpura in Etawah in his relationship and husband of the victim, Kalua started having quarrel with him at Oodi Mod and because of that, the

police had arrested and *challaned* him. There was an old enmity between him and Kalua and both of them did not visit each other's house. Kalua was also sitting in the same bus in which the victim was sitting and there, both of them had a quarrel and because of enmity with Kalua, the appellant has been falsely implicated in this case. In defence, one witness, Puttu Singh was examined as D.W.-1.

8. Learned Amicus Curiae for the appellant has argued that appellant was falsely implicated in this case. There is no evidence against him on record and yet, trial court has proceeded to convict him and, accordingly, the judgement needs to be set-aside. If the accused is found to be guilty, he should be given benefit of Probation of Offenders Act, 1958 and be released on probation.

9. In this case, the most important witness is the victim herself who has been examined as P.W. 4, therefore her testimony has to be scrutinized very minutely and cautiously. She has stated that she was living with her father at Ram Nagaria, P.S Jaitpur and the accused appellant, Kalletariya was employed by the village *Pradhan* of the said village, Dhandhu and the said accused frequently came to the house of victim. The said accused was her *jeth*. On the date of occurrence at about 8.30 a.m., when she had gone to attend the nature's call, accused appellant and other co-accused had met her and both of them had given her temptation that they would provide her good clothes and jewellery and that she would be married to accused appellant, Kalletariya and at this, she proceeded with them and thereafter they had taken her to *sookhatal* and at the point of knife, she was raped by them in the field of *arhar* against her wish, thereafter the accused had taken her to village, Mauran in the house of Bhola and remained there for two and a half hours and from there, she was taken to Kori Kuan and from there, she was taken to Etawah by bus. When the said bus stopped at Oodi Mod, she saw policemen there, after seeing them, she raised an alarm and, thereafter she revealed all the details to them pursuant to which, the appellants were arrested and were taken to P.S. Badhpura where the victim lodged a report and, thereafter she was taken to P.S. Jaitpur along with accused.

10. In cross-examination, several questions were put to her which were superfluous such as when she was going for easing herself out; whether she had any '*lota*' regarding which she had stated that the accused had got the said *lota* thrown away but when asked as to why the same was not written in F.I.R., no cogent reply could be given by her but such kind of minor and insignificant questions and their answers would not impact the case adversely. She further stated in her cross-examination that she was given temptation of good jewellery and good clothes by the appellant and she fell prey to the same because of immaturity and proceeded with the accused. Several questions were also asked with respect to the time as to when she reached Oodi Mod and some discrepancies have been noticed in reply to the same and it was argued that if her testimony be taken into consideration in totality, the hours which she is stated to have consumed in travelling from one place to another before reaching the Oodi Mod by 5:00 p.m., the same would not bear out to be true, therefore her statement should not be believed. But it has also

come on record that she is an illiterate lady, hence, such kind of discrepancies for difference in time may be very natural and on this count alone, her statement cannot be disbelieved. One more important aspect regarding which she was cross-examined was the knife which she is said to have been shown at the time of commission of offence, the same was not found to have been entered in police record as there was no recovery memo of the same, therefore, it cannot be concluded that she was taken away from her house under threat and later on rape was committed upon her by showing her knife and she had gone out of her own free will with the accused. The said argument also does not stand good because if the said knife was not taken into possession by the I.O. that would be taken as fault on the part of I.O. and not on the part of victim. As regards her consent being there in going with the accused, the same cannot be taken as free consent because in F.I.R., she has stated herself to be 16 years of age on the date of occurrence and in statement of P.W. 3, Dr. S. Bhatiya, in elbow joint of the victim, Epiphysis was found fused in metaphysic and in wrist joint, Epiphysis with Metaphysic was not found fused completely and on that basis, she had opined that her age could not be 19 years because such fusion takes place at the age of 18 years and in the case at hand when in the wrist joint, Epiphysis with Metaphysic was not found fused completely that would mean that she was less than 18 years, therefore, the prosecution version that the victim was minor at the date of occurrence, so could not give consent to accompany the accused appellant has substance and when she was tempted to accompany the accused that would mean that she was taken away by the accused appellant without her consent.

11. Next important statement is that of P.W. 1, S.I. Vasdev Singh who has stated in his examination-in-chief that on 10.01.1978, he was posted at chauki, Oodi Mod, P.S. Badhpura, District Etawah as In-charge of the chauki. On the said date at about 5.00 p.m., one bus was standing in front of the said chauki and he heard a sound *'bachao'* of a girl, on which he along with Constables Ashok and Indradev reached the bus stand and enquired from the said girl as to what happened then she revealed that these accused i.e. Kalletariya and Bhola had beguiled her away at about 8:30 O' clock that they would provide her ornaments and good clothes and was being taken away with a view to marrying her. They had committed rape upon her near *sookhatal* in the village in the field of *arhar* and, thereafter she was taken to village, Mauran at the place of Bhola where she was kept for 2-3 hours and from there, she was brought to Kori Kuan and after making her aboard the bus, she was taken to Etawah. The said statement was made by the victim in presence of Ram Autar and one another, thereafter after arresting the said accused persons, he had taken them to P.S., Badhpura, District Etawah where the report of the victim/informant was lodged.

12. In cross-examination, this witness has stated that there were few shops situated near the bus stand and several people had come there during the time when the victim narrated her version but he did not make them witnesses in this case. The said witnesses were not resident of Oodi Mod but are of the villages which are located nearby. In the said bus, about

30-35 passengers were aboard. Several other questions were put to him with respect to the direction in which the bus was facing etc. but they are not very relevant.

13. In cross-examination, nothing such has emerged which would make his testimony/examination-in-chief to be impeachable and his statement proves this much that the victim had cried aloud at Oodi Mod, hearing which, this witness had reached on the spot along with other police personnel and she was being accompanied by the accused appellant and other co-accused in the said bus.

14. Constable, Girish Chandra (P.W.2) is a formal witness. He has proved only F.I.R., Exhibit Ka-1 and the G.D. of Registration of case, Exhibit Ka-2. This witness was also recalled on 22.09.1981 and has proved the material Exhibits 1 and 2 i.e. *Petticoat* of the victim and under-wear of the accused.

15. Dr. S. Bhatiya has been examined as P.W.3 who has stated in examination-in-chief that on 11.1.1978 at about 6.00 p.m., the informant/victim, Vidya was brought before her for being medically examined. She did not find any external injury on her body. Hymen was found torn, old and healed. No spermatozoa was found. On the basis of x-ray of elbow joint, Epiphysis was found fused in metaphysic and in wrist joint, Epiphysis with Metaphysic was not found fused completely and it has been expressed that no opinion could be given with regard to rape as she was used to sexual intercourse. X-ray had shown her age above 16 years but below 18 years. She has proved her medical examination report as Exhibit Ka-4.

16. P.W.3 has been cross-examined at length and nothing such has come in her cross-examination which would create any doubt about truthfulness of her testimony and she has emphatically opined in cross-examination that the age of the victim/informant was 16-18 years only and she could not be 19 years' old, therefore, this witness has also clinchingly given evidence to the effect that victim was less than 18 years on the date of occurrence, therefore she could not be taken to be a consenting party for having been allowed to have sexual intercourse.

17. P.W.5, S.I. Ratan Lal who has conducted the investigation has stated in examination-in-chief that on 10.01.1978 when he was posted at P.S. Jaitpur, he was assigned investigation of this case. On 11.01.1978, he has taken statement of informant/victim (Vidya) and on 19.01.1978 at her instance, he had gone to village, Ram Nagaria and investigated the place of occurrence from where the victim was said to have been taken away and prepared the site-plan of the said place which is Exhibit Ka-5. In the site-plan by letter 'A' is shown the place where the victim had gone for easing herself out, thereafter she had also shown him the place where rape was committed upon her and he prepared the site-plan of the same which is Exhibit Ka-6 in which by letter 'A' is shown the place where the said occurrence happened in the field of *arhar* of Raghuraj Singh. On the same day, he came to village of accused, Bhola and at the instance of victim, he prepared the site-plan of the place where she was kept by the accused which is Exhibit Ka-7, thereafter he went to P.S. Badhpura and interrogated S.I., Vasdev Singh of police chauki, Oodi Mod, P.S. Badhpura, District Etawah and recorded his statement and statement of other witnesses i.e. Ram Autar Singh and

Gambhir Singh. On 6.02.1978, after having concluded the investigation, he has submitted the charge-sheet, Exhibit Ka-8.

18. In cross-examination, this witness has stated that the place from where the victim was abducted was about one and half furlong away from Ram Nagaria. The distance from Nagaria to the field of *arhar* in *sookhatal* would be around 5-6 kms. From village, Mauran to *sookhatal*, the distance was about two and half kms. Mauran to Kori Kuan, the distance was about 1 1/2 to 2 kms. The distance from Kori Kuan to Oodi Mod, he does not recollect. In the field of pulses (*arhar*), the crop would be of a height of a man. He had found the crop of pulses in bent condition but has not shown them that way. In village, Mauran, he did not meet Natthu Singh, Baldev and Sukhram but had interrogated others which included Naresh Singh and Babu Singh but they were not made witnesses in this case. Further he has stated that on the next day of occurrence, he had taken the victim to the field of pulses and village of Bhola. The victim, Vidya had not disclosed to him that in the bus, the accused had shown her knife nor had she told him about knife being recovered from them. During investigation, it had not come in his knowledge that from both the accused, knife was recovered. At Jaitpur police station, the victim, Vidya has not lodged any report. From P.S., Badhpura to P.S. Jaitpur, victim had come in the night at about 10.00 p.m. on 10.01.1978, entry regarding which is made in G.D. No. 41. Further he has stated that he had not interrogated any of the shop-keepers who were located near Oodi Mod. Gambhir Singh and Ram Autar told him that they were in the bus. Bus number was not mentioned in the report of P.S. Badhpura nor the same was mentioned in the statement of witness under Section 161 Cr.P.C. The name of the bus driver was Munna Lal and that of conductor was Raja Ram. He has recorded statement of both of them and has denied that he has submitted false charge-sheet against the appellants.

19. From the statement of this witness narrated above, nothing such has come to light which could cast any doubt in respect of truthfulness of his statement in examination-in-chief and this witness has clearly proved that a fair investigation was made by him and has prepared not only one but three site-plans of each place i.e. place from where the victim was said to have been taken away by the accused appellant and the place where rape was committed upon her and the place where she was kept for few hours in the house of co-accused appellant. The only thing that would create doubt in the mind was about the fact that the knife which was stated by the victim to have been used by the accused appellants to threaten her and by showing the same, she was said to have been raped, the same fact was not stated by the victim to the I.O. that such a knife was used by the accused persons and in this regard, there is contradiction in the statement of victim because in her statement before court, she has stated that she had revealed it to the I.O. that such a knife was used by the accused persons at the point of which she was raped but I do not find such contradiction to be minor contradiction with regard to the happening of occurrence with the victim.

20. One Bharat Kishore Singh has been examined as P.W. 6 who was Constable at P.S., Badhpura on 10.01.1978 and has stated in examination-

in-chief that on the same day, in the evening at about 6:30 p.m., he along with other constable, Hari Kishan had taken chick, G.D., recovery-memo and the sample-seal etc. to the P.S. Jaitpur for which he had departed from there at about 22:00 hours and these articles were deposited at P.S. Jaitpur. He is a formal witness, therefore, his statement does not require to be analysed in depth.

21. Constable Udal Singh has been examined as P.W. 7 who has stated that on 10.01.1978, he was posted at P.S., Jaitpur and on the same day in the night at about 10:00 P.M., Constable Bharat Kishore Singh (P.W. 6) and Hari Kishore had come to his P.S. along with victim and two sealed bundle, copy of F.I.R. and G.D. etc., entry regarding which was made at G.D. no. 41 dated 10.01.1978 by him which is Exhibit Ka-9. This witness is also a formal witness and his testimony also does not require to be discussed at length.

22. Before analysing said evidence and to see whether offence under the above-mentioned sections are made out or not, it would be appropriate to refer here necessary ingredients of those offences.

23. For offence under Section 363 I.P.C., following ingredients are required to be fulfilled:-

"(i) That the accused did:

(a) Forceful compulsion or inducement by deceitful means;

(b) The object of such compulsion or inducement must be the going of a person from any place;

(ii) That such kidnapping of any person was done from India or from the lawful guardianship."

24. As regards offence under Section 366 I.P.C., following ingredients are required to be fulfilled:

"(i) Kidnapping or abducting of any woman;

(ii) Such kidnapping or abducting must be-

(i) 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

(ii) in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse; or

(iii) by means of criminal intimidation or otherwise by inducing any woman to go from any place with intent that she may be, or knowing that she will be, forced or seduced to illicit intercourse.

It is immaterial whether the woman kidnapped is a married woman or not. "

25. Now in the light of above ingredients, I find in this case according to the prosecution version that the victim (P.W.4) was beguiled away by the accused appellant, Kalletariya along with co-accused (Bhola) on the date of occurrence at about 8:30 p.m. when she had gone for easing herself out by telling her that she would be provided good clothes and ornaments and that she would be married to accused appellant, Kalletariya. When she proceeded little ahead of Kori Kuan towards *sookhatal*, these accused had shown her knife and by giving her threat to kill, they had forcibly taken her to the field of pulses where she was raped and, thereafter from the Kori Kuan, she was taken to the village of Bhola where she was kept for two to three

hours and, thereafter both the appellants had taken her to Etawah by motor. At about 5:00 p.m. when the bus stopped at Oodi Mod, the victim cried loudly to call the policemen who were standing there and told them the entire occurrence whereafter both the appellants were arrested by the policemen and were brought to the P.S. The statement of the victim in support of the prosecution version is given in examination-in-chief and in cross-examination as well, she has stood her ground that she was taken away being beguiled by these appellants and subsequently was raped at the point of knife. The Doctor (P.W. 3) has stated that she did not find any injuries upon the body of the victim and could not express any definite opinion of rape because the victim was used to sexual intercourse but she did say that the age of the victim was between 16-18 years and certainly not 19 years.

26. The trial court has not found the case of rape proved because it has written its finding that if two men would commit rape upon the victim, certainly some injuries would have been caused to the victim and the place where the said incident is said to have taken place, crop etc. would have been found crushed under the weight but such a case was not found by the trial court because of which it has given benefit of doubt to the appellants with respect to the offence of rape being committed by the appellants.

27. The said finding need not to be disturbed because the conviction is made under Section 363 and 366 I.P.C. only, hence I uphold the said finding of the trial court for the reasons given by it.

28. As regards the offence under Sections 363, 366 I.P.C. is concerned, it is apparent that the ingredients mentioned above of these two sections appear to be clearly made out on the basis of testimony of the victim (P.W.4) as well as of P.W. 1 and the corroboration of the same by the testimonies of P.W. 3 (doctor) and I.O. (P.W.5). The trial court has also written a finding that because the victim was less than 18 years, she was not competent to give consent to have sexual intercourse with her and her age was found to be proved by the statement of the P.W. 3 who had examined her medically and on the basis of x-ray report, P.W. 2 had opined that she was less than 18 years, therefore, it was held by the trial court that she could not give consent for being taken away by the accused appellants in order to be provided jewellery, clothes and for the purposes of marrying one of the appellants from out of the guardianship of her father where she was residing after her marriage away from her husband. It is also mentioned by the trial court that the evidence which has been adduced from the side of defence of D.W.1, Puttu Singh was not trust-worthy and the same has been discarded. This witness has stated that he was also travelling by the same bus in which the victim was travelling with one man and in the said bus, the said man had a quarrel with the accused appellant, Kallectaria and, thereafter the police had forcibly de-boarded them from the said bus along with victim.

29. In cross-examination, this witness could not give any detail as to what led to the dispute between them and has admitted that it was accused appellant, Kallectaria who had brought him to court for deposition. He did not know the said accused from before and about the fact that who was that man who was accompanying the victim, he could

not throw light upon it. The defence version is that in the said bus, husband of the victim i.e. Karua was also travelling and with him, the accused had picked up quarrel. The victim was sitting in the said bus but he did not know where the Karua was going with Vidya. The said defence as well as the effort of the defence side to prove their version by getting examined, D.W. 1, Puttu Singh does not appear to be believable because it is a case of the prosecution that the victim was living away from her husband under the protection/guardianship of her father. There was no occasion for the husband of the victim accompanying her in bus and the accused appellants picking up a row with him. It appears to be story concocted by the defence side. The trial court has rightly held the statement of D.W.1 to be untrustworthy and this Court concurs with the opinion of trial court in this regard.

30. It is apparent from the testimony of the above cited witnesses that the version of P.W. 4 i.e. victim gets support from the version of P.W. 1 that he had found the P.W.4 crying aloud at Oodi Mod, hearing which he had approached the victim and when she narrated as to how she was forcibly taken away by the appellants, the accused appellants were arrested and taken to P.S. and thereafter, F.I.R. was lodged, therefore, I find that the prosecution side has been able to prove its case to the extent that the accused appellant along with co-accused had taken the victim, Vidya out of the guardianship of her father and she being less than 18 years was not competent to even give consent to leave her father's house without permission of her father and the intention certainly was to commit sexual assault upon her and, therefore, ingredients of both the sections i.e. Sections 363 and 366 I.P.C. appeared to be satisfied on the basis of evidence and trial court does not appear to have committed any error in holding the accused appellant guilty under Sections 363 and 366 I.P.C.

31. Section 4 of Probation of Offenders Act, 1958 says that if 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.

32. Looking to the fact that on the date of recording of statement of accused under Section 313 Cr.P.C. i.e. on 24.02.1982, the accused appellant was 22 years' old, therefore, by now, he must be more than 59 years old person which by any standard would be considered to be old at this distant point of time and since it is being found that co-accused had already died, it is appearing to be very inhuman to send the appellant, Kalletariya to jail to serve out the sentence awarded by the trial court of three years

particularly looking to the fact that he was not found to have committed offence of rape and only offence which has been found proved is that of Section 363 and 366 I.P.C. which is punishable up to ten years only and with fine.

33. In view of the above, the judgement of the trial court is upheld and the sentence awarded to the appellant is maintained, however, looking to the special circumstance narrated above, I find that this would be suitable case in which provision of Probation of Offenders Act, 1958 should be invoked and, hence instead of sending the accused appellant to jail, it is directed that he shall be released on probation for a period of three years on his furnishing two sureties and personal bond of same amount to the satisfaction of the trial court with the direction that he shall appear before the court as and when he is called upon to receive sentence. During this period, he shall maintain peace and shall be of good behaviour.

34. The appeal is, accordingly dismissed.

35. Appellant is on bail. He shall appear before the trial court at the earliest within a period of one month and shall fill up bonds as directed, in case of default, he shall serve out the remaining sentence.

36. Copy of this judgement be transmitted back to the trial court along with lower court record at the earliest by office for strict compliance of the judgement forthwith.

37. Learned Amicus Curiae has assisted this Court for deciding this Appeal, hence for the said effort on her part, it is deemed proper that she should be paid Rs. 5,000/- as remuneration in accordance with rules.

(2019)12 ILR A422

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 26.11.2019

BEFORE
THE HON'BLE PRADEEP KUMAR SRIVASTAVA, J.

Criminal Appeal No. 811 of 1996

Rajwa & Ors. ...Appellants
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri A.K. Singh, Sri Apul Misra, Sri Nand Kishor Mishra, Sri Raja Ram Kushwaha, Ms. Shilpa Ahuja

Counsel for the Opposite Party:
A.G.A., Sri Rakesh Kumar Gupta

A. Evidence Law - Indian Evidence Act, 1872, Criminal Appeal – Motive – In face of direct evidence of eye-witnesses and injured witnesses – motive not required to be proved. (Para 2) Prosecution examined PW-1 and PW-2 who are eye-witnesses and injured witnesses – they are the real brothers of the deceased - they have supported the prosecution version - stated that they saw the whole incident and the accused persons also caused injuries to them - the testimony of a witness cannot be discredited only on the ground that the witnesses are related or interested - the testimony of such witness should be scrutinized cautiously and carefully- relationship by itself will not render the witness untrustworthy. (Para 25, 26 & 28)

B. Criminal Law - Indian Penal Code, 1860 - Section 149 - Every member of unlawful assembly guilty of offence committed in prosecution of common object - There is no substantial

contradiction or discrepancies in the evidence of the prosecution and some of the minor contradiction and discrepancies go to establish the reliability of the witnesses and that also shows that they are not tutored - the witnesses examined by prosecution are natural, credible and trustworthy- Held - no infirmity in the evidence of eyewitnesses who are injured witnesses also, on the basis of which their ocular testimony could be discarded - Conviction is legal and absolutely justified.

The accused persons formed an unlawful assembly with common object to commit offence by causing injuries - F.I.R. for the occurrence lodged without any delay - The injuries found on the body of the deceased person and other injured persons find support from the medical evidence and from the postmortem report by which the date and time of causing the injuries and death is very much corroborated - The place of occurrence has been fully established **.** (Para 43)

C. Criminal Law - Indian Penal Code, 1860 - Section 147,148,323/149 I.P.C - Trial court awarded 6 months for the offence under section 147 - punishment under this section could extend for two years - Same sentence awarded under section 148 - maximum sentence provided under law is 3 years - One year punishment provided under section 323 I.P.C. - trial court awarded sentence of 6 months - Held - the sentence awarded for offence under section 147,148,323/149 I.P.C. is appropriate, proportionate and reasonable. (Para 44)

The use of force and violence by unlawful assembly constituted by the accused persons is very much established in this instant case. In *Sunder Singh v The State, AIR 1955 All 232* and *Barendra Kumar v State of Assam 1978 Cri LJ (noc) 90 (Gauhati),* it has been clarified that where offence has been committed by a member of unlawful assembly, the persons having deadly weapon, shall be punished for the offence under section 148 and others not carrying deadly weapon, shall be punished under section 147. In this case, accused Pragi Lal was having spade which was a deadly weapon and being member of unlawful assembly, committed the offence. As such, his act constituted an offence of rioting committed with spade, a deadly weapon, and that is punishable under section 148. Therefore, a charge under section 147 I.P.C. was unnecessarily framed against accused Pragi Lal, and if framed, he could not be convicted and sentenced for the same and could only be punished for the offence under section 148 I.P.C. In view of this, the conviction and sentence of Accused Pragi Lal for the offence under section 147 I.P.C. is not sustainable and is liable to be set aside. (Para 42)

D. Criminal Law - Indian Penal Code, 1860 - Section 304 Part II - Section 304 Part II provides a maximum sentence of ten years - trial court awarded sentence of 10 years rigorous imprisonment - maximum sentence awarded by the trial court for this offence - trial court mentioned it as first offence of accused persons - they had no criminal antecedent - they committed offence due to social circumstances - Held- sentence awarded by the learned trial court being maximum, if reduced to 7 years, the same will be proportionate in view of the nature of culpability. (Para 45)

The Indian Penal Code recognizes three degrees of culpable homicide namely, (1) culpable homicide of the first degree, a gravest form of culpable homicide which is defined under section 300 as murder, (2) culpable homicide of the second degree, a lower or lessor form of homicide not amounting to murder as defined in section 299, punishable under the first part of section 304 and (3) culpable homicide of the third degree, a lowest type of culpable homicide, punishable under the second part of section 304 - appellants convicted under the category of lowest type of culpable homicide - to give lesson to complainant side because of Chunuvadiya episode - no deadly weapon was arranged and the accused persons were carrying bamboo stick and one was having a spade which is more an agriculture tool rather than weapon. (Para 40)

Held:- Finding of conviction - No illegality or perversity – modification in the sentence - Sentence of *accused* for the offence under section 147 I.P.C. is set aside - Sentence under section 147, 323/149 I.P.C. of *convicted appellants* and sentence of *accused* for the offence under section 148, 323/149 I.P.C. is upheld - sentence of *convicted appellants* and *accused* under section 304 Part II I.P.C. is reduced to seven years. (Para 45)

Criminal Appeal disposed of. (E-7)

List of cases cited: -

1.Saddik Vs. State of Gujarat, (2016) 10 SCC 663

2.Masalti V. State of U.P. (AIR 1965 SC 202)

3.M.C. Ali v. State of Kerala: AIR 2010 SC 1639;

4. Himanshu v. State (NCT of Delhis) (2011) 2 SCC 36: 2011) 1 SCC (Cri) 593,

5.(Bhajan Singh and others Vs. State of Haryana; (2011) 7 SCC 421

6.Jayabalan vs. U.T. of Pondicherry; 2010(68) ACC 308 (SC),

7.Jalpat Rai v/s State of Haryana AIR 2011 SC 2719

8.Waman v/s State of Maharashtra AIR 2011 SC 3327

9.Shyam Babu Vs. State of UP, AIR 2012 SC 3311,

10.Dhari & Others Vs. State of UP, AIR 2013 SC 308 and

11.Bhagwan Jagannath Markad Vs. State of Maharashtra, (2016) 10 SCC 537

12.Rupinder Singh Sandhu vs State of Punjab, (2018) 16 SCC 475,

13.State of Haryana Vs. Krishan, AIR 2017 SC 3125,

14.Mukesh Vs. State for NCT of Delhi & Others, AIR 2017 SC 2161 (Three-Judge Bench),

15.Bhagwan Jagannath Markad Vs. State of Maharashtra, (2016) 10 SCC 537

16.Jarnail Singh Vs. State of Punjab, 2009 (6) Supreme 526

17.State of U.P. Vs. Chhoteylal, AIR 2011 SC 697,

18.Dimple Gupta (minor) Vs. Rajiv Gupta, AIR 2008 SC 239

19.State of U.P. v. Naresh; 2011 (75) ACC 215) (SC)

20.Gosu Jayarami Reddy and another Vs. State of Andhra Pradesh; (2011) 3 SCC(Cri) 630,

21.Parsu Ram Pandey v/s State of Bihar AIR 2004 SC 5068,

22.Shivappa v. State of Karnataka; AIR 2682,

23.Ramchandaran v/s State of Kerala AIR 2011 SC 3581

24.Mukesh Vs. State for NCT of Delhi & Others, AIR 2017 SC 2161 (Three-Judge Bench)

25.Bhagwan Jagannath Markad Vs. State of Maharashtra, (2016) 10 SCC 53,

26.Mukesh v State for NCT of Delhi & Others, AIR 2017 SC 2161,

27.Bhagwan Jagannath Markad v State of Maharashtra, (2016) 10 SCC 537

28.Hukum Singh v State of Rajasthan, 2001 CrLJ 511 (SC),

29.Dharnidhar Vs. State of U.P, (2010) 7 SCC 759

30.Sunder Singh v The State, AIR 1955 All 232

31.Barendra Kumar v State of Assam 1978 Cri LJ (noc) 90 (Gauhati)

32.Ananta Deb Singha Mahapatra v State of WB, AIR 2007 SC 2524

33.State of Karnataka v Bhaskar Kushali Kotharkar, AIR 2004 SC 4333,

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

1. Heard Sri Apul Misra, Ms. Shilpa Ahuja and Sri N.K. Mishra, learned counsel for the appellants, Sri Rakesh Kumar Gupta, learned counsel for the complainant and Sri M. P. Singh Gaur, learned A.G.A. for the State.

2. This criminal appeal has been filed against the judgment and order dated 04.05.1996, passed by Additional Sessions Judge, Hamirpur, in Sessions Trial No. 179 of 1990 (State vs. Rajwa and others), arising out of Case Crime No. 137 of 1988, Police Station Kabrai (Hamirpur), District Mahoba by which the appellants Rajwa, Shiva Narain, Babu Lal, Sipahi Lal, Pragi Lal and Lalloo have been convicted and sentenced for the offence under Section 147 I.P.C. for six months rigorous imprisonment each, for the offence under Section 304/149 I.P.C. for ten years rigorous imprisonment along with fine of Rs. 2000/- each and in default of fine six months additional imprisonment and for the offence under Section 323/149 I.P.C. for six months rigorous imprisonment along with fine of Rs. 500/- each and in default of fine one month additional imprisonment. The accused-appellant Pragi Lal has also been convicted and sentenced for the offence under Section 148 I.P.C. for six months rigorous imprisonment. However, accused persons Nanna and Bachcha have been acquitted by the learned trial court.

3. It appears that **accused-appellant no. 4 namely Sipahi Lal has died and his appeal has been abated by the order dated 16.08.2019.**

4. Brief facts of the case is that on 29.07.1988 at about 5 to 6 P.M. Rishi Ram had gone for natural call and Rameshwar, the another brother of informant Mewa Lal was returning after natural call. At the moment, he reached at the door of Sipahi Lal, the accused persons Rajwa, Shiva Narain, Sipahi Lal, Pragi Lal, Bachcha, Nanna, Lalloo and Babu Lal carrying spade and lathi in their hands met and said to Rishi Ram that Chunwadia, the daughter of Kalloo has been defamed by them. Rishi Ram and Rameshwar refused having done so, whereupon the accused persons started beating both of them. On hue and cry being raised, the informant Mewa Lal, Dwarika and Punna reached there and they were also beaten by the accused persons by spade and lathi. The witnesses Murli, Ram Das and others reached there on hearing noise. Mewa Lal lodged the first information report at Police Station Kabrai on 29.07.1988. The injured persons Punna, Mewa Lal, Rameshwar, Dwarika and Rishi Ram were medically examined in Primary Health Centre, Kabrai. Seeing the serious conditions of all the injured persons, they were sent to District Hospital, Hamirpur. Finding the condition of Rishi Ram more serious, he was referred from District Hospital to Kanpur Helat Hospital, where, on 1.08.1988 Rishi Ram died during treatment because of the injuries caused by the accused persons on the date of incident.

5. Alleging motive, it was stated in the first information report that in respect of Chunuwadia, a Panchayat took place in the village but nothing was decided and her illicit relations with accused Rajwa remained a rumour and the accused persons were of the opinion that she is being scandalized because of Rishi Ram and Rameshwar and they had inimical relation with them.

6. On information of death of Rishi Ram in Helat Hospital, the police came

and prepared inquest report on 1.08.1988 and with necessary paper, the dead body was sent for postmortem to District Hospital, Kanpur. The postmortem was conducted at about 04:00 P.M. and the post-mortem report was prepared. On the death of Rishi Ram on 18.08.1988, the Investigating Officer made addition of Sections 147, 148 and 304 I.P.C. and the investigation was started. The I.O. recorded the statements of the witnesses, prepared site map and thereafter submitted charge sheet under sections 147, 148, 323, 324, 304 I.P.C. against all the accused persons.

7. Charges were framed against the accused persons for the offences under Section 147, 302/149, 324/149 I.P.C. and against against accused Pragi Lal, charge was also framed under Section 148 I.P.C.. The prosecution examined as many as seven witnesses and documents Exhibits Ka-1 to Ka-13 were proved by the prosecution witnesses. The statements of the accused persons were recorded under Section 313 Cr.P.C., who did not give any evidence in defence. They, however, stated that the statements given by the witnesses were false and because of enmity, they have been falsely implicated in the present case. After hearing the prosecution and defence side, the learned trial court passed the impugned judgment and convicted and sentenced the accused-appellants.

8. Feeling aggrieved by the impugned judgment, the present criminal appeal has been filed challenging the impugned judgment on the ground that the conviction and sentence is against the weight of evidence available on record. The sentence is too severe and the learned trial court did not consider the evidence on record properly. Therefore, the impugned judgment is liable to be set aside and the accused-appellants are entitled for acquittal.

9. PW-1 Mewa Lal (informant and eye witness) has stated that the accused persons Rajwa, Shiva Narain, Sipahi Lal, Pragi Lal, Bachcha, Nanna, Lalloo and Babu Lal belong to his village and he knows them and they are present in the court. Accused Shiva Narain and Babu Lal are sons of accused Rajwa, whereas, accused Nanna and Bachcha are sons of the maternal uncle of Rajwa. Sipahi Lal is cousin brother of Rajwa and accused Lalloo is brother-in-law of Rajwa, whereas, accused Pragi Lal is close companion of Rajwa. The witness has stated that the deceased Rishi Ram was his real brother and at about 6 A.M. in the morning on the date of incident when he was going for natural call and his brother Rameshwar was coming back and when both reached in front of the house of accused Sipahi Lal, he came out and on his door, all the accused persons were present with lathi in their hands whereas Pragi Lal was having a spade. They were talking about the conduct of Rishi Ram and Rameshwar making allegations that they are defaming them. When both denied accused persons Nanna and Bachcha kept standing there, whereas other accused persons namely Rajwa, Shiva Narain, Sipahi Lal, Pragi Lal, Lalloo and Babu Lal started beating Rishi Ram and Rameshwar by lathi and spade. On hue and cry, Mewa lal, his father Punna and his brother Dwarika reached there and tried to prevent accused persons but the accused persons also started beating them and caused injuries to them. Witnesses Murli and Ram Das reached there and saw the incident. He lodged the

first information report which is Ext. Ka-1. They were sent to hospital by police where they were medically examined. Injured persons including Rishi Ram were referred to District Hospital. Rishi Ram was more serious, hence, he was referred to Helat Hospital, Kanpur, where he died on 01.08.1988 because of the injuries caused by the accused persons. The witness has also stated about the Panchayat which took place in respect of Chunuwadia, the daughter of Kalloo and Rajwa having illicit relations. The accused persons were suspecting Rishi Ram and Rameshwar were scandalizing Chunuwadia. In cross-examination, he has stated that no injury was caused by spade by Pragi Lal to him. By spade Rameshwar and Dwarika sustained injuries. Punna did not suffer any injury of spade.

10. PW-2 Rameshwar has also supported the statement of PW-1 Mewa Lal and has stated that when he was going for natural call and Rishi Ram was returning back, in front of the door of Sipahi Lal, the accused persons carrying a lathi and accused Pragi Lal with a spade met there and on account of rumour defaming Chunuwadia, they all started beating Rishi Ram. When Mewa Lal, Dwarika and Punna reached there, they were also beaten. Witnesses Murli and Ram Das reached there who saw the incident. The injured persons were taken to hospital, where they were medically examined in Primary Health Centre, Kabrai and thereafter they were sent to District Hospital, Hamirpur. The condition of Rishi Ram was being more serious, hence he was referred to Helat Hospital, Kanpur, where he died. The witness also stated that Murli and Ram Das have come in collusion with the accused persons and they are not prepared to give evidence against them.

11. PW-3 Dr. M. L. Verma examined injured Rishi Ram on 29.07.1988 at PHC, Kabrai at 10 A.M. and found following injuries on his body:-

1. Lacerated wound 1.5 cm. X 0.5 cm. X bone deep at head in left side in parietal region, 7 cm. above left ear. The injury was crushed and lacerated in irregular way and on touching, the injury was bleeding.

2. Contusion 8 cm. X 4 cm. on left side on forehead above left eyebrow. There was swelling and redness in the eyes. X-ray was advised.

3. Incised would 1.5 cm. X 0.5 cm. X 0.2 cm. on left forearm in the middle and on the outer side, 12 cm. below the left joint elbow. Clean cut, fresh and slant.

4. Contusion 10 cm. X 3 cm. on left thigh in the middle and outer side. 20 cm. above the left knee joint, red in colour and swelling was present.

5. Contusion 6 cm. X 3 cm. on forehead in the left side. 4 cm. below the injury no. 1, colour redish, swelling was present, X-ray was advised.

6. Contusion 6 cm. X 3 cm. on the right side of head behind temporal region. 4 cm. above the right ear, redish and swelling was present in slant, X-ray was advised.

According to doctor, injures no. 1, 2, 4, 5 and 6 were caused by blunt object like lathi and injury no. 3 was caused by sharp weapon like spade. The injured was unconscious at the time of medical. There was bleeding from his mouth and his condition was very poor.

12. On the same day at about 10:15 A.M. injured Rameshwar was also examined and following injuries were found on his body :-

1. Crush injury 5 cm. X 1.5 cm. bond deep in the right side of head and

parietal region, 13 cm. above the right ear, irregularly lacerated and crushed, bleeding was starting on touching the injury. X-ray was advised. The injury was in the slant condition.

2. Abrasion 4 cm. X 3 cm. on the right side of face, 4 cm. above from the mouth angle.

3. Abrasion 10 cm. X 3 cm. on the joint of right shoulder.

According to doctor injuries no. 2 and 3 were caused by blunt object and it was possible to have come by friction. X-ray was advised in respect of injury no. 1.

13. On the same day at about 10:45 A.M., injured Dwarika was examined and following injuries were found on his body :-

1. Crushed injury 8 cm. X. 1.5 cm. X bone deep on the right side of head on temporal region in slant position, above 8 cm. from the right ear. The edges of the injury was irregular and there was bleeding on touching the injury.

2. Crushed wound 4 cm. X 1.5 cm. X bone deep on the back side of head in the occipital area horizontally and 9 cm. away from injury no. 1. The edges of the injury was irregular and bleeding was present on touching the same.

3. Contusion 6 cm. X. 3.5 cm. on the 1/3 area of right forearm, 5 cm. Above the right joint. The injury was redish and swelling was present. X-ray was advised.

4. Contusion 8 cm. X 3 cm. on the back of the joint of right shoulder, 3 cm. Behind the scapula. The injury was redish and swelling was present.

According to doctor all the injuries wee caused by blunt object like lathi and were simple in nature.

14. On the same day at about 11:20 A.M., injured Punna was medically examined and following injuries were found on his body :-

1. Lacerated wound 3 cm. X. 1.5 cm. X bone deep on the left side of head in the parietal region, 10 cm. above the left ear. The edges of the injury were irregular and badly crushed. Bleeding was present on touching the injury. The injury was in slant position.

2. Contusion 10 cm. X 9 cm. on the left forearm on the back side, 21 cm. below the left elbow joint. The injury was redish and X-ray was advised.

3. Contusion 7 Cm. X 3 cm. in the right hand on the back of outer side of 1/3 forearm, 2 cm. above the wrist joint. Swelling was present. The injury was redish and X-ray was advised.

4. Contusion 7 cm. X 3.5 cm. behind the right forearm, 6 cm. below the right elbow. Injury was redish, swelling was present and X-ray was advised.

5. Contusion 7 cm. X 3 cm. outside the right hand and in the middle chest above the right elbow joint.

6. Abraded contusion 4 cm. X. 3 cm. above the right shoulder. The injury was redish and swelling was present.

7. Contusion 8 cm. X. 3 cm. behind the abdomen in slant position, 14 cm. below the scapula angle. The injury was redish, swelling was present and X-ray was advised.

According to doctor all the injuries were caused by blunt object like lathi and were simple in nature.

15. On the same day at about 12:15 P.M. injured Mewa Lal was examined and following injuries were found on his body :-

1. Contusion 6 cm. X 4 cm. on the left side of the face on the angle of

medieval bone, below 2.5 cm. from the left ear. The injury was redish, swelling was present and X-ray was advised.

2. Contusion 8 cm. X. 3 cm. in the middle of right thigh, 2.5 cm. above the right knee joint. The injury was redish and swelling was present.

3. Contusion 11 cm. X. 3 cm. in the right thigh, 2 cm. Below the injury no. 2. The injury was redish and swelling was present.

According to doctor all the injuries were caused by blunt object like lathi and were simple in nature.

16. The doctor has stated that the injuries of all the injured persons were found to be fresh and the same were possible to have been caused on 29.07.1988 at about 6 A.M. He has also proved the injury reports as Ext. no. Ka-2 to Ka-6. In the cross-examination, however, he has stated that the injuries of Rishi Ram are also possible at 3 to 4 A.M. in the morning. There was no incised wound to injured Rameshwar and Dwarika. Similarly, after seeing the postmortem report, the witness has stated during cross-examination that no incised wound is mentioned on the body of Rishi Ram.

17. PW-4 Surendra Bahadur Singh SI has stated that on 29.07.1988, he was deputed as S.I. in Police Station Kabrai and Case Crime No. 137 of 1988 was registered in his presence and he was assigned investigation on 03.08.1988. He has recorded the statements of witnesses Rameshwar, Dwarika, Punna and Murli and prepared the site-map Ext. Ka-7. On 29.07.1988, he obtained the postmortem report of Rishi Ram and copied the same in the case diary and accordingly an addition of offence under Section 304 I.P.C. was made. He could not get the X-ray report on that date. On 10.10.1988, he recorded the statements of witnesses Ram Das and others and after completing the investigation, he submitted charge sheet. He has also stated that initially investigation was made by S.I. Ram Naresh Yadav and he recorded the statement of informant. The witness has also proved the GD as Ext. Ka-9 by which the offence was modified and chik F.I.R. as Ext. Ka-10 and G.D. report as Ext. Ka-11 have also been proved by him.

18. PW-5 Chandra Shekhar Gautam, Chief Pharmacist has stated that the post-mortem of Rishi Ram was conducted by Dr. S.M. Agarwal in the mortuary of U.H.N. Hospital on 01.08.1988. Dr. S.N. Agarwal has died and since he worked with him and had seen him writing and signing, therefore, he has proved the postmortem report as Ext. Ka-12.

19. From the perusal of postmortem report, it appears that the deceased Rishiram was aged about 43 years. Following ante-mortem injuries were found on the body of deceased:

1. Lacerated wound 2 cm x 2 cm x bone deep present on the right side of scalp in parietal region 5 cm above from left year.

2. Contusion on left eye (blackening) 5 cm x 2.5 cm.

3. Contusion on the right eye 3 cm x 2 cm (blackening).

4. Lacerated wound 1 cm x 0.5 cm on the left forearm 10 cm below elbow joint.

The cause of death has been shown to be shock and hemorrhage resulted because of ante-mortem injuries.

20. PW-6 and I.O. Ram Naresh Yadav has stated that on the date of incident he was given investigation of the offence. He copied the medical report in the case diary and arrested accused Nanna. Thereafter, SI S.B. Singh conducted the investigation. In his cross-examination, the witness has stated that he did not take statement of Chunuwadia.

21. PW-7 Ram Narayan has stated that Rishi Ram died in Helat Hospital and the police of District Kanpur prepared the inquest report and other papers on which he also signed which is Ext. Ka-13.

22. The submission of the learned counsel to the appellants is that all the witnesses examined by the prosecution are interested and related witnesses and none of the independent witnesses has been produced. The motive for the offence is not clear and confusing. On the same evidence, two accused persons have been acquitted. There is only one injury which can be said to be fatal and on vital part resulting in death of the deceased, but the learned trial court has convicted 6 persons for the offence under section 304 I.P.C.. The sentence is too severe. Only Pragilal has been said to be having spade, but he has been convicted for both the offence under section 147 and 148 I.P.C.. It has been also argued that the F.I.R. is delayed for which no explanation has been given by the prosecution.

23. So far as the delay in lodging the F.I.R. is concerned, the learned trial court has found on evidence that the F.I.R. was lodged in 3-4 hours from the time of incident on the same day. The police station was 21 km. away from the place of occurrence and 6 persons were injured of complainant side and they went to police station on bullock-cart. Therefore, the learned trial court rightly concluded that in the facts and circumstances of the case, there was no delay in lodging F.I.R.

24. So far as motive for the offence is concerned, the learned trial court, after clarifying on the basis of statement of PW-1, has pointed out that that the reason for the incident was the illicit relation between Rajawa and Chunuvadiya due to which she was enough scandalized and this brought bad name and frame to her and family. The mention of Chunuvadiya in F.I.R. and the expression *'badnami karni hai'* was concluded by the learned trial court that it was not happily worded and it has come in the statement of informant that it was to indicate that the complainant side has scandalized her and it meant *'Chunuvadiya ko badnam kar diya hai'* (Chunuvadiya has been scandalized) and in respect of it, a panchayat also took place in the village on the initiation of the accused persons 15 days before. It needs mention that Chunuvadiya is the sister of accused Pragi and it was a rumour in the village that she had illicit relation with accused Rajawa and accused persons believed that rumour has been spreaded by the complainant side in the village. Therefore, on the basis of evidence on record, the learned trial court found that this became a motive for this criminal incident.

25. Moreover, in a case based on direct evidence, the settled law is that existence or proof of motive is not necessary. In ***Saddik Vs. State of Gujarat, (2016) 10 SCC 663,*** it has been held that motive is not a sine qua non for the commission of a crime. Moreover, it takes a back seat in a case of direct ocular account of the commission of the offence

by a particular person. In a case of direct evidence the element of motive does not play such an important role as to cast any doubt on the credibility of the prosecution witnesses even if there be any doubt raised in this regard. If the eye-witnesses are trustworthy, the motive attributed for the commission of crime may not be of much relevance. Failure to prove motive or absence of evidence on the point of motive would not be fatal to the prosecution case when the other reliable evidence available on record unerringly establishes the guilt of the accused. It is pertinent to mention that where case is based on direct evidence it is not incumbent for the prosecution to allege or prove motive. It can, however, be pointed out that in this case, the motive has been alleged and proved by the prosecution.

26. In the case in hand, the prosecution has examined PW-1 Mewalal and PW-2 Rameshwar who are eye-witnesses and injured witnesses and they have supported the prosecution version and have stated that they saw the whole incident and the accused persons also caused injuries to them. The submission of the learned counsel for the appellant is that both these witnesses are related and highly interested witnesses as they are the brothers of the deceased. The law in this regard is well settled that the testimony of a witness cannot be discredited only on the ground that the witnesses are related or interested. The only requirement is that the testimony of such witness should be scrutinized cautiously and carefully. Thus, In ***Masalti V. State of U.P. (AIR 1965 SC 202)*** Supreme Court Observed:

"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."

27. The above observation has been affirmingly quoted in subsequent judgments. Thus, for instance, in ***M.C. Ali v. State of Kerala:: AIR 2010 SC 1639; and Himanshu v. State (NCT of Delhis) (2011) 2 SCC 36: 2011) 1 SCC (Cri) 593, (Bhajan Singh and others Vs. State of Haryana; (2011) 7 SCC 421***, it was laid down that evidence of a related witness can be relied upon provided it is trustworthy. Such evidence is required to be carefully scrutinized and appreciated before reaching to a conclusion on the conviction of the accused in a given case.

28. Again in ***Jayabalan vs. U.T. of Pondicherry; 2010(68) ACC 308 (SC), Jalpat Rai v/s State of Haryana AIR 2011 SC 2719*** and ***Waman v/s State of Maharashtra AIR 2011 SC 3327,*** it was observed that the over-insistence on witnesses having no relation with the victims often results in criminal justice going away. The testimony of a witness in a criminal trial cannot be discarded merely because the witness is a relative or family member of the victim of the offence. In such a case, court has to adopt a careful approach in analyzing the evidence of such witness and if the testimony of the related witness is otherwise found credible, accused can be convicted on the basis of testimony of such related witness. This view has been reiterated in ***Shyam Babu Vs. State of UP, AIR 2012 SC 3311, Dhari & Others Vs. State of UP, AIR 2013 SC 308*** and ***Bhagwan Jagannath Markad Vs. State of Maharashtra, (2016) 10 SCC 537.***

Recently, in ***Rupinder Singh Sandhu vs State of Punjab, (2018) 16 SCC 475,*** it has been reiterated by the supreme court that relationship by itself will not render the witness untrustworthy. It is true that PW-1 and PW-2 are the real brothers of deceased. But, there is nothing in their statements which can create any amount of doubt, although, both have been cross-examination at length on every point very minutely.

29. So far as trustworthiness of the fact witnesses is concerned, it needs to be pertinently mentioned that both these witnesses are injured witnesses and law gives a very high value to a witness who has sustained injury in the same incident. As held in ***State of Haryana Vs. Krishan, AIR 2017 SC 3125,Mukesh Vs. State for NCT of Delhi & Others, AIR 2017 SC 2161 (Three-Judge Bench), Bhagwan Jagannath Markad Vs. State of Maharashtra, (2016) 10 SCC 537 and Jarnail Singh Vs. State of Punjab, 2009 (6) Supreme 526***, deposition of an injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies for the reason that his presence on the scene stands established in the case and it is proved that he suffered the injuries during the said incident. Moreover, both the witnesses are illiterate villagers and keeping in view the law laid down in ***State of U.P. Vs. Chhoteylal, AIR 2011 SC 697, Dimple Gupta (minor) Vs. Rajiv Gupta, AIR 2008 SC 239*** the court should keep in mind the rural background and the scenario in which the incident had happened and should not appreciate the evidence from rational angle and discredit the witness's otherwise truthful version on technical grounds.

30. From the statement of doctor who has examined both the witnesses, it is clear that their injuries were possible by the weapons which have been assigned to the accused persons and must have been caused on date and time as alleged by the prosecution.

31. The learned counsel for the appellants has mentioned certain discrepancy and contradiction in the testimony of witnesses with regards to who reached first and who gave how many blows and who caused injuries to whom and the like. It needs to be pointed out that where one person of the same family died on the spot and four other received injuries, in such a horrendous situation, the witnesses are not supposed to be perfectionist to give the exact account of the incident. Some sort of contradiction, improvement, embellishment is bound to occur in the statement. As laid down in ***State of U.P. v. Naresh; 2011 (75) ACC 215) (SC),*** 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. 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.

32. In ***Gosu Jayarami Reddy and another Vs. State of Andhra Pradesh;***

(2011) 3 SCC(Cri) 630, it was observed that Courts need to be realistic in their expectation from the witnesses and go by what would be reasonable based on ordinary human conduct with ordinary human frailties of memory and power to register events and their details. A witness who is terrorized by the brutality of the attack cannot be disbelieved only because in his description of who hit the deceased on what part of the body there is some mix-up or confusion.

33. Further, in ***Parsu Ram Pandey v/s State of Bihar AIR 2004 SC 5068, Shivappa v. State of Karnataka; AIR 2682, Ramchandaran v/s State of Kerala AIR 2011 SC 3581,*** it was held that minor discrepancies or some improvements would not justify rejection of the testimonies of the eye-witnesses, if they are otherwise reliable. Some discrepancies are bound to occur because of the sociological background of the witnesses as also the time gap between the date of occurrence and the date on which they give their depositions in Court. In ***Mukesh Vs. State for NCT of Delhi & Others, AIR 2017 SC 2161 (Three-Judge Bench)*** and ***Bhagwan Jagannath Markad Vs. State of Maharashtra, (2016) 10 SCC 53,*** it was reiterated that minor contradictions in the testimonies of the Prosecution Witness are bound to be there and in fact they go to support the truthfulness of the witnesses.

34. It has been further argued on behalf of the learned counsel to the appellant that no independent witnesses, though alleged in F.I.R., have been examined nor other injured witnesses except PW-1 and PW-2 have been produced by the prosecution. It is true that in the F.I.R., it has been alleged that on hearing noise, witnesses Murali and Ramdas reached there and their name finds mention in the charge-sheet. In respect of these witnesses, PW-1 and PW-2 have stated that they are not prepared to give evidence in support and they are in collusion with the accused persons. In such circumstances if they have not been examined, it will have no effect on prosecution case.

35. In ***Mukesh v State for NCT of Delhi & Others, AIR 2017 SC 2161, Bhagwan Jagannath Markad v State of Maharashtra, (2016) 10 SCC 537*** and ***Hukum Singh v State of Rajasthan, 2001 CrLJ 511 (SC),*** the Supreme Court has explained the law on this point and has laid down that if a witness examined in the court is otherwise found reliable and trustworthy, the fact sought to be proved by that witness need not be further proved through other witnesses though there may be other witnesses available who could have been examined but were not examined. Non-examination of material witness is not a mathematical formula for discarding the weight of the testimony available on record however natural, trustworthy and convincing it may be. It is settled law that non-examination of eye-witness cannot be pressed into service like a ritualistic formula for discarding the prosecution case with a stroke of pen. Court can convict an accused on statement of sole witness even if he is relative of the deceased and non examination of independent witness would not be fatal to the case of prosecution. It has been further laid down in ***Dharnidhar Vs. State of U.P, (2010) 7 SCC 759*** that non- examination of independent eye witnesses is inconsequential if the witness was won

over or terrorised by the accused. In ***Hukum Singh (supra),*** the Supreme Court expressed following view:

"If there are too many witnesses on the same point the Public Prosecutor is at liberty to choose two or some among them alone so that the time of the Court can be saved from repetitious depositions on the same factual aspects. That principle applies when there are too many witnesses cited if they all had sustained injuries at the occurrence. The Public Prosecutor in such cases is not obliged to examine all the injured witnesses. If he is satisfied by examining any two or three of them, it is open to him to inform the Court that he does not propose to examine the remaining persons in that category. This will help not only the prosecution for relieving itself of the strain of adducing repetitive evidence on the same point but also helps the Court considerably in lessening the workload. Time has come to make every effort possible to lessen the workload, particularly those Courts crammed with cases, but without impairing the cause of justice."

36. Another submission is in respect of cause of death of Rishiram as in paper no 18A, it has been reported by the Helat Hospital that his death occurred due to sudden cardiac respiratory arrest. It is a routine communication made by the Hospital to the police for necessary action as the deceased was referred and brought in critical condition accompanied by Dr. Bajpayee in the Hospital where he died during treatment because of head injury. In postmortem report it has been mentioned that the cause of death was shock and hemorrhage resulted because of ante-mortem injuries. A person who has suffered serious injuries on his head resulting in fracture and is sent for better treatment in attendance of a doctor and dies during treatment there, falsifies the argument of appellant as it cannot be concluded that he died not because of injuries but died his natural death. The learned trial court has very rightly rejected this argument and has concluded that death of deceased occurred because of injuries caused to him in the criminal incident.

37. It has been further submitted that non of the injuries sustained by the deceased can be said to have been caused by spade and therefore, the participation of accused Pragi Lal is doubtful. From the perusal of the postmortem report it appears that 4 ante-mortem injuries have been found on the body of Rishipal- two lacerated wound and two contusion. Prior to his death, he was also examined by the doctor and his medical report Ext. Ka-2 is on record in which at least one injury has been found to be caused by sharp weapon. The said injury reads- *"Incised would 1.5 cm. X 0.5 cm. X 0.2 cm. on left forearm in the middle and on the outer side, 12 cm. below the left joint elbow. Clean cut, fresh and slant."* Moreover, it has been rightly concluded by the learned trial court that, in such situation where a number of accused persons have attacked with lathi, spade could have been used in both manner- like blunt object and also like a sharp weapon. The participation of accused Pragi Lal has been also found to have been established in view of the fact that some of the other injured persons have sustained crushed injuries and after a logical discussion, on the basis of size, shape and impact of injuries, the learned trial court has given a finding that those injuries were possible by a spade when used by the reverse side like a heavy blunt

object. Therefore, I find no force in this argument.

38. The learned counsel for the appellant has submitted that as many as 8 persons have been roped by prosecution who have been alleged to have caused injuries to the deceased and injured persons, but, the number of injuries found is not so to indicate that so many persons were involved in the commission of the offence. In this incident, 5 persons have sustained injuries and the total number of injuries including the injuries of the deceased are 27. The learned trial court has scruitnised the evidence on record and has arrived at a conclusion that in such kind of cases where the accused persons are assaulting by lathi except Pragi Lal who assaulted by spade, there remains always a possibility that some of the assault may be missed and by some assaults, visible injuries may not be sustained. Moreover, causing injuries to five persons including death of one in the same incident and total number of injuries being 27, is quite in consonance with the numbers of the accused persons. As such, the learned trial court rejected the contentions of the appellant on this point. I find myself in total agreement with the finding recorded by the learned trial court.

39. The plea of defence of false implication on account of enmity and family dispute has been rightly disbelieved by the learned trial court in absence of any cogent evidence. Moreover, these accused persons, except accused Pragi Lal, were close relatives and family members. Accused Pragi Lal is also closely associated with them in view of Chunuvadiya episode who was his sister. There is no reason why accused persons will be falsely implicated by complainant side. Their involvement and participation has been proved by injured eye-witnesses and despite detailed cross-examination, nothing has come out to create any suspicion on prosecution version. This finding also finds support by the fact that the crime took place in front of the house of accused persons. Both the side belong to same village and locality and their presence during occurrence at the place is natural.

40. It is pertinent to mention that the convicted appellants have been tried for the offence under section 302 I.P.C. and have been convicted for the offence under section 304 Part II. On the basis of above discussion, to put it in simple terms. The Indian Penal Code recognizes three degrees of culpable homicide namely, (1) culpable homicide of the first degree, a gravest form of culpable homicide which is defined under section 300 as murder, (2) culpable homicide of the second degree, a lower or lessor form of homicide not amounting to murder as defined in section 299, punishable under the first part of section 304 and (3) culpable homicide of the third degree, a lowest type of culpable homicide, punishable under the second part of section 304. The appellants have been convicted by the learned trial court under the category of lowest type of culpable homicide and have been sentenced accordingly for the reason that the trial court found that the accused persons intended to give lesson to complainant side because of Chunuvadiya episode. Moreover, no deadly weapon was arranged and the accused persons were carrying bamboo stick and one was having a spade which is more an agriculture tool rather than weapon.

41. There is yet another submission and it has been submitted that accused

Pragi Lal has been said to carry spade and to have caused injury. The learned trial court has not only framed charge against him for both the offence under section 147 and section 148 I.P.C., but has also convicted for both the offences. The learned counsel to the appellant has argued that the conviction under both section is not possible and the accused could only be convicted for the either offence. Section 147 incorporates punishment for simple rioting whereas, section 148 provides punishment for offence of rioting by a person armed with deadly weapon. The offence of 'Rioting' has been defined by section 146 of the Indian Penal Code as below:

"146. Rioting- Whenever force or violence is used by an unlawful assembly, or by any member thereof, in prosecution of the common object of such assembly, every member of such assembly is guilty of the offence of rioting."

42. The use of force and violence by unlawful assembly constituted by the accused persons is very much established in this instant case. In ***Sunder Singh v The State, AIR 1955 All 232*** and ***Barendra Kumar v State of Assam 1978 Cri LJ (noc) 90 (Gauhati),*** it has been clarified that where offence has been committed by a member of unlawful assembly, the persons having deadly weapon, shall be punished for the offence under section 148 and others not carrying deadly weapon, shall be punished under section 147. In this case, accused Pragi Lal was having spade which was a deadly weapon and being member of unlawful assembly, committed the offence. As such, his act constituted an offence of rioting committed with spade, a deadly weapon, and that is punishable under section 148. Therefore, a charge under section 147 I.P.C. was unnecessarily framed against accused Pragi Lal, and if framed, he could not be convicted and sentenced for the same and could only be punished for the offence under section 148 I.P.C.. In view of this, the conviction and sentence of Accused Pragi Lal for the offence under section 147 I.P.C. is not sustainable and is liable to be set aside.

43. From the above discussion, I am of the considered view that the learned trial court has rightly concluded that the prosecution has been able to prove the charges beyond shadow of any doubt. Excluding the accused persons who have been acquitted, the number of the convicted accused persons/appellants has been **6** and **2** eyewitnesses who were injured in the same incident have stated the whole incident in a very natural and spontaneous way. It has been established that the accused persons were present at the place of occurrence with bamboo stick and one Pragi lal with spade in a planned way. It has come in the evidence that when PW-2 and deceased reached on spot, all the accused persons entered into a short conversation regarding Chunuvadiya and thereafter started beating them. On noise, other injured persons of the family of deceased reached there and they were also beaten by the accused persons. It goes to establish that the accused persons formed an unlawful assembly with common object to commit offence by causing injuries to complainant side. It is also clear that the F.I.R. for the occurrence was lodged without any delay and even if for the sake of argument there was any delay, the same stands reasonably explained by the prosecution witnesses and in the facts and circumstances of the case. The injuries found on the body of the deceased person

namely Rishiram and other injured persons find support from the medical evidence and from the postmortem report by which the date and time of causing the injuries and death is very much corroborated. Medical evidence clearly indicates that because of injuries caused by the accused persons, Rishiram died. The place of occurrence has been fully established. There is no substantial contradiction or discrepancies in the evidence of the prosecution and some of the minor contradiction and discrepancies which have been discussed above goes to establish the reliability of the witnesses and that also shows that they are not tutored. Thus, the witnesses examined by prosecution are natural, credible and trustworthy. There appears to be no infirmity in the evidence of eyewitnesses who are injured witnesses also, on the basis of which their ocular testimony could be discarded. The conviction recorded by the learned trial court is legal and absolutely justified.

44. It has been further argued that the sentence awarded by the learned trial court is too severe in the facts and circumstances of the case. The learned trial court has awarded 6 months for the offence under section 147, whereas, the punishment under this section could extend for two years. The same sentence has been awarded under section 148, while the maximum sentence provided under law is 3 years. One year punishment has been provided under section 323 I.P.C. and the learned trial court has awarded sentence of 6 months. Therefore, the sentence awarded for these offence appears to be appropriate, proportionate and reasonable and I find no force in the argument of the learned counsel in respect of offence under section 147,148,323/149 I.P.C..

45. So far as the sentence awarded for the offence under section 304 Part II is concerned, the learned trial court has awarded sentence of 10 years rigorous imprisonment. Section 304 Part II provides a maximum sentence of ten years. It means that maximum sentence has been awarded by the learned trial court for this offence. The learned trial court while hearing on sentence, has mentioned that it was first offence of accused persons, they had no criminal antecedent and they committed offence due to social circumstances. It has not been mentioned anywhere the reasons why it thought necessary to award maximum sentence when the finding was recorded that the death was caused without intention to cause death. This instant appeal pertains to a crime which took place in the year 1988 and the appeal itself is of the year 1996. I find that in ***State of Karnataka v Bhaskar Kushali Kotharkar, AIR 2004 SC 4333,*** sentence of 7 years has been reduced to 5 years and in ***Ananta Deb Singha Mahapatra v State of WB, AIR 2007 SC 2524,*** sentence of 8 years has been reduced to 6 years by the Supreme Court for the offence under section 304 Part II. Therefore, the sentence awarded by the learned trial court being maximum, if reduced to 7 years, the same will be proportionate in view of the nature of culpability.

44. Amongst the appellants, one appellant Sipahi has died during the pendency of this appeal and his appeal has been already abated.

45. In view of the above discussion, I find no illegality or perversity in the impugned judgment so far as finding of conviction is concerned. As concluded above, the sentence of accused **Pragi Lal** for the offence under section 147 I.P.C. is

set aside. The sentence under section 147, 323/149 I.P.C. of convicted appellants **Rajwa, Shiva Narain, Babu Lal,** and **Lalloo** and sentence of accused **Pragi Lal** for the offence under section 148, 323/149 I.P.C. is upheld. The sentence of convicted appellants **Rajwa, Shiva Narain, Babu Lal, Lalloo** and **Pragi Lal** under section 304 Part II I.P.C. is reduced to seven years. The default sentence in lieu of fine as awarded by the learned trial court for the above offences will remain undisturbed. As directed in the impugned judgment, all the sentences shall run concurrently and the period already undergone by convicted appellant shall be adjusted against the awarded sentence.

46. With the aforesaid modification, this criminal appeal is finally **disposed of.**

47. The appellants **Rajwa, Shiva Narain, Babu Lal, Lalloo** and **Pragi Lal** to surrender before the concerned court forthwith to be sent to jail to undergo the sentence.

48. The office is directed to return the lower court record to the concerned court along with a certified copy of the judgment for information and necessary compliance.

(2019)12 ILR A438

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 30.08.2019

BEFORE
THE HON'BLE VIPIN SINHA, J.
THE HON'BLE SIDDHARTH, J.

Criminal Appeal No. 1487 of 1984

Ram Chandra & Anr. ...Appellants (In Jail)

Versus

State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri A. Hajela, Sri Rahul Misra (A.C.), Sri V.B.L. Srivastava, Sri V.K. Shukla

Counsel for the Opposite Party:
A.G.A.

A. Criminal Law - Indian Penal Code, 1860 – conviction - Section 302 IPC , Section 324 IPC (Voluntary causing hurt by dangerous weapons or means) read with Section 34 IPC (Acts done by several persons in furtherance of common intention) - the time of death of the deceased mentioned in the FIR appears to be doubtful - Presence of rigor mortis by itself cannot be decisive of the time of death - prosecution failed to discharge its burden regarding the incident in dispute - it has failed to prove the injury nos. 5, 6 and 7 on the body of the deceased – held - the motive of crime set up by the prosecution was not convincing. (Para 41,42 & 43)

The incident in dispute is doubtful appears convincing from the testimony of P.W.-1. - The statement of P.W.-1 that he did not went to the police station directly but he went to the house of his uncle, and thereafter, he went to lodge the FIR shows that the FIR was lodged by the P.W.-1 after due deliberation with his uncle - rigor mortis sets in and reaches the 'extremities' at the end and that it follows the same pattern both in the matter of appearance and disappearance - Presence of rigor mortis by itself cannot be decisive of the time of death - It is true that on the basis of presence of rigor mortis, no opinion can be given with mathematical precision regarding the time of death - The process of appearance and disappearance of rigor mortis may take relatively shorter and longer time depending on various factors like temperature, season, etc., of the place of death. (Para 34, 36, 38, 39 & 40)

Held**: -** The prosecution has failed to establish the alleged crime against the appellants

beyond reasonable doubt -The appellants are acquitted of the charges. (Para 44)

Criminal Appeal allowed. (E-7)

List of cases cited: -

1.Virendra @ Buddhu and another vs. State of U.P., 2008 (15) SCALE 283

(Delivered by Hon'ble Siddharth, J.)

1. Heard Sri Rahul Misra, learned Amicus curaie for the appellants and Sri Rajesh Mishra, learned A.G.A. for the State.

2. This criminal appeal has been preferred against the judgment and order of conviction dated 30.04.1984 passed by VIth Additional District & Sessions Judge, Saharanpur in Sessions Trial No. 584 of 1982 (State vs. Sia Ram and two others) convicting and sentencing the appellants, namely, Ram Chander son of Godhra Kisan and Jaduvir son of Jograj Kisan. Appellant no. 1, Ram Chander, is convicted and sentenced to undergo imprisonment for life under Section 302 IPC. He is also convicted and sentenced to undergo rigorous imprisonment for three years under Section 324 IPC read with Section 34 IPC. Appellant no. 2, Jaduvir, is also convicted and sentenced to undergo life imprisonment under Section 302/34 IPC. He is also sentenced to undergo rigorous imprisonment for three years under Section 324 IPC. Both the sentences have been directed to run concurrently.

3. The prosecution case is that Ram Kishore, informant, lodged the first information report at Police station-Jaitipur, on 11.03.1982 at 07:15 am stating that his grandfather, Anokhe Lal, had illicit relationship with Smt. Prema, widow of Khushali. Khushali was elder uncle (tau) of co-accused, Sia Ram. After death of Khushali, Smt. Prema had been living in his house and she transferred 20 bighas of land of her share to Anokhe Lal. She died about 7 years back. Ever since her death, co-accused, Sia Ram wanted to get back the aforesaid land back but he could not get possession of the same. Due to the above motive yesterday i.e., 10.03.1982, at about 3:00 pm, when the informant was going along with his uncle, Gendan Lal and Nanku, to village- Kota on the eve of *Holi*, co-accused, Sia Ram, armed with gun, his brother, Ram Chander, armed with country made pistol and Jaduvir, armed with *kanta*, came out of the house of Sia Ram. When they reached the door of Sia Ram he fired at his uncle, Gendan Lal, with his gun. When his uncle fell down, Jaduvir attacked him on his legs with a *kanta* and Ram Chander fired from his country made pistol on his right ear. Sia Ram hit him with the butt of the gun on his head also and Gendan Lal died.

4. Inquest report and site plan were prepared, blood stained earth was taken from the spot and thereafter post mortem report of the body of Gendan Lal was conducted by Doctor Aslam Khan. After due investigation charge-sheet was submitted against the appellants and co-accused, Sia Ram, who died during pendency of trial.

5. Accused-appellant no. 1, Ram Chander, was charged under Section 302 IPC and 324 IPC read with Section 34 IPC. Accused-appellant no. 2, Jaduvir, was charged under Section 302/34 IPC and 324 IPC.

6. Prosecution examined, P.W.-1, Ram Kishore, the informant; P.W.-2,

Nanku; P.W.3, S.I. Kali Shanker Tiwari, Investigating Officer; P.W.-4, Dr. Mohd. Aslam Kamal Khan, who conducted the post-mortem of deceased Gendan Lal and P.W.-5, Constable, Asif Husain, who brought the sealed dead body of deceased for post-mortem along with the papers.

7. P.W.-1, Ram Kishore, deposed that deceased, Gendan Lal, was his uncle. Name of his father was Kunwar Bahadur. Co-accused, Sia Ram, has died. Ram Chander, is real brother of deceased co-accused, Sia Ram. Accused-appellant no. 2, Jaduvir is real nephew of Ram Chander. Khushali was uncle of Ram Chander and Sia Ram. Smt. Prema was widow of Khusali. His grandfather, Anokhey Lal, has illicit relation with Smt. Prema. After death of her husband, she began to live with Anokhey Lal in his house. Smt. Prema transferred her share of 20 bighas of land in the name of Anokhey Lal. Smt. Prema died about 8 years back. Co-accused, Sia Ram, wanted to get back that land, which was transferred by Smt. Prema. As Sia Ram could not get possession over that land, hence accuseds had enmity with them. About one year, 10 months back at 3 pm, he alongwith deceased, Gendan Lal and Nanku, were going to village- Kota in connection with *Holi Milan*. When they reached at the door of Sia Ram, deceased co-accused, he was armed with a country-made gun, Jaduvir had a *kanta* and Ram Chander was armed with a pistol. Sia Ram fired with the gun at his uncle, Gendan Lal. Ram Chander fired with the pistol and Jaduvir attacked him with the *kanta*. Sia Ram attacked with the butt of the gun also on the head of the deceased and due to injuries inflicted his uncle died.

8. In his cross-examination P.W.-1 stated that his father were five brothers, namely, Rajaram, Ramnath, Gendan Lal, Ram Sewak and Kunwar Bahadur. His father, Kunwar Bahadur, was murdered in dacoity. Brother of accused, Sia Ram, Hemraj, was murdered prior to the present murder of Gendan Lal. In the murder trial of Hemraj, he and his uncle Ram Sewak are accuseds. The trial is still pending. Wife of Ram Chandra is the witness and mother of Jaduvir is also a witness in the trial. He stated that his uncle, Ram Nath, was murdered in Saraiyaganj. In the aforesaid murder Ram Singh and Chote were tried. In suggestion he denied that the deceased, Gendan Lal, was tried in the murder of Mahesh. He also denied implication of deceased, Gendan Lal, in dacoity in the house of Lallu Singh. He also denied implication of deceased, Gendan Lal, in the theft case at Sraiyaganj before trial court. He further stated that he wrote the application for lodging FIR in his house where no one were present. Raja Ram was near the dead body of Gendan Lal and his uncle, Nanku, was also there. All the other people were near the dead body of the deceased but he was in the house. He did not slept in the night and started for police station at 4:00 - 4:30 a.m on foot. Police Station is 6 *kos* away. First he went to village Padainiya where his uncle (*fufa*), Pothi Ram resides, and after taking him from his house and he went to the police station. Jaitipur is too *kos* away from Padainiya. He specifically denied that the report was lodged on the next day of the incident.

9. P.W.-2, Nanku, stated in his statement that he is resident of village Gauhaniya and deceased, Gendan Lal, was his cousin *(mausera bhai)*. At the time of incident he was residing in village Jhabra along with deceased. His murder took place at 3:00 pm when he was going to village Kota for meeting people on the eve of *holi* from the passage passing

through the house of Sia Ram. As soon as they reached the gate of house of Sia Ram the accuseds, Sia Ram, Ramchandra and Jaduvir came out from their house. Sia Ram had gun, Ram Chandra had a country made pistol and Jaduvir was having a *kanta*. Sia Ram stated that he will let them enjoy the taste of cultivating the land of his aunt today and thereafter he threw a challenge. Gendan Lal, turned back after raising his arms and then Sia Ram fired at him which hit him below the arm pit and he fell down. Ram Chandra fired at his right ear and Jaduvir gave blow of *kanta* on his right leg. Sia Ram hit Gendan Lal on his head by the barrel of the gun. He along with Ram Kishore cried for help but no one came. He went and saw Gendan Lal who had died. On account of fear he and the informant did not went anywhere. His brother, Raja Ram was weak and therefore he was living with him in his village.

10. In his cross-examination, P.W.-2 stated that he does not knows how much land did Raja Ram had. He further stated that Rajaram had about 60, 70 bighas of land which was joint. There were two other persons to work, apart from Raja Ram. He has land of about 40-50 bighas in village Gauhaniya. He admitted in cross-examination that he was not doing the ploughing, planting and harvesting of the land of Raja Ram. He does not knows how much land Raja Ram has in the village. He admitted that his village is 10-11 *kos* away and 1.5 miles are equal to one *kos*. At the time of incident Gendan Lal was 3-4 steps ahead to him. Sia Ram fired at him immediately after coming out of the gate. After firing Sia Ram did not run away nor the informant, Ram Kishore ran. Gendan Lal suffered injuries. Neither the informant nor he suffered any injury. Sia Ram did not attacked them. Deceased fell down infront of the house of Ram Bharose. He did not lifted him. Since he was empty handed he did not made any effort to defend him. He further stated that he informed the investigating officer that injuries of *kanta* was caused on the left leg and right feet of the deceased. Deceased fell in the middle of the passage. After Gendan Lal fell the ladies of his house came. Neither the informant nor he had any talk with the ladies. He and Raja Ram remained with the dead body till it was lying there and it was only after it was sealed and taken away by the police that they left. He does not knows Pothi Ram. He was not the witness of inquest report. At the time of inquest Ram Kishore was there. He does not remembers who were signatories of inquest report. He denied that signature of Ram Kishore was taken before him on the inquest report. The dead body was sealed at 12:00- 12:30 pm. After it was taken away in bullock-cart he went alone. He denied that Gendan Lal was involved in any criminal case regarding theft, dacoity, gangster, etc. He also denied any such involvement of Ram Kishore, the informant. He denied that he has not seen the incident and is falsely deposing before the court.

11. P.W.-3, Kali Shanker Tiwari, deposed that on basis of report Ext. Ka-1, head constable Bani Singh executed chick which is Ext. Ka-2, copy of G.D. No. 7, 7:15 am dated 11.03.1982 executed by the said constable is Ext. Ka-3. He took the statements of the witnesses and reached the place of occurrence. He took the dead body of deceased, Gendan Lal, in his possession, executed *panchnama*, Ext. Ka-4, prepared photo of deed body, chalan of dead body and specimen of seal

and letters to the C.M.O. and R.I. which are Ext. Ka-5, Ka-6, Ka-7, Ka-8 and Ka-9. He sealed the dead body and handed over sealed dead body and relevant papers for post-mortem to constable, Asif Husain, and village- Chaukidar Rahwari. He prepared site plan, Ext. Ka-10. From the place of occurrence, he took in possession shoes of deceased and plain earth and blood stained earth and prepared the memos which are Ext. Ka-11 and Ka-12. Shoes are Ext. 13. Blood stained earth is Ext. 2 and plain earth is Ext. 3. After investigation, he filed charge sheet Ext. Ka-14.

12. Dr. Mohd. Aslam Kamal Khan, P.W.-4, deposed that on 12.03.1982 at 4:30 pm he conducted the post-mortem of Gendan Lal who was brought by constable, Asif Husain and Chaukidar Rahwari. Seal was intact. Dead body was identified by the above mentioned constable and Chaukidar. Duration of the death of the deceased was about 2 days. Rigor mortis had passed off from the upper portion and was passing from lower portion.

13. Ante-mortem injuries on the dead body of the deceased were following:-

(1) Incised wound on the dorsum of right foot 10cm x 1.5 cm x bone deep.

(2) Incised wound of 3.5cm x 1 cm on left leg in the middle 1/5 of the leg.

(3) Gunshot wound of enterance 6 cm circular x chest cavity deep, margins lacerated and inverted, on the right side of the chest lower part 12 cm (sic) and lateral to the right nipple at 8 o'clock position. Blackenning and tattooing present around the wound.

(4) Gunshot wound of enterance 3 cm circular x brain cavity deep on the right side of the skull just behind the right ear. No blackenning and tattooing.

(5) Incised would 4 cm x 1 cm x cranial cavity deep 5 cm about right ear.

(6) Incised wound 10 cm x 0.5 cm x cranial cavity deep on the top of skull in sagettal place 9 cm above the injury nos. 5 and 7.

(7) Wound 4 cm x 1 cm x cranial cavity deep on the front of the skull 6cm away from the bridge of the nose. Bones fractured under the wounds.

14. On internal examination, he found that stomach contained 100 grams food particles, not recognizable. Gall bladder was empty. In small intestines digested food was found. According to him death was due to shock and haemorrhage. He deposed that time of death may be at about 3 pm. On 10.03.1982. Dr. also deposed that injury nos. 3 and 4 are possible by gun and pistol and injuries nos. 1, 2, 5, 6 and 7 are possible by *kanta*.

15. Accused, Ram Chander, deposed under Section 313 Cr.P.C. that informant killed his brother. At the time of incident, informant, Ram Kishore and his uncle, Ram Sewak, were accuseds in a case regarding death of his brother, Hemraj, due to which he has been falsely implicated, so that he could not do *pairavi* of that case.

16. Jaduvir, deposed under Section 313 Cr.P.C., that informant, Ram Kishore and his uncle, Ram Sewak, killed his uncle, Hemraj. He and his mother are witnesses in that case. Therefore, he has been falsely implicated in this case.

17. Accused did not produced any oral evidence in defence.

18. The accuseds filed copy of the charge sheet in the Case Crime No. 95, under Sections 302, 307/34 IPC, Police Station- Jaitipur (State vs. Raja Ram, Sita Ram and Hemraj) of the court of II-Additional Sessions in Sessions Trial No. 30/1981 (State vs. Raja Ram and others) under Sections 395 IPC, Police Station-Jaitipur and judgment of the IInd Additional Sessions Judge, Sri R.G. Gupta, in Sessions Trial No. 30 of 1981, copy of the charge sheet in Crime No. 101 under Sections- 148, 147, 149, 342, 364, 302, 20 IPC, Police Station- Jaitipur, (State vs. Raja Ram and others).

19. This court vide order dated 13.08.2018 appointed Sri Rahul Mishra, Advocate as Amicus Curaie to assist the court on behalf of appellants since no one was appearing to argue the appeal on behalf of the appellants.

20. He has firstly submitted that the appellants have been falsely implicated in this case. Their presence on the scene of occurrence is doubtful and not proved from the evidence on record. The testimony of P.W.-1 is not worth credence since he has deposed before the court that deceased, Gendan Lal, was done to death before him and he made no effort to save him. He made no effort of lifting him from the spot with the help of Nanku, P.W.-2. He did not even touched the deceased to ascertain whether he is alive or not. He has only stated that he raised the alarm for help but no one came. It has been stressed that the conduct of the informant is not normal since as soon as Gendan Lal fell he along with P.W.2 presumed that he has died and their conduct shows that neither P.W.-1 nor P.W.-2 were present on the spot. P.W.-2 has also admitted that where the deceased fell he remained there and he did not lifted him or tried to save him by taking him to doctor.

21. In support of his argument, learned Amicus Curaie has further stated that there was prior enmity between the family of the deceased and the accuseds. P.W.-1 has stated in his cross-examination that his father were five brothers, namely, Rajaram, Ramnath, Gendan Lal, Ram Sewak and Kunwar Bahadur. His father Kunwar Bahadur was murdered in dacoity. Brother of co-accused, Sia R
7. am, Hemraj, was murdered prior to the murder of Gendan Lal. In the murder trial of Hemraj he and his uncle Ram Sewak are accuseds. The trial is still pending. Wife of Ram Chander is the witness and mother of Jaduvir is also a witness in the trial. He has further submitted that his uncle, Ram Nath, was murdered in Saraiyaganj. In the aforesaid murder Ram Singh and Chote were tried. In suggestion he denied that the deceased, Gendan Lal, was tried in the murder of Mahesh. He also denied implication of deceased, Gendan Lal, in dacoity in the house of Lallu Singh. He also denied implication of deceased, Gendan Lal, in the theft case at Sraiyaganj before trial court. The accuseds filed the documentary evidence regarding the criminal cases pending against the family members of P.W.-1 but the trial court has not considered the documentary evidences filed by the accuseds.

22. It has been submitted that the deceased was murdered by unknown person/persons in the night of 10.03.1982 and since there was a criminal trial pending regarding the murder of brother of Sia Ram, Hemraj. Wife of Hemraj and

mother of appellant, Jaduvir are witnesses in the case and P.W.-1 was in the need of defending himself and his uncle, Ram Sewak, in the aforesaid trial thereafter he falsely implicated the deceased, Sia Ram and appellants, who are the brother and nephew of Sia Ram respectively and by the same relation brother and nephew of deceased, Hemraj.

23. By implicating the appellants and deceased Sia Ram in the murder of Gendan Lal, the informant succeeded in presurizing the appellants in the trial of murder of Hemraj.

24. The second submissions made by learned Amicus Curaie is that the FIR was lodged showing incorrect time of death of the deceased and therefore the prosecution case has wrongly been believed by the trial court. He has elaborated that P.W.-1 and P.W.-2, both have stated in their statements that the murder of Gendan Lal took place at 3:00 pm on 10.03.1982. Both the witnesses have stated that on account of fear they did not went to the police station on the same day to lodge the FIR. P.W.-1 has stated that in the morning of 11.03.1982 he went to lodge the FIR at 4:00 to 4:30 am in the morning from his village by foot. Police Station is about 6 *kos* from his village. He had written the application in the night. He did not went directly to the police station- Jaitipur. He first went to village Padiniya where his uncle (*fufa*), Pothi Ram, resides and thereafter he went to the police station along with his uncle, Pothi Ram.

25. Learned Amicus Curaie has pointed out to the post mortem report and the statement of P.W.-4, Dr. Mohd, Aslam, wherein it has been stated that at the time of post mortem of the deceased on 12.03.1982 at 4:30 pm. rigor mortis on the upper part of the body of the deceased had passed off, while in the lower part it was passing off. He has submitted that if the murder of the deceased took place at 3:00 pm on 10.03.1982 there was no reason for the rigor mortis not to have passed off completely over the body of the deceased at the time of post-mortem after more than 48 hours of the murder of the deceased.

26. He has submitted that the trial court has not examined this aspects while dealing with the contentions of the defence. He has further submitted that P.W.-1 and P.W.-2 both have stated that they did not went to lodge FIR on the date of incident because of fear. However, P.W.-1 has not stated how he went alone to lodge the FIR at 4:00 to 4:30 am on foot when the accuseds were absconding. He has submitted that the explanation of delay in lodging of the FIR was not convincing and the court below has wrongly accepted the same. The murder of the deceased took place sometimes in the night of 10.11.1982 and the first information report was lodged next day at 07:15 am before the police station by falsely implicating the appellants and Sia Ram. The medical evidence does not supports the time of death mentioned in the FIR as 3:00 pm on 10.03.1982. He has further pointed out that the FIR was lodged after consultation with Pothi Ram, uncle of P.W.-1. In his statement P.W.-1 has admitted that he first went to Pothi Ram and after taking him along went to lodge the F.I.R. at police station.

27. The third submissions made by the learned Amicus Curaie is that the prosecution case cannot be said to have

been proved keeping in view the statement of the doctor, P.W.-4 wherefrom it is clear that there is no explanation of injury nos. 5, 6 and 7 mentioned in the statement of the doctor.

28. From the statement of P.W.-1 and P.W.-2 it is clear that there was no injury of *kanta* caused on the head, ear and skull of the deceased. Injury nos. 5, 6 and 7 are such injuries which were not alleged by the prosecution either in the FIR or in the statements of the witnesses. He has further pointed out that in the anti-mortem injuries mentioned by the trial court the injury no. 7 has been mixed with injury no. 6 when injury no. 7 is different from injury no. 6. It is incised wound 4 cm x 1 cm cranial cavity deep, 6 cm away from nose bridge. He has pointed out that the prosecution was required to explain the injuries noted above which has not been explained. It casts doubt over the prosecution case.

29. The final submission of the learned Amicus Curaie is that the motive of crime alleged is not convincing. The disputed transfer of 20 bighas of land by Smt. Prema, widow of Khushali, was done by her in favour of Anokhe Lal about 7 years back. Thereafter, no litigation, civil or revenue, or even a petty dispute ever took place between the family of Sia Ram and the appellants. Therefore, the motive of the crime set up by the prosecution is not correct. No evidence was led before the Court that after the transfer of the aforesaid land by Smt. Prema any dispute ever took place between the two families. How all of a sudden Sia Ram and the appellants caused the murder of only Gendan Lal, when the informant, Ram Kishore, who also belonged to the family of Anokhey Lal and was also beneficiary of the land of Smt. Prema, was not harmed at all by Sia Ram and the appellants. He has submitted that the motive of crime set up by the prosecution was false and had been wrongly believed by the court below.

30. Learned A.G.A. has submitted that the first submission of learned Amicus Curaie is misconceived since P.W.-1 was very much present on the scene of occurrence and he has given exact description of the incident as it occurred. There were only 4 to 5 families left in the village and therefore when he raised the alarm no one came for his help. The village was not well populated and therefore no one could hear his cry for help. He has further submitted that mere non-causing of any injury to P.W.-1 and P.W.-2 does not implies that they were not present on the scene of occurrence. The motive of implication of the appellants only because of the mother of appellant, Jaduvir and wife of Hemraj being witness in the murder case of Hemraj, cannot be said to be correct. The reason for implication of the appellants was the dispute regarding the land which was given to the father of Gendan Lal by elder aunt of Sia Ram and appellants and Sia Ram were trying to get back the possession of the same.

31. Regarding the second submissions made by learned Amicus Curaie, learned A.G.A. has submitted that the time of death of the deceased was not incorrect. The first information report disclosed the correct time of death of the deceased, Gendan Lal, at 3:00 p.m. on 10.03.1982. Both the witnesses have testified the aforesaid time of death of the deceased and it cannot be disputed in appeal when the trial court has also

accepted the same as correct. He has not given any reply to the argument of the learned Amicus Curaie that the rigor mortis was passing on the lower part of the body on 12.03.1982 at 4:30 p.m., when the post-mortem was conducted.

32. Regarding the third submissions of the learned Amicus Curaie that there was no explanation for injury nos. 5, 6 and 7 in the statements of P.W.-1 and P.W.-2, the learned A.G.A. has also not been able to give any cogent reply.

33. Regarding the final submission of the learned Amicus Curaie, that Smt. Prema, transferred 20 bighas of land in favour of Anokhey Lal, father of the deceased and therefore Sia Ram and appellants were aggrieved and they killed Gendan Lal and that the land in dispute was not the motive of crime committed by the appellants, the learned A.G.A. has submitted that there was no other motive of the crime except the land dispute because Sia Ram and the appellants were deprived of their 20 bighas of valuable land on account of the execution of sale deed by Smt. Prema in favour of Anokhey Lal, father of the deceased, Gendan Lal, therefore, they caused the murder of Gendan Lal.

34. After hearing the rival contentions, this court finds that the first submission of the learned Amicus Curaie, that the incident in dispute is doubtful appears convincing from the testimony of P.W.-1. It is clear that when he along with the deceased, who was his real uncle, were passing from the house of Sia Ram and the appellants, they suddenly came out armed with the alleged weapons and all of them attacked only the deceased, Gendan Lal. Not a scratch was caused to P.W.-1, who was the real nephew of the deceased. After Gendan Lal fell down, P.W.-1 not even touched the deceased to ascertain whether his life can be saved nor he made any effort to lift him with the help of P.W.-2, Nanku, for taking him to any doctor. He simply presumed that Gendan Lal is now dead. P.W.-2 has stated in his statement that he along with P.W.-1 remained with the dead body till it was lifted by the police and taken for post-mortem at about 12-12:30 p.m., but P.W.-1 has deposed that he went to his house soon after the murder of Gendan Lal and remained there. Other members of family were with the dead body. He did not slept in the night and left for the police station, after writing the application in the night at around 4:00 to 4:30 p.m. on 11.03.1982. The statement of P.W.-1 that he did not went to the police station directly but he went to the house of his uncle, Pothi Ram, and thereafter, he went to lodge the FIR shows that the FIR was lodged by the P.W.-1 after due deliberation with Pothi Ram.

35. From the statement of P.W.-1 it has also come on record that the deceased had criminal history and was involved in number of cases of theft, dacoity, etc. Documentary evidence in this regard was placed before the trial court by the appellants but the trial court has not adverted to the same nor has recorded any finding for not considering the same. The argument advanced that in the murder of the brother of Sia Ram, Hemraj, Ram Sewak, uncle of P.W.-1 and P.W-1 himself were accuseds therefore the appellants were falsely implicated in order to pressurize the witnesses in the family of the appellants from deposing against Ram Sewak in the trial appears to have force. The FIR has been lodged after

more than 12 hours of the incident and there was sufficient time for planning with the P.W.-1 to implicate the appellants and Sia Ram. By implicating the appellants and Sia Ram, P.W.-1 succeeded in pressurizing them to depose favorably in the trial of Hemraj. He got Sia Ram and the appellants falsely implicated thus.

36. The second argument made by learned Amicus Curaie has not been answered by the learned A.G.A., however, a perusal of the statement of P.W.-2 shows that the rigor mortis on the dead body of the deceased had passed from the upper portion of the body and was passing off from the lower part.

37. In view of the controversy at the Bar we have consulted, apart from Modi's Medical Jurisprudence and Toxicology, Taylor's Principles and Practice of Medical Jurisprudence and Jhala & Raju's Medical Jurisprudence (by Dr. R. K. Jhala and V. B. Raju). It would be useful to refer to the opinion of the learned authors as follows. Modi in his Medical Jurisprudence (21 st Edition at page 171) writes, Rigor mortis first appears in the involuntary muscles and then in the voluntary muscles. In the voluntary muscles rigor mortis follows a definite course. It first occurs in the muscles of the eyelids, next in the muscles of the back of the neck and lower jaw, then in those of the front of the neck, face, chest and upper extremities and lastly extends downwards to the muscles of the abdomen and lower extremities. Last to be affected are the small muscles of the fingers and toes. It passes off in the same sequence.

Taylor in his book (13th Edition at page 143) under the caption 'The order in which rigor appears' states :-

As a rule, cadaveric rigidity first appears in the muscles of the face, neck and trunk; it then takes place in the muscles of the upper extremities and lastly in the legs...In regard to its disappearance the muscles of the lower extremities will often be found rigid, while those of the trunk and upper extremities are again in a state of relaxation. It appears later and lasts longer in the lower extremities than in other parts of the body.

In Jhala and Raju's Medical Jurisprudence (6th Edition at pages 256-257) it has been stated :-

Rigor mortis is due to rigidity of the muscles. It appears both in the voluntary as well as involuntary muscles, its appearance and disappearance in various muscles follows a pattern. It is apparent first in the region of head, face, neck, eyelids and lower jaw. It last shows its appearance in the lower extremities. Hence if rigor mortis is present in lower extremities, it can safely be opined that it is present all over...After the rigor mortis has set in the whole body (as confirmed from its presence in lower extremities) no specific opinion is possible till the time it starts disappearing i.e. after about 18 hours.

38. It would, thus, appear that all the authorities on the subject are unanimous in their opinion that rigor mortis sets in and reaches the 'extremities'at the end and that it follows the same pattern both in the matter of appearance and disappearance. Presence of rigor mortis by itself cannot be decisive of the time of death. It is true that on the basis of presence of rigor mortis, no opinion can be given with mathematical precision regarding the time of death. At the same time, in view of the undisputed position regarding the 'course' of appearance and disappearance of rigor, its presence only in the lower left of body

does provides a sound basis to find out the probability or otherwise of the prosecution case regarding time of death. The process of appearance and disappearance of rigor mortis may take relatively shorter and longer time depending on various factors like temprature, season, etc., of the place of death.

39. In the present case the time of death of the deceased has been disputed on the ground that at the time of post-mortem of the dead body of the deceased which took place on 12.03.1982 at 4:30 p.m., the rigor mortis was passing from lower half of the body and therefore the learned Amicus Curaie for the appellant has submitted that the death of the deceased had not taken place at 3:00 p.m on 10.03.1982 but sometimes in the night of 10/11-03-1982. Jhala & Raju in their medical jurisprudence have held that rigor mortis usually is absent after about 36 hours but the period may be longer in cold whether and for other reasons. As per **Taylor** the dead body becomes limp after 36 hours of death. As per **Modi** also the rigor mortis passes off from dead body after 36 hours of death. In the case of ***Virendra @ Buddhu and another vs. State of U.P., 2008 (15) SCALE 283***, the Apex Court doubted the prosecution case where the rigor mortis was present in the lower extremities at the time of post mortem conducted after 30 hours when death was alleged to have taken place more than 48 hours of ago. The relevant paragraph is as follows:-

"Moreover, the doctor who conducted autopsy on the dead body on 06.10.1979 at 4.30 p.m., in the report has mentioned that rigor mortis had passed through upper extremities and was present in lower extremities. It is mentioned at page 125 of Modi's Medical Jurisprudence and Toxicology, Edition 1977 that in general rigor mortis sets in 1 to 2 hours after death, is well developed from head to foot in about 12 hours, is maintained for about 12 hours and passes off in about 12 hours. In the instant case rigor mortis was present in lower extremities at the time autopsy was conducted on the dead body after 30 hours. As according to ocular testimony deceased was murdered on 05.10.1979 at about 10.00 a.m. and the doctor conducted autopsy on the dead body on the next day at about 4.30 p.m. after 30 hours of death but rigor mortis was found present in lower extremities. Had he died on 04.10.1979 at about 10.00 p.m. or so rigor mortis would have passed off from the dead body completely at the time of autopsy. Thus the ocular testimony that he was murdered on 05.10.1979 at about 10.00 a.m. stands corroborated from the medical evidence pin-pointing that rigor mortis was present in lower extremities at the time when the autopsy was conducted on the dead body after 30 hours."

40. From the above consideration, it is clear that the time of death mentioned by the prosecution cannot be accepted as correct. Jhala & Raju have held that as a result of exposure and cold stiffening can appear as rigor mortis. In the present case the incident is of March in District Saharanpur which is in northern India and dead body is stated to be lying in open field from 3 p.m on 10.03.1982 till 12:30 p.m on 11.03.1982. Thereafter, post-mortem was conducted on 12.03.1982 at 4:30 p.m. In the month of March it not so cold which may lead to further stiffening to body beyond period of 36 hours. Therefore, the contention raised on behalf

of appellant is not without substance. It appears that the death of Gendan Lal did not took place at 3 p.m on 10.03.1982 but sometimes in the night of 10/11-03-1982 and the prosecution has mentioned incorrect time of death only to implicate the appellants and deceased co-accused, Sia Ram, with whom the informant had prior enmity.

41. On the basis of the other material on record the time of death of the deceased mentioned in the FIR too appears to be doubtful. The explanation on the basis of fear in going to police station soon after the incident and then going alone to lodge the FIR by P.W.-1 at 4:00 - 4:30 a.m the next day is contradictory. The prosecution case does not inspires confidence on this account too.

42. Regarding the third argument of the learned Amicus Curaie that there is no explanation for injury nos. 5, 6 and 7, it is found from the injury report of the deceased that no evidence was led by the prosecution regarding the aforesaid injuries and P.W.-4, the doctor has stated that such injuries cannot be caused by the barrel of the gun. There is no explanation on record and therefore this court has no option but to accept the contention raised on behalf of the appellants that prosecution has failed to discharge its burden regarding the incident in dispute and it has failed to prove the injury nos. 5, 6 and 7 on the body of the deceased.

43. Regarding the last submission made on behalf of the learned Amicus Curaie it is found that the motive of the crime alleged by the prosecution has not been successfully established. The dispute regarding the transfer of land by Smt. Prema in favour of Anokhey Lal, father of the deceased and grandfather of P.W.-1, was never raised during the period of 7 years prior to the incident in dispute and all of sudden it would result in a selective murder of only one person from the family of Anokhey Lal without causing any harm to the other person, P.W.-1, cannot be accepted as correct foundation of motive set up by the prosecution. There is no evidence on record to prove that any pre-planning was done by the appellants or Sia Ram for causing the murder of Gendan Lal on the eve of *Holi* and there is also no material on record to show that the motive of crime was evident from any material or any conduct of the appellants whatsoever. Therefore, it can be safely held that the motive of crime set up by the prosecution was not convincing.

44. After consideration of the entire material on record and the judgment of the trial court, we have come to the conclusion that the prosecution has failed to establish the alleged crime against the appellants beyond reasonable doubt. The judgment and order of conviction of the trial court is set aside and the appellants are acquitted of the charges. The bail bonds of the appellants are cancelled and the sureties are discharged.

45. Let the copy of this judgment along with lower court record be sent to court below for compliance.

46. While recording our appreciation for Sri Rahul Misra, Advocate, learned Amicus Curaie for ably assisting us, we direct that he should be paid his professional fee of Rs. 15,000/- in this case.

47. This Criminal Appeal is ***allowed***.

(2019)12 ILR A450

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.11.2019

BEFORE
THE HON'BLE MANOJ MISRA, J.
THE HON'BLE MRS. MANJU RANI CHAUHAN, J.

Criminal Appeal No. 1599 of 1992

Dalveer & Ors. ...Appellants (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Mohan Chandra, Sri Mohit Singh

Counsel for the Opposite Party:
A.G.A.

A. Criminal Law - Indian Penal Code, 1860 - section 148 (Rioting, armed with deadly weapons) and 302/149 - Every member of the unlawful assembly guilty of offence committed in prosecution of common object.

B. Evidence Law - Indian Evidence Act, 1872– first information report does not constitute substantive evidence - can only be used as a previous statement for the purpose of either corroborating its maker under section 157 of the Evidence Act or for contradicting him under section 145 thereof - Cannot be used to corroborate or contradict other witnesses - FIR was lodged by doing guess-work and by creating witness of circumstance, namely, P.W.2.(Para 34 & 50)

In the instant case, admittedly, the informant was not produced as a witness and the FIR did not relate to the cause of his own death, or as to any of the circumstances of the transaction which resulted in his death, therefore the said first information report is not admissible as a dying declaration under section 32(1) of the Evidence Act - Held- it cannot be used for the purpose of contradicting or corroborating the testimony of other witnesses - no recovery, either of the gun or of any other incriminating material, from the possession or on the pointing out of the surviving appellant or the other two accused who were seen running with him-there is virtually no worthwhile evidence to uphold the conviction of the appellant(Naresh). (Para 35 & 49)

C. Evidence Law - Indian Evidence Act, 1872 - Section 6 - rule of *res gestae* - the facts which, though not in issue, are so connected with the fact in issue as to form part of the same transaction, become relevant by itself, whether they occurred at the same time and place or at different times and places. (Para 44)

Where the time gap between the statement and the fact in issue is such that it does not make it contemporaneous with the fact in issue, or where there is no satisfactory evidence to show that the statement is contemporaneous with the fact in issue, or where the distance between the place of occurrence and the place where the statement is made is such, which could be considered sufficient to douse the stress or the emotions, thereby giving opportunity to the possibility of concoction, the statement would not fall within the exception to the rule against hearsay and, hence, would not be admissible. (Para 47)

Held**: -** There are too many gaps in the prosecution evidence and, therefore, by the circumstantial evidence, the chain of circumstances is not complete to rule out all other hypothesis than the guilt of the accused - The accused appellant is entitled to get the benefit of doubt. (Para 53)

Criminal Appeal allowed. (E-7)

List of cases cited: -

1. Sheikh Hasib alias Tabarak v. The State of Bihar: (1972) 4 SCC 773,

2. Harkirat Singh v. State of Punjab: (1997) 11 SCC 215

3. Gentela Vijayavadhan Rao and another v. State of A.P.: (1996) 6 SCC 241

4. Vasa Chandrasekhar Rao vs Ponna Satyanarayana & Anr.: (2000) 6 SCC 286

5. Dhal Singh Dewangan vs State of Chhattisgarh: (2016) 16 SCC 701

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

1. This appeal assails the judgment and order dated 28.08.1992 passed by the IVth Additional Sessions Judge, Moradabad in Sessions Trial No. 587 of 1986 by which the appellants, namely, Dalveer, Ramesh and Naresh were convicted under sections 148 and 302/149 IPC and punished as follows: one year of rigorous imprisonment under section 148 I.P.C.; and imprisonment for life under section 302 read with section 149 I.P.C. Both sentences to run concurrently.

2. The aforesaid appellants were sent for trial along with co-accused Man Singh. Man Singh however died during the course of the trial. Hence, the case against him was abated. Amongst the appellants, Dalveer and Ramesh died during the pendency of the appeal hence their appeal was abated vide order dated 31.01.2019. Thus this appeal has been pressed only on behalf of surviving appellant no.3, namely, Naresh.

3. In brief the facts of the case are that on 14.06.1986, at 04:15 hours, a first information report (for short FIR) (Exhibit Ka-1) was lodged by Jagdish Prasad (not examined) at police station Kund Fatehgarh, District Moradabad, which was at a distance of about 10 km from the place of occurrence. In the FIR it was alleged that the informant along with his sister's husband (the deceased - Kishan Lal), nephew (another deceased, namely, Mahender son of Kishan Lal) and another nephew (P.W.3), namely, Surender son of Kishan Lal, had gone to the house of Nathu Lal (not examined), at about 7 pm, on 13.06.1986, to attend a feast. On their way back home, near the house of Roshan (not examined), at about 8:30 p.m., they were surrounded by five persons, namely, Dalveer (appellant no.1), Ramesh (appellant no.2); Naresh (appellant no.3); Man Singh Jatav (who died during trial); and one unknown person. All of them had emerged from the *Gher* of Naresh. Naresh had a gun whereas the rest had *Tabal* (sharp-edged weapon). Ramesh challenged the deceased - Kishan Lal by saying that today he shall be taught a lesson for lodging a case against him and for implicating Dalveer's father in a dacoity case. On his saying so, Naresh opened fire from his gun at the deceased - Kishan Lal, as soon as he fell down, Dalveer attacked him with his *Tabal*. In the meantime, informant's nephew, namely, Mahender, was surrounded by accused Ramesh, Man Singh, Dalveer and the unknown person, who all attacked him with *Tabal* and killed him too. Seeing all that, the informant raised an alarm. Upon which, Ramesh fired two shots in the air, as a result, due to fear, no villager came forward. Thereafter, Dalveer, Ramesh and Naresh effected their escape by running away towards the west and while they were running informant's sister- Ramwati (PW2) and informant's niece Ramshree (not examined) spotted them from the roof of their house. The remaining accused, namely, Man Singh and the unknown person escaped by using a *Gali* (lane) towards the east. In the FIR it was alleged that bodies of the two deceased were lying on the spot. The FIR sought to explain the delay by stating that in the night, due to fear, it could not be lodged.

4. The informant was not examined as a witness, as he was reported dead.

However, the lodging of the FIR was proved by the Head Moharir (Shiv Kumar Singh - P.W.4), who had made GD entry of the FIR, and the writing of the informant was proved by his relative, namely, Yashoda Nandan (P.W.7).

5. Two inquest reports were prepared for the two deceased. They were proved by the Investigating Officer (I.O.) (P.W.5) and were marked Exhibit Ka-3 and Exhibit Ka-4. Ex. Ka-3 indicated that inquest started at about 8.05 am on 14.06.1986 and was completed at 10.15 am. The other inquest, as per Ex. Ka-4, started at 10.15 am and was completed at about 11.30 am. The autopsy of deceased - Mahendra Kumar was conducted on 15.06.1986 at about 2.45 pm. As per autopsy report (Ex. Ka-27), eight ante-mortem incised wounds were there. Semi digested food material was present in small intestine whereas large intestine was found full with faecal matters. The cause of death was due to shock and haemorrhage as a result of ante-mortem injuries. Time of death was estimated about two days before. Autopsy of Kishan Lal was conducted on 15.06.1986 at about 1.00 pm. The autopsy report (Ex. Ka.22) disclosed five ante-mortem injuries on his body. Apart from one gun shot wound of entry on the front of right side of chest 4 cm below the right nipple, with blackening and charring present all around the wound, there were three incised wounds and one abrasion found. Some semi-digested food material was also found in the small intestine and the large intestine was found loaded with faecal matter. The time of death was estimated two days before.

6. During the course of investigation, recovery of *Farsa* (*Tabal*) was made on the pointing out of co-accused Man Singh of which a fard / memorandum (Exhibit Ka-12) was prepared. However, no recovery of any incriminating material was made from the appellants. After investigation, charge-sheet (Ex. Ka 14) was laid against four accused, namely, Dalveer, Ramesh, Naresh, and Man Singh. The identity of the fifth accused however could not be ascertained. Upon cognizance and consequential committal to the court of sessions, charges were framed against all the four accused for offences punishable under section 148 I.P.C. and under section 302 read with section 149 I.P.C. The accused pleaded not guilty and claimed for trial.

7. Seven witnesses were examined by the prosecution. PW 2 and PW 3 were witnesses of fact whereas the rest were formal witnesses. Before we proceed to notice the testimony of the witnesses of fact, it would be useful to briefly notice the testimony of the other witness, which is as under:

8. **P.W.1- Natthu Singh,** constable who visited the spot along with the Investigation Officer (I.O.). He stated that on 14.06.1986, he visited the spot with the I.O; that the dead body of Mahender and Kishan Lal were sealed and handed over to him for being carried to the mortuary for autopsy; that by the time he could reach there, it had become late, therefore, autopsy could not be conducted on that day. Hence, it was conducted on 15.06.1986 post noon.

9. **P.W-4 - Shiv Kumar Singh,** Head Moharir posted at the police station where the FIR was lodged. He stated that on 14.06.1986 Jagdish Prasad (informant)

had brought a written report to the police station of which GD Entry was made by him.

10. **P.W.5-** Harish Chand Rana, the I.O. - Station House Officer of the police station concerned. He proved the various steps taken during the course of investigation including holding of inquest proceeding, preparation of memorandums of recovery of: (I) samples of blood-stained and plain earth, (ii) empty catridge of 12 bore, (iii) slippers and shoes of the two deceased and (iv) *Farsa* (sharp-edged weapon) from co-accused Man Singh. Site plan (Ex. Ka 13) from where recovery of *Farsa* was shown was prepared by him. The site plan (Exhibit Ka - 6) of the scene of the incident was prepared by him. He stated that on 14.06.1986 he had recorded statement of informant - Jagdish Prasad. He stated that on the same day, he recorded statements of Smt. Ramwati; Laturi Singh, Bhuri, Ram Avtar, Km. Ramshree, Itwari Lal and others. He also stated that on 15.06.1986, he recorded the statement of Surendra (PW3) on the basis of gestures made by him to the questions put to him. He also stated that though PW3 was dumb but he had the capacity to hear. He proved the submission of charge-sheet (Ex. Ka-14). He also stated that he learnt about the death of informant - Jagdish Prasad through a *Pairokar*. In his cross-examination at the instance of accused Ramesh and Dalveer, he stated that though he had recorded statement of various persons of the area residing close to the place of occurrence but they all gave hearsay evidence except Chowkidar Latti (not examined). He also admitted that in the site plan (Exhibit Ka-6), he had not shown the house of deceased - Kishan Lal and had also not disclosed the place from where Ramwati (PW2) had seen the accused running away. He stated that towards north of the place of occurrence, at a distance of just about 15-20 paces, there are shops. He admitted that he had not recorded statement of those shopkeepers. He also stated that towards north of the place of occurrence there is a temple and towards north-east there is jungle whereas towards north-west there is abadi. He stated that he did not record statement of Nathu Lal or any such person who may have returned with the deceased after attending the feast. During cross-examination, he could not tell the distance of deceased- Kishan Lal's house from the place of occurrence though he stated that it is quite near. He however denied the suggestion that he had filed a false charge-sheet. He also denied the suggestion that Jagdish had not given any statement. He however admitted that he had not mentioned the date on which report of the case was sent though he stated that it was sent by post. He stated that as per endorsement, the FIR was sent to the court of Chief Judicial Magistrate on 19.06.1986.

11. **P.W.6 - Dr. Y.C.** Gupta proved the post-mortem reports of the two deceased. He opined that the death could have had occurred in between 8 and 8:30 pm on 13.06.1986. Though, during cross-examination, he stated that it is possible that the deceased may have had died at about quarter to 11 pm on 13.06.1986 as there could always be a variation of 6 to 8 hours in the estimation of time of death. He also accepted the possibility that the deceased died 3 to 4 hours after having meal.

12. **P.W.-7 - Yasoda Nandan** proved the signature of Jagdish Prasad on

the written report (FIR). He stated that he is the brother-in-law *(Jija)* of the deceased - Mahender and son-in-law of the deceased-Kishan Lal and that he knew Jagdish Prasad (informant), the brother-in-law of Kishan Lal, very well and was conversant with his writing. He stated that Jagdish Prasad had been visiting Raholi (the village where the incident occurred) quite often. In his cross-examination, he admitted that he has not brought with him any writing of Jagdish Prasad. He denied the suggestion that Jagdish Prasad had died in the year 1980-81. He feigned ignorance as regards execution of will by Jagdish Prasad in favour of deceased Mahendra as also whether Mahendra (the deceased), on strength of that will on death of Jagdish Prasad, had applied for mutation. He denied the suggestion that on 13/14.06.1986 Jagdish Prasad was not alive.

13. The two witnesses of fact, namely, Ramwati (P.W.2), the widow of the deceased - Kishan Lal and the mother of the other deceased- Mahender, and Surendra Singh (PW3 - the other son of the deceased), deposed as follows:

14. **P.W.-2 Ramwati** stated that about a year and a half before the incident, her husband (Kishan Lal) had lodged a first information report against the accused Ramesh and Dalveer in connection with theft of tractor bearings. In that theft case, Dalveer and Ramesh were charge-sheeted, as a result, the accused were inimical towards her husband and son. She stated that Jagdish Prasad (the informant) was her brother. Two days prior to the date of incident, Jagdish Prasad had come to her house. On the date of the incident, her two sons, namely, Surendra (PW3) and Mahendra (the other deceased) along with Jagdish Prasad and her husband (deceased - Kishan Lal) had left the house at about 7.00 pm to attend a feast at Natthu's place. At about 8 pm, while she was there at her own house with her daughter (Ramshree), she heard a gun shot. On hearing the gun shot, she and her daughter went upstairs. While they were climbing the staircase, they heard two shots more. Soon thereafter, she saw, towards the west, in the *Gali*, Dalveer, Ramesh and Naresh running and uttering in an abusive tone, in vernacular, *"this is what happens to police informers"*. Naresh had a gun in his hand whereas Dalveer and Ramesh had *Tabal*. They ran through the *Gher* of Khushiram towards the North. She saw them in moonlight. Shortly thereafter her brother (informant) and her son Surendra (PW3) arrived and informed her that Dalveer, Naresh, Ramesh and Man Singh along with another person have killed her husband and her son Mahendra. In her cross-examination, she could not tell the distance of the place of occurrence from her house. She admitted having seen the accused running, near her house only. She also admitted that by that time the night had set in. She admitted that towards east of the place of occurrence, there is a *rasta* going towards the jungle. In response to the suggestion that her house is at a distance of 300-400 yards from the place of occurrence, she could not tell the distance. She stated that when her brother and son (PW3) informed her about the incident she had already come down from the staircase. She stated that she had visited the spot after receiving information but no one from the Mohalla was present there, though, later, they had come. Later, Natthu had also arrived. In her cross-examination, she denied the suggestion that her husband had got her

son's name mutated over the land of Jagdish by showing him dead. She also denied the suggestion that on account of such act of her husband, Jagdish was angry with him. In her cross-examination she stated that her brother and son (PW3) at that time had not informed her whether the deceased had left Natthu's house after having food, though, later, she came to know that they had had food. In her cross-examination she admitted that her maternal home i.e. house of Jagdish, is at a distance of 15 *Kos* (45 km) from her village. She stated that there was no special reason for Jagdish to have come to her house though he used to visit her house on a regular basis. In her cross-examination, she admitted that boundary wall of her house is quite high towards the lane, which was used by the accused for effecting their escape, and that she could not have seen the accused had she not been on the roof. A specific question was put to her as to when she first saw the accused to which she responded by saying that when they were about 8-10 yards away from her door towards the east. In response to a specific question as to what her brother had been doing the entire night, she stated that she could not tell because she had been crying and was in a state of shock. She also could not tell who had visited her in the night. She, however, stated that her brother had left at about 4 am, before sun rise, on a tractor, along with fellow villagers Parmanand and her son' brother-in-law, namely, Umesh, to lodge the FIR. In her cross-examination, she admitted that her husband had been mingling with criminals and had been passing on information to the police, as a result, criminals were annoyed with him. She accepted the suggestion that her husband had got multiple accused arrested. She however could not tell whether he had been witness in various cases. She also stated that in her house, about 25 years back, there was a dacoity in which Dalveer's father, namely, Lokman alias Loki, was accused though he was acquitted. She stated that though, thereafter, there had been no quarrel with Loki but, about two years back, Dalveer and Ramesh had stolen her tractor's parts. However, she could not tell whether any case in that connection was going on. She denied the suggestion that on the night of the incident there was no moonlight as there were clouds. She further denied the suggestion that she did not see the accused but has implicated them on account of past enmity. In her cross-examination, at the instance of accused Naresh, she admitted that Naresh is Nai by caste whereas the remaining accused were *Dhobi* by caste. During her cross-examination at the instance of Naresh, she was also confronted by her statement recorded under Section 161 Cr.P.C. wherein she had not stated that she heard Naresh also exclaiming about the fate of police informers when she spotted him running with other accused persons. On being confronted with that statement, she stated that she does not know as to how the I.O. did not mention that. She denied the suggestion that Jagdish, her brother, had died much before the incident. As regards the direction where the accused went, during cross-examination, she stated that the accused were seen running towards north through the *Gher* of Khushiram's house. Later, she stated that she had seen the accused entering that *Gher* but could not see where they went. She stated that, at that time, her daughter-in-law and her daughter were also there at the roof. She stated that she had informed the I.O. about the place from where she had witnessed the incident but she could

not tell as to why the I.O. had not disclosed that place in the site plan. She further stated that her younger son Surender (PW3) though is dumb but is able to hear and understand. She denied the suggestion that she, at the time of incident, was at her Maika. She denied the suggestion that Jagdish was not present. She also denied the suggestion that Naresh was not involved in the incident and that she leveled false allegations.

15. **P.W.3 - Surendra Singh,** son of the deceased - Kishan Lal, who was aged about 14-15 years at the time of his examination, being dumb, therefore, through gestures got his statement recorded in the question and answer form. The said witness initially tried to support the prosecution case but in his cross-examination, the said witness made gestures to questions in such a manner which suggested that he did not have knowledge of the incident and was tutored. Interestingly, the said witness, in his cross-examination, by making gestures, admitted that he came to know about his father and brother's death when he woke up in the morning. The trial court therefore discarded his testimony.

16. The entire incriminating circumstances evinced from the prosecution evidence were put to the accused while recording their statement under Section 313 Cr.P.C. The accused denied the allegations and claimed that they were falsely implicated on account of police pressure and enmity. In addition thereto, they claimed that Jagdish Prasad (the informant) had died much before the incident and in support thereof they passed on a Khatauni extract to demonstrate that mutation proceedings were drawn in respect of plots of agricultural land consequent to death of a tenure holder named Jagdish Lal. They however led no evidence in defense.

17. The trial court though discarded the testimony of P.W.3 by holding him to be a tutored witness but convicted the accused-appellant on the basis of other evidence. While recording conviction, the trial court relied on the hearsay testimony of Ramwati (PW2), by treating it to be admissible under section 6 of the Evidence Act, 1872 (for short the Evidence Act). The trial court took the view that the said hearsay testimony was corroborated by circumstantial evidence as well as medical evidence.

18. We have heard Sri V.P. Srivastava, learned senior counsel, assisted by Sri Mohit Singh, for the surviving appellant - Naresh; and Sri Deepak Mishra, the learned A.G.A. for the State.

19. The learned counsel for the appellant submitted that as the informant (Jagdish Prasad) was not examined, the first information report which, by itself, is not a substantive piece of evidence, could not have been taken into consideration to corroborate the testimony of other witnesses and could not have been read to ascertain the manner in which the incident occurred. He submitted that since the testimony of P.W. 3 has been discarded by the trial court there remains the testimony of Ramwati (P.W.2) only. Admittedly, Ramwati is not an eye-witness of the incident. Her testimony is only to the effect that she saw three persons running with arms and proclaiming that *"this is what happens to police informers"*. This by itself is not a clinching circumstance inasmuch as the

place of the incident and the place from where P.W.2 noticed the three, out of the five accused, running were not proved to be in such close proximity to each other that involvement of other persons in the crime could be ruled out.

20. It has been submitted that the site plan prepared by the I.O. neither discloses the location of the house of P.W.2 with reference to the place of occurrence nor it discloses the spot from where she had allegedly witnessed the three accused running. Moreover, the suggestion put to PW2 that her house is at a distance of 300-400 yards from the place of occurrence has not been specifically denied though she claimed that she is not aware of the distance. Further, in her testimony, PW2 has neither disclosed the time nor the time-gap by which, or within which, she received information from her brother Jagdish regarding the murder of her husband and her son by the accused-appellants. Otherwise also, since it has not specifically come in the evidence as to how contemporaneous with the incident was the reporting of the incident by the informant to PW2, the hearsay evidence would not become admissible by applying the principle of res gestae enshrined under section 6 of the Evidence Act.

21. In addition to above, the learned counsel for the appellant submitted that it has come in the post-mortem of the deceased that there was semi-digested food found present in the intestine though the large intestine was found full of faecal matter which is suggestive of the fact that the deceased had had their food 2-3 hours before their death. If that is so, then the prosecution story that the deceased had left at 7 pm to attend a feast at the house of Natthu and, after having the dinner there, on way back, at about 8 pm, the incident occurred gets falsified. It has been submitted that in all probability the incident had occurred much later and, only after learning about the incident, on the basis of guess work and past enmity, the prosecution story was developed, which theory gets probabilized by the delay in lodging the FIR.

22. It has also been submitted that evidence was brought on record to demonstrate that in the year 1981, by showing Jagdish Prasad (the informant) dead, mutation proceedings had been undertaken concerning land of Jagdish Prasad which resulted in entry of the name of one of the deceased, that is Kishan Lal's son, in the revenue records. This gives rise to three possibilities, first, that Jagdish, if not dead, would be inimical towards the deceased's family and, therefore, would not probably be in the company of the deceased; second, that, under the circumstances, he came only after hearing about the death of his brother in law to help out his bereaved sister and, therefore, was not witness to the incident; and, third, the first information report is completely bogus. It has been submitted that even assuming that Jagdish Prasad was alive, the second possibility gets credence from the circumstance that there was no justification to wait till 4:15 am of the next day to lodge the FIR, particularly, when they had a tractor for transportation and, if there had been fear of the night, even by that time, that is 4:15 am, the sun had not come out, which is the admitted case of the prosecution. It thus appears that the incident occurred late in the night; that no one had witnessed the incident; that Jagdish Prasad who resided at a

distance of about 45 kms was informed and called; that, upon his arrival, on the basis of suspicion and guess-work, the prosecution story was developed with the help of the police as the deceased Kishan Lal was admittedly a police informer.

23. In addition to above, it was submitted that if the statement of Ramwati (PW2) is taken in its entirety, Jagdish had not informed her as to who played what role in the killing of the two deceased, as also, as to how many shots were fired by whom and in what manner, because, she has merely stated that Jagdish informed her that the accused have killed her husband and son but who did what is not disclosed by her. The medical evidence discloses, inter alia, solitary gun shot wound, that too, on one of the two deceased persons. Whereas, according to PW2 she heard three gun shots. Who fired those three shots is not disclosed. The contents of the FIR though may offer explanation for all that but it is not admissible in evidence as the informant was not examined. Thus, as only three accused were seeing running and, out of them, only one had gun in his hand whereas the other two had *Tabal*, who fired the other shots becomes a mystery. More so, because the I.O. in his testimony disclosed that on the spot only one 12 bore empty cartridge was found.

24. It was also argued that no source of light except moonlight has been disclosed by P.W.2 in her testimony. The distance from where P.W. 2 saw the accused running appears to be about 8 to 10 yards. Whether a person could be recognized from that distance, in moonlight, is extremely doubtful. It has also been submitted that, apart from above, P.W.2 in her statement recorded under section 161 Cr.P.C has not disclosed that Naresh was also exclaiming that *"this is what happens to police informers"*. This clearly shows that her stand is not consistent and her testimony in absence of other convincing evidence cannot form basis of conviction.

25. Learned counsel for the appellant also submitted that, admittedly, Naresh is a Nai by caste whereas the other accused were *Dhobi* by caste; and there is no motive attributed to Naresh for the crime though motive has been attributed to other accused Dalveer and Ramesh. Hence, there was no valid reason shown for Naresh to associate with the other accused persons.

26. It has next been submitted that nothing incriminating has been recovered on the pointing out of the accused Naresh or Dalveer or Ramesh who were allegedly seen running together. The recovery, as alleged, is at the instance of co-accused Man Singh who was not seen running with the accused appellants.

27. It was lastly contended that the appellants though have been convicted under section 148 IPC as also under section 302 with the aid of section 149 I.P.C. but the prosecution has miserably failed to disclose that there was a fifth accused also. Even the charge-sheet was submitted against four persons only. Further, the fourth person, namely, Man Singh, was not seen together with the accused-appellant. Under the circumstances, there was no evidence to suggest that there existed an unlawful assembly of five persons of which the appellants were members. Hence, the conviction under section 148 I.P.C. as also under section 302 I.P.C. with the aid

of section 149 I.P.C. is not at all sustainable.

28. It has thus been prayed that the conviction of the accused appellant by the trial court is completely unjustified and the impugned judgment and order be therefore set aside.

29. **Per Contra,** the learned A.G.A. submitted that the evidence brought on record indicated that the two deceased had died at the same time and on or about the same spot. One of them died due to gun shot injury as also incised wounds and the other died due to several incised wounds which disclosed that multiple assailants were there. Shortly, after hearing the gun shot, the appellant - Naresh was seen in the company of other two accused persons with such weapons of which injuries were found on the body of the two deceased and, soon thereafter, Jagdish, the informant, who had accompanied the two deceased, came rushing and informed P.W.2 that her husband and her son have been killed by five persons, out of those five, three were seen by her. All this constituted part of the same transaction and therefore the statement of Jagdish Prasad (the informant), narrated to his sister - Ramwati (P.W.2), becomes admissible in evidence by applying the doctrine of *res gestae* enshrined under section 6 of the Evidence Act and as such was admissible and sufficient to record conviction, particularly, when nothing material could come out of her cross-examination.

30. It was also submitted by him that, admittedly, Ramesh and Dalveer were inimical to the deceased as they had been implicated by the deceased in a theft case. Hence, they had motive for the crime and Naresh by joining them has incurred liability even though he may not have had personal motive for the crime.

31. The learned A.G.A. also pointed out that it was proved not only by the testimony of the Investigating Officer but also of P.W.7 that Jagdish had lodged the FIR. It has been submitted that as two persons were brutally murdered in the night, awaiting the wee hours of the morning to lodge the FIR is a natural human conduct on the part of victim's family and therefore it cannot be said that the FIR is highly delayed and that the prosecution version suffers from embellishment.

32. It was next submitted that no explanation has been offered by the accused as to why they were running with weapons in the night shortly after the incident. Lack of explanation could therefore provide the missing link which completes the chain of circumstances pointing towards the guilt of the accused. He thus prayed that the appeal be dismissed and the judgment of the court below be maintained.

33. We have given our thoughtful consideration to the rival submissions and have perused the record carefully.

34. Before we proceed to deal with the weight of the rival submissions, it would be useful for us to first examine whether the contents of the FIR lodged by Jagdish Prasad, who has not been examined as a witness, could be read and considered for the purpose of corroborating and contradicting the testimony of the witnesses who were examined during the course of trial. In this regard in ***Sheikh Hasib alias***

Tabarak v. The State of Bihar : (1972) 4 SCC 773, it has been held that a first information report does not constitute substantive evidence. It can, however, only be used as a previous statement for the purpose of either corroborating its maker under section 157 of the Evidence Act or for contradicting him under section 145 thereof. It cannot be used for the purpose of corroborating or contradicting other witnesses. Similarly, in ***Harkirat Singh v. State of Punjab : (1997) 11 SCC 215,*** the apex court had observed that where the first informant could not be examined as a witness during the course of trial and the first information report does not relate to the cause of his own death, or as to any of the circumstances of the transaction resulting in his death, the first information report cannot be used as substantive piece of evidence.

35. In the instant case, admittedly, the informant - Jagdish Prasad was not produced as a witness and the FIR did not relate to the cause of his own death, or as to any of the circumstances of the transaction which resulted in his death, therefore the said first information report is not admissible as a dying declaration under section 32(1) of the Evidence Act. Hence, in view of the decisions of the apex court noticed above it can not be used for the purpose of contradicting or corroborating the testimony of other witnesses. Under the circumstances, the prosecution case would therefore depend on the admissibility, reliability and weight of other evidences led during the case of the trial.

36. The issues that now arise for our consideration are whether the hearsay testimony of P.W.2 (Ramwati) that she was informed by her brother (Jagdish Prasad - informant) and her dumb son (Surendra - P.W.3) that her husband (Kishan Lal) and her elder son (Mahendra) were killed by the accused persons could be considered admissible under Section 6 of the Evidence Act. If no, then, whether there remains on record sufficient reliable evidence on the basis of which the accused-appellant could be convicted.

37. Before we proceed to examine the admissibility of the statement of Ramwati (P.W.2) that her husband and son were done to death by the accused, as told to her by her late brother and dumb son, we may note that the trial court has already discarded the testimony of her dumb son, namely, Surendra Singh, who was examined as PW3, by observing that the said witness was not reliable as he appeared tutored and could not withstand the test of cross-examination and by his gestures gave an impression that he used to sleep by the sun set and that he got information about the death of his father and brother when he woke up next morning. Thus, the testimony of PW2 alone survives for our consideration.

38. At this stage, before proceeding to analyze the statement of P.W.2 on the principles laid out by 6 of the Evidence Act, it would be apposite for us to observe that the prosecution has not set up recovery of any incriminating article from the surviving appellant or the other accused-appellants with whom the surviving appellant (Naresh) was seen running soon after the gun shots were heard by PW2. The alleged recovery of *Farsa* (sharp-edged weapon), allegedly used in the crime, was made at the instance of co-accused Man Singh, who died during the pendency of the trial. Admittedly, Man Singh was not seen

running with the accused-appellants. Hence, the recovery at the instance of Man Singh is inconsequential in so far as the surviving accused-appellant Naresh is concerned.

39. Now we shall proceed to analyze the testimony of Ramwati (P.W.2). Her testimony is in two parts. The first part relates to what she saw and the second part relates to what she heard from her brother Jagdish (Informant) and what she gathered from her dumb son Surendra Singh (P.W.3). As per what she saw, even if her testimony is accepted in its entirety, she just saw three persons, namely, Dalveer; Ramesh; and Naresh (the surviving appellant) running with weapons and proclaiming *"this is what happens to police informers"*. Though, in her statement before the court, she stated that she heard all three proclaiming in unison but in her statement recorded under section 161 Cr.P.C, with which she was confronted, she had not disclosed that the surviving appellant- Naresh was also heard proclaiming. These three accused were seen running in a lane which was adjacent to her house. She saw them in moonlight after she had climbed the stairs of her house upon hearing gun shots. She admitted in her cross-examination that the boundary wall of her house is high and the lane would not have been visible had she not gone upstairs. She stated that as she had heard gun shots, to find out as to what had happened, she had climbed the staircase with her daughter and daughter in law. She stated that from the higher floor of her house she could see the lane and those three accused running. She had been cross-examined in respect of source of light. She stated that there was moonlight and in that moonlight she saw the accused running.

40. The learned counsel for the appellant had strenuously urged that it was not possible for P.W.2 to recognize persons in moonlight, particularly, when they are running and it has not been satisfactorily established as to from how far she had spotted the accused more so when the I.O. in the site plan had not shown the place from where P.W.2 saw the accused running and the place where they were seen running. Further, the site plan that was prepared by the I.O. did not disclose the location of the house of P.W.2 from where she saw qua the place where the incident occurred and the bodies were found.

41. Upon careful perusal of the site plan (Ex. Ka-6) prepared by the I.O. (P.W.5), the distance between the two spots, where the two bodies were lying, was about 21 paces. Meaning thereby that the two bodies were separated by 21 paces. The first body which is shown at point A was lying on the side of the path whereas the second body was lying on the middle of the path 21 paces towards the north. At the place where the second body was lying, going towards east from that place, there existed a *rasta* (path). The main *rasta* (path) where the bodies were found proceeded towards north and then curved towards the west. Before it curved towards the west, there was another *rasta* (path) going towards the north. The site plan though discloses that the accused-appellant took the path curving towards west, which was towards north from the place of occurrence, but the location of the house of P.W.2. from where she allegedly spotted the accused-appellants has not been disclosed. P.W.2 has not stated in her testimony that she could see the place of occurrence from the upper floor of her house or from any portion of

her house. A suggestion was put to her that her house is 300-400 yards away from the place of occurrence in response to which she could not tell the distance of the place of occurrence from her house. She also did not disclose the exact time, shortly where after, she saw the accused running, after she had heard the gun shots. She only stated that she saw them running when she had climbed the upper floor of her house upon hearing the gun shots. The time duration between hearing the gun shots and seeing the accused running by P.W.2 has not come in the evidence. The distance between the house of P.W.2 and the place of occurrence has also not come in the evidence. Further, from the site plan it appears that for the assailants there were two other escape /exit points from where they could have exited the main path before reaching the house of PW2. The other two exit points were as follows: one towards east and the other towards north. From the evidence led, it appears, the house of PW2, from where she spotted the accused running, fell after those two exit points. Thus, the circumstance that the accused were seen running with weapons in front of the house of PW2, in our view, is not clinching enough to put the burden on the accused to explain their conduct or presence inasmuch as the said circumstance does not rule out intervention of others in the crime as there existed other exit and access points for the assailants to arrive and to effect their escape from the place of occurrence, much before reaching the house of PW2.

42. Now, we shall examine whether PW2 was allegedly informed by her brother and son almost contemporaneous to the incident so as to form part of the same transaction. In her testimony PW2 has stated that after having witnessed the accused running away, when she had come downstairs, her brother (informant) and her son (PW 3) arrived and informed her that the accused persons including the appellants have killed her husband and her son. The time gap between the accused seen running away and her brother and son arriving at her house and reporting it to her is not disclosed. Interestingly, in her testimony, she has not disclosed that her brother - Jagdish and her son (PW3) had told her about the role played by each accused as was narrated in the FIR. Further, she has not disclosed in her testimony that her brother had informed her that the other two accused, out of a total of five accused, escaped by taking some other route.

43. From a close scrutiny of the evidence noticed above, it is clear that the information, if any, given to PW2 by her brother and son, does not appear to be contemporaneous with the time and place of the incident for the following reasons: (a) because the place of incident is not demonstrated to be in close proximity; and (b) because the time-gap between the incident and the information provided has not been demonstrated to be almost non-existent.

44. Now we shall examine whether the statement of PW2 in respect of culpability of the accused appellant on the basis of statement of the informant could be considered admissible under section 6 of the Evidence Act, as found by the trial court. The rule of res gestae embodied in section 6 of the Evidence Act in essence is that the facts which, though not in issue, are so connected with the fact in issue as to form part of the same transaction, become relevant by itself, whether they occurred at the same time

and place or at different times and places. The apex court had the occasion to examine the said principle in several decisions. In ***Gentela Vijayavadhan Rao and another v. State of A.P. : (1996) 6 SCC 241,*** the apex court, in paragraph 15 of the judgment, as reported, held as follows:-

"The principle or law embodied in Section 6 of the Evidence Act is usually known as the rule of res gestae recognised in English Law. The essence of the doctrine is that fact which, though not in issue, is so connected with the fact in issue "as to form part of the same transaction-becomes relevant by itself. This rule is, roughly speaking, an exception to the general rule that hearsay evidence is not admissible. The rationale in making certain statement or fact admissible under Section 6 of the Evidence Act is on account of the spontaneity and immediacy of such statement or fact in relation to the fact in issue. But it is necessary that such fact or statement must be part of the same transaction. ***In other words, such statement must have been made contemporaneous with the acts which constitute the offence or atleast immediately thereafter. But if there was an interval, however slight it may be, which was sufficient enough for fabrication then the statement is not part of res gestae.*** *In R. v. Lillyman, (1896) 2 O.B. 167 a statement made by a raped woman after the ravishment was held to be not part of the res gestae on account of some interval of time lapsing between making the statement and the act of rape. Privy Council while considering the extent up to which this rule of res gestae can be allowed as an exemption to the inhibition against hearsay evidence, has observed in Teper v. Reginam, (1952) 2 All E.R. 447, thus :*

"The rule that in a criminal trial hearsay evidence is admissible if it forms part of the res gestae is based on the propositions that the human utterance is both a fact and a means of communication and that human action may be so interwoven with words that the significance of the action cannot be understood without the correlative words and the dissociation of the words from the action would impede the discovery of the truth. ***It is essential that the words sought to be proved by hearsay should be, if not absolutely contemporaneous with the action or event, at least so clearly associated with it that they are part of the thing being done, and so an item or part of the real evidence and not merely a reported statement."***

The correct legal position stated above needs no further elucidation."

(Emphasis Supplied)

45. In ***Vasa Chandrasekhar Rao vs Ponna Satyanarayana & Anr. : (2000) 6 SCC 286,*** a question had arisen whether statement of prosecution witness that accused's father had told the prosecution witness over the telephone that his son (the accused) had killed the deceased, could be read in evidence under Section 6 of the Evidence Act, particularly, when the accused's father, in the witness box, had denied making any such statement. The apex court, in paragraph 7 of its judgment, though had found that the prosecution had been able to prove the case against the accused on the basis of circumstantial evidence but as regards admissibility of the said statement, under Section 6 of the Evidence Act, it proceeded to observe as follows:-

"The question arises whether the statement of PW21 that PW1 told him

on telephone at 6 p.m. that his son has killed the deceased, could go in as evidence under Section 6 of the Evidence Act. PW1, not having supported the prosecution during trial, the aforesaid statement of PW 21 would be in the nature of an hearsay but Section 6 of the Evidence Act is an exception to the aforesaid hearsay rule and admits of certain carefully safeguarded and limited exceptions and makes the statement admissible when such statements are proved to form a part of the res gestae, to form a particular statement as a part of the same transaction or with the incident or soon thereafter, so as to make it reasonably certain that the speaker is still under stress of excitement in respect of the transaction in question. ***In absence of a finding as to whether the information by PW1 to PW 21 that accused has killed the deceased was either of the time of commission of the crime or immediately thereafter, so as to form the same transaction, such utterances by PW1 cannot be considered as relevant under Section 6 of the Evidence Act."***

(Emphasis Supplied)

46. In ***Dhal Singh Dewangan vs State Of Chhattisgarh : (2016) 16 SCC 701,*** a three-judges bench of the Apex Court had the occasion to deal with the applicability of section 6 of the Evidence Act. In this case, a question had arisen whether the testimony of prosecution witnesses that after receipt of information about the crime they had reached the spot and had found Kejabhai (PW.6 of that case) shouting that the accused had killed his wife and children could be considered admissible under section 6 of the Evidence Act. After examining the provisions of section 6 of the Evidence Act and the law laid down in earlier decisions, the apex court, by its majority view, in paragraphs 24 and 25 of the judgment, held as follows:-

"The general rule of evidence is that hearsay evidence is not admissible. However, Section 6 of the Evidence Act embodies a principle, usually known as the rule of res gestae in English Law, as an exception to hearsay rule. ***The rationale behind this Section is the spontaneity and immediacy of the statement in question which rules out any time for concoction. For a statement to be admissible under Section 6, it must be contemporaneous with the acts which constitute the offence or at least immediately thereafter.*** *The key expressions in the Section are "...so connected... as to form part of the same transaction". The statements must be almost contemporaneous as ruled in the case of Krishan Kumar Malik (Supra) and there must be no interval between the criminal act and the recording or making of the statement in question as found in Gentela Vijayvardhan Rao's case (Supra). In the latter case, it was accepted that the words sought to be proved by hearsay, if not absolutely contemporary with the action or event, at least should be so clearly associated with it that they are part of such action or event. This requirement is apparent from the first illustration below Section 6 which states .... "whatever was said or done.... at the beating, or so shortly before or after it as to form part of the transaction, is a relevant fact."*

Considered in the aforesaid perspective, we do not find the statements attributed to PW-6 Kejabai by PWs 3 and 5 to be satisfying the essential requirements. ***The house of the appellant, according to the record, was at***

a distance of 100 yards from Gandhi Chowk, where these witnesses are stated to have found PW-6 Kejabai crying aloud. Both in terms of distance and time, the elements of spontaneity and continuity were lost. PW-6 Kejabai has disowned and denied having made such disclosure. But even assuming that she did make such disclosure, the spontaneity and continuity was lost and the statements cannot be said to have been made so shortly after the incident as to form part of the transaction. *In the circumstances, we reject the evidence sought to be placed in that behalf through PWs 3 and 5. Even if we were to accept the version of PWs 1 and 2, the same would also suffer on this count and will have to be rejected."*

(Emphasis Supplied)

47. From the decisions noticed above, the legal principle deducible is that section 6 of the Evidence Act is one of the exceptions to the rule against hearsay evidence therefore hearsay statement of a witness, by taking the aid of Section 6 of the Evidence Act, would be admissible in evidence only if that statement was made to the witness contemporaneous with the acts which constitute the offence or at least immediately thereafter so as to form part of the same transaction. As to whether it forms part of the same transaction is to be found out from the proven facts and circumstances of each case. One of the tests is whether such statement has been made so contemporaneous with the transaction in question as to make it reasonably certain that the speaker is still under stress of excitement in respect of the transaction in question. Where it is not clear from the evidence led as to what was the time gap between the incident and the making of that statement and whether the maker of the statement was still under stress of excitement in respect of the transaction in question, it would be unsafe to rely upon such statement by invoking the provisions of section 6 of the Evidence Act inasmuch as the principle embodied under section 6 of the Evidence Act is an exception to the general rule against hearsay evidence. Where the time gap between the statement and the fact in issue is such that it does not make it contemporaneous with the fact in issue, or where there is no satisfactory evidence to show that the statement is contemporaneous with the fact in issue, or where the distance between the place of occurrence and the place where the statement is made is such, which could be considered sufficient to douse the stress or the emotions, thereby giving opportunity to the possibility of concoction, the statement would not fall within the exception to the rule against hearsay and, hence, would not be admissible.

48. When we test the testimony of P.W.2 in the light of the legal principle noticed above, we find that the prosecution has failed to disclose the distance between the place of occurrence and the house where P.W.2 resided, that is the place where she was allegedly informed by the informant and her son PW3. The prosecution evidence also fails in specifically disclosing the time-gap between the incident and making of the statement by the informant and P.W.3, which has been narrated by P.W.2. The evidence that has come only indicates that P.W.2 was informed by the informant and P.W.3 shortly after the accused ran away. The evidence does not indicate that P.W.2's brother (informant) or her son (P.W.3), who had reported the incident to

her, were being chased by the accused, or they came chasing the accused, when they entered the house and informed P.W. 2 that her husband and elder son have been done to death by as many five persons. Rather, the testimony is to the effect that P.W.2, upon hearing gun shots, went upstairs. From there she could see three persons running and proclaiming that *"this is what happens to police informers"*. Thereafter, she came down and, soon thereafter, her brother (informant) and younger son (P.W.3) arrived and informed her that the accused persons have killed her husband and her elder son. The testimony noticed above suggests that there was a time-gap between the incident and the reporting of the incident to P.W.2. The possibility of the time-gap being substantial cannot be ruled out because in the site plan, the house of P.W. 2 is not disclosed. In fact, a suggestion has come that her house is at a distance of about 300 to 400 yards from the place of occurrence, which has not been specifically refuted by her. Further, as the informant and PW3 had not arrived at the residence either being chased by, or while giving chase to, the accused, in absence of cogent evidence in respect of the time-gap between the incident and reporting of the incident, it cannot be safely concluded that the informant and PW3 were still reeling under the stress of excitement in respect of the transaction in question. Under the circumstances, keeping in mind that there is no clear and cogent evidence led by the prosecution to disclose the distance between the two places and the time gap between the incident and reporting of the incident to P.W.2, it would be unsafe on our part to accept the statement of the informant and PW3, narrated in the testimony of P.W.2, as admissible by applying the doctrine of res gestae.

49. Once, we discard this hearsay statement of PW2, we are left with very little evidence which is of P.W.2 seeing the three accused running, two with sharp-edged weapon and one with a gun. Admittedly, from the place where PW2 saw the accused running, the place of occurrence was not visible. Further, we have already found that the path which connects the place of occurrence and the house of PW2, from where she spotted the accused running on the path, before reaching the house of PW2 provided at least two other exit points for the perpetrator of the crime to escape as is clear from the site plan (Ex. Ka-6). Thus, the circumstance that these three accused persons were seen running is not such which could rule out all other hypothesis than the guilt of the accused. In addition to above, the proclamation by these three persons that this is what happens to police informers is not an admission of guilt but is simply an expression of opinion as to what is the fate of police informers. This evidence, as we have found, being not clinching enough, would not throw the burden on the accused to explain the circumstance in which they were seen running. Moreover, there is no recovery, either of the gun or of any other incriminating material, from the possession or on the pointing out of the surviving appellant or the other two accused who were seen running with him. We are thus of the considered view that there is virtually no worthwhile evidence to uphold the conviction of the appellant (Naresh).

50. There is another aspect of the matter, which is whether PW2 was really informed by her brother and son about the incident or she came to know from other sources. In this regard, what assumes

importance is that PW3, who happens to be the dumb son of PW2, has been discarded as completely unreliable. Once that is the case, we would have to test whether this information could have come to her from the informant. In this regard there are certain circumstances which may be noticed. According to the prosecution case the two deceased had gone to attend a feast at about 7 pm. P.W.2 had admitted in her testimony that she was informed that they had had food there before leaving. However, semi-digested food was found in the small intestine. The incident is said to have occurred at 8.00 pm. Normally, digestion would take some time. This lends credence to the argument that the incident took place much later, and may not have been witnessed. This theory gets corroborated from the circumstance that the FIR was lodged at 4:15 am next day. If fear of night was the factor for the delay in lodging the FIR what was the hurry in lodging the FIR at 4.15 am when, admittedly, it was still dark. This also lends credence to the possibility, which has been suggested by the defense, that Jagdish Prasad (the informant), who resided in a different village 45 km away, was summoned, and, thereafter, FIR was lodged by doing guess-work and by creating witness of circumstance, namely, P.W.2

51. There is yet another aspect which goes in favour of the appellant. This is that the charge against the appellant is not under section 302 IPC simpliciter but under section 302 read with section 149 I.P.C. Interestingly, except the statement of the informant made to P.W.2, which we have already held not admissible, there is no evidence to show that there were five or more persons involved in the crime. Admittedly P.W.2 saw only three accused running. The remaining two were not seen by her. In fact, charge-sheet was laid against four persons only. The identity of the fifth could not be established. When participation by five persons is not proved by any admissible evidence led by the prosecution, there can be no conviction with the aid of section 149 I.P.C. Otherwise, there is no evidence as to who played what role and whether they shared common intention hence conviction with the aid of section 34 IPC would also not be justified more so because the only evidence that survives is with regard to three persons running not from the spot of occurrence but at some distance therefrom. On this ground also, the conviction of the appellants can not be sustained.

52. In addition to above, there is another unexplained circumstance in the prosecution case which is as to why would Naresh (surviving appellant), who had no motive, would join other accused in finishing off the two deceased. No doubt, prosecution has led evidence that there had been a motive for Dalveer; Man Singh; and Ramesh to finish off the deceased - Kishan Lal as he had implicated them in the past but there is no motive attributed to the surviving-appellant Naresh to join the other accused. Further, we find that other two accused were by caste *Dhobi* whereas Naresh is Nai by caste.

53. When we take a conspectus of the entire evidence led by the prosecution, we find that there are too many gaps in the prosecution evidence and, therefore, even if we go by the circumstantial evidence, the chain of circumstances is

not complete to rule out all other hypothesis than the guilt of the accused. Hence, the benefit of doubt would have to go to the accused.

54. Consequently, for all the reasons recorded above, we have no option but to allow the appeal. The judgment and order dated 28.08.1992 passed by IVth Additional Sessions Judge, Moradabad in Sessions Trial No. 587 of 1986 is hereby set aside as against the appellant Naresh. The appellant Naresh is acquitted of all the charges leveled against him. If the appellant is on bail, he need not surrender.

55. Let a copy of this order be sent to the trial court for compliance.

(2019)12 ILR A468

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.11.2019

BEFORE
THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE VIVEK VARMA, J.

Criminal Appeal No. 1749 of 1988

Bhim Sen ...Appellant (In Jail)
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri G.N. Sharma, Sri Jitendra Singh

Counsel for the Respondent:
D.G.A.

A. Evidence Law - The Indian Evidence Act, 1872 - Section 32 - dying declaration - Section 106 - Burden of proving fact especially within knowledge.

The conviction of the appellant in the present case is essentially based upon the dying declaration of the deceased - it stands admitted to the appellant that he was present in the house and he has failed to come up with any explanation with regard to the deceased's clothes having caught fire, the Court can validly draw an adverse inference against him on the presumption that the appellant has concealed material information pertaining to the death of the deceased from the Court - the complicity of the appellant in committing the deceased's murder is proved from the facts stated by the deceased in her dying declaration. (Para 29, 44 & 45)

B. Evidence Law - The Indian Evidence Act, 1872 - Section 32 - doctrine of dying declaration-*'Nemo moriturus praesumitur mentire'* - which means 'a man will not meet his maker with a lie in his mouth' – held-the dying declaration of the deceased is not liable to be discarded solely on the ground because there is no law which requires that dying declaration in order to be reliable, should be recorded before the Magistrate. (Para 35)

The doctrine of dying declaration is enshrined in section 32 of the Indian Evidence Act, 1872 as an exception to the general rule contained in section 60 of the Evidence Act, which provides that oral evidence in all cases must be direct i.e., it must be the evidence of a witness, who says he saw it. The dying declaration is, in fact, the statement of a person, who cannot be called as witness and, therefore, cannot be cross-examined. Such statements themselves are relevant facts in certain cases. (Para 31)

C. Evidence Law - The Indian Evidence Act, 1872 - Section 106 - Burden of proving fact especially within knowledge - When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. (Para 43)

The appellant had neither stated in his examination u/s 313 Cr.P.C. nor he had given any suggestion to any of the witnesses or adduced any evidence to show that he was not present in the house at the time of the incident. There is complete absence of any denial from the side of the appellant about his

presence in his house at the time of the occurrence. (Para 43)

Held**:-** The dying declaration recorded in accordance with law, is reliable and gives a cogent and possible explanation of the occurrence of the events - no illegality or legal infirmity in relying upon the deceased's dying declaration for the purpose of recording the appellant's conviction - Apart from the dying declaration of the deceased there is yet another extremely glaring incriminating circumstance pointing at the guilt of the appellant. (Para 41, 42 & 49)

Criminal appeal dismissed. (E-7)

List of cases cited: -

1.Munnawar and others v. State of Uttar Pradesh and others, 2010 (70) ACC 853 (SC),

2.Bhajju alias Karan Singh v. State of M.P., 2012 (77) ACC 182 (SC)

3.Munna Raja and another v. The State of Madhya Pradesh, (1976) 3 SCC 104

4.Munnu Raja and another v. The State of Madhya Pradesh, (1976) 3 SCC 104

5.State (Delhi Administration) vs Lachhman Kumar & others, 1986 SCC (Crl) page 2

6.Liyakat Ali vs State reported in 1988 (1) Crimes page 647

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

1. Heard Sri Jitendra Singh, learned counsel for the appellant and Sri M.C. Joshi and Smt. Manju Thakur, learned A.G.A.-I for the State.

2. Appellant Bhim Sen has filed this appeal before this Court against the judgement and order dated 06.08.1988 passed by IInd Additional Sessions Judge, Mathura in S.T. No. 603 of 1987, 'State Vs. Gir Prasad and two others' arising out of Case Crime No. 157 of 2014 by which he has been convicted and sentenced to imprisonment for life u/s 302 I.P.C. and three years rigorous imprisonment u/s 498-A I.P.C. Both the sentences were directed to run concurrently.

3. Briefly stated the facts of this case are that appellant Bhim Sen son of Dhaniram was married according to Hindu rites and rituals to Smt. Bina (deceased), daughter of Sukha, resident of village- Pilua Sadikpur, P.S.- Farah, District- Mathura about three years before the incident and one Bainiram was the middle man. It is also alleged that Bainiram had given a loan of Rs. 14,000/- to Dhaniram, father of the three accused, prior to the said marriage and when Dhaniram showed his reluctance to return the loan amount, Bainiram asked him to return the same with a promise to give him loan again at the time of marriage of appellant Bhim Sen, as a result of which Dhaniram returned the said money to Bainiram. It is further alleged that at the time of the marriage of appellant Bhim Sen when Dhaniram again demanded the loan from Bainiram, he refused to oblige him. However, for the said marriage of appellant Bhim Sen, Dhaniram took loan from some third person. The other two accused, Chhotey and Gir Prasad used to tell appellant Bhim Sen that he must compensate them for the money spent by their father in the marriage. It is further alleged that two months prior to May, 1986, appellant Bhim Sen went to Sukha, father of Smt. Bina (deceased) and asked him to arrange payment of Rs. 7,000/- spent by her father in the marriage but Sukha showed his inability to arrange the said money. Thereafter, all the aforesaid three accused, it is alleged, started

harassing and maltreating Smt. Bina for the said amount. It is further alleged that on 19.05.1986 at about 7 a.m., P.W.1 informant Girraj Singh, Pradhan of village- Kharba along with P.W.2 Ram Gopal alias Ghora happened to pass from near the house of appellant Bhim Sen and they heard shrieks of a lady emanating from inside his house. When they went inside the house, they saw Smt. Bina in the courtyard, appellant Bhim Sen and accused Chhotey had caught hold of her while accused Gir Prasad had set her on fire as a result of which she was burnt. It is also alleged that before putting her on fire, kerosene oil had been poured on her body by accused-appellant Bhim Sen. The said occurrence was also witnessed by P.W.3 Saligram, P.W.4 Ram Dayal and other residents of village- Nagla. Smt. Bina was taken to P.S.- Raya by P.W.1 informant Girraj Singh to lodge the written report of the incident (Ext.Ka.1) containing the prosecution version of the case.

4. Smt. Bina was immediately taken to Civil Hospital, Mathura and from there, she was taken to Methodist Hospital, Jaisingh Pura, Mathura. There she made a statement which was recorded as her dying declaration by P.W.13 Dr. Solomon Chatterjee. On 23.05.1986, Smt. Bina died as a result of burn injuries received by her in the above occurrence.

5. After completion of the investigation of the aforesaid case, the Investigating Officer submitted charge-sheet against all the three accused before the Chief Judicial Magistrate, Mathura (Ext.Ka.18).

6. Since the offences mentioned in the charge-sheet were triable exclusively by the Court of Sessions, Chief Judicial Magistrate, Mathura committed the accused for trial to the Court of Sessions Judge, Mathura where Case Crime No. 157 of 2014 was registered as S.T. No. 603 of 1987, "State Vs. Gir Prasad and two others", and made over for trial from there to the Court of IInd Additional Sessions Judge, Mathura who on the basis of material collected during the investigation and after hearing the prosecution as well as the accused on the point of charge, framed charge u/s 302 & 498-A I.P.C. against appellant Bhim Sen while acquitted co-accused Chhotey @ Om Prakash and Gir Prasad of all the charges. Appellant Bhim Sen abjured the charges framed against him and claimed trial.

7. The prosecution in order to prove its case against the accused-appellant Bhim Sen examined as many as 14 witnesses.

8. P.W.1 informant Girraj Singh, who is the father of the deceased, stated that on 19.05.1986 at about 7 a.m. when he along with P.W.2 Ghora alias Ram Gopal was passing from near the house of the accused, he heard shrieks of a lady from inside the house and when they went inside the house, they found that appellant Bhim Sen and Chhotey had caught hold of Smt. Bina whose body was on fire and accused Gir Prasad was also present there. He also stated that at that time, the three accused were taunting Smt. Bina that her father had not returned Rs. 12,000/- which he had promised to give. He also stated that in the said occurrence, appellant Bhim Sen also received burn injuries. He also stated that thereafter he lodged written report of the incident (Ext.Ka.1) at P.S.- Raya, District- Mathura.

9. P.W.2 Ram Gopal alias Ghora is also an eye-witness of the occurrence and he corroborated the statement of P.W.1 informant Girraj Singh to some extent but since he had not fully corroborated the statement which he had given earlier u/s 161 Cr.P.C., at the request of public prosecutor, he was declared hostile and public prosecutor was allowed to cross-examine him.

10. P.W.3 Saligram and P.W.4 Ram Dayal were eye-witnesses of the occurrence but both of them turned hostile and did not support the prosecution case.

11. P.W.5 Keshav, who is the real brother of the deceased Smt. Bina stated that about three years ago, his sister was married with appellant Bhim Sen according to Hindu rites in which one Bainiram was middleman. He had also stated that Bainiram had given a loan of Rs. 14,000/- to Dhaniram, father of the three accused and he took the above loan amount from Dhaniram under the excuse that he would again advance money at the time of marriage of appellant Bhim Sen but he did not stand by his promise, as a result of which Dhaniram had to take loan from some other persons to meet the expenses of marriage of appellant Bhim Sen. He also stated that accused Gir Prasad and Chhotey used to ask appellant Bhim Sen to compensate them for the money spent by their father in his marriage and two months before the death of Smt. Bina, appellant Bhim Sen had come to his house and demanded Rs. 7,000/- from his father to arrange the money which had been spent in the marriage of Smt. Bina but his father refused. He also stated that thereafter, he saw his sister in a burnt condition in Methodist Hospital, Jaisingh Pura, Mathura.

12. P.W.6 Dr. P.K. Sharma stated that on 19.05.1986, he conducted medical examination of Smt. Bina and he found 1 to 3 degree burns over the face, neck, skull, hair of Smt. Bina and also on other portions of her body and the burns were about 80 to 85%. He also opined that the injuries found on the body of Smt. Bina could have been caused to her at about 7 a.m. on the same day and he proved his injury report as (Ext.Ka.2).

13. P.W.7 Constable Vinod Kumar stated that on 23.05.1986, he along with Constable Bachu Singh had brought the dead body of Smt. Bina to Mathura for postmortem examination.

14. P.W.8 Head Constable Madan Lal is the scribe of check F.I.R. (Ext.Ka.3) and corresponding G.D. Entry (Ext.Ka.4). He also stated that on 28.05.1986, the present case was converted from u/s 307 I.P.C. to u/s 302 I.P.C. and he proved corresponding G.D. Entry (Ext.Ka.5). He also proved G.D. Entries (Exts.Ka.6 and Ka.7) which related to the factum of sending of special report to the concerned authorities and also entry regarding the return of the constable at the police station after delivery of the special report.

15. P.W.9 S.I. P.C. Chaturvedi stated that on 23.05.1986, he conducted inquest on the dead body of Smt. Bina and prepared inquest report (Ext.Ka.8) and other related documents (Exts.Ka.9 to Ka.13).

16. P.W.10 S.I. Satyapal Singh stated that the present case was registered at the police station in his presence and he was entrusted with the investigation of the case. He stated that during investigation of the case, he prepared site plan of the place of occurrence (Ext.Ka.14) and

recovery memos of 'pipi' of kerosene oil (Ext.Ka.15), burnt dhoti (Ext.Ka.16) and kerosene oil stained earth (Ext.Ka.17). He also stated that thereafter the investigation of the case was handed over by him to P.W.12 Deputy S.P. Suresh Chandra Sharma as it was the case of dowry death.

17. P.W.11 Dr. S.K. Srivastava, Methodist Hospital, Jaisingh Pura, Mathura produced the dying declaration of Smt. Bina dated 19.05.1986 from the record of the hospital and proved the same as (Ext.Ka.20).

18. P.W.12 Deputy S.P. Suresh Chandra Sharma who had investigated the case in later stages, stated that after completion of investigation, he filed charge-sheet (Ext.Ka.18) against the three accused.

19. P.W.13 Dr. Solomon Chatterjee stated that on 19.05.1986 when he was working in Methodist Hospital, Jaisingh Pura Mathura, he recorded the dying declaration of Smt. Bina (Exts.Ka.19). He also stated that he recorded the said dying declaration instead of calling a Magistrate because Smt. Bina had burn injuries of 95% and he was afraid that she may succumb to her injuries even before the arrival of the Magistrate.

20. P.W.14 Dr. M.K. Gupta stated that on 23.5.1986, he was posted as Medical Officer, Civil Hospital, Mathura and had conducted postmortem examination on the dead body of Smt. Bina and prepared her postmortem report (Ext.Ka.21) He noted following ante-mortem injuries on the person of Smt. Bina :-

Superficial two deep septic wound burns present on head and face, neck both sides, thorex both sides, including both breasts upper part of abdomen above the umblicus both sides. Both upper limb, both side front and back including both hands lower part of both thighs and whole of leg on both sides. Foul smelling coming from septic wounds. Skin is peeled at places. Vesicles present at places.

21. According to P.W.14 Dr. M.K. Gupta, the death of Smt. Bina was caused due to shock and toxaemia as a result of ante-mortem burn injuries.

22. The appellant and the other co-accused in their examination u/s 313 Cr.P.C. admitted that Smt. Bina was married to the appellant but rest of the allegations were denied by them. Appellant Bhim Sen also stated that P.W.1 informant Girraj Singh, Pradhan of the village, wanted to grab the land belonging to his family and for that reason, he and his brothers had been falsely implicated in the present case. The accused-appellant also examined Hoti Lal and Dr. H.K. Kulshrestha as D.W.1 and D.W.2.

23. Learned IInd Additional Sessions Judge, Mathura 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, by the impugned judgement and order, while acquitting co-accused Chhotey @ Om Prakash and Gir Prasad, convicted the appellant and awarded aforesaid sentences to him.

24. Hence, this appeal.

25. It is contended by Sri Jitendra Singh, learned counsel for the appellant

that no one had actually seen the incident and after the deceased's clothes had caught fire while she was cooking food and taken to the hospital where she succumbed to her burn injuries, an absolutely false F.I.R. was lodged by P.W.1 informant Girraj Singh, the Pradhan of the village, falsely implicating his brothers with the sole malafide intention of grabbing their property. He next submitted that the glaring contradictions between the recitals contained in the F.I.R. lodged by P.W.1 informant Girraj Singh describing himself as the eye-witness and those contained in the dying declaration of the deceased which itself is a forged and fabricated statement, totally belies the prosecution story that the appellant had caused the death of his wife after pouring kerosene oil on her and setting her ablaze on account of her failure to bring the sum of Rs. 14,000/- which his brothers had allegedly spent on the marriage between the deceased and the appellant. He next submitted that there is no explanation why the dying declaration of the deceased was not recorded before the Magistrate although she had remained alive for more than four days after the incident and there is no cogent and reliable evidence on record indicating that the deceased who was admitted to the hospital and with more than 95 burn injuries, was in a fit mental condition to record her dying declaration or for that matter even to speak and hence, reliance placed by the learned trial Judge on the deceased's dying declaration is totally unjustified. He lastly submitted that the neither the recorded conviction of the appellant nor the sentence awarded to him can be sustained and is liable to be set-aside.

26. Per contra Smt. Manju Thakur, learned A.G.A.-I for the State submitted that it is fully proved from the evidence of the three eye witnesses of fact that the appellant had set his wife (deceased) ablaze after pouring kerosene oil on her on account of non-fulfillment of demand made by him from her family members. It is further established from the medical evidence that the deceased had died as a result of the burn injuries received by her in her matrimonial home. She also contended that even if it is assumed for the sake of arguments that there are contradictions in the statements of the eye-witnesses and the facts stated by the deceased in the dying declaration, even then the appellant is not entitled to be acquitted of the charges for the simple reason that there being no denial on the part of the appellant that at the time of the incident, he was not present in the house and hence, the facts relating to the unnatural death of the deceased were within his special knowledge and he having failed to come up with any explanation for the circumstances under which the deceased had caught fire and received burn injuries to which she later succumbed, the appellant cannot escape fastening of guilt of the murder of his wife on him. Even otherwise, contradiction if any vis-a-vis the F.I.R. recitals and the dying declaration of the deceased are not so material so as to render the entire prosecution case unreliable and untrustworthy. This appeal lacks merit and is liable to be dismissed.

27. We have heard learned counsel for the parties present and perused the entire lower court record very carefully.

28. The only question which arises for our consideration in this appeal is that whether the prosecution has been able to prove its case against the accused-appellants beyond all reasonable doubts or not ?

29. The conviction of the appellant in the present case is essentially based upon the dying declaration of the deceased (Exts.Ka.19 & Ka.20).

30. Before testing the grounds on which the learned counsel for the appellant has challenged the veracity of the dying declaration of the deceased, we consider it useful to have a glance at the law on the issue of admissibility of dying declaration for the purpose of conviction of appellant.

31. The doctrine of dying declaration is enshrined in the legal maxim *'Nemo moriturus praesumitur mentire'*, which means 'a man will not meet his maker with a lie in his mouth'. The doctrine of dying declaration is enshrined in section 32 of the Indian Evidence Act, 1872 (hereinafter called as, 'Evidence Act') as an exception to the general rule contained in section 60 of the Evidence Act, which provides that oral evidence in all cases must be direct i.e., it must be the evidence of a witness, who says he saw it. The dying declaration is, in fact, the statement of a person, who cannot be called as witness and, therefore, cannot be cross-examined. Such statements themselves are relevant facts in certain cases.

32. In the case of ***Munnawar and others v. State of Uttar Pradesh and others*** reported in ***2010 (70) ACC 853 (SC),*** the Apex Court held as under:

"that a dying declaration can be relied upon if the deceased remained alive for a long period of time after the incident and died after recording of the dying declaration. That may be evidence to show that his condition was not overtly critical or precarious when the dying declaration was recorded."

33. It would be pertinent to note the case of ***Bhajju alias Karan Singh v. State of M.P.*** reported in ***2012 (77) ACC 182 (SC)*** before the Apex Court which had almost identical facts. The dying declaration of the deceased was relied upon as the witnesses of fact did not support the prosecution case and were declared hostile and similar defence was taken that the deceased had caught fire while she was cooking food. The Hon'ble Court referring to the case of ***Munna Raja and another v. The State of Madhya Pradesh*** reported in ***(1976) 3 SCC 104*** relied upon by the learned counsel for the accused-appellant observed as under:

*"Reliance placed by the learned counsel appearing for the appellant/accused upon the judgement of this Court in the case of **Munnu Raja and another v. The State of Madhya Pradesh** reported in **(1976) 3 SCC 104** to contend that a dying declaration cannot be corroborated by the testimony of hostile witnesses is hardly of any help. As already noticed, none of the witnesses or the authorities involved in the recording of the dying declaration had turned hostile. On the contrary, they have fully supported the case of the prosecution and have, beyond reasonable doubt, proved that the dying declaration is reliable, truthful and was voluntarily made by the deceased. We may also notice that this very judgement relied upon by the accused itself clearly says that the dying declaration can be acted upon without corroboration and can be made the basis of conviction. Paragraph 6 of the said judgement reads as under:-*

".....It is well settled that though a dying declaration must be approached with caution for the reason that the maker of the statement cannot be subject to cross-examination, there is neither a rule of law nor a rule of prudence which has hardened into a rule of law that a dying declaration cannot be acted upon unless it is corroborated (see ***Khushal Rao v. State of Bombay****). The High Court, it is true, has held that the evidence of the two eye-witnesses corroborated the dying declarations but it did not come to the conclusion that the dying declarations suffered from any infirmity by reason of which it was necessary to look out for corroboration."*

In para-22 of this report the Hon'ble Court has further held that-

"The law is very clear that if the dying declaration has been recorded in accordance with law, is reliable and gives a cogent and possible explanation of the occurrence of the events, then the dying declaration can certainly be relied upon by the Court and could form the sole piece of evidence resulting in the conviction of the accused. This Court has clearly stated the principle that section 32 of the Evidence Act, 1872 (for short 'the Act') is an exception to the general rule against the admissibility of hearsay evidence. Clause (1) of section 32 makes the statement of the deceased admissible, which is generally described as a 'dying declaration'."

The Apex Court relying upon the dying declaration of the deceased being consistent with the prosecution case which was fully corroborated by medical evidence did not disturb the concurrent findings of guilt of accused-appellant recorded by the two Courts. In view of the aforesaid preposition of the law the dying declaration of the deceased recorded in this case fulfills all the legal requirements and it is in consonance with the prosecution story as also the medical evidence.

34. Thus, what follows from the reading of the aforesaid authorities on the issue is that if the dying declaration has been recorded in accordance with law, is reliable and gives a cogent and possible explanation of the occurrence of the events, then the dying declaration can certainly be relied upon by the Court could form a sole piece of evidence resulting in the conviction of the the accused.

35. Admissibility of the dying declaration of the deceased has been assailed by the learned counsel for the appellants on four grounds. Firstly, it was not recorded before the Magistrate although the circumstance did not warrant any such urgency as shown by P.W.13 Dr. Solomon Chatterjee in recording deceased's dying declaration without waiting for the Magistrate to arrive. In our opinion, the dying declaration of the deceased is not liable to be discarded solely on the aforesaid ground because there is no law which requires that dying declaration in order to be reliable, should be recorded before the Magistrate. Before drawing any adverse inference against the prosecution on account of the dying declaration having been recorded by the doctor attending her and not before the Magistrate, we will have to examine the other attending circumstances also.

36. The second ground on which the deceased's dying declaration has been challenged is that there was evidence on record showing that when she was admitted to the hospital, she was injected

pethidine injection and as such she was not in a position to speak and hence, her dying declaration could not have been recorded there. In this regard, learned counsel for the appellant invited attention of the court to the verdict of Hon'ble Supreme Court rendered in the case **State (Delhi Administration) vs Lachhman Kumar & others** reported in **1986 SCC (Crl) page 2.** In the aforesaid case before the Hon'ble Supreme Court, pethidine injection had been given to the deceased and the doctor prescribed repetition of it every eight hours. It was observed by Hon'ble Supreme Court in para 26 of the judgement on page 17 that a judicial notice can be taken of the fact that after pethidine injection is given, the patient would not have normal alertness and thus, the certificate of the doctor that deceased was in a fit condition to make a dying declaration can not be given full credit. The above observation was made by Hon'ble Supreme Court on the basis of the peculiar facts of that case. In that case, a dying declaration of a lady had been recorded by a police officer in suspicious circumstances which was contradictory to her earlier oral dying declaration and the court while dis-believing the said dying declaration took the above fact also in view that she had been given a pethidine injection before her dying declaration was recorded. So far as the present case is concerned, P.W.13 Dr. Solomon Chatterjee was cross-examined quite in detail regarding the effect of pethidine injection and on pages 5 and 6 of his statement, he stated that if pethidine injection of small dose of 50 mg is given to a patient then the patient need not in every case became unconscious. He also opined that main function of the pethidine injection is to reduce the pain of the patient. He specifically stated that when he recorded the dying declaration of Smt. Bina, she was fully conscious. A certificate to this effect was also recorded by the doctor below the dying declaration of Smt. Bina (Ext.Ka.19) that the patient was in a fully lucid condition. A reading of the entire evidence of P.W.13 Dr. Solomon Chatterjee leaves no doubt that when he recorded the dying declaration (Ext.Ka.19) of Smt. Bina, she was fully conscious and, therefore, merely because a pethidine injection had been given to her earlier to reduce her pain, from this fact, no presumption can be drawn that she was not in a fit condition to give the said dying declaration.

37. We further find that there is nothing on the record indicating anything on the file to show that when her dying declaration was recorded by P.W.13 Dr. Solomon Chatterjee, Smt. Bina was not in a fit condition to make the said dying declaration.

38. The next ground raised on behalf of appellant Bhim Sen is that it is admitted to P.W.13 Dr. Solomon Chatterjee that when Smt. Bina was brought to Methodist Hospital, she had about 90 to 95% burns and thus, according to learned counsel for the appellant, when a patient has suffered such burn injuries, it is apparent that he/she cannot be in a fit condition to make a dying declaration. When in this regard, P.W.13 Dr. Solomon Chatterjee was cross-examined, he stated that inspite of 90 to 95% burns, Smt. Bina was in a condition to make a dying declaration. In **Liyakat Ali vs State** reported in **1988 (1) Crimes page 647,** Hon'ble Delhi High Court observed that a patient having even 90% burns may even be in a position to give a statement depending on nature and

depth of the burns and thus simply because a patient has 90 to 95% burns, it does not lead to the only conclusion that he/she is not in a fit condition to make any statement. P.W.13 Dr. Solomon Chatterjee who is an absolutely honest an independent witness and who has no motive whatsoever either against appellant Bhim Sen or against any other accused and who had no opportunity to record dying declaration (Ext.Ka.19) of Smt. Bina has stated clearly that when he recorded her statement, she was in a fit condition to make the statement and there is nothing on the record to dis-believe the above contention of P.W.13 Dr. Solomon Chatterjee and, therefore, simply because she had 90 to 95% burns on her body, it will not be enough to believe that she was not in a fit condition to make a statement when her dying declaration was recorded.

39. The fourth ground on which the dying declaration has been castigated by the learned counsel for the appellant is that there are material contradictions between the facts stated by the deceased in her dying declaration and those in the written report of the incident. Inviting our attention to the written report of the incident (Ext.Ka.1) and the deceased's dying declaration (Ext.Ka.19), he submitted that while in the written report of the incident, it has been recited that when the informant reached the house of the deceased on hearing her shrieks at about 7 p.m., he saw that appellant Bhim Sen and Jyoti had caught the hands of Smt. Bina and set her ablaze shouting that her family members had failed to fulfill their demands of dowry of Rs. 10,000/- and the incident was the result of the aforesaid omission on their part. However, the deceased in her dying declaration had stated that her brother-in-law and sister-in-law (jeth and jethani) used to quarrel with her everyday and ask her to bring Rs. 12,000/- from her paternal home which was spent on her marriage. On 19.05.1986 when she had returned after answering the call of nature in the morning, her brother-in-law and sister-in-law had again quarrelled with her and thereafter her husband Bhim Sen had sprinkled kerosene oil on her and set her ablaze. The villagers had saved her.

40. We do not find any reason to disbelieve the dying declaration of the deceased on the ground of aforesaid contradictions. The written report of the incident was not lodged by the deceased and hence, the defence cannot get any advantage of the aforesaid discrepancy especially when we have found her dying declaration to be a valid document.

41. The dying declaration in this case, in our opinion, has been recorded in accordance with law, is reliable and gives a cogent and possible explanation of the occurrence of the events.

42. Thus, in view of the above, we do not find that the learned trial Judge committed any illegality or legal infirmity in relying upon the deceased's dying declaration (Ext.Ka.19) for the purpose of recording the appellant's conviction. Apart from the dying declaration of the deceased (Ext.Ka.19), we find that there is yet another extremely glaring incriminating circumstance pointing at the guilt of the appellant.

43. The appellant had neither stated in his examination u/s 313 Cr.P.C. nor he had given any suggestion to any of the witnesses or adduced any evidence to show that he was not present in the house

at the time of the incident. There is complete absence of any denial from the side of the appellant about his presence in his house at the time of the occurrence. In such a case, Section 106 of the Evidence Act comes into play. Section 106 of the Evidence Act reads as hereunder :-

Section 106 in The Indian Evidence Act, 1872

106. Burden of proving fact especially within knowledge--When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Illustrations

(a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.

(b) A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him.

44. Now, since we have already noted that it stands admitted to the appellant that he was present in the house and he has failed to come up with any explanation with regard to the deceased's clothes having caught fire, the Court can validly draw an adverse inference against him on the presumption that the appellant has concealed material information pertaining to the death of the deceased from the Court.

45. Thus, the complicity of the appellant in committing the deceased's murder is proved from the facts stated by the deceased in her dying declaration.

46. Although there is no law which requires that a conviction can be based upon a dying declaration only when corroborated by other evidence. In the present case, the facts deposed by the deceased in her dying declaration finds corroboration from the other circumstances as well. The presence of the appellant at the time and place of the incident is not only established from the evidence of P.W.1 informant Girraj Singh but also from the testimony of Dr. H.K. Kulshreshtha, who was examined as D.W.2. and who had proved the injuries of the deceased as well as the appellant Bhim Sen which he is alleged to have received in the same occurrence.

47. Learned counsel for the appellant has endeavoured to persuade us that the factum of the deceased also having received injuries in the same incident is a very strong circumstance indicating that the appellant could not have set the deceased on fire as he himself had received injuries in the occurrence trying to douse the fire in order to save her.

48. The aforesaid ground deserves to be rejected forthwith. It is evident from the injury report of the appellant as well as the evidence of D.W.2 Dr. H.K. Kulshreshtha that the appellant had got his injuries examined at 6.45 p.m. although the incident had taken place at 7 a.m. No explanation is coming forth for the inordinate delay of almost 12 hours on the part of the appellant in getting his injuries examined promptly. Under such circumstances, the possibility of the burn injuries noted by D.W.1 and the appellant's body being self-inflicted with the object of saving himself, cannot be ruled out.

49. Thus, upon a holistic view of the facts of the case, attending circumstances

and the evidence on record, we do not find that the learned trial Judge committed any other illegality in convicting the appellant and awarding aforesaid sentences to him.

50. This appeal lacks merit and is accordingly **dismissed**.

51. Appellant Bhim Sen is on bail. His bail bonds are cancelled and his sureties discharged. Chief Judicial Magistrate, Mathura is directed to get appellant Bhim Sen arrested and sent to jail for serving out the remaining part of his sentences.

52. There shall however, be no order as to costs.

(2019)12 ILR A479

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.05.2019

BEFORE
THE HON'BLE RAMESH SINHA, J.
THE HON'BLE DINESH KUMAR SINGH-I, J.

Criminal Appeal No. 2421 of 1985

Bashir & Anr. ...Accused/Appellants (In Jail)

Versus

State of U.P. ...Respondent

Counsel for the Appellants:
Sri S.A. Shah, Sri Ambrish Kumar Kashyap

Counsel for the Respondent:
D.G.A.

A. Evidence Law - Indian Evidence Act, 1872 -Motive - direct evidence - eye witness - deceased died on account of fire arm injuries - cause of death - shock and hemorrhage as a result of ante mortem injuries - no motive to commit the murder of the deceased - in case of direct evidence motive has no significance - P.W. 2(eye witness of the occurrence) appears to be highly inimical witness against the appellant - eye witness standing at a distance of 50 paces from the place of occurrence - eye witness reached the place of occurrence after half an hour and saw that the deceased lying dead - his presence at the place of occurrence is doubtful - no recovery of any weapon or incriminating article made from the possession of the appellant - Prosecution failed to prove its case beyond reasonable doubt– Accused entitled to be acquitted . (Para 31, 34 & 35)

Criminal appeal allowed. (E-7)

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

1. The present appeal has been filed by two accused-appellants out of which appellant no. 1 Bashir son of Sri Murli died during the pendency of appeal. The appeal on his behalf has already been ordered to be abated by Co-ordinate Bench of this Court vide order dated 13.9.2018 and the present appeal survives with respect to appellant Afsar son of Roab Sher only, hence the Court proceeds to adjudicate the aforesaid appeal with respect to the said appellant.

2. The present appeal has been filed by the appellant against the judgment and order dated 29.7.1985 passed by Ist Additional Sessions Judge, Farrukhabad in S.T. No. 364 of 1984 convicting and sentencing the appellant under section 302/34 I.P.C. to undergo life imprisonment.

3. The prosecution case in brief is that an F.I.R. was lodged by the informant P.W. 1 Neksu at police station Kampil against two accused, namely, Bashir and Afsar stating that on 20.3.1984 he along

with his brother Ali Mohammad and one Kallu of his village had gone to village Pankhiya Nagla to see the Shisham tree and when they were returning to their village then at the outskirt of village Iklahra where on either side of the road which run from West to East there were fields of one Niwazi. He stated that quite close to the field belonging to Niwazi on the Southern side of the road there was field of Ali Mohammad in which there was a Rahat and a well. Ali Mohammad was a little ahead of him and Kallu and when they were near the field of Niwazi and the Rahat at about 2 p.m. in the afternoon both the accused persons, who had been lying ambush in the field of Niwazi came out with country made pistols in their hands and fired at Ali Mohammad, who tried to run away but fell down in other field of Niwazi towards North of the road in which Barley crop had been standing. Both the accused persons went near Ali Mohammad and again fired at him with their pistols saying *"we have taken the revenge today"*. Thereafter, both the accused ran away towards the North. They were chased by the witnesses upto some distance but none of them could be apprehended.

4. Prior to 3-4 years of the present incident, the police had arrested accused Bashir along with country made pistol and since then the accused Bashir used to bear enmity with his brother Ali Mohammad. Accused Bashir was having relations with one Manohar of his village, who was a criminal. He stated that because of inimical relationship with his brother, the two accused with a conspiracy of Manohar, have committed murder of his brother Ali Mohammad. It was stated by him that the dead body of his brother is lying at the spot and near the dead body, he has left his family members and other persons of his village, who were present there and prayed that necessary action be taken against the accused persons.

5. The F.I.R. was lodged by the informant after getting it written by one Murtaza Ali. On the basis of the said written report (Ext. Ka. 1) submitted by the informant Neksu which he got scribe by Murtaza Ali, a chik F.I.R. (Ext. Ka-3) was prepared at police station Kampil. The information of the same was also endorsed in G.D. No. 16 copy of which was marked as Ex. Ka-6 and F.I.R. was registered as case crime no. 55 of 1984 under section 302 I.P.C. (Ext. Ka-3). The Investigating Officer Ram Autar Singh (P.W. 7), who was entrusted with the investigation of the case, reached at the spot immediately at about 6 p.m. He prepared the inquest report of the deceased (Ext. Ka-5) and prepared photo nash, challan nash (Exts. Ka-7 and 8) and wrote letters to Reserve Inspector and C.M.O. for post mortem which were marked as Exts. Ka-9 to 11. He prepared the site plan of the place of occurrence (Ext. Ka-15) and took in his possession the blood stained and simple earth, shoes put on by the deceased and a belt of cartridges found at the place of occurrence and prepared its recovery memos which were marked as Exts. Ka-12 to 14. The post mortem on the dead body of the deceased was conducted by Dr. S.C. Gupta (P.W. 4), who proved the same as Ext. Ka-2. After recording the statements of the witnesses and completing all other formalities the Investigating Officer concluded the investigation of the case and submitted charge-sheet (Ext. Ka.16) against the two accused persons before the competent court.

6. The trial court framed charges against the two accused persons, who in their statements recorded under section 313 Cr.P.C. have denied the charges and

pleaded not guilty stating that they have been falsely roped in the present case due to animosity. In defence they submitted that the deceased Ali Mohammad was killed at some point of time in the night in his field near the place of occurrence when he was keeping watch over his crops. According to the suggestion put forward by the defence, one Jauhari Kisan belonging to the gang of notorious dacoit Mahabira was killed in a fake encounter by the police with the help of Ali Mohmmad-the deceased and his three companions, namely, Mukut, Babu and Ram Sanehi. The gang of Mahabira decided to take revenge and killed the three companions of Ali Mohammad one by one. In a bid to kill Ali Mohammad, they incidentally killed his brother Ali Mulla thereafter finding an opportunity they killed Ali Mohammad too in his own field.

7. The prosecution in support of its case examined P.W. 1-Neksu-the informant of the case, P.W. 2 Kallu, who is said to be the eye witness of the occurrence, P.W. 3 Murtaza Ali-Scribe of the F.I.R., P.W. 4 Dr. S.C. Gupta, who conducted the post mortem of the deceased, P.W. 5 Head Constable Ram Karan, P.W. 6 Constable Sobran Singh and P.W. 7 Ram Autar Singh.

8. The accused did not examine any witness in their defence.

9. P.W. 1 Neksu, who is the informant of the case and real brother of the deceased was examined by the trial court and in his deposition before the trial court, he has stated that he along with his brother Ali Mohammad-the deceased and one Kallu of his village were going back to their village Iklahra from village Pankhiya Nagla where they had gone to cut some Shisham trees and at two p.m. when they reached near the Rahat of Niwazi, the accused Bashir and Afsar came out from the field of wheat with country made pistol in their hands and both the accused fired at the deceased Ali Mohammad due to which he received injuries on his person and when he tried to run away both the accused assaulted him with lathi on his feet on account of which he fell down and thereafter again they fired at him. On the alarm raised by him and other villagers, both the accused fled away towards North. His brother Ali Mohammad died at the spot within 5-6 minute. The witness Munshi had also arrived at the spot. He deposed that prior to 5-6 years of the incident, the deceased Ali Mohammad had got the accused Bashir arrested by the police for keeping an illegal gun on account of which the accused Bashir was keeping ill-will with the deceased. The witness stated that he does not know whether accused Bashir was convicted in the said case or not. On the dictation of the said witness, the report of the incident was written by Murtaza Ali in the village in his drawing room (Baitakh). He proved the written report as Ext. Ka-1 which he submitted at the police station. Munnauar, Alla Sher etc. also went along with him to the police station. At the time of writing of the report of the incident, he had kept the dead body of the deceased out side of the drawing room. The Station Officer had arrived and prepared the inquest report and other police papers. At that time, the dead body of the deceased was lying near the Rahat of Niwazi.

10. In his cross examination, the witness has stated that in the case in which accused Bashir was arrested with a

gun his brother Ali Mohammad was a witness and he is not aware of the fact whether his brother had deposed in the said case or not. He admitted that Sheru and Liyaqat were real brothers. The sister of accused Afsar was married to Sheru and his own sister was married to Liyaqat but he denied that there had been any quarrel or dispute between the wives of Sheru and Liyaqat nor any quarrel between Liyaqat and Sheru. He also denied any dispute with accused Bashir on account of the boundary of fields belonging to him and Bashir. However, he admitted that Manohar had killed his brother Alimulla about 4 or 5 years prior to the present incident. He was not aware of the fact whether Jauhari Kisan of his village was killed in an encounter by the police and had denied that his brother Ali Mohammad, Mukut and Babu Khan were also present at the time of encounter along with the police. Though he admitted the killings of Mukut, Ali Mulla and Babu Khan but denied that they were killed by the gang of Jauhari Kisan as vendetta. He also denied that his brother Ali Mohammad and his nephew Riyasat and Kallu were accused for murdering one Ram Sanehi. However, he admitted that his sister's husband Liyaqat was an accused in a dacoity committed in the house of one Parasram. He further shows his ignorance about the fact that the deceased Ali Mohammad was a police witness in several cases. He stated that the accused belong to a gang of Manohar and they were in his gang for the last 6-7 years. The Investigating Officer has recorded his statement under section 161 Cr.P.C. in which he had told him that Manohar had conspired the murder of the deceased. The place of occurrence is about one mile from the village. There is no abadi between the village and the place of occurrence. Village Pankhiya Nagala is about one and half kms. from the place of occurrence and in between there is Abadi of Shekhpur which is at a distance of one km. from the place of occurrence and except the same there is no Abadi. Towards the North of place of occurrence till river Ganga, there is no Abadi. Towards North and South there is Chak of Niwazi in between there is way. In the Southern side of the Chak of Niwazi there is Chak of Ali Mohammad. The Chak of Ali Mohammad is about 50 paces from the place of occurrence where is his Rahat and there is no Madhhaiya and according to the information of the witness no one stays at the field for keeping watch. The trees at Pankhiya Nagla were not cut down on the said date. He stated that earlier it was wrongly stated by him that they were returning after cutting the trees for which he cannot tell the reason. He denied the suggestion that in order to establish his presence at the place of occurrence, he has deposed about the cutting of trees. He wrongly stated that at the time of incident, the crops of wheat was half ripe and it was at waist height. He had seen the accused coming out from the field of Newazi and in the said field there was no crop of peas and barley but there was wheat. At the Southern side of the field there was crop of Barley and somewhere some peas were also there. The deceased was murdered at the Southern side of the said field. When he saw the accused for the first time in the field, they were at a distance of 20 paces inside the field. They were coming through the way and the accused came out from the field and on the way they fired at that time the witness was at a distance of 50 paces towards West. The deceased Ali Mohammad was at a distance of 2-3 paces towards North of the accused when they

had fired. The deceased Ali Mohammad was at Dadhe. When the fire was shot, the deceased Ali Mohammad was facing towards East. At the beginning, one shot was fired at Ali Mohammad and he denied that two shots were fired in the beginning and thereafter several shots were fired. He stated that initially, he has stated in his statement that one shot was fired, was because of his weak memory and it is quite possible that two fires could have been shot and he had heard only one of them. He denied that the accused have shot the deceased from front. He had not given any such statement to the Investigating Officer. The first shot which was fired was hit at the shoulder of the deceased and thereafter within a minute several shots were fired. At that time, Ali Mohammad step ahead towards the Northern field of Newazi. He had entered in the field upto 15-20 paces. The accused also chased him and entered into the field and when first fire was shot at him his face was towards East and when second fire was shot his face was towards East and the accused took him towards South. He cannot tell where the deceased received injuries of three shots fired at him. After receiving the injuries, he could not fled away. When the three fires were shot then Kallu ran in another field in the West. The deceased had fallen within 15-20-25 paces inside the field. The dead body of the deceased was brought to the house of the witness from the place of occurrence after Sun set. The report of the incident was got written by him at his house prior to bringing the dead body. He denied the suggestion that the report was lodged after the dead body of the deceased was brought to the house. He denied at at the time of lodging the report, the dead body was in front of drawing room and he had wrongly given the said statement. He denied the suggestion that after the arrival of the Station Officer, the report was lodged with his consultation. He further denied the suggestion that he was not present at the place of occurrence and also denied that because of enmity the name of accused were falsely implicated after consultation with the police.

11. P.W. 2 Kallu in his deposition before the trial court though has supported the prosecution case but has deposed differently to that of P.W. 1. He has stated that he and Ali Mohammad were returning to village Iklahra from Pakhiya Nagla where they had gone to cut Shisham trees when the occurrence took place in between the fields of Niwazi near the well and the Rahat. He stated that Ali Mohammd was ahead of him at a distance of 2-4 paces and both the accused came from behind and fired at Ali Mohammad which hit him and he turned around and saw that both of them were carrying country made pistol and he raised alarm and ask what was going on then Ali Mohammad started running and both the accused chased him. The witness further stated that he ran for his life and stopped at a distance of about 50 paces in the field of one Ali Murad and from there he heard three more shots. The witness went on to say that after half an hour when he went to the place of occurrence, he found Ali Mohammad lying dead near the well and Rahat in the field of Newazi. He further stated that at the time of incident along with him and Ali Mohammad neither his brother Neksu nor any other person were present there.

12. In his cross examination, he has admitted that on the date of incident, in village Pankhiya Nagla trees of Shisham were not cut as they could not get a

Carpenter. He denied the suggestion that Rahat of Newazi is out side towards North and his Rahat is inside the Chak and the length of the Chak of Newazi towards the North to South is 100-150 yards and from East to West about 70-80 yards and when the fires were made at Ali Mohammad, he was at a distance of 20 paces from Rahat. His statement was recorded by the Investigating Officer and when the fires were shot at Ali Mohammad, the accused were at a distance of 4-6 paces behind him. The first shot was fired at Ali Mohammad on his left shoulder, who on receiving the injury ran towards the North. The accused also ran behind him and thereafter the witness also run away. He did not see Munshi Singh at the place of occurrence nor heard his voice and after half an hour when he reached at the place of occurrence no one was present there. When after reaching at the village, the told about the incident to the villagers then the villagers reached at the place of occurrence. The dead body of the deceased Ali Mohammad was lying at the place of occurrence. The Station Officer had arrived at the place of occurrence in the evening between 4:30 to 5:00 p.m. and had prepared the inquest report and other police papers. After sealing, the dead body was brought in the village in front of Chaupal of Neksu in a vehicle in which it was kept lying. The accused were not there. Murtaza was present there. The Station Officer was also present there. He did not see Murtaza writing the report. He was ignorant of the fact that the Station Officer had brought Neksu to the police station or not. He stated that Qaisar is his son and there was a scuffle between his son and one Akbar, who is the brother of accused Afsar in which Akbar and his son Qaisar received injuries of lathi. His daughter is married to Noor Hasan, who is related to accused Afsar. He denied that he had stopped his daughter from going with Noor Hasan. He denied that Afsar had forcibly taken his daughter on account of which there was some quarrel between him and accused Afsar. He had purchased field of Dad Khan and given it to Afsar because of relationship with him. He had further stated that he had not given him Rs. 412/- which he did not return but he denied that because of which he was annoyed with Afsar. He stated that there was a scuffle between his son Nanku and Ahmad son of Kashmir but no one has received injuries. He stated that he heard that Jauhari Kisan has been killed in a police encounter. He also was not aware of the fact that Mukut, Babu and Ali Mohammad had helped the police in the said encounter. Ali Mulla and Mukut have been murdered and he heard that both them were murdered by the gang of Mahabira. He was not aware of the fact whether Jauhari Kisan was in the gang of Mahabira. Ram Snehi Baniya of Bhawalpur has also been killed and no report was lodged against Ali Mohammad, Riyasat and others. In the village, dacoity had taken place in the house of Parshuram in which report was lodged against Ali Mohammad and Liyaqat or not he did not remember as the incident had taken place 15-16 years ago. The brother-in-law of Afasr, namely, Sheru resides in his village and he is not aware of the fact whether there was a quarrel between Liyaqat and Sheru. He denied that Ali Mohammad was killed in the evening in his field near Rahat. He further denied that the information about the incident was given to him on the next day and he also denied the suggestion that he in collusion with Neksu and Munshi has lodged a false report against the accused.

13. P.W. 3 Ali Murtaza has stated before the trial court that on 20.3.1985, he

on the dictation of Neksu had written a report (Ex. Ka.-1) and he had written what was dictated to him by Neksu and after reading and hearing the same he had affixed his thumb impression. The written report was in his hand writing and signature and he has proved the same as Ex. Ka. 1.

14. In his cross examination, he has stated that a report (Ex. Ka-1) was written in the drawing room of Neksu and when he was writing the report, the dead body was kept in front of the drawing room and dead body was brought before the drawing at 3-3:1/2 in the evening in his presence. The Station Officer had come when the dead body was brought. The report was written at about 7-8 p.m. in the night and the Station Officer while writing the report was consulting with the family members of Neksu. The said witness was declared hostile by the prosecution.

15. In his cross examination by the prosecution, he denied that he had written the report at 2 p.m. in the afternoon. He further denied that the Neksu had dictated the report. He further denied the suggestion that in collusion with the accused persons, he is falsely deposing.

16. P.W. 4 Dr. S.C. Gupta has stated before the trial court that on 21.3.1984, he was posted as Medical Officer at District Hospital Fatehgarh and he was on duty. He conducted the post mortem of the dead body of the deceased Ali Mohammad at 3:15 p.m. which was brought by Constable No. 607 Soobaram Singh, who had identified the dead body along with Constable No. 467 Ramesh Chandra and following injuries on his person:-

"1. Gun shot wound of entry 2-1/2 cm.x 2 cm.x stomach cavity deep on the right side upper part of the stomach 27 cm. above and lateral to the umbilicus with a number of wound of pellets entry in an area of 8 cm. x 6 cm around it. The direction of the wound was from right to left.

2. Gun shot wound of entry 0.2 cm. x 0.2 cm. skin deep on the back of the right elbow.

3. Two gun shot wounds of entry 10 cm. apart from each other on back of the left fore arm 0.2 cm. x. 0.2 cm and 1 cm x 0.2 cm. both skin deep.

4. Four gun shot wounds of entry in an area of 7 cm. x 4 cm. on the back 1/3rd of the left arm 2 to 4 cm. apart from each other.

All the wounds were skin deep.

5. Multiple gun shot wounds of entry in an area of 28 cm. x 22 cm. on the upper and middle part of the back, skin to muscle deep and 0.2 cm. x 0.2 cm. to 1 cm. x 0.2 cm. in measurements. The direction of the wounds was from back to front.

6. Gun shot wound of entry 0.7. cm. x 0.5 cm. x chest cavity deep on the right side back 3 cm. away and inside from the shoulder. The direction of the wound was from back to front and upward to downward.

7. Lacerated wound 4 cm. x 1 cm. x muscle deep on the back of the head."

17. The internal examination revealed the that the lungs and their membrane were lacerated at several places. Heart was empty and heart and its membrane were lacerated. There was 1-1/2 litre of liquid mixed with blood in the chest cavity. The membrane of the stomach was lacerated and in the abdominal cavity one litre of liquid mixed

blood and fecal matter was present. There was 200 grams of semi digested food in the stomach and fecal mater in the large intestines.

18. Liver was also lacerated.

19. In the opinion of the doctor the death had occurred sometime at 2 p.m. on 20.3.1984 due to excessive bleeding and shock caused by the ante mortem injuries detailed earlier.

20. A bullet from the chest cavity 18 pellets embedded in the back and 12 pellets from the abdominal cavity were found by the doctor and were taken out. He also took a shirt, a vest and the dhoti, an underwear and the Angochha from the dead body. He kept all these articles in two different sealed bundles and sent to the S.S.P. Fatehgarh through the constable.

21. According to the doctor all the injuries except injury no. 7 were caused by some fire arm and injury no. 7 either by some blunt weapon or by a fall.

22. In his cross-examination, the said witness has stated that the duration of death on either side would be from 5-6 hours. The deceased would have taken food 4-5 hours prior to death. He cannot tell whether both the rifle and gun were used to cause injuries to the deceased or not. He cannot tell about the weapon.

23. P.W. 5 Head Constable Ram Karan has stated before the trial court that on 20.3.1984, he was posted as Head Moharrir in police station Kampil. On the said date, the informant Neksu had given a written report which was written by Murtaza Ali in the police station to him on the basis of which he prepared the chik F.I.R in his hand writing and signature which is on record and proved the same as Ex. Ka-3. The endorsement of the same was made in the G.D. No. 26 at 15:45 house on the same day. He has proved the same in his writing and signature as Ex. Ka-4. He denied the suggestion that in the G.D., the time of the report had been changed by him. He was unaware of the fact that prior to the present incident any person by the name of Jauhari Kisan was killed in a police encounter and he was not posted there at that time and no such fact was mentioned in the report and it was stated that the deceased Ali Mohammad had helped the police in the encounter of Jauhari.

24. P.W. 6 Sobran Singh has stated that he was posted as Constable on 20.3.1984 at police station Kampil and on the said date he had handed over the dead body of the deceased Ali Mohammad along with Constable Rakesh Chandra Khare in the evening at about 7:30 p.m. at Fatehgarh District Hospital for post mortem to the doctor which was in a sealed condition along with other police papers and after post mortem, the clothes which were sealed in a bundle and one sealed envelope in which pellets were kept had submitted the same at police station and till that time, the dead body was in his custody and he did not allow any persons to see or touch it.

25. He in his cross-examination has stated that no one had told him that the deceased had helped the police in the encounter of Jauhari Kisan and the Station Officer Narain Jatav was not the Station Officer at police station Kampil during his tenure.

26. P.W. 7 Ram Autar Singh has stated that on 20.3.1984 he was posted as

Station Officer of police station Kampil and in his presence on the said date at about 15:45 p.m., the informant Neksu has submitted a written report on the basis of which a case was registered and the investigation was entrusted to him. He had recorded the statement of the informant at the police station and on reaching at the place of occurrence he had taken over the custody of the dead body of the deceased Ali Mohammad and conducted the panchayatnama. He got the panchayatnama of the dead body of the deceased done by S.I. R.K. Singh. Thereafter sealed the dead body of the deceased and sent the same along with other police papers for post mortem through Constable Soobran Singh and Constable Rakesh Chandra Mishra and he has proved the panchayatnama as Ex. Ka-6. Photo nash, challan nash, letter to R.I. and letter to C.M.O. was prepared by S.I. R.K. Singh before him in his hand writing and signature at the place of occurrence. He has proved the same as Exts. Ka-7 to 11. He has also taken the shoes of the deceased, blood stained and plain earth and a belt of cartridges and got the recovery memo of the same prepared by S.I. R.K. Singh in the presence of the witnesses and got their thumb impression and proved the same as Exts. Ka-12, 13 and 14. At the pointing out of the informant, site plan of the place of occurrence was prepared by him which was marked as Ex. Ka-15. He made a search of the accused but they could not be apprehended. He recorded the statements of Kallu, Munshi Singh and other witnesses of recovery on 30.3.1984. He got the place of occurrence inspected by the Circle Officer. The accused surrendered on 30.3.1984 and he recorded their statements in jail on 4.4.1984. After completing the investigation, he submitted charge-sheet on 5.5.1984 in his hand writing and signature which is marked as Ex. Ka-16. The criminal antecedents of accused Bashir was also enclosed by him along with the charge-sheet in his hand writing and signature. The accused Bashir was a history sheeter and his history sheet was opened at police station Kampil and beside the same there were five other criminal cases against him. The blood stained and plain earth Exts. 1 and 2 was proved by him. The clothes of the deceased such as Baniyan, dhoti, Kameez, Aungauchha and Rumal were marked as Exts. 5 to 9. All the articles which were kept in a sealed cover were opened in the Court. He reached the place of occurrence on 20.3.1984 at about 5 p.m. in the evening and remained there at about 8 p.m. and at 7:30 p.m. he sent the dead body of the deceased for post mortem through Constables. Thereafter he did not see the dead body. He denied the suggestion that he had gone to see the dead body in the drawing room of the informant Neksu. He had not sent the dead body of the deceased at the drawing room of Neksu nor has given any such instruction to the Constable. The report of the incident was registered in his presence at 3:45 p.m. and after registration of the report he remained at police station for about 45 minutes and thereafter he left for Eklahara by Jeep. He denied the suggestion that Neksu had written the report before him. He submitted the written report at the police station. He denied the suggestion that without the registration of the report, he had proceeded to village Eklahara. He further denied the suggestion that when he reached at village Eklahra, he firstly went to the house of Neksu and he found the dead body of the deceased in front of the drawing room of his house. He further

denied the suggestion that he had dictated the report to Neksu. He is not aware of the police encounter of Jauhari Kisan. He is also not aware that the said encounter of Jauhari Kisan was done by S.O. Narain Singh in the way of Eklahara to Kampil. He did not know that when Jauhari Kisan was killed in the police encounter, deceased Ali Mohammad, Babu Khan and Mukut were also accompanying the police party. He denied the suggestion that Ali Mohammad could not be traced out, hence his brother Ali Mulla was murdered.

27. In his cross-examination, he admitted that Ram Sanehi Baniya of Bhawalpur was murdered. It is incorrect the deceased Ali Mohammad and Riyasat were named accused in the said case. He denied that charge-sheet has not been submitted against Ali Mohammad though he was named as accused in the said case. He stated that during his tenure no dacoity had taken place in village Iklahara in which the deceased Ali Mohammad and his brother-in-law Liyaqat of Bahawalpur were accused. He also does not know that the brother-in-law of Neksu and brother-in-law of accused Afsar were real brothers. He is not aware of the fact that the daughter of P.W. 2 Kallu is married to the brother of accused Afsar, namely, Noor Hasan. He was not aware of the fact that Ali Mohammad was also history-sheeter or not and he did not try to gather such an information and Ali Mohammad was amongst good person. The witness had met him when he had come in a meeting at police station. He had not come at police station as an accused at any point of time in his tenure.

28. The trial court after examining the prosecution evidence and the defence version has concluded that it was the appellants along with co-accused, who have murdered the deceased and has convicted and sentenced they for the offence under section 302 I.P.C. for life imprisonment, hence the present appeal by the appellants.

29. Heard Sri Ambrish Kumar Srivastava, learned counsel for the appellants, Sri Jai Narain, learned A.G.A. for the State and perused the record as well as impugned judgment and order of the trial court.

30. Learned counsel for the appellants submits that the deceased Ali Mohammad was a pocket witness of the police and he along with Mukut had assisted the police in the encounter of one Jauhari Kisan, who was done to death in the said police encounter. As a revenge, Mukut, Babu and the brother of the deceased-Ali Mohammad, namely, Ali Mulla were murdered by the gang of Mahabira as Jauhari Kisan belonged to the said gang and it appears that the deceased was also shot dead by Mahabira gang and the appellant has been falsely implicated in the present case due to inimical relationship with P.W. 2. He argued that the daughter of P.W. 2 was married to Noor Hasan, who belonged to the family of appellant Afsar. He has pointed that as per the evidence of P.W. 2 though he has denied that Afsar had forcibly taken his daughter due to which there was a dispute between them on account of which he has implicated the appellant. He further pointed out that there appears to be some animosity of P.W. 2 with appellant Afsar as P.W. 2 had purchased an agricultural land of one Dad Khan and given it to him and Afsar had not given Rs. 412 to him because of

which he was annoyed with him and there was ill will between the parties and the false implication of the appellant Afsar by P.W. 2 cannot be ruled out. He argued that P.W. 1, who is the real brother of the deceased was though stated to have accompanied the deceased along with P.W. 2 Kallu at the time of incident but his testimony has been discarded by the trial court as his presence at the place of occurrence was found to be doubtful and the conviction of the appellant is solely based on the evidence of P.W. 2, who claims to be the eye witness of the occurrence. He submitted that the place of occurrence also appears to be doubtful as it appears from the evidence of P.W. 7 Ram Autar Singh-the Investigating Officer as it was stated by him that the place of occurrence is an interior place where the chak of the deceased Ali Mohammad was situated and the deceased was done to death in some other manner and not as stated by the prosecution by some unknown miscreants and at the time of his death belt of cartridges were also found which shows that the deceased was done to death by firing shot on him at his chak which was an interior and lonely place. It was submitted by him that the testimony of P.W. 2 is also not reliable as from his evidence also it is evident that he was following the deceased, who was ahead of him and when the deceased was shot it is stated by him that out of two accused including the appellant Bashir and Afsar one of them, who fired at the deceased which hit him and when he turned around then he saw that two accused were having country made pistol in their hands and because of fear he ran for his life and was standing at a distance of 50 paces in the field of Ali Murad and heard three more shots. He reached the place of occurrence after half an hour which goes to show that the said witness actually did not see the incident and he has also denied that P.W. 1 was present along with him and the deceased at the place of occurrence.

31. It was further pointed out that from the evidence of P.W. 6 it is quite evident that the deceased, who was shot dead at an interior place situated at his chak and when information was received by P.W. 1 and 2 and others villagers they reached at the place of occurrence and informed the police, who arrived thereafter. He submitted that so far as appellant is concerned, he has no criminal antecedent whereas co-accused Bashir was a man of criminal antecedents and he had also strong motive to commit the murder of the deceased as he was caught by the police with a country made pistol and he had an impression that because of the deceased Ali Mohammad being a pocket witness of the police, had got him arrested by the police, hence he committed the murder of the deceased and no recovery of any weapon or incriminating article was made either from the possession of the appellant or on his pointing out, hence conviction and sentence of the appellant by the trial court is against the evidence on record and liable to be set aside and appellant be acquitted.

32. On the other hand, learned A.G.A. opposed the argument of learned counsel for the appellant and stated that it is true that the trial court, only on the basis of testimony of P.W. 2, has convicted the appellant as it has disbelieved the presence of P.W. 1 at the place of occurrence. He argued that P.W. 2 Kallu was accompanying the deceased as it appears from his evidence and the

ocular testimony fully corroborates the post mortem of the deceased, who died on account of fire arm injuries on his person. It was submitted by him that the suggestion which was given from the side of the defence that the deceased was a pocket witness of the police and he helped the police in the encounter of one Jauhari Kisan along with Mukut, Babu and Ali Mulla, who have been murdered and they were murdered by the gang of Mahabira as Jauhari Kisan belonged to the gang of Mahabira, has been denied by the P.W. 2 as he was not aware of the said fact but he could not dispute the fact that the deceased used to help the police in the encounters of dacoits of the area and it appears that Mahabira gang was operating in the area as the same was dacoity affected area. Thus, he refuted the contention of the learned counsel for the appellant and argued that no interference is required by this Court in the judgment and order of the trial court.

33. We have given thoughtful consideration to the submissions of learned counsel for the parties and perused the impugned judgment and order as well as lower court record.

34. From the prosecution case it is apparent that the deceased died on account of fire arm injuries received on his person as he has received as many as six gun shot injuries on his person whereas one lacerated wound on the back of the head and in the opinion of the doctor, the cause of death is shock and hemorrhage as a result of ante mortem injuries. The F.I.R. of the case was lodged by P.W. 1 Neksu and the scribe of the same was Mohammad Murtaza Ali which was registered on the basis of written report submitted by P.W. 1 at the police station on 20.3.1984 p.m. with respect to the incident which had taken place on the same day at 2 p.m. in the afternoon. P.W. 1 in his evidence has stated before the trial court that he was accompanying the deceased and eye witness Kallu at the time of incident and has seen the incident in which the two accused including the appellant have murdered the deceased by country made pistols. He further stated that the deceased was also assaulted by the said accused persons by lathi, who were carrying the same. It was submitted by learned counsel for the appellant that it is highly improbable that a person, who is carrying a country made pistol and had shot at the deceased would simultaneously carry lathi with them and assault the deceased with the same. It was submitted that the said improvement has been made by P.W. 1 in his statement before the trial court as injury no. 7 which was a lacerated wound found on the back of the head could be caused by blunt object, hence P.W. 1 tried to improve the prosecution case in his statement before the trial court though he has not mentioned about the deceased being assaulted with lathi by the two accused persons when they fired at him with a country made pistol and they were also carrying lathi with them. Moreover, P.W. 2 has categorically denied the presence of P.W. 1 at the place of occurrence in his evidence and has stated that only the deceased was with him and there was no one else present at the time of incident. After the incident, P.W. 2 had gone to the village and informed them about the incident, thus the trial court found the discrepancy in the evidence of P.W. 1 and his presence at the place of occurrence also appears to be doubtful, hence has discarded his evidence and found that he is not a wholly reliable witness and

disbelieved his evidence but so far as evidence of P.W. 2 is concerned, the trial court has based the conviction of the appellant on his testimony only as it found that his evidence fully corroborates the prosecution case as his ocular testimony is supported by the medical report. From his evidence it is also evident that his daughter was married in the house of appellant Afsar to one Noor Hasan, it appears that Noor Hasan married his daughter against his wishes and further it was suggested to him that the appellant Afsar had forcibly taken his daughter to his house on account of which there was some quarrel between him and appellant Afsar though he denied the said fact. It was further suggested that an agricultural land of one Dad Khan was purchased by him-P.W. 2 and he had given the same to appellant Afsar because of his relationship with him and Afsar had not paid Rs. 412 to him due to which P.W. 2 was also annoyed though he has denied the said suggestion also. So far as suggestion given to P.W. 2 that one Jauhari Kisan was killed in a police encounter with the help of the deceased Ali Mohammad, Mukut and Babu Khan, who have assisted the police in the said encounter and Ali Mulla, Mukut and Babu Khan have been done to death and they were murdered by the gang of Mahabira, the witness had stated that he was not aware of the said fact. The witness had admitted that Ram Sanehi Baniya of Bahawalpur had been killed and there was no report regarding his murder against Ali Mohammad, Riyasat and others. In the village at the house of Parshuram, a dacoity had taken place and he had lodged a report against Ali Mohammad, Liyaqat but he has stated that he did not remember about the said fact as the incident was 15-16 years old. The brother-in-law of Afsar, namely, Sheru used to live in his village and there appears to be some quarrel between Liyaqat and Sheru. All these facts go to show that there was some inimical relation of P.W. 2 with appellant Afsar though he has denied the same in his evidence and regarding the deceased Ali Mohammad being a police witness and has having helped in the encounter of Jauhari Kisan, who was stated to be a member of the gang of Mahabira and also that Ali Mulla was suspected to be involved in the dacoity which had taken place in the village at the house of Parsuhram, goes to show that it was quite probable that the deceased was done to death in some other manner by unknown miscreants in the interior and lonely place where his chak was situated as has come in the evidence of P.W. 2 and the false implication of the appellant Afsar by P.W. 2 cannot be ruled out. It is also significant to note here that he had no motive to commit the murder of the deceased but this Court also does not loose sight that in a case of direct evidence motive has no significance but it would not be safe to convict and sentence the appellant only on the basis of evidence of P.W. 2 which appears to be highly inimical witness against the appellant. It also appears from the evidence of P.W. 2 that he was standing at a distance of 50 paces from the place of occurrence and has seen the accused persons from there. After half an hour he reached the place of occurrence and saw that the deceased lying dead which further goes to show that his presence at the place of occurrence is doubtful as had he been present there definitely he would also have been killed by the accused persons.

35. From the cross examination of P.W. 7-the Investigating Officer it is evident that he has stated that Ram Sanehi Baniya of Bahawalpur was murdered and

in that murder he was given a suggestion that he has denied that the deceased Ali Mohammad and Riyasat were also an accused and he has submitted charge-sheet against the accused persons but had not submitted any charge-sheet against Ali Mohammad which also goes to show that Ali Mohammad was also not a man of good antecedent and he was a police witness and used to assist the police in the encounters of dacoits and he himself was involved in criminal cases but the police had protected him and no charge-sheet was submitted against him in the murder case of Ram Sanehi. Thus from the prosecution case, it is apparent that the prosecution has failed to prove its case beyond reasonable doubt against the appellant, hence the appellant is entitle to be acquitted.

36. In view of the foregoing discussion, impugned judgment and order of the trial court convicting and sentencing the appellant Afsar is hereby set aside.

37. The appeal stands allowed.

38. The appellant Afsar stated to be on bail. He need not surrender. His bail bond and sureties stands discharged.

39. It is further directed that the appellant shall furnish bail bonds with sureties to the satisfaction of the court concerned in terms of the provision of Section 437-A Cr.P.C.

40. Let the lower court record along with the present order be transmitted to the trial court concerned for necessary information and compliance forthwith.

(2019)12 ILR A492

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 11.11.2019

BEFORE
THE HON'BLE IRSHAD ALI, J.

Criminal Revision No. 1479 of 2019

Suresh Chimanlal Shah ...Revisionist
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri Sunil Kumar Yadav, Sri R. Krishnaan Morthi, Sri Suresh Kumar Yadav

Counsel for the Opposite Parties:
A.S.G.

A. Criminal Law - Code of Criminal Procedure, 1973- Sections 397/401 & Prevention of Corruption Act, 1988 - section 13(1)(d)-application-rejection of discharge application- The Revisional Court on the basis of material on record, has recorded cogent reasons and finding and arrived to the conclusion that the present revisionist is not entitled to get relief and has already taken cognizance on the charges and the trial is at the stage of examination of evidence-It has further been recorded that on perusal of the oral submission and documentary evidence, prima facie charge levelled against the revisionist appears to be true and suspicious, therefore, the discharge application was rejected In the opinion of the Court, the revisional court has committed no error in law. (Para 35, 36 & 38)

Criminal Revision dismissed. (E-6)

List of cases cited: -

1. C.K. Jaffer Sharief Vs. State (Through CBI); 2013 (1) SCC 205.

2. Alpic Finance Ltd. Vs. Sadasivan; (2001) 3 SCC 513

3. General Officer Commanding, Rashtriya Rifles Vs. Central Buerau of Investigation and others.

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

1. Heard learned counsel for the revisionist and Sri S.B. Pandey, learned A.S.G. assisted by Sri Kazi Mirza, learned Advocate for the respondents.

2. The present criminal revision has been filed under Section 397/401 of the Code of Criminal Procedure against the order dated 5.10.2019, passed by Special Judge, CBI, Court No.5, Lucknow (CBI Vs. Suresh Chimanlal Shah and others), whereby the discharge application No.B-355 has been rejected.

3. Factual matrix of the case is that a First Information Report was lodged on 22.5.2010 and after completion of investigation, charge-sheet was submitted on 29.5.2012 along with the statements of 48 witnesses under Section 161 Cr.P.C. and a list of 22 documents.

4. The revisionist filed discharge application, which was rejected, against which, Revision No.1028/2017 was filed before this Court.

5. During the pendency of the revision before this Court, the trial court framed charges on 4.9.2018 and against the framing of charges, Revision No.1176 of 2018 was filed before this Court.

6. Both the aforesaid revisions were disposed of by this Court vide order dated 27.3.2019, directing the trial court to consider the discharge of the revisionist in view of the observation made in the order dated 16.2.2015, passed by a Co-ordinate Bench of this Court in Criminal Revision No.463/2012 (Dr. Ketan Desai Vs. CBI, New Delhi), wherein Dr. Ketan Desai was discharged under Section 13 (1)(d) of Prevention of Corruption Act.

7. In compliance of the order passed by this Court, the impugned order dated 5.10.2019 has been passed.

8. Learned counsel for the revisionist submits that the case of the revisionist is similar to that of Dr. Ketan Desai, thus, his submission is that the revisionist is entitled to get discharged from the aforesaid case. He next submitted that the lower court has committed manifest error of law in not considering the grievances raised before it and in a very cursory manner, has proceeded to pass the impugned order.

9. He further submits that the judgment referred in the impugned order has wrongly been relied upon by the trial court. The case of Ketan Desai is similar and the ratio of the judgment applied for is distinguishable and is not applicable to the present facts and circumstances of the case. He invited attention of this Court to the provision of Section 13 (1)(d) of the Prevention of Corruption Act and submitted that the work done with dishonest intention to get undue pecuniary advantage can be the charge punishable under the aforesaid provision. He submitted that the revisionist did not get any pecuniary benefit, therefore, no offence has been made out under Section 13 (1)(d) of the Prevention of Corruption Act.

10. In support of his submission, he placed reliance upon a judgment of the Hon'ble Supreme Court in the case of **C.K. Jaffer Sharief Vs. State (Through CBI); 2013 (1) SCC 205.**

11. He next submitted that there is no ingredient of Section 420 IPC against the revisionist. In support of his submission, he placed reliance upon a judgment of Hon'ble Supreme Court in the case of **Alpic Finance Ltd. Vs. Sadasivan; (2001) 3 SCC 513.**

12. He further submitted that the revisionist being Additional Inspector, is an employee of the Medical Council of India under section 9 (3) of the Indian Medical Council Act, 1956 and the acts done in good faith are protected from any suit/ prosecution or other legal proceeding under Section 21 of the said Act. He placed reliance upon a judgment in the case of **General Officer Commanding, Rashtriya Rifles Vs. Central Buerau of Investigation and others.**

13. On the other hand, Sri S.B. Pandey, learned A.S.G. by inviting attention on the report of the expert appointed to examine the correctness of act of the revisionist and found the revisionist to be involved and in this regard, submitted that cogent reasons have been recorded. He next submitted that the case of the revisionist and Dr. Ketan Desai are on different footings. Dr. Ketan Desai is the President of the Medical Council of India and was not in any manner involved in the inspection of the medical college concerned, nor has approved the inspection report submitted by the revisionist. After constituting a committee, he recommended to the Central Government for taking necessary action, therefore, the benefit of Dr. Ketan Desai is not available to the present revisionist.

14. His last submission is that the revisionist has not made out any case. The court below has committed no error in law in rejecting the application for discharge, thus, his submission is that the revision being misconceived, is liable to the dismissed.

15. After having heard the rival contentions of learned counsel for the parties, I perused the material on record as well as the judgment relied upon by learned counsel for the revisionist.

16. In regard to the first point under consideration that the claim of the revisionist is similar to that of Dr. Ketan Desai, this Court perused the material on record and on its perusal, it is evident that the Indian Medical Council Act, 1956 provides for the re-constitution of the Medical Council of India and the maintenance of medical register for India and for matters connected therewith.

17. The Medical Council of India (MCI) is a statutory body for the maintenance of uniform and high standards of medical education in India. The Council grants recognition of medical qualifications, gives accreditation to the medical colleges, grants registration to medical practitioners and monitors medical practice in India.

18. Section 10-A of the Indian Medical Council Act, 1956 provides for the previous permission of the Central Government for establishment of new medical college, new course of study etc. on the recommendation of the Medical Council of India.

19. Section 19-A of the Indian Medical Council Act, 1956 prescribes the minimum standards of medical education required for granting recognized medical

qualifications by medical institutions in India.

20. Section 33 of the Indian Medical Council Act, 1956 provides the previous sanction of the Central Government, the MCI has power to make regulations generally to carry out the purposes of the Indian Medical Council Act, 1956. The regulation is known as "Minimum Standard Requirements for the Medical College for 100 Admissions Annually Regulations, 1999", which was published in part-III, Section 4 of the Gazette of India dated 29.4.1999. To verify the minimum requirement, the MCI gets conducted inspections of the medical colleges by its inspectors and obtains inspection reports from them on the availability of staff (teaching faculty and residents) and other infrastructural facility in the college as per the minimum requirement prescribed by the Act.

21. In view of the provision referred hereinabove, the MCI inspection team comprises of three inspectors, one of which is the permanent/ additional inspector of MCI and the remaining two are visiting inspectors who are normally professors of different medical colleges in India. As per Section 17 of the IMC Act, 1956, the executive committee appoints medical inspectors to inspect any medical institution for the purpose of recommending to the Central Government.

22. In the present case, for extension of the renewal of term for the admission of 5th batch of 100 MBBS students for the academic year 2009-10, a team of MCI comprising of Dr. Suresh Chimanlal Shah, Additional Inspector (present revisionist) and two visiting Inspectors namely Dr. S. Chugh and Pt. B.D. Sharma, PGIMS, Rohtak and Dr. S. Nagesh, Professor of Community Medicine, Lady Hardinge Medical College, New Delhi, conducted the inspection of Sri Ram Murti Smarak Institute of Medical Sciences, Bareilly on 20th and 21st February, 2009 and report was submitted to the Secretary, MCI, New Delhi on 9.3.2009 pointing out deficiencies in the Medical College regarding the infrastructural facility and strength of teaching faculty indicating shortage of 11.57%. The report was placed before the executive committee of MCI in its meeting held on 13.3.2009, wherein it was resolved by recommending to the Central Government not to renew the permission for the admission of 5th batch of students in the academic session 2009-10. The decision taken by the executive committee was communicated to the Central Government vide letter dated 13.3.2009 with a copy endorsed to the college to submit compliance in respect of the deficiencies pointed out by the MCI Inspectors within two weeks.

23. In pursuance to the information furnished to the college to submit compliance report, the compliance report was sent by Dr. Ved Prakash Shrotiya, Dean, Sri Ram Murti Smarak Institute of Medical Sciences, Bareilly to the Secretary, MCI, New Delhi vide letter dated 4.4.2009 and the same was marked to Dr. Ketan Desai, the then President, MCI, who appointed three Inspectors namely, Dr. Suresh Chimanlal Shah (the present revisionist), Dri Sanjay Bijwe, OSD, Medical Education and Drugs Department, Government of Maharashtra, Mumbai and Dr. R.R. Satoskar, Professor of Surgery, Seth G.S. Medical College and KEM Hospital, Mumbai for making

compliance verification inspection of the college.

24. The compliance verification inspection of Sri Ram Murti Smarak Institute of Medical Sciences, Bareilly carried out by a team of MCI comprising of Dr. Suresh Chimanlal Shah, Additional Inspector, MCI (the present revisionist), Dr. Sanjay Bijwe, OSD, Medical Education & Drugs Department, Government of Maharashtra, Mumbai and Dri R.R. Satoskar, Professor of Surgery, Seth G.S. Medical College & KEM Hospital, Mumbai on 4.5.2009 and a report in this regard was submitted to the Secretary, MCI, New Delhi and pointed out deficiency in the medical colleges regarding infrastructural facility and the strength of teaching faculty (shortage of 15.7%) and residents (shortage of 48.23% residents).

25. The report was again put up before the executive committee of MCI in the meeting held on 9.5.2009 and recommendation was made to the Central Government not to renew the admission to 5th batch of students for the session 2009-10 to the concerned medical college. The executive committee communicated to the Central Government vide letter dated 9.5.2009 with the copy of the said recommendation to the college authorities to submit a detailed point-wise compliance in respect of the deficiencies pointed out.

26. A compliance report in respect of the deficiencies pointed out by the MCI Inspectors was received by the MCI from Dean of the college vide letter dated 19.5.2009, which was marked to Dr. Ketan Desai, the then President, who appointed three Inspectors namely, Dr. Suresh Chimanlal Shah, Additional Inspector, MCI, New Delhi (the present revisionist), Dr. Anil Pande, Professor of Medicine, Patna Medical College, Patna and Dr. A.P. Dongre, Professor of Forensic Medicine & Dean, Indira Gandhi Medical College, Nagpur for making compliance inspection of the college, fixing the date of inspection as 26.5.2009 and intimation was given to the Dean/ Principal of the concerned medical college vide letter dated 25.5.2009 through Fax.

27. The inspection was carried out by the team of MCI comprising the persons referred hereinabove on 26.5.2009 and report was submitted to the Secretary, MCI, New Delhi and reported deficiency of 1.65% in the strength of teaching staff against the previous inspection deficiency of 15.7%. They also reported shortage of 48.23% residents in the previous inspection.

28. The inspection report submitted, was put up in the meeting of the MCI held on 10th and 11th June, 2009 and the matter was fixed in the executive committee. The meeting was attended by Dr. Ketan Desai and other members, wherein it was resolved to recommend the Central Government to renew the permission for admission of 5th batch of 100 MBBS students in the academic session 2009-10 to the concerned medical college. The report of the MCI was affirmed and approved.

29. The decision taken by the executive committee was communicated to the Central Government i.e. Secretary, Ministry of Health & Family Welfare, New Delhi on 13.6.2009 and on the basis of recommendation of MCI, the Central

Government approved the renewal of permission for admission of the batch of MBBS students for academic session 2009-10 to Sri Ram Murti Smarak Institute of Medical Sciences, Bareilly, which was conveyed to the Dean of the said college by Sri K.V.S. Rao, Deputy Secretary, Ministry of Health & Family Welfare, New Delhi vide letter dated 3.7.2009.

30. Thereafter, it came in the knowledge that on the basis of false report dated 26.5.2009, recommendation was made to the Central Government to renew the permission of said college for 5th batch and the matter was handed over to the Central Bureau of Investigation (CBI) to make investigation in the matter and thereafter, the case was registered and investigation was handed over to Sri Rajiv Kumar, Inspector, CBI, ACB, Lucknow. Prior to it, the expert of the field enquired into the matter and submitted its report in regard to the deficiency existing in the said medical college and taking into consideration the involvement of the revisionist along with others, the matter was handed over to CBI New Delhi to make investigation in the matter and after investigation, Criminal Case No.7/2012 under Sections 120-B and 420 IPC read with Section 13 (1)(d) of the Prevention of Corruption Act was registered at CBI, Lucknow, wherein the revisionist has been summoned under the aforesaid Sections.

31. Dr. Ketan Desai moved an application for discharge, which was allowed by the Co-ordinate Bench and on the said basis, learned counsel for the revisionist is making submission that the case of the revisionist is similar, therefore, parity to the order passed be given to the present revisionist also and he should be discharged from the criminal case.

32. I have perused the entire material on record.

33. In regard to the first submission of learned counsel for the revisionist, whereby he has claimed parity of Dr. Ketan Desai is concerned, it is reflected that Dr. Ketan Desai is President of the MCI. In no manner, he was member of the inspection team. On bonafide belief, that report submitted by the inspecting team, wherein revisionist was one of the member, is true, made recommendation for consideration to the executive committee and thereafter, recommendation was made to the Central Government for the grant to run the classes for 5th batch of the said college. To resolve the controversy, Section 13 (1) (d) of the Prevention of Corruption Act is quoted below :-

"13. Criminal misconduct by a public servant.?

1(d) if he,?

(i) by corrupt or illegal means, obtains for himself or for any other person any valuable thing or pecuniary advantage; or

(ii) by abusing his position as a public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage; or

(iii) while holding office as a public servant, obtains for any person any valuable thing or pecuniary advantage without any public interest; or"

34. In support of the submission that no pecuniary benefit has been availed by the revisionist, learned counsel for the revisionist has relied upon a judgment in

the case of **C.K. Jaffer Sharief** (Supra), the relevant portion is quoted below :-

"If in the process, the Rules or Norms applicable were violated or the decision taken shows an extravagant display of redundance it is the conduct and action of the appellant which may have been improper or contrary to departmental norms. But to say that the same was actuated by a dishonest intention to obtain an undue pecuniary advantage will not be correct. That dishonest intention is the gist of the offence under section 13(1)(d) is implicit in the words used i.e. corrupt or illegal means and abuse of position as a public servant. A similar view has also been expressed by this Court in M. Narayanan Nambiar vs. State of Kerala[1] while considering the provisions of section 5 of Act of 1947."

35. I have considered the provisions contained under Section 13 (1) (d) of the Prevention of Corruption Act and the judgment relied and found that on two occasions, a team inspected the concerned medical college and found the deficiency existing in the institution. The revisionist was member of the inspection team and on the next time, for the reasons best known to him, submitted a report pointing out deficiency of 1.65% in the strength of teaching staff. The court on the basis of material placed. has found the role of the revisionist to be suspicious and has passed the impugned order. No mini trial is contemplated at stage of considering discharge application. Court to proceed with assumption that materials brought on record by prosecution are true. Only probative value of materials has to be gone into to see if there is a *prima facie* case for proceeding against the accused. The Court is not expected to go deep into the matter and hold that materials would not warrant a conviction. If Court, on the basis of materials, thinks that accused *prima facie* might have committed offence, it can frame the charge. In the present case, the Court arrived at the conclusion that there is *prima facie* case against the accused.

36. In my opinion, the ground taken by relying upon the judgment in the case of **C.K. Jaffer Sharief** (Supra), the facts and circumstances of the case is distinguishable and is not applicable to the case of the revisionist. Dr. Ketan Desai was the President and not the member of the inspecting team. On the basis of inspection, recommendation was made to the Central Government by the MCI to grant permission to run the classes, thus, the parity claimed with Dr. Ketan Desai is not available to the present revisionist.

37. In regard to the submission that there is no ingredient of Section 420 IPC against the revisionist, learned counsel for the revisionist placed reliance upon a judgment in the case of **Alpic Finance Ltd.** (Supra), the relevant portion is quoted below :-

"Here the main offence alleged by the appellant is that respondents committed the offence under Section 420 I.P.C. and the case of the appellant is that respondents have cheated him and thereby dishonestly induced him to deliver property. To deceive is to induce a man to believe that a thing is true which is false and which the person practicing the deceit knows or believes to be false. It must also be shown that there existed a fraudulent and dishonest intention at the time of commission of the offence."

38. I have also perused the entire material on record and the judgment relied upon by the learned counsel for the revisionist in the aforesaid case. The revisional court on the basis of material on record, has recorded cogent reasons and finding and arrived to the conclusion that the present revisionist is not entitled to get relief and has already taken cognizance on the charges and the trial is at the stage of examination of evidence. It has further been recorded that on perusal of the oral submission and documentary evidence, *prima facie* charge levelled against the revisionist appears to be true and suspicious, therefore, the discharge application was rejected vide impugned order dated 5.10.2019. In the opinion of the Court, the revisional court has committed no error in law. Once there was a suspicion of involvement of the revisionist, the revisional court has rightly rejected the discharge application of the revisionist. The ratio of the judgment in the aforesaid case is distinguishable and is not applicable in the present facts and circumstances of the case.

39. In regard to the submission that the revisionist being Additional Inspector, is an employee of the Medical Council of India under section 9 (3) of the Indian Medical Council Act, 1956 and the acts done in good faith are protected from any suit/ prosecution or other legal proceeding under Section 21 of the said Act, he placed reliance upon a judgment in the case of **General Officer Commanding, Rashtriya Rifles** (Supra), the relevant portion is quoted below :-

"Thus, in view of the above, the law on the issue of sanction can be summarised to the effect that the question of sanction is of paramount importance for protecting a public servant who has acted in good faith while performing his duty. In order that the public servant may not be unnecessarily harassed on a complaint of an unscrupulous person, it is obligatory on the part of the executive authority to protect him. However, there must be a discernible connection between the act complained of and the powers and duties of the public servant. The act complained of may fall within the description of the action purported to have been done in performing the official duty. Therefore, if the alleged act or omission of the public servant can be shown to have reasonable connection inter-relationship or inseparably connected with discharge of his duty, he becomes entitled for protection of sanction."

40. In this regard, once on the basis of material and evidence produced before the revisional court, *prima facie* satisfaction has been made out that the conduct of the revisionist is suspicious, the same cannot be treated to be work done in good faith. The revisionist while performing his duty has been found to be connected with the discharge of his duty and the work done by him is suspicious in nature. The ratio of the judgment in the aforesaid case is distinguishable and is not applicable in the present facts and circumstances of the case.

41. On overall consideration and on perusal of the impugned order, it is evident that the revisional court has considered each and every aspect as well as the judgment relied upon by the learned counsel for the revisionist and found that there is sufficient ground to proceed with the trial against the revisionist. In the opinion of the Court, in

rejecting the discharge application, the revisional court has committed no error in law, therefore, this Court found no merit in the submission advanced by learned counsel for the revisionist.

42. The revision being devoid of merit, is hereby **dismissed.**

(2019)12 ILR A500

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 12.12.2019

BEFORE
THE HON'BLE ANIRUDDHA SINGH, J.

Criminal Revision No. 1640 OF 2019

Anil Kumar ...Revisionist
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri Sunil Kumar Singh

Counsel for the Opposite Parties:
Govt. Advocate

A. Criminal Law - Code of Criminal procedure, 1973 - Section 397/401, Indian Penal Code, 1860 - Sections 498-A, 304-B & Dowry Prohibition Act, 1961 - Section3/4 - application – rejection – application for cross-examination of P.W. 1 (deceased father) u/s 311 Cr.P.C. was moved-order u/s 311 Cr.P.C. is interlocutory order-revision against such an order is barred u/s 397(2) Cr.P.C. (Para 8 & 10)

Criminal Revision dismissed. (E-6)

List of cases cited: -

1. Sethuraman Vs. Rajamanickam, 2009 (65) ACC 607 SC

2. Asif Hussain Vs. St. of U.P. 2007 (57) ACC 1036.

3. Munna Devi Vs. St. of Rajasthan & Anr.Appeal(Crl.) No. 1138 of 2001 decided on 6.11.2001

(Delivered by Hon'ble Aniruddha Singh, J.)

1. Heard Sri Sunil Kumar Singh, learned counsel for revisionist and Sri Santosh Kumar Mishra, learned AGA. Perused the record.

2. This criminal revision has been preferred by Anil Kumar against the impugned order dated 29.11.2019 passed by learned Additional Sessions Judge/F.T.C.-II, Court No. 2, Sultanpur in S.T. No. 150 of 2012 arising out of Case Crime No./F.I.R. No. 531 of 2011 (State of U.P. Vs. Anil Kumar), under Sections 498-A, 304-B IPC & Section ¾ Dowry Prohibition Act, Police Station Bazar Khala Shukla, District C.S. Nagar/Amethi whereby application under Section 311 Cr.P.C. was rejected.

3. In a nutshell, facts of the case are that F.I.R. was lodged on 19.9.2011 against four accused persons namely Anil Kumar (husband), Ram Jas, Dileep Kumar and mother-in-law (wife of Ram Jas) alleging that the marriage of deceased Raj Kumari (daughter of complainant) was solemnized with Anil Kumar 14 months back, they demanded additional dowry from the deceased for which the deceased was being tortured by them and on 17.9.2011 they killed her by administering poison. After investigation, charge sheet was submitted for the offence under Sections 498-A, 304-B IPC & Section ¾ Dowry Prohibition Act. Danbahadur (father of deceased) was examined and cross-examined as P.W.1 by prosecution. Later on, application for cross-examination of P.W.1 was moved

under Section 311 Cr.P.C which was rejected. Hence this revision.

4. Learned counsel for the revisionist submitted that impugned order is illegal, against facts and law and without applying judicial mind. F.I.R. was lodged after two days of incident without explaining delay after thought and with due legal consultation. There is no evidence against the revisionist.

5. Learned AGA opposed the contention of learned counsel for revisionist and submitted that order passed by the Court concerned is legal and revision has no force.

6. From the perusal of record, it transpires that during trial an application 41-B was moved by the revisionist Anil Kumar with the prayer to summon P.W.1 Danbahadur for cross-examination again. On application 41-B objection was filed stating therein that cross-examination of P.W. 1 Dan Bahadur was done by Sri Akhilesh Srivastava, learned counsel for revisionist in length and for delaying tactic, this application was moved. After hearing both the parties, impugned order was passed and it was held that material cross-examination was done by learned counsel for the revisionist and other things may be proved at the time of producing evidence and documents in defence after recording statement under Section 313 Cr.P.C., application was dismissed.

7. From the perusal of record, it also transpires that cross-examination of P.W.1 was done by learned counsel for the revisionist (annexed at page no. 41 to 43) and relevant questions were asked. Hence, no prejudice is caused to the revisionist by rejecting the application of revisionist by impugned order.

8. In the case of **Sethuraman Vs. Rajamanickam, 2009 (65) ACC 607 SC,** Hon'ble Supreme Court has held that rejection order under Section 311 Cr.P.C. is interlocutory order, hence revision is not maintainable.

9. Same view was taken by Allahabad High Court in the case of **Asif Hussain Vs. State of U.P. 2007 (57) ACC 1036.**

10. The observation made by Division Bench of Allahabad High Court in case of **Asif Hussain** (supra) para 26 is reproduced as under:

26. From what I have stated above I find my self in disagreement with my esteemed brother Hon'ble V.K. Chaturvedi, J. that the order under Section 311 Cr. P.C. is a final order and is a revisable one. In my view it is nothing but an interlocutory order and revision against such an order is barred under Section397(2) Cr. P.C.

11. Moreover, in the case of **Munna Devi vs. State of Rajasthan & another Appeal(Crl.) No. 1138 of 2001 decided on 6.11.2001,** Hon'ble Supreme Court has held that the revisional power under the Code of Criminal Procedure cannot be exercised in a routine and casual manner.

12. This Court finds no illegality, impropriety, material irregularity or jurisdictional error in the impugned order dated 29.11.2019. The view taken by Court below is plausible view, hence no interference is called for by this Court. The present revision lacks merit and is liable to be dismissed.

13. The revision is ***dismissed*** at admission stage.

14. Copy of this order be transmitted to the Court concerned immediately.

(2019)12 ILR A502

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.09.2019

BEFORE
THE HON'BLE NARENDRA KUMAR JOHARI, J.

Criminal Revision No. 3025 OF 2016

Smt. Raj Kumari ...Revisionist
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri Irfan Hasan, Sri Kamlesh Kumar Tiwari, Sri Kripa Shankar Pandey

Counsel for the Opposite Parties:
G.A.

A. Criminal Law - Code of Criminal Procedure, 1973 - Sections 397/401 & Section 125 - challenge to - amount of maintenance from the date of order not from the date of application filed and the amount is meagre- Learned lower court has awarded Rs.2,500/- the maintenance amount for the revisionist, accordingly Rs.83.33/- per day comes to revisionist for her maintenance. At present considering the price hike and higher cost of living it cannot be presumed that Rs.83.33/- is sufficient for a lady to maintain herself. the amount fixed by the court below is insufficient as according to present scenario, the revisionist is entitled to receive minimum Rs.5,000/- per month as maintenance from the date of filing of application. (Para 17 & 18)

B. Criminal Law - Sub-clause 2 of Section 125 Cr.P.C. make the provisions that allowance shall be payable either from the date of order or from the date of application for maintenance. This sub-clause provides discretionary power to Magistrate but this power is not absolute. Discretion inherits judicial discretion; therefore, the law requires that if the Court passes the order of maintenance payable not from the date of application but from the date of order than in that case the court has to give reason for that. (Para10)

Order has been passed without judicial application of mind, the order can be challenged under revisional jurisdiction. In present case, the court of Principal Judge Family Court, Agra has not given any reason for passing the order to pay amount of maintenance from the date of order. (Para 11)

Criminal Revision allowed. (E-6)

List of cases cited: -

1. Shail Kumar Devi Vs. Krishan Bhagwan Pathak @ Kishun B Pathak decision dated 28.7.2008 [2008 LawSuits (SC) 1030].

2. Jaiminiben Hirenbhai Vyas & Anr Vs. Hirenbhai Rameshchandra Vyas & Anr decision dated 19.11.2014 [2014 LawSuit (SC)916]

3. Chandrapal vs Harpyari And Anr. reported in 1991 CRI. L. J. 2847

4. Basanta Kumari Mohanty Vs. Sarat Kumar Mohanty reported in 1982 CRI. L.J. 485

(Delivered by Hon'ble Narendra Kumar Johari, J.)

1. The present revision has been filed by revisionist- Raj Kumari against the judgment and order dated 22.7.2016 passed by Principal Judge Family Court, Agra in Criminal Case No.812 of 2014 "Smt. Raj Kumari Vs. Daya Sankar" under Section 125 Cr.P.C.

2. The revisionist challenged the order under revision mainly on two grounds:-

(a) the Sub-ordinate Court has awarded the amount of maintenance from the date of order which is not proper, it should be from the date of filing of the application under Section 125 Cr.P.C.;

(b) the amount of compensation fixed by the court is meagre and is liable to be enhanced.

The brief fact of the case is that revisionist is wife and opposite party no.2 is husband. It has been mentioned that the revisionist was married with opposite party no.2 on 16.2.2010, at the time of marriage, father of the revisionist had given sufficient articles as dowry like jewelries and cash amount Rs.50,000/- as according to his capacity but opposite party no.2 and the family members of opposite party no.2 were not satisfied by the dowry given by father of the revisionist. They were demanding motor-cycle and Rs.50,000/- cash as additional dowry. In furtherance and their demand opposite party no.2 and his family members were started torturing to the revisionist. In continuance of her torture, on 23.5.2014 opposite party no.2 and his family members locked to revisionist and her sister Sanju in a room, beaten and threaten for life. On the same date opposite party dropped to revisionist and her sister near St. John's Chauraha, Agra and told that unless his aforesaid demand of dowry fulfill she will stay to his father's home. Further on 12.9.2014 father of revisionist reached at the residence of opposite party no.2 alongwith his relatives for compromise. Opposite party no.2 and their family members again demanded motor-cycle and cash money as additional dowry and started abusing. The opposite party and his family member also not accepted to revisionist at their residence. After her desertion, opposite party no.2 has neither taken any care of revisionist, nor given any money for her maintenance. Opposite party no.2 is doing the business of ornament making and earns Rs.50,000/-. He possess some agricultural land also. His income from agricultural land is Rs.5,00,000/- per annum. The revisionist is a domestic lady. She is not doing any work and absolutely depend on her father. The revisionist prayed that she may be provided Rs.10,000/- per month as maintenance from her husband.

3. During the proceedings in trial court, notice for appearance was issued to opposite party which was served on him but he did not appeared and the court proceed ex-party against him.

4. In ex-parte hearing revisionist/applicant filed affidavit in support of her application and the court concerned has passed the order dated 22.7.2016 that from the date of order opposite party no.2 will pay amount of Rs.2,500/- per month for the maintenance of revisionist/applicant. The revisionist/ applicant challenged the said order mainly on the two grounds as noted above.

5. During the proceeding of the revision the notice was issued to opposite party no.2 which was served personally but opposite party did not put his appearance before the court.

6. Heard learned counsel for the revisionist and perused the record. Learned counsel for the revisionist has submitted the following case laws:-

1. **Shail Kumar Devi Vs. Krishan Bhagwan Pathak @ Kishun B Pathak decision dated 28.7.2008 [2008 LawSuits (SC) 1030].**

2. **Jaiminiben Hirenbhai Vyas & Anr Vs. Hirenbhai Rameshchandra Vyas & Anr decision dated 19.11.2014 [2014 LawSuit (SC)916]**

7. The learned court below while considering the averments of application relied on affidavit of revisionist and concluded that although applicant/revisionist has not filed any documentary evidence regarding the income of opposite party but it appears that opposite party no.2 is capable to provide maintenance to his wife which is his moral duty also. The court has also concluded that revisionist/applicant is a domestic lady, she is not doing any work and is depend on her father.

8. If a husband having sufficient means neglects or refuses to maintain his wife who is unable to maintain herself, a Magistrate of competent jurisdiction may pass order under Section 125 Cr.P.C. against husband to make a monthly allowance for the maintenance of his wife. The provisions of Section 125 Cr.P.C. reads as under:-

"125. Order for maintenance of wives, children and parents.-

(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 the 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 not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct:

Provided that the Magistrate may order the father of a minor female child referred to in clause (b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means:

Provided further that the Magistrate may, during the pendency of the proceeding regarding monthly allowance for the maintenance under this sub- section, order such person to make a monthly allowance for the interim maintenance of his wife or such child, father or mother, and the expenses of such proceeding which the Magistrate considers reasonable, and to pay the same to such person as the Magistrate may from time to time direct:

Provided also that an application for the monthly allowance for the interim maintenance and expenses of proceeding under the second proviso shall, as far as possible, be disposed of within sixty days from the date of the service of notice of the application to such person.

Explanation.- For the purposes of this Chapter,-

(a) " minor" means a person who, under the provisions of the Indian

Majority Act, 1875 (9 of 1875); is deemed not to have attained his majority;

(b) "wife" includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried.

(2) Any such allowance shall be payable from the date of the order, or, if so ordered, from the date of the application for maintenance or interim maintenance and expenses of proceedings, as the case may be.

(3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole or any part of each month' s allowances remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made:

Provided that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due:

Provided further that if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing.

Explanation.- If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife' s refusal to live with him.

(4) No Wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.

(5) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order."

9. The right of a destitute wife to get maintenance is essentially a civil right accordingly the remedy provided under Chapter IX of Cr.P.C. The procedure laid down in this Chapter is enacted as a measure of social justice and are dealt with summoning in a criminal Court for the purposes of speedy disposal on grounds of convenience and social order.

10. Sub-clause 2 of Section 125 Cr.P.C. make the provisions that allowance shall be payable either from the date of order or from the date of application for maintenance. This sub-clause provides discretionary power to Magistrate but this power is not absolute. Discretion inherits judicial discretion, therefore the law requires that if the Court passes the order of maintenance payable not from the date of application but from the date of order than in that case the court has to give reason for that.

11. Although, the Revisional Court cannot interfere in the finding of fact but when it is shown that impugned order has been passed without judicial application of mind, the order can be challenged under revisional jurisdiction. In present

case, the court of Principal Judge Family Court, Agra has not given any reason for passing the order to pay amount of maintenance from the date of order.

12. Certified copy of application under Section 125 Cr.P.C. is available on record at page No.14 which indicates that on 12.9.2014 opposite party no.2 has not permitted petitioner to enter in her matrimonial house. The petition was filed on dated 15.9.2014. On the date of application the petitioner was residing in deserted condition which has been specifically mentioned in para 7 of the application also. The above fact is sufficient to infer that petitioner was not being maintained by her husband, therefore, it appears prima facie that she was entitled to get maintenance money from the date of filing of application under Section 125 Cr.P.C..

13. In the case of **Jaiminiben Hirenbhai Vyas & Anr. Vs Hirenbhai Rameshchandra Vyas & Anr. [2014 LawSuits (SC) 916** decided on 19 November, 2014. It has been held by the Hon'ble Apex Court in para 8 and 9:-

*"8. **In Shalil Kumari Devi Vs. Krishan Bhagawn Pathak** this Court dealt with the question as to from which date a Magistrate may order payment of maintenance to wife, children or parents. In Shail Kumar Devi, this Court considered a catena of decisions by the various High Courts, before arriving at the conclusion that it was incorrect to hold that, as a normal rule, the Magistrate should grant maintenance only from the date of the order and not from the date of the application for maintenance. It is, therefore, open to the Magistrate to award maintenance from the date of application. The Court held, and we agree, that if the Magistrate intends to pass such an order, he is required to record reasons in support of such Order. Thus, such maintenance can be awarded from the date of the Order, or, if so ordered, from the date of the application for maintenance, as the case may be. For awarding maintenance from the date of the application, express order is necessary.*

9. In the case before us, the High Court has not given any reason for not granting maintenance from the date of the application. We are of the view that the circumstances eminently justified grant of maintenance with effect from the date of the application in view of the finding that the Appellant had worked before marriage and had not done so during her marriage. There was no evidence of her income during the period the parties lived as man and wife. We, therefore reverse the Order of the High Court in this regard and direct that the respondent shall pay the amount of maintenance found payable from the date of the application for maintenance. As far as maintenance granted under Section 24 of the H.M. Act by the Courts below is concerned, it shall remain unaltered."

(emphasized)

14. In the case of **Shail Kumari Devi & Anr Vs Krishan Bhagwan Pathak @ Kishun B [2008 LawSuit(SC) 1030]** decided on 28 July, 2008. It has been held by Hon'ble Supreme Court in para 44:-

"44. In our considered opinion, the High Court is not right in holding that as a normal rule, the Magistrate should grant maintenance only from the date of the order and not from the date of the application for maintenance. And if he

intents to pass such an order, he is required to record reasons in support of such order. As observed in K. Sivaram, reasons have to be recorded in both the eventualities. The Court was also right in observing that wherever Parliament intended the Court to record special reasons, care had been taken to make such provision by requiring the Court to record such reasons. " ***(emphasized)***

15. Revisionist/applicant has mentioned in para 9 of the application that, opposite party is doing the job of making gold and silver ornaments and earns Rs.50,000/- apart from that he has agricultural land also by which he earns Rs.5,00,000/- per annum. Admittedly the revisionist/applicant had not filed any documentary evidence regarding business or regarding ownership of agricultural land, but there is no ground to presume that opposite party no.2 was not a physically fit person. Learned lower court has also concluded in its order/judgment dated 22.7.2016 that opposite party no.2 is capable and competent person. If a man is healthy and able bodied he must be held to possess sufficient money to support his wife, children and parents. Sufficient means should not be confined to the actual pecuniary resources but should have reference to the earning capacity. The wording "Means" as used in the provision does not mean the tangible property or income only but also his capacity, potentialities and status of living.

It has been held by this court in the case of **Chandrapal vs Harpyari And Anr.** reported in **1991 CRI. L. J. 2847** that-

"13. In the case of Mohammad Ayyub Vs. Zaibul Nissa, 1974 (Vol. 2) Criminal Law Journal 1237 this Court held that the quantum of allowance directed to be paid by the husband to the wife has relevance to his means. Where the Magistrate does not give any thought to the question as to what are the means existing or potential of the husband Justifying an order for payment or allowance to his wife, the order is liable to be set aside. " ***(emphasized)***

On this point the another Bench of Orissa High Court in the case of **Basanta Kumari Mohanty Vs. Sarat Kumar Mohanty** reported in **1982 CRI. L.J. 485** held in para 7 that:-

"7. No doubt an order Under Section 125 can be passed only if a person having sufficient means neglects or refuses to maintain his wife, child, parents etc. It is, however, well settled that the expression 'means' occurring in Section 125 does not signify only visible means, such as, real property or definite employment and if a man is healthy and able-bodied, he must be held to be possessed of means to support his wife, child etc. The Courts have gone to the extent of laying down that the husband may be insolvent or a professional beggar or a minor or a monk, but he must support his wife so long as he is able-bodied and can eke out his livelihood. "

Therefore, if the opposite party has not put his appearance in the case and led any evidence regarding his earnings, an inference can be drawn against him on the basis of material available on record.

16. It should not be forgotten that under Section 401 Cr.P.C. a revisional court can make any amendment or any consequential or incidental order that may be just or proper. In this connection provisions of Section 401(1) and 386(e)

can be referred to. Provisions of Section 125 Cr.P.C. have been engrafted in Criminal Procedure Code for preventing destitution or vagrancy and providing succour to starving persons. It is to be find out as to what is required by the wife to maintain the standard of living which is neither luxurious nor penury but is modestly consistent with the status of family. In the present case, learned lower Court has awarded Rs. 2,500/- per month has maintenance amount of revisionist. Learned counsel for the revisionist has submitted that from 2014 the revisionist is living in mercy-full condition.

17. Learned lower court has awarded Rs.2,500/- the maintenance amount for the revisionist, accordingly Rs.83.33/- per day comes to revisionist for her maintenance. At present considering the price hike and higher cost of living it cannot be presumed that Rs.83.33/- is sufficient for a lady to maintain herself. In my opinion, the amount fixed by the court below is insufficient as according to present scenario, the revisionist is entitled to receive minimum Rs.5,000/- per month as maintenance.

18. Taking the facts and circumstances of the case into consideration, the judgment of court below dated 22.7.2016 is liable to be modified upto the extent that applicant is entitled to receive Rs.5,000/- per month as maintenance from the date of filing of application under Section 125 Cr.P.C.

19. In the result, the revision is **allowed.**

(2019)12 ILR A508

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 15.11.2019

BEFORE
THE HON'BLE KARUNA NAND BAJPAYEE, J.

Criminal Revision No. 4167 OF 2019

Radheshyam @ Anil ...Revisionist
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Revisionist:
Sri Vijay Kumar Dubey

Counsel for the Opposite Parties:
A.G.A.

A. Criminal Law - Code of Criminal Procedure, 1973 - Sections 397/401 & section 125- examination-in-chief of wife was recorded- counsel for the husband-revisionist did not appear-the opportunity of her cross-examination of wife was closed-the court grants at least one further opportunity to cross-examine the wife. (Para 3 & 6)

The Court finds that though no serious castigation against the impugned order may be levelled and it cannot be said that the same suffers from any element of perversity but when the overall cause of justice is evaluated and weighed and the principles of fairness and equity are kept in perspective this Court adopts a view which may not only meet the ends of justice but may also result in adopting a correct approach in order to arrive at the ends of justice. Leaving a wife uncross-examined is likely to result in creating obstacle in correctly appreciating the evidence and to that extent and in that context the approach adopted by the court below may not be said to be a correct one. (Para 6)

Criminal Revision allowed. (E-6)

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

1. This revision has been preferred with the prayer to set aside the impugned order dated 21.10.2019 passed by the

Principal Judge, Family Court, Sant Kabir Nagar in Case No.72/11/2018 (Bandana Devi and another vs. Radheshyam @ Anil) u/s 125 Cr.P.C., Police Station-Kotwali Khalilabad, District-Sant Kabir Nagar and to direct the learned court below to give opportunity to the revisionist to cross-examine the opposite party no.2.

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

3. Submission of counsel for the revisionist is that opposite party no.2 Bandana, who is the wife of the revisionist, had been produced in the court and her examination-in-chief was recorded but as the counsel for the husband-revisionist did not appear, the opportunity of her cross-examination was closed. Further submission is that in the absence of effective cross-examination the cause of revisionist shall suffer beyond repair and the fairness of the proceedings will also get vitiated. It has been further submitted that it is not only in the interest of the husband-revisionist but it shall also go to deprive the court from appreciating the facts in correct perspective. It has also been submitted that an untested testimony becomes often misleading and deceitful to be relied upon and before the court should act upon the deposition of a witness, it is very essential to test the same on the anvil of cross-examination. Submission is that at least one opportunity may be granted so that the revisionist may cross-examine the wife who is a very essential witness in the case and the fate of the case will turn upon the quality of her statement and the evidentiary value which she shall carry.

4. Heard learned A.G.A. and perused the record.

5. Ordinarily this Court would have proceeded in the matter after issuance of notice to the opposite side but in that course the proceedings would have taken much longer time as in the wake of heavy pendency of cases where dockets are already bursting on their seams, there is no likelihood of this revision to be taken up at an early date. Moreover, as the only point involved in this case relates to the principles of justice, equity and fairness and no great point of law or fact is involved, therefore, this Court deems it proper to decide this revision at this very stage so that the proceedings of the case may get expedited and the matter may not be allowed to shelve for a longer period of time.

6. After perusing the impugned order this Court finds that though no serious castigation against the impugned order may be levelled and it cannot be said that the same suffers from any element of perversity but when the overall cause of justice is evaluated and weighed and the principles of fairness and equity are kept in perspective this Court adopts a view which may not only meet the ends of justice but may also result in adopting a correct approach in order to arrive at the ends of justice. Leaving a wife uncross-examined is likely to result in creating obstacle in correctly appreciating the evidence and to that extent and in that context the approach adopted by the court below may not be said to be a correct one. Moreover, perusal of the order-sheet also shows that there have been many dates on which even the wife did not appear in the court and it cannot be said that the liability for the delay was squarely on the shoulders of the revisionist. This Court is of the considered opinion that it shall go to further the cause of justice and also

shall go to render assistance to the court to appreciate the facts in the right and broader perspective, if it grants at least one further opportunity to cross-examine the wife.

7. Without going further into the matter, this Court deems it appropriate to direct that the revisionist shall move again an application seeking the recall of witness Bandana, whenever the case is taken up again after mediation process. If such an application is moved on behalf of the revisionist, the court below will proceed to summon aforesaid witness Bandana and provide opportunity to the husband-revisionist to cross-examine her.

8. The revisionist is also directed to deposit Rs.5000/- as a matter of cost/expenses and this money shall be given to the witness Bandana whenever she appears for the purpose of cross-examination.

9. It is made clear that whenever witness Bandana appears for cross-examination she shall be cross-examined on that very day and no further adjournment on behalf of revisionist shall be sought or granted. If the opportunity of cross-examination shall not be availed on the first date for the reason of non availability of the counsel or for any reason which may be attributable to the revisionist, her evidence shall stand closed and the concerned court below shall thereafter proceed further in accordance with law.

10. As it appears from the impugned order that the matter has already been referred to the Mediation Centre, it is also being clarified that this order shall come into application only if the result of the mediation is negative and the litigation continues. But if the matter gets settled, it goes without saying that there would be no need either to move any such application or to recall the witness for the purpose of cross-examination.

11. The revision stands allowed in aforesaid terms and the impugned order so far as it relates to the refusal of Court to summon the aforesaid witness for cross-examination stands set aside.

(2019)12 ILR A510

APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 11.11.2019

BEFORE
THE HON'BLE JASPREET SINGH, J.

FAFO No. 604 of 2011
With
FAFO No. 433 of 2011

Smt. Ranjan Singh & Ors. ...Appellants
Versus
Shri Abbu Saeed & Ors. ...Respondents

Counsel for the Appellants:
Sri Belendu Shekhar, Sri Aanand Mohan, Sri Anil Kr. Srivastava

Counsel for the Respondents:
Sri Anil Kumar Srivastava, Mohd. Shamshad Khan, Sri M.S. Khan

A. Motor Accident claim - Motor Vehicles Act (59 of 1988) - Sections 166 & 168 - Compensation - Future Prospects - Deceased in a permanent job - aged about 38 years - addition of 50% of actual salary to the income of the deceased towards future prospects (Para 25)

B. Motor Vehicles Act (59 of 1988) Section 168 - Compensation - Tax Deduction - Tribunal incorrectly made income tax deduction

Held - Deceased was a government servant thus as per income tax laws it is incumbent for the employer to deduct tax prior to the payment of the salary - thus after deduction of tax at source there can be no scope of further deduction - even otherwise the deceased would be in the non- taxable bracket - Tribunal erroneously held that by adding for future prospect the income comes in the taxable bracket - but it failed to consider that with passage of time the exemption limits of income tax also increase from time to time - 20% deduction made towards tax was unwarranted (Para 21, 22)

C. Motor Vehicles Act (59 of 1988) Section 168 - Compensation - Non Pecuniary damages - loss of consortium - "consortium" encompasses 'spousal consortium', 'parental consortium', and 'filial consortium' - grant of non-pecuniary damages under the head of loss of consortium is available to the wife, children, parent each

Held - Conventional head of consortium: (a) Spouse: Rs 40,000/- (b) Parental: Rs 40,000/- (c) Filial: Rs 40,000/- (d) Funeral expenses: Rs 15,000/- (e) Loss of estate: Rs 15,000/- (Para 27 & 28)

First Appeal from Order partially allowed. (E-5)

List of cases cited: -

1. Sarla Verma & Ors Vs Delhi Transport Corporation & anothers (2009) 6 SCC 121

2. National Insurance Company Limited Vs Pranay Sethi (2017) 16 SCC 680

3. Manasavi Jain Vs Delhi Transport Corporation (2014) 13 SCC 22

4. Vimal Kanwar & Others Vs Kishore Dan & others (2013) 7 SCC 476

5. Magma General Insurance Co. Ltd vs Nanu Ram 2018 SCC Online SC 1546

(Delivered by Hon'ble Jaspreet Singh, J.)

1. Heard Shri Prakash Chandra learned counsel for claimant in FAFO No. 604 of 2011 and Shri Anil Kumar Srivastava learned counsel for appellant in FAFO No. 433 of 2011.

2. These connected two FAFO arise out of the same accident. The Tribunal has made its award dated 05.03.2011 and has awarded a sum of Rs 15,62,000/- in favour of the claimant. Being aggrieved against the same the claimants have preferred an appeal for enhancement which is registered as FAFO No. 604 of 2011 whereas the insurance company being aggrieved against the aforesaid award has preferred the appeal bearing number FAFO No. 433 of 2011. Accordingly both the appeals were clubbed and have been heard together.

3. Briefly the facts giving rise to present appeals are that on 06.12.2008 at around 8:00 AM, the deceased, Amitabh Singh was riding his motorcycle bearing number UP 92 E 8150 and was returning from Hindustan Bio Energy Limited towards his residence and as he had reached Kanhat Tarun Majra Pyarepur Bahad, PS Harchandpur, at the relevant time, a truck bearing number UP 32 T 3490 which was coming from opposite direction and was being driven rashly and negligently came on wrong side of the road and hit the motorcycle, as a result, the deceased Amitabh Singh received grievous injuries and died on the spot. The FIR in respect of the aforesaid incident was lodged on the same day. It was further pleaded that the deceased was a pharmacist and was in service in the Department of Prison posted at Kanpur Dehat and was earning Rs. 16,040/- per month.

4. It is with aforesaid averments that the Claim Petition no. 21 of 2009 was filed before the Motor Accident Claims

Tribunal/Additional District Judge, Court No. 1 Lucknow. The owner of truck Shri Abu Saed filed his written statement. The defense taken by the owner was that the truck bearing number UP 32 T 3490 was being driven at a very safe and controlled speed. It was further pleaded that it was actually the motorcyclist who was coming at a high speed from opposite direction and was driving rashly and negligently and despite the truck driver having taken all possible precautions i.e. using the horn as well as applying brakes to slow the speed, however, the motorcycle was at such a high speed that it came and dashed the backside of truck and overturned due to which the person driving the motorcycle suffered injuries and died and thus the accident was on account of the negligence of the motorcyclist.

5. It was alternatively pleaded that even otherwise it would be a case of contributory negligence and it was pleaded that the truck was duly insured with the United India Insurance Company Ltd, and the driver also had a valid and effective driving license and the registration papers were also complete, thus any award was liable to be indemnified by the Insurance Company.

6. The insurance company also filed its separate written statement and in para 12 it took a plea that the truck in question was not being driven rashly and negligently and also pleaded that the accident happened on account of rash and negligent driving of the motorcyclist.

7. It was in view of the aforesaid pleadings that the Tribunal framed five issues and the claimants examined Shri Ambreshwar Singh (the brother of the deceased) as the witness. Whereas no witness in shape of the truck driver was examined by the owner. The tribunal while considering the evidence, both oral and documentary, found that the accident had occurred on account of rash and negligent driving of the truck since PW-2 was an eyewitness and despite his cross examination there was no discrepancy or contradiction in his testimony and it cast no doubt on the version and narration of the accident. The Tribunal also opined that the truck in question was duly insured with the insurance company and its driver had a valid and effective driving license. The question regarding contributory negligence was also considered along with issue number 1 and the tribunal did not find any favour with the plea raised by the opposite parties coupled with the fact that site plan of the accident was also brought on record which clearly indicated that the truck had swerved on wrong side of the road and hit the motorcyclist and as such it could not be found that the motorcyclist had contributed to the aforesaid accident.

7. While considering the quantum, the Tribunal found that the deceased was working in Department of Prison and his salary certificate was also brought on record. His age was determined to be 38 years. However while considering the salary the Tribunal has taken the same to be Rs 15,000/- per month and thereafter deductions of income tax has been made. The tribunal has also allowed future prospects @30%. The Tribunal also held that since the wife of the deceased was also an earning member therefore in such circumstances it made a deduction of 50% towards personal expenditure and as such a total sum of Rs 15,62,000/- was awarded which included the sum of Rs 2,500/- towards loss of estate, Rs 2,000/-

towards funeral expenses and Rs 5,000/- towards loss of life partner. Thus a total sum of Rs 15,62,000/- along with 6% interest has been awarded by means of award dated 05.03.2011. It is this award which has been assailed by the appellants.

8. First this Court takes up the plea raised by Shri Anil Kumar Srivastava, learned counsel appearing for insurance company in FAFO no. 433 of 2011. The primary submission of learned counsel for appellant is that the tribunal had erred in failing to hold that the alleged accident was not solely on account of rash and negligent driving of the truck driver. It is further submitted that according to the version of the claimant it has been indicated that soon after the accident another vehicle i.e. a Santro car also came and dashed against the truck therefore it could not be ruled out regarding the involvement of aforesaid Santro car. It is further been urged that as per newspaper cutting, a copy of which has been annexed as Annexure No. 9 with the affidavit in support the application for interim relief filed before this Court, which reports that on account of dense fog the accident occurred wherein the deceased expired and on the strength of the aforesaid newspaper cutting it has been urged that since the circumstance which indicate that there was dense fog and on account of the same the accident occurred and since the truck driver was not examined consequently the finding returned on issue number 1 and 3 is not based on cogent appreciation of evidence.

9. Learned counsel for the insurance company has further urged that initially the insurance company had made an application under section 170 of the Motor Vehicles Act which was rejected by the Tribunal by means of order dated 15.09.2010. However later another application under Section 170 of the Act 1988 was moved by the appellant insurance company which was allowed on 14.02.2011. Thereafter the matter was fixed on 23.02.2011 on which date the insurance company had made an application seeking recall of order dated 11.10.2010 by which the opportunity to lead the evidence was closed by the court however the said application was also rejected and thereafter the matter was reserved for orders consequently it has given rise to the judgment dated 05.03.2011 and it has been submitted that once the application of the insurance company under section 170 of the Motor Vehicles Act was allowed on 14.02.2011 thereafter no opportunity was granted to the insurance company to lead the evidence as the insurance company was to summon the driver of the truck for the purpose of buttressing their defense which has been improperly rejected by the Tribunal. Accordingly, it has been submitted that the award dated 05.03.2011 is bad in eyes of law since an opportunity has been deprived to the insurance company.

10. Per contra, Shri Prakash Chandra learned counsel appearing for claimants has submitted that initially the applications under Section 170 of Motor Vehicles Act was rejected on 15.09.2010 and later the opportunity of the insurance company to lead the evidence was also closed on 11.10.2010.

11. Even though by means of order dated 14.02.02011 the court permitted the insurance company to contest on all the grounds yet it made the application for recalling of order dated 11.10.2010 after

more that eight months and that too with the sole purpose of delaying the proceedings. It is further been submitted that after the application was rejected on 23.02.2011 the insurance company did not assail the said order further. Once the matter was fixed for judgment thereafter there is no purpose for the insurance company to lead evidence coupled with he fact that where the question regarding the negligence was already established and the insurance company had already participated in the proceedings and had cross examined the claimant witness and the owner did not examine the driver. In the aforesaid circumstances it could not be said that no opportunity was granted to the insurance company.

12. The Court has considered the rival submissions and also perused the records. On the perusal of the record it would indicate that on the date of the accident i.e. 06.12.2008 the brother of the deceased Shri Ambrishwar Singh had primarily lodged the FIR in which a clear averment was contained that the accident had occurred on account of rash and negligent driving of the truck driver. In pursuance of the aforesaid FIR, a criminal case was also lodged against the driver of the truck. The certified copy of site map was also brought on record. The site plan clearly indicates that the motorcycle which was being driven by the deceased and seen by the eyewitness was coming on left side of the road from West to East i.e. from Lucknow side towards Raibarailly side. It however indicates that the truck which was going from the Raiberailly side and ought to have been on its left side rather it has completely swerved and had moved on its right side and has hit the motorcycle. From the perusal of site plan it is clear that the truck was found to be on wrong side and therefore upon the same coupled with the testimony of the eye witness Shri Ambrishwar Singh who has been cross examined by the insurance company, no material contradiction or inconsistency could be elicited from his testimony.

13. Moreover the eyewitness has completely supported the version and accordingly upon consideration of the evidence brought on record, the findings returned by the Tribunal in so far as issue number 1 and 3 is concerned, this Court does not find that there is any scope for interference therein.

14. The submission of the learned counsel for the appellant is that it has been deprived of an opportunity to contest the claim on merits. As far as this submission is concerned it would be seen that the insurance company has merely raised a defense which is not in its personal means of knowledge. It is borrowed from the plea which was raised by owner of truck while filing his written statement which is dated 07.05.2008 whereas written statement filed by the insurance company is dated 04.09.2009. In light of the documentary evidence which was brought on record coupled with the evidence of the eyewitness i.e. PW-2 it is clear that the accident had occurred on account of rash and negligent driving of the truck in question. Surprisingly the truck owner has not preferred any appeal and at no point of time the truck driver was ever examined as an eyewitness to support the plea. The insurance company also did not made any application to summon the truck driver as a witness rather only an application made at the late stage on 23.02.2011 seeking to recall the order dated 11.10.2010 by

which its opportunity to lead the evidence had been closed while the matter was ripe and fixed for final hearing. Significantly on 23.02.2011 the matter was heard and also reserved for judgment and thereafter the award was pronounced on 05.03.2011. From the record it would indicate that the insurance company has not made any effort to seriously contest the claim petition. Once its application under section 170 had been dismissed and consequently its opportunity to lead evidence had been closed on 11.10.2010 no effort to assail the said orders was made by the insurance company. The learned counsel for the insurance company could not indicate any fresh material which was brought on record which could establish that the insurance company has come in possession of certain new facts or circumstances which justified the making of an application for seeking recall of order dated 11.10.2010.

15. Under the circumstances where insurance company has not made the effort to lead evidence of its own and rather had already cross examined the claimant witness thereafter at the late stage where the claim petition was ripe for final hearing attempt to derail the entire proceedings by means of repeated applications and seeking summoning of the driver, the same could not be construed as the bonafide attempt coupled with the fact that in the entire memo of appeal the ground though has been taken in its appeal however the emphasis is merely upon the contributory negligence coupled with the facts reliance has been placed on the newspaper cutting which indicated that on account of dense fog the accident occurred. Neither the newspaper cutting was placed before the Tribunal nor any such pleadings is present in either the FIR or in the claim petition, neither in the written statement of any of the opposite parties and thus at a later stage, an attempt to carve out new case on the basis of newspaper cutting does not appear to be a bonafide defense. Accordingly, the submission for the reasons as mentioned above does not find favour of this Court. Accordingly the appeal preferred by the insurance company i.e. **FAFO No. 433 of 2011 does not have merit and is accordingly dismissed.**

16. Now coming to the FAFO 604 of 2011, learned counsel for claimants has raised his argument on following grounds:

16.1 That the Tribunal has erred in considering the salary of deceased to be Rs 15,000/- whereas according to salary certificate which was brought on record it indicated that gross salary of deceased was Rs 16,040/-. It is further been submitted by the learned counsel for claimants that the Tribunal has also incorrectly made income tax deduction of Rs 27,000/- @20% coupled with the fact that it has adopted an unsound reasoning of deducting 50% towards personal expenses solely on the ground that the claimant no. 1 i.e. the wife of the deceased was also a earning member. The submission is that where there were five dependents of the deceased thus according to the decision of the Apex Court in the case of **Sarla Verma & Ors vs Delhi Transport Corporation & anothers (2009) 6 Supreme Court Cases 121** and subsequent constitution bench decision in the case of **National Insurance Company Limited vs Pranay Sethi (2017) 16 Supreme Court Cases 680** the Tribunal ought to have made a deduction of 1/4th and 50% deduction is totally unwarranted. It has also been

submitted that the tribunal has added for the future prospect of deceased @ 30% whereas the percentage ought to have been taken at 50% considering the age of the deceased which was 38 years at the time of accident. It is further been submitted that the compensation for non-pecuniary damages which has been awarded is extremely low and is not in accordance with the amount which has been fixed by the Apex Court in the case of Pranay Sethi (Supra).

17. Learned counsel for the appellant has also submitted that while disbursing the amount the tribunal has put an embargo upon wife of deceased in as much as a sum of Rs 6 lakhs has been awarded to her out of which Rs 1,50,000/- has been directed to be paid by means of a crossed cheque and remaining Rs 4.5 lakhs have been directed to be paid to her in shape of fixed deposits maturing after 5, 7 and 9 years respectively. It has been submitted that this kind of restriction imposed by Tribunal is not in sound exercise of discretion especially considering the fact that children of deceased have already attained a age where they are taking specialized and higher education in the filed of engineering and therefore by placing these unnecessary fetters it also creates a restriction which needs to be set aside.

18. Shri Anil Kumar Srivastava learned counsel appearing for insurance company in FAFO no. 604 of 2011 has submitted that the Tribunal has correctly assessed the compensation coupled with the fact that death in family is not to be considered as a bounty rather the Tribunal has fairly considered the compensation which is just and appropriate and it is with aforesaid principle in mind that the Tribunal has considered all aspects of the matter and has correctly made the assessment and has awarded the sum of Rs 15,62,000/- to claimants.

19. Considering the submissions of the learned counsel for the parties this Court has considered the material available on record and also the finding recorded by the Tribunal on issue no. 5. The record indicates that the salary certificate which was issued and duly verified by the Senior Superintendent of the Central Prisons at Naini, Allahabad indicated that the deceased Amitabh Singh was drawing a total salary of Rs 16,040/-. As far as his age is concerned the same was verified on the basis of documents in which he was found to be of 38 years. It is also not disputed that the deceased was survived by his wife, three minor children and mother. The decision in cases of **Sarla Verma & Ors vs Delhi Transport Corporation & anothers** and **National Insurance Company Limited vs Pranay Sethi** is being taken note of and relevant para of the aforesaid decisions are being reproduced hereinafter for ready reference.

19.1 In the case of **Sarla Verma & Ors vs Delhi Transport Corporation & anothers** Hon'ble Apex Court has observed as under:

"30. Though in some cases the deduction to be made towards personal and living expenses is calculated on the basis of units indicated in Trilok Chandra, the general practice is to apply standardized deductions. Having considered several subsequent decisions of this court, we are of the view that where the deceased was married, the deduction towards personal and living

expenses of the deceased, should be one-third (1/3rd) where the number of dependent family members is 2 to 3, one-fourth (1/4th) where the number of dependant family members is 4 to 6, and one-fifth (1/5th) where the number of dependant family members exceed six.

42. 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 Charlie), 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.'

19.2 In the case of **National Insurance Company Limited vs Pranay Sethi** Hon'ble Apex Court has observed as under:

"37. Three aspects need to be clarified. The first one pertains to deduction towards personal and living expenses. In paragraphs 30, 31 and 32, Sarla Verma lays down:-

"30. Though in some cases the deduction to be made towards personal and living expenses is calculated on the basis of units indicated in Trilok Chandra, the general practice is to apply standardized deductions. Having considered several subsequent decisions of this court, we are of the view that where the deceased was married, the deduction towards personal and living expenses of the deceased, should be one-third (1/3rd) where the number of dependent family members is 2 to 3, one-fourth (1/4th) where the number of dependant family members is 4 to 6, and one-fifth (1/5th) where the number of dependant family members exceed six.

31. Where the deceased was a bachelor and the claimants are the parents, the deduction follows a different principle. In regard to bachelors, normally, 50% is deducted as personal and living expenses, because it is assumed that a bachelor would tend to spend more on himself. Even otherwise, there is also the possibility of his getting married in a short time, in which event the contribution to the parent(s) and siblings is likely to be cut drastically. Further, subject to evidence to the contrary, the father is likely to have his own income and will not be considered as a dependant and the mother alone will be considered as a dependant. In the absence of evidence to the contrary, brothers and sisters will not be considered as dependants, because they will either be independent and earning, or married, or be dependent on the father.

32. Thus even if the deceased is survived by parents and siblings, only the mother would be considered to be a dependant, and 50% would be treated as the personal and living expenses of the bachelor and 50% as the contribution to the family. However, where the family of the bachelor is large and dependent on the income of the deceased, as in a case where he has a widowed mother and large number of younger nonearning sisters or brothers, his personal and living expenses may be restricted to one-third and contribution to the family will be taken as two-third."'

"39. In Reshma Kumari, the three-Judge Bench, reproduced paragraphs 30, 31 and 32 of Sarla Verma and approved the same by stating thus: (Reshma Kumar Case, SCC pp. 90- 91, paras 41-42)

"41. The above does provide guidance for the appropriate deduction for personal and living expenses. One must bear in mind that the proportion of a man's net earnings that he saves or spends exclusively for the maintenance of others does not form part of his living expenses but what he spends exclusively on himself does. The percentage of deduction on account of personal and living expenses may vary with reference to the number of dependent members in the family and the personal living expenses of the deceased need not exactly correspond to the number of dependants.

42. In our view, the standards fixed by this Court in Sarla Verma on the aspect of deduction for personal living expenses in paras 30, 31 and 32 must ordinarily be followed unless a case for departure in the circumstances noted in the preceding paragraph is made out."'

"40. The conclusions that have been summed up in Reshma Kumari are as follows:-

"43.1. In the applications for compensation made under Section 166 of the 1988 Act in death cases where the age of the deceased is 15 years and above, the Claims Tribunals shall select the multiplier as indicated in Column (4) of the Table prepared in Sarla Verma read with para 42 of that judgment.

43.2. In cases where the age of the deceased is up to 15 years, irrespective of Section 166 or Section 163- A under which the claim for compensation has been made, multiplier of 15 and the assessment as indicated in the Second Schedule subject to correction as pointed out in Column (6) of the Table in Sarla Verma should be followed.

43.3. As a result of the above, while considering the claim applications made under Section 166 in death cases where the age of the deceased is above 15 years, there is no necessity for the Claims Tribunals to seek guidance or for placing reliance on the Second Schedule in the 1988 Act.

43.4. The Claims Tribunals shall follow the steps and guidelines stated in para 19 of Sarla Verma for determination of compensation in cases of death.

43.5. While making addition to income for future prospects, the Tribunals shall follow para 24 of the judgment in Sarla Verma.

43.6. Insofar as deduction for personal and living expenses is concerned, it is directed that the Tribunals shall ordinarily follow the standards prescribed in paras 30, 31 and 32 of the judgment in Sarla Verma subject to the observations made by us in para 41 above."

41. On a perusal of the analysis made in Sarla Verma which has been reconsidered in Reshma Kumari, we think it appropriate to state that as far as the guidance provided for appropriate deduction for personal and living expenses is concerned, the tribunals and courts should be guided by conclusion 43.6 of Reshma Kumari. We concur with the same as we have no hesitation in approving the method provided therein.

42. As far as the multiplier is concerned, the claims tribunal and the Courts shall be guided by Step 2 that finds place in paragraph 19 of Sarla Verma

read with paragraph 42 of the said judgment. For the sake of completeness, paragraph 42 is extracted below:-

"42. 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 Charlie), which starts with an operative ultiplier 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."

"44. At this stage, we must immediately say that insofar as the aforesaid multiplicand/multiplier is concerned, it has to be accepted on the basis of income established by the legal representatives of the deceased. Future prospects are to be added to the sum on the percentage basis and "income" means actual income less than the tax paid. The multiplier has already been fixed in Sarla Verma which has been approved in Reshma Kumari with which we concur.'

"45. In our considered opinion, if the same is followed, it shall subserve the cause of justice and the unnecessary contest before the tribunals and the courts would be avoided.'

"52. The conventional and traditional heads, needless to say, cannot be determined on percentage basis because that would not be an acceptable criterion. Unlike determination of income, the said heads have to be quantified. Any quantification must have a reasonable foundation. There can be no dispute over the fact that price index, fall in bank interest, escalation of rates in many a field have to be noticed. The court cannot remain oblivious to the same. There has been a thumb rule in this aspect. Otherwise, there will be extreme difficulty in determination of the same and unless the thumb rule is applied, there will be immense variation lacking any kind of consistency as a consequence of which, the orders passed by the tribunals and courts are likely to be unguided. Therefore, we think it seemly to fix reasonable sums. It seems to us that reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs.15,000/-, Rs. 40,000/- and Rs. 15,000/- respectively. The principle of revisiting the said heads is an acceptable principle. But the revisit should not be fact-centric or quantum-centric. We think that it would be condign that the amount that we have quantified should be enhanced on percentage basis in every three years and the enhancement should be at the rate of 10% in a span of three years. We are disposed to hold so because that will bring in consistency in respect of those heads.'

20. From the above it would indicate that in so far as deduction of 50% by the Tribunal on account of personal expenditure of the deceased is concerned, the same is not in consonance with the principles as laid down by Apex Court, which ought to have been 1/4th.

21. Even the tax liability of 20% which has been deducted is also not in sound exercise of jurisdiction. It will be relevant to mention that since the deceased was a government servant thus as per the prevailing income tax laws it is incumbent for the employer to deduct tax

prior to the payment of the salary and moreover since the salary is Rs 16,040/- per month thus after deduction of tax at source there can be no scope of further deduction and even otherwise the deceased would be in the non-taxable bracket. However the reason given by the Tribunal is erroneous in as much it held that by adding for future prospect the income comes in the taxable bracket but it failed to consider and note that with passage of time the exemption limits of income tax also increase from time to time. This aspect of the matter has been considered by the Apex Court in the case of **Manasavi Jain vs Delhi Transport Corporation (2014) 13 Supreme Court Cases 22** and the relevant paras read as under:

"8. This Court in Shyamwati Sharma & Ors. Vs. Karam Singh & Ors. (2010) 12 SCC 378, while considering the issues of deduction of taxes, contributions etc., for arriving at the figure of net monthly income, held that(SCC p. 380, para 9):

"while ascertaining the income of the deceased, any deductions shown in the salary certificate as deductions towards GPF, life insurance premium, repayments of loans etc., should not be excluded from the income. The deduction towards income tax / surcharge alone should be considered to arrive at the net income of the deceased."

9. In the present case, there is no dispute about of the salary of the deceased. As per salary certificate, his monthly income and deductions are as under:

Monthly Income Rs. 26,950-00
Deductions Provident Fund 8,000-00
House Rent 525-00
G.I.S. 120-00
Income Tax 2,500-00

So, from the above table, it is clear that except an amount of Rs.2,500/- towards Income Tax, rest of the amounts were voluntarily contributed by the deceased for the welfare of his family. Considering the decision of this Court in Shyamwati Sharma & Ors., (supra), in our opinion, except contribution towards Income Tax, the other voluntary contributions made by the deceased, which are in the nature of savings, cannot be deducted from the monthly salary of the deceased to decide his net salary or take home salary. Hence, the take home salary of the deceased comes to Rs.24,450/- which can be rounded to Rs.25,000/-.'

22. Also the Apex Court in the case of **Vimal Kanwar & Others vs Kishore Dan & others and as reported in (2013) 7 Supreme Court Cases 476** where considering and following the case of Sarla Verma (Supra) it has been held as under:

The third issue is "whether the income tax is liable to be deducted for determination of compensation under the "Motor Vehicles Act" In the case of Sarla Verma & Anr. (Supra), this Court held "generally the actual income of the deceased less income tax should be the starting point for calculating the compensation." This Court further observed that "where the annual income is in taxable range, the word "actual salary" should be read as "actual salary less tax". Therefore, it is clear that if the

annual income comes within the taxable range income tax is required to be deducted for determination of the actual salary. But while deducting income-tax from salary, it is necessary to notice the nature of the income of the victim. If the victim is receiving income chargeable under the head "salaries" one should keep in mind that under Section 192(1) of the Income-tax Act, 1961 any person responsible for paying any income chargeable under the head "salaries" shall at the time of payment, deduct income- tax on estimated income of the employee from "salaries" for that financial year. Such deduction is commonly known as tax deducted at source ("TDS' for short). When the employer fails in default to deduct the TDS from employee salary, as it is his duty to deduct the TDS, then the penalty for non-deduction of TDS is prescribed under Section 201(1A) of the Income-tax Act, 1961.

Therefore, in case the income of the victim is only from "salary", the presumption would be that the employer under Section 192(1) of the Income- tax Act, 1961 has deducted the tax at source from the employee's salary. In case if an objection is raised by any party, the objector is required to prove by producing evidence such as LPC to suggest that the employer failed to deduct the TDS from the salary of the employee.

However, there can be cases where the victim is not a salaried person i.e. his income is from sources other than salary, and the annual income falls within taxable range, in such cases, if any objection as to deduction of tax is made by a party then the claimant is required to prove that the victim has already paid income tax and no further tax has to be deducted from the income.

23. Thus this Court finds that 20% deduction made towards tax was unwarranted.

24. Similarly the consideration of future prospects has also not been rightly considered and is against the provisions as settled by the Apex Court in above mentioned decisions which has been reproduced for ready reference.

24.1 In the case of **National Insurance Company Limited vs Pranay Sethi** Hon'ble Apex Court has observed as under:

"59.3 While determining the income, an addition of 50% of actual salary to the income of the deceased towards future prospects, where the deceased had a permanent job and was below the age of 40 years, should be made. The addition should be 30%, if the age of the deceased was between 40 to 50 years. In case the deceased was between the age of 50 to 60 years, the addition should be 15%. Actual salary should be read as actual salary less tax.

59.4 In case the deceased was self-employed or on a fixed salary, an addition of 40% of the established income should be the warrant where the deceased was below the age of 40 years. An addition of 25% where the deceased was between the age of 40 to 50 years and 10% where the deceased was between the age of 50 to 60 years should be regarded as the necessary method of computation. The established income means the income minus the tax component.'

25. Thus in the present case the deceased was in a permanent job having a salary which was subject to enhancement

with passage of time accordingly applying the principle of Pranay Sethi (Supra) 50% ought to be added towards future prospect to the salary of the deceased.

26. As far as grant of non-pecuniary damages is concerned the same has been settled by the Apex Court in the case of Pranay Sethi and if seen in light thereof it would indicate that the award made by Tribunal is grossly inadequate.

27. The grant of non-pecuniary damages under the head of loss of consortium as considered by Apex Court is not only available to the wife on account of death of her husband but is also available for the children on account of losing their parent. Similarly, it is also available to the mother who has lost her son. This aspect of the matter has been considered by the Apex Court in the case of **Magma General Insurance Co. Ltd vs Nanu Ram 2018 SCC OnLine SC 1546** and the relevant part is reproduced as under:

"8.6 The MACT as well as the High Court have not awarded any compensation with respect to Loss of Consortium and Loss of Estate, which are the other conventional heads under which compensation is awarded in the event of death, as recognized by the Constitution Bench in Pranay Sethi (supra).

The Motor Vehicles Act is a beneficial and welfare legislation. The Court is duty-bound and entitled to award "just compensation", irrespective of whether any plea in that behalf was raised by the Claimant.

In exercise of our power under Article 142, and in the interests of justice, we deem it appropriate to award an amount of Rs. 15,000 towards Loss of Estate to Respondent Nos. 1 and 2.

8.7 A Constitution Bench of this Court in Pranay Sethi (supra) dealt with the various heads under which compensation is to be awarded in a death case. One of these heads is Loss of Consortium.

In legal parlance, "consortium" is a compendious term which encompasses "spousal consortium', "parental consortium', and "filial consortium'.

The right to consortium would include the company, care, help, comfort, guidance, solace and affection of the deceased, which is a loss to his family.

With respect to a spouse, it would include sexual relations with the deceased spouse.

Spousal consortium is generally defined as rights pertaining to the relationship of a husband-wife which allows compensation to the surviving spouse for loss of "company, society, cooperation, affection, and aid of the other in every conjugal relation."

Parental consortium is granted to the child upon the premature death of a parent, for loss of "parental aid, protection, affection,society, discipline, guidance and training."

Filial consortium is the right of the parents to compensation in the case of an accidental death of a child. An accident leading to the death of a child causes great shock and agony to the parents and family of the deceased. The greatest agony for a parent is to lose their child during their lifetime. Children are valued for their love, affection, companionship and their role in the family unit.

Consortium is a special prism reflecting changing norms about the

status and worth of actual relationships. Modern jurisdictions world-over have recognized that the value of a child's consortium far exceeds the economic value of the compensation awarded in the case of the death of a child. Most jurisdictions therefore permit parents to be awarded compensation under loss of consortium on the death of a child. The amount awarded to the parents is a compensation for loss of the love, affection, care and companionship of the deceased child.

The Motor Vehicles Act is a beneficial legislation aimed at providing relief to the victims or their families, in cases of genuine claims. In case where a parent has lost their minor child, or unmarried son or daughter, the parents are entitled to be awarded loss of consortium under the head of Filial Consortium. Parental Consortium is awarded to children who lose their parents in motor vehicle accidents under the Act.

A few High Courts have awarded compensation on this count. However, there was no clarity with respect to the principles on which compensation could be awarded on loss of Filial Consortium.

The amount of compensation to be awarded as consortium will be governed by the principles of awarding compensation under "Loss of Consortium' as laid down in Pranay Sethi (supra).'

28. Considering the aforesaid this Court has no hesitation to conclude that the amount as calculated by the Tribunal is not in accordance with the settled legal principals and this Court redetermines the compensation as under:

Income (Rounded off) : Rs 16,000/- Per Month

Add: Future Prospect @ 50% : Rs 8,000 Per Month

Net Income: Income after deduction of 1/4th : Rs (24,000 - 6,000) = Rs 18,000/- per month

Age : 38 years

Multiplier : 15

Thus compensation payable :Rs.18000x15x12 = Rs 32,40,000/-

Conventional head of consortium:

(a) Spouse : Rs 40,000/-

(b) Parental : Rs 40,000/-

(c) Filial : Rs 40,000/-

(d) Funeral expenses : Rs 15,000/-

(e) Loss of estate : Rs 15,000/-

Thus, total compensation payable shall be : Rs **33,90,000/-**

29. In view of the above the appellant shall be entitled to be a total sum of Rs **33,90,000/-** Any amount paid to the appellant shall be deducted from aforesaid amount and the remaining shall be payable to claimants in accordance with the guidelines given in the award itself. As far as the restrictions imposed for grant of compensation to the wife of the deceased is concerned the same is set aside and the insurance company would be liable to satisfy the award by making the payment to the wife, mother and such children of the deceased who have attained majority however the portions in

respect of minor children shall be deposited in an interest bearing instrument (FDR) into a nationalised bank for the duration of such minority under guardianship of their mother.

30. With the aforesaid, and subject to the above determination of compensation the award dated 05.03.2011, shall stand modified. The **FAFO no. 604 of 2011 stands partially allowed.** The record of Tribunal concerned shall be remitted to Tribunal within a period of two weeks. Any amount deposited before this Court by insurance company shall also be remitted to the Tribunal to be released in favour of claimants in light of observations made in the judgment. There shall be no order to costs. The aforesaid two FAFO stand decided accordingly.

(2019)12 ILR A524

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.10.2019

BEFORE
THE HON'BLE PRADEEP KUMAR SRIVASTAVA, J.

FAFO No. 761 of 2015

The Oriental Insurance Co. Ltd. ...Appellant
Versus
Smt. Munni Devi & Ors. ...Respondents

Counsel for the Appellant:
Sri Kuldip Shanker Amist

Counsel for the Respondents:
Sri Sudhir Kumar Singh Parmar, Sri Vijay Kant Dwivedi, Sri Virendra Singh Parmar

A. Motor Accident claim - Motor Vehicles Act (59 of 1988) - Section 166 - U.P. Motor Vehicle Rules, 2011- Amended Rule 204 - Claim petition - Driver is a necessary party to the application for compensation filed u/s 166 w.e.f. 26.9.2019 - However, prior to 26.9.2019 driver was only a proper party but was not necessary party (Para 13)

B. Motor Vehicles Act (59 of 1988) - Sections 166 & 168 - Compensation - Selection of Multiplier - Deceased aged about 52 years - Operative multiplier is 11 for the age group of 51 to 55 years (Para 14)

First Appeal from Order disposed off. (E-5)

List of cases cited: -

1. Oriental Insurance Co. Ltd. Vs Meena Variyal AIR 2007 SC 1609

2. Machindranath Kernath Kasar Vs D. S. Mylarappa AIR 2008 SC 2545

3. Sarla Verma Vs Delhi Transport Corporation Ltd., AIR 2009 SC 3104

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

1. Heard Shri Kuldip Shanker Amist, learned counsel for the appellant and Shri Sudhir Kumar Singh Parmar, learned counsel for the respondents.

2. This appeal has been filed by the Oriental Insurance Co. Ltd. against the award dated 20.12.2014 passed by Additional District Judge, Court No. 10/Motor Accident Claims Tribunal, Kanpur Nagar in MACP No. 819 of 2011 allowing total amount of compensation as Rs. 21,91,664/- along with interest at the rate of 6% per annum from the date of filing of the claim petition.

3. The said award has been challenged by the appellant on the ground that the claimant did not implead the driver who was necessary party in the

case and a finding was given that the driver was driving the offending vehicle in rash and negligent way and because of that the accident occurred. The amount of compensation is very high and the Tribunal has committed error in calculating and not applying the principle of law while determining the quantum of compensation. The Tribunal has applied high multiplier of 11 while calculating the amount of award, which is not correct. The deceased was 53 years at the time of accident and his service remains only about 7 years and thereafter he was to retire, and therefore, a multiplier of 11 is not applied and a proportional deduction could have been made. Therefore, the amount awarded is illegal and arbitrary and is not sustainable under law and no compensation could be awarded to the claimant.

4. The factual matrix of the case is that an accident took place on 12.12.2010 on 07:30 p.m. by a bus U.P.14-B.T. 7092 which was coming from the side of Dadri and it was alleged that the driver of the bus was driving the bus rashly and negligently and coming from behind, he dashed constable Suresh Singh Yadav, who sustained injuries and died out of accident. The F.I.R. was lodged and the matter was investigated by police and thereafter a charge-sheet was submitted against the driver of the offending vehicle.

5. The appellant being Insurance Company contested the petition on all grounds such as on rash and negligent driving, the driver was not having a valid driving license at the time of incident nor there was valid registration certificate, permit and fitness of the offending vehicle. Moreover it was alleged that there was violation of the condition of insurance policy.

6. Following issues were framed by the Tribunal.

1- क्या याचिका के कथनानुसार दुर्घटना दिनांक 12.12.2010 को समय 7:30 बजे शाम स्थान सेक्टर 37 के पास स्थित पेट्रोलपम्प अन्तर्गत थाना नोयडा सेक्टर 39, जिला गौतम बुद्ध नगर में उस समय घटित हुई जबकि मृतक कां 0 सुरेन्द्र सिंह यादव सरकारी कार्य से जा रहा था तभी बस सं 0 यूपी 14 बीटी -7092 के चालक ने अपने वाहन को तेजी , लापरवाही एवं बिना हार्न बचाए गलत साइड में लाकर सुरेन्द्र सिंह को पीछे से टक्कर मार दी जिससे इलाज हेतु ले जाते समय रास्ते में उसकी मृत्यु हो गयी ?

2- क्या दुर्घटना में आलिप्त वाहन बस सं 0 यूपी 14 बीटी - 7092 विपक्षी सं 0 2 दि ओरियन्टल इन्श्योरेंस कं 0लि 0 से बीमित था , यदि हाँ तो प्रभाव ?

3- क्या दुर्घटना के दिनांक को उक्त बस के चालक के पास वैध व प्रभावी ड्राइविंग लाइसेन्स था तथा वाहन के अन्य प्रपत्र वैध व प्रभावी थे ?

4- क्या याचिनी कोई प्रतिकर राशि प्राप्त करने की अधिकारी है यदि हाँ तो कितनी और किस विपक्षी से ?

7. Documentary evidence was given from the side of claimant and PW-1 Smt. Munni Devi (claimant), PW-2 Satish Kumar, (eye witness), PW-3 Mohd. Abid

(eye witness) and PW-4 Virendra Kumar Sharma were examined, the defendant did not examined any witnesses.

8. After perusing the evidence on record the learned tribunal passed the impugned judgment which is under challenge.

9. So far as issue nos. 2 and 3 are concerned, they relates to the insurance of the offending vehicle and with regard to driver having a valid license or not and on the basis of the documentary evidence on record these two issued have been concluded in favour of claimant and against the defendant. From the perusal of the finding of the learned tribunal, it appears that the offending vehicle was ensured with the appellant and the driver who was driving the said offending vehicle was having a valid driving license and the driving license was filed by the appellant himself.

10. So far as the issue with regard to rash and negligent driving is concerned, the learned counsel for the appellant has admitted that four witnesses have been examined from the side of the claimant and they all have supported the version of claim petition and have stated that because of the rash and negligent driving by the driver of the offending vehicle, the accident took place and in the accident, the husband of the petitioner-claimant suffered serious injuries and died. The statement of the witnesses is further supported by the police papers such as FIR, charge-sheet, site-map and postmortem report.

11. The learned counsel for the appellant has restricted his argument to two points, firstly, that the multiplier applied in this case was not correct as the age of the deceased at the time of incident was 53 years and he was likely to retire on attaining the age of 60 years this is within 7 years and therefore, the multiplier of 11 was not permissible. Secondly, he has submitted that the driver of the offending bus was a necessary party who was not impleaded by the claimant and therefore, the driver could not be examined who could explain how the accident took place.

12. So for as the impleadment of driver is concerned, no such plea was taken by the Insurance Company nor any issue appears to have been pressed before the learned Tribunal. In **Oriental Insurance Co. Ltd. v. Meena Variyal AIR 2007 SC 1609,** the Supreme Court expressed the view that when a car belonging to an owner is insured with the insurance company and it is being driven by a driver employed by the insured, when it meets with an accident, the primary liability under law for payment of compensation is that of the driver. Once the driver is liable, the owner of the vehicle becomes vicariously liable for payment of compensation. It is this vicarious liability of the owner that is indemnified by the insurance company. A third party for whose benefit the insurance is taken, is therefore entitled to show, when he moves under Section 166 of the Motor Vehicles Act, that the driver was negligent in driving the vehicle resulting in the accident; that the owner was vicariously liable and that the insurance company was bound to indemnify the owner and consequently, satisfy the award made. Therefore, under general principles, one would expect the driver to be impleaded before an adjudication is claimed under Section 166 of the Act as to whether a claimant before the Tribunal

is entitled to compensation for an accident that has occurred due to alleged negligence of the driver.

13. In **Machindranath Kernath Kasar v. D. S. Mylarappa AIR 2008 SC 2545,** the Supreme Court, however, took the view that the driver of vehicle should be impleaded as party in proceeding though he may not be necessary party. The driver, therefore, may be a proper but not a necessary party though in case of several tortfeasors, all the tortfeasors are not to be impleaded and impleadment of one set of tortfeasors is sufficient. In motor accident cases, the concept of joint tortfeasors applies only in case of composite negligence of drivers of two vehicles colliding with each other on any side, and according to the settled principles under law of torts it is sufficient if only one set of such tortfeasors is impleaded and proceeded against. Amended Rule 204 of **U.P. Motor Vehicle Rules, 2011,** however at present, provides that in the application for compensation filed u/s 166 driver is a necessary party. It is pertinent to mention that the amended Rules, 2011 has been published in official gazette on 26.9.2019, whereas, the claim petition has been filed on 5.8.2011, much before when the amended Rules came into force. As such, this argument has got no force as no such objection or issue was raised before the Tribunal and moreover, it has not caused any prejudice to the appellant.

14. The next argument is with regards to application of multiplier. From the perusal of the finding on this aspect, it is clear that the learned tribunal has concluded that at the time of incident the deceased was just above 52 years and the multiplier in this age which has been provided in the Schedule of the Motor Vehicle Act. Moreover, in **Sarla Verma Vs. Delhi Transport Corporation Ltd., AIR 2009 SC 3104** is from the age of 50 to 55 is 11 years. The Supreme Court has laid down as below:

"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 Charlie), 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."

15. Therefore, in view of the multiplier system affirmed by the Supreme Court, it cannot be said that there is any illegality in applying the multiplier of 11 years. It is pertinent to mention that multiplier system has been provided under law law to maintain uniformity in determining quantum of compensation in order to avoid variation. It is also pertinent to mention that the admitted fact is that the deceased was employed in police department as constable and it appears from the impugned judgment that on the basis of his salary, the compensation has been calculated. The learned tribunal has also correctly reduced the compensation by 1/3 as permissible under Rules against the personal expenses of the deceased.

16. In **Sarla Verma (supra),** it has been held by the Supreme Court that a proceeding before the Tribunal is in the

nature of inquiry in which a very few thing is required to be established. The Court observed:

"Basically only three facts need to be established by the claimants for assessing compensation in the case of death: (a) age of the deceased; (b) income of the deceased; and the (c) the number of dependents. The issues to be determined by the Tribunal to arrive at the loss of dependency are (i) additions/deductions to be made for arriving at the income; (ii) the deduction to be made towards the personal living expenses of the deceased; and (iii) the multiplier to be applied with reference of the age of the deceased."

17. From the perusal of the impugned judgment, it is clear that the learned Tribunal has considered all the aspects as laid down by **Sarla Verma (supra)** and has given finding based on the evidence on record. I do not find any perversity or any illegality in the impugned judgment.

18. In view of the above discussions, I find no force in this appeal and the appeal is liable to be dismissed.

18. The appeal is **dismissed.**

19. The office is directed to send a copy of this judgment to the Court concerned for information and necessary compliance.

(2019)12 ILR A528

APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 04.12.2019

BEFORE
THE HON'BLE VED PRAKASH VAISH, J.

FAFO No. 802 of 2018

Awdhesh Kumar ...Appellant
Versus
Rajendra Kumar ...Respondent

Counsel for the Appellant:
Sri Adnan Ahmad

Counsel for the Respondent:
Sri Alok Srivastava

Civil Law - Code of Civil Procedure - Section 107 read with Order 41 Rule 24 - Remand - First appellate court has power to remand if the trial court has disposed of a suit on a preliminary issue without recording evidence but where evidence on record is sufficient, Appellate court may itself determine the case finally.

Held - In the instant case, the respondent/ plaintiff filed a suit for cancellation of sale deed, written statement was filed by the appellant/defendant, issues were framed and the evidence was adduced by both the parties. It is not a case where the trial court has disposed of the suit on a preliminary issue without recording evidence and giving its decision on the rest of the issues. The first appellate court could have decided the matter on the basis of the evidence on record (Para 21 & 22)

First Appeal from Order allowed. (E-5)

List of cases cited: -

1. Santosh Hazari Vs Purushottam Tiwari (Deceased) by LRs (2001) 3 SCC 179

2. Madhukar & Others Vs Sangram & Others (2001) 4 SCC 756

3. B.V. Nagesh and another Vs H.V. Sreenivasa Murthy (2010) 13 SCC 530

4. State Bank of India & Anr Vs Emmsons International Ltd.& Anr (2011) 12 SCC 174

5. P. Purushottam Reddy And Anr. v Pratap Steels Ltd (2002) 2 SCC 686

(Delivered by Hon'ble Ved Prakash Vaish, J.)

1. Heard Sri Adnan Ahmad, learned counsel for the appellant and Sri Alok Srivastava, learned counsel for the respondent.

2. This is an appeal under Order 43 Rule 1 (u) of the Code of Civil Procedure, 1908 (hereinafter referred to as "C.P.C.") against the judgment and order dated 05th October, 2018 passed by learned Sixth Additional District Judge, Unnao, in Civil Appeal No.02 of 2016, whereby the appeal filed by the respondent was allowed.

3. Succinctly stating the facts of the present case as borne out from the record are that the respondent herein (plaintiff) filed a suit for cancellation of sale deed, which was registered on 22nd November, 2007, in respect of plot No.210, ad-measuring one bigha six biswa situated at Village Newlapur, Pargana Bangarmau, Tehsil Safipur, District Unnao bearing Civil Case R.S. No.76 of 2008. In the plaint, it was stated by plaintiff that he was owner of the half portion of plot No.208, ad-measuring 0.658 hec. situated at Village Newlapur, Pargana Bangarmau, Tehsil Safipur, District Unnao and the other half portion of the said plot was owned by his mother, namely, Smt. Somwati; the plaintiff sold the half portion of said plot No.208 to the defendant and executed a registered sale deed on 05.03.2004 for a consideration of Rs.80,000/- (rupees eighty thousand only), which was duly registered in the office of Sub-Registrar, Safipur, District Unnao; after execution of the said sale deed, in the month of July, 2007, the defendant stated that in the sale deed 05.03.2004, the boundaries of plot No.208 have been wrongly recorded and it needs to be corrected; the plaintiff agreed to the same, the defendant prepared a document to get the boundaries corrected and after one month, the defendant (appellant) told to the plaintiff that he should return the consideration amount of Rs.80,000/- and he is unwilling to buy the said plot No.208; the plaintiff was ready to return the consideration amount and proposed to the defendant that he would have to execute back the sale deed which he had executed in favour of the defendant; the defendant refused to bear the expenses of the stamp duty and registration fee; later on, when some people intervened, it was agreed that the defendant would execute a sale deed and the plaintiff would return the consideration amount of Rs.80,000/- and bear all other expenses of stamp duty and registration fee. Both the parties went to the office of Sub-Registrar, Safipur, District Unnao on 22.11.2007, since everything was decided and the sale deed was to be executed, the plaintiff returned the consideration amount of Rs.80,000/- to the defendant, in the presence of the witnesses, for the said half portion of plot No.208 ad-measuring 0.658 hec.; the plaintiff signed the document and put his thumb impression. It was alleged that the plaintiff put the thumb impression and signatures under the impression that the sale deed was being executed as per settlement; for execution of sale deed both the parties went to the office of Sub-Registrar, thumb impression of the plaintiff was taken and registration fee was paid by the plaintiff, the defendant went away from the office of Sub-Registrar on the excuse that he was going to toilet, the plaintiff waited for the defendant but the defendant did not turn up, the plaintiff got the information at the

end of day that defendant got executed a sale deed fraudulently. It was also alleged that the defendant succeeded in getting the sale deed in respect of plot No.210 ad-measuring two bigha four biswa out of total area of 2.056 hec. situated at Village Newlapur, Pargana Bangarmau, Tehsil Safipur, District Unnao instead of executing back the sale deed in respect of plot No.208. It was also alleged that the plaintiff did not receive the consideration in respect of plot No.210; plot No.210 was a valuable piece of land situated at Lucknow Bangurmau Road and value of the plot No.210 is approximately Rs.4,00,000/- (rupees four lacs) per bigha; the sale deed was got executed in respect of plot No.210 without payment of consideration and by playing fraud on the plaintiff. Hence, the respondent/plaintiff filed a suit for cancellation of sale deed in respect of plot No.210 ad-measuring as one bigha six biswa registered on 22.11.2007 with the office of Sub-Registrar, Safipur, District-Unnao.

4. The suit was contested by the appellant/respondent by filing written statement; it was stated that the plaintiff is owner of both the plots No.209 and 210 and the plaintiff agreed to sell half portion of plot No.209 for a consideration of Rs.80,000/-. It was further stated that the sale deed was executed on 05.03.2004, when the defendants started raising boundaries on the spot, the plaintiff objected to the same and at that time the defendant came to know that the land which was purchased by him was plot No.210 which was shown as plot No.209 in the sale deed and he was cheated by the plaintiff. Thus, it is stated by the appellant in the written statement that the plaintiff concealed the said fact with an ill motive to defraud him.

5. On the pleadings of parties, following issues were framed on 11.11.2019:-

"1. Whether the plaintiff is entitled to get the sale deed dated 22.11.2007 canceled on the basis of his pleadings mentioned in the plaint?

2. Whether the suit is undervalued for the purpose of court fees and jurisdiction?

3. Is the suit barred by the provisions of Sec.331 of the ULZALR Act?

4. Which relief is the plaintiff entitled to obtain?"

6. In support of his case, the respondent/plaintiff filed some documents. After considering the pleadings and material on record, the suit of the plaintiff was dismissed by learned Additional Civil Judge (J.D.), Unnao vide judgment and decree dated 28th January, 2016.

7. Against the said judgment and decree, the respondent filed Civil Appeal No.02 of 2016. Vide impugned judgment and decree dated 05th October, 2018, learned Additional District Judge, Unnao allowed the appeal, set aside the judgment and decree dated 28th January, 2016 passed by learned Additional Civil Judge (J.D.), Unnao and the matter was remanded back for passing a fresh order after considering the pleas of the parties.

8. Being aggrieved by the said judgment and decree dated 05th October, 2018, the appellant has filed the present appeal.

9. Learned counsel for the appellant submitted that after order of remand

neither fresh evidence is to be recorded nor fresh issues are to be framed. The first appellate court could have decided the matter after considering the pleadings of the parties, documents on record and evidence adduced by the parties and there was no occasion for remanding the matter without giving any findings on merits.

10. Learned counsel for the appellant further submitted that the respondent/plaintiff has filed a Civil Suit No.116 of 2008 wherein it was stated that the boundaries have not been correctly mentioned in the sale deed dated 05.03.2004.

11. Per contra, learned counsel for the respondent urged that the plaintiff has not played any fraud and the sale deed was executed after payment of consideration. According to learned counsel for the respondent, the first appellate court has committed no illegality while remanding the matter for passing a fresh order on the basis of material on record.

12. I have given my thoughtful consideration to the submissions made by learned counsel for both the parties. I have also gone through the material available on record.

13. Before adverting the facts of the present case, it is necessary to consider the provisions of Rule 23 and 24 of Order XLI of C.P.C. Rule 23 and 24 of Order XLI of C.P.C. read as under:-

*"**23. Remand of case by Appellate Court.-** Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, which directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand.*

***23-A. Remand in other cases.-** Where the Court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point, and the decree is reversed in appeal and a retrial is considered necessary, the Appellate Court shall have the same powers as it has under Rule 23.*

***24. Where evidence on record sufficient, Appellate Court may determine case finally.-** Where the evidence upon the record is sufficient to enable the Appellate Court to pronounce judgment, the Appellate Court may, after resettling the issues, if necessary, finally determine the suit, notwithstanding that the judgment of the Court from whose decree the appeal is preferred has proceeded wholly upon some ground other than that on which the Appellate Court proceeds."*

14. On perusal of provisions of Rule 23 Order XLI of C.P.C. it is clear that where the Court has disposed of the suit on a preliminary point and the decree is reversed in appeal, the appellate court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded. Rule 23A of Order XLI of

C.P.C. provides that where the Courts from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point, and the decree is reversed in appeal and a retrial is considered necessary, the appellate court shall have the same powers as it has under Rule 23. Rule 24 of Order XLI of C.P.C. provides that where the evidence on record is sufficient, appellate court may determine case finally, instead of remanding the same to the lower court.

15. It is settled principle of law that the powers under Section 96 of C.P.C. are wide. The first appeal has to be decided on facts as well as on law. In the first appeal parties have the right to be heard both on questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons. Unfortunately, the High Court, in the present case has not recorded any finding either on facts or on law. Sitting as the first appellate court it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording the finding regarding title.

16. The scope and ambit of the first appellate court under Section 96 of C.P.C. have been considered in **'Santosh Hazari vs. Purushottam Tiwari (Deceased) by LRs.', (2001) 3 SCC 179,** in the said case the Hon'ble Supreme Court held (at pages 188-189) as under:-

"The appellate court has jurisdiction to reverse or affirm the findings of the trial court. First appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. ... while reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it."

17. In **'Madhukar & Others v. Sangram & Others',** (2001) 4 SCC 756, the Hon'ble Supreme Court reiterated that sitting as a court of first appeal, it is the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings.

18. Further, in the case of **'B.V. Nagesh and another v. H.V. Sreenivasa Murthy',** (2010) 13 SCC 530, the Hon'ble Supreme Court after taking note of all the earlier judgments laid down following principle with regard to Order XLI of C.P.C. which is as follows:

"3. How the regular first appeal is to be disposed of by the appellate court/High Court has been considered by this Court in various decisions. Order 41 of C.P.C. deals with appeals from original decrees. Among the various rules, Rule 31 mandates that the judgment of the appellate court shall state: (a) the points for determination; (b) the decision thereon; (c) the reasons for the decision; and (d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled.

4. The appellate Court has jurisdiction to reverse or affirm the findings of the trial court. The first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must,... therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions putforth, and pressed by the parties for decision of the appellate court. Sitting as a court of first appeal, it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings. The first appeal is a valuable right and the parties have a right to be heard both on questions of law and on facts and the judgment in the first appeal must address itself to all the issues of law and fact and decide it by giving reasons in support of the findings. (Vide ***Santosh Hazari v. Purushottam Tiwari, (2001) 3 SCC 179 at p.188, para 15 and Madhukar v. Sangram, (2001) 4 SCC 756 at p.758,*** *para 5.)*

5. In view of the above salutary principles, on going through the impugned judgment, we feel that the High Court has failed to discharge the obligation placed on it as a first appellate court. In our view, the judgment under appeal is cryptic and none of the relevant aspects have even been noticed. The appeal has been decided in an unsatisfactory manner. Our careful perusal of the judgment in the regular first appeal shows that it falls short of considerations which are expected from the court of first appeal. Accordingly, without going into the merits of the claim of both parties, we set aside the impugned judgment and decree of the High Court and remand the regular first appeal to the High Court for its fresh disposal in accordance with law."

19. In **'State Bank of India & Anr. v. Emmsons International Ltd.& Anr.'** (2011) 12 SCC 174, the Hon'ble Supreme Court reiterated the aforesaid principles.

20. Also, the Hon'ble Supreme Court considered the provisions of Rule 23 of Order XLI of C.P.C. in **'P. Purushottam Reddy And Anr. v Pratap Steels Ltd',** (2002) 2 SCC 686, it was held:-

"11. In the case at hand, the trial court did not dispose of the suit upon a preliminary point. The suit was decided by recording findings on all the issues. By its appellate judgment under appeal herein, the High Court has recorded its finding on some of the issues, not preliminary, and then framed three additional issues leaving them to be tried and decided by the trial court. It is not a case where a retrial is considered necessary. Neither Rule 23 nor Rule 23-A of Order 41 applies. None of the conditions contemplated by Rule 27 exists so as to justify production of additional evidence by either party under that Rule. The validity of remand has to be tested by reference to Rule 25. So far as the objection as to maintainability of the suit for failure of the plaint to satisfy the requirement of Forms 47 and 48 of Appendix A CPC is concerned, the High Court has itself found that there was no specific plea taken in the written statement. The question of framing an issue did not, therefore, arise. However, the plea was raised on behalf of the defendants purely as a question of law which, in their submission, strikes at the

very root of the right of the plaintiff to maintain the suit in the form in which it was filed and so the plea was permitted to be urged. So far as the plea as to readiness and willingness by reference to Clause (c) of Section 16 of the Specific Relief Act, 1963 is concerned, the pleadings are there as they were and the question of improving upon the pleadings does not arise inasmuch as neither any of the parties made a prayer for amendment in the pleadings nor has the High Court allowed such a liberty. It is true that a specific issue was not framed by the trial court. Nevertheless, the parties and the trial court were very much alive to the issue whether Section 16(c) of the Specific Relief Act was complied with or not and the contentions advanced by the parties in this regard were also adjudicated upon. The High Court was to examine whether such finding of the trial court was sustainable or not-in law and on facts. Even otherwise the question could have been gone into by the High Court and a finding could have been recorded on the available material inasmuch as the High Court being the court of first appeal, all the questions of fact and law arising in the case were open before it for consideration and decision."

21. Undisputedly, Section 107 of the C.P.C. empowers the appellate court to remand a case but it also empowers the appellate court to take additional evidence or to require such evidence to be taken. Rule 24 of Order XLI of the C.P.C. provides that where evidence on record is sufficient, the appellate court may determine the case finally. It is settled principle of law that the first appellate court has power to remand the case if the trial court has disposed of a suit on a preliminary issue without recording evidence and giving its decision on the rest of the issues.

22. In the instant case, the respondent/ plaintiff filed a suit for cancellation of sale deed dated 22.11.2007, written statement was filed by the appellant/defendant, issues were framed and the evidence was adduced by both the parties. It is not a case where the trial court has disposed of the suit on a preliminary issue without recording evidence and giving its decision on the rest of the issues. The first appellate court could have decided the matter on the basis of the evidence on record.

23. In view of the aforesaid discussion, the appeal is **allowed,** impugned judgment and decree dated 05th October, 2018 passed by learned Additional District Judge, Unnao, in Civil Appeal No.02 of 2016, are set aside and the matter is remanded back to the first appellate court to decide the appeal on merits and pass a fresh order after hearing both the parties, in accordance with law. The first appellate court is directed to decide the appeal expeditiously and preferably within a period of three months.

24. Both the parties are directed to appear before learned District Judge, Unnao on 06.01.2020 who will hear the appeal himself or assign the same to some other competent court for deciding the same according to law.

25. A copy of this judgment be sent back to the first appellate court immediately.

(2019)12 ILR A534

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.09.2019

BEFORE
THE HON'BLE VIRENDRA KUMAR SRIVASTAVA, J.

FAFO No. 2738 of 2011

The Oriental Insurance Co. Ltd.
...Appellant
Versus
Ramesh Chandra Nishad & Ors.
...Respondents

Counsel for the Appellant:
Sri Ashok K. Jaiswal, Sri Sidharth Jaiswal

Counsel for the Respondents:
Sri Sharve Singh, Sri Sudhaker Pandey, Smt. Neeraja Singh

A. Motor Accident Claim - Motor Vehicles Act (59 of 1988) - Section 163A - claimant not required to prove the negligence of the offending vehicle - in proceeding u/s 163A of the Act, Insurance Company cannot raise any defence of contributory negligence on the part of the victim to counter a claim for compensation (Para 19 & 20)

B. Motor Vehicles Act (59 of 1988) - Composite Negligence - Claim Petition not defective merely because compensation prayed from only one of the owner/driver - if alleged accident caused due to composite negligence of drivers of both vehicles, claimant is entitled to sue both or any one of the joint tortfeasors (Para 21 & 22)

C. Motor Vehicles Act (59 of 1988) - Section 2(21) - Alleged vehicle a mini bus, unladen weight 3250 kg, as per S. 2 (21) the alleged vehicle is light motor vehicle - DL of driver of offending vehicle valid upto 2017 for LMV private vehicle, was valid on the date of accident i.e. 15.7.2009 and the driver was competent to drive transport vehicle or omnibus as the gross vehicle weight of did not exceed 7500 kg - Driving Licence issued for driving Light Motor Vehicle (LMV) would not be affected merely on its subsequent endorsement for driving of heavy transport vehicle (HTV) (Para 18)

D. Motor Vehicles Act (59 of 1988) - Section 14 - Driving licence - Driving licence validly issued but its validity had expired - notwithstanding its expiry, the driving license continued to be effective for a period of thirty days from such expiry - Section 15 - Renewal of driving licences - Any driving licence may be renewed on an application, made by the licensee within 30 days

Held - Accident occurred on 15.7.2009 - Driving licence expired on 10.7.2009 – Driving licence valid for further period of thirty days i.e. up to 9.8.2009 - as such on the date of alleged accident on 15.7.2009 the driver was duly licensed for driving offending vehicle (Para 14)

First Appeal from Order dismissed. (E-5)

List of cases cited: -

1. Oriental Insurance Co. Ltd. Vs Santosh Kumari and others 2019 ACJ 225

2. National Insurance Co. Ltd. Vs Swaran Singh 2004 ACJ 1 (SC)

3. Jagdish Kumar Sood Vs United India Insurance Co. Ltd (2018) 3 SCC 697

4. Mukund Dewangan Vs Oriental Insurance Co. Ltd (2017) 14 SCC 663

5. Shivaji Vs Divisional Manager United India Insurance Co. Ltd., 2018 ACJ 2161

6. United India Insurance Company Ltd. Vs Sunil Kumar 2018 ACJ 1 (SC)

7. Khenyei Vs New India Assurance Co. Ltd (2015) 9 SCC 273

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

1. This appeal has been filed by appellant Insurance Company (hereinafter

referred to as "Insurer") against the award dated 28.4.2011 passed by Motor Accident Claims Tribunal/Additional District Judge, Court No. 5, Allahabad in M.A.C.P. No. 627 of 2009 *(Ramesh Chandra Nishad and others Vs. Leeladhar Tripathi and others)* whereby claim petition filed by claimants-respondents No. 1and 2 (for short "claimants") has been allowed and compensation of Rs. 3,35,979/- along with 6.5% simple annual interest has been awarded.

2. The brief facts, arising out of this appeal, are that on 15.7.2009 at about 12 O' clock, the deceased Mahesh, aged about 24 years was riding as pillion rider on motorcycle, driven by one Sushil Kumar. When he was passing nearby a culvert situated near the Shastri Bridge within jurisdiction of P.S. Daraganj, Allahabad, driver of the vehicle TATA Mini Bus No. UP 70 AT-4058, driving the said vehicle, rash and negligently, dashed the motorcycle of Sushil Kumar whereby deceased Mahesh received grievous injuries, in result whereof he died on 16.7.2009, during treatment. First Information Report was lodged by one Sunil Kumar Nishad and Case Crime No. 173 of 2009 under Section 279, 337, 338, 304-A IPC, was registered at P.S. Daraganj, Allahabad.

3. Claim petition was filed by claimants (parents of deceased Mahesh) under Section 163-A of Motor Vehicle Act (for short "M.V. Act"), for compensation of Rs. 9 lakhs against the owner of vehicle/ respondent no.3 and Insurer. The said claim petition was allowed by the Tribunal by aforesaid impugned order and award. Aggrieved by the said award this appeal has been filed.

4. Heard Sri Sidharth Jaiswal, Advocate, holding brief of Sri Ashok Kumar Jaiswal, learned counsel for Insurer, Sri Sudhakar Pandey, learned counsel for claimant, Smt. Neeraja Singh, learned counsel for respondent No. 3 and perused the record.

5. Learned counsel for Insurer has submitted that accident was happened on 15.7.2009. At the time of accident, the driver of the vehicle had not any valid licence or authority to drive the said vehicle, because the driving licence (hereinafter referred to as "D.L.") of the driver Anant Lal who was driving the alleged vehicle at the time of accident, had expired on 10.7.2009 which was renewed after 13.10.2009. Thus, there is complete breach of policy. It has further been submitted that alleged accident was caused due to negligence of driver of motorcycle (Sushil Kumar) but the Tribunal has not held him for contributory negligence and held total negligence of the driver of offending vehicle TATA Mini Bus UP 70 AT-4058. The said judgment is against the evidence and material on record and also against the settled principle of law, which is liable to be set aside.

6. Learned counsel for claimants vehemently opposed the submission advanced by the learned counsel for Insurer and submits that there is no illegality or perversity in the judgment. It is further submitted that at the time of alleged accident motorcyclist Sushil Kumar was driving the motorcycle with slow and moderate speed. He was not negligent at the time of accident. The claim petition was filed under Section 163-A of M.V. Act wherein the contributory negligence of the motorcyclist cannot be taken as defence by Insurer.

7. Learned counsel for respondent No. 3/owner of the vehicle has submitted that alleged accident had not been caused by offending vehicle No. UP 70 AT 4058. It was being driven, at the time of alleged accident, by a qualified and skilled driver, having effective D.L. Mere fact that the validity of D.L. had been expired just 5 days prior to the date of accident, will not absolve Insurer from its liability to pay compensation because at the time of accident all the papers of vehicle were valid and it was insured by the Insurer.

8. I have considered the rival submissions of learned counsel for parties and perused the record.

9. So far as question whether on the date of alleged accident i.e. 15.7.2009, driver of the offending vehicle No. UP 70 AT- 4058 had any valid and effective licence or not, is concerned, respondent no.3/owner of the offending vehicle in his written statement, filed before Tribunal, has specifically stated that all the papers including insurance cover policy and D.L. of the offending vehicle were effective and valid at the time of occurrence and at the time of accident, alleged vehicle was being driven by Anant Lal.

10. DW-3, Anant Lal, driver of the offending vehicle, has stated before the Tribunal that on 15.7.2009 he was driver of UP 70 AT 4058 and at that time he had valid and effective licence to drive the alleged vehicle. DW-1, Sagir Ahmad is an official of the office of Road Transport Authority, Allahabad. He has stated on oath before the Tribunal that D.L. No. 4520/HTV/2000 is new number of old D.L. No. A-16767/A/97, issued on 3.4.1997 to Anant Lal (DW-3). According to him the old D.L. was valid from 3.4.1997 up to 2017, for Light Motor Vehicle (for short "LMV")/private vehicle. Filing copies of relevant document of records, kept in this regard in his office, he has further stated that D.L. was endorsed for driving of heavy transport vehicle (hereinafter referred to as "HTV") on 12.1.2000 which was valid from 12.1.2000 to 11.1.2003 and renewed thereafter from 22.2.2003 to 21.2.2006; from 11.7.2006 to 10.7.2009. No witness has been produced by the Insurer before the Tribunal to controvert the statement of either Anant Lal (DW-3) or Sagir Ahmad (DW-1) and only investigation report was filed wherein it has been admitted that D.L. No. 4520/HTV/2000 (old D.L. No. A-16767/A/97) has been issued on 3.4.1997 to Anant Lal (DW-3). The said old D.L. was issued for driving of LMV (non transport) which was later on endorsed for HTV. Thus the aforesaid investigation report also corroborate the statement of Sagir Ahmad (DW-1) that earlier a D.L. of LMV (non transport) A-16767/A/97 was issued to Anant Lal on 3.4.1997 which was later on endorsed for HTV. Thus it is clear that old licence of LMV was valid up to 2017 but the endorsement for driving of HTV was valid only for 10.7.2009 which was later on renewed from 13.10.2009 to 12.12.2012.

11. Section 14, 15 and 149 of the M.V. Act deals with currency of D.L., provision regarding its renewal and the duty of insurer to satisfy the award against person insured in respect of third party risks including defence available to insure to avoid its liability, which are as under:-

"14. Currency of licences to drive motor vehicles. *- (1) A learner's*

licence issued under this Act shall, subject to the other provisions of this Act, be effective for a period of six months from the date of issue of the licence.

(2) A driving licence issued or renewed under this Act shall -

(a) in the case of a licence to drive a transport vehicle, be effective for a period of three years :

[Provided that in the case of licence to drive a transport vehicle carrying goods of dangerous or hazardous nature be effective for a period of one year and renewal thereof shall be subject to the condition that the driver undergoes one day refresher course of the prescribed syllabus ; and]

(b) in the case of any other licence -

(i) if the person obtaining the licence, either originally or on renewal thereof, has not attained the age of [fifty years] on the date of issue or, as the case may be, renewal thereof -

(A) be effective for a period of twenty years from the date of such issue or renewal ; or

(B) until the date on which such person attains the age of [fifty years], whichever is earlier ;

[(ii) if the person referred to in sub-clause (i), has attained the age of fifty years on the date of issue or as the case may be, renewal thereof, be effective, on payment of such fee as may be prescribed, for a period of five years from the date of such issue or renewal :]

Provided that every driving licence shall, notwithstanding its expiry under this sub-section, continue to be effective for a period of thirty days from such expiry.

15. Renewal of driving licences. *- (1) Any licensing authority may, on application made to it, renew a driving licence issued under the provisions of this Act with effect from the date of its expiry :*

Provided that in any case where the application for the renewal of a licence is made more than thirty days after the date of its expiry, the driving licence shall be renewed with effect from the date of its renewal :

Provided further that where the application is for the renewal of a licence to drive a transport vehicle or where in any other case the applicant has attained the age of forty years, the same shall be accompanied by a medical certificate in the same form and in the same manner as is referred to in sub-section (3) of section 8, and the provisions of sub-section (4) of section 8 shall, so far as may be, apply in relation to every such case as they apply in relation to a learner's licence.

(2) An application for the renewal of a driving licence shall be made in such form and accompanied by such documents as may be prescribed by the Central Government.

(3) Where an application for the renewal of a driving licence is made previous to, or not more than thirty days after the date of its expiry, the fee payable for such renewal shall be such as may be prescribed by the Central Government in this behalf.

(4) Where an application for the renewal of a driving licence is made more than thirty days after the date of its expiry, the fee payable for such renewal shall be such amount as may be prescribed by the Central government :

Provided that the fee referred to in sub-section (3) may be accepted by the licensing authority in respect of an application for the renewal of a driving licence made under this sub-section if it is satisfied that the applicant was prevented

by good and sufficient cause from applying within the time specified in sub-section (3) :

Provided further that if the application is made more than five years after the driving licence has ceased to be effective, the licensing authority may refuse to renew the driving licence, unless the applicant undergoes and passes to its satisfaction the test of competence to drive referred to in sub-section (3) of section 9.

(5) Where the application for renewal has been rejected, the fee paid shall be refunded to such extent and in such manner as may be prescribed by the Central Government.

(6) Where the authority renewing the driving licence is not the authority which issued the driving licence it shall intimate the fact of renewal to the authority which issued the driving licence.

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, judgement or award in respect of any such liability as is requirement 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 judgement 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 judgements.*

(2) No sum shall be payable by an insurer under sub-section (1) in respect of any judgement or award unless, before the commencement of the proceedings in which the judgement 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 judgement 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 licenced, 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 judgement as is referred to in sub-section (1) is obtained from a Court in a reciprocating country and in the case of a foreign judgement 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 judgement were given by a Court in India :

Provided that no sum shall be payable by the insurer in respect of any such judgement unless, before the commencement of the proceedings in which the judgement 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 subsection (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 expression "material fact" and "material particular" means, respectively, a fact or particular of such a nature as to influence the judgement 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 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 judgement or award as is referred to in

sub-section (1) or in such judgement 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 purposes 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."

(Emphasis supplied)

12. The aforesaid provision reveals that if a certificate of insurance has been issued in favour of insured, the insurer is under obligation, subject to the provision of Section 149, to pay the person entitled to the benefit of decree (awarded compensation), though insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy. Sub-Section 2 of Section 149 provides the ground of defence which may be taken by the insurer to avoid its liability, wherein sub-clause (ii) provides that if the alleged vehicle is not being driven by a duly licensed person or has been driven by a person disqualified for holding or obtaining a D.L. during the period of disqualification or driven by any person which was excluded for driving.

13. In this case Insurer has not produced any evidence that Anant Lal (DW-3) was specifically disqualified for holding or obtaining D.L. It is also not the case of appellant that there was any condition in the D.L. to exclude him from driving.

14. So far as question, whether driver of the offending vehicle, Anant Lal (DW-3), was duly licensed or not, at the time of accident, is concerned, proviso of Section 15 sub-section (1) clearly provides that any D.L. may be renewed on an application, made by the licensee within 30 days, whereas proviso of Section 14 sub-Section 2; clause b(ii) provides that every D.L. shall, notwithstanding its expiry under this sub-section, continue to be effective for a period of thirty days from such expiry. Thus from perusal of aforesaid provision it is clear that driving licence which was valid up to 10.7.2009 was also valid for further period of thirty days i.e. up to 9.8.2009. In view of above it is clear that at the time of alleged accident Anant Lal (DW-3) was duly licensed for driving of the offending vehicle, because accident in question has been caused on 15.7.2009.

15. In **Oriental Insurance Co. Ltd. Vs. Santosh Kumari and others, 2019 ACJ 225,** in similar case where the question had arisen as to whether D.L. would be effective and valid in case where accident was caused on 31.12.2006 but D.L. had expired on 25.12.2006, Division Bench of this Court, while relying on the law laid down by Hon'ble Supreme Court in **National Insurance Co. Ltd. Vs. Swaran Singh, 2004 ACJ 1 (SC),** has held as under:-

*24. We would like to refer to a judgment rendered by the Hon'ble Supreme Court of India in **National Insurance Company Limited versus Swaran Singh (2004)3 SCC 297.** Paras 45 and 46 are required to be extracted for consideration of the issue involved in this case. Paras 45 and 46 read as under :*

"45. Thus, a person whose licence is ordinarily renewed in terms of the Motor Vehicles Act and the Rules framed thereunder, despite the fact that

during the interregnum period, namely, when the accident took place and the date of expiry of the licence, he did not have a valid licence, he could during the prescribed period apply for renewal thereof and could obtain the same automatically without undergoing any further test or without having been declared unqualified therefor. ***Proviso appended to Section 14 in unequivocal terms states that the licence remains valid for a period of thirty days from the day of its expiry.***

46. Section 15 of the Act does not empower the authorities to reject an application for renewal only on the ground that there is a break in validity or tenure of the driving licence has 5 lapsed, as in the meantime the provisions for disqualification of the driver contained in Sections 19, 20, 21, 22, 23 and 24 will not be attracted, would indisputably confer a right upon the person to get his driving licence renewed. In that view of the matter, he cannot be said to be delicensed and the same shall remain valid for a period of thirty days after its expiry."

The Supreme Court appears to have considered the provisions of Sections 14 and 15 of the Motor Vehicles Act in the above noted paragraphs. It has specifically been held by the Hon'ble Supreme Court in para 45 that proviso appended to Section 14 in unequivocal terms states that the licence remains valid for a period of thirty days from the day of its expiry.

In view of the above, we have no hesitation in holding that the appellant insurer would be liable to pay the claimants the insured amount awarded by the tribunal. The accident occurred within thirty days of expiry of the licence, therefore, under the proviso to Section 14 of The Act, it remained effective. It dis-entitles the insurer to take a plea that the licence was not valid.

16. It is also pertinent to mention at this juncture the law laid down by the Hon'ble Supreme Court in **Jagdish Kumar Sood Vs. United India Insurance Co. Ltd., (2018) 3 SCC 697,** where the driver of the alleged vehicle, having licence of LMV was driving the transport vehicle, in absence of specific authorization. Relying on **Mukund Dewangan Vs. Oriental Insurance Co. Ltd., (2017) 14 SCC 663,** Hon'ble Supreme Court, has held as under:-

" The issue which arises before the Court is not res integra and is covered by a judgment of three Judges of this Court in Mukund Dewangan v Oriental Insurance Co. Ltd. in which it has been inter alia held as follows:

"60.1. "Light motor vehicle" as defined in Section 2(21) of the Act would include a transport vehicle as per the weight prescribed in Section 2(21) read with Sections 2(15) and 2(48). Such transport vehicles are not excluded from the definition of light motor vehicle by virtue of Amendment Act 54 of 1994."

"60.2. A transport vehicle and omnibus, the gross vehicle weight of either of which does not exceed 7500 kg would be a light motor vehicle and also motor car or tractor or a roadroller, "unladen weight" of which does not exceed 7500 kg and holder of a driving licence to drive class of "light motor vehicle" as provided in Section 10(2)(d) is competent to drive a transport vehicle or omnibus, the gross vehicle weight of which does not exceed 7500 kg or a motor car or tractor or roadroller, the "unladen weight" of which does not exceed 7500 kg. That is to say, no separate

endorsement on the licence is required to drive a transport vehicle of light motor vehicle class as enumerated above. A licence issued under Section 10(2)(d) continues to be valid after Amendment Act 54 of 1994 and 28-3-2001 in the form."

17. In this case the alleged vehicle No. UP 70 AT 4058 is mini bus. From perusal of registration certificate of the said vehicle, filed by the claimant, which has also been verified by the investigator of appellant- Insurer, it transpires that unladen weight of alleged vehicle is 3250 kg and its laden weight is 5300 kg. Section 2(21) of M.V. Act defines LMV which is as under:-

"Light motor vehicle means a transport vehicle or omnibus the gross vehicle weight of either of which or a motor car or tractor or road-roller the unladen weight of any of which, does not exceed [7500] kilograms."

18. Thus it is clear that the alleged vehicle is light motor vehicle. According to Sagir Ahmad (DW-1), an official of the office of Road Transport Authority, Allahabad, old D.L. of Anant Lal (DW-3) was valid from 3.4.1997 to 2017 for LMV, private vehicle. According to him further, the said D.L. was endorsed for driving the HTV on 12.1.2000, which was valid from 12.1.2000 to 11.1.2003 and later on renewed from time to time up to 10.7.2009 and also renewed from 13.10.2009 to 12.12.2012. In my view, D.L. of Anant Lal, driver of the offending vehicle, valid up to 2017 for LMV private vehicle, was valid on the date of accident i.e. 15.7.2009 and its validity for LMV would not be affected merely on its subsequent endorsement for HTV. In addition to above, in view of the law settled by the Hon'ble Apex Court in **Mukund Devangan (supra)** and followed in **Jagdish Kumar Sood (supra)**, Anant Lal (DW-3) was qualified, having valid and effective D.L., to drive the alleged vehicle at the time of accident.

19. The M.V. Act is social and beneficial legislation. Its purpose is to compensate the poor and helpless family whose bread winner has died or become disabled due to motor accident. Parliament was aware of the fact that in some cases where negligence of driver of offending vehicle could not be proved but since victim had died or suffered injuries due to such accident, in such cases some compensation ought to be awarded to him or his dependents. Section 163-A of M.V. Act is the provision which does not require the claimant to prove the negligence of the offending vehicle, which is as under:-

"163A. Special provisions as to payment of compensation on structured formula basis-

(1) Notwithstanding anything contained in this Act or in any other law for time being in force or instrument having the force of law, the owner of the motor vehicle of the authorised insurer shall be liable to pay in the case of death or permanent disablement due to accident arising out of the use of motor vehicle, compensation, as indicated in the Second Schedule, to the legal heirs or the victim, as the case may be.

Explanation- For the purposes of this sub-section, "permanent disability" shall have the same meaning and extent as in the Workmen's Compensation Act, 1923.

(2) In any claim for compensation under sub-section (1), the claimant shall not be required to plead or

establish that the death or permanent disablement in respect of which the claim has been made was due to any wrongful act or neglect or default of the owner of the vehicle or vehicles concerned or of any other person.

(3) The Central Government may, keeping in view the cost of living by notification in the Official Gazette, from time to time amend the Second Schedule."

20. Deceased Mahesh was travelling on the said motorcycle as a pillion rider which was being ridden by one Sushil Kumar. The claim petition has been filed under Section 163-A of M.V. Act and it has been held by the Tribunal that motorcyclist Sushil Kumar was not negligent at the time of accident. Record shows that F.I.R. was lodged against the driver of offending vehicle i.e. TATA 407 mini bus, under Section 279, 337, 338 and 304-A IPC and after due investigation charge sheet was filed against Anant Lal Pal (DW-3), driver of the offending vehicle bearing registration No. UP 70 AT 4058 for rash and negligent driving. No evidence has been produced before the Tribunal by the appellant- Insurer regarding any negligence of motorcyclist, Sushil Kumar. It has now been settled by the Supreme Court that in claim petition, filed u/s 163-A of M.V. Act, plea of contributory negligence cannot be taken. Hon'ble Supreme Court in **Shivaji and another Vs. Divisional Manager United India Insurance Co. Ltd., 2018 ACJ 2161,** where a question was involved as to whether Insurance Company can take plea of contributory negligence in claim petition, under Section 163-A of M.V. Act, filed by parents of driver of car which dashed the truck, resulting his death and other two persons traveling by car, relying on ratio of **United India Insurance Company Ltd. Vs. Sunil Kumar, 2018 ACJ 1 (SC)** has held as under:-

*"The issue which arises before us is no longer res integra and is covered by a recent judgment of three judges of this Court in United India Insurance Co. Ltd. v. Sunil Kumar & Anr., wherein it was held that to permit a defence of negligence of the claimant by the insurer and/or to understand Section 163A of the Act as contemplating such a situation, would be inconsistent with the legislative object behind introduction of this provision, which is "final compensation within a limited time frame on the basis of the structured formula to overcome situations where the claims of compensation on the basis of fault liability was taking an unduly long time". The Court observed that if an insurer was permitted to raise a defence of negligence under Section 163A of the Act, it would "bring a proceeding under Section 163A of the Act at par with the proceeding under Section 166 of the Act which would not only be self-contradictory but also defeat the very legislative intention". **Consequently, it was held that in a proceeding under Section 163A of the Act, the insurer cannot raise any defence of negligence on the part of the victim to counter a claim for compensation."*** (Emphasis supplied)

21. It is also settled principle of law that even if it is found that the alleged accident was caused due to composite negligence of drivers of both vehicles, claim petition for compensation may be filed against owners/drivers of both the vehicles or anyone of them. Hon'ble Supreme Court in **Khenyei Vs. New**

India Assurance Co. Ltd., (2015) 9 SCC 273, has held as under:-

(i) In the case of composite negligence, plaintiff/claimant is entitled to sue both or any one of the joint tortfeasors and to recover the entire compensation as liability of joint tortfeasors is joint and several.

22. Thus Insurer cannot take plea either of contributory negligence of motorcyclist or that claim petition is defective as no compensation has been prayed from motorcyclist.

23. In view of the above discussion I do not find any merit in the present appeal. The impugned judgment and award passed by the Tribunal requires no interference. Accordingly, the appeal is **dismissed**.

24. Office is directed to return back the lower court record to Tribunal forthwith so that the awarded compensation be paid to the claimants in view of the impugned award. The statutory deposit of Rs. 25000/-, deposited by the Insurer before this Court, if not remitted, be also remitted to the Tribunal.

(2019)12 ILR A545

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.10.2019

BEFORE
THE HON'BLE PRADEEP KUMAR SRIVASTAVA, J.

FAFO No. 4083 of 2011

The New India Assurance Co. Ltd. ...Appellant

Versus

Ram Ganesh & Ors. ...Respondents

Counsel for the Appellant:
Sri S.K. Mehrotra

Counsel for the Respondents:
Sri R.C. Maurya

Motor Vehicles Act (59 of 1988) - Sections 166 & 168 - Selection of Multiplier - Operative multiplier is 17 for the age groups of 26 to 30 (Para 7)

First Appeal from Order dismissed. (E-5)

List of cases cited: -

1. Sarla Verma Vs Delhi Transport Corporation (2009) 6 SCC 121

2. National Insurance Company Vs Pranay Sethi & others AIR 2017 SC 5157

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

1. Heard Sri S.K. Mehrotra, learned counsel for the appellant, Sri R.C. Maurya, learned counsel for the respondents and perused the record.

2. This appeal has been filed by the New Indian Assurance Co. Ltd. against the judgment and award dated 17.09.2011, passed by Motor Accident Claims Tribunal / Special Judge, E.C. Act, Agra, in MACP No. 05 of 2010 (Ram Ganesh and others vs. P.S. Batesh and others) by which the learned tribunal has awarded the compensation of Rs. 5,05,000/- with 6% per annum simple interest from the date of filing of the appeal.

3. Aggrieved by the aforesaid judgment and award, the present appeal has been filed and the impugned judgment

has been challenged on the ground that the accident in question did not occur due to rash and negligent driving of the driver of motorcycle nor the involvement of the motorcycle in accident was established. There was contributory negligence of the deceased and this fact has not been considered. The learned Tribunal assumed Rs. 30,000/- income of the deceased whereas, there was no evidence to that effect. The notional income should have been only Rs. 15,000/- annual. After investigation, the police has submitted final report as no accident was committed by the said motorcycle.

4. During arguments, the learned counsel for the appellant has submitted that the final report was submitted, therefore, the said accident is not supported by any charge sheet against the driver of the offending motorcycle. In this regard, the learned Tribunal has found on the basis of evidence on record that even if the final report was submitted by the police, the protest application was filed against the final report and the accused has been summoned by the learned Magistrate. Therefore, the learned Tribunal has concluded that the fact that final report was filed, will not render any benefit to the Insurance Company. Learned Tribunal has also found that the oral testimony established that the accident took place because of rash and negligent driving of the driver of the motorcycle and because no evidence was given from the side of opposite parties to prove contributory negligence, therefore, the driver of the motorcycle was alone responsible for the accident in which the wife of the claimant died out of injuries.

5. Another argument is with regard to determination of the income of the deceased. It appears that the learned Tribunal has assessed the income of the deceased to be Rs. 100/- per day on notional basis and Rs. 2500/- monthly considering that if a simple labourer will earn for 25 days, he would earn Rs. 25,00/- per month. I do not find any illegality or perversity in the determination of the income of the deceased. As such, the income of the deceased was considered to Rs. 30,000/- per year and looking to the strength of the family, 1/3 was deducted against the personal expenses. It is pertinent to mention that besides the husband, the deceased was having four children. Therefore, the deduction is also adequate and the annual income for the purpose of determination of compensation after deducting 1/3rd against the personal expenses of deceased, comes to Rs. 20,000/- in a year.

6. Learned Tribunal has determined the age of the deceased to be 27 years and in the said age, multiplier of 17 has been correctly applied as in view of the decision in **Sarla Verma vs Delhi Transport Corporation (2009) 6 SCC 121,** the multiplier from the age of 26 to 30 years is 17. The Supreme Court has laid down as below:

"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 Charlie), 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."

7. It is clear from the above observation that between the age of 26 to 30, the available multiplier is 17. This has further been affirmed on the point of multiplier by the Hon'ble Apex Court in the case of **National Insurance Company vs. Pranay Sethi & others, AIR 2017 SC 5157.** The learned Tribunal has determined the age of the deceased to be 27 years, hence, the multiplier of 17 has correctly been used. Applying the multiplier of 17, the amount of Rs. 20000/- yearly comes to a total amount of Rs. 340000/-.

8. In **Sarla Verma (supra),** it has been held by the Supreme Court that a proceeding before the Tribunal is in the nature of inquiry in which a very few thing is required to be established. The Court has observed as under :-

"Basically only three facts need to be established by the claimants for assessing compensation in the case of death: (a) age of the deceased; (b) income of the deceased; and the (c) the number of dependents. The issues to be determined by the Tribunal to arrive at the loss of dependency are (i) additions/deductions to be made for arriving at the income; (ii) the deduction to be made towards the personal living expenses of the deceased; and (iii) the multiplier to be applied with reference of the age of the deceased."

9. The amount of expenses for treatment was established on the basis of medical bills etc. for a sum of Rs. 1,58,027/- and adding the amount under conventional head, the total amount which was determined by the learned Tribunal was Rs. 5,05,000/-. As such, the amount cannot be said to be in the higher side and if the principle laid down in **Sarla Verma (supra)** and **Pranay Sethi (supra)** are made applicable, the amount of compensation must have been much more, therefore, there is no reason for the appellant to be aggrieved as amount of compensation is much in lower side.

10. In view of the above, I do not find any force in the appeal and the appeal is liable to be dismissed.

11. Accordingly, the appeal is dismissed. Interim order, if any, stands vacated.

12. The office is directed to send back the lower court record with the certified copy of this judgment to the Tribunal concerned for information and necessary compliance.

13. The amount of Rs. 25000/- deposited at the time of filing of appeal be remitted back to the learned Tribunal to be adjusted against the awarded amount.

(2019)12 ILR A547

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.10.2019

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE RAJEEV MISRA, J.

First Appeal No. 739 of 2017

Smt. Komal ...Appellant

Versus

Arvind Kumar ...Respondent

Counsel for the Appellant:
Sri Sudhir Kumar Chandraul, Sri Krishna Manohar Tiwari, Smt. Priya Tiwari

Counsel for the Respondent:
Sri Mahesh Sharma, Sri Sharad Sinha

Family & Personal Law - Guardians and Wards Act (8 of 1890)-Section 25 - Custody of child to father - paramount interest of minor is the primary criteria for deciding custody and guardianship of a minor - even a natural guardian can be denied custody of minor child for good and compelling reasons. (Para 10)

Appellant - Mother admitted that she is not having any independent source of income & that she cannot bear expenses of schools in which minor children are studying – no dispute that respondent-father having sufficient income to meet expenses of minor children – court below held conversation with minor children - both children categorically stated that they wish to stay with their father - sufficient and compelling circumstances permit continuance of custody of minor children with their father as their interest is best protected in the company of their father

First Appeal dismissed. (E-5)

List of cases cited: -

1. Mritunjay Vs. Hari Shankar Dixit First Appeal Defective No. 138 of 2019, 8.7.2019

2. Lekha Vs. P. Anil Kumar 2006 (13) SCC 555

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

1. Challenge in this appeal under section 47 of Guardian and Wards Act, 1890 (hereinafter referred to as 'Act, 1890'), wrongly mentioned as Section 19 Family Court Act, 1984 is to judgement dated 1.5.2017, passed by Principal Judge, Family Court, Baghpat, in Misc. Case No. 01 of 2013 (Smt. Komal Vs. Arvind Kumar), under section 25 of Act 1890 whereby claim of plaintiff mother for custody of her minor children has been rejected.

2. We have heard Mr. Krishna Mohan Tiwari, learned counsel for appellant and Mr. Mahesh Sharma, learned counsel for respondent.

3. It transpires from record that marriage of appellant was solemnized with respondent Arvind Kumar on 22.2.1999 in accordance with Hindu Rites and Customs. After marriage, appellant came to her matrimonial home and discharged her espousal obligations. Inspite of aforesaid, respondent and his family members did not extend love and affection to appellant. Their conduct towards appellant was vindictive and aspersions were cast upon her for not bringing sufficient dowry. The matrimonial bond however continued and from wedlock of appellant and respondent, a daughter namely, Chavi and a son namely, Nakul were born. It is alleged by appellant that respondent was a drunkard and under spell of intoxication, used to assault and abuse appellant. Ultimately, appellant alleges to have been ousted from her matrimonial home on 16.2.2010 but custody of minor children was retained by respondent. Apprehending damage to the personality of her minor children on account of bad habits of respondents and further that they may not come up with strong moral character, coupled with refusal on part of respondent to hand over custody of minor children, appellant filed Suit No. 01 of 2013 (Smt. Komal Vs. Arvind Kumar) under section 25 of Act, 1890, claiming custody of her minor children. It was also pleaded by appellant that respondent is not paying required interest for welfare of

minor children. They are unable to study properly. The minor daughter of appellant is being looked after by her grand mother. As appellant is capable of looking after her minor children and also a natural guardian of minor children, therefore, their custody be given to appellant.

4. Suit filed by appellant was contested by defendant respondent by filing a written statement whereby not only plaint allegations were denied but also additional pleas were raised. It was pleaded by respondent that appellant is incapable of meeting educational expenses of minor children as she herself has filed case No. 69 of 2011 under Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as 'Act, 2005') wherein she has claimed interim maintenance on account of financial constraints Appellant has also filed a case under section 125 Cr.P.C. in the competent Court at Muzaffarnagar for payment of maintenance. Minor son Nakul is studying in Class-XI at, Diwan Public School, which is one of the best public schools in Meerut. The respondent is himself bearing expenses of his son. The Phupha and Buwa of minor have been appointed as guardian, as they are working in Meerut. Photocopy of certificate showing payment of fees was filed in evidence to support the same. In respect of minor daughter Chavi, it was pleaded that she is studying in Class-V at C.B.S.M Public School. The respondent is bearing her educational expenses. The minor daughter is being looked after by respondent along with his parents. Photocopy of fees card pertaining daughter, Chavi, was also filed in evidence. It was then urged that respondents is looking after his minor children to the best of his ability and means, they are receiving good education. Appellant is living separately, since 16.2.2010, without any reason. Appellant is unable to sustain herself and to get the amount of maintenance enhanced, she has filed application for custody of minor children to exert pressure upon respondent. On the aforesaid pleas, it was submitted that application filed by appellant for custody of minor children is liable to be rejected.

5. After the pleadings were exchanged, parties went to trial. Appellant in support of her claim, filed her own affidavit, whereas respondents in support of his defence, filed his affidavit. Upon consideration of pleadings adduced by parties and material filed by them in support of their respective case, Court below opined that only single point of determination is involved i.e. "in whose custody, the interest of minor children would be best protected".

6. Court below, upon evaluation of material on record and also in view of the dialogue with minor children as they were of tender age, arrived at the conclusion that interest of minors is best protected in the custody of their father i.e. respondent. Accordingly, Court below vide order dated 1.5.2017 rejected application filed by appellant under section 25 of Act 1890, claiming custody of her minor children. Feeling aggrieved by aforesaid judgement, appellant has now come to this Court, by means of present first appeal.

7. Mr. Krishna Manohar Tiwari, learned counsel for appellant, in challenge to impugned judgement, submitted that impugned judgement passed by Court below, is unsustainable in law and fact.

Consequently, the same is liable to be set aside by this Court. Elaborating his submission, he submits that from the wedlock of appellant and respondent, two children were born, namely, a son and daughter. At the time of presentation of petition, under section 25 of Act, 1890, both the children were of tender age i.e. 8 and 6 years respectively. It is well settled that when children are of tender age, they should be in custody of their mother. It was then submitted that in respect of minor daughter, mother is the best guardian and her custody should remain with mother till she reaches the age of pubetry. Court below, while passing impugned judgement and order has failed to consider aforesaid aspects of the matter which has vitiated the impugned judgement. It is thus urged that impugned judgement passed by Court below, is liable to be set aside.

8. Mr. Mahesh Sharma, learned counsel for respondent, on the other hand has supported impugned judgement. According to learned counsel for respondent, Court below has passed a just and reasonable order which is not liable to be interfered with. Court below has taken into consideration the paramount interest of minor children and in line with aforesaid principle, held that interest of minor children is best protected in custody of their father. Court below was aware of the fact that minor children are of tender age, therefore, Court itself held conversation with minor children to ascertain their willingness regarding their stay with either of the parents. As such, both on facts and law, no fault can be attributed to the order passed by Court below.

9. Before proceeding to evaluate the rival submissions made by learned counsel for parties, it would be appropriate to reproduce section 25 of Act, 1890:

*""**25. Title of guardian to custody of ward.**--(1) If a ward leaves or is removed from the custody of a guardian of his person, the Court, if it is of opinion that it will be for the welfare of the ward to return to the custody of his guardian, may make an order for his return and for the purpose of enforcing the order may cause the ward to be arrested and to be delivered into the custody of the guardian.*

(2) For the purpose of arresting the ward, the Court may exercise the power conferred on a Magistrate of the first class by section 100 of the Code of Criminal Procedure, 1882 (10 of 1882).

(3) The residence of a ward against the will of his guardian with a person who is not his guardian does not of itself terminate the guardianship.

10. From the perusal of Section 25 of Act 1890 it is apparent that there are no directions contained in the section itself in accordance with which application for guardianship and custody shall be decided. However, as law has developed on the subject concerned, it is well crystallized that paramount interest of minor is the primary criteria for deciding custody and guardianship of a minor. Apart from above, it is now further established that a minor who is below five years of age, shall ordinarily be allowed to stay with mother. Similarly in case of minor girls, it has been the consistent view that their custody should remain with mother till they attain age of majority. It shall be useful to refer to a Division Bench judgement of this Court in **First Appeal Defective No. 138 of**

2019 (Mritunjay Vs. Hari Shankar Dixit) decided on 8.7.2019. In paragraphs 7, 8, 9, 10 and 11 Court has said as under:

"7. While determining the question of custody of a minor child, the first and the paramount consideration is the welfare and interest of the child and not the rights of the parents under a statute.

8. In Mausami Moitra Ganguli v. Jayant Ganguli (2008) 7 SCC 673, it has been held that the principles of law in relation to the custody of a minor child are well settled. While determining the question as to which parent the care and control of a child should be committed, the first and the paramount consideration is the welfare and interest of the child and not the rights of the parents under a statute.

9. In the above case, a passage from Halsbury's Laws of England (4th Edn., Vol. 13) was reproduced which reads as under:

"809. Principles as to custody and upbringing of minors.- Where in any proceedings before any court, the custody or upbringing of a minor is in question, the court, in deciding that question, must regard the welfare of the minor as the first and paramount consideration, and must not take into consideration whether from any other point of view the claim of the father in respect of such custody or upbringing is superior to that of the mother, or the claim of the mother is superior to that of the father. In relation to the custody or upbringing of a minor, a mother has the same rights and authority as the law allows to a father, and the rights and authority of mother and father are equal and are exercisable by either without the other."

10. Earlier, Apex Court in Rosy Jacob v. Jacob A. Chakramakkal (1973) 1 SCC 840, ruled that the children are not mere chattels, nor are they mere playthings for their parents. ***Absolute right of parents over the destinies and the lives of their children has, in the modern changed social conditions, yielded to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society and the guardian.***

11. Following the above authorities, in Santhini Vs. Vijaya Venketesh (2018) 1 SCC 1 Court expressed the same view holding as under:

"It is to be borne in mind that in a matter relating to the custody of the child, ***the welfare of the child is paramount and seminal.*** *It is inconceivable to ignore its importance and treat it as secondary. The interest of the child in all circumstances remains vital and the Court has a very affirmative role in that regard. Having regard to the nature of the interest of the child, the role of the Court is extremely sensitive and it is expected of the Court to be pro-active and sensibly objective." (emphasis added) "*

11. Supreme Court in **Lekha Vs. P. Anil Kumar 2006 (13) SCC 555,** had dealt with the issue regarding guardianship and custody of minor under section 25 of Act 1890 and observed as follows in paragraphs 15, 16, 17 and 19:

"15. Sk. Moidin v. Kunhadevi [AIR 1929 Mad 33 (FB)] was a case of a father, a motor driver, applying for writ of habeas corpus to get custody of his 7-year-aged child. Nobody was available in his house to look after such child. The

Full Bench held that the Court has to look to an application under habeas corpus in the interest of the child as being paramount. The Court held that prima facie in the eye of the law, the father is the natural guardian and custodian of the person of his child. But it has been the law for a very long time both in England and in this country that what a court has to look to on applications under habeas corpus is the interest of the child as being paramount.

16. In Samuel Stephen Richard v. Stella Richard [AIR 1955 Mad 451 : 56 Cri LJ 1192] the High Court in deciding the question of custody held as follows: (AIR p. 452)

"In deciding the question of custody, the welfare of the minor is the paramount consideration and the fact that the father is the natural guardian would not "ipso facto' entitle him to custody. The principal considerations or tests which have been laid down under Section 17, in order to secure this welfare, are equally applicable in considering the welfare of the minor under Section 25.

The application of these tests casts an "arduous' duty on the court. Amongst the many and multifarious duties that a Judge in Chambers performs by far the most onerous duties are those cast upon him by the Guardians and Wards Act. He should place himself in the position of a wise father and be not tired of the worries which may be occasioned to him in selecting a guardian best fitted to assure the welfare of a minor and thereafter guide and control the guardian to ensure the welfare of the ward--a no mean task but the highest fulfilment of the dharmasastra of his own country.

It is only an extreme case where a mother may not have the interest of her child most dear to her. Since it is the mother who would have the interest of the minor most at heart, the tender years of a child needing the care, protection and guidance of the most interested person, the mother has come to be preferred to others."

17. In Thrity Hoshie Dolikuka v. Hoshiam Shavaksha Dolikuka [(1982) 2 SCC 544 : AIR 1982 SC 1276] this Court held as under: (SCC p. 565, para 17)

"17. The principles of law in relation to the custody of a minor appear to be well established. It is well settled that ***any matter concerning a minor, has to be considered and decided only from the point of view of the welfare and interest of the minor.*** *In dealing with a matter concerning a minor, the Court has a special responsibility and it is the duty of the Court to consider the welfare of the minor and to protect the minor's interest. In considering the question of custody of a minor, the Court has to be guided by the only consideration of the welfare of the minor."*

19. The law permits a person to have the custody of his minor child. The father ought to be the guardian of the person and property of the minor under ordinary circumstances. The fact that the mother has married again after the divorce of her first husband is no ground for depriving the mother of her parental right of custody. In cases like the present one, the mother may have shortcomings but that does not imply that she is not deserving of the solace and custody of her child. ***If the court forms the impression that the mother is a normal and independent young woman and shows no indication of imbalance of mind in her, then in the end the custody of the minor child should not be refused to her or else we would be really assenting to the proposition that a second marriage***

involving a mother per se will operate adversely to a claim of a *mother for the custody of her minor child. We are fortified in this view by the authority of the Madras High Court in S. Soora Reddi v. S. Chenna Reddi[AIR 1950 Mad 306 : (1950) 1 MLJ 33] where Govinda Menon and Basheer Ahmed Syed, JJ. have clearly laid down that the father ought to be a guardian of the person and property of the minor under ordinary circumstances and the fact that a Hindu father has married a second wife is no ground whatever for depriving him of his parental right of custody." (Emphasis added)*

12. Thus from above quoted observations, it is explicitly clear that even though father is natural guardian but simply on that ground he is not entitled to the custody and guardianship of minor children. Courts while deciding guardianship and custody of a minor have to be guided by observations made by Court as referred to above. When case in hand is examined in light of above quoted observations made by Court, balance tilts in favour of father i.e. defendant-respondent.

13. From perusal of record, it is apparent that appellant in her affidavit clearly admitted that she is not having any independent source of income hence unable to sustain herself. As such, she is dependent upon her father. She further admitted that she cannot bear expenses of schools in which minor children are studying. If custody is granted to her, she will claim their expenses from respondent. Apart from above, there was no denial of fact that minor children are studying in good schools at Meerut. Furthermore, it could not be disputed by appellant that respondent is having sufficient income to meet his personal expenses as well as the expenses of minor children. It is further evident that since children were of tender age, court below before proceeding to decide their custody held conversation with them and obtained their desire of stay with father or mother. Both children categorically stated that they wish to stay with their father. Having ascertained the status of parties and willingness of minor children, Court below proceeded to decide the question of custody of minor children as per the principle "paramount interest of minor".

14. Learned counsel for appellant could not dispute before us that conclusion drawn by Court below regarding financial status of parties, willingness of children to stay with their father and paramount interest of children in facts and circumstances of case are neither perverse nor erroneous.

15. In view of above, argument raised by learned counsel for appellant that since both children were minor and particularly since daughter had not even attained the age of puberty, were liable to be given in custody of their mother, is wholly misconceived. Law on the subject now stands crystallized and it has been held that even a natural guardian can be denied custody of minor children for good and compelling reasons. It is established from record that sufficient and compelling circumstances exist on record, which permit continuance of custody of minor children with their father as their interest is best protected in the company of their father.

16. For reasons, given herein above, we do not find any good ground to interfere in this appeal. Appeal being

devoid of merits is liable to be dismissed. It is accordingly, dismissed. Cost made easy.

(2019)12 ILR A554

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.11.2019

BEFORE
THE HON'BLE PANKAJ MITHAL, J.
THE HON'BLE VIVEK AGARWAL, J.

Writ A No. 8242 of 2019

Jay Singh & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Kamaluddin Khan

Counsel for the Respondents:
C.S.C.

A. Law of Torts - Motor Vehicles Act, 1988 - Section 45 - Power of Registering Officer to refuse registration - Refusal on ground of traffic problem in the city is patently without jurisdiction-power to refuse - limited to grounds mentioned under section 45 - if he has reason to believe that vehicle is stolen or defective-or fails to comply with requirements of Act-or if Applicants fails to furnish necessary particulars - Resolution quashed.

Writ Petition allowed. (E-9)

List of cases cited: -

1. Mohd. Aman and 3 ors vs. St. Of U.P. & 5 ors- Writ A no. 17235 of 2018

(Delivered by Hon'ble Pankaj Mithal, J.
Hon'ble Vivek Agarwal, J.)

1. Heard Sri Kamaluddin Khan, learned counsel for the petitioners and learned Standing Counsel for the respondents.

2. The petitioners have preferred this petition so as to challenge the Condition No.3 of the Resolution No. 1.9 passed on 27.02.2018 in the meeting of the Divisional Road Safety Committee headed by the Commissioner of the Division.

3. The aforesaid condition states that in the district of Meerut, about 1300 valid registrations have been granted for plying of the e-rickshaws. Thus looking to the traffic condition it has been decided not to grant any further registrations to e-rickshaws in the district until further orders.

4. The petitioners are all owners of e-rickshaws and their e-rickshaws are not being registered by the Regional Transport Authority on the basis of the aforesaid resolution.

5. The Court while entertaining the writ petition on being prima-facie satisfied that there is no provision under the Motor Vehicles Act, 1988 which allows the authorities to stop the registration of any vehicle much less that of e-rickshaws on the ground of traffic condition issued an ad-interim mandamus to the respondents to register e-rickshaws owned by the petitioners in accordance with law provided petitioners furnish all the necessary documents and produce e-rickshaws before the competent authority or to show-cause by filing counter affidavit within 3 weeks.

6. In pursuance to the above interim direction, neither the e-rickshaws of the petitioners have been registered despite

their production before the authority concerned and furnishing of all papers nor any counter affidavit has been filed explaining any legal impediment in such registration.

7. Chapter IV of the Motor Vehicles Act, 1988 provides for the registration of the motor vehicles and Section 45 thereof gives power to the Registering Officer to refuse registration. The Registration can be refused only on the limited grounds mentioned therein if the Registering Officer has reason to believe that the vehicle is a stolen one or is mechanically defective or fails to comply with the requirements of the Act or the Rules made therein, or if the applicant fails to furnish necessary particulars. No other ground for refusal has been prescribed therein. The traffic problem of the area, city or town is not a ground on which registration of any motor vehicle can be refused.

8. In one of the cases before this Court i.e. ***Writ A No. 17235 of 2018 (Mohd Aman and 3 others Vs. State of U.P. and 5 others),*** a Division Bench of this Court after considering the pleadings of the parties, deemed it appropriate to dispose off a similar writ petition refusing registration of e-rickshaws with the direction to the Transport Authorities to register the e-rickshaws in accordance with law provided the owners thereof furnish all necessary papers and present their e-rickshaws before the competent authority.

9. In view of the above, we have no option but to make the above interim direction to be absolute more particularly for the reason that the Resolution impugned is patently without jurisdiction as there is no provision under the Act which authorizes the respondent authorities to refuse registration or to keep the registration in abeyance on account of traffic conditions in the city.

10. Accordingly, the Resolution dated 27.02.2018 is quashed and mandamus is issued to the respondents to register the e-rickshaws of the petitioners on the fulfilment of the necessary formalities.

11. The writ petition stands **allowed** accordingly.

(2019)12 ILR A555

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.11.2019

BEFORE
THE HON'BLE MRS. SUNITA AGARWAL, J.

Writ A No. 15941 of 2019

Mukesh Kumar ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Arvind Srivastava

Counsel for the Respondents:
A.S.G.I., Sri Aditya Kumar Singh

A. Service Law - Compassionate appointment- Application not moved within a reasonable time - nor offered any explanation for delay - further scheme for such appointment cannot be given retrospective effect -scheme to be strictly constructed-impugned order do not suffer from any infirmity.

Held -any delay on the part of the dependants of the deceased employee has to be explained in order to enable the public authority to examine whether the family of the deceased

would not be able to meet the crisis unless a job is offered to the eligible member of the family. (Para 18)

Writ Petition dismissed. (E-9)

List of Cases cited: -

1. State Bank of India and others vs Sheo Shankar Tewari, (2019) 5 SCC 600

2. Canara Bank and another vs M. Mahesh, (2015) 7 SCC 412

3.SBI vs Raj Kumar, (2010) 11 SCC 661

4. MGB Gramin Bank vs Chakrawarti Singh, (2014) 13 SCC 583

5. SBI vs Jash pal Kaur, (2007) 9 SCC 571

6. Umesh Kumar Nagpal vs State of Haryana, (1994) 4 SCC 138

7. State of Jharkhand and others vs Shiv Karampal Sahu , (2009) 11 SCC 453

8. Bhawani Prasad Sonkar vs Union of India and others, (2011) 4 SCC 209

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

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

2. The challenge in the present petition is to order of rejection of claim of the petitioner for grant of compassionate appointment. The reason given therein is that the scheme of compassionate appointment was not available in the Bank on the date of death of the employee, i.e. father of the petitioner.

3. Submission of learned counsel for the petitioner is that the petitioner's father who was working as Accounts Officer with the respondent Bank had died on 12.5.2018. As the salary of the petitioner's father was the only source of income of the family, the petitioner's mother moved an application dated 8.4.2019 for grant of compassionate appointment to the petitioner herein with the consent of all other dependants of the deceased employee. The prayer of the petitioner's mother had wrongly been rejected by the order impugned though the scheme of compassionate appointment was available in the Bank, w.e.f 15.3.2019.

4. It is contended that on demand of the employees of the Public Sector Banks, the Government of India had approved the scheme of compassionate appointment and a communication dated 7.8.2014 was sent to all Public Sector Banks for adoption of the said scheme w.ef. 5.8.2014. It was further communicated by the letter dated 5.12.2014 issued by the Under Secretary to the Government of India, Ministry of Finance that the Banks can have both the options, i.e. to offer compassionate appointment or payment of lump sum ex-gratia amount. However, for providing any of the above two benefits, it is necessary that other conditions of compassionate appointment are met. In the light of the said communication, the Scheme of compassionate appointment became operative in all Public Sector Banks.

5. Thereafter, by the letter dated 3.11.2014, the National Bank for Agricultural Rural Development (NABARD) wrote to the Government of India to extend the scheme of compassionate appointment approved by it on 5.8.2014 to the Regional Rural Banks, they being Public Sector Banks established under the Regional Rural Banks Act, amended by Act No. 140 of

2015. The Government of India having realised discrimination to the employees of Regional Rural Banks extended the Scheme of compassionate appointment, approved by it for Public Sector Banks, to the Regional Rural Bank by means of the communication dated 31.12.2018. The Board of respondent Bank, however, had adopted the scheme of compassionate appointment, w.e.f 15.3.2019, though it had been communicated that the scheme was approved by the Government of India on 7.8.2014 and has been made applicable w.e.f 5.8.2014.

6. With the above facts, it is vehemently contended by the learned counsel for the petitioner that adoption of scheme of compassionate appointment by the Board of the Regional Rural Banks was only a ministerial exercise and it was not open for the Board to make any distinction in the matter of applicability of the scheme of compassionate appointment. The scheme was to be applied w.e.f 5.8.2014 as had been done for the employees of Public Sector Banks. There was no justification for discrimination between two sets of employees and the artificial classification made by the Board of the Bank is wholly arbitrary, discriminatory and violative of Article 14 of the Constitution of India.

7. In the alternative, it is contended that once the respondent Board had acknowledged that the scheme of compassionate appointment was adopted on 15.3.2019, the application moved by the petitioner's mother on 8.4.2019, i.e. after implementation of the scheme could not have been rejected on the ground that the said scheme was not available on the date of death of the petitioner's father. It is contended that the date of death of an employee can have no relation with the claim of compassionate appointment as the dependant of a deceased employee has no vested right to seek compassionate appointment. In fact no cause of action accrued to the petitioner on the date of death of the employee to seek compassionate appointment as only right was to seek consideration of his claim which had accrued either on the date of the application or the date of the consideration of the same. In the instant case, on both dates, i.e. when the claim for compassionate appointment was filed and considered, the scheme of compassionate appointment was in vogue. The relevant date being the date of consideration of the application and not the date of death of the employee, the rejection order cannot be sustained.

8. Further, the application seeking compassionate appointment having been moved within a period of five years from the death of the employee, as per Clause-8 of the scheme itself, the time limit for considering application had not expired. The application having been given within the limitation period prescribed in the scheme could not have been rejected.

9. Furthermore, the Clause-8 of the scheme provides the procedure for disposal of application for compassionate appointment. Being procedural subordinate legislation, it has to be given retrospective effect. Moreover, in view of the fact that the scheme of compassionate appointment is beneficial legislation, the bank can not discriminate by making an artificial classification in implementation of the scheme of compassionate appointment by relating it to the date of death of the employee. There is no justification for the said classification

made by the Bank, as it cannot insist that compassionate appointment would be extended to dependants of only those employees who had died after implementation of the scheme, i.e. 15.3.2019.

10. It is submitted that such a situation came before the Apex Court and in the case of ***State Bank of India and others vs Sheo Shankar Tewari*** noticing the conflict in the judgments of the Apex Court in ***Canara Bank and another vs M. Mahesh***, ***SBI vs Raj Kumar, MGB Gramin Bank vs Chakrawarti Singh*** and ***SBI vs Jash pal Kaur ,*** the issue has been referred to the Larger Bench by the order dated 8.2.2019. It is contended that the appellate bank therein itself had taken a stand that there was no vested right with the dependants of the deceased to seek consideration under the former scheme and the governing scheme would be one which was applicable when the application came up for consideration. On the other hand, the contention of the applicant therein was that the governing scheme would be the former scheme ie; the scheme available on the date of the application and scrapping of the former scheme for compassionate appointment after the claim was raised was of no effect.

11. Learned Senior counsel appearing for the respondent bank in rebuttal vehemently submits that the compassionate appointment is an exception to the general rule of appointments in the public services which should be made strictly from the open market by inviting applications on merit of all eligible applicants. As has been held by the Apex Court in ***Umesh Kumar Nagpal vs State of Haryana***, the scheme of compassionate appointment has to be given strict construction. It cannot be treated as a benevolent or beneficial legislation like any other scheme. Similar issue came up before the Apex Court in ***State of Jharkhand and others vs Shiv Karampal Sahu*** wherein it is held that the benevolent circular or scheme cannot be extended to a case which was not contemplated by the scheme itself. Liberal construction cannot be given in the matter of implementation of the beneficial legislation which has a scheme of its own and where there is no vagueness or doubt therein.

12. Placing the scheme of compassionate appointment applied in the Regional Rural Banks w.e.f 15.3.2019, it is contended that the Clause-1 regarding 'Coverage' of the Scheme shows that it cannot be given retrospective effect. Clause-1.1(a) provides that compassionate appointment can be given to the dependant family member of a permanent employee of bank who dies while in service. Meaning thereby, the scheme covers only those claims for which cause of action arose after implementation of the scheme w.e.f 15.3.2019, i.e. in case of death of the employee after the said date. In the instant case, the application having been made after approximately one year from the date of death of the employee ie 8.4.2019 and as there was no pending claim on the date of implementation of the scheme, Clause-8 is not attracted at all.

13. The judgments in **MGB Gramin Bank (supra), Canara Bank (supra)** have been placed before the Court to submit that the ratio of the said decisions do not apply in the present case for the reason that both the above judgments

were delivered in the peculiar facts and circumstances of those cases, where changes in the scheme were brought during pendency of the application for compassionate appointment.

14. The conflict noted in the case of ***State Bank of India and others vs Sheo Shankar Tewari*** reported in ***(2019) 5 SCC 600*** by the Apex court therefore, has no relevance in the present case.

15. In the light of the above submissions, it would be apt to first consider the well settled principles of law pertaining to grant of compassionate appointment. In ***Umesh Kumar Nagpal vs (supra)*** it was emphasized by the Apex Court that a compassionate appointment cannot be claimed as a matter of course as the object is not to give appointment to a member of the family rather the whole object of granting compassionate appointment is to enable the family to meet immediate financial crisis.

16. The source of livelihood provided by compassionate appointment is an exception in favour of the dependants of an employee dying in harness. Mere death of employee in harness does not entitle his family to such source of livelihood. The exception carved out to the general rules of appointments in public services is to be followed strictly in every case. The Government or the public authority concerned has to examine the financial condition of the family of the deceased, it is only if it satisfied, that but for provision of employment, the family will not be able to meet the crisis that the job is to be offered to the eligible member of the family (emphasis added).

17. In ***Bhawani Prasad Sonkar vs Union of India and others*** it was held that while considering a claim for employment on compassionate ground, the following factors have to be borne in mind:-

"20.Thus, while considering a claim for employment on compassionate ground, the following factors have to be borne in mind:

(i) Compassionate employment cannot be made in the absence of rules or regulations issued by the Government or a public authority. The request is to be considered strictly in accordance with the governing scheme, and no discretion as such is left with any authority to make compassionate appointment dehors the scheme.

(ii) An application for compassionate employment must be preferred without undue delay and has to be considered within a reasonable period of time.

(iii) An appointment on compassionate ground is to meet the sudden crisis occurring in the family on account of the death or medical invalidation of the bread winner while in service. Therefore, compassionate employment cannot be granted as a matter of course by way of largesse irrespective of the financial condition of the deceased/incapacitated employee's family at the time of his death or incapacity, as the case may be.

(iv) Compassionate employment is permissible only to one of the dependants of the deceased/incapacitated employee, viz. parents, spouse, son or daughter and not to all relatives, and such appointments should be only to the lowest category that is Class III and IV posts."

18. Keeping in mind the object of the compassionate appointment in the

light of the above principles, it is evident that an application for compassionate appointment has to be preferred without any delay and has to be considered within a reasonable period of time. Any delay on the part of the dependants of the deceased employee has to be explained in order to enable the public authority to examine whether the family of the deceased would not be able to meet the crisis unless a job is offered to the eligible member of the family. Noteworthy is the fact that in the instant case, no explanation has been offered by the petitioner for moving application after a period of one year from the date of death of the employee when admittedly he was eligible being major and having completed his studies (graduation) in the year 2015.

19. Further, it is settled that the scheme for grant of compassionate appointment must be considered in terms of the stipulations made in the Circular letters containing the policy decisions. Such a scheme cannot be given liberal construction. In the case of the ***State of Jharkhand and others (supra),*** the Apex Court has stated the following :-

"11. The scheme for grant of monetory compensation to the dependents of the deceased or injured who are affected in any kind of terrorist/virulent/communal attack must be considered in terms of the stipulations made in the circular letters containing policy decisions. Appointment on compassionate ground, it is trite, must be made keeping in view the provisions contained in Articles 14 and 16 of the Constitution of India. Such schemes cannot be given an expansive meaning as the constitutional scheme envisages that all persons who are entitled to be considered for appointment would be eligible for being considered therefor. Any policy decision for appointment on compassionate ground must, therefore, receive a strict construction."

13. A circular letter providing for appointment on compassionate ground in case of death of a government servant cannot be extended in case of the dependents of the deceased who was not a government servant. A public employment must be offered to a person who is entitled therefor. All recruitments subject to just exceptions must be made in terms of the rules framed under the proviso appended to Article 309 of the Constitution of India. A circular letter issued by the State cannot be issued de hors the constitutional scheme of making offer of public appointment. [See Official Liquidator vs. Dayanand & ors. [(2008) 10 SCC 1 para 52]; State of Bihar vs. Upendra Narayan Singh & Ors. [(2009) 4 SCALE 282 para 19]; and Man Singh v. Commissioner, Garhwal Mandal, Pauri & Ors. [2009 (4) SCC 645].

14. Moreover, a benevolent circular, it is well known, cannot be extended to a case which was not contemplated by the circular itself.

In Regional Director, Employees' State Insurance Corporation, Trichur vs. Ramanuja Match Industries [AIR 1985 SC 278], this Court held:

"...We do not doubt that beneficial legislations should have liberal construction with a view to implementing the legislative intent but where such beneficial legislation has a scheme of its own there is no warrant for the Court to travel beyond the scheme and extend the scope of the statute on the pretext of extending the statutory benefit to those who are not covered by the scheme."

15.In Deepal Girishbhai Soni & ors. vs. United India Insurance Co. Ltd., Baroda [(2004) 5 SCC 385], it was opined :

"53. Although the Act is a beneficial one and, thus, deserves liberal construction with a view to implementing the legislative intent but it is trite that where such beneficial legislation has a scheme of its own and there is no vagueness or doubt therein, the court would not travel beyond the same and extend the scope of the statute on the pretext of extending the statutory benefit to those who are not covered thereby."

20. It has been further held therein that in the matter of construction and application of subordinate legislation, the rule of incorporation by reference should not be applied unless a clear case is made out therefor. Ordinarily a subordinate legislation should not be construed to be retrospective in operation. The circular letter providing scheme of compassionate appointment should be given prospective effect. It was further held in para-'16' and '17' as under:-

"16. Furthermore, in the matter of construction or application of subordinate legislation the rule of incorporation by reference should not be applied unless a clear case is made out therefor. The circular letter dated 21.9.1987 is an independent one. It operates in its own field. There is no scope of reading both the circulars together. Even if they could be read, the general circulars in regard to the appointment on compassionate ground which were again applicable to the cases of dependents of the deceased employees either for the purpose of consideration of the period during which such appointments were to be made or otherwise could not have been taken into consideration for the purpose of grant of benefit to which he was not otherwise entitled to.

In Management of Indian Bank & Anr. vs. Ramachandran & ors. [JT 2007 (13) SC 436], it has been held:

"It is now a trite law that for the purpose of construing a statute, reference to another statute is not permissible and, thus, Regulation 21 of the Civil Services Pension Rules contemplates a different situation, the same will have no application in the instant case. The High Court, therefore, committed an error in relying on the said provision."

17. Ordinarily, a subordinate legislation should not be construed to be retrospective in operation. The circular letter dated 7.5.2003 was given a prospective effect. The father of the respondent died on 19.5.2000. There is nothing to show that even circular dated 9.8.2000 had been given retrospective effect. In any view of the matter, as the State of Jharkhand in the circular letter dated 7.5.2003 adopted the earlier circular letters issued by the State of Bihar only in respect of cases where death had occurred after 15.10.2000, i.e., the date from which the State of Jharkhad came into being, the High Court, in our opinion, committed a serious error in giving retrospective effect thereto indirectly which it could not do directly.

Reasons assigned by the High Court, for the reasons aforementioned, are unacceptable."

21. In the case of ***MGB Gramin Bank*** (supra), considering the object for compassionate appointment as laid down

in ***Umesh Kumar Nagpal*** (supra) it was held in para-'8' as under:-

"8. An "ameliorating relief' should not be taken as opening an alternative mode of recruitment to public employment. Furthermore, an application made at a belated stage cannot be entertained for the reason that by lapse of time, the purpose of making such appointment stands evaporated."

22. Furthermore, it was held therein that as the appointment on compassionate ground cannot be claimed as a matter of right nor an applicant becomes entitled automatically for appointment with the death of the employee in harness, a dependant of the deceased cannot claim appointment as a vested right, as a right independent of any contingency and which cannot be taken away without consent of the person concerned. The entitlement for appointment on compassionate grounds depends on various other circumstances such as eligibility and financial condition of the family etc., and the application has to be considered in accordance with the scheme. Since the scheme does not create any vested right, a candidate cannot claim that his case is to be considered under the scheme existing on the date when the cause of action has arisen, i.e. the date of death of the incumbent on the post. It was, thus, held that as the new scheme came into force within a short period from the date of receiving of the application, the candidate cannot claim consideration under the old scheme. The scheme as prevailing on the date of consideration of the application would apply and the application has to be considered strictly in accordance with the new scheme.

23. Whereas in **Canara Bank (supra),** considering the judgment in *SBI vs Jashpal (supra),* it was held that the claim of compassionate appointment which was materialized under the old scheme cannot be decided on the basis of the scheme that was promulgated much after the dispute in the said case. It was found that the application for compassionate appointment "dying in harness" scheme was moved when scheme for compassionate appointment was in force. The new scheme providing for ex gratia payment (by scrapping of scheme of dying-in-harness appointment) came much after the filing of the application. In the said fact and circumstances of that case, it was held that the cause of action to be considered for compassionate appointment arose when the old scheme was in force and the new scheme being an administrative order cannot be given retrospective effect so as to take away right of consideration accrued to the applicant under the old scheme. The claim was directed to be considered under the old scheme with the observations in relevant paragraph-'18' and ***Canara Bank and another*** (supra) as under:-

"18. It is also pertinent to note that 2005 Scheme providing only for ex-gratia payment in lieu of compassionate appointment stands superseded by the Scheme of 2014 which has revived the scheme providing for compassionate appointment. As on date, now the scheme in force is to provide compassionate appointment. Under these circumstances, the appellant- bank is not justified in contending that the application for compassionate appointment of the respondent cannot be considered in view of passage of time."

24. Having carefully gone through the above decisions, it is more than

apparent that both the said judgments were rendered in the circumstance where the applications for compassionate appointment were moved within a reasonable time from the date of death of the incumbent on the post.

25. However, in the instant case the petitioner did not move application for compassionate appointment within a reasonable time and has not offered any explanation for moving application after one year from the date of cause of action which arose with the death of his father.

26. It is not a case where the application was moved under the old scheme but remained pending and new scheme came in. In fact, there was no occasion for the Bank to consider the claim of family of the deceased employee to grant financial assistance to overcome the crisis immediately on the death of the employee. The law laid down by the Apex Court in ***MGB Gramin bank*** *(supra)* has no application in the fact situation of the present case. The ratio in ***Canara Bank and another*** *(supra)* cannot be applied. The question of reference in State Bank of India (supra) does not arise for consideration in the instant case.

27. Moreover, the scheme of compassionate appointment implemented, w.e.f 15.3.2019 can not be given retrospective effect. The said scheme can be applied only in the following contingencies, i.e:-

(i)where the incumbent on the post dies in harness after implementation of the scheme w.e.f 15.3.2019.

(ii)the application seeking financial assistance (ex-gratia payment) under the old scheme was moved and remained pending for the inaction or non consideration on the part of the respondent bank.

(iii)where the application was moved under the old scheme (for ex gratia payment) and within a short period from the date of receiving of the application, new scheme for compassionate appointment came into force.

28. Further, the time limit provided under Clause-8 of the current scheme for considering application within a period of five years has to be reckoned from the date of death of the employee in harness and cannot come to rescue of the petitioner who himself moved application after a lapse of one year from the date of accrual of the cause of action or death of the employee without any explanation for the delay.

29. In view of the above, the decision of the Bank in refusing to consider the claim for compassionate appointment made by the petitioner's mother, cannot be said to suffer from any infirmity.

30. The writ petition is found devoid of merit and hence, **dismissed**.

(2019)12 ILR A563

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.10.2019

BEFORE
THE HON'BLE SUNEET KUMAR, J.

Writ A No. 26849 of 2018

Mayank Babu Agrawal ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:

Sri Pradeep Singh, Arti Agrawal, Sri Ashok Mehta

Counsel for the Respondents:
C.S.C.

A. Service Law - U.P. Government Servant (Discipline and Appeal) Rules, 1999 - Departmental Enquiry - charges do not elucidate the imputed misconduct-document relied upon has been taken as a separate charge-gross violation of Rule 7-demand for summoning employees/staff for cross examination declined- whole enquiry stands vitiated.

Held - Taking the allegations made in the charge on face value, it cannot be said by any stretch of imagination that the charge is precise, clear and definite to give sufficient indication to the petitioner of the facts and circumstances of misconduct against him. The charge does not elucidate the imputation of misconduct. The allegations are vague and beyond comprehension. In support of the allegations forty-five documents were relied upon. They range from 1990 to 1998 i.e. from the date of appointment of the petitioner to the date when the petitioner was placed under suspension. It is not clear from the charge, what is the alleged misconduct imputed against the petitioner, the allegation does not refer to any specific incident of a particular year. On the contrary in the same breath Enquiry Officer records that the service record of the petitioner reflects that it is satisfactory and the integrity of the petitioner has been duly certified. Upon considering the very same entries, petitioner was confirmed as a permanent employee. It is not inferable from the charges 11 as to which act or omission has been committed by the petitioner, in which year and month the specific circumstances that constitutes misconduct is not detailed. (Para 23)

Further, he demanded that the employees/staff named by him be summoned for cross-examination, which admittedly was declined by the Enquiry Officer only for the reason that the witnesses were not mentioned in the charge-sheet, therefore, were 7. (1964) 4 SCR 718 15 not required to be summoned. The Enquiry Officer sought to prove the charges relying upon the documents which were not proved by their author nor the author of the documents were summoned for cross-examination. Even if the employee refuses to participate in the enquiry, the employer cannot straight away dismiss him, but must hold an ex-parte enquiry where evidence must be led as held by the Supreme Court in Imperial Tobacco Company Limited Vs. Its Employees. (Para 32)

Writ Petition allowed. (E-9)

List of cases Cited:

1. Govinda Menon v. Union of India, AIR 1967 SC1274, 1283

2. Surath Chandra Chakravarty Vs. The State of West Bengal, AIR 1971 SC 752

3. Shri Anant R. Kulkarni Vs. Y.P. Education Society & others, 2013 6 SCC 515

4. Roop Singh Negi vs. Punjab National Bank and others,2009 (2) SCC 570

5. M.V. Bijlani v. Union of India this Court held: (SCC p. 95, para 25)

6. Union of India vs. H.C. Goel, (1964) 4 SCR 718

7. Imperial Tobacco Company Limited Vs. Its Employees, AIR 1962 SC 1348 (9)

8. Meenglas Tea Estate V. The Workmen, AIR 1963 SC 1719

9. Deepali Gundu Surwase vs. Kranti Junior Adhyapak Mahavidyalaya (D.ED.) and others, (2013) 10 SCC 324

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

1. Heard Sri Ashok Mehta, learned Senior Advocate assisted by Sri Pradeep Singh, learned counsel for the petitioner and learned Standing Counsel for the State-respondents.

2. The facts giving rise to the instant writ petition, briefly stated, is that petitioner came to be appointed on compassionate ground on the post of Junior Assistant Clerk on 3 July 1990. Petitioner was dismissed vide order dated 30 March 1999, passed by the second respondent-Disciplinary Authority/Joint Development Commissioner, Allahabad. The order of dismissal was subjected to challenge in a petition being Writ-A No.15413 of 1999. The writ petition came to be allowed on the ground that the principles of natural justice was flouted with impunity. The operative portion of order dated 21 November 2017, reads thus:

"From the above discussion, it is clear that the legal requirements of conducting a fair and impartial inquiry and thereafter arriving on the fair conclusion, have been disregarded by the respondents, therefore, the dismissal order dated 30.3.1999 is hereby quashed. The petitioner shall be reinstated in service with 50 per cent of the arrears of salary because he did not submit any reply to the charge-sheet initially, which led to ex-parte inquiry against him. The respondents are at liberty to proceed against the petitioner departmentally afresh in accordance with law."

3. The order of the learned Single Judge came to be assailed by the second respondent in appeal being Special Appeal No.84 of 2018. The appellate Court modified the operative portion of the order, which reads thus:

"We modify the operative portion of the order of the learned Single Judge in the following manner:

1. Once the inquiry is vitiated the natural consequence is for the employer to restart the inquiry from the stage it was found vitiated. We accordingly, direct the Inquiry Officer to conclude the inquiry after examining all the witnesses and after giving liberty to the writ-petitioner to defend himself. Such inquiry would be completed within four months from the date of production of a certified copy of this order before the Disciplinary Authority in accordance with the governing service Rules.

2. The question of reinstatement with arrears of salary would be subject to final order being passed by the Disciplinary Authority, after conclusion of the inquiry.

We find that the writ-petitioner was suspended during the inquiry proceeding, it would be open to the writ-petitioner to apply for subsistence allowance during the inquiry proceeding. If the writ-petitioner applies before the Disciplinary Authority, he will pass appropriate order in accordance with Rules within a period of two weeks.

The special appeal is partly allowed with the aforesaid modification."

4. Pursuant thereof, the disciplinary enquiry was initiated from the stage of charge sheet. The earlier charge sheet dated 5 November 1998 was served upon the petitioner afresh on 7 March 2018, by the Enquiry Officer reiterating the charges. Petitioner submitted reply to the charge sheet on 21 March 2018, which was duly received by the Enquiry Officer, wherein, petitioner denied the allegations of misconduct and desired to cross-examine 14 officers/staff, purportedly, authors of the documents The witnesses desired by the petitioner were not summoned. It is noted in the enquiry report that petitioner had not relied upon any evidence or witness in defence,

though, it is admitted that petitioner insisted to cross-examine the officers, i.e. the authors of the documents relied upon in the charge sheet in support of the charge. The Enquiry Officer declined the request of the petitioner to cross-examine the officers for the reason that the witnesses are not mentioned in the charge-sheet to support the charges. It is further noted by the Enquiry Officer that several opportunities was given to the petitioner to furnish the list of documents/witnesses, however, despite opportunity, petitioner kept insisting that he desired to examine the 14 officers/staff to extract the truth with regard to the documents relied upon. It appears, thereafter, the Enquiry Officer proceeded to prove the charges relying upon the documents taking that petitioner had nothing to say in defence.

5. Three charges were leveled against the petitioner. Charge nos.1 and 3 have been proved, partly, whereas, charge no.2 has been disproved. The charges reads thus:

"आरोप संख्या–1

मृतक कर्मचारी आश्रित सेवा नियमावली 1974 के अधीन 18 वर्ष की आयु पूर्ण करते ही कनिष्ठ लिपिक के पद पर सहानुभूतिपूर्वक की गई नियुक्ति के प्रारम्भ से ही आप उच्चाधिकारियों के आदेशों की अवहेलना, किसी भी महत्वपूर्ण बैठक या कार्य के समय स्वेच्छाचारितापूर्ण ढंग से अधिकारियों के आदेषों की अवहेलना करते हुए कार्यालय से अनुपस्थित हो जाने, कार्यालय की छवि धूमिल करने, अपने पटल से सम्बन्धित अभिलेख/पत्रावलियां उपलब्ध न कराकर षासकीय कार्य में अवरोध उत्पन्न करने, बिना चिकित्सा प्रमाण पत्र के चिकित्सावकाष प्रार्थना पत्र भेजकर सतत अनुपस्थित रहने के आदी हैं। नियुक्ति के समय से ही प्रायः सभी उप/संयुक्त विकास आयुक्तों तथा स्आफ आफिसर द्वारा निरंतर कड़ी चेतावनियों/भर्त्सना के बावजूद अपने आचरण एवं कार्यषैली में सुधार न करने, महामहिम राज्यपाल एवं अन्य उच्च स्तरीय बैठकों तथा मण्डलीय समीक्षा बैठक जैसे महत्वपूर्ण कार्यों के समय जानबूझकर अवकाष पर चले जाने तथा राष्टÂीय पर्वों पर भी अनुपस्थित रहने के दोषी हैं।

आरोप संख्या–2

आप स्वीकृत बाउचरों के बिल तैयार करने में जानबूझकर विलम्ब करने, तैयार बिल भी आहरण/वितरण अधिकारी के हस्ताक्षर कराकर आहरण हेतु कोषागार को समय से न भेजने, कई स्वीकृत बाउचर बिल तैयारी हेतु कई माह तक अपने स्तर पर रोकने, अकारण विलम्ब के संबंध में उच्चाधिकारियों द्वारा आख्या मांगे जाने पर आख्या/विवरण प्रस्तुत करने तथा बिलों के आहरण/वितरण में विलम्ब के माध्यम से शासकीय कार्यों में अवरोध उत्पन्न करने के दोषी हैं।

आरोप संख्या–3

आप प्रायः विलम्ब से कार्यालय आने, अपरान्ह में समय से पहले उच्चाधिकारियों के कार्यालय में मौजूद रहने के बावजूद बिना अनुमति कार्यालय छोड़कर चले जाने, शासकीय कार्य में असहयोग, स्वस्थ रहते हुए भी बिना चिकित्सा प्रमाण पत्र के चिकित्सावकाश की मांग करने, पढ़ाई, परीक्षा तथा अन्य निजी कार्यों हेतु राजकीय कार्य में व्यवधान उत्पन्न कर चिकित्सावकाश का दुरूपयोग करने, अल्प सेवाकाल में ही देय सम्पूर्ण चिकित्सावकाश का उपभोग करने, लम्बित कार्य निस्तारण हेतु आदेश दिए जाने पर अवकाश पर चले जाने की धमकी एवं अनुशासनहीनतापूर्ण ढंग से मण्डलायुक्त को सीधे पत्र प्रेषण के कारण उ.प्र. सरकारी कर्मचारी सेवा नियमावली के नियम 9 तथा 27ए के उल्लंघन तथा कार्यहित में अधिकारियों द्वारा अवकाष अस्वीकृति किए जाने पर बिना अनुमति अनाधिकृत ढंग से अनुपस्थित होकर उ.प्र. सरकारी कर्मचारी सेवा नियमावली के नियम 3 के उल्लंघन के दोषी हैं।

6. The charges is not accompanied with the statement of misconduct. In support of charge nos.1 and 3, the list of documents relied upon were same. The Enquiry Officer while dealing with charge no.1, noted that petitioner not only denied the charge but categorically stated that the documents relied upon, does not prove the charge.

7. It appears from the enquiry report that the Enquiry Officer, barring document no.1 and document no.2, which pertains to petitioner's appointment and the High School certificate, the Enquiry Officer has treated each document as a separate/independent charge and thereafter returned findings on each of the documents i.e. proved or not proved. Thereafter, inference has been drawn by the Enquiry Officer, that charge no.1 is

proved in part. The report further notes that as per the service record of the petitioner since 1990-91 to 1997-98, the services of the petitioner has been certified either good, very good or satisfactory, integrity is duly certified. However, it is noted that in the matters pertaining to Rules 67 and 95 of the Fundamental Rules, Part-II, Chapter 2 to 4 has been violated. Accordingly, the Enquiry Officer has held that charge no.1 has been proved partly.

8. Charge no.2 has been held not proved.

9. In respect of charge no.3, an inference has been drawn by the Enquiry Officer that there is no violation of Rule 3 of U.P. Government Servants Conduct Rules, 19561. However, petitioner has been found guilty of violating of Rule 27-A of Rules, 1956, for communicating directly with the superior officer bypassing the proper channel. The charge has been proved in part.

10. It is not being disputed by the contesting parties that proceedings against the petitioner was conducted under the provisions of the U.P. Government Servant (Discipline and Appeal) Rules, 19992.

11. In the aforesaid backdrop, the submission of the learned Senior Counsel appearing for the petitioner is as follows:

(i) that the charges taken on face value is vague, not definite nor precise as mandated under Rule 7 of Rules, 1999;

(ii) that the procedure for imposition of major penalty mandated under Rule 7 has not been complied, particularly, Sub-rule (ii), (iii), (iv) and (vii), that is, upon denial of the charge, the witnesses named by the petitioner to cross-examine them was denied;

(iii) that the onus of proving innocence of the charge was shifted upon the petitioner despite the petitioner having denied all the charges;

(iv) that the impugned order has been passed at the behest of the superior officer i.e. Commissioner, Allahabad Division, Allahabad, upon pressurizing the Disciplinary Authority.

12. In rebuttal, the learned Standing Counsel appearing for the respondents submits that the enquiry report reflects that petitioner was granted several opportunities to produce evidence in support of his defence, but petitioner did not comply. There was no occasion to summon or cross-examine the officers desired by the petitioner as they were not named as witnesses in the charge sheet.

13. On specific query, learned counsel for the respondent does not dispute that the petitioner had denied the charges and insisted to summon the witnesses.

14. Rival submissions fall for consideration.

15. The question that arises for determination is as to whether the disciplinary enquiry stands vitiated for non-compliance of the mandatory procedure contemplated in Rule 7 of Rules, 1999, and whether the charges are vague, not definite/precise i.e. beyond comprehension.

16. On bare perusal of the charges taken on face value, it merely records the

allegation against the petitioner alleging that petitioner absented without proper leave application; he is habitual in not complying the orders of the superiors. The leave applications were not submitted in prescribed proforma under the Rules; petitioner directly communicated with the superior officer bypassing the proper channel, etc. The allegations are mere general statements not disclosing the precise imputation of misconduct. In other words, the charge is not definite/clear and precise indicating as to when the petitioner flouted the orders of the officers; proceeded on leave without information; and not complied with the directions of the superiors or/and when bypassed the proper channel while communicating with the superior officer. The substance of the misconduct is absent in the charges.

17. On perusal of the enquiry report, it reflects that the documents relied upon in support of the charge sheet, in particular document nos.3, 4 and 5, have been taken by the Enquiry Officer as a separate charge and a finding has been returned on each document as to whether it is proved against the petitioner or not. The documents are of a particular alleged incident but the charge does not detail the substance and circumstances of the incident constituting the misconduct. In other words the Enquiry Officer himself was not clear about the charge, the evidence relied upon in support of the charge was taken as a separate charge. The departmental enquiry taken as it stands is in gross violation of Rule 7 of Rules, 1999, providing the procedure for imposing major penalties. Sub-rule (ii), (iii), (iv) and (vi) of Rule 7 is extracted:

"7. ***Procedure for imposing major penalties-*** *Before imposing any major penalty on a Government Servant, an inquiry shall be held in the following manner:*

(i) xxx xxx xxx xxx

(ii) The facts constituting the misconduct on which it is proposed to take action shall be reduced in the from of definite charge or charges to be called charge-sheet. The charge-sheet shall be approved by the Disciplinary Authority.

(iii) ***The charges framed shall be so precise and clear as to give sufficient indication to the charged Government Servant of the facts and circumstances against him.*** *The proposed documentary evidences and the name of the witnesses proposed to prove the same alongwith oral evidences, if any, shall be mentioned in the charge-sheet.*

(iv) The charged Government Servant shall be required to put in a written statement of his defence in person on a specified date which shall not be less than 15 days from the date of issue of charge-sheet and to state whether he desires to cross-examine any witness mentioned in the charge-sheet and whether desires to give or produce evidence in his defence. He shall also be informed that in case he does not appear or file the written statement on the specified date, it will be presumed that he has none to furnish and inquiry officer shall proceed to complete the inquiry ex parte.

(v) xxx xxx xxx xxx

(vi) xxx xxx xxx xxx

(vii) Where the charged Government Servant denies the charges the Inquiry Officer shall proceed to call the witnesses proposed in the charge-sheet and record their oral evidence in presence of the charged Government Servant who shall be given opportunity to cross-examine such witnesses. After

recording the aforesaid evidences, ***the Inquiry Officer shall call and record the oral evidence which the charged Government Servant desired in his written statement to be produced in his defence:*** *Provided that the Inquiry Officer may for reasons to be recorded in written refuse to call a witness."*

18. The mandatory provision of Rules, 1999, framed by the Governor in exercise of powers conferred under the proviso to Article 309, is legislative in nature and binding upon the respondents and the delinquent employee. Sub-rule (iii) of Rule 7 mandates that the "charges framed shall be so precise and clear' to give indication to the delinquent employee of the facts and circumstances against him. Further, Sub-rule (vii) provides that the Enquiry Officer shall call and record the oral evidence which the delinquent employee desired in the written statement. In the facts of the instant case neither the charge is definite and clear nor did the Enquiry Officer summon the officers demanded by the petitioner.

19. The purpose of holding an enquiry against any employee is not only with a view to establish the charges levelled against him or to impose a penalty, but is also conducted with the object of recording the truth of the matter, and in that sense, the outcome of an enquiry may either result in establishing or vindicating the stand of the delinquent, hence result in his exoneration. Therefore, fair action on the part of the authority concerned is a paramount necessity.

20. The word "charge' denotes the accusations or imputations against member of the service, vide ***Govinda Menon v. Union of India.*** The word "definite' signifies that which is defined or has the limits drawn or marked out; definite is said of things as they present themselves or are presented to the mind; as a definite idea, a definite proposal; positive assertion. "Definite' means something which is not vague. The word "vague' is the antonym of definite. If the charge which is supplied is incapable of being understood or defined with sufficient certainty it is vague. If on reading the charges furnished to the employee is capable of being intelligently understood and sufficiently definite to furnish objections and evidence in defence, the charge then is not vague.

21. In ***Surath Chandra Chakravarty Vs. The State of West Bengal,*** the Supreme Court held that it is not permissible to hold an enquiry of vague charges as the same does not give a clear picture to the delinquent to raise the effective defence as he will be unaware of the exact nature of the allegation against him, and what defence he should put up for rebuttal thereof. The Court observed as under:-

"The grounds on which it is proposed to take action have to be reduced to the form of a definite charge or charges which have to be communicated to the person charged together with a statement of the allegations on which each charge is based and any other circumstance which it is proposed to be taken into consideration in passing orders has to be stated. This rule embodies a principle which is one of the specific contents of a reasonable or adequate opportunity for defending oneself. If a person is not told clearly and definitely what the allegations are on

which the charges preferred against him are founded, he cannot possibly, by projecting his own imagination, discover all the facts and circumstances that may be in the contemplation of the authorities to be established against him."

22. The principle was reiterated by the Supreme Court in ***Shri Anant R. Kulkarni Vs. Y.P. Education Society & others,*** it was held that where the charge sheet is accompanied by the statement of facts and the allegations are not specific in the charge sheet, but are crystal clear from the statement of facts, in such a situation, as both constitute the same document it cannot be held that the charge is not specific or definite. But in case, the statement of facts is not clear and definite the enquiry would vitiate. The relevant portion of paragraph no.10 is extracted:

"Thus, nowhere should a delinquent be served a chargesheet, without providing to him, a clear, specific and definite description of the charge against him. When statement of allegations are not served with the chargesheet, the enquiry stands vitiated, as having been conducted in violation of the principles of natural justice. Evidence adduced should not be perfunctory, even if the delinquent does not take the defence of, or make a protest with against that the charges are vague, that does not save the enquiry from being vitiated, for the reason that there must be fair-play in action, particularly in respect of an order involving adverse or penal consequences. What is required to be examined is whether the delinquent knew the nature of accusation. The charges should be specific, definite and giving details of the incident which formed the basis of charges and no enquiry can be sustained on vague charges. (Vide: State of Andhra Pradesh & Ors. v. S. Sree Rama Rao, AIR 1963 SC 1723; Sawai Singh v. State of Rajasthan, AIR 1986 SC 995; Union of India & Ors. v. Gyan Chand Chattar, (2009) 12 SCC 78; and Anil Gilurker v. Bilaspur Raipur Kshetria Gramin Bank & Anr., (2011) 14 SCC 379."

23. On taking the allegations made in the charge on face value, it cannot be said by any stretch of imagination that the charge is precise, clear and definite to give sufficient indication to the petitioner of the facts and circumstances of misconduct against him. The charge does not elucidate the imputation of misconduct. The allegations are vague and beyond comprehension. In support of the allegations forty five documents were relied upon. They range from 1990 to 1998 i.e. from the date of appointment of the petitioner to the date when the petitioner was placed under suspension. It is not clear from the charge, what is the alleged misconduct imputed against the petitioner, the allegation does not refer to any specific incident of a particular year. On the contrary in the same breath Enquiry Officer records that the service record of the petitioner reflects that it is satisfactory and the integrity of the petitioner has been duly certified. Upon considering the very same entries, petitioner was confirmed as a permanent employee. It is not inferable from the charges as to which act or omission has been committed by the petitioner, in which year and month the specific circumstances that constitutes misconduct is not detailed.

24. On bare perusal of the enquiry report, it transpires that Enquiry Officer has taken each document relied upon in

support of the charges as a separate charge and thereafter returned a finding thereon, which in my opinion is in gross violation of the procedure for imposition of major penalty prescribed under Rule 7 of Rules, 1999. The charges taken on face value is no charge in the eye of law. In the circumstances the enquiry as a whole stands vitiated.

25. It is specifically pleaded in paragraph nos.30, 31 and 32 of the writ petition that no date and time was fixed for oral evidence. The documents relied upon by the Enquiry Officer in support of the charge is neither supported nor proved by oral evidence, the enquiry report was submitted without any evidence being led before the Enquiry Officer. Paragraph nos.30, 31, 32 are extracted:

"30. That the enquiry officer never fixed any date, time and place for the oral evidence to prove the charges against the petitioner even after various requests dated 02.04.2018, 24.04.2018 and 08.05.2018 by the petitioner. The true copy of reminders for fixing date, time and place is filed herewith and marked as Annexure-14 to the writ petition.

31. That the documents presented before enquiry officer was never supported nor proved by any oral evidence and accordingly the documents not proved, can not be the basis of impugned order dated 17.10.2018.

32. That without any evidence enquiry officer submitted the enquiry report on 21.05.2018 and the petitioner was provided the copy of the same vide letter dated 11.06.2018. The true copy of the letter dated 11.06.2018 is filed herewith and marked as Annexure-15 to the writ petition."

26. The reply has been given by the respondents in paragraph no.21 of the counter affidavit, which reads thus:

"21. That the contents of paragraph nos.29, 30, 31, 32 and 33 of the writ petition are misconceived as stated hence are denied. Detailed and appropriate reply has already been given in the preceding paragraphs of the counter affidavit. However, it is submitted that after considering and examining entire facts, material and records, order impugned has been passed after affording ample opportunity to the petitioner so as to substantiate his defence hence the same is just and proper and in accordance with Rules and Law. The enquiry was initiated and concluded in the matter, in the light of order dated 02.02.2018 passed by the Division Bench of this Hon'ble Court in the Special Appeal No.84 of 2018."

27. Further, reliance has been placed by the learned Standing Counsel on the averments made in paragraph no.6 of the counter affidavit. Paragraph no.6 (IV), (V) and (VI) of the counter affidavit, reads thus:

"6. xxx xxx xxx xxx

IV. The enquiry officer, after examining and considering the provisions laid down under Rules, 1999 and Employees Conduct Rules, 1956 as well as provisions laid down under Financial Handbook, after affording ample opportunity to the petitioner for substantiating his defence, submitted his enquiry report dated 21.05.2018. True copy of letter dated 09.04.2018 as well as enquiry report dated 21.05.2018 are being filed herewith and marked as Annexure-C.A.-2 & 3 respectively to this affidavit.

V. In pursuance to aforesaid enquiry report, the then Joint Development Commissioner, as per provisions laid down under Rules, 1999, issued letter dated 11.06.2018 requiring the petitioner to submit his stance over the enquiry report 21.05.2018 and thereafter in pursuance to the same, the petitioner has submitted his reply dated 24.06.2018 (Annexure no.16 to the writ petition) before Joint Development Commissioner.

VI. Finally, the disciplinary authority i.e. Joint Development Commissioner, after considering and examining the entire aspects of the matter, adjudicated the matter by means of order dated 17.10.2018, whereby the termination order dated 30.03.1999 passed against the petitioner previously, has been affirmed and kept intact being found legal and valid."

28. The averments made in paragraph no.6 of the counter affidavit has been denied by the petitioner in the rejoinder affidavit, it is further contended that the impugned order dated 17 October 2018, passed by the Disciplinary Authority, has merely reaffirmed the earlier order of dismissal passed on 30 March 1999, which came to be quashed by this Court on 21 November 2017. Division Bench, in appeal, merely modified the order directing the Enquiry Officer to conclude the enquiry after giving opportunity to the petitioner. The order of the learned Single Judge, quashing the earlier order of dismissal was not interfered with, but only the arrears of salary was made subject to the outcome of the enquiry. In other words, the Disciplinary Authority had to apply his mind afresh on the enquiry report that would have been submitted after enquiry being undertaken from the stage of charge-sheet.

29. Supreme Court in ***Roop Singh Negi vs. Punjab National Bank and others,*** was of the view that there must be some evidence, on record to show that the delinquent employee had indulged in the alleged act of misconduct. There must be some evidence to link the petitioner to the alleged misconduct. Supreme Court held that departmental proceeding is a quasi-judicial proceeding. The inquiry officer performs a quasi-judicial function. The inquiry officer has a duty to arrive at a finding upon taking into consideration the materials brought on record by the parties. The inquiry officer should appreciate the evidences and the conclusion should be based on evidence. The inquiry report if based on conjectures and surmises cannot be sustained. Suspicion howsoever high, cannot be a substitute for legal proof.

30. Yet again in ***M.V. Bijlani v. Union of India this Court held: (SCC p. 95, para 25)***

"25. ....Although the charges in a departmental proceedings are not required to be proved like a criminal trial, i.e., beyond all reasonable doubts, we cannot lose sight of the fact that the Enquiry Officer performs a quasi-judicial function, who upon analysing the documents must arrive at a conclusion that there had been a preponderance of probability to prove the charges on the basis of materials on record. While doing so, he cannot take into consideration any irrelevant fact. He cannot refuse to consider the relevant facts. He cannot shift the burden of proof. He cannot reject the relevant testimony of the witnesses only on the basis of surmises and

conjectures. He cannot enquire into the allegations with which the delinquent officer had not been charged with."

31. In Union of India vs. H.C. Goel, it was held:

"....The two infirmities are separate and distinct though, conceivably, in some cases, both may be present. ***There may be cases of no evidence even where the Government is acting bona fide; the said infirmity may also exist where the Government is acting mala fide and in that case, the conclusion of the Government not supported by any evidence may be the result of mala fides, but that does not mean that if it is proved that there is no evidence to support the conclusion of the Government, a writ of certiorari will not issue without further proof of mala fides.*** *That is why we are not prepared to accept the learned Attorney-General's argument that since no mala fides are alleged against the appellant in the present case, no writ of certiorari can be issued in favour of the respondent."*

32. In the facts of the instant case, it is not in dispute that the petitioner appeared to participate in the departmental enquiry, he filed written statement denying the allegations. Further, he demanded that the employees/staff named by him be summoned for cross-examination, which admittedly was declined by the Enquiry Officer only for the reason that the witnesses were not mentioned in the charge-sheet, therefore, were not required to be summoned. The Enquiry Officer sought to prove the charges relying upon the documents which were not proved by their author nor the author of the documents were summoned for cross-examination. Even if the employee refuses to participate in the enquiry, the employer cannot straight away dismiss him, but must hold an ex-parte enquiry where evidence must be led as held by the Supreme Court in ***Imperial Tobacco Company Limited Vs. Its Employees.***

33. It is an elementary principle that a person, who is required to answer a charge must know not only the accusation but also the testimony by which the accusation is supported. He must be given fair chance to hear the evidence in support of the charge and to put such relevant questions by way of cross-examination as he desires. Then he must be given a chance to rebut the evidence led against him. It is admitted that the witnesses sought by the petitioner to be summoned were authors of the documents listed in the charge-sheet and the documents were to be used against the petitioner to prove the charge. This is the rarest requirement of an enquiry of this character and this requirement must be substantially fulfilled before the result of the enquiry. Reference may be made to the decision rendered in ***Meenglas Tea Estate V. The Workmen.*** Nothing of this sought was done by the Enquiry Officer.

34. Further, reliance has been placed on communication dated 15 October 2010, issued by the Commissioner, Allahabad Division, Allahabad, addressed to the Principal Secretary Village Development Uttar Pradesh, wherein, it has been stated that pursuant to the order passed by the Division Bench, petitioner is entitled to subsistence allowance, as the enquiry had not been concluded within four months, as directed by the Court. In the opinion of the Commissioner, in case,

subsistence allowance is to be paid to the petitioner which would workout to be a large amount, that would tantamount to financial irregularity. Accordingly, the Commissioner recommended that an enquiry be conducted by the department against the Disciplinary Authority. The order was received on 17 October 2018 by the second respondent, the Disciplinary Authority, who on the very same date under threat and coercion exercised by Divisional Commissioner passed the impugned order hurriedly in violation of the mandatory rules with impunity.

35. In this backdrop, it is urged that the impugned order has been passed on the fear of the superior officer, who had expressed his mind that he was having some grudge and/or prejudice against the petitioner. In other words, it is contended that the Disciplinary Authority was coerced to pass the impugned order dismissing the petitioner from service. The documents placed on record by the petitioner before the Court has not been denied by the respondents, rather it is admitted. The facts reflect that petitioner has been subjected to repeated victimisation under the garb of holding departmental enquiry.

36. Learned counsel for the respondent, finally, has raised a preliminary objection with regard to the maintainability of the writ petition. It is sought to be urged that the petitioner has an alternative remedy of either preferring a statutory appeal under Rules, 1999, or approaching the Administrative Tribunal.

37. In rebuttal, it is urged that the petitioner has not raised any defence on merit nor has he led any evidence to show that the charges against the petitioner could not have been proved. The contention of the learned counsel for the petitioner is that taking the charges as they stand it does not make out a case of misconduct being absolutely vague and unclear. Further, the mandatory provision of Rule 7 has not been followed as is writ large from the enquiry report without raising any counter argument. Petitioner has been subjected to harassment by the respondents wilfully and deliberately with a pre-determined mind to ensure that he is kept out of service. In the circumstances, it is urged that alternative remedy, in the given facts, is a futile exercise. The submission of the learned Counsel for the petitioner has merit. The objection, accordingly, is rejected.

38. The question that follows is as to whether petitioner is entitled to back-wages on reinstatement. In ***Deepali Gundu Surwase vs. Kranti Junior Adhyapak Mahavidyalaya (D.ED.) and others,*** Supreme Court held, in case of wrongful termination of service, reinstatement with continuity of service and back wages is the normal rule. Where the Court reaches a conclusion that the inquiry was held in respect of frivolous issue or petty misconduct, as a camouflage to get rid of the employee or victimise him, and the punishment is a result of such scheme or intention. In such cases, the principles relating to back wages will be the same as those applied in the cases of illegal termination.

The proposition which was culled out from the judgments referred by the Supreme Court while deciding the issue of back-wages, inter alia, for the instant case is as follows:

"(i) In cases of wrongful termination of service, reinstatement with

continuity of service and back wages is the normal rule.

(ii) xxx xxx xxx xxx

(iii) xxx xxx xxx xxx

(iv) xxx xxx xxx xxx

(v) The cases in which the competent court or tribunal finds that the employer has acted in gross violation of the statutory provisions and/or the principles of natural justice or is guilty of victimizing the employee or workman, then the court or tribunal concerned will be fully justified in directing payment of full back wages. In such cases, the superior Courts should not exercise power under Article 226 or 136 of the Constitution and interfere with the award passed by the Labour Court, etc., merely because there is a possibility of forming a different opinion on the entitlement of the employee/workman to get full back wages or the employer's obligation to pay the same. The Courts must always be kept in view that in the cases of wrongful/illegal termination of service, the wrongdoer is the employer and sufferer is the employee/workman and there is no justification to give premium to the employer of his wrongdoings by relieving him of the burden to pay to the employee/workman his dues in the form of full back wages."

39. The principle of entitlement of back-wages applicable to workmen under labour laws would not however, apply to government servants governed by statutory rules. Rule 54-A of the U.P. Fundamental Rules deals with pay and allowances admissible to a government servant where the dismissal is set aside by a competent court. Rule 54-A reads thus:

"Rule 54-A. (1) Where the dismissal, removal or compulsory retirement of a Government servant is set aside by a Court of Law and such Government servant is reinstated without holding any further inquiry, the period of absence from duty shall be regularised and the Government servant shall be paid pay and allowances in accordance with provisions of sub-rule (2) or (3) subject to the directions, if any, of the Court.

(2) xxx xxx xxx xxx

(3) If the dismissal, removal or compulsory retirement of a Government servant is set aside by the Court on the merits of the case, the period intervening between the date of dismissal, removal or compulsory retirement including the period of suspension preceding such dismissal, removal or compulsory retirement, as the case may be, and the date of reinstatement shall be treated as duty for all purposes and he shall be paid the full pay and allowances for the period, to which he would have been entitled, had he not been dismissed, removed or compulsory retired or suspended prior to such dismissal, removal or compulsory retirement, as the case may be."

Having due regard to the mandatory provision and in view of the findings returned here-in-above, petitioner is entitled to full pay and allowance on reinstatement.

40. In the given facts and circumstances of the case, the disciplinary proceedings initiated against the petitioner is accordingly quashed, consequently, the impugned order dated 17 October 2018, passed by the second respondent-Joint Development Commissioner, Allahabad, stands quashed. The writ petition is allowed. Petitioner shall be reinstated forthwith and shall be paid full pay and allowances from the date of termination

i.e. 30 March 1999, with all consequential benefits.

41. The cost of litigation assessed at Rs.25,000/- payable to the petitioner by the second respondent.

(2019)12 ILR A576

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.10.2019

BEFORE
THE HON'BLE AJIT KUMAR, J.

Writ A No. 39402 of 2017

Dashrath Lal ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Gautam Baghel, Sri D.K. Ojha

Counsel for the Respondents:
C.S.C.

A. Service Law - Civil Services Regulations- petitioner was senior clerk on regular pay scale -period worked on ad-hoc basis in permanent establishment- shall also be counted in computation of pensionable service.

Writ Petition allowed. (E-9)

List of cases cited: -

1. Shashi Srivastava v. State of U.P. & Another 2019 (7) ADJ 302 (DB)

2. Prem Singh v. State of U.P. 2019 LawSuit (SC) 1557

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

1. Heard Sri Gautam Baghel, learned counsel for the petitioner, learned Standing Counsel appearing for the State respondents and perused the record.

2. By means of this petition under Article 226 of the Constitution, the petitioner has challenged the order dated 21.02.2017, whereby, the total pensionable service of the petitioner has been counted as 14 years 9 months and 10 days and the period running from 26.06.1987 to 21.12.2001 during which the petitioner worked only on ad-hoc capacity has been held to be not countable for the purposes of pension.

3. Briefly stated facts of the case are that the petitioner was appointed on 25.06.1987 on the post of Senior Clerk on regular pay scale but on ad-hoc basis and his appointment was to last till regular selection was to be made.

4. It transpires that the petitioner continued to work on ad-hoc basis until he came to be regularized on 01.06.2016. The order regularizing the services of the petitioner dated 01.06.206 for convenience, is reproduced hereunder:

''कार्यालय अधिशाषी अभियन्ता, ग्रामीण अभियन्त्रण विभाग,
प्रखण्ड इलाहाबाद
पत्रांक 523/ग्रा0अ0वि0/2016–17
दिनांक 01–6–16''

कार्यालय आदेश

शासनादेश संख्या 15/18/86–का–1–2001 लखनऊ दिनांक 20.12.2001 में निहित निर्देश के अंतर्गत श्री दशरथ लाल कनिष्ठ सहायक (तदर्थ रूप से नियुक्त) का विनियमितीकरण अधीक्षण अभियन्ता, ग्रामीण अभियन्त्रण विभाग, परिमण्डल इलाहाबाद के पत्रांक 650/ग्रा0अ0वि0/स्था0/विनियमितीकरण/2012–13 दिनांक 16.8.2012 में किया गया था। निदेशक एवं मुख्य अभियन्ता, ग्रामीण अभियन्त्रण विभाग, उ0प्र0 लखनऊ के पत्रांक 2147–2246/ग्रा0अ0वि0/स्था0–2/अमरजीत–इलाहाबाद/2014–15 दिनांक 17.11.2014 के अनुपालन में

अधीक्षण अभियन्ता, ग्रामीण अभियन्त्रण विभाग, परिमण्डल इलाहाबाद के पत्रांक 1295 / ग्रा0अ0वि0 / स्था0 / वि0नि0 / 2014–15 दिनांक 01.12.2014 द्वारा विनियमितीकरण कार्यवाही किए जाने का निर्देश दिया गया।

उक्त के अनुपालन में श्री दशरथ लाल कनिष्ठ सहायक को उपरोक्त संदर्भित शासनादेश दिनांक 20.12.2001 के परिपालन में प्रखण्ड में तत्समय उपलब्ध कनिष्ठ सहायक के पद के सापेक्ष दिनांक 20.12.2001 से कनिष्ठ सहायक के पद पर विनियमितीकरण किया जाता है।

अधिशाषी अभियन्ता
ग्रामीण अभियन्त्रण विभाग
प्रखण्ड इलाहाबाद

पत्रांक एवं दिनांक उपरोक्तानुसार–

प्रतिलिपि– निम्नलिखित को सूचनार्थ एवं आवश्यक कार्यवाही हेतु प्रेषित।

1– संबंधित कर्मचारी, ग्रामीण अभियन्त्रण विभाग, प्रखण्ड इलाहाबाद।

2– अधीक्षण अभियन्ता, ग्रामीण अभियन्त्रण विभाग, परिमण्डल इलाहाबाद।

3– मुख्य वरिष्ठ सहायक, ग्रामीण अभियन्त्रण विभाग, प्रखण्ड इलाहाबाद।

4– व्यक्तिगत पत्रावली हेतु।

अधिशाषी अभियन्ता

ग्रामीण अभियन्त्रण विभाग

प्रखण्ड इलाहाबाद

5. From the bare reading of the aforesaid order regularizing the services of the petitioner, it is clearly revealed that the petitioner has been regularized against the post on which he had continued since 1986 on ad-hoc basis. The petitioner thereafter, attained the age of superannuation on 30.09.2016.

6. The question then arose relating the period of service that the petitioner has rendered for the purposes of computation of pensionable service and by the impugned order dated 21.02.2017, the period during which the petitioner continued on ad-hoc basis, has been left out and the period from 2001 until the age of superannuation by the petitioner worked on a regular basis after his regularization in service, has only been computed.

7. The argument advanced by learned counsel for the petitioner is that the issue regarding qualifying period of service for pension purpose whether would include temporary, ad-hoc or work charge period of service, is no more *res integra* and for this purpose, he has placed reliance of a judgment of this Court in the case of **Shashi Srivastava v. State of U.P. & Another 2019 (7) ADJ 302 (DB).**

8. Considering the relevant provisions of Rule 3(8) of Civil Services Regulations, as contained in Regulation 368, the Division Bench has held that the period during which a person has continued on ad-hoc basis in a permanent establishment, shall also count towards the pensionable service. The relevant paragraphs of the judgment in the case of **Shashi Srivastava** (*supra*) are reproduced hereunder:

"6. Under U.P. Retirement Benefit Rules, 1961 (hereinafter referred to as "Rules, 1961") "qualifying service" is defined in Rule 3(8). It means 'service' which qualifies for pension in accordance with provisions of Article 368 of C.S.R. Rule 3(8) is quoted as below:-

"Rule 3(8)- " Qualifying service" means service which qualifies for pension in accordance with the provisions of Article 368 of the Civil Services Regulations:

Provided that continuous temporary or officiating service under the Government of Uttar Pradesh followed without interruption by confirmation in the same or any other post except-

(i) periods of temporary or officiating service in a non-pensionable establishment.

(ii) periods of service in a work-changed establishment, and

(iii) periods of service in a post, paid from contingencies; shall also count as qualifying service.

Note- If service rendered in a non-pensionable establishment, work-charged establishment or in post paid form contingencies falls between two periods of temporary service in a pensionable establishment or between a period of temporary service and permanent service in a pensionable establishment, it will not constitute an interruption of service." (emphasis added)

7. Article 368, C.S.R., provides that service does not qualify, unless officer holds a substantive office in a permanent establishment. Articles 368 and 369 are quoted herein below:

"368. Service does not qualify unless the officer holds a substantive office on a permanent establishment.

369. An establishment, the duties of which are not continuous but are limited to certain fixed periods in each year, is not a temporary establishment. Service in such an establishment, including the period during which the establishment is not employed qualifies but the concession of counting as service the period during while the establishment is not employed does not apply to an officer who was not on actual duty when the establishment was discharged, after completion of its work, or to an officer who was on actual duty on the first day on which the establishment was again re-employed."

8. It is not in dispute that petitioner was appointed on substantive post in permanent establishment which is/was pensionable. Nature of his appointment i.e. ad-hoc appointment is not of much relevance in as much as period spent by him as ad-hoc was in permanent pensionable establishment, which ultimately resulted into regularization of petitioner without any break in service.

9. Moreover, vide Sub-rule 8 of Rule 3 of Rules 1961, qualifying service includes temporary service followed by confirmation and continued without interruption. In this view of the matter, services rendered by petitioner on ad-hoc basis followed by Regularization would stand covered under "qualifying service" defined under Rule 3(8) of Rules 1961, for the purpose of pension.

10. In taking this view we are fortified by a Division Bench decision in State of U.P. and Others vs. Dr. Amrendra Narain Srivastava, 2012 (8) ADJ 376. Similar issue recently has been considered by this Court in Dr. Indrapal Singh Sachan vs. State of U.P. and 4 Others, (Writ -A o. 62179 of 2015) decided on 07.02.2018, wherein this Court has followed judgment passed in Writ Petition No. 65873 of 2014 and directed that adhoc service would be counted for payment of retiral benefit treating the same as "qualifying service". Judgment passed in Dr. Indra Pal Singh Sachan (supra) reads as under:-

"Heard Shri Ashok Khare, learned Senior Counsel, assisted by Shri Siddharth Khare, learned counsel for the petitioner and learned Standing Counsel appearing for the respondents.

Pleadings have been exchanged between the parties and we have perused the same.

The petitioner is aggrieved by the office order dated 9th September,

2015, passed by the Principal Secretary, AYUSH, State of U.P., whereby the representation of the petitioner, for payment of pensionary benefits, has been rejected.

The petitioner was appointed as Ayurvedic doctor on contract basis vide order dated 1.12.1988. The petitioner continued to function as such. A Writ Petition No. 4806 of 1990 (U.P. Anskalik Chikitsak Sangrah Samiti vs. State of U.P. and another), came to be filed by association of Ayurvedic doctors. It was decided vide judgment and order dated 11.9.1992, with a direction to consider the claim of their regularisation within six months and for the payment of full salary of a Medical Officer.

In pursuance of the above judgment of this Court, an office order was issued on 28.2.1992, directing for treating the services of the contract basis Ayurvedic doctors on ad hoc basis. The petitioner was also included in the list attached with the aforesaid office order and his services also were treated on ad hoc basis.

Subsequently, by order dated 25th September, 2009, the services of all ad hoc doctors were regularized and, accordingly, the services of the petitioners were also regularized with effect from 16.3.2005. The petitioner, ultimately, retired on 30.9.2007. On his retirement, he raised a claim for grant of pensionary benefits, which was not accepted. Therefore, he filed Writ Petition No. 49467 of 2012 (Dr. Indrapal Singh Sachan vs. State of U.P. and others), which was disposed of on 22.4.2015, observing that the issue arising in the petition stand answered by the decision of the Court, rendered in Writ Petition No. 61974 of 2011 (Dr. Amrendra Narain Srivastava vs. State of U.P. and others), which has been followed in Writ Petition No. 65873 of 2014 (Dr. Mohd. Mahboob Husain Abbasi vs. State of U.P. and 4 others). Accordingly, the Principal Secretary, Department of Medical Education, Government of U.P., Lucknow, was directed to consider the claim of the petitioner within a time-bound period, keeping into mind the parameters as has been settled in the aforesaid two decisions.

In pursuance of the above, the impugned order has been passed, rejecting the representation of the petitioner with regard to the claim of the pentionary benefits.

The claim of the petitioner has been distinguished in it from that of Dr. Amerendra Narain Srivastava, on the ground that the petitioner was never confirmed, therefore, his services cannot be counted for the purposes of grant of pension. In the case of Amrendra Narain Srivastava, the Division Bench has dealt with the Uttar Pradesh Retirement Benefit Rules, 1965, and the period of qualifying service mentioned therein vis a vis Regulation 368 of the Civil Services Regulations and came to the conclusion that the petitioner therein shall be entitled to pension from the date on which he joined the services by adding the services rendered by him in temporary capacity to his services rendered by him with the Government Department on substantive basis. In other words, on being absorbed in the Government Department in substantive capacity or being regularized, it was provided that the services earlier rendered by him may be in a temporary capacity has to be counted for the purposes of payment of pension.

The aforesaid decision has been followed in the case of Dr. Mohd. Mahboob Husain Abbasi.

In the instant case also, the services of the petitioner, treated to be on ad hoc basis vide order dated 28.2.1992, was ultimately regularized vide order dated 25.9.229 with effect from 16.3.2005. Thus, once the petitioner stood duly regularized/confirmed, the services, rendered by him prior to his regularization on ad hoc basis, would be included in his length of service for the purposes of grant of pension. In this way, for the purposes of pension, the petitioner has rendered service with effect from 28.2.1992 till 30.9.2007. The said period is more than the qualifying service period of 10 years necessary for the grant of pensionary benefits.

In view of the aforesaid facts and circumstances, the distinction, made by the Principal Secretary in passing the impugned order, is not tenable and, accordingly, the same is hereby quashed, holding that services rendered by the petitioner with effect from 28.2.1992, shall be counted in his services rendered by him after his regularization for the purposes of grant of pension. The respondents are, as such, directed to work out the pension admissible to the petitioner as aforesaid and to start paying the same as well as the arrears. The arrears shall be paid with interest of 8 per cent within a period of three months.

The writ petition is allowed, accordingly."

9. Very recently, the Apex Court in the case of **Prem Singh v. State of U.P. 2019 LawSuit (SC) 1557** has observed in quite unequivocal terms that even the service period of an employee in capacity of a work charged employee shall be added while counting qualifying service for computation of pension. Vide para 29 and 30, the Apex Court has observed thus:

"29. We are not impressed by the aforesaid submissions. The appointment of the work-charged employee in question had been made on monthly salary and they were required to cross the efficiency bar also. How their services are qualitatively different from regular employees? ***No material indicating qualitative difference has been pointed out except making bald statement. The appointment was not made for a particular project which is the basic concept of the work charged employees. Rather, the very concept of work-chargedemployment has been misused by offering the employment on exploitative terms for the work which is regular and perennial in nature.*** *Payment used to be made monthly but the appointment was made in the pay scale of Rs.200-320. Initially, he was appointed in the year 1978 on a fixed monthly salary of Rs.205 per month.* ***They were allowed to cross efficiency bar also as the benefit of pay scale was granted to them during the period they served as work-charged employees they served for three to four decades and later on services have been regularized time to time by different orders.*** *However, the services of some of the appellants in few petitions/ appeals have not been regularized even though they had served for several decades and ultimately reached the age of superannuation.*

30. ***In the aforesaid facts and circumstances, it was unfair on the part of the State Government and its officials to take work from theemployees on the work-charged basis.*** *They ought to have resorted to an appointment on regular basis.* ***The taking of work on the work-charged basis for long amounts to adopting the exploitative device. Later on, though their services have been***

regularized. However, the period spent by them in the work-charged establishment has not been counted towards the qualifying service. Thus, they have not only been deprived of their due emoluments during the period they served on less salary in work charged establishment but have also been deprived of counting of the period for pensionary benefits as if no services had been rendered by them. The State has been benefitted by the services rendered by them in the heydays of their life on less salary in work- charged establishment. *(Emphasis added)*

10. Learned Standing Counsel appearing for the contesting respondents does not dispute the above legal position.

11. In view of the above facts and circumstances of the case and the legal position emerging out from the judgment (*supra*), this writ petition deserves to be allowed.

12. The writ petition succeeds and is accordingly **allowed.**

13. The order dated 21.02.2017 (Annexure No. 8 to the writ petition) and the order dated 24.03.2017 (Annexure No. 10 to the writ petition) are hereby quashed and the respondents are directed to include the period of service which the petitioner has spent on ad-hoc basis from 25.06.1987 till 20.12.2001 towards pension and the pension shall accordingly be calculated and the due amount as consequence thereof shall be paid within a period of three months from the date of production of certified copy of this order.

(2019)12 ILR A581

ORIGINAL JURISDICTION
CIVIL SIDE

DATED: ALLAHABAD 11.09.2019 & 15.11.2019

BEFORE
THE HON'BLE AJIT KUMAR, J.

Writ A No. 58005 of 2017
&
Ref: Civil Misc. Correction Appl. No. 7 of 2019

Hari Om Yadav ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Sunil Kumar Srivastava, Sri Ashok Khare

Counsel for the Respondents:
C.S.C., C.S.C.

A. Education Law - Intermediate Education Act, 1921 - Section 16 FF - Minority Institution - Appointment on the post of Assistant Teacher - L.T. grade - DIOS disapproved the selection - on the ground-that post had lapsed under relevant regulations and advertisement - not proper - not held anywhere that petitioner was ineligible otherwise - DIOS can withhold the approval only on ground of lack of qualification.

Writ Petition allowed. (E-9)

List of cases cited: -

1. Mukesh Singh Chauhan and others v. State of U.P. and others, 2006 (4) AWC 3471

2. C/M St. John's Girls' Inter College M.G. Road, Agra v. Joint Director of Education, Agra Region, Agra and others (Writ- A No.- 29428 of 2017 decided on 19th August, 2017)

3. The Manager, Corporate Educational Agency v. James Mathew and others, (Civil Appeal Nos.- 826-827 of 2017)

4. Secretary Malankara Syrian Catholic College v. T. Jose and others, reported in 2007 (1) SCC 386

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

1. Heard Sri Sunil Kumar Srivastava, learned counsel for the petitioner and learned Standing Counsel for the State- respondent.

2. In view of the office report dated 20th January, 2018, service of notice upon the respondent No.4 is deemed sufficient and accordingly, this Court proceeds finally to decide the matter.

3. The petitioner before this Court claims to have been validly appointed as Assistant Teacher in L.T. Grade by the 4th respondent in the institution, namely, 'Christian Inter Inter College, Mainpuri' admittedly a minority institution. The petitioner has become aggrieved by the order passed by the District Inspector of Schools dated 7th October, 2017, whereby an appointment of the petitioner has been disapproved by the District Inspector of Schools exercising power under Section 16 FF of Intermediate Education Act, 1921 and another order dated 13th October, 2017, whereby papers relating to the selection and appointment of the petitioner have been returned and the 4th respondent has been directed to act afresh in accordance with the letter dated 7th April, 2017 issued by the Director Education (Secondary), U.P. Lucknow.

4. Briefly stated facts of the case are that in the minority institution being run by the respondent No.4, it is stated that two vacancies arose of Assistant Teacher in L.T. Grade on 30th June, 2014 due to retirement of Mr. Stanley M. Lal and also on account of promotion of one Mr. Vinay Kumar as Lecturer (Hindi). According to the petitioner and as per norms the existing sanction strength of Faculty in L.T. Grade, the total number of posts are 29 duly approved by the State Government and this has come to be acknowledged by the District Inspector of Schools in his letter dated 20th December, 2012. As a consequence to the vacancy fallen vacant substantively, the 4th respondent issued an advertisement in two widely circulated newspapers, namely, Amar Ujala (Hindi) on 20th March, 2015 and Sunday Express (English) on 5th April, 2015, a copy whereof has been brought on record as Annexure- 2 to the writ petition. Pursuant to the said advertisement the petitioner applied for the post of Assistant Teacher in L.T. Grade and was interviewed on 6th July, 2016 by the Selection Committee and was selected. Selection result issued by the Selection Committee in which the petitioner and one Ajay Kumar Singh have been shown as selected bears the signatures of the members of the Committee including Chairman.

5. The papers were forwarded to the District Inspector of Schools by the Manager of the Committee of Management on 22nd July, 2016 as required under Section 16FF of the Intermediate Education Act, 1921. However, since the matter remained pending before the District Inspector of Schools and the statutory period provided for under the regulations within which the District Inspector of Schools has to take decision either way and he did not take decision, the Committee of Management proceeded to issue appointment order to the petitioner on 28th November, 2016. The petitioner submitted his joining on 1st December, 2015 in the institution as Assistant Teacher in L.T. Grade. As the petitioner had joined and was discharging

duties that in the meanwhile on 7th October, 2017 the District Inspector of Schools passed a detailed order disapproving the selection and appointment of the petitioner as Assistant Teacher in L.T. Grade in the institution on two basic grounds:-

(1). First ground taken by the District Inspector of Schools in his order is that the post in question had lapsed in view of the relevant provisions as contained in the regulations under Intermediate Education Act, 1921. According to Regulation 20 of Chapter II of the Intermediate Education Act, 1921, if the post is not filled up within three months of its falling vacant, it automatically lapses and then it becomes necessary to get it revived. In support of the stand taken by the District Inspector of Schools, he has reminded the Committee of Management to its own letters dated 21st September, 2016 and 5th October, 2016 seeking revival of the vacancies that had been lapsed and the District Inspector of Schools in that regard had made recommendations for the revival for only two positions in his letter dated 21st January, 2017 addressed to the Director of Education (Secondary), U.P. Lucknow and the Director of Education (Secondary) U.P. Lucknow had issued an order on 7th April, 2017 reviving the post of Lecturers (Psychology) and (Hindi). However, in the category of L.T. Grade those two posts were not revived.

(2). Another reason assigned in the order impugned is that the advertisement was not properly made and that too not in two widely circulated in the daily newspapers and, therefore, the selections and appointments are bad being *de hors* the procedure prescribed in law and it is since the appointments have been held bad, the District Inspector of Schools has subsequently passed another order directing the management to proceed in accordance with letter dated 7th April, 2017.

6. Assailing the order aforesaid, passed by the District Inspector of Schools, the argument advanced by the learned counsel for the petitioner is that the posts cannot automatically lapse as sanction once granted cannot be treated to be withdrawn automatically by lapse of time unless the order/ sanction is so conditioned. The provision as contained under Regulation 20 Chapter II, it is argued, is merely directory and recommendatory in nature. It is submitted vehemently that the post once has been created can be cancelled by way of a written order and that too with proper approval of the authority concerned. Moreover, he submits that the District Inspector of Schools has failed to detail out under what circumstances the post has lapsed as there is no reference about the period during which the post had remained vacant.

7. It has been further argued by the learned counsel for the petitioner that in the matter of minority institutions the parameters for granting approval to the selection is not same as applicable to other institutions. It is submitted that minority institution has been given freedom to make selection in accordance with its own choice and what has to be seen is only the applications are invited from open market and there is an advertisement of the vacancy and those selected possess requisite qualifications. It has also been argued that the stand taken by the District Inspector of Schools that vacancies were not duly advertised is not

correct because vacancy was duly advertised in widely circulated daily newspaper like Amar Ujala (Hindi) and Sunday Express (English).

8. *Per contra,* the argument advanced by the learned Standing Counsel is that the minimum requirement of law is existence of vacancy and fair procedure in matter of the selection is sine qua non qua the appointments. He submits that once the management itself sought revival of the post in question and no order in response to the request was made by the competent authority, the management should have waited. It is further argued that the advertisement is meant for public, offering opportunities to all the eligible persons to apply against the vacancy advertised. Every advertisement should be clear in terms of qualification, pay-scale and the nature of the vacancy inasmuch as the date should be specified relating to time period within which the applicant has to apply. He submits further that the in respect of the aided institutions where the grant is being received from the public exchequer, a duty is cast upon the District Inspector of Schools to ensure that one who is paid salary is duly selected and appointed and is eligible for the post that he holds even in the matters of appointment in minorities institutions. He argued that there is no error much less a substantial one in the order impugned so as to warrant interference in the matter.

9. Having heard learned counsel for the learned counsel for the petitioner and their arguments advanced across the Bar and having perused the record, I find that only two points required consideration in the matter:-

(A). Whether the post would lapse under Regulation 20 Chapter II of the Intermediate Education Act, 1921 in case if it is not advertised/ proceedings for initiating selection and appointment is not made within a period of 90 days and so there did not exist vacancy resulting in appointment of the petitioner as *null and void*.

(B). Whether the procedure otherwise adopted by the institution in conducting selection and appointment of the petitioner is bad being vitiated in law for non compliance of necessary rules and the petitioner is otherwise also not eligible for the post he holds.

10. Coming to the first point; the controversy should no longer detain this Court as the regulations framed under Chapter II of the Intermediate Education Act, 1921 have been already held only guidelines in respect of the minorities institutions in the case of **Mukesh Singh Chauhan and others v. State of U.P. and others, 2006 (4) AWC 3471.**

11. Very recently in the case of **C/M St. John's Girls' Inter College M.G. Road, Agra v. Joint Director of Education, Agra Region, Agra and others** (Writ- A No.- 29428 of 2017 decided on 19th August, 2017) a concurrent Bench of this Court while dealing with Regulation 20 of Chapter II framed under the Intermediate Education Act, 1921 has held it to be not mandatory. This Court considering such above aspect in the judgment (*supra*) has held thus:-

"Indisputably, the institution is a minority institution. There is no dispute that the post on which the petitioner has made appointment is a sanctioned post and one regular teacher Smt. V. Ivan was working on the said post and she attained her age of superannuation on 30th June,

2015. It is also not disputed that the Committee of Management of the institution has sent three successive communications to the District Inspector of Schools seeking his permission to make the advertisement. This fact has been admitted in paragraph-13 of the counter affidavit. Section 16-FF(4) of the Act, 1921 came to be considered in a large number of cases by this Court. A simple reading of Section 16-FF(4) would show that the District Inspector of Schools has been empowered to withhold the selection only on the ground of lack of qualification of teachers. As regards Regulation 20 of Chapter II of the Regulations framed under the Act, 1921, it came to be considered in the above mentioned three cases. The consistent view taken by this Court is that the Regulations are merely guidelines in view of the explicit statutory provision, which has used the words that the District Inspector of Schools can withhold the approval only on the ground of lack of qualification.

In view of the above, I am of the opinion that the view taken by the District Inspector of Schools-II, Agra, the second respondent, declining approval is unsustainable. Accordingly, the impugned order dated 05th December, 2016 passed by the second respondent is set aside."

12. Coming to the second aspect of the matter law is well settled that in matters of procedure to be followed by in the minorities institutions in the light of the spirit of the provisions as contained under sub-section 4 of Section 16-FF, in my considered opinion, once the candidate is found to be eligible who has been given appointment, the District Inspector of Schools cannot hold approval. Sub-section 4 of Section 16-FF of the Intermediate Education Act, 1921 is reproduced hereunder:-

"16-FF(4). The Regional Deputy Director of Education or the Inspector, as the case may be, shall not withhold approval for the selection made under this section where the person selected possesses the minimum qualifications prescribed and is otherwise eligible."

13. This Court had already dealt with such controversy in the case of **Mukesh Singh** (*supra*) wherein the Court was dealing with Regulation 17(A) (2) of Chapter II of the Regulations which provided for the procedure to be followed in matters of advertisement to be made in respect of the vacancies which are sought to be filled in. The Court held that these regulations are mere guidelines and if a candidate is otherwise eligible, his appointment cannot be disapproved in the minorities institutions by the authorities. Vide paragraph 8 of the judgment (*supra*) this Court has held thus:-

"8. Clause (4) of Section 16-FF indicates that the authority could not withhold the approval for the selection made where the persons selected possesses the minimum qualifications prescribed and was otherwise eligible. The impugned order does not speak about the qualifications of the petitioners nor does it indicate that the petitioners did not possess the requisite qualifications. In the absence of a finding in this regard, the District Inspector of Schools was therefore required to grant the approval of the appointments of the petitioners and could not go into the intricacies or irregularities alleged to have been made in the selection process, which otherwise did not exist, as would be clear hereinafter. In my opinion, the provision contemplated under Regulation 17 of

Chapter II of the Regulations framed under the Intermediate Education Act, in my opinion, could not override Sub-clause) of Section 16-FF of the Intermediate Education Act. In the opinion of the Court, Regulation 17 is only a guideline and any irregularity committed would not make a candidate ineligible when he was otherwise eligible and qualified for an appointment as contemplated under Sub-section [4] of Section 16-FF of the Act."

14. The freedom of the minorities institution in making selection and appointment against the vacancies in the institution has come to be considered in many cases by the Apex Court. The Apex Court in the case of **The Manager, Corporate Educational Agency v. James Mathew and others,** decided on 11th July 2017 (Civil Appeal Nos.- 826-827 of 2017) held that *the emerging position is that, once the Management of a minority educational institution makes a conscious choice of a qualified person from the minority community to lead the institution, either as the Headmaster or Principal, the court cannot go into the merits of the choice or the rationality or propriety of the process of choice. In that regard, the right under Article 30(1) is absolute.*

15. Further in the case of **Secretary Malankara Syrian Catholic College v. T. Jose and others**, reported in **2007 (1) SCC 386** repelling the argument raised by the learned counsel for the petitioner that Regulation 30 (1) cannot be used against members of the teaching staff as teachers belong to the same community in matters of appointment of Headmaster to the institution. Where the management has chosen headmaster exercising its discretion to select a person of its own choice, the Apex Court has held vide paragraph 28 of the judgment (*supra*) thus:-

"28. The appellant contends that the protection extended by Article 30(1) cannot be used against a member of the teaching staff who belongs to the same minority community. It is contended that a minority institution cannot ignore the rights of eligible lecturers belonging to the same community, senior to the person proposed to be selected, merely because the institution has the right to select a Principal of its choice. But this contention ignores the position that the right of the minority to select a Principal of its choice is with reference to the assessment of the person's outlook and philosophy and ability to implement its objects. The management is entitled to appoint the person, who according to them is most suited, to head the institution, provided he possesses the qualifications prescribed for the posts. The career advancement prospects of the teaching staff, even those belonging to the same community, should have to yield to the right of the management under Article 30(1) to establish and administer educational institutions."

16. Section 57(3) of the said Act that provided that the rule of seniority-cum-fitness for selection and appointment on the post of Principal of the aided institution was held to be violative of Article 30(1) of the Constitution and, accordingly, was held not applicable to the minority institutions.

17. In view of above exposition of law emerging out from the authorities cited above, coming to the facts of the

present case, and reason assigned in the order impugned in the present writ petition, I find that the District Inspector of Schools disapproved the selection and appointment only on the ground that the post had lapsed under the relevant regulations and that advertisement was not proper as per the provisions contained under the Regulations and the procedure prescribed for preparation for select list and now applying the law as discussed above, the reasons assigned in the order, therefore, cannot be sustained.

18. The District Inspector of Schools has not held anywhere in the order that the petitioner who was duly selected and appointed, did not possess the minimum qualification prescribed for under the Appendix (A) to the Regulations of Chapter II of the Intermediate Education Act, 1921. Accordingly, the order dated 7th October, 2017 and 13th October, 2017 passed by the District Inspector of Schools cannot be sustained and are hereby quashed.

19. The District Inspector of Schools is directed to reconsider the matter of approval, however he can exercise his discretion of enquiry only to the limited extent as to whether the petitioner did possess the requisite qualification for holding post on the date of his selection and appointment or not.

20. It is made clear that in case if the petitioner is found to have possessed the requisite qualification on the date of selection and appointment, the District Inspector of Schools shall proceed to issue positive directions approving appointment order and also for payment of salary.

21. The writ petition is, thus, allowed in terms of the order passed hereinabove.

(2019)12 ILR A587

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.10.2019

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE VIRENDRA KUMAR SRIVASTAVA, J.

Writ C No: 32096 of 2018

Indian Press Pvt. Ltd. ...Petitioner
Versus
State of U.P. & Ors.. ...Respondents

Counsel for the Petitioner:
Sri Komal Mehrotra, Sri Maya Shankar Srivastava, Sri Pramod Kumar Jain

Counsel for the Respondents:
C.S.C., Sri Ajit Kumar Singh (Addl. Advocate General), Sri Nimai Das Addl. C.S.C.

A. Civil Law - Public Premises (Eviction of Unauthorized Occupants) Act, 1971- Section 4 - Issue of notice to show cause against order of eviction - section 5 - Eviction of unauthorised occupants - Nazul Land - Resumption of land by state for public purpose – validity.

Litigation initiated by petitioner has given enough time to continue to hold and enjoy land in dispute - respondent authorities were denied opportunity to take possession of land in question for the purpose of carrying out developmental activities where time is a matter of essence -. more than twelve months have already been availed by petitioner to enjoy benefit of possession of land in dispute - It has enjoyed the same without spending even a single penny towards rent, damages, compensation for such enjoyment - Land in question is required for developmental activities in furtherance of developing Prayagraj City as "Smart City" - Developmental activities require an early

action, but, by indulging in litigation, petitioner has already delayed it sufficiently. (Para 144)
Held: **-** Petitioner has already enjoyed continued possession over land in dispute for the last almost more than a year - petitioner directed to vacate disputed land within one month. (Para 144)

Writ petition dismissed. (E-7)

List of cases cited: -

1.Purushottam Dass Tandon and others vs. State of U.P., Lucknow and others AIR 1987 All 56

2.Hajee S. V. M. Mohd. Jamaludden Bros. And Co. vs. Government of T.N., 1997 (3) SCC 466,

3.State of U. P. Vs. Zahoor Ahmad, (1973) 2 SCC 547,

4.Chintamani Ghosh and another vs. State of U. P. and others, 2001 (2) UPLBEC 1003,

5.State of Andhra PradeshVs. Kaithala Abhishekam, AIR 1964 AP 450,

6.Union of India and others vs. Harish Chand Anand, AIR 1996 SC 203,

7.Smt. Shakira Khatoon Kazmi and others vs. State of U. P. and others, 2002 (1) AWC 226 and

8.Azim Ahmad Kazmi and others vs. State of U. P. and others, 2012 (7) SCC 278.

9.Dyke v. Walford 5 Moore PC 434= 496-13 ER 557 (580)

10.Pierce Leslie and Co. Ltd. Vs. Miss Violet Ouchterlony Wapsnare, AIR 1969 SC 843

11.Collector of Masulipatam v. C. Vencata Narainapah 8 MIA 500, 525;

12.Ranee Sonet Kowar v. Mirza Himmut Bahadoor (2) LR 3 IA 92, 101,

13.Bombay Dyeing and Manufacturing Co. Ltd. v. State of Bombay [1958] SCR 1122, 1146,

14.Superintendent and, Legal Remembrancer v. Corporation of Calcutta (1967) 2 SCR 170.

15.Cook v. Sprigg (1899) AC 572

16.Raja Rajinder Chand v. Mst. Sukhi, AIR 1957 SC 286.

17.Nayak Vajesingji Joravarsingji v. Secretary of State for India in Council AIR 1924 PC 216

18.Dalmia Dadri Cement Co. Ltd. v. CIT [1958] 34 ITR 514 (SC) : AIR 1958 SC 816,

19.Promod Chandra Deb v. State of Orissa AIR 1962 SC 1288

20.Amarsarjit Singh v. State of Punjab AIR 1962 SC 1305

21.Thakur Amar Singhji v. State of Rajasthan AIR 1955 SC 504
22.State of Rajasthan vs. Sajjanlal Panjawat AIR 1975 SC 706

23.Director of Endowments, Govt. of Hyderabad vs. Akram Ali, AIR 1956 SC 60, and

24.Sarwarlal vs. State of Hyderabad, AIR 1960 SC 862.

25.Promod Chandra Deb vs. State of Orissa AIR 1962 SC 1288

26.Biswambhar Singh vs. State of Orissa 1964 (1) SCJ 364

27.State of U.P. vs. Zahoor Ahmad, 1973(2) SCC 547

28.Hajee S.V.M. Mohamed Jamaludeen Bros. & Co. vs. Government of Tamil Nadu (1997) 3 SCC 466

29.State of U.P. and others vs. United Bank of India and others (2016) 2 SCC 757

30.Pradeep Oil Corporation vs. Municipal Corporation of Delhi and others (2011) 5 SCC 270

31.Shakira Khatoon Kazmi vs. State of U.P., AIR 2002 All 101

32.Writ Petition No. 44517 of 1998, Sayed Shah Khursheed Ahmad Kashmi vs. State of U.P.

33.State of U.P. vs. Zahoor Ahmad, 1973(2) SCC 547

34.The State of U.P. vs. Zahoor Ahmad and Another, 1973(2) SCC 547

35.Purshottam Dass Tandon and others vs, State of U.P. And others, AIR 1987 All 56

36.State of U.P. and others vs. Purshottam Das Tandon and others 1989 Supp.(2) SCC 412

37.Bishan Das and others Vs. State of Punjab and others AIR 1961 SC 1570,

38.Express Newspapers Pvt. Ltd. and others Vs. Union of India (1986) 1 SCC 133,

39.Yar Mohammad and another vs. Lakshmi Das and others AIR 1959 Allahabad 1 and

40.Lallu Yeshwant Singh (dead) by his legal representative vs. Rao Jagdish Singh and others, AIR 1968 SC 620

41.Azim Ahmad Kazmi and others vs. State of U.P. and Another (2012) 7 SCC 278

42.Shanti Prasad Devi and others vs. Shankar Mahto and others (2005) 5 SCC 543

43.Sevoke Properties Ltd. vs. West Bengal State Electricity Distribution Company Ltd. AIR 2019 SC 2664

44.R.V. Bhupal Prasad v. State of A.P. (1995) 5 SCC 698.

45.Thakoor Chunder Parmanick Vs. Ramdhone Bhuttacharjee (1866) 6 W.R. 228;

46.Lala Beni Ram Vs. Kundan Lall (1899) L.R. 26 I.A. 58 and

47.Narayan Das Khettry Vs. Jatindranath (1927) L.R. 54 I.A. 218

48.Wazir Chand Vs. The State of Himachal Pradesh AIR 1954 SC 415

49.Express Newspapers Pvt. Ltd. and others Vs. Union of India (1986) 1 SCC 133

50.Bishan Das and others Vs. State of Punjab and others (supra) and State of Orissa Vs. Ram Chandra Dev AIR 1964 SC 685

51.Mohammed Hanif Vs. State of Assam (1969) 2 SCC 782

52.Yar Mohammad and another vs. Lakshmi Das and others AIR 1959 Allahabad 1

53.Lallu Yeshwant Singh (dead) by his legal representative vs. Rao Jagdish Singh and others, AIR 1968 SC 620

54.Jnanendra Nath Nanda vs. Jadu Nath Banerji AIR 1938 Cal 211

55.Secretary of State for India in Council vs. Lal Mohan Chaudhuri, AIR 1935 Cal 746

56.Lala Kishun Chand vs. Sheo Dutta, AIR 1958 All. 879

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

1. 'Prayagraj' has an old historicity tracing back to Vedic period. Lord Rama while in exile, rested in Rishi Bharadwaj Ashrama, on the bank of river Ganga. It is also known for King Harshvardhana, who used to come every twelve years to donate his entire wealth to needy and poor people. From the time of Lord Buddha, it is also a well known centre of education which continued when Allahabad University was founded on 23rd September, 1887 and reached its glory called "Oxford of East". A large number of social Reformers, Literary Scholars and Political personalities have their birth place at Allahabad. In 1575, when Akbar came to Allahabad and built a big fort, he was so fascinated by cultural, spiritual and also strategic location that he named it as "Abode of God" i.e. "Alhabas", which later changed to Allahabad under

Shah Jahan and now again as 'Prayagraj'. City lies close to "three-river confluence" i.e. Triveni Sangam, Originally known as "Prayag" i.e. place of sacrifice or offering. It plays a central role in Hindu Scriptures. The city was also called Kaushambi (now a separate district) by Kuru rulers of Hastinapur, who developed it as their capital. In 17th century under the reign of Jahangir, it was a Provincial capital. In 1580, Akbar created "Subah of Ilahabas" with Allahabad as its capital. In mid 1600, Salim had made an abortive attempt to seize Agra's treasury and came to Allahabad, seizing its treasury and setting himself up as a virtually independent Ruler. He however, reconciled with Akbar and returned to Allahabad where he stayed before returning to Royal Court in 1604. In 1833, it became the seat of ceded and conquered Provinces region before its capital was moved to Agra in 1835. Allahabad became the capital of North-Western Provinces in 1858 and was capital of India for a day. It was capital of United Provinces from 1902 to 1920. It had remained at the forefront of national importance during struggle for Indian independence and even thereafter till date. It has given three strong and most popular Prime Minister to the country namely Pt. Jawahar Lal Nehru, Smt. Indira Gandhi and Sri Vishwanath Pratap Singh.

2. Geographically, it lies at peninsula of Island having on three sides, two major rivers of India namely Ganga and Yamuna. During British period, they developed it as a strong military centre and what we called today "Civil Lines Area", was developed as Civil Station for civilians having huge land which was owned by Government in the form of Nazul. At that time, the then Government allotted land on long lease to its well wishers and others to oblige and otherwise pamper. The terms of lease though given enough control to Government towards its title but premium and rent was almost negligible. With the passage of time, population influx from nearby rural area increased number of local inhabitant multifold causing huge scarcity of land availability in the city.

3. Recently newly elected Central Government evolved a policy of developing various cities as 'Smart City' and for this purpose Allahabad, (now named as 'Prayagraj'), is also chosen to be developed as 'Smart City'. This has resulted in demand of huge land by various Government departments for own establishments necessary to develop the city as 'Smart City'. Since most of the State's land is in the hands of individuals, it has given rise to a virtual clash of interest and this High Court is witnessing a lot of litigations on this account.

4. The present writ petition is outcome of such dispute where State has sought to resume/re-enter its own land i.e. Nazul for public purpose and that is being opposed by petitioner. Land in dispute is sought to be resumed/re-entered by State, is required for developing as "Nurseries for Horticulture Department, Homeopathic/Ayurvedic/Unani Hospital, Office of Information Department and Office of Central Ground Water Board".

5. Indian Press Private Limited, sole petitioner has filed this writ petition under Article 226 of the Constitution of India with a prayer for issue of writ of certiorari to quash order dated 18.08.2018 passed by District Magistrate, Allahabad (respondent 2) (Annexure-1 to the writ petition) whereby petitioner has been

informed that land in dispute has been approved by State Government for resumption/re-entry of property and, therefore, petitioner must vacate the same. Further a writ of mandamus has been prayed directing respondents to consider petitioner's application dated 31.08.2016 for renewal of lease in the light of this Court's judgment in **Purushottam Dass Tandon and others vs. State of U.P., Lucknow and others AIR 1987 All 56,** affirmed by Supreme Court, and also not to evict petitioner from disputed land.

6. Land in dispute in present writ petition is Nazul, area 3609 square yard (i.e. 3017.48 square meter) situate in Intra Municipal Land at Bhardwaj Fatehpur Bichuwa (Hospital and Garden) (hereinafter referred to as "Disputed Nazul Land").

7. Facts in brief as stated in the petition are that petitioner-Indian Press Private Limited was established in 1884 by Sri Chintamani Ghosh, resident of Bengal who made his own home at Allahabad and the premises is now occupied by Art faculty of Allahabad University. Petitioner-Press was transferred to 36 Panna Lal Road, Allahabad on 17.05.1922 since earlier premises was taken over by State to establish Allahabad University. Land on which Petitioner-Press was transferred to function on 17.05.1922 became insufficient for expanding its work of printing and publication of books and journals. There was an adjoining plot, area 3017.48 square meters, which was on north east side of Petitioner-Press. This land was ,Nazul,. Therefore, Secretary of State for India in Council executed a lease deed dated 20.09.1926 in favour of Manager, Indian Press Private Limited, leasing out disputed land for a period of 30 years commencing from 15.09.1926 for construction of building, garden and hospital. Lease was renewed by lease deed dated 06.03.1961 and 29.01.1996. Latest renewal of lease deed dated 29.01.1996 was given effect from 15.09.1986. Since Lease was going to expire on 14.09.2016, hence, petitioner applied for fresh lease on 31.08.2016. When the matter was in process, respondent 2 passed impugned order dated 18.08.2018 stating that State Government has exercised right of resumption under provisions of Government Grants Act, 1895 *(hereinafter referred to as "GG Act, 1895").*

8. This order has been challenged on the ground that GG Act, 1895 has been repealed by Repealing and Amending (Second) Act, 2017 *(hereinafter referred to as "Repeal Act, 2017"),* hence reference to GG Act, 1895, is illegal; it has been passed in violation of principles of natural justice; no opportunity was given to petitioner; Commissioner was only competent authority to consider question of renewal of lease and District Magistrate had no such power; the alleged public purpose is superficial and eye wash; petitioner's Homeopathic Hospital is running on land in dispute; petitioner has right to renewal in view of judgment in **Purushottam Dass Tandon and others vs. State of U.P., Lucknow and others (supra);** procedure prescribed in Uttar Pradesh Public Premises (Eviction of Unauthorised Occupants) Act, 1972 *(hereinafter referred to as "U.P. Act, 1972")* has not been followed; petitioner has been discriminated, inasmuch as, in other matters lease has been renewed.

9. In para 43 of petition it is however stated that certain area of the building in which earlier Allopathic

dispensary was running upto the year 2000, was given to Mitra Prakashan, which is now under custody of Official Liquidator.

10. On behalf of respondents-2 and 3, a counter affidavit has been filed sworn by Sri Gore Lal Shukla, Additional District Magistrate (Nazul), Allahabad. It is said that Nazul Plot, Intra Municipal Land, at Bhardwaj Fatehpur Bichuwa, area 3609 square yard (i.e. 3017.48 square meter) was demised by an Indenture of lease dated 20.09.1926 executed by Collector, Allahabad on behalf of Secretary of State in favour of Management of Indian Press Private Limited. Lease was for a period of 30 years. It was granted for the purpose of Hospital and Garden and no other purpose. Lastly, lease was renewed in 1996 for a period of 30 years commencing from 15.09.1986 which ended on 14.09.2016. Renewal of lease was in same terms in which initial lease was granted. Lease was governed by GG Act, 1895 and there was specific condition in lease, permitting lessor i.e. State Government for re-entry on the land in dispute. Petitioner's application for renewal of lease has been rejected since land is required for public purpose by State namely for development of Nurseries for Horticulture Department, Homeopathic/Ayurvedic/Unani Hospital, Office of Information Department and Office of Central Ground Water Board. District Magistrate is competent to pass impugned order which simply communicates decision of Government for resumption and re-entry. Respondents have placed reliance on judgments in **Hajee S. V. M. Mohd. Jamaludden Bros. And Co. vs. Government of T.N., 1997 (3) SCC 466, State of U. P. Vs. Zahoor Ahmad, (1973) 2 SCC 547, Chintamani Ghosh and another vs. State of U. P. and others, 2001 (2) UPLBEC 1003, State of Andhra Pradesh Vs. Kaithala Abhishekam, AIR 1964 AP 450, Union of India and others vs. Harish Chand Anand, AIR 1996 SC 203, Smt. Shakira Khatoon Kazmi and others vs. State of U. P. and others, 2002 (1) AWC 226 and Azim Ahmad Kazmi and others vs. State of U. P. and others, 2012 (7) SCC 278.**

11. We have heard Sri Pramod Kumar Jain, Senior Advocate, assisted by Sri Komal Mehrotra, learned counsel for petitioner and Sri Ajeet Kumar Singh, Additional Advocate General, assisted by Sri Nimai Das and Sri Sudhanshu Srivastava, learned Additional Chief Standing Counsel for State of U.P. and its authorities.

12. The facts, as noticed above, show that this is an admitted position that land in dispute is 'Nazul'. Further terms and conditions of lease, as contained in initial lease deed, have continued broadly in all subsequent renewed lease deeds and two relevant terms contained in lease deeds are as under :

"PROVIDED ALWAYS and these presents are executed on this express condition that if and whenever the said rent or any part thereof shall be in arrear and unpaid ***for the space of one calendar month whether the same shall have been lawfully demanded or not*** *or if there shall be a breach or non-observance of any of the covenants by the Lessees hereinbefore contained then and in* ***any such case the Secretary of State notwithstanding the waiver of any cause or right of re-entry may re-enter upon***

the said premises *and* ***expel the lessee*** *and all occupiers of the same therefrom* ***and this demise shall absolutely determine and the lessees shall forfeit all rights to remove or recover any compensation for any buildings erected by him*** *on the said premises AND the Secretary of State hereby covenants with the lessee that he will at the request and cost of the lessee at the end of the said term of years and so on fresh time to time hereafter at the end of each successive term of years that may be granted execute to the lesseee a new lease of the said premises by way of renewal for the term of thirty years PROVIDED ALWAYS that such renewed terms of years as may be granted shall not with the original term of years exceeding the aggregate the period of ninety years and that the Secretary of State shall not be bound to grant any renewal except at the rate of rent then being paid for the said premises or as he may elect at such enhanced rate not exceeding 50 per cent, of the rent payable during the period immediately granting the renewal as may be assessed by such Collector regard being had to the circumstances of the demised plot and to the market value of similar plots in the neighbourhood which assessment shall be final save that where the estimated value of the plot shall exceed Rs. 300 the lessee shall have a right of appeal to the Commissioner of the Allahabad division."*

(Emphasis added)

13. Initial lease deed was granted on 20.09.1926 commencing from 15.09.1926. It was twice renewable for 30 years each. 90 years period expired admittedly on 14.09.2016. Therefore, maximum period for which lease could have been granted and renewed has already expired. It is now in these circumstances, we have to examine claim of petitioner for renewal of lease or to retain possession of land in dispute, opposing resumption/re-entry of State, is how far legal, valid and justified. In this aspect, the **first question,** which we propose to consider is, "what is Nazul"? Every land owned by State Government is not termed as 'Nazul' and therefore it has become necessary to understand, what is 'Nazul'.

14. State Government may own land by having acquired and vested in various ways, which includes vesting of land in the capacity of a Sovereign body and having right of bona vacantia. Property may also be acquired and owned by State by way of acquisition under the Statute relating to acquisition of land or by purchase through negotiation or gift by an individual or in similar other manners. All such land, which is owned and vested in State Government results in making the State, owner of such land, but in legal parlance, the term "Nazul" is not applicable to all such land.

15. It is only such land which is owned and vested in the State on account of its capacity of sovereign, and application of right of bona vacantia, which is covered by the term 'Nazul', as the term is known for the last more than one and half century. In Legal Glossary 1992, fifth edition, published by Legal Department of Government of India, at page 589, meaning of the term 'Nazul' has been given as 'Rajbhoomi, i.e., Government land'.

16. Nazul is an Arabic word. It refers to a land annexed to Crown. During British Regime, immoveable property of individuals, Zamindars, Nawabs and

Rajas when confiscated for one or the other reason, it was termed as 'Nazul property'. The reason being that neither it was acquired nor purchased after making payment. In old record, when such land was referred in Urdu, this kind of land was shown as 'Jaidad Munzabta'.

17. For dealing with such property, under the authority of Lt. Governor of North Western Provinces, two orders were issued in October, 1846 and October, 1848. Therein, after the words "Nazul property", its english meaning was given as 'Escheats to the Government'. Sadar Board of Revenue on May 20, 1845 issued a circular order in reference to "Nazul land" and in para 2 thereof it mentioned, "The Government is the proprietor of those land and no valid title to them can be derived but from the Government". Nazul land was also termed as "Confiscated Estate". Under Circular dated July 13, 1859, issued by Government of North Western Provinces, every Commissioner was obliged to keep a final confiscation statement of each District and lay it before Government for orders.

18. Right of King to take property by 'escheat' or as 'bona vacantia' was recognized by common law of England. Escheat of property was Lord's right of re-entry on real property held by a tenant, dying intestate, without lawful heirs. It was an incident of Feudal Tenure and based on the want of a tenant to perform Feudal services. On the tenant dying intestate without leaving any lawful heir, his estate came to an end and Lord, by his own right and not by way of succession or inheritance from the tenant, re-entered real property as Owner. In most of the cases, land escheated to Crown as the 'Lord Paramount', in view of gradual elimination of Intermediate or Mesne lords since 1290 AD. Crown takes as 'bona vacantia' goods in which no one else can claim property. In **Dyke v. Walford 5 Moore PC 434= 496-13 ER 557 (580)** it was said 'it is the right of the Crown to bona vacantia to property which has no other owner'. Right of the Crown to take as "bona vacantia" extends to personal property of every kind. The escheat of real property of an intestate dying without heirs was abolished in 1925 and Crown thereafter could not take such property as bona vacantia. The principle of acquisition of property by escheat, i.e., right of Government to take on property by 'escheat' or 'bona vacantia' for want of a rightful owner was enforced in Indian territory during the period of East India Company by virtue of Statute 16 and 17 Victoria, C. 95, section 27.

19. We may recollect, having gone through history, that prior to 1857, several Estates were taken over by British Company i.e. East India Company by way of annexation. Doctrine of lapse applied in Jhansi was another kind of above mentioned two principles.

20. The above provisions had continued by virtue of section 54 of Government of India Act, 1858, section 20(3)(iii) of Government of India Act, 1915 and section 174 of Government of India Act, 1935. After enactment of Constitution of independent India, Article 296 now continue above provision and say :

'Subject as hereinafter provided, ***any property in the territory of India which,*** *if this Constitution had not come into operation,* ***would have accrued to***

His Majesty or, as the case may be, to the Ruler of an Indian State by escheat or lapse, or as bona vacantia for want of a rightful owner, shall if it is property situate in a State, vest in such State, and shall, in any other case, vest in the Union.' (Emphasis added)

21. Article 296, therefore, has retained power of State to get ownership of such land, in respect whereof principle of 'escheat', 'lapse' or 'bona vacantia' would have been applicable prior to enforcement of Constitution of India. The above power continued to apply after enactment of Constitution with the only modification that if such land is situate within the territory of State Government, it will vest in State and in other cases, it will vest in Union of India. Vesting of land and giving ownership to State Government or Union of India under Article 296 is clearly in respect of a land, which will come to it by way of 'escheat', 'lapse' or 'bona vacantia' and not by way of acquisition of land under some statute or purchase etc.

22. In **Pierce Leslie and Co. Ltd. Vs. Miss Violet Ouchterlony Wapsnare, AIR 1969 SC 843** Court has considered the above principles in the context of 'Sovereign India' as stands under Constitution after independence, and, has observed :

"....in this country the Government takes by escheat immoveable as well as moveable property for want of an heir or successor. *In this country escheat is not based on artificial rules of common law and is not an incident of feudal tenure.* ***It is an incident of sovereignty and rests on the principle of ultimate ownership by the State of all property within its jurisdiction".*** (Emphasis added)

23. Court also placed reliance on **Collector of Masulipatam v. C. Vencata Narainapah 8 MIA 500, 525; Ranee Sonet Kowar v. Mirza Himmut Bahadoor (2) LR 3 IA 92, 101, Bombay Dyeing and Manufacturing Co. Ltd. v. State of Bombay [1958] SCR 1122, 1146, Superintendent and, Legal Remembrancer v. Corporation of Calcutta (1967) 2 SCR 170.**

24. Judicial Committee in **Cook v. Sprigg (1899) AC 572** while discussing, 'what is an act of State', observed :

"The taking possession by Her Majesty, whether ***by cession or by any other means by which sovereignty can be acquired,*** *was an act of State."* (Emphasis added)

25. This decision has been followed in **Raja Rajinder Chand v. Mst. Sukhi, AIR 1957 SC 286.**

26. In **Nayak Vajesingji Joravarsingji v. Secretary of State for India in Council AIR 1924 PC 216,** Lord Dunedin said :

"When ***a territory is acquired by a sovereign State for the first time, that is an act of State.*** *It matters not how the acquisition has been brought about. It may be* ***by conquest, it may be by cession following a treaty, it may be by occupation of territory hitherto unoccupied by a recognised ruler. In all cases the result is the same.*** *Any inhabitant of the territory can make good in the municipal courts established by the new sovereign only such rights as that sovereign has, through his officers,*

*recognised. Such **rights as he had under the rule of predecessors avail him nothing."***

27. In **Dalmia Dadri Cement Co. Ltd. v. CIT [1958] 34 ITR 514 (SC) : AIR 1958 SC 816**, Court said (page 523 of 34 ITR) :

*"The **expression 'act of State'** is, it is scarcely necessary to say, not limited to hostile action between rulers resulting in the occupation of territories. It **includes all acquisitions of territory by a sovereign State for the first time, whether it be by conquest or cession."***
(Emphasis added)

28. In **Promod Chandra Deb v. State of Orissa AIR 1962 SC 1288,** Court said, 'Act of State' is the taking over of sovereign powers by a State in respect of territory which was not till then a part of its territory, either by conquest, treaty or cession, or otherwise.

29. To the same effect was the view taken by a Constitution Bench in **Amarsarjit Singh v. State of Punjab AIR 1962 SC 1305,** where in para 12, Court said :

"It is settled law that conquest is not the only mode by which one State can acquire sovereignty over the territories belonging to another State, and that the same result can be achieved in any other mode which has the effect of establishing its sovereignty."

30. In **Thakur Amar Singhji v. State of Rajasthan AIR 1955 SC 504,** in para 40, Court said :

*"The **status of a person must be either that of a sovereign or a subject.** There is no tedium quid. The law does not recognise an intermediate status of a person being partly a sovereign and partly a subject and when once it is admitted that the Bhomicharas had acknowledged the sovereignty of Jodhpur their status can only be that of a subject. **A subject might occupy an exalted position and enjoy special privileges, but he is none the less a subject…"***
(Emphasis added)

31. In **State of Rajasthan vs. Sajjanlal Panjawat AIR 1975 SC 706** it was held that Rulers of the erstwhile Indian States exercised sovereign powers, legislative, executive and judicial. Their firmans were laws which could not have been challenged prior to the Constitution. Court relied on earlier decisions in **Director of Endowments, Govt. of Hyderabad vs. Akram Ali, AIR 1956 SC 60, and Sarwarlal vs. State of Hyderabad, AIR 1960 SC 862.**

32. In **Promod Chandra Deb vs. State of Orissa AIR 1962 SC 1288** "act of the State" was explained in the following words :

*'an "act of State" may be the taking over of sovereign powers either **by conquest or by treaty or by cession or otherwise.** It may have happened on a particular date by a public declaration or proclamation, or it may have been the result of a historical process spread over many years, and sovereign powers including the right to legislate in that territory and to administer it may be acquired without the territory itself merging in the new State.'*

33. This decision has been followed later in **Biswambhar Singh vs. State of**

Orissa 1964 (1) SCJ 364, wherein Court said :

16. Thus, ***a territory acquired by a sovereign State is an Act of State but the land comprising territory does not become the land owned by State. The land owned by State may come to it in various ways, like confiscation, purchase, escheat or bona vacantia, gift, etc.*** *In such a case the ownership vests in State, like any other individual and* ***State is free to deal with the same in a manner like any other owner may do so.***

*17. Thus '****Nazul' is a land vested in State for any reason whatsoever that is cession or escheat or bona vacantia, for want of rightful owner or for any other reasons and once land belong to State,*** *it will be difficult to assume that State would acquire its own land. It is per se impermissible to acquire such land by forcible acquisition under Act, 1894, since there is no question of any transfer of ownership from one person to another but here State already own it, hence there is no question of any acquisition.*

(Emphasis added)

34. Thus the land in question which is admittedly 'Nazul', belonged to the category as discussed above i.e. it came to be vested and owned by State in its capacity of Sovereign and right of bona vacantia. When acquisition is made under the provisions of a Statute, purpose of acquisition is already known and State pay its price but when land is owned by State, which is Nazul, objective of use of such land is not predetermined but it can be utilized by State for larger public welfare and its benefit, as necessitated from time to time. In other words 'Nazul' land form assets owned by State in trust for the people in general who are entitled for its user in the most fair and beneficial manner for their benefit. State cannot be allowed to distribute such largesse by pick and choose or to some selected groups etc.

35. **First question,** therefore, is answered accordingly.

36. The **second question** up for consideration is "lease in question whether governed by provision of Transfer of Property Act, 1882 *(hereinafter referred to as "TP Act, 1882")* or GG Act, 1895 and what is inter-relationship of the two?"

37. Historical documents, record as also authorities discussed above show that earlier Government i.e. East India Company upto 1858 and thereafter British Government used to allot "Nazul land" to various persons, who had shown their alliance to such Government in various ways, sometimes by deceiving their Indian counter parts who had raised voice against British Rule, or otherwise remained faithful to British regime and helped them for their continuation in ruling this country. Sometimes land was given on lease without any condition and sometimes restricted for certain period etc., but in every cases, lease was given to those persons who were faithful and had shown complete alliance to British Rule. The reason was that in respect of Nazul, no predetermined objective was available as was the case in respect of land acquired by State by way of acquisition under Statute of Acquisition, after paying compensation or purchase. Such allocation of land by British Government used to be called "Grant".

38. In other words, we can say that initially land owned by State used to be allotted in the form of 'Grant' by the then British Government. No specific statutory provisions were available to govern it. TP Act, 1882 was enacted to govern transfer of immovable property. Sections 10 - 12 of TP Act, 1882 made provisions invalidating, with certain exceptions, all conditions for forfeiture of transferred property on alienation by transferee and all limitations over consequent upon any such alienation or any insolvency of or attempted alienation by him.

39. Apprehending that above provisions of TP Act, 1882, may be construed as a fetter upon discretion of Crown in creation of inalienable Jagirs in 'Grants', acting upon advice that it would not be competent for Crown to create an inalienable and impartible estate in the land comprised in the Crown Grant, unless such land has heretofore descended by custom as an impartible Raj, it was sought to make a separate statute to give supremacy to the provisions contained in Crown's Grant, notwithstanding any other law including TP Act, 1882. With this objective, 'GG Act 1895' was enacted.

40. Preamble of GG Act, 1895 gives purpose of its enactment stating that doubts have arisen to the extent and operation of TP Act, 1882 and to the power of Crown (later substituted by word "Government") to impose limitations and restrictions upon grants and other transfers of land made by it or under its authority, hence to remove such doubts, GG Act, 1895 was enacted.

41. Section 2 of GG Act, 1895, as it was initially enacted, read as under :

"2. Transfer of Property Act, 1882, not to apply to Government grants.- ***Nothing in the Transfer of Property Act, 1882, contained shall apply or be deemed ever to have applied to any grant or other transfer of land*** *or of any interest therein heretoforce made or hereafter to be made by or on behalf of Her Majesty the Queen Empress, Her heirs or successors, or by or on behalf of the Secretary of State for India in Council to, or in favour of, any person whomsoever; but* ***every such grant and transfer shall be construed and take effect as if the said Act had not been passed."*** (Emphasis added)

42. The above provision was amended in 1937 and 1950 and the amended provision read as under :

"2. Transfer of Property Act, 1882, not to apply to Government grants.- ***Nothing in the Transfer of Property Act, 1882,*** *contained* ***shall apply or be deemed ever to have applied to any grant or other transfer of land or of any interest therein*** *heretoforce made or hereafter to be made by or on behalf of the Government to, or in favour of, any person whomsoever; but* ***every such grant and transfer shall be construed and take effect as if the said Act had not been passed."*** (Emphasis added)

43. Section 3 of GG Act, 1895 read as under :

"Government grants to take effect according to their tenor.- ***All provisions, restrictions, conditions and limitations over contained in any such grant or transfer*** *as aforesaid* ***shall be valid and the effect according to their tenor, any rule of law, statute or***

enactment of the Legislature to the contrary notwithstanding."

44. In the State of Uttar Pradesh, vide Government Grants (U.P. Amendment) Act, 1960 (U.P. Act No.XIII of 1960), Sections 2 and 3 of GG Act, 1895, were substituted by Section 2, as under :

"2. (1) Transfer of Property Act, 1882, not to apply to Government Grants.- ***Nothing contained in the Transfer of Property Act, 1882, shall apply or be deemed ever to have applied to any grant*** *or other transfer of land or of any interest therein, heretoforce made or hereafter to be made, by or on behalf of the Government to or in favour of any person whomsoever; and* ***every such grant and transfer shall be construed and take effect as if the said Act had not been passed."***

(2) U.P. Tenancy Act, 1939 and Agra Tenancy Act, 1926 not to affect certain leases made by or on behalf of the Government.- ***Nothing contained in the U.P. Tenancy Act, 1938, or the Agra Tenancy Act, 1926, shall affect, or be deemed to have ever affected any rights, created, conferred or granted,*** *whether before or after the date of the passing of the Government Grants (U.P. Amendment) Act, 1960,* ***by leases of land by,*** *or on behalf of, the Government in favour of any person; and* ***every such creation, conferment or grant shall be construed and take effect, notwithstanding anything to the contrary contained in the U.P. Tenancy Act, 1939, or the Agra Tenancy Act, 1926.***

(3) Certain leases made by or on behalf of the Government to take effect according to their tenor.- ***All provisions, restrictions, conditions and limitations*** *contained in any such creation, conferment or grant referred to in Section 2,* ***shall be valid and take effect according to their tenor,*** *any decree or direction of* ***a court of law or any rule of law, statute or enactment of the Legislature, to the contrary notwithstanding :***

Provided that nothing in this section shall prevent, or be deemed ever to have prevented, ***the effect of any enactment relating to the acquisition of property, land reforms or the imposition of ceiling on agricultural land."*** (Emphasis added)

45. A perusal of Section 2 of GG Act, 1895 shows two things :

i. A declaration is made that any grant or other transfer of land or of any interest therein, made by or on behalf of Government, in favour of any person, on and after enactment of GG Act, 1895, would not be governed by provisions of TP Act, 1882 i.e. nothing contained in TP Act, 1882 shall apply to such Grant, transfer or interest.

ii. A clarification that a Grant or Transfer, referred to in Section 2, when is to be construed and given effect, it shall be done in such manner and by treating as if TP Act, 1882 has not been passed.

46. Thus, GG Act, 1895 basically was a declaratory statute. First declaration is in respect of Grant or transfer of land or creation of any interest, as the case may be, to exclude TP Act, 1882 for all purposes. Second part of Section 2 clarified that while construing and giving effect to a Grant or Transfer, referred to in Section 2, it will be presumed that TP Act, 1882 has not been passed at all.

47. In Section 2(1) of GG Act, 1895, as amended in Uttar Pradesh, we do not find any distinction vis a vis what has been said in Section 2 of GG Act, 1895. There is an addition in GG Act, 1895 in its application to Uttar Pradesh, inasmuch as, by inserting sub-section (2), a provision, as made in sub-section (1) of Section 2 with regard to TP Act, 1885, was also made in respect of U.P. Tenancy Act, 1939 and Agra Tenancy Act, 1926. A similar declaration has been made in respect of TP Act, 1882.

48. Sub-section (3) of Section 2 of GG Act, 1895 protects certain leases, already made, declaring the same to be valid in the light of insertion of sub-section(1) of Section 2 in the State of Uttar Pradesh and that is why, notwithstanding any decree or direction of Court of law, leases already made, were validated, which otherwise might have been affected by U.P. Tenancy Act, 1938 or Agra Tenancy Act, 1926.

49. Proviso to sub-section (3) of Section 2 of GG Act, 1895 further declare that all provisions of Section 2 of GG Act, 1895 will have no effect when land is sought to be acquired under the provisions of Statute relating to acquisition or for giving effect to a Statute relating to land reforms or imposition of ceiling on agricultural land.

50. Section 3 of GG Act, 1895 is not available in State of U.P. after U.P. Amendment Act, 1960 since Sections 2 and 3 of Principal Act virtually got amalgamated in the form of Section 2, by Government Grants (U.P. Amendment) Act, 1960. However, intent, effect and declaration by legislature is almost pari materia with the only addition that in State of U.P., U.P. Tenancy Act, 1939 and Agra Tenancy Act, 1926 are also excluded in the same manner as done in respect of TP Act, 1882.

51. Sections 2 and 3 of GG Act, 1895 were considered in **State of U.P. vs. Zahoor Ahmad, 1973(2) SCC 547** and in para 16, Court said :

*"**Section 3** of the Government Grants Act **declares the unfettered discretion of the Government to impose such conditions and limitations as it thinks fit, no matter what the general law of the land be.** The meaning of Sections 2 and 3 of the Government Grants is that the scope of that Act is not limited to affecting the provisions of the Transfer of Property Act only. The **Government has unfettered discretion to impose any conditions, limitations, or restrictions in its grants, and the right, privileges and obligations of the grantee would be regulated according to the terms of the grant, notwithstanding any provisions of any statutory or common law."*** (Emphasis added)

52. Again in **Hajee S.V.M. Mohamed Jamaludeen Bros. & Co. vs. Government of Tamil Nadu (1997) 3 SCC 466,** Court said that combined effect of two sections of GG Act, 1895 is that terms of any Grant or terms of any transfer of land made by a Government would stand insulated from tentacles of any statutory law. Section 3 places terms of such Grant beyond reach of any restrictive provision contained in any enacted law or even equitable principles of justice, equity and good conscience adumbrated by common law, if such principles are inconsistent with such terms. Court said :

*"The two provisions are so framed as to **confer unfettered discretion on the government to enforce any***

condition or limitation or restriction in all types of grants made by the government to any person. *In other words, the rights, privileges and obligations of any grantee of the government would be* ***completely regulated by the terms of the grant, even if such terms are inconsistent with the provisions of any other law."***

(Emphasis added)

53. In **Azim Ahmad Kazmi and others vs. State of U.P. and Another (supra)** observations made in para 16 in **State of U.P. vs. Zahoor Ahmad (supra)** have been reproduced and followed.

54. In **State of U.P. and others vs. United Bank of India and others (2016) 2 SCC 757,** in para 30 of the judgment, Court said :

"Indisputably, the lease of nazul land is governed by the Government Grants Act, 1895. Sections 2 and 3 of the Government Grants Act, 1895 very specifically provide that the ***provisions of the Transfer of Property Act do not apply to government lands ....."***

(Emphasis added)

55. Thus, a 'Grant' of Nazul will be governed by terms and conditions contained in the instrument/deed of Grant, wholly unaffected by any Statute providing otherwise. It cannot be doubted that the lease granted in the case in hand is/was a 'Grant' governed by GG Act, 1895. Broadly, 'Grant' includes lease.

56. In other words, where 'Nazul' is let out to a person by Government under agreement of lease i.e. Grant, it is governed by GG Act, 1895 and rights of parties therefore have to be seen in the light of stipulations contained in the document of 'Grant'. 'Grant' includes a property transferred on lease though in some cases, 'Grant' may result in wider interest i.e. transfer of title etc. Whatever may be nature of document of transfer i.e. instrument of 'Grant', the fact remains that terms and conditions of 'Grant' shall be governed by such document and it shall prevail over any other law including TP Act 1882. One cannot take resort to TP Act, 1882 to wriggle out of any condition or limitation etc. imposed by terms and conditions set out in the document of 'Grant'.

57. In State of Uttar Pradesh, management of 'Nazul', in absence of statutory provisions, is governed by various administrative orders compiled in a Manual called "Nazul Manual". Here Government has made provisions of management of 'Nazul' through its own authorities namely District Magistrate or Commissioner, and, in some cases, through local bodies.

58. Nature of orders compiled in "Nazul Manual" in the context of 'Nazul' have been considered in **State of U.P. vs. United Bank of India (supra)** where Court has said that land and building in question is "Nazul" being property of Government, maintained by State authorities in accordance with 'Nazul Rules' but not administered as a 'State property'. Court has also observed that lease of "Nazul" land is governed in accordance with GG Act, 1895. Sections 2 and 3 thereto, very specifically provide that provisions of TP Act, 1882 do not apply to Government land. Section 3 says that all provisions, restrictions, conditions and limitations contained in any such 'Grant' or 'Transfer', as aforesaid, shall be valid and take effect according to their

tenor, any rule of law statute or enactment of the Legislature to the contrary, notwithstanding. Thus the stipulations in "lease deed" shall prevail and govern the entire relations of State Government and lessee.

59. In **Pradeep Oil Corporation vs. Municipal Corporation of Delhi and others (2011) 5 SCC 270,** Court said that GG Act, 1895 is a special Statute and will prevail over general Statute i.e. TP Act, 1882. It says:

*"In the **present case grant has been made by the President of India in terms of Section 2 of the Government Grants Act, 1895 and the Transfer of Property Act, 1882 may have little bearing in the instant case. The former,** i.e. the Government Grants Act, 1895 being **a special statute would prevail over the general statute, i.e. the Transfer of Property Act, 1882.** Accordingly, the rights and obligations of the parties would be governed by the terms of the provisions of Government Grants Act, 1895 whereunder the Government is entitled to impose limitations and restrictions upon the grants and other transfer made by it or under its authority."* (Emphasis added)

60. Superiority of the stipulations of Grant to deal with relations between Grantor and Grantee has been reinforced in **Azim Ahmad Kazmi and others (Supra).** Therein dispute related to Plot No. 59, Civil Station, Allahabad, area 1 acre and 4272 sq. yard, i.e., 9112 sq. yard or 7618 sq. meter. Initially a lease deed was executed on 11.01.1868 by Secretary of State for India in Council in favour of one, Thomas Crowby, for a period of 50 years and it was signed by Commissioner, Allahabad Division on behalf of Secretary of State for India in Council. After expiry of lease, a fresh lease was executed for another period of 50 years on 12.04.1923 w.e.f. 01.01.1918. Lease holder with permission of Collector, Allahabad transferred lease rights to Purshottam Das in 1945. The legal heirs of Sri Purshottam Das, on 31.10.1958, transferred leasehold rights in favour of Smt. Shakira Khatoon Kazmi, Smt. Sabira Khatoon Kazmi and Smt. Maimoona Khatoon Kazmi. After the death of Smt. Maimoona Khatoon Kazmi, her legal heirs, namely, Azim Ahmad Kazmi, Omar Ahmad Kazmi, Shamim Ahmad Kazmi, Alim Ahmad Kazmi and Maaz Ahmad Kazmi also claimed lease rights by succession. Lease granted on 12.04.1923 w.e.f. 01.01.1918 expired on 31.12.1967. It was renewed on 19.03.1996 for a period of 30 years w.e.f. 01.01.1968 which period expired on 31.12.1997. Again on 17.07.1998 it was renewed for a further period of 30 years w.e.f. 01.01.1998. While lease was continuing, vide Government Order *(hereinafter referred to as "G.O.")* dated 15.12.2000, right of resumption was exercised by State Government. It directed resumption of possession of plot in question and lease deed was cancelled. District Magistrate, Allahabad served a notice dated 11.01.2001 to lease holders intimating them that State Government's order dated 15.12.2000 has cancelled lease and resumed possession of land in question, as the same was required for public purpose. Notice also directed lease holders to remove structures standing on plot, failing which possession would be taken in accordance with Clause 3(c) of lease deed. Lease holders filed objections against notice to District Magistrate and also stated that they have sent representation/ objection to Chief

Minister praying for revocation of G.O. dated 15.12.2000. District Magistrate passed order on 24.08.2001 rejecting objection of lease holders and sent a cheque of Rs. 10 lacs representing compensation for the building standing over plot. State authorities claimed that they took possession of open land on 01.09.2001. Lease holders filed writ petition which was dismissed vide judgment dated 07.12.2001, **Shakira Khatoon Kazmi vs. State of U.P., AIR 2002 All 101.** Lease holders challenged judgment dated 07.12.2001 in Supreme Court to the extent they failed. State Government also filed appeal against part of order of this Court wherein an observation was made that State Government is not entitled to take forcible possession though it may take possession of demised premises in accordance with procedure established by law. After considering Clause 3(c) of lease deed which provides for resumption of land for public purpose after giving a month's clear notice to lessee to remove any building standing at that time on demised premises and within two months of receipt of notice to take possession thereof, on expiry of that period, and Sections 2 and 3 of GG Act, 1895, Court said that Clause 3(c) of lease deed confers power upon State Government that plot in question, if required by State Government for its own purpose or for any public purpose, it shall have right to give one month's notice in writing to lessees to remove any building standing on the plot and to take possession thereof on expiry of two months from the date of service of notice. Court said that land, if required for any public purpose, State Government has absolute power to resume leased property and under the terms of Grant it is absolute, therefore, order of resumption is perfectly valid and cannot be said to be illegal. It also refers to an earlier instance where Nazul Plot No. 13, Civil Station, Allahabad, situate in Civil Lines area was resumed by State Government for the purpose of construction of a 'Bus Stand' by exercising similar power, without initiating any proceeding under Land Acquisition Act, 1894 *(hereinafter referred to as "LA Act, 1894")*. Resumption in that case was also challenged in **Writ Petition No. 44517 of 1998, Sayed Shah Khursheed Ahmad Kashmi vs. State of U.P.** and said writ petition was **dismissed on 16.12.1999** by a Division Bench of this Court, whereagainst Special Leave Petition No. 4329 of 2000 was dismissed by Supreme Court on 07.09.2001. First question, therefore, was answered in negative and in favour of Government.

61. With respect to procedure for taking possession, Supreme Court, while considering Question-2, said that in absence of any specific law, State Government may take possession by filing a suit. When a land is acquired under LA Act, 1894, Government can take possession in accordance with provisions of said Act and in case of urgency, Collector can take possession after publication of notice under Section 9 and no separate procedure is required to be followed. Court said that similarly where a lease has been granted under the terms of GG Act, 1895, then what procedure has to be followed is provided by Section 3 of GG Act, 1895 which says that all provisions, restrictions, conditions and limitations contained in any such creation, conferment or Grant referred to in Section 2, shall be valid and take effect according to their tenor; any decree or direction of a Court of Law or any rule of

law, statute or enactments of the Legislature, to the contrary notwithstanding. Court relied on earlier judgment in **State of U.P. vs. Zahoor Ahmad, 1973(2) SCC 547** holding that Section 3 of GG Act, 1895 declares unfettered discretion of Government to impose such conditions and limitation as it thinks fit, no matter what the general law of land be. Then Court construing Clause 3(C) of lease deed said that it provides procedure for taking possession of demised premises when State Government re-enter or resume possession of demised land. Court in para 30 and 32 of judgment said:

*"30. In the case of **The State of U.P. vs. Zahoor Ahmad and Another, 1973(2) SCC 547,** this Court held that the Section 3 of the Act declares the unfettered discretion of the Government to impose such conditions and limitation as it thinks fit, no matter what the general law of land be. From Clause 3(C) of the deed, it is clear that the **State of U.P. while granting lease made it clear that if the demised premises are at any time required by the lessor for his or for any public purpose, he shall have the right to give one month's clear notice to the lessee to remove any building standing at the time of the demised property and within two months' of the receipt of the notice to take possession thereof on the expiry of that period** subject to the condition that the lessor is willing to purchase the property on the demised premises, the lessee shall be paid for such amount as may be determined by the Secretary to the Government of U.P. in the Nagar Awas Department."*

*"32. **Under Clause 3(C) of the lease deed, the respondent-State was permitted resumption of the land which required for its own use or for public purpose** and after giving one month's clear notice in writing is entitled to remove any building standing at the time on the demised premises and within two months of the receipt of the notice to take possession thereof subject to the condition that if the lessor is willing to purchase the building of the demised premises required to pay the lessee the amount for such building as may be determined by the Secretary to Government of U.P. in the Nagar Awas Department...."* (Emphasis added)

62. Having said so, Court said :

*"we are of the view that there is no other procedure or law required to be followed, as a **special procedure for resumption of land has been laid down under the lease deed".***

63. Supreme Court then set aside direction of this Court that State will not take possession forcibly except in accordance with procedure established by any other law, by holding, that since special procedure for resumption is prescribed under lease deed, no direction otherwise could have been issued to State Government.

64. The above discussion makes it clear that 'Nazul' is a land owned and vested in State. It is such land which has vested in State by virtue of its 'Sovereignty' and incidence of 'Sovereignty' i.e. annexation, lapse and bona vacantia. Further, 'Grant' means transfer of property by a deed in writing and includes within its ambit, an instrument of lease/lease deed. Such 'Grant' is governed by provision of GG Act, 1895, which were applicable to 'Grants' executed on and after

enforcement of GG Act, 1895 and rights and entitlement of private parties in respect of land, which was transferred to such person under such 'Grant' would be governed by terms and conditions contained in such 'Grant' and not by provisions of TP Act, 1882 or any other Statute. Moreover, in State of U.P., wherever applicable, U.P. Tenancy Act, 1939 and Agra Tenancy Act, 1926 will also be inapplicable to such 'Grant'.

65. Above discussion, therefore, leaves no manner of doubt that Grant/Lease of Nazul land shall be exclusively governed by stipulations/conditions/terms contained in Grant/Indenture of Lease and no Statute will be resorted to govern rights of parties over Nazul land, which will be governed by aforesaid Grant/Indenture of Lease.

66. We accordingly answer **second question** holding that Grant of Nazul Land would be governed by terms and conditions therein, which shall prevail over any otherwise law including TP Act, 1882 and as provided by GG Act, 1894, it will be treated as TP Act, 1882 has not been enacted for construing and giving effect to terms and conditions contained in the Grant.

67. The **third question** is, "whether petitioner was entitled to renewal of lease in view of judgment in **Purshottam Dass Tandon and others vs, State of U.P. And others, AIR 1987 All 56,** whereupon heavy reliance has been placed".

68. Submission is that possession has continued with petitioner and petitioner itself applied for renewal of lease on 31.08.2016, therefore, it was entitled for renewal in view of judgment rendered in **Purshottam Dass Tandon and others vs, State of U.P. And others (supra).** This requires us to examine aforesaid judgment in detail.

69. In **Purshottam Dass Tandon and others vs, State of U.P. And others, (supra)** question of renewal of lease came up for consideration in the light of Government Orders dated 23.4.1959, 07.07.1960 and 03.12.1965. Therein historical backdrop of various Government Orders dealing with policy of renewal of lease has been given in detail. The first G.O. was issued in March, 1958 whereby Chief Minister directed that case for renewal of leases may be taken individually and possession may be taken only if lessee surrender or lease stood terminated in absence of any request from lessee for grant of fresh lease. Thereafter, on 23.04.1959, a G.O. was issued to grant fresh lease in cases where lease has already expired but has not been renewed so far, or which is likely to expire within the next 5 or 6 years, on the terms and conditions given in the said G.O. The proposed premium in the said G.O. was objected by Lease Holders, whose leases were already expired or likely to expire. Several representations were sent to Government. Some house-owners met the then Prime Minister Late Pt. Jawahar Lal Nehru, who had visited Allahabad in November or December, 1959. It resulted in issue of G.O. dated 07.07.1960 whereby rate of premium on first three acres was reduced to Rs.2,000/- in each slab. It also permitted payment of premium in five instalments and reduced ground rent to Rs.100/- per acre. In the earlier G.O., there was an insistence on construction of Community latrines till sewer lines were

laid but this insistence was given up in G.O. dated 07.07.1960. Lessees were granted further three months' time to get leases renewed. Still Lease-Holders did not comply and made representations to Government. On 21.03.1963, again a G.O. was issued declaring rates of premium for commercial sites. On 3.12.1965 a G.O. was issued indicating terms and conditions for renewal of leases for commercial and residential purposes and it was said that rates of premium and annual rent shall be as fixed by G.O. dated 07.07.1960. Payment in five equal yearly instalments was continued but in special cases, Commissioner, Allahabad Division, Allahabad, was authorized to make recommendations to Government for enhancing number of instalments. This G.O. further insisted for renewal of existing leases on payment of at least one instalment, within one month of receipt of intimation by Lessee from Collector, or within three months of the date of expiry of lease, whichever is earlier. Deposit was to be deemed as proper step on the part of Lessee to get a fresh lease executed by Lessor. The G.O. of 1965 itself made a distinction between those whose leases had expired and others by describing them as sitting and existing lessees.

70. There was a second phase which covered period from 1966 to 1981. On 16.02.1966, U.P. Awas Vikas Parishad Adhiniyam, 1965 *(hereinafter referred to as "U.P.Act, 1965")* was enacted for providing housing sites and construction of building. G.O. dated 03.12.1965, thus was modified by G.O. dated 04.11.1968, and it was directed that leases of joint lessees should be renewed as far as possible for one acre only. Sub-division was permitted only where sub-divided plot was not less than 800 sq. yards. Concession in payment of lease money and ground rent was allowed on same terms and conditions as it was in G.O. dated 03.12.1965 but time was extended for payment of first instalment for those who had not received any intimation from Collector by a further period of one month from the date of intimation by Collector. Clause (c) of G.O. dated 04.11.1968 categorically said that where steps have been taken for renewal of leases, as stated in earlier G.Os., fresh leases shall be sanctioned according to terms offered by Competent Authority.

71. In March, 1970, a G.O. was issued banning grant of renewal of leases all over the State, since Government was contemplating to bring out legislation on Urban Ceiling. This ban was lifted on 12.01.1972 but leases henceforth were to be sanctioned by State Government only. Commissioner and Collector could make recommendations only. Aforesaid G.O., however, provided that in all those cases where Government had sanctioned grant of leases but it could not be executed or registered because of ban imposed in 1970, steps may be taken immediately for execution. Clause (ii) of G.O. provided that all those cases in which Collector or Commissioner had approved renewal but could not be executed because of 1970 order, should be sent to Government immediately for acceptance. On 09.05.1972 Urban Building Ceiling Bill was introduced and on 11.07.1972 Uttar Pradesh Ceiling of Property (Temporary Restriction on Transfer), Ordinance, 1972 was promulgated in pursuance of Article 398 of Constitution of India. The Ordinance continued till it was replaced by Urban Land (Ceiling and Regulation) Act, 1976 *(hereinafter referred to as "U.P. Act, 1976")*. The said Act was

enacted to prevent concentration of Urban Property and discourage construction of luxurious houses. On 19.12.1972, provisions pertaining to Nazul were amended providing for maximum area permissible for renewal of leases of 2000 sq. yards plus land on which building was constructed. Remaining area was to be surrendered to Housing Board and Lessees were prohibited from sub-dividing or transferring any land. On 10.12.1976, Government issued an order superseding all previous orders in respect of renewal of leases of Civil Lines, Allahabad in view of Act, 1976 and laid down fresh terms and conditions for renewal of such leases.

72. Here leases were to be renewed in the light of Sections 2 and 4 of U.P. Act, 1976 and while doing so, all residents in one house were to be treated as one unit. This again resulted in representations of Lease-Holders to Government requesting for reduction in rate of premium and ground rent. A G.O. was issued on 17.09.1979 superseding all previous orders and it provided for submission of details about extent and type of construction, utilisation of vacant land etc. Again representations, which culminated in G.O. dated 19.04.1981, superseded all previous Orders, provided for renewal of leases on fresh and new terms. It said that Leaseholders and their heirs shall be treated as one Unit. They were supposed to file details about land, constructed area, its user, time when it was taken on lease etc. before 30.06.1981. List of residents including out-houses dwellers was to be prepared by District Magistrate. Heirs of deceased lease-holders were to be treated as one unit. Area for which renewal could be made was reduced to building with 500 sq. metre of land appurtenant and 500 sq. metre open land or 1500 sq. metre whichever was more. Area of building for commercial purpose was fixed at 2000 sq. metres. Premium was fixed at 50 paisa per sq. metre. Thus, from 1976 onwards, for the purpose of renewal, area was reduced from acre to square metre and unit for premium and ground rent became square feet instead of acre. All heirs of Lessees became one unit for renewal. Land covered by outhouses were to be excluded. Lessees could not even opt for it.

73. Lease Holders, whose lease had already expired or those who were sitting Lease Holders and leases were going to expire in a short period, came to this Court in various writ petitions. This entire bunch was decided in **Purushottam Dass Tandon and others vs. State of U.P., Lucknow and others (supra)**. There were two categories of writ petitioners, before this Court, in **Purushottam Dass Tandon and others (supra)**, as under :

(i) Those, to whom notices were given by Collector and who had complied with terms and conditions as laid down in various orders issued from time to time prior to 1965; and

(ii) Those, to whom no notice was sent and till matter filed before the Court, no steps were taken and no order was passed in their favour.

74. Court held :

(I) A Lessor may, after expiry of period for which lease is granted, renew the same or resume i.e. re-enter. But if out of the two i.e. re-entry or resumption, the two divergent courses, he chooses to grant fresh lease or at least creates that

impression by his conduct spread over long time, it results in abandonment.

(II) If the land is needed or building has to be demolished in public interest for general welfare, probably no exception can be taken as the interest of individual has to be sacrificed for the society. But asking Lessee to vacate land or remove Malba for no rhyme or reason but because State is the owner, cannot be accepted to be in consonance with present day philosophy and thinking about role of State.

(III) After Act, 1976, no person can successfully or validly claim to hold land, more than the Ceiling limit.

(IV) Some part of G.O. of 1981 was not consistent with Act, 1976. The rules contained in Nazul Manual are set of Administrative Orders or collections of guidelines issued by Government for the authorities to deal with Government property.

(V) When a G.O. was issued and its conditions are complied with, mere for bureaucratic delay, performance under the said G.O. cannot be denied. Therefore, Lessee, who had deposited first instalment, as directed in G.O. of 1965, were entitled for renewal of their lease.

(VI) After enactment of ceiling law, a Lessee cannot hold land more than the provided limit.

(VII) If leases were renewed in respect of those, who had acquired social or political status, whose names are given in para 15 of judgment, which includes, Dr. K. N. Katju, ex-Central Law Minister, Chief Minister and Governor, Dr. S. K. Verma, ex-Chief Justice and Governor, Sri B.L. Gupta, ex-Judge High Court, J. D. Shukla, I.C.S., O. N. Misra, I.A.S., when there was no justification not to give same benefit to others. Similar benefit must be given since most of them were also distinguished persons namely S.N. Kacker, ex-Central Law Minister, Solicitor General of India and Advocate General of the State, Sri S. S. Dhavan, ex-Judge, High Court and Governor and High Commissioner, Sri Lal Ratnakar Singh I.A.S. Ex-Member of Board of Revenue, M.L.Chaturvedi, ex-Judge, High Court and member of Union Public Service Commission, W. Broome, I.C.S. etc.

75. Aforesaid judgment was confirmed by Supreme Court by dismissing appeals preferred by State of U.P. and others i.e. **State of U.P. and others vs. Purshottam Das Tandon and others 1989 Supp.(2) SCC 412.** Court clarified that renewal of leases shall be subject to the provisions of U.P.Act, 1976 and High Court judgment shall apply to all the leases to whom G.O. dated 23.04.1959, 02.07.1960 and 03.12.1965 were applicable and all those claiming under them. The order of Supreme Court reads as under :

"We have heard the learned counsel for both the parties at length. We do not find any infirmity in the judgment and order passed by the High Court against which these special leave petitions are preferred. We, however, make it clear that the leases that are going to be granted pursuant to the writ issued by the High Court will be subject to the provisions of the Urban Land (Ceiling and Regulation) Act, 1976. On the leases being granted, the Competent Authority under the Act shall be at liberty to apply the provisions of the Act and in particular section 15 thereof to all the leases and take away all the surplus lands in their hands after determining the

surplus lands in accordance with law. The ***directions issued by the High Court can be availed of by all the lessees to whom the G.O. dated 23rd April, 1959, 2nd July, 1960 and 3rd December, 1965 were applicable and all those claiming under them.***

All the Special Leave Petitions are dismissed accordingly with these observations. If any further directions are needed, the persons interested may approach the High Court."

(Emphasis added)

76. Aforesaid judgment has no application to the case of petitioner at all since neither petitioner come within the category of eligible person to apply renewal of lease under Government Orders which were considered in **Purushottam Dass Tandon and others vs. State of U.P., Lucknow and others (supra)** nor even otherwise petitioner has shown any provision, whether statutory or executive, including G.O., which may confer entitlement of petitioner to seek renewal of lease at all, once the maximum period of lease i.e. 90 years has lapsed.

77. **Third question,** therefore, is answered against petitioner.

78. Once it is clear that right and obligation etc. are to be governed by terms and conditions of lease, the **fourth question** is "whether petitioner can claim renewal of lease after expiry of maximum period of lease of 90 years, for which lease or renewal can be granted in its entirety, as provided in initial lease-deed?"

79. In our view, this question is squarely covered and answered by Supreme Court in **Azim Ahmad Kazmi and others vs. State of U. P. and others (supra)** wherein Court has categorically held that in terms of provisions of GG Act, 1895 read with conditions of lease-deed, parties are bound by terms of lease and rights of respective parties are governed by terms and conditions of lease-deed. Therefore, once maximum period, for which lease and its renewal could have been granted, has expired, petitioner is not entitled to claim renewal of lease. Thus, merely for the reason that petitioner's application for further renewal of lease beyond 90 years, has not been considered and decided by authorities, will not confer any benefit upon petitioner.

80. The **fourth question,** is answered accordingly.

81. The **fifth question** is, "whether State Government can exercise right of resumption/re-entry by impugned order dated 18.08.2018?"

82. Since lease has already expired on 14.09.2016 it was obligatory upon petitioner to hand over vacant possession of land to State, which it has not done. Therefore, in our view, in terms of discussion made above and also considering law laid down in **Azim Ahmad Kazmi and others vs. State of U. P. and others (supra)**, State Government is within its right to re-enter/resume land in question. Therefore, notice given by State to vacate Nazul land in dispute cannot be faulted. In this regard we do not find that principles of natural justice are applicable and contention raised otherwise has no substance in law.

83. One more argument, which has been raised is about the effect of repeal of GG Act, 1895 by Repeal Act, 2017.

Therefore **sixth question** is "whether Repeal Act, 2017 has effect of denying the State of right of resumption/re-entry due to repeal of GG Act, 1895."

84. It is contended that Section 4 of Repeal Act, 2017 only protects right, title, obligation or liability already acquired, accrued or incurred by State of U.P. under GG Act, 1895 to resume Nazul land according to resumption clause of lease-deed prior to repeal of GG Act, 1895 and nothing more than that. Since no right, title, obligation or liability was acquired or incurred or accrued to State Government by resorting to resumption under resumption clause before repeal of GG Act, 1895, resumption sought with reference to GG Act, 1895 after its repeal is wholly illegal.

85. Meaning of words 'accrued', 'acquired' and 'incurred' have been given in various paragraphs of writ petitions but we find that basic aspect has been ignored and missed by petitioner. Terms of lease, as soon as lease was executed, created rights, obligations, duties and interest of both the parties i.e. Lessor and Lessee so as to be governed in accordance with terms and conditions of lease. Relevant clause says that it shall be lawful for Secretary of State, notwithstanding waiver of any previous cause or right of re-entry, to enter into and upon said demised premises, whereupon the same shall remain to the use of and vested in Secretary of State and said demise shall absolutely determine out. The Lessee, who agreed with said term, 'incurred' duty to allow re-entry to State whenever Government do exercise its right of re-entry. Here lies the right of State to re-enter, which was acquired by State by virtue of execution of lease deed and accepted by Lessee and he (Lessee) 'incurred' liability not to obstruct the said right of State i.e. Lessor.

86. Petitioner, in our view, has misconstrued provisions of Section 4 vis-a-vis terms of lease and therefore, entire argument in this respect is devoid of merit. Sixth question is hence answered against petitioner.

87. The next three question, in our view, are incidental one, i.e., **(vii)** "whether continued possession of petitioner after expiry of lease on 14.09.2016 would confer any benefit upon it"; **(viii)** "whether petitioner can be said to have status of 'holding over' governed by Section 116 of TP Act, 1882", and, **(ix)** "whether petitioner is entitled for quit notice under Section 106/107 TP Act, 1882 since after expiry of lease, as it claims, tenancy should be treated to be on month to month basis?"

88. In this respect, it is contended that even if petitioner is a rank Trespassor, the fact is that it is in possession of land in dispute and therefore by application of force, petitioner cannot be evicted. Petitioner, at the best, is an unauthorized occupant in terms of U.P. Act, 1972 and therefore, atleast procedure prescribed in the said Act has to be followed. Further continued possession of petitioner over land in dispute entitles petitioner a notice under Section 106 read with Section 116 TP Act, 1882, since principle of 'holding over' will apply, or in any case, State can evict petitioner by filing a suit for eviction, which is a remedy available in common law. In this regard, reliance is placed on **Bishan Das and others Vs. State of Punjab and others AIR 1961**

SC 1570, Express Newspapers Pvt. Ltd. and others Vs. Union of India (1986) 1 SCC 133, Yar Mohammad and another vs. Lakshmi Das and others AIR 1959 Allahabad 1 and Lallu Yeshwant Singh (dead) by his legal representative vs. Rao Jagdish Singh and others, AIR 1968 SC 620.

89. With regard to applicability of TP Act, 1882 we have already discussed in the light of TP Act, 1882 and law laid down in **Azim Ahmad Kazmi and others vs. State of U.P. and Another (2012) 7 SCC 278**. At the pain of repetition, we may observe that Supreme Court has held that in the matter of Government Grant, the relations of Lessor and Lessee are governed by lease deed and no other Statute including TP Act, 1882 will have any application. Court has also said that procedure prescribed under lease deed for re-entry / resumption of land is a special procedure and that can be followed for re-entry and no other Statute or procedure is to be observed.

90. So far as application of Section 116 of TP Act, 1882 is concerned, we find nothing on record to show that it has any application in the case in hand. Section 116 of TP Act, 1882 is attracted only when an assent of landlord has been obtained for continuation of lease after expiry of lease period, which is not the case in hand. These aspects have been dealt with in **Shanti Prasad Devi and others vs. Shankar Mahto and others (2005) 5 SCC 543**, which has been following in **Delhi Development Authority Vs. Anant Raj Agencies Pvt. Ltd. (supra)**.

91. In the present case, it is not the case of the petitioner that after expiry of lease in 2016, they have been permitted to remain in possession of disputed Nazul land and rent has been accepted by respondents or they have paid rent. Even if what is said by petitioner is taken to be correct, we do not find that Section 116 is applicable in the case in hand at all. Section 116 of TP Act, 1882 reads as under :

*"**116. Effect of holding over.**- If a lessee or under-lessee of property remains in possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee or under lessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased, as specified in section 106."*

92. Twin conditions to attract principle of holding over vide Section 116 of TP Act, 1882, which need by satisfied are:

(i) After determination of lease, lessor or his representative has accepted rent from lessee or under lessee or assented to his continuing in possession; and

(ii) Lessee or under-lessee has remained in possession.

93. None of the above conditions are attracted/satisfied in this case. Hence Section 116, TP Act, 1882 is not attracted.

94. Now, we come to the question of applicability of UP Act, 1972.

95. As we have already said that in view of declaration made under Section 2

of GG Act, 1895, as amended in Uttar Pradesh, no Statute will govern conditions of Government Grant and instead it will specifically be governed only by terms of Government Grant. Therefore, it is not necessary for State to follow procedure of U.P. Act, 1972 though it is also available and under the provisions thereof admittedly petitioner is 'unauthorized occupant'.

96. Above contentions can be examined from another angle. Petitioner's possession after expiry of tenure of lease, at the best, can be juridical possession though it is admittedly unlawful and illegal. Property is a legal concept that grants and protects a person's exclusive right to own, possess, use and dispose of a thing. The term property does not suggest a physical item but describes a legal relationship of a person to a thing. Real property consists of lands, tenements and hereditaments. Land refers to ground, the air above, the area below the Earth's surface and everything that is erected on it. Tenements include land and certain intangible rights recognized by municipal laws related to lands. A hereditaments embraces every tangible or intangible interest in real property that can be inherited. An interest describes any right, claim or privilege that an individual has towards real property. Law recognizes various types of interests in real property which may justify possession over property of person concerned. A non-possessory interest in land is right of one person to use or restrict use of land that belongs to other persons such as easementary rights. Non-possessory interest do not constitute ownership of land itself. Holders of a non-possessory interest in real property do not have title and owner of land continues to enjoy full rights of ownership, subject to any encumbrances. An encumbrance is a burden, claim or charge on real property that can affect the quality of title and value and/or use of property. Encumbrances can represent non-possessory interests in real property.

97. Possession is also of two kinds namely, (a) de facto possession, and (b) *de jure possession*. De facto possession is when a person being in actual physical possession and *de jure* possession is a possession in law. Constructive possession would be a possession through a representative, agent, tenant or a trustee. A person in de facto possession could be in adverse possession. In a civilized society some protection of possession is essential. The methods of protection recognized are :

(i) Possessor can be given certain legal rights, such as a right to continue in possession free from interference by others; and

(ii) Protective possession by prescribing criminal penalties for wrongful interference and wrongful dispossession.

98. When certain legal right are given to a person, one of the mode is that possessory right in rem are supported by various rights in personam against those who violate possessor's right; he can be given a right to recover compensation for interference and for dispossession, and a right to have his possession restored to him. But, whenever such a person invoke such remedies, one of the question which has to be examined would be, whether a person invoking them actually has any possession to be protected. In other words, it has to be examined "whether a

person is in possession of an object?" However, legal concept of possession is not restricted to commonsense concept of possession, namely physical control. Possession in fact is not a simple notion. Whether a person is in possession of an article depends on various factors namely nature of article itself, attitudes and activities of other persons.

99. Possession may be 'lawful' or 'unlawful' or even 'legal' or 'illegal'. Acquisition of legal possession would obviously be lawful and of necessity involve occurrence of some event recognized by law whereby subject matter falls under the control of the possessor. Problem, however, arises where duration for which possession recognized is limited by Grantor or law. Continuance of possession beyond prescribed period is not treated as a 'lawful possession'. If a landlord does not consent to lease being continued, possession of tenant would not be a lawful unless there is some Statute providing otherwise. Nature of possession being not lawful would entitle landlord to regain possession.

100. Thus, a lawful possession is state of being a possessor in the eyes of law. Possession must be warranted or authorized by the law; having qualifications prescribed by law neither contrary to nor forbidden by law. However, law recognizes possession as a substantive right or an interest. Continued possession of a person is recognized by law as a sufficient interest capable of being protected by possessor, right being founded on mere fact of possession. Possession is a good title of right against anyone who cannot show a better title. However, when a person in possession, may not be lawful, recovery of possession by owner must have sanction of law. It cannot proceed to dispossess the other in a forcible manner not recognized in law.

101. In some authorities, possession of a person, who has entered therein initially validly but subsequently become unlawful has been given a different meaning i.e. 'juridical possession'. A tenant's holding over without consent of landlord would be a juridical possession though his possession is not lawful. It is said that possession of tenant, post efflux of lease period would not be treated as lawful possession still he would not be treated as a rank trespasser. Here comes the concept of juridical possession.

102. It also cannot be doubted that any person having juridical possession though illegal and unlawful, by a sheer executive fiat cannot be thrown out of possession of the land. But where terms of lease, which is the genesis of claim of such person provides manner in which Lessor can re-enter land and such procedure has been recognized by Statute, as also upheld in **Azim Ahmad Kazmi and others vs. State of U.P. and Another (supra)**, when Lessor follows such procedure, it cannot be said that eviction is being resorted to illegally or without following lawful method.

103. Further, once lease period expired, whether a quit notice is necessary or not, in our view, is an issue, which need not detain us since this aspect is already covered by a recent authority in **Sevoke Properties Ltd. vs. West Bengal State Electricity Distribution Company Ltd. AIR 2019 SC 2664.** Therein, Court held that once it is admitted by Lessee that term of lease has expired, lease stood determined by efflux of time. Then Court said :

"Once the lease stood determined by efflux of time, *there* ***was no necessity for a notice of termination Under Section 106."*** (Emphasis added)

104. For taking above view, Court relied on its earlier decision in **R.V. Bhupal Prasad v. State of A.P. (1995) 5 SCC 698.**

105. In the above authority, Court held that after expiry of period of lease, status of Lessee becomes that of 'Tenant at sufferance'. 'Tenant at sufference' is one who comes into possession of land by lawful title, but who holds it by wrong after termination of term or expiry of lease by efflux of time. The tenant at sufferance is one who wrongfully continues in possession after extinction of a lawful title. There is little difference between him and a trespasser. Quoting from Mulla's Transfer of Property Act (7th Edn.) at page 633, Court observed that tenancy at sufferance is merely a fiction to avoid continuance in possession operating as a trespass. It has been described as the least and lowest interest which can subsist in reality. It, therefore, cannot be created by contract and arises only by implication of law when a person who has been in possession under a lawful title continues in possession after that title has been determined, without consent of person entitled. A "tenancy at sufferance" does not create relationship of landlord and tenant. Court further quoted from page 769 of Mulla's transfer of Property Act (7th Edition), that act of holding over after expiration of term does not necessarily create a tenancy of any kind. If lessee remains in possession after determination of term, the common law Rule is that he is a tenant at sufferance.

106. The expression "holding over" is used in the sense of retaining possession. However, in the present case, as we have already said that even Section 116 of TP Act, 1882 is not applicable to the case of petitioner.

107. It is in this backdrop we find that authorities relied by petitioner are inapplicable to the facts of this case and do not help petitioner at all.

108. The first authority cited is **Bishan Das and others Vs. State of Punjab and others (supra)** in which a Constitution Bench had an occasion to consider fundamental right of property vis-a-vis infringement therewith by executive orders. Therein, one Lala Ramji Das , carrying on a joint family business in the name and style of Faquir Chand Bhagwan Das, desired to construct a Dharmasala on a Nazul property of the then State of Patiala. In 1909, he sought permission of Government to construct a Dharmasala on the said land, since it situate near Barnala Railway Station, and therefore would have been convenient to Travellers who come to that place. It appears that initially for the same purpose, Patiala Government had granted permission to Choudhuris of Barnala bazar, but they could not do so for want of funds. Therefore when Ramji Das sought permission in the name of Firm "Faquir Chand Bhagwan Das" in May, 1909, same was granted and communicated by Assistant Surgeon, In-charge of Barnala Hospital, who was presumably In-charge of Public Health Arrangements at Barnala. The sanction was subject to certain conditions, namely, no tax shall be taken for the land; shopkeepers will arrange 'Piao' for the passengers; plans of the building shall be presented before sanctioning authority; cleanliness and sanitary rules shall be followed by the

persons maintaining Dharmasala; no permission to construct any shop will be granted and if any condition is violated, State shall dispossess them from the land in dispute.

109. Dharmasala was constructed in 1909 and an inscription on the stone to the following effect was made:

"Dharmasala Lala Faquir Chand Bhagwan Das, mahajan, 1909."

110. Though a condition was imposed for not permitting construction of any shop, but as a matter of fact, a number of shops were later constructed, with the permission of authorities concerned, for meeting expenses for maintenance of Temple and Dharmasala. A complaint was made in 1911 against Ramji Das that he was utilizing Dharmasala for his private purpose but it remained unheeded. On the complaint made, some inquiry was also conducted by Tehsildar wherein Ramji Das got his statement recorded in January, 1925. On 07.04.1928, Revenue Minister, Patiala State, passed an order stating that though land on which Dharmasala had been built, was originally Government land (nazul property), it would not be proper to declare it as such and Dharmasala should continue to exist for the benefit of the public; Ramji Das or any other person will not be competent to transfer land and if such transfer is made, it would be unlawful and invalid and in such event, Government will escheat. Some further inquiry was also made and it appears that Ramji Das was given permission to make a raised platform and other extensions etc. On 10.09.1954, one Gopal Das, Secretary, Congress Committee, Barnala, filed a petition to Revenue Minister, Patiala, making various allegations against Ramji Das. Thereupon an inquiry was conducted by Tahsildar, who found that Dharmasala was constructed by Ramji Das on Government land; Dharmasala was for public benefit; and, that Ramji Das had been its Manager throughout; Ramji Das was bound to render accounts which he failed considering that property belong to him; and, therefore, he should be removed and past accounts be called for. When matter went for opinion of Legal Remembrancer of State Government, it was pointed out that Dharmasala and Temple, though built on Government land, but not Government property. It also said that though Ramji Das was repudiating existence of a Public Trust, he was working as Trustee of a Trust created for public purposes of a charitable or religious nature and could be removed by State only under Section 92 Civil Procedure Code. Ramji Das died on 10.12.1957. Petitioner Bishan Das and others came to manage Dharmasala, Temple and the shops etc. On 23.12.1957, Gopal Das and some others, describing themselves as members of public, made an application that since Ramji Das was dead, new arrangements should be made for proper management of Dharmasala which is used for the benefit of the public. Again a search of old papers was made and this time Sub-Divisional Officer, Barnala, recommended that in the interest of Government, Municipal Committee, Barnala, should take immediate charge of management of Dharmasala. This recommendation was affirmed by Deputy Commissioner, Sangrur, and pursuant to the said order, Kanungo presumably dispossessed Bishan Das and others from part of Dharmasala on 07.01.1958 and charge thereof was given to Municipal Committee, Barnala. These orders were

challenged by petitioners alleging that the same were without any authority of law and violative of fundamental rights enshrined under Articles 14, 19 and 31 of Constitution.

111. The defence taken was that property is Trust property of a public and charitable character, hence Bishan Das and others were not entitled to claim any property rights in respect thereof.

112. Supreme Court observed in Para-10 that even if it is assumed that the property is Trust property, no authority of law authorizing State or its Executive Officers to take action against Bishan Das and others in respect of Dharmasala was shown. Government counsel sought to argue that Bishan Das and others were Trespassers and land on which Dharmasala situate belong to Government, hence Government was entitled to use minimum of force to eject trespassers, but this defence was rejected by Court holding that it is a clear case of violation of fundamental right of Bishan Das and others. Court said that nature of sanction granted in 1909 in respect of land, whether it was a lease or licence, with a Grant or an irrevocable licence are questions of fact, need not be gone into by it but admitted position is that land belonged to Government who granted permission to Ramji Das on behalf of Joint Family Firm to build Dharmasala, Temple and Shops and manage the same during his life time. After his death his family members continued with management. Thus, they were not trespassers at all in respect of Dharmasala, Temple and Shops; nor could it be held that Dharmasala, Temple and Shops belong to State. The question whether Trust created was public or private is irrelevant. Court said that a Trustee, even of a Public Trust, can be removed only by procedure known to law. He cannot be removed by an executive fiat. The maxim, what is annexed to the soil goes with the soil, has not been accepted as an absolute rule of law in India and in this regard, Court referred to earlier decisions in **Thakoor Chunder Parmanick Vs. Ramdhone Bhuttacharjee (1866) 6 W.R. 228; Lala Beni Ram Vs. Kundan Lall (1899) L.R. 26 I.A. 58 and Narayan Das Khettry Vs. Jatindranath (1927) L.R. 54 I.A. 218.** Court said that a person who bona fide puts up constructions on land belonging to others with their permission would not be a trespasser, nor would the buildings so constructed vest in the owner of the land by application of maxim *quicquid plantatur solo, solo credit.* It held:

"It is, therefore, ***impossible to hold that in respect of the dharmasala, temples and shops, the State has acquired any rights whatsoever merely by reason of their being on the land belonging to the State.*** *If the State thought that the constructions should be removed or that the condition as to resumption of the land should be invoked, it was open to the State to take appropriate legal action for the purpose."*

(Emphasis added)

113. Court said that even if State proceeded on the assumption that there was a Public Trust, it could have taken appropriate legal action for removal of Trustees by way of Suit under Section 92 C.P.C. and not otherwise. Constitution Bench then said:

" .. that ***does not give the State or its executive officers the right to*** *take the law into their own hands and* ***remove the trustee by an executive order.***

(Emphasis added)

114. Court concluded its findings in Para-14 of judgment, as under:

"The facts and the position in law thus clearly are (1) that the buildings constructed on this piece of Government land did not belong to Government, (2) that the petitioners were in possession and occupation of the buildings and (3) that by virtue of enactments binding on the Government, the petitioners could be dispossessed, if at all, only in pursuance of a decree of a Civil Court obtained in proceedings properly initiated."

115. Court passed serious stricture against State authorities holding that the executive action taken by State and its Officers is destructive of the basic principle of rule of law. Hence action of Government in taking law into their hands and dispossessing petitioners by display of force, exhibits a callous disregard of normal requirements of rule of law, apart from what might legitimately and reasonably be expected from a Government functioning in a society governed by a Constitution which guarantees to its citizens against arbitrary invasion by the executive on peaceful possession of property. Court reiterated what was said in **Wazir Chand Vs. The State of Himachal Pradesh AIR 1954 SC 415** that State or its executive officers cannot interfere with the rights of others unless they can point out some specific rule of law which authorizes their acts. Supreme Court seriously deprecated State and said:

*"We have **here a highly discriminatory and autocratic act which deprives a person of the possession of property without reference to any law or legal authority.** Even if the property was trust property it is difficult to see how the Municipal Committee, Barnala, can step in as trustee on an executive determination only."*

116. Aforesaid decision has no application to the present case, inasmuch as, here State has exercised its power following terms and conditions laid down under lease-deed, which were made to prevail over any Statute providing otherwise, including TP Act, 1882, vide Section 2 of GG Act, 1895. Further, respondents, in exercise of right of resumption/re-entry, have not straightway went to dispossess petitioner but notice in question has been given to it giving time to vacate the premises whereafter respondents proposes to take further action for taking possession after approval from State Government. Therefore, it cannot be said that no notice has been given to petitioner in the present case.

117. **Express Newspapers Pvt. Ltd. and others Vs. Union of India (1986) 1 SCC 133** is a matter which was decided in a Writ Petition filed under Article 32 of Constitution by aforesaid Newspaper Company having its Establishment in Express Buildings at 9-10, Bahadurshah Zafar Marg, New Delhi, which was a land on perpetual lease from Union of India, under a registered Indenture of Lease, dated 17.03.1958. Five petitioners, who filed above Writ Petition before Supreme Court included Indian Express Newspaper (Bombay) Private Limited of which Express Newspapers Private Limited was a subsidiary and petitioners-3, 4 and 5, namely, Sri Ram Nath Goenka, as Chairman of the Board of Directors, Nihal Singh, Editor-in-chief of Indian Express and Romesh Thapar, Editor of Paper

published from the Express Buildings. Union of India; Lt. Governor of Delhi, Sri Jagmohan; Municipal Corporation of Delhi; Zonal Engineer (Buildings) and Land and Development Officer were impleaded as respondents-1 to 5. The validity of notice of re-entry upon forfeiture of lease issued by Engineer Officer, Land and Development Office, New Delhi on 10.03.1980 was challenged. The notice required petitioners to show cause why Union of India should not re-enter upon and take possession of demised premises i.e. plots nos. 9 and 10, Bahadurshah Zafar Marg, together with Buildings built thereon under Clause 5 of Indenture of Lease, dated 17.03.1958, for committing breach of Clauses 2(14) and 2(5) of lease-deed. Another notice was issued earlier on 01.03.1980 by Zonal Engineer (Buildings), Municipal Corporation, City Zone, Delhi requiring Express Newspapers Pvt. Ltd., New Delhi to show cause why aforesaid buildings, being unauthorized, be not demolished under Sections 343 and 344 of Delhi Municipal Corporation Act, 1957 (hereinafter referred to as "DMC Act, 1957"). A challenge was made, besides others, on the ground of personal vendetta against Express Group of Newspapers and also being violative of Articles 14, 19(1)(a) and 19(1)(g) of the Constitution. The questions posed by Supreme Court, to be of far reaching consequence for maintenance of federal structure of Government, were:

(1) Whether the Lt. Governor of Delhi could usurp the functions of the Union of India, Ministry of Works and Housing and direct an investigation into the affairs of the Union of India i.e. question the legality and propriety of the action of the then Minister for Works and Housing in the previous Government at the center in granting permission to Express Newspapers Pvt. Ltd. to construct new Express Building with an increased FAR of 360 with a double basement for installation of a printing press for publication of a Hindi Newspaper on the western portion of the demised premises i.e. Plots No. 9 and 10, Bahadurshah Zafar Marg, New Delhi with the Express Buildings built thereon?

(2) Whether the grant of sanction by the then Minister for Works and Housing and the consequential sanction of building plans by him of the new Express Building was contrary to the Master Plan and the Zonal Development Plans framed under the Delhi Development Act, 1957 and the municipal bye-laws, 1959 made under the DMC Act, 1957 and therefore the lessor i.e. the Union of India had the power to issue a notice of re-entry upon forfeiture of lease under Clause 5 of the indenture of lease dated March 17, 1958 and take possession of the demised premises together with the Express Buildings built thereon and the Municipal Corporation had the authority to direct demolition of the said buildings as unauthorized construction under Sections 343 and 344 of the DMC Act, 1957?

(3) Whether the threatened action which the petitioners characterise as arbitrary, illegal and irrational was violative of Article 19(1)(a) read with Article 14 of the Constitution?

118. Thereafter Court analyzed facts in detail and respective arguments and from Para-45 to 47 we find that Government of India and Lt. Governor of Delhi were Head on to each other and even Counsel's role was not appreciated by Court. In the light of arguments

advanced by parties, in para-59 of judgment, Court formulated eight questions. The issue of maintainability of writ petition under Article 32 was also raised and it was considered in the judgment from para-66 onwards. Court held that building in question was necessary for running press. Any statutory or executive action to pull it down or forfeit the lease, would directly impinge on the right of freedom of speech and expression under Article 19(1)(a) and therefore, writ petition was maintainable. Court said:

"... impugned notices of re-entry upon forfeiture of lease and of the threatened demolition of the Express Buildings are intended and meant to silence the voice of the Indian Express. It must logically follow that the impugned notices constitute a direct and immediate threat to the freedom of the press and are thus violative of Article 19(1)(a) read with Article 14 of the Constitution."

119. Since, land in dispute was Government land, provisions of Government Grants Act, 1895 (hereinafter referred to as "GG Act, 1985") were also relied on by Government and, therefore, Court examined provisions thereof also. It held that GG Act, 1895 is an explanatory or declaratory act. It said:

"Doubts having arisen as to the extent and operation of the Transfer of Property Act, 1882 and as to the power of the Government to impose limitations and restrictions upon grants and other transfers of land made by it or under its authority, the ***Act was passed to remove such doubts as is clear from the long title and the preamble.*** *The Act contains two sections and provides by Section 2 for the exclusion of the Transfer of Property Act, 1882 and, by Section 3 for the exclusion of, any rule of law, statute or enactment of the Legislature to the contrary."*

(Emphasis added)

120. Court in **Express Newspapers Pvt. Ltd. and others Vs. Union of India (supra)** further said:

"It is plain upon the terms that Section 2 excludes the operation of the Transfer of Property Act, 1882 to Government grants. While Section 3 declares that all provisions, restrictions, conditions and limitations contained over any such grant or transfer as aforesaid shall be valid and shall take effect according to their tenor, notwithstanding any rule of law, statute or enactment of the Legislature to the contrary. A series of judicial decisions have determined the overriding effect of Section 3 making it amply clear that ***a grant of property by the Government partakes of the nature of law since it overrides even legal provisions which are contrary to the tenor of the document."***

(Emphasis added)

121. Having said so, Court found that the stand taken on behalf of Union of India that there was non compliance of mandatory requirement of Clause-6, therefore notice of re-entry was valid, is not correct.

122. Court then noted some contradictions in Constitution Bench judgment in **Bishan Das and others Vs. State of Punjab and others (supra) and State of Orissa Vs. Ram Chandra Dev AIR 1964 SC 685.**

123. In **State of Orissa Vs. Ram Chandra Dev (supra),** Constitution Bench observed:

"Ordinarily, where property has been granted by the State on condition which make the grant resumable, after resumption it is the grantee who moves the Court for appropriate relief, and that proceeds on the basis that the ***grantor State which has reserved to itself the right to resume may, after exercising its right, seek to recover possession of the property without filing a suit. "***

(Emphasis added)

124. It was observed that existence of a right is the foundation for a petition under Article 226 of Constitution. In Para-84 Court said that in cases involving purely contractual issues, the settled law is, where statutory provisions of public law are involved, writs will be issued and referred to its earlier judgment in **Mohammed Hanif Vs. State of Assam (1969) 2 SCC 782.** Thereafter it also considered the provisions of Public Premises (Eviction of Unauthorized Occupants) Act, 1971 *(hereinafter referred to as "Act, 1971")* and observed that Express building was constructed with the sanction of lessor, i.e., Union of India on plots demised on 'perpetual lease' by registered lease-deed dated 17.03.1958 hence cannot be regarded as 'public premises' belonging to the Central Government under Section 2(e). That being so, Act, 1971 has no application.

125. Court then considered other provisions relating to power of Lt. Governor, and Central Government and factual aspects involved in the matter. In our view, the same are not relevant for the purpose of this Case. Court also examined applicability of doctrine of estoppel but that has also not been raised in these matters, hence it is not necessary to examine it.

126. One aspect we may notice hereat that detailed judgment has been written by Hon'ble A.P. Sen, J. Justice E.S. Venkataramiah has agreed with the judgment of Hon'ble A.P. Sen, J in relation to the aspect that Lt. Governor of Delhi, Sri Jagmohan, has taken undue interest in getting notices issued to Express Newspapers and this action is not consistent with normal standards of administration and issued under pressure of Lt. Governor of Delhi; notices were violative of Article 14, suffers with arbitrariness and non application of mind. His Lordship said that it was not necessary to express any opinion on the contention based on Article 19(1)(a) of Constitution. Hon'ble Venkataramiah, J, further said that question relating to civil rights of the parties flowing from lease deed cannot be disposed of in a petition under Article 32 of Constitution since questions whether there has been breach of covenants under the lease, whether lease can be forfeited, whether relief against forfeiture can be granted etc. are foreign to the scope of Article 32 of Constitution which should be tried in a regular civil proceeding. His Lordship further said in Para-202 of judgment as under:

"One should remember that the property belongs to the Union of India and the rights in it cannot be bartered away in accordance with the sweet will of an Officer or a Minister or a Lt. Governor but they should be dealt with in accordance with law. At the same time a person who has acquired rights in such

property cannot also be deprived of them except in accordance with law."

127. Having said so, while agreeing with ultimate order of quashing of notices, Hon'ble Venkataramiah, J. said:

"I express no opinion on the rights of the parties under the lease and all other questions argued in this case. *They are left open to be decided in an appropriate proceeding."*

(Emphasis added)

128. Hon'ble R.B. Misra, J. also agreed with Hon'ble A.P. Sen and E.S. Venkataramiah, JJ that the notices challenged in writ petition are invalid, having no legal consequences and must be quashed for reasons detailed in both the judgments. His Lordship, however, said that other questions involved in the case are based upon contractual obligations between the parties and can be satisfactorily and effectively dealt with in a properly instituted suit and not by way of writ petition on the basis of affidavits which are so discrepant and contradictory in this case. Hon'ble R.B. Misra, J. in para 207 of judgment, said:

"207. The ***right to the land and to construct buildings*** *thereon for running a business is not derived from Article 19(1)(a) or 19(1)(g) of the Constitution* ***but springs from terms of contract between the parties*** *regulated by other laws governing the subject, viz., the Delhi Development Act, 1957, the Master Plan, the Zonal Development Plan framed under the Delhi Municipal Corporation Act and the Delhi Municipal Bye-laws, 1959 irrespective of the purpose for which the buildings are constructed.* ***Whether there has been a breach of the contract of lease or whether there has been a breach of the other statutes regulating the construction of buildings are the questions which can be properly decided by taking detailed evidence involving examination and cross-examination of witnesses."*** (Emphasis added)

129. The above judgment also has no application to the facts of present case. On the contrary, majority view expressed in above judgment is that right to land and to construct building is not derived from Articles 19(1)(a) or 19(1)(g) of Constitution but springs from promise of contract between the parties. Whether there has been breach of contract of lease or there has been breach of any provision regulating lease rights and construction of building etc. are such questions which can be properly decided by taking detailed evidence involving examination and cross examination of witnesses and therefore, such rights can be enforced in common law proceedings by filing suit.

130. In **Yar Mohammad and another vs. Lakshmi Das and others AIR 1959 Allahabad 1,** a Full Bench of this Court considered following question :

"Whether the jurisdiction of the Civil Court is barred by virtue of Section 242 of the U. P. Tenancy Act in respect of suit filed under Section 9 of the Specific Relief Act for obtaining possession over agricultural land from which the plaintiff alleged his illegal dispossession within six months of the date of the-suit".

131. Therein plaintiffs instituted suit on 30.11.1948 for possession under Section 9 of Specific Relief Act, 1877 (hereinafter referred to as "Act, 1877") alleging that they were in actual

possession of land in dispute (land was admittedly an agricultural land) but wrongfully dispossessed by defendants in November 1948. Defendants contested the suit and disputed correctness of above allegations of plaintiffs and pleaded that they were in possession of land as tenants of plaintiffs for more than 12 years, hence, plaintiffs cannot eject them. They also pleaded that suit was filed under Section 9 of Act, 1877 only to evade jurisdiction of Revenue Court. Trial Court i.e. learned Munsif rejected plea of lack of jurisdiction raised by defendants, accepted the case set up by plaintiffs and decreed the suit. Defendants then filed revision no.461 of 1952, which resulted in Reference to a Larger Bench. The issue was with respect to applicability of Section 242 of U. P. Tenancy Act, 1939. Court said that Section 242 confers exclusive jurisdiction on Revenue Court and takes away jurisdiction of Civil Court only in two kinds of actions.

(i) suits or application of the nature specified in the Fourth Schedule of the Act; and

(ii) suits or applications based on a cause of action in respect of which any relief can be obtained by means of a suit or application specified in that schedule.

132. It was held that in order to attract Section 242, one has to demonstrate that action would fall under either of the above-mentioned two categories and if does not, jurisdiction of Civil Court is not ousted and Revenue Court will have no jurisdiction to entertain the action.

133. Then construing the cases, which may resort to Section 9 of Act, 1877, Court said that Section 9 gives a special privilege to persons in possession who take action promptly. In case they are dispossessed, Section 9 entitles them to succeed simply by proving:

(1) that they were in possession,

(2) that they have been dispossessed by the defendant,

(3) that dispossession is not in accordance with law, and

(4) that dispossession took place within six months of the suit.

134. No question of title, either of plaintiffs or of defendants, can be raised or gone into in an action brought under Section 9 of Act, 1877. Plaintiffs will be entitled to succeed without proving any title on which he can fall back upon and defendant cannot succeed even though he may be in a position to establish the best of all titles. Restoration of possession under Section 9 is however subject to a regular suit and person who has real title or even better title cannot be prejudiced in any way by a decree of a suit under Section 9. A person having real or better title always has a right to establish his title in a regular suit and get the possession back. The objective and idea behind Section 9, as the Court observed is that law does not permit any person to take law in his own hands and to dispossess a person, in actual possession, without having recourse to a Court or Institution, in an illegal manner. In other words, objective of Section 9 is to discourage people from taking law in their own hands, how-ever good title they may have. In the interest of public order, self-help is not permitted so far as possession over Immovable property is concerned, Section 9 is intended to discourage and prevent proceedings which might lead to serious breach of peace. It does not allow a person

who has acted high-handedly by wrongfully dispossessing a person in possession from deriving any benefit from his own unjustified act. Section 9, infact, provides for a summary and quick remedy for a person who is in possession but illegally ousted therefrom without his consent. Court observed that 'Possession' is prima facie evidence of title and if a person who is in possession is dispossessed, he has a right to claim back possession from the person who dispossesses him. In an ordinary common law proceedings, a person who has a title, is entitled to possession and cannot be deprived of his right of possession by a person, who has no title or inferior to the former. Court said that for Section 9, claim of title is not allowed to be set up and possession wrongfully taken, has to be restored. Full Bench therefore, answered question formulated above in negative.

135. In our view, above judgment has no application to the facts of this case for the reason that title of land is not in dispute, inasmuch as, it is admitted case of petitioner that land in dispute is 'Nazul', hence it is owned and vested in Government. It is also not in dispute that petitioner got possession of land in dispute being original Lessees. Petitioner has not been evicted illegally, hence Section 9 of Act, 1877 has no application. In the present case right of re-entry is being exercised by respondent-State in terms of lease-deed, pursuant whereto possession was given to Lessees, and now it (petitioner) is bound to restore possession in terms of lease whereunder lessee was obliged to surrender/hand over possession to State Government.

136. We may also note hereat that in the case in hand, lease was governed by provisions of GG Act, 1895 and Section 2, as amended in State of U.P., has excluded provisions of U.P. Tenancy Act, 1939 for governing rights etc. of parties. Only provisions contained in lease-deed shall apply and have to be given effect to as if U.P. Tenancy Act, 1939 was not passed. Therefore also, reliance placed upon the aforesaid judgment, in the case in hand, is of no consequence.

137. **Lallu Yeshwant Singh (dead) by his legal representative vs. Rao Jagdish Singh and others, AIR 1968 SC 620** is a judgment which came up before two Judges Bench of Supreme Court from a dispute raised under Qanoon Mal Riyasat Gwalior Samvat, 1983 *(hereinafter referred to as "Qanoon Mal")* that is from Madhya Pradesh. Under Section 326 of Qanoon Mal, a suit was filed by Yeshwant Singh and others i.e. plaintiffs against Rao Jagdish Singh and others (defendants) in the Court of Tehsildar for possession of some agricultural land. Plaintiffs set up a case that they were in possession of land and forcibly dispossessed by defendants, therefore, should be restored their possession. Tehsildar decreed the suit and order was affirmed in appeal by Collector as well as Commissioner. Revision was also dismissed by Board of Revenue and decree passed by Tehsildar was maintained. Section 326 of Qanoon Mal broadly provided summary remedy as is provided in Section 9 of Act, 1877. In para 7 of judgment, Court has referred to both the provisions and said that both are broadly similar. High Court took a different view holding that it was not necessary for a Lessor to resort to Court for obtaining possession and if there is default by plaintiff, it could have been dispossessed by defendants. Supreme Court said that no person can take law in

its own hand and in such matter, where provisions providing summary procedure for restoration of illegal dispossession of land have been made, the same can be resorted to by the person who has been illegally dispossessed. Supreme Court affirmed Full Bench judgment of this Court in **Yar Mohammad (supra)**. Here also we do not find applicability of this judgment to the case in hand for the reasons we have already said in respect of judgment in **Yar Mohammad (supra).**

138. Decision in **State of U.P. Vs. Zahoor Ahmad and another (supra)**, we find, instead of helping petitioner, supports the view which we have taken hereinabove. **State of U.P. vs. Zahoor Ahmad and another (supra)** was a matter which came up before two Judges Bench of Supreme Court arising from action by State in respect of certain land which fell within Reserved Forest in State of Uttar Pradesh. Zahoor Ahmad was granted lease of a plot of land at Chandan Chowki, Sonaripur Range in North Kheri Forest Division for an annual rent of Rs.100/-. The aforesaid land was part of Reserved Forest of which State of U.P. is the proprietor. Lease was granted for industrial purposes for one year commencing from 18.03.1947. It was renewed on 10.06.1948 with effect from 18.03.1948 for one year and again in 1949 for further one year. Ultimately lease expired on 18.03.1950. State of U.P., after termination of lease, allowed Zahoor Ahmad to continue in possession of land on the conditions settled between the parties that Licensee i.e. Zahoor Ahmad would pay Rs.1,000/- as annual rent for occupation till 15.07.1950. Even after determination of lease on 15.7.1950, Zahoor Ahmad i.e. Licensee continued in possession and State of U.P. allowed him to remain in possession for three years beyond 15.07.1950 though for this period Zahoor Ahmad did not agree to give any undertaking of making payment of annual rent of Rs.1,000/-. A letter dated 04.12.1951 was issued to Zahoor Ahmad asking him to pay Rs.3,000/- for the year 1950-51. Letter further provided that if Zahoor Ahmad do not agree to pay Rs.3,000/- for the year 1950-51, amount of rent would be reduced to Rs.1800/- but he would not be allowed lease in future in any circumstance. The fact remains that Zahoor Ahmad was allowed to continue in occupation of land without any agreement as to the amount of rent payable for 1950-51. On 29.10.1952, Conservator of Forests sent a letter that Zahoor Ahmad can be allowed to run mill beyond 15.07.1950 for three years if he pays Rs.3,000/- per annum, and for one year only, if he is ready to pay Rs.1,800/- but thereafter lease would not be renewed. Notice also said that he was only Licensee and should remove his plant and vacate the premises within one month and pay Rs.6,000/- as damages for use and occupation. Zahoor Ahmad did not pay the amount, hence a suit for recovery of damages was filed by State of U.P. High Court came to the conclusion that Licensee (Zahoor Ahmad) was allowed to continue with the consent of State of U.P. though there was no written agreement about rate of rent and lease was granted for industrial purposes. Under Section 106 of TP Act, 1882, such lease is for year to year basis. The lease could have been terminated by six months notice and no such notice was given, therefore, tenancy was not validly terminated. With respect of amount of rent, Court took the view that under Section 116, renewal would mean the same terms and conditions as made applicable in previous lease. High

Court therefore decreed the suit for payment of rent of Rs.3,000/-. Possession was allowed by State with its consent. Thus, High Court took the view that 'holding over' was applicable under Section 116. State Government bye-passing provision of TP Act, 1882 sought to rely on GG Act, 1895. Whether the kind of above lease, granted by State could have been brought within the purview of GG Act, 1895, Supreme Court examined this issue by referring to two judgments. In one, lease of forest land of Sunderbans was held to be a 'Grant' while, in another, Grant of Khas Mahal was not held to be as 'Grant'. In **Jnanendra Nath Nanda vs. Jadu Nath Banerji AIR 1938 Cal 211** two leases of two lots were granted by Sunderban Commissioner on behalf of Secretary of State. The land comprised in the lots were 'waste lands' of the Government. 'Waste lands' of Sunderbans were not property of any subject. Sunderbans was vast impenetrable forest. It was the property of East India Company and later on vested in Crown by virtue of an Imperial Statute. Court found that history of legislation showed that grants of Sunderbans lands were treated to be 'Crown Grants' within the meaning of 'Crown Grants Act'. In another matter i.e. **Secretary of State for India in Council vs. Lal Mohan Chaudhuri, AIR 1935 Cal 746** in respect of Khas Mahal, lease was granted by Government. It was held that lease of Khas Mahal does not come within the category of 'Grant' as contemplated in GG Act, 1935. Having said so, in para 13 of judgment, Court said that lease granted to Zahoor Ahmad was for the purpose of erecting a temporary rice mill and for no other purpose. The mere fact that State is the lessor will not by itself make above lease a 'Government Grant' within the meaning of GG Act, 1895. We may reproduce para 13 of the judgment in **State of U.P. vs. Zahoor Ahmad (supra)** as under :

"The lease in the present case was for the purpose of erecting a temporary rice mill and for no other purpose. The mere fact that the State is the lessor will not by itself make it a Government grant within the meaning of the Government Grants Act. There is no evidence in the present case in the character of the land or in the making of the lease or in the content of the lease to support the plea on behalf of the State that it was a grant within the meaning of the Government Grants Act." (Emphasis added)

139. When a question arose whether High Court has rightly applied Section 116 of TP Act, 1882, Supreme Court, in this context, referred to a judgment of this Court in **Lala Kishun Chand vs. Sheo Dutta, AIR 1958 All. 879** wherein after expiry of lease of Nazul land, Licensee was permitted by Board of Revenue to continue in occupation as tenant and rent was also realized from him and held that in these facts, Section 116 TP Act, 1882 was rightly applied.

140. Thus, the above judgment insofar as interpretation of GG Act, 1895 and giving terms of lease overriding effect, does not help petitioner and in other aspect it is decided on its own facts.

141. We, therefore, answer **questions (vii), (viii) and (ix)** against petitioner.

142. The **last and tenth question** is "whether re-entry/resumption of land by Lessor i.e. State Government is valid?"

143. So far as validity of resumption of land for 'public purpose' is concerned, it could not be disputed that land has been sought to be required by State for 'public purpose'. Allahabad City has been selected for development as a Smart City and respondents have pleaded that demand of huge land has been made by various Government departments since various Offices, Workshops, Parks, Parking places etc. have to be constructed. The land in dispute has been found suitable for "Nurseries for Horticulture Department, Homeopathic/Ayurvedic/Unani Hospital, Office of Information Department and Office of Central Ground Water Board" which are public purpose. In fact, on this aspect, no substantial argument has been made and in our view, resumption of land by State is for 'public purpose'.

144. Now, we may also observe that litigation initiated by petitioner on the one hand has given enough time to it to continue to hold and enjoy land in dispute and simultaneously denied opportunity to respondent authorities to take possession of land in question for the purpose of carrying out developmental activities where time is a matter of essence. The impugned notice was issued on 18.08.2018 and for more than twelve months have already been availed by petitioner to enjoy benefit of possession of land in dispute. It has enjoyed the same without spending even a single penny towards rent, damages, compensation for such enjoyment. Land in question is required for developmental activities in furtherance of developing Prayagraj City as "Smart City". Developmental activities require an early action, but, by indulging in litigation, petitioner has already delayed it sufficiently, therefore, even if what petitioner claims that it should have been given notice or sufficient time to vacate, the same has already been achieved as petitioner had already enough time. It is, thus, a fit case where we do not find that any other technicality should be allowed to intervene and, earliest is the better that possession of land is transferred to respondents so that developmental activities may proceed without any further delay. Considering the facts and circumstances and also the fact that petitioner has already enjoyed continued possession over land in dispute for the last almost more than a year after issue of impugned notice, we direct petitioner to vacate disputed land within one month from the date of delivery of judgment.

145. In view of above discussion, we do not find any merit in the petition. Subject to above direction with respect to period of vacating land in dispute, writ petition is dismissed.

146. No costs.

(2019)12 ILR A626

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.10.2019

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE VIRENDRA KUMAR SRIVASTAVA, J.

Writ C No: 32687 of 2018

Hari Babu Jain & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Ishwar Chandra Tyagi, Sri Nirvikar Gupta

Counsel for the Respondents:
C.S.C., Sri Ajit Kumar Singh (Addl. A.G.), Sri Nimai Das & Sudhanshu Srivastava (Addl. C.S.C.)

A. Civil Law - Government Grants Act, 1895 - Section 3 - 'Nazul' - a land owned and vested in State - land which has vested in State by virtue of its 'Sovereignty' and incidence of 'Sovereignty' i.e. annexation, lapse and bona vacantia - 'Grant' - transfer of property by a deed in writing and includes within its ambit, an instrument of lease/lease deed. (Para-81)

Entry of petitioners over land in dispute was wholly unauthorized -, their status is of 'rank trespassers' - they have no right over land in dispute - respondent's authority has given opportunity to petitioners by means of notice in question - Even otherwise, if petitioners would have been a valid leaseholder, their rights under lease would have been contractual. (Para 168 & 205)

Held: - In the matter of contract principles of natural justice are not applicable. (Para 168 & 205)

B. Civil Law - Government Grants Act, 1895 - Section 3(repealed by Act of 2017) - Nazul land - Resumption of land by Government.

Resumption of land in question is in accordance with law and petitioners have no right whatsoever to claim continued possession over land in dispute. Even scheme of freehold as governed by various Government Orders shows, wherever land is required by State Government for 'public purpose' for own use, it shall not allow freehold. (Para 201)

Held:- Petitioners had no right, legal, contractual or otherwise in respect of possession of land in dispute; they were not holding possession of land validly; once State exercises right of re-entry, question of conversion of freehold also would not arise, hence notice in question warrants no interference.- by means of impugned notice, petitioners have been given enough time to vacate the land and thereafter only State shall take steps for possession, if vacant possession is not given by petitioners-Petitioners already enjoyed interim order passed by this Court and continued in possession over land in dispute for last almost more than a year - petitioners directed to vacate disputed land within one month . (Para - 202, 208 & 211)

Writ petition dismissed. (E-7)

List of cases cited: -

1.Anand Kumar Sharma Vs. State of U.P. 2014 (2) ADJ 743

2.Hajee S.V.M. Mohd. Jamaludeen Bros. & Co. vs. Govt. of T.N., (1997) 3 SCC 466;

3.State of U.P. vs. Zahoor Ahmad (1973) 2 SCC 547;

4.Chintamani Ghosh and another vs. State of U.P. and others, 2001 (2) UPLBEC 1003;

5.State of Andhra Pradesh vs. Kaithala Abhishekam, AIR 1964 AP 450;

6.Union of India and others vs. Harish Chand Anand, AIR 1996 SC 203;

7.Smt. Shakira Khatoon Kazmi and others vs. State of U.P. and others, 2002 (1) AWC 226;

8.Azim Ahmad Kazmi and others vs. State of U.P. and others (2012) 7 SCC 278;

9.Anand Kumar Sharma vs. State of U.P. and others, 2014 (2) ADJ 742

10.Writ Petition No. 62588 of 2010 (M/s Madhu Colonizers Pvt. Ltd. vs. State of U.P. and others)

11.Dyke v. Walford 5 Moore PC 434= 496-13 ER 557 (580)

12.Pierce Leslie and Co. Ltd. Vs. Miss Violet Ouchterlony Wapsnare, AIR 1969 SC 843

13.Collector of Masulipatam v. C. Vencata Narainapah 8 MIA 500, 525;

14.Ranee Sonet Kowar v. Mirza Himmut Bahadoor (2) LR 3 IA 92, 101,

15.Bombay Dyeing and Manufacturing Co. Ltd. v. State of Bombay [1958] SCR 1122, 1146,

16.Superintendent and, Legal Remembrancer v. Corporation of Calcutta [1967] 2 SCR 170.

17.Cook v. Sprigg (1899) AC 572

18.Raja Rajinder Chand v. Mst. Sukhi, AIR 1957 SC 286.

19.Nayak Vajesingji Joravarsingji v. Secretary of State for India in Council AIR 1924 PC 216

20.Dalmia Dadri Cement Co. Ltd. v. CIT [1958] 34 ITR 514 (SC) : AIR 1958 SC 816,

21.Promod Chandra Deb v. State of Orissa AIR 1962 SC 1288

22.Amarsarjit Singh v. State of Punjab AIR 1962 SC 1305

23.Thakur Amar Singhji v. State of Rajasthan AIR 1955 SC 504

24.State of Rajasthan vs. Sajjanlal Panjawat AIR 1975 SC 706

25.Director of Endowments, Govt. of Hyderabad vs. Akram Ali, AIR 1956 SC 60,

26.Sarwarlal vs. State of Hyderabad, AIR 1960 SC 862.

27.Promod Chandra Deb vs. State of Orissa AIR 1962 SC 1288

28.Biswambhar Singh vs. State of Orissa 1964 (1) SCJ 364

29.State of U.P. vs. Zahoor Ahmad, 1973(2) SCC 547

30.Hajee S.V.M. Mohamed Jamaludeen Bros. & Co. vs. Government of Tamil Nadu (1997) 3 SCC 466

31.Azim Ahmad Kazmi and others vs. State of U.P. and Another (2012) 7 SCC 278

32.State of U.P. and others vs. United Bank of India and others (2016) 2 SCC 757

33.Mohsin Ali vs. State of M.P. AIR 1975 SC 1518

34.Pradeep Oil Corporation vs. Municipal Corporation of Delhi and others (2011) 5 SCC 270

35.Shakira Khatoon Kazmi vs. State of U.P., AIR 2002 All 101

36.Writ Petition No. 44517 of 1998, Sayed Shah Khursheed Ahmad Kashmi vs. State of U.P

37.State of U.P. vs. Zahoor Ahmad, 1973(2) SCC 547

38.The State of U.P. vs. Zahoor Ahmad and Another, 1973(2) SCC 547,

39.Delhi Development Authority Vs. Anant Raj Agencies Pvt. Ltd. (2016) 11 SCC 406

40.State of U.P. and others vs. United Bank of India and others (2016) 2 SCC 757

41.R.V. Bhupal Prasad vs. State of A.P. (1995) 5 SCC 698

42.Sevoke Properties Ltd. vs. West Bengal State Electricity Distribution Company Ltd. AIR 2019 SC 2664

43.Purushottam Dass Tandon and others vs. State of U.P. & Ors. AIR 1987 All. 56,

44.State of U.P. and others vs. Purshottam Das Tandon and others 1989 Supp.(2) SCC 412

45.Shanti Prasad Devi and others vs. Shankar Mahto and others (2005) 5 SCC 543

46.Bishan Das and others Vs. State of Punjab and others AIR 1961 SC 1570,

47.Express Newspapers Pvt. Ltd. and others Vs. Union of India (1986) 1 SCC 133,

48.Yar Mohammad and another vs. Lakshmi Das and others AIR 1959 Allahabad 1

49.Lallu Yeshwant Singh (dead) by his legal representative vs. Rao Jagdish Singh and others, AIR 1968 SC 620.

50.Bishan Das and others Vs. State of Punjab and others AIR 1961 SC 1570

51.Thakoor Chunder Parmanick Vs. Ramdhone Bhuttacharjee (1866) 6 W.R. 228;

52.Lala Beni Ram Vs. Kundan Lall (1899) L.R. 26 I.A. 58

53.Narayan Das Khettry Vs. Jatindranath (1927) L.R. 54 I.A. 218.

54.Wazir Chand Vs. The State of Himachal Pradesh AIR 1954 SC 415

55.Express Newspapers Pvt. Ltd. and others Vs. Union of India (1986) 1 SCC 133

56.Bishan Das and others Vs. State of Punjab and others (supra) and State of Orissa Vs. Ram Chandra Dev AIR 1964 SC 685.

57.Mohammed Hanif Vs. State of Assam (1969) 2 SCC 782.

58.Yar Mohammad and another vs. Lakshmi Das and others AIR 1959 Allahabad 1

59.Lallu Yeshwant Singh (dead) by his legal representative vs. Rao Jagdish Singh and others, AIR 1968 SC 620

60.Jnanendra Nath Nanda vs. Jadu Nath Banerji AIR 1938 Cal 211

61.Secretary of State for India in Council vs. Lal Mohan Chaudhuri, AIR 1935 Cal 746

62.Lala Kishun Chand vs. Sheo Dutta, AIR 1958 All. 879

63.Bhawanji Lakhanishi vs. Himatlal Jamnadas AIR 1972 SC 819

64.Ratan Lal vs. Farshi Bibi (1907) ILR 34 Cal 396

65.Govindaswami vs. Ramaswami (1916) 30 Mad LJ 492

66.Christian vs. Hari Prasad AIR 1955 Pat 158 and Pritilata Devi vs. Banke Bihari Lal AIR 1962 Pat 446

67.Gordhan vs. Ali Bux AIR 1981 Raj 206

68.Ashoka Marketing Ltd. And another vs. Punjab National Bank and others, (1990) 4 SCC 406

69.Sarup Singh Gupta vs. S. Jagdish Singh and others (2006) 4 SCC 205

70.Anand Kumar Sharma vs. State of U.P. and others 2014(2) ADJ 742

71.Writ Petition No.62588 of 2010, M/s Madhu Colonizers Pvt. Ltd. vs. State of U.P. & Ors.,

72.State of Gujarat and Ors. vs. Meghji Pethraj Shah Charitable Trust and Ors., 1994(3) SCC 552

73.Pimpri Chinchwad Municipal Corporation and Ors. vs. Gayatri Construction Company and Anr., 2008(8) SCC 172

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

1. Heard Sri Nirvikar Gupta, learned counsel for petitioners and Sri Ajit Kumar Singh, Additional Advocate General assisted by Sri Nimai Das and Sri Sudhanshu Srivastava, Additional Chief Standing Counsel.

2. This writ petition under Article 226 of Constitution of India has been filed by three petitioners namely Hari Babu Jain, Ajit Kumar Jain and Praveen Kumar Jain, all real brothers and sons of Late Sri Panna Lal, resident of 3-A/3, P.D. Tandon Road, Civil Lines, Allahabad. They have prayed for issue of a writ of certiorari to quash order dated 14.08.2018 (Annexure 1 to the writ petition), passed by District Magistrate, Allahabad communicating that State has exercised right of resumption in respect of Nazul land

no.127, Civil Station, Allahabad area 2 acres 3947 Sq. Yards. Letter/notice of aforesaid order is addressed to 21 persons including three petitioners, who are at Serial No.5 in the aforesaid notice.

3. Petitioners have also prayed for issue of a writ of mandamus directing respondents 1 and 2 not to dispossess petitioners from area of 1204.23 Sq. Meters, in Bungalow No.3, P.D.Tandon Road, (Old Kanpur Road), Civil Lines, Allahabad, which is part of Nazul Plot No.127, Civil Station, Allahabad and also not to demolish dwelling house and constructions, superstructures, sheds, office etc., raised by petitioners on the aforesaid land.

4. Facts in brief as set out in writ petition are that Nazul Plot No.127, Civil Station, Allahabad *(hereinafter referred to as "Disputed Nazul Land")* is a very big plot having area of 2 acres 3947 Sq. Yard i.e. total 11393.53 Sq. Meters. It was initially leased out to one 'E.J.Lazarus' by Secretary of State for India in Council through Collector, District Allahabad vide lease deed dated 02.04.1862. The period of lease was 50 years. After expiry of initial period of 50 years on 01.4.1912, another lease deed was executed on 18.06.1912 for a further period of 50 years and period of lease commenced from 02.4.1912. This lease deed was executed by Secretary of State for India in Council through Collector Allahabad in favour of 'Evelyn Constance Trisham'. The lease was executed for allowing lessee to raise a dwelling house, garden or pleasure grounds. Period of lease expired on 01.4.1962.

5. Disputed Nazul Land was let out by erstwhile lessee i.e. E.C.Trisham to Vishun Nath son of Shambhu Nath and his name was also recorded in Nazul Register. Vishun Nath died in 1958 leaving behind his widow Smt. Jamuna Devi and three sons namely Harihar Nath Dhar, Triloki Nath Dhar, and Sri Dhar. Since lease expired on 01.4.1962, Sri Dhar son of Vishun Nath submitted application dated 04.5.1962 requesting for grant of fresh lease of Disputed Nazul Land. Superintendent Municipal Estates and Nazul Properties, Nagar Mahapalika, Allahabad vide letter dated 26.5.1962 informed him that no subdivision of Disputed Nazul Land would be allowed and all co-lessees have to apply jointly for fresh lease for entire site measuring 2 acres 3947 Sq. Yards. Fresh lease could not be executed, as is evident from letter dated 13.8.1969 sent by Nazul Superintendent, Nagar Mahapalika, Allahabad requiring Smt. Jamuna Devi and Shri Dhar to file affidavit on behalf of all the legal heirs. Heirs of Vishun Nath, however, inducted in 1980, petitioners as tenant over 1204.23 Sq. Yards, allocated in Northern part of P.D.Tandon Road at the rent of Rs.250/- per month. Petitioners raised various constructions etc. over the said land and continuously paid rent to Harihar Nath Dhar, who issued rent receipts being Karta of family. Petitioners constructed wood shop by the main P.D.Tandon Road in which they started a Furniture Showroom in the name of "Shree Digamber Traders". In the other portion, family members of petitioners were residing. Petitioners are also paying house tax and water tax of property in their possession.

6. Special Nazul Officer, Allahabad issued a letter dated 05.01.1981 addressed to Harihar Nath Dhar requiring him to produce following documents :

''1. मैट्रिक प्रणाली पर बना हुआ साइट का नक्शा जिसमें पूरा निर्मित क्षेत्रफल पूरे नाप के साथ दिखाया गया हो। यदि भूमि का एक से अधिक उपयोग हो रहा है तो विभिन्न भू उपयोगों का नक्शे पर स्पष्ट रूप से प्रदर्शित किया जाय और यदि साइट का विभाजन हुआ है तो इसे भी नक्शे पर दिखाया जाय।

2. विभाजन की स्थिति में विभाजन स्वीकृत कराने सम्बन्धी जिलाधीश / शासन का आदेश भी प्रस्तुत करें।

3. अपने ***स्वत्व के समर्थन में आवश्यक दस्तावेज प्रस्तुत करें।***

4. यदि ***समाप्त लीज के कई पट्टेदार थे और आपके अतिरिक्त अन्य लोग नया पट्टा लेने के इच्छुक नहीं हैं तो आपके पक्ष में पट्टा दिए जाने हेतु उनका लिखित संस्तुति / सहमति हेतु प्रस्तुत करें।''***

"1- The site-map be made on the basis of the metric system, in which whole constructed area be shown with all dimensions. If the land is used for more than one purpose, then all different usages be specifically shown in the map, and if the site has been partitioned, then it be also shown on the map.

2- In case of partition, order of District Magistrate/ Government relating to approval of partition be also produced.

3- In ***support of the title, necessary documents be produced.***

4- If ***there were many other lease-holders, and except you, no one is prepared to take new lease, then written recommendation/consent for allotting lease in your favour be produced."***

(Emphasis added)

(English Translation by Court)

7. Vishun Nath died in 1958. His wife Smt. Jamuna died in 1974. An agreement was executed on 08.11.1988 between Harihar Nath as Karta of family and petitioners Hari Babu Jain, Ajit Kumar Jain and Praveen Kumar Jain for transfer of portion of land and structure i.e. area 1204.23 Sq.meters subject to permission of Government, on payment of sale consideration of Rs.84,297.50 by petitioners to Harihar Nath. Relevant stipulations of agreement contained in paras 3, 6, 7 and 10 are as under :

3. That the ***2nd party will be responsible to obtain the permission of the Government for the transfer of the portion of the land shown red in the attached plan at his own cost and expenses.***

6. That the ***1st party will transfer the land under the possession of the 2nd party after the permission was granted by the government after the grant of the fresh lease.***

7. That ***in case the fresh lease was not granted in favour of the 1st party by including the land proposed to be transferred the 2nd party will have the rights to get the fresh lease granted to them direct from the government on payment of premium and fixed annual ground rent demanded by the government and in that case the 1st party will have no objection.***

10. That the 1st party including his heirs, executors, administrators and assigns will have no objection in case the 2nd party got the fresh lease executed in their favour direct from the government."

(Emphasis added)

8. The entire consideration was paid by petitioners to Harihar Nath. They are transferees/assignees and co-lessees of part of Disputed Nazul Land measuring 1204.23 Sq. meters. In the light of State Government's policy of making freehold of lease rights enshrined in Government Order *(hereinafter referred to as "G.O.")* dated 01.12.1998, petitioner-1 Hari Babu Jain, being Karta of family and on behalf of all other petitioners, filed application dated 28.01.1999 before Collector

Allahabad for freehold and also deposited 25 percent of circle rate i.e. Rs.1,08,260/- vide Treasury Challan dated 28.01.1999. Since no decision was taken, petitioners served notice dated 09.6.2003 on Collector, Allahabad, requesting him to decide petitioners' application for freehold. Another reminder notice was sent on 21.8.2013 by petitioners to Collector Allahabad. Petitioners also filed Original Suit No.392 of 2015, impleading Omeshwar Nath, Brijeshwar Nath, Kamleshwar Nath and Gyaneshwar Nath, all sons of late Harihar Nath, and State of Uttar Pradesh through District Magistrate, Allahabad as defendants 1 to 5 and sought following reliefs:

*''11. यह कि माननीय न्यायालय द्वारा जरिये घोषणात्मक डिक्री भवन सं0 3ए/ 3 पी0डी0 टण्डन रोड सिविल लाइन इलाहाबाद को वादीगण के हक में घोषणा कर दी जावे। **उक्त भवन के मालिक काबिज दाखिल वादीगण हैं** प्रतिवादीगण से कोई वास्ता नहीं है।*

12. (अ) यह कि प्रतिवादीगण से वादीगण को मुकदमा खर्चा दिलाया जाय।

(ब) यह कि करीन हिंसा बहक वादीगण विरूद्ध प्रतिवादीगण साबित कर लिये जाये।''

*"11. That a decree of declaration for building no. 3A/3, PD Tandon Road, Civil Lines, Allahabad may kindly be passed by the Hon'ble Court in favour of the plaintiffs to the effect that he **plaintiffs are owners having possession over the said building** and the defendants have no concern with it.*

12 (a) That the cost of the case may kindly be awarded to the plaintiffs from the defendants.

b) That share of plaintiff against defendants be declared.

(Emphasis added)

(English Translation by Court)

9. The aforesaid suit is still pending. In the meantime, now respondent-2 has passed impugned order dated 14.08.2018.

10. The order has been assailed on various grounds, i.e. notice contains names of some persons who are already dead; petitioners had applied for freehold but their application has not been decided; in an abrupt manner, impugned order has been passed without giving any opportunity; it is illegal and arbitrary particularly when in number of cases freehold has been allowed; respondents could have acquired land following procedure laid down in Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 *(hereinafter referred to as Act, 2013")* but the said procedure has not been followed and therefore, resumption is wholly illegal; lot of land is available for developing as 'Sports Complex' besides the fact that a 'Sport Complex' is already available in the city hence alleged requirement for development of 'Sports Complex' is not genuine and against public policy; petitioners cannot be ousted forcibly without resorting to procedure prescribed in Uttar Pradesh Public Premises (Eviction of Unauthorized Occupants) Act, 1972 *(hereinafter referred to as "U.P. Act, 1972")*; and, petitioners having been allowed to stay in land in dispute despite expiry of lease in 1962, bring in doctrine of estoppel against respondents and now they cannot take a somersault by asking petitioners to vacate land in dispute over which several developments by raising constructions have been made by petitioners.

11. Respondent -2 contesting the writ petition has filed counter affidavit sworn by Sri Gore Lal Shukla, Additional District Magistrate (Nazul), Allahabad. He has pleaded that Disputed Nazul Land was leased out to E.C.Tresham vide lease

deed dated 18.6.1912 executed for a period of 50 years with effect from 02.04.1912. In terms of Government Grants Act 1895 (hereinafter referred to as "GG Act, 1895") rights of parties are to be governed by the said lease deed and not by any other contrary statutory law. With respect to surrender after expiry of period of lease, relevant stipulations in lease deed reads as under :-

*"....And also **shall and will at the end, expiration or other sooner determination of the said term peaceably and quietly leave surrender and yield up to the said Secretary of State,** his Successors or Assigns the said piece or parcel of land or ground together with **all such of the said erection or building and all fixtures and fittings** which at any time and during the said term shall be affixed or set up within or upon the said demised premises **as the said Secretary of State, his Successors and Assigns shall desire to take over at a valuation according to the option hereinafter reserved to them,** subject however to the conditions hereinaftercontained."* (Emphasis added)

12. With respect to resumption by State Government, lease deed contains a clause, which reads as under:-

*"Provided always and it is hereby **declared and agreed that no compensation or payment shall be claimable by the said lessee his Executors,** Administrators or Assigns **for any buildings, erections, or fixtures, erected affixed, or placed by him, them or any of them in or upon the said premises or any part thereof, in case these premises shall be determined by re-entry for forfeiture in which case the buildings, erections and fixtures shall vest absolutely in the said Secretary of State,** his Successors and Assigns as his own property without any **compensation or payment** in respect there* (Emphasis added)

13. Land is required for public purpose of developing a 'Sports Complex' in the city of Allahabad, which has been chosen to be developed as "Smart City". A proposal sent to State Government on 19.6.2018 for resumption/re-entry has been approved by State Government vide letter 9.8.2018 and in terms thereof order dated 14.8.2018 has been passed by District Magistrate, Allahabad. No lease deed was ever executed in favour of Vishun Nath son of Shambhu Nath and there is no renewal of lease after 1.4.1962. The alleged induction of petitioners in 1980 is wholly unauthorized as it was never approved or sanctioned by State Government. Mere application for 'freehold' does not confer any vested right in petitioners as held by the Full Bench of this Court in **Anand Kumar Sharma Vs. State of U.P. 2014 (2) ADJ 743**. In any case, petitioners have no right over land in dispute on the basis of agreement dated 8.11.1988 since, Executors at that time did not possess any transferable right at all. Power of resumption is consistent with terms of lease read with provisions of GG Act 1895. It is also said that GG Act, 1895 has been repealed by Repealing and Amending (Second) Act, 2017 *(hereinafter referred to as "Act, 2017")* but rights etc. in respect of effect and consequences etc. of act already done or suffered have been saved. Section 2 provides that enactment specified in First Schedule are hereby repealed. Reference of GG Act, 1895 is in First Schedule. Section 4 of Act, 2017 reads as under :

*"**4. Savings.-** The repeal by this Act of any enactment shall not affect any*

other enactment in which the repealed enactment has been applied, incorporated or referred to;

and this Act ***shall not affect*** *the validity, invalidity,* ***effect or consequences or anything already done or suffered, or any right, title, obligation or liability already acquired, accrued or incurred, or any remedy or proceeding in respect thereof, or any release or discharge of or from any debt, penalty, obligation, liability, claim or demand, or any indemnity already granted,*** *or the proof of any past act or thing;*

nor shall this Act affect *any principle or rule of law, or established jurisdiction, form or course of pleading, practice or procedure, or existing usage, custom, privilege, restriction, exemption, office or appointment, notwithstanding that the same respectively may have been in any manner affirmed or recognized or derived by, in or from any enactment hereby repealed;*

nor shall the repeal by this Act *of any enactment* ***revive or restore any jurisdiction,*** *office, custom,* ***liability, right, tittle, privilege, restriction, exemption, usage, practice, procedure*** *or other matter or thing not now existing or any force."* (Emphasis added)

14. In view of GG Act, 1895 read with Section 4 of Act, 2017, respondents 1 and 2 have exercised power of resumption. The respondents, in their counter affidavit have placed reliance upon **Hajee S.V.M. Mohd. Jamaludeen Bros. & Co. vs. Govt. of T.N., (1997) 3 SCC 466; State of U.P. vs. Zahoor Ahmad (1973) 2 SCC 547; Chintamani Ghosh and another vs. State of U.P. and others, 2001 (2) UPLBEC 1003; State of Andhra Pradesh vs. Kaithala Abhishekam, AIR 1964 AP 450; Union of India and others vs. Harish Chand Anand, AIR 1996 SC 203; Smt. Shakira Khatoon Kazmi and others vs. State of U.P. and others, 2002 (1) AWC 226; Azim Ahmad Kazmi and others vs. State of U.P. and others (2012) 7 SCC 278; Anand Kumar Sharma vs. State of U.P. and others, 2014 (2) ADJ 742** and judgment of this Court in **Writ Petition No. 62588 of 2010 (M/s Madhu Colonizers Pvt. Ltd. vs. State of U.P. and others)** decided on 2.4.2013.

15. A rejoinder affidavit has been filed by petitioners denying all averments made in the counter affidavit which are contrary to pleadings of petitioners in writ petition. Basically averments in rejoinder affidavit are repetition of pleadings of writ petition, hence, we are not dealing with the same but may refer the same at a later stage whenever it is required.

16. Learned counsel for petitioners argued that petitioners are in possession of land in dispute since 1980. No step was taken by State of U.P. or Collector, Allahabad to dispossess petitioners from land in dispute, hence petitioners' possession over land in dispute cannot be said to be wholly illegal. They cannot be treated as mere trespasser. In accordance with policy of freehold, petitioners have also applied for conversion of lease rights into freehold but no decision has been taken thereon and abruptly impugned order has been passed, that too, without any show cause notice to the petitioners or giving opportunity, hence it is wholly illegal and in violation of principles of natural justice. It is also said that resumption, in effect, amounts to acquisition of land and therefore, taking land of petitioners without following procedure prescribed under Act, 2013 is

patently illegal. He further submitted that respondents have discriminated petitioners by keeping petitioners' application for conversion of lease rights into freehold pending while in various other matters such conversion has been allowed. Lastly, it is said that resumption on the ground of 'public purpose' i.e. for development of 'Sports Complex' is nothing but illusory and pretext to oust petitioners from land in dispute over which petitioners' residence and commercial establishments are existing, providing shelter and source of earning livelihood, hence petitioners' ouster in such manner violate their fundamental right under Articles 14 and 21 of Constitution of India.

17. Sri Ajit Kumar Singh, learned Additional Advocate General said that petitioners are wholly unauthorised occupants over land in dispute; have no right at all whatsoever; writ petition at the instance of petitioners in respect of land in dispute is not maintainable and deserves to be dismissed for this reason alone. He further reiterated all the conditions and arguments, which have been pleaded in counter affidavit and relied on authorities, which are cited in counter affidavit, which we have noticed above.

18. From rival submissions, issues which, in our view, require to be adjudicated in these writ petitions are :

i. What is "Nazul"?

ii. What is/are Statute(s) governing Crown (later amended as "Government") Grant of land owned by Crown (Government) i.e. Nazul? Its status and effect.

iii. Whether lease right governed by instrument of lease read with GG Act, 1895 is transferrable and if so, whether it is subject to any condition and any transfer made not consistent with such conditions, whether would be valid and confer an actionable right upon Transferree?

iv. What was the status of Lessee after expiry of lease-deed and any subsequent Transferee inducted by such Lessee on the land in respect whereof Grant was executed, whether such person brought in possession before expiry of lease or subsequently, would have any legally enforceable right over such premises?

v. Whether petitioners had right to get land in dispute freehold on mere submission of application form and such right will override right of State for resumption/re-entry on disputed Nazul land?

vi. Whether right of resumption exercised by State in the present case is valid and in accordance with law and is it open to State Government to seek resumption by giving notice to occupant of the land in accordance with terms of lease deed or State is bound to follow procedure of filing suit for eviction or procedure laid down in U.P. Act, 1972?

vii. Whether impugned notice and order of approval of State Government for resumption/re-entry over land in dispute is invalid on account of lack of opportunity to petitioners. In other words, whether principles of natural justice are applicable when State Government chose to exercise right of resumption/re-entry in respect of land owned by it?

19. We have framed above questions in the light of the fact that it is admitted

by all the parties that land in dispute is 'Nazul' and owned by State Government.

20. Questions (i) and (ii), in our view, can be taken together hence we proceed to discuss both these questions (i) and (ii) together.

21. Every land owned by State Government is not termed as 'Nazul' and therefore it has become necessary to understand, what is 'Nazul'.

22. State Government may own land by having acquired and vested in various ways, which includes vesting of land in the capacity of a Sovereign body and having right of bona vacantia. Property may also be acquired and owned by State by way of acquisition under the Statute relating to acquisition of land or by purchase through negotiation or gift by an individual or in similar other manner. All such land, which is owned and vested in State Government results in making the State, owner of such land, but in legal parlance, the term "Nazul" is not applicable to all such land.

23. It is only such land which is owned and vested in the State on account of its capacity of Sovereign, and application of right of bona vacantia, which is covered by the term 'Nazul', as the term is known for the last more than one and half century. In Legal Glossary 1992, fifth edition, published by Legal Department of Government of India, at page 589, meaning of the term 'Nazul' has been given as 'Rajbhoomi, i.e., Government land'.

24. Nazul is an Arabic word. It refers to a land annexed to Crown. During British Regime, immoveable property of individuals, Zamindars, Nawabs and Rajas when confiscated for one or the other reason, it was termed as 'Nazul property'. The reason being that neither it was acquired nor purchased after making payment. In old record, when such land was referred in Urdu, this kind of land was shown as 'Jaidad Munzabta'.

25. For dealing with such property, under the authority of Lt. Governor of North Western Provinces, two orders were issued in October, 1846 and October, 1848. Therein, after the words "Nazul property", its english meaning was given as 'Escheats to the Government'. Sadar Board of Revenue on May 20, 1845 issued a circular order in reference to "Nazul land" and in para 2 thereof it mentioned, "The Government is the proprietor of those land and no valid title to them can be derived but from the Government". Nazul land was also termed as "Confiscated Estate". Under Circular dated July 13, 1859, issued by Government of North Western Provinces, every Commissioner was obliged to keep a final confiscation statement of each District and lay it before Government for orders.

26. Right of King to take property by 'escheat' or as 'bona vacantia' was recognized by common law of England. Escheat of property was Lord's right of re-entry on real property held by a tenant, dying intestate, without lawful heirs. It was an incident of Feudal Tenure and based on the want of a tenant to perform Feudal services. On the tenant dying intestate without leaving any lawful heir, his estate came to an end and Lord, by his own right and not by way of succession or inheritance from the tenant, re-entered real property as owner. In most cases, land escheated to Crown as the 'Lord

Paramount', in view of gradual elimination of Intermediate or Mesne lords since 1290 AD. Crown takes as 'bona vacantia' goods in which no one else can claim property. In **Dyke v. Walford 5 Moore PC 434= 496-13 ER 557 (580)** it was said 'it is the right of the Crown to bona vacantia to property which has no other Owner'. Right of the Crown to take as "bona vacantia" extends to personal property of every kind. The escheat of real property of an intestate dying without heirs was abolished in 1925 and Crown thereafter could not take such property as bona vacantia. The principle of acquisition of property by escheat, i.e., right of Government to take on property by 'escheat' or 'bona vacantia' for want of a rightful owner was enforced in Indian territory during the period of East India Company by virtue of Statute 16 and 17 Victoria, C. 95, section 27.

27. We may recollect, having gone through history, that prior to 1857, several Estates were taken over by British Company i.e. East India Company by way of annexation. Doctrine of lapse applied in Jhansi was another kind of above mentioned two principles.

28. The above provision had continued by virtue of Section 54 of Government of India Act, 1858, section 20(3)(iii) of Government of India Act, 1915 and section 174 of Government of India Act, 1935. After enactment of Constitution of independent India, Article 296 now continues above provision and says:

*'Subject as hereinafter provided, **any property in the territory of India which,** if this Constitution had not come into operation, **would have accrued to His Majesty or, as the case may be, to the Ruler of an Indian State by escheat or lapse, or as bona vacantia for want of a rightful owner, shall if it is property situate in a State, vest in such State, and shall, in any other case, vest in the Union.'*** (Emphasis added)

29. Article 296, therefore, has retained power of State to get ownership of such land, in respect whereof principle of 'escheat', 'lapse' or 'bona vacantia' would have been applicable prior to enforcement of Constitution of India. The above power continued to apply after enactment of Constitution with the only modification that if such land is situate within the territory of State Government, it will vest in State and in other cases, it will vest in Union of India. Vesting of land and giving ownership to State Government or Union of India under Article 296 is clearly in respect of a land, which will come to it by way of 'escheat', 'lapse' or 'bona vacantia' and not by way of acquisition of land under some statute or purchase etc.

30. In **Pierce Leslie and Co. Ltd. Vs. Miss Violet Ouchterlony Wapsnare, AIR 1969 SC 843,** Court has considered the above principles in the context of 'Sovereign India' as stands under Constitution after independence, and, has observed :

"....in this country the Government takes by escheat immoveable as well as moveable property for want of an heir or successor. *In this country escheat is not based on artificial rules of common law and is not an incident of feudal tenure.* ***It is an incident of sovereignty and rests on th*****e principle of ultimate ownership by the State of all property within its jurisdiction".**

(Emphasis added)

31. Court placed reliance on **Collector of Masulipatam v. C. Vencata Narainapah 8 MIA 500, 525; Ranee Sonet Kowar v. Mirza Himmut Bahadoor (2) LR 3 IA 92, 101, Bombay Dyeing and Manufacturing Co. Ltd. v. State of Bombay [1958] SCR 1122, 1146, Superintendent and, Legal Remembrancer v. Corporation of Calcutta [1967] 2 SCR 170.**

32. Judicial Committee in **Cook v. Sprigg (1899) AC 572** while discussing, 'what is an act of State', observed :

"The taking possession by Her Majesty, whether ***by cession or by any other means by which sovereignty can be acquired,*** *was an act of State."*

(Emphasis added)

33. This decision has been followed in **Raja Rajinder Chand v. Mst. Sukhi, AIR 1957 SC 286.**

34. In **Nayak Vajesingji Joravarsingji v. Secretary of State for India in Council AIR 1924 PC 216,** Lord Dunedin said :

"When ***a territory is acquired by a sovereign State for the first time, that is an act of State.*** *It matters not how the acquisition has been brought about. It may be by conquest, it may be by cession following on treaty, it may be* ***by occupation of territory hitherto unoccupied by a recognised ruler. In all cases the result is the same.*** *Any inhabitant of the territory can make good in the municipal courts established by the new sovereign only such rights as that sovereign has, through his officers, recognised.* ***Such rights as he had under the rule of predecessors avail him nothing."*** (Emphasis added)

35. In **Dalmia Dadri Cement Co. Ltd. v. CIT [1958] 34 ITR 514 (SC) : AIR 1958 SC 816,** Court said (page 523 of 34 ITR) :

"The ***expression 'act of State'*** *is, it is scarcely necessary to say, not limited to hostile action between rulers resulting in the occupation of territories. It* ***includes all acquisitions of territory by a sovereign State for the first time, whether it be by conquest or cession."***

(Emphasis added)

36. In **Promod Chandra Deb v. State of Orissa AIR 1962 SC 1288,** Court said, 'Act of State' is the taking over of sovereign powers by a State in respect of territory which was not till then a part of its territory, either by conquest, treaty or cession, or otherwise'.

37. To the same effect was the view taken by a Constitution Bench in **Amarsarjit Singh v. State of Punjab AIR 1962 SC 1305,** where in para 12, Court said:

"It is settled law that conquest is not the only mode by which one State can acquire sovereignty over the territories belonging to another State, and that the same result can be achieved in any other mode which has the effect of establishing its sovereignty."

38. In **Thakur Amar Singhji v. State of Rajasthan AIR 1955 SC 504,** in para 40, Court said :

"The ***status of a person must be either that of a sovereign or a subject.*** *There is no tedium quid. The law does not*

recognise an intermediate status of a person being partly a sovereign and partly a subject and when once it is admitted that the Bhomicharas had acknowledged the sovereignty of Jodhpur their status can only be that of a subject. ***A subject might occupy an exalted position and enjoy special privileges, but he is none the less a subject..."*** (Emphasis added)

39. In **State of Rajasthan vs. Sajjanlal Panjawat AIR 1975 SC 706** it was held that Rulers of the erstwhile Indian States exercised sovereign powers, legislative, executive and judicial. Their firmans were laws which could not have been challenged prior to the Constitution. Court relied on earlier decisions in **Director of Endowments, Govt. of Hyderabad vs. Akram Ali, AIR 1956 SC 60, and Sarwarlal vs. State of Hyderabad, AIR 1960 SC 862.**

40. In **Promod Chandra Deb vs. State of Orissa AIR 1962 SC 1288** "act of the State" was explained in the following words :

"an "act of State" may be the taking over of sovereign powers either ***by conquest or by treaty or by cession or otherwise.*** *It may have happened on a particular date by a public declaration or proclamation, or it may have been the result of a historical process spread over many years, and sovereign powers including the right to legislate in that territory and to administer it may be acquired without the territory itself merging in the new State."*

(Emphasis added)

41. This decision has been followed later in **Biswambhar Singh vs. State of Orissa 1964 (1) SCJ 364** wherein Court said:

16. Thus, ***a territory acquired by a sovereign State is an Act of State but the land comprising territory does not become the land owned by State.*** *The* ***land owned by State may come to it in various ways, like confiscation, purchase, escheat or bona vacantia, gift, etc.*** *In such a case the ownership vests in State, like any other individual and* ***State is free to deal with the same in a manner like any other owner may do so.***

17. Thus ***'Nazul' is a land vested in State for any reason whatsoever that is cession or escheat or bona vacantia, for want of rightful owner or for any other reasons and once land belong to State,*** *it will be difficult to assume that State would acquire its own land. It is per se impermissible to acquire such land by forcible acquisition under Act, 1894, since there is no question of any transfer of ownership from one person to another but here State already own it, hence there is no question of any acquisition.*

(Emphasis added)

42. Thus the land in question which is admittedly 'Nazul', belonged to the category as discussed above i.e. it came to be vested and owned by State in its capacity of Sovereign and right of bona vacantia. When acquisition is made under the provisions of a Statute, purpose of acquisition is already known and State pay its price but when land is owned by State, which is Nazul, objective of use of such land is not predetermined but it can be utilized by State for larger public welfare and its benefit, as necessitated from time to time. In other words 'Nazul' land forms the asset owned by State in

trust for the people in general who are entitled for its use in the most fair and beneficial manner for their benefit. State cannot be allowed to distribute such largesse by pick and choose or to some selected groups etc.

43. Historical documents, record as also authorities discussed above show that earlier Government i.e. East India Company upto 1858 and thereafter British Government used to allot "Nazul land" to various persons, who had shown their alliance to such Government in various ways, sometimes by deceiving their Indian counter parts who had raised voice against British Rule, or remained faithful to British regime and helped them for their continuation in ruling this country and similar other reasons. Sometimes land was given on lease without any condition and sometimes restricted for certain period etc., but in every cases, lease was given to those persons who were faithful and shown complete alliance to British Rule. The reason was that in respect of Nazul, no predetermined objective was available as was the case in respect of land acquired by State by way of acquisition under Statute of Acquisition after paying compensation or purchase. Such allocation of land by English Rulers used to be called "Grant".

44. In other words, we can say that initially land owned by State used to be allotted in the form of 'Grant' by British Government. No specific statutory provisions were available to govern it. TP Act, 1882 was enacted to govern transfer of immovable property. Sections 10 to 12 of TP Act, 1882 made provisions invalidating with certain exceptions, all conditions for forfeiture of transferred property on alienation by transferee and all limitations over consequence upon such alienation or any insolvency of or attempted alienation by him.

45. Apprehending that above provisions of TP Act, 1882, may be construed as a fetter upon discretion of Crown in creation of inalienable Jagirs in 'Grants', acting upon advice that it would not be competent for Crown to create an inalienable and impartible estate in the land comprised in the Crown Grant, unless such land has heretofore descended by custom as an impartible Raj, it was sought to make a separate statute to give supremacy to the provisions contained in Crown's Grant, notwithstanding any other law including TP Act, 1882. With this object, i.e., 'GG Act 1895' was enacted.

46. Preamble of GG Act, 1895 gives purpose of its enactment stating that doubts have arisen to the extent and operation of TP Act, 1882 and to the power of Crown (later substituted by word "Government") to impose limitations and restrictions upon grants and other transfers of land made by it or under its authority, hence to remove such doubts, GG Act, 1895 was enacted.

47. Section 2 of GG Act, 1895, as it was initially enacted, read as under :

"Transfer of Property Act, 1882, not to apply to Government grants.- ***Nothing in the Transfer of Property Act, 1882, contained shall apply or be deemed ever to have applied to any grant or other transfer of land*** *or of any interest therein heretoforce made or hereafter to be made by or on behalf of Her Majesty the Queen Empress, Her heirs or successors, or by or on behalf of the Secretary of State for India in Council to, or in favour of, any person whomsoever; but* ***every such grant***

and transfer shall be construed and take effect as if the said Act had not been passed." (Emphasis added)

48. The above provision was amended in 1937 and 1950. The amended provision read as under :

"2. Transfer of Property Act, 1882, not to apply to Government grants.- ***Nothing in the Transfer of Property Act, 1882, contained shall apply or be deemed ever to have applied to any grant or other transfer of land or of any interest therein*** *heretoforce made or hereafter to be made by or on behalf of the Government to, or in favour of, any person whomsoever; but* ***every such grant and transfer shall be construed and take effect as if the said Act had not been passed."***

(Emphasis added)

49. Section 3 of GG Act, 1895 read as under :

3. Government grants to take effect according to their tenor.- ***All provisions, restrictions, conditions and limitations*** *over contained in any such grant or transfer as aforesaid* ***shall be valid and the effect according to their tenor, any rule of law, statute or enactment of the Legislature to the contrary notwithstanding."***

50. In State of Uttar Pradesh, vide Government Grants (U.P. Amendment) Act, 1960 (U.P. Act No.XIII of 1960), Sections 2 and 3 of GG Act, 1895, were substituted by Section 2, as under :

"2. (1) Transfer of Property Act, 1882, not to apply to Government Grants.- ***Nothing contained in the Transfer of Property Act, 1882, shall apply or be deemed ever to have applied to any grant*** *or other transfer of land or of any interest therein, heretoforce made or hereafter to be made, by or on behalf of the Government to or in favour of any person whomsoever; and* ***every such grant and transfer shall be construed and take effect as if the said Act had not been passed."***

(2) U.P. Tenancy Act, 1939 and Agra Tenancy Act, 1926 not to affect certain leases made by or on behalf of the Government.- ***Nothing contained in the U.P. Tenancy Act, 1938, or the Agra Tenancy Act, 1926, shall affect, or be deemed to have ever affected any rights, created, conferred or granted,*** *whether before or after the date of the passing of the Government Grants (U.P. Amendment) Act, 1960,* ***by leases of land by,*** *or on behalf of, the Government in favour of any person; and* ***every such creation, conferment or grant shall be construed and take effect, notwithstanding anything to the contrary contained in the U.P. Tenancy Act, 1939, or the Agra Tenancy Act, 1926.***

(3) Certain leases made by or on behalf of the Government to take effect according to their tenor.- ***All provisions, restrictions, conditions and limitations*** *contained in any such creation, conferment or grant referred to in Section 2,* ***shall be valid and take effect according to their tenor,*** *any decree or direction of* ***a court of law or any rule of law, statute or enactment of the Legislature, to the contrary notwithstanding :***

Provided that nothing in this section shall prevent, or be deemed ever to have prevented, ***the effect of any enactment relating to the acquisition of property, land reforms or the imposition***

of ceiling on agricultural land." (Emphasis added)

51. A perusal of Section 2 of GG Act, 1895 shows two things :

i. A declaration is made that any grant or other transfer of land or of any interest therein, made by or on behalf of Government, in favour of any person, on and after enactment of GG Act, 1895, would not be governed by provisions of TP Act, 1882 i.e. nothing contained in TP Act, 1882 shall apply to such Grant, transfer or interest.

ii. A clarification that a Grant or Transfer, referred to in Section 2, when is to be construed and given effect, it shall be done in such manner and by treating as if TP Act, 1882 has not been passed.

52. Thus, GG Act, 1895, in fact, was a declaratory statute. First declaration is in respect of Grant or transfer of land or creation of any interest, as the case may be, to exclude TP Act, 1882 for all purposes. Second part of Section 2 clarified that while construing and giving effect to a Grant or Transfer, referred to in Section 2, it will be presumed that TP Act, 1882 has not been passed at all.

53. In Section 2(1) of GG Act, 1895, as amended in Uttar Pradesh, we do not find any distinction vis a vis what has been said in Section 2 of GG Act, 1895. There is an addition in GG Act, 1895 in its application to Uttar Pradesh, by inserting sub-section (2) in Section 2, a provision in respect of U.P. Tenancy Act, 1939 and Agra Tenancy Act, 1926 also, making a similar declaration, as made in sub section (1) in respect of TP Act, 1882.

54. Sub-section (3) of Section 2 of GG Act, 1895 protect certain leases, already made, declaring same to be valid in the light of insertion of sub-section(1) of Section 2 in the State of Uttar Pradesh and that is why, notwithstanding any decree or direction of Court of law, leases already made, were validated, which otherwise might have been affected by U.P. Tenancy Act, 1938 or Agra Tenancy Act, 1926.

55. Proviso to sub-section (3) of Section 2 of GG Act, 1895 further declare that Section 2 of GG Act, 1895 will have no effect when land is sought to be acquired under the provisions of Statute relating to acquisition or for giving effect to a Statute relating to land reforms or imposition of ceiling on agricultural land.

56. Section 3 of GG Act, 1895 is not available in State of U.P. after U.P. Amendment Act, 1960 since Sections 2 and 3 of Principal Act virtually got amalgamated in the form of Section 2, by Government Grants (U.P. Amendment) Act, 1960. However, intent, effect and declaration by legislature is almost pari materia with the only addition that in State of U.P., U.P. Tenancy Act, 1939 and Agra Tenancy Act, 1926 are also excluded in the same manner as was done in respect of TP Act, 1882.

57. Sections 2 and 3 of GG Act, 1895 were considered in **State of U.P. vs. Zahoor Ahmad, 1973(2) SCC 547** and in para 16, Court said :

*"**Section 3** of the Government Grants Act **declares the unfettered discretion of the Government to impose such conditions and limitations as it thinks fit, no matter what the general law of the land be.** The meaning of Sections 2 and 3 of the Government Grants is that*

the scope of that Act is not limited to affecting the provisions of the Transfer of Property Act only. The ***Government has unfettered discretion to impose any conditions, limitations, or restrictions in its grants, and the right, privileges and obligations of the grantee would be regulated according to the terms of the grant, notwithstanding any provisions of any statutory or common law."***

(Emphasis added)

58. Again in **Hajee S.V.M. Mohamed Jamaludeen Bros. & Co. vs. Government of Tamil Nadu (1997) 3 SCC 466,** Court said that combined effect of two sections of GG Act, 1895 is that terms of any Grant or terms of any transfer of land made by a Government would stand insulated from tentacles of any statutory law. Section 3 places terms of such Grant beyond reach of any restrictive provision contained in any enacted law or even equitable principles of justice, equity and good conscience adumbrated by common law, if such principles are inconsistent with such terms. Court said :

"The two provisions are so framed as to ***confer unfettered discretion on the government to enforce any condition or limitation or restriction in all types of grants made by the government to any person.*** *In other words, the rights, privileges and obligations of any grantee of the government would be* ***completely regulated by the terms of the grant, even if such terms are inconsistent with the provisions of any other law."***

(Emphasis added)

59. In **Azim Ahmad Kazmi and others vs. State of U.P. and Another (2012) 7 SCC 278** observations made in para 16 in **State of U.P. vs. Zahoor Ahmad (supra)** have been reproduced and followed.

60. In **State of U.P. and others vs. United Bank of India and others (2016) 2 SCC 757,** in para 30 of the judgment, Court said :

"Indisputably, the lease of nazul land is governed by the Government Grants Act, 1895. Sections 2 and 3 of the Government Grants Act, 1895 very specifically provide that the ***provisions of the Transfer of Property Act do not apply to government lands .....***" (Emphasis added)

61. Thus, a 'Grant' of a Nazul will be governed by terms and conditions contained in the instrument/deed of Grant, wholly unaffected by any Statute providing otherwise. It cannot be doubted that the lease granted in the case in hand is/was a 'Grant' governed by GG Act, 1895. Broadly, 'Grant' includes 'lease'.

62. The term "Grant" has not been defined in GG Act, 1895. What a 'Grant' would mean is of importance for the reason that GG Act, 1895 has used the term "Grant". Therefore, it has to be seen "whether a lease executed by State in respect of land owned by it and covered by the term "Nazul", through a lease deed or instrument of lease or indenture of lease, whatever the term used, will constitute a "Grant" of State or it is something else.

63. In **Black's Law Dictionary, Eighth Edition, at page 719,** the word "Grant" has been defined as under :

*"**Grant,** n. 1. An agreement that creates a right of any description other*

*than the one held by the grantor. **Examples include leases,** easements, charges, patents, franchises, powers,and licenses. 2. The formal transfer of real property. 3. The document by which a transfer is effectd; esp., DEED. 4. The property or property right so transferred."*

64. Interestingly, in **Black's Law Dictionary,** 'Grant' has been said to be of various kinds and it has enumerated seven types of 'Grant' as under:

*"**Community grant.** A grant of real property made by a government (or sometimes by an individual) **for communal use,** to be held in common with no right to sell. A community grant may set out specific, communal uses for the property, such as for grazing animals or a playground. Cf. Private grant.*

***Escheat grant.** A **government's grant of escheated land to a new owner.** - Also termed escheat patent.*

***imperfect grant.** 1. A grant that requires the grantee to do something before the title passes to another. Cf. Perfect grant. 2. A grant that **does not convey all rights and complete title against both private persons and government, so that the granting person or political authority may later disavow the grant.** See Paschal v. Perex, 7 Tex. 368 (1851).*

***inclusive grant.** A deed or grant that describes the boundaries of the land conveyed and excepts certain parcels within those boundaries from the conveyance, usu. Because those parcels of land are owned or claimed by others.- Also termed inclusive deed.*

***office grant.** A grant made by a legal officer because the owner is either unwilling or unable to execute a deed to pass title, as in the case of a tax deed. See tax deed under DEED.*

***Perfect grant.** A grant for which the grantor has done everything required to pass a complete title, and the grantee has done everything required to receive and enjoy the property in fee. Cf. Imperfect grant*

***private grant.** A grant of real property made to an individual for his or her private use, including the right to sell it. Private grants made by a government are often found in the chains of title for land outside the original 13 states, esp. in former Spanish and Maxican possession."*

65. In **Corpus Juris Secundum,** A Complete Restatement of the Entire American Law, as developed by All Reported Cases, Volume XXXVIII, word "Grant" has been defined at page 1066-1070, as under :

*"**Grant** - In General - A word which has a peculiar and appropriate meaning in the law, and is to be construed and understood according to such meaning; but its signification, in particular cases is to be determined from its connection and the manner of its use.*

As a Noun

*In General. **The act of granting;** a bestowing or conferring; a boon, a concession, a gift; also the thing granted or bestowed. As **applied to grants by public authority,** the word "grant" implies the conferring by the sovereign power of some valuable privilege, franchise, or other right of like character on a corporation, person, or class of persons; an act evidenced by letters patent under the great seal, **granting something from the king to a subject.** In*

a somewhat different sense, an admission of something as true.

As a Contract. *A grant is said to be a contract executed, that is, one in which the object of the contract is performed. Ordinarily, the essential elements of a contract are necessary to constitute a grant, such as competent parties and a subject matter, a legal consideration, a mutuality of agreement and of obligation. As in the case of other contracts in writing, it ordinarily comprehends something more than the mere execution of the instrument; it includes a delivery of it. It is not indispensable, however, that technical words be used.*

Transfer of Property. *As a technical term, originally used to signify a conveyance of an incorporeal hereditament whereof livery could be had, but now of far more extended application, see Deeds (1 c notes 54 - 63). While the term is commonly used to denote private conveyances, it has been characterized as a nomen generalissimum, applicable to all sorts of conveyances, and in this sense has been defined* ***as a transfer of property, real or personal, by deed or writing.*** *The following notes contain examples of what, under particular circumstances and according to the subject matter and the context, the term may be applied to, or be held to include or what the term may be held not to include.*

...

Transferring property. An operative word of transfer, technically applicable to real estate, although not necessarily so. It is made use of in deeds of conveyance of lands to import a transfer; and in this application has been defined as meaning to convey; to make conveyance of; to transfer property by an instrument in writing.

As used in a will, to devise or to bequeath."

66. In **Words and Phrases, Permanent Edition, Volume 18A Gone-Gyrotiller,** word "Grant" has been defined at page 379, as under :

" ...

To grant means to give over, to make conveyance of, to give the possession or title to, to convey-usually in answer to petitioner; to confer or bestow, with or without compensation, particularly in answer to prayer or request; to admit as true when disputed or not satisfactorily proved; to yield belief to; to allow; to yield; to concede. Grant is usually regarded as synonymous with give, confer, bestow, convey, transfer, admit, allow, concede. As a noun, the term signifies: (1) The act of granting; a bestowing or conferring; concession; admission of something as true. (2) The thing granted or bestowed; a gift; a boon. (3) ***a transfer of property by deed or writing,*** *especially an appropriation or* ***conveyance made by the government, as a grant of land."***

67. In **Jowitts Dictionary of English Law, Second Edition by John Burke (Volume 1),** word "Grant" has been defined at page 870, as under:

"Grant :a common law conveyance.

. . .

The sovereign's grants are matters of record, and are either letters patent or writs close.

"Grant" is the term commonly applied to rights created or

transferred by the Crown, *e.g., grants of pensions, patents, charters, franchises. It is also used in reference to public money devoted to special purposes. See Exchequer Grants."*

68. In **Biswas Encyclopedic Law Dictionary (Legal & Commercial) Third Edition 2008,** word "Grant" has been defined at page 737, as under :

*"**GRANT.** The act of granting; something granted, especially a gift for a particular purpose;* ***a transfer of property by deed or writing; the instrument by which such a transfer is made; also the property so transferred.***

A grant may be defined generally as the transfer of property by an instrument in writing without the deliverty of possession of any subject-matter *thereof. Mozley & Whiteley's Law Dictionary, 8th edn."*

69. In **P Ramanatha Aiyar's "The Law Lexicon", Fourth Edition 2017,** word "Grant" has been defined at page 762-763, as under :

"...

An operative word of conveyance, *particularly appropriate to deeds of grant, properly so called, but used in other conveyances also, such as deeds of bargain and sale,* ***and leases.***

...

"This word is taken largely where any thing is granted or passed from one to another, and in this sense it doth comprehend feofments, bargains and sales, gifts, leases, charges, and the like; for he that doth give, or sell, doth grant also and ***thus it is sometimes in writing or by deed,*** *and sometimes it is by word without writing. But the word* ***being taken more strictly and properly, it is the grant, conveyance, or gift, by writing of such an Incorporeal thing as lieth in grant, and not in livery, and cannot be given or granted by word only without deed, or it is the grant by such persons as cannot pass anything from them but by deed,*** *as the King, bodies corporate, &c. And this albeit it may be made by other most proper to this purpose"*

The word "grant" in sec. 5 connotes transfer of property and mining leases are property. Biswanath Prasad v. Union of India, AIR 1965 SC 821, 825. [Mines and Minerals (Regulation and Developments) Act (67 of 1957), S. 5(1)]

The expression "grant" is wide enough to take within its sweep a grant by the government to the Girasdar and is not limited to a grant by the Girasdar to the tenant. Digvijaysingh Ji v. Manji Savda, AIR 1969 SC 370, 372. [Saurashtra Land Reforms Act (25 of 1951), S. 18]

"GRANT, BESTOW, CONFER. Honours, distinctions, favours, privileges are conferred. Goods, gifts, endowments are bestowed. Requests, prayers, privileges, favours, gifts, allowances, opportunities are granted. ***A peculiar sense attaches to the word Grant as a legal term, as a piece of land granted to a noble or religious house.*** *So Blackstone speaks of "the transfer of property by sale, grant, or conveyance." (Smith. Syn. Dis.)"*

70. Under Indian Easements Act, 1882, (hereinafter referred to as "IE Act, 1882"), definition of "licence" in Section 52 says that it is the Grant of a right made by Grantor. Sections 53 and 54 of IE Act, 1882 also refer to grant of licence. Thus, without a "Grant" in general sense, a licence cannot be created. This is how

definition of "licence" under IE Act, 1882 vis a vis the term "Grant" was considered in **Hajee S.V.M. Mohamed Jamaludeen Bros. & Co. (supra)**. Court also said that though the term "Grant" is not defined in GG Act, 1895, but it is quite evident that this word has been used in GG Act, 1895 in its ethnological sense and therefore, it should get its widest import.

71. In **Mohsin Ali vs. State of M.P. AIR 1975 SC 1518**, Court said :

*"in the widest sense '**grant' may comprehend everything that is granted or passed from one to another by deed.** But commonly the term is applied to rights created or transferred by the Crown e.g. grants of pensions, patents, charters, franchise."*

(Emphasis added)

72. Court in **Hajee S.V.M. Mohamed Jamaludeen Bros. & Co. (supra)**, in para 16, said that word "Grant" used in GG Act, 1895 could envelop within it, everything granted by the government to any person. A licence obtained by a person by virtue of agreement would also fall within the ambit of "Grant" envisaged in GG Act, 1895.

73. In **Pradeep Oil Corporation vs. Municipal Corporation of Delhi and others (2011) 5 SCC 270,** Court said that GG Act, 1895 is a special Statute and will prevail over general Statute i.e. TP Act, 1882. It says:

*"In the **present case grant has been made by the President of India in terms of Section 2 of the Government Grants Act, 1895 and the Transfer of Property Act, 1882 may have little bearing in the instant case. The former,** i.e. the Government Grants Act, 1895 being **a special statute** would **prevail over the general statute, i.e. the Transfer of Property Act, 1882.** Accordingly, the rights and obligations of the parties would be governed by the terms of the provisions of Government Grants Act, 1895 whereunder the Government is entitled to impose limitations and restrictions upon the grants and other transfer made by it or under its authority."* (Emphasis added)

74. Therefore, where 'Nazul' is let out to a person by Government under agreement of lease i.e. Grant, it is governed by GG Act, 1895 and rights of parties therefore have to be seen in the light of stipulations contained in the document of 'Grant'. 'Grant' includes a property transferred on lease though in some cases, 'Grant' may result in wider interest i.e. transfer of title etc. Whatever may be nature of document of transfer i.e. instrument of 'Grant', the fact remains that terms and conditions of 'Grant' shall be governed by such document and it shall prevail over any other law including TP Act 1882. One cannot take resort to TP Act, 1882 to wriggle out of any condition or limitation etc. imposed in terms of document of 'Grant'.

75. In State of Uttar Pradesh, management of 'Nazul', in absence of statutory provisions, is governed by various administrative orders compiled in a Manual called "Nazul Manual". Here Government has made provisions of management of 'Nazul' through its own authorities namely District Magistrate or Commissioner, or, in some cases, through local bodies.

76. Nature of orders compiled in "Nazul Manual" in the context of 'Nazul'

has been considered in **State of U.P. vs. United Bank of India (supra)** where Court has said that land and building in question is "Nazul" being property of Government, maintained by State authorities in accordance with 'Nazul Rules' but not administered as a 'State property'. Court has also observed that lease of "Nazul" land is governed in accordance with GG Act, 1895. Sections 2 and 3 thereto very specifically provide that provisions of TP Act, 1882 do not apply to Government land. Section 3 says that all provisions, restrictions, conditions and limitations contained in any such 'Grant' or 'Transfer', as aforesaid, shall be valid and take effect according to their tenor, any rule of law, statute or enactment of Legislature to the contrary, notwithstanding. Thus the stipulations in "lease deed" shall prevail and govern entire relation of State Government and lessee notwithstanding any statute providing otherwise.

77. Superiority of stipulations of Grant to deal with relation between Grantor and Grantee has been reinforced in **Azim Ahmad Kazmi and others (Supra).** Therein dispute related to Plot No. 59, Civil Station, Allahabad, area 1 acre and 4272 sq. yard, i.e., 9112 sq. yard or 7618 sq. meter. Initially a lease deed was executed on 11.01.1868 by Secretary of State for India in Council in favour of one, Thomas Crowby, for a period of 50 years and it was signed by Commissioner, Allahabad Division on behalf of Secretary of State for India in Council. After expiry of lease, a fresh lease was executed for another period of 50 years on 12.04.1923 w.e.f. 01.01.1918. Lease holder with permission of Collector, Allahabad transferred lease rights to Purshottam Das in 1945. The legal heirs of Sri Purshottam Das, on 31.10.1958, transferred leasehold rights in favour of Smt. Shakira Khatoon Kazmi, Smt. Sabira Khatoon Kazmi and Smt. Maimoona Khatoon Kazmi. After the death of Smt. Maimoona Khatoon Kazmi, her legal heirs, namely, Azim Ahmad Kazmi, Omar Ahmad Kazmi, Shamim Ahmad Kazmi, Alim Ahmad Kazmi and Maaz Ahmad Kazmi also claimed lease rights by succession. Lease granted on 12.04.1923 w.e.f. 01.01.1918 expired on 31.12.1967. It was renewed on 19.03.1996 for a period of 30 years w.e.f. 01.01.1968 which period expired on 31.12.1997. Again on 17.07.1998 it was renewed for a further period of 30 years w.e.f. 01.01.1998. While lease was continuing, vide G.O. dated 15.12.2000, right of resumption was exercised by State Government. It directed resumption of possession of plot in question and lease deed was cancelled. District Magistrate, Allahabad served a notice dated 11.01.2001 to lease holders intimating them that State Government's order dated 15.12.2000 has cancelled lease and resumed possession of land in question as the same was required for public purpose. Notice also directed lease holders to remove structures standing on plot, failing which possession would be taken in accordance with Clause 3(c) of lease deed. Lease holders filed objections against notice to District Magistrate and also stated that they have sent representation/ objection to Chief Minister praying for revocation of G.O. dated 15.12.2000. District Magistrate passed order on 24.08.2001 rejecting objection of lease holders and sent a cheque of Rs. 10 lacs representing compensation for the building standing over plot. State authorities claimed that they took possession of open land on 01.09.2001. Lease holders filed writ

petition which was dismissed vide judgment dated 07.12.2001, **Shakira Khatoon Kazmi vs. State of U.P., AIR 2002 All 101**. Lease holders challenged judgment dated 07.12.2001 in Supreme Court to the extent they failed. State Government filed appeal against part of order of this Court, wherein an observation was made that State Government is not entitled to take forcible possession though it may take possession of demised premises in accordance with procedure established by law. After considering Clause 3(c) of lease deed which provides for resumption of land for public purpose, after giving a month's clear notice to lessee to remove any building standing at the time on demised premises and within two months of receipt of notice to take possession thereof, on expiry of that period. Court said that Clause 3(c) of lease deed confers power upon State Government that plot in question, if required by State Government for its own purpose or for any public purpose, it shall have right to give one month's notice in writing to lessees to remove any building standing on the plot and to take possession thereof on expiry of two months from the date of service of notice. Court said that land, if required for any public purpose, State Government has absolute power to resume leased property and under the terms of Grant it is absolute, therefore, order of resumption is perfectly valid and cannot be said to be illegal. It also refers to an earlier instance where Nazul Plot No. 13, Civil Station, Allahabad situate in Civil Lines area was resumed by State Government for the purpose of construction of a 'Bus Stand' by exercising similar power, without initiating any proceeding under Land Acquisition Act, 1894 *(hereinafter referred to as "LA Act, 1894").* Resumption in that case was also challenged in **Writ Petition No. 44517 of 1998, Sayed Shah Khursheed Ahmad Kashmi vs. State of U.P.** and said writ petition was **dismissed on 16.12.1999** by a Division Bench of this Court, whereagainst Special Leave Petition No. 4329 of 2000 was dismissed by Supreme Court on 07.09.2001. First question, therefore, was answered in negative and in favour of Government.

78. With respect to procedure for taking possession, Supreme Court, while considering Question-2, said that in absence of any specific law, State Government may take possession by filing a suit. When a land is acquired under LA Act, 1894, Government can take possession in accordance with provisions of said Act and in case of urgency, Collector can take possession after publication of notice under Section 9 and no separate procedure is required to be followed. Court said that similarly where a lease has been granted under the terms of GG Act, 1895, then what procedure has to be followed is provided by Section 3 of GG Act, 1895 which says that all provisions, restrictions, conditions and limitations contained in any such creation, conferment or Grant referred to in Section 2, shall be valid and take effect according to their tenor; any decree or direction of a Court of Law or any rule of law, statute or enactments of the Legislature, to the contrary, notwithstanding it relied on its earlier judgment in **State of U.P. vs. Zahoor Ahmad, 1973(2) SCC 547** holding that Section 3 of GG Act, 1895 declares unfettered discretion of Government to impose such conditions and limitation as it thinks fit, no matter what the general law of land be. Then Court construing

Clause 3(C) of lease deed said that it provides procedure for taking possession of demised premises when State Government re-enter or resume possession of demised land. Court in para 30 and 32 of judgment, said:

"30. In the case of ***The State of U.P. vs. Zahoor Ahmad and Another, 1973(2) SCC 547,*** *this Court held that the Section 3 of the Act declares the unfettered discretion of the Government to impose such conditions and limitation as it thinks fit, no matter what the general law of land be. From Clause 3(C) of the deed, it is clear that the* ***State of U.P. while granting lease made it clear that if the demised premises are at any time required by the lessor for his or for any public purpose, he shall have the right to give one month's clear notice to the lessee to remove any building standing at the time of the demised property and within two months' of the receipt of the notice to take possession thereof on the expiry of that period*** *subject to the condition that the lessor is willing to purchase the property on the demised premises, the lessee shall be paid for such amount as may be determined by the Secretary to the Government of U.P. in the Nagar Awas Department."*

"32. Under Clause 3(C) of the lease deed, the respondent-State was permitted resumption of the land which required for its own use or for public purpose and after giving one month's clear notice in writing is entitled to remove any building standing at the time on the demised premises and within two months of the receipt of the notice to take possession thereof subject to the condition that if the lessor is willing to purchase the building of the demised premises required to pay the lessee the amount for such building as may be determined by the Secretary to Government of U.P. in the Nagar Awas Department...." (Emphasis added)

79. Having said so, Court said :

"we are of the view that there is no other procedure or law required to be followed, as a ***special procedure for resumption of land has been laid down under the lease deed".***

80. Supreme Court then set aside direction of this Court that State will not take possession forcibly except in accordance with procedure established by any other law by holding that since special procedure for resumption is prescribed under lease deed, no direction otherwise could have been issued to State Government.

81. The above discussion makes it clear that 'Nazul' is a land owned and vested in State. It is such land which has vested in State by virtue of its 'Sovereignty' and incidence of 'Sovereignty' i.e. annexation, lapse and bona vacantia. Further, 'Grant' means transfer of property by a deed in writing and includes within its ambit, an instrument of lease/lease deed. Such 'Grant' is governed by provision of GG Act, 1895, which were applicable to 'Grants' executed on and after enforcement of GG Act, 1895 and rights and entitlement of private parties in respect of land, which was transferred to such person under such 'Grant' would be governed by terms and conditions contained in such 'Grant' and not by provisions of TP Act, 1882 or any other Statute. Moreover, in State of U.P., wherever applicable, U.P. Tenancy Act, 1939 and Agra Tenancy Act, 1926 will also

be inapplicable to such 'Grant'. For the purpose of resumption/ re-entry of land, State Government can follow procedure prescribed in the terms of lease as it is a special procedure for such purpose and it is not necessary to look into any other procedure prescribed in law.

82. We, therefore, answer **questions (i) and (ii)** accordingly.

83. The answer to questions (i) and (ii), in effect, gives answer to question (iii) and (iv) also, inasmuch as, Grantee cannot transfer property, which was transferred to it by way of 'Grant' except the manner in which it is permitted by such 'Grant'. Any transfer otherwise will be illegal and would not confer any right upon Transferree.

84. Here, we remind ourselves with the principle that a person can transfer only such rights and interest which he or she possesses and not beyond that. If a person did not possess any right of transfer or such right is subject to any restriction like prior permission of owner etc., it means that such person has no right of transfer and/or his right is restricted in a particular manner and such restriction is to be observed in words and spirit to validate such transfer, else the transfer shall be illegal and will not result in bestowing any legal right upon Transferee. In other words, any otherwise transfer by such person of land subjected to Grant, will not confer any valid right or interest upon the person to whom property under 'Grant' is transferred in violation of stipulations contained in Grant.

85. In **Delhi Development Authority Vs. Anant Raj Agencies Pvt. Ltd. (2016) 11 SCC 406** Court said :

"It is well settled position of law that the person having no right, title or interest in the property cannot transfer the same by way of sale deed."

86. In **State of U.P. and others vs. United Bank of India and others (supra)** considering a similar situation, Court held that any transfer without sanction of lessor will be invalid. In paras 39 and 40 of the judgment Court said as under :

39. This "within written lease" is the original lease deed as mentioned in the Form 2 of the Nazul Manual. Form 2 of lease of Nazul land for building purposes it is one of the condition between the lessor and the lessee that " the lessee will not in any way transfer or sublet the demised premises or buildings erected thereon without the previous sanction in writing of the lessor".

*40. In the present case t**here was nothing on the record to show that the lessee i.e. (ABP) has obtained any written sanction from the lessor i.e. Government before mortgaging his leasehold interest in the Nazul Land. Meaning thereby the mortgage done by the lessee in favour of the Bank itself is bad in law, which was done in clear violation of the terms of the lease deed i.e. mortgage of the Nazul land without previous sanction in writing of the State."***

(Emphasis added)

87. Further, any such invalid transfer can also be construed as breach of terms of Grant and would empower and enable principal Grantor i.e. State, owner of property, to take such steps including resumption/re-entry to the property under Grant, to itself, besides claiming damages, compensation, as the case may be, and law permits.

88. Applying above principles to the facts of present writ petition, we find that last lease-deed was executed on 18.6.1912 with effect from 02.4.1912 for a period of 50 years, in favour of Evelyn Constance Trisham. Hence, original Lessee was Sri Trisham. He let out leased land to Sri Vishun Nath. When it was let out, is not stated in writ petition but in para 7 of writ petition, it is said that it was more than 60 years back. Whether said transfer was made after complying terms and conditions of lease-deed and procedure stated therein or not, also cannot be ascertained since nothing has been said in this regard by either of the parties. However, it has been placed on record that name of Vishun Nath was mutated in Nazul record in register No.165/169 at serial No.025 at page no. 7 (file no. 341) of Register Book No.1, maintained by Collector, Allahabad, in respect of Nazul land. Thus, we can assume that Sri Trisham may have transferred lease right to Vishun Nath after complying provisions contained in lease-deed i.e. with the permission of Collector.

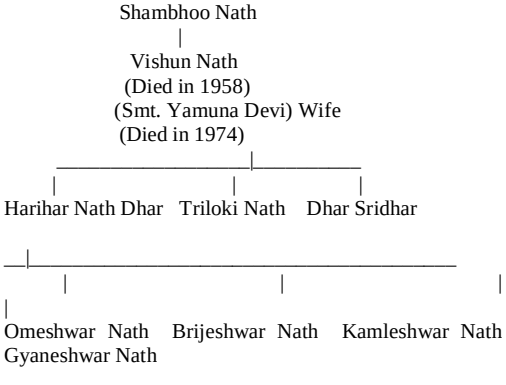
89. Conditions imposing restriction upon transfer of disputed Nazul land is contained in following clauses of lease-deed :

(i) "PROVIDED FURTHER and it is hereby agreed that the said Lessee, her Executors, Administrators and Assigns, ***shall not assign or underlet or otherwise part with the possession of the said premises or any part thereof without the permission of the said Secretary of State his Successors*** *or Assigns (which permission may be signified by the said Collector or by such other person as the Government of the North-Western Provinces or the said Secretary of State may appoint in that behalf) for that express purpose had and obtained."*

(ii) "PROVIDED ALWAYS that ***if the said Lessee*** *her Executors, Administrators or Assigns* ***shall Assign or transfer these presents,*** *or the* ***lease or term hereby granted or created, or the unexpired portion of the said term,*** *or shall underlet the said premises or any part thereof with such permission as aforesaid* ***unto any other person or persons of whom the said Collector shall approve, and if such person or persons shall engage and bind themselves to observe all the conditions, agreements and provisions of these presents in respect of such*** *portion of the said term or of the said premises as shall* ***have been so assigned or underlet to him as aforesaid and shall procure such assignments or sublease to be registered in such manner as shall be appointed by the said Secretary of State for purpose of registering lease and other instruments of or relating to lands situate within the local limits of Allahabad*** *(and for the registry of which assignments or sublesses a fee of not more than Rs. 16 shall be paid by the person of persons tendering such assignment or sublease for registry) then and* ***otherwise the liability of the said lessee her Heirs, Executors, Administrators, for the purpose or subsequent observance and performance of the covenants on the leases part herein contained, so far as relates to the portion of the said term or of the said premises so assigned or underlet as aforesaid, but not further or otherwise, shall cause and determine, but without*** *prejudice however to the* ***right of section of the Secretary of State*** *his Successors or Assigns in respect or on* ***account of any previous breach of any covenant or covenants herein contained.***

(Emphasis added)

90. Without permission, therefore, no right and interest in respect of disputed Nazul land, whether entire or part thereof, could have been transferred. For the present case, however, we may assume that Sri Vishun Nath was transferred such lease rights in compliance of requirement of lease-deed for remaining period. That is how, his name was entered into Nazul Register. The fact remains that lease expired on 01.04.1962. It is also evident that Sri Vishun Nath died in 1958, therefore, whatever lease rights for balance period, he had, same would have been succeeded by his legal heirs for remaining period only. Family tree of Vishun Nath, as evident from record is as under :



91. Legal heirs of Vishun Nath could not have succeeded any right, larger and more than what Vishun Nath himself had on transfer from original Lessee i.e. E.C.Trisham. The said lease rights were only for a period upto 1st April, 1962.

92. It is admitted position that lease has never been extended thereafter. Induction of petitioners by legal heirs of Vishun Nath i.e. Harihar Nath Dhar, even if he acted as a Karta of family after death of Vishun Nath, was wholly unauthorised and illegal, inasmuch as, neither he had any such power of transfer after 1st April, 1962 nor any transfer of right and/or interest in land in question, whether in respect of entire land or part thereof, could have been made without permission of Collector, which admittedly was not taken in the case in hand.

93. A perusal of lease deed also shows that no construction could have been raised on land in dispute unless permitted by Lessor i.e. owner of land i.e. State Government or Collector. There is neither any pleading nor any material on record to show that alleged transfer of disputed land to petitioners in 1980 was with the permission of Collector or State Government and/or construction raised by petitioners over land in dispute was after permission and/or sanction of Collector, Allahabad or State Government. Thus transfer of disputed land and construction raised by petitioners over such land all are/were wholly illegal and unauthorised. It would not confer even an iota of actionable interest or right in petitioners to take recourse to legal action for protection of their illegal and unauthorised possession as well as structure raised on land in dispute.

94. We also find that this aspect is covered by a recent judgment of Supreme Court in **State of U.P. and others vs. United Bank of India and others (2016) 2 SCC 757** wherein Court in similar circumstances, where transfer without sanction of Lessor was made, held illegal and void. We have already referred paras 39 and 40 of this judgment above.

95. In view thereof, we have no hesitation in holding that petitioners never

entered into possession of disputed land validly and transfer to them by Harihar Nath Dhar was wholly illegal, unauthorised and without having any legal consequence. It did not create any right or interest in petitioners over land in dispute. In fact, Harihar Nath Dhar himself was not having right or interest over land in dispute after lease expired on 01.04.1962. Neither land was owned by Harihar Nath Dhar nor he had legal right after 01.04.1962 therefore, he could not have transferred anything to petitioners in 1980 or 1988 when he himself did not possess any right or interest over land in dispute at that point of time.

96. **Questions (iii) and (iv)** therefore are answered accordingly against petitioners.

97. Now, we shall deal with questions (v) and (vi) together.

98. These questions again have to be considered in the light of stipulations contained in 'Grant'. If the 'Grant' itself did not contemplate any continuance of 'Grantee' over land subjected to 'Grant' and requires Grantee to hand over or surrender possession on expiry of period of 'Grant', Grantee is obliged to do so and mere fact that he/she had continued in possession over land subjected to 'Grant', will not confer any legal status upon him/her or legality to such possession after expiry of period of Grant.

99. If a person has lawfully entered a premises as a valid Lessee but continued in possession over such land after expiry of period of lease or after determination of lease by Lessor in terms of stipulations in lease, status of Lessee becomes that of 'Tenant at sufference'. Supreme Court said that even a quit notice under Section 106 of TP Act, 1882 is not required to be given to such occupant.

100. Relying on earlier decision in **R.V. Bhupal Prasad vs. State of A.P. (1995) 5 SCC 698** in a recent decision in **Sevoke Properties Ltd. vs. West Bengal State Electricity Distribution Company Ltd. AIR 2019 SC 2664,** Court held that once it is admitted by Lessee that term of lease has expired, lease stood determined by efflux of time and in such case, a quit notice under Section 106 is not required to be given. Court has said as under :

"Once the lease stood determined by efflux of time, *there* ***was no necessity for a notice of termination Under Section 106."***

(Emphais added)

101. In the above authority, Court held that after expiry of period of lease, status of Lessee becomes that of 'Tenant at sufferance'. 'Tenant at sufference' is one who comes into possession of land by lawful title, but who holds it by wrong after termination of term or expiry of lease by efflux of time. The tenant at sufferance is one who wrongfully continues in possession after extinction of a lawful title. There is little difference between him and a trespasser. Quoting from Mulla's Transfer of Property Act (7th Edn.) at page 633, Court observed that tenancy at sufferance is merely a fiction to avoid continuance in possession operating as a trespass. It has been described as the least and lowest interest which can subsist in reality. It, therefore, cannot be created by contract and arises only by implication of law when a person who has been in possession under a lawful title continues in possession after

that title has been determined, without consent of person entitled. A "tenancy at sufferance" does not create relationship of landlord and tenant. Court further quoted from page 769 of Mulla's transfer of Property Act (7th Edition), that act of holding over after expiration of term does not necessarily create a tenancy of any kind. If lessee remains in possession after determination of term, the common law Rule is that he is a tenant at sufferance.

102. Lot of argument at this stage has been made that despite expiry of lease right on 30.9.1986, since Lessee(s) did not hand over possession of 'disputed Nazul land' and State Government and its authorities did not take any action for taking possession of land in dispute, therefore, petitioners' possession had implied sanction of Lessor. However, no law in support of above proposition has been placed before us. When lease deed itself contemplate sanction, it is actual and not fictional. Petitioners, however, relied on the decision in **Purushottam Dass Tandon and others vs. State of U.P. & Ors. AIR 1987 All. 56,** to claim right of renewal of lease. The decision deals with various G.Os. issued for renewal of lease.

103. With regard to renewal of lease, Government circulated its policy through various G.Os. The first G.O. was issued in March, 1958 whereby Chief Minister directed that case for renewal of leases may be taken individually and possession may be taken only if lessee surrender or lease stood terminated in absence of any request from lessee for grant of fresh lease. Thereafter, on 23.04.1959, a G.O. was issued to grant fresh lease in cases where lease has already expired but has not been renewed so far, or which is likely to expire within the next 5 or 6 years, on the terms and conditions given in the said G.O. The proposed premium in the said G.O. was objected by Lease Holders, whose leases were already expired or likely to expire. Several representations were sent to Government. Some house-owners met the then Prime Minister Late Pt. Jawahar Lal Nehru, who had visited Allahabad in November or December, 1959. It resulted in issue of G.O. dated 07.07.1960 whereby rate of premium on first three acres was reduced to Rs.2,000/- in each slab. It also permitted payment of premium in five instalments and reduced ground rent to Rs.100/- per acre. In the earlier G.O., there was an insistence on construction of Community latrines till sewer lines were laid but this insistence was given up in G.O. dated 07.07.1960. Lessees were granted further three months' time to get leases renewed. Still lease-holders did not comply and made representations to Government. On 21.03.1963, again a G.O. was issued declaring rates of premium for commercial sites. On 3.12.1965 a G.O. was issued indicating terms and conditions for renewal of leases for commercial and residential purposes and it was said that rates of premium and annual rent shall be as fixed by G.O. dated 07.07.1960. Payment in five equal yearly instalments was continued but in special cases, Commissioner, Allahabad Division, Allahabad, was authorized to make recommendations to Government for enhancing number of instalments. This G.O. further insisted for renewal of existing leases on payment of at least one instalment, within one month of receipt of intimation by Lessee from Collector, or within three months of the date of expiry of lease, whichever is earlier. Deposit was

to be deemed to be proper step on the part of Lessee to get a fresh lease executed by the Lessor. The G.O. of 1965 itself made a distinction between those whose leases had expired and others by describing them as sitting and existing lessees.

104. There was a second phase which covered period from 1966 to 1981. On 16.02.1966, U.P. Awas Vikas Parishad Adhiniyam, 1965 *(hereinafter referred to as "U.P.Act, 1965")* was enacted for providing housing sites and construction of building. G.O. dated 03.12.1965, thus was modified by G.O. dated 04.11.1968, and it was directed that leases of joint lessees should be renewed as far as possible for one acre only. Sub-division was permitted only where sub-divided plot was not less than 800 sq. yards. Concession in payment of lease money and ground rent was allowed on same terms and conditions as it was in G.O. dated 03.12.1965 but time was extended for payment of first instalment for those who had not received any intimation from Collector by a further period of one month from the date of intimation by Collector. Clause (c) of G.O. dated 04.11.1968 categorically said that where steps have been taken for renewal of leases, as stated in earlier G.Os., fresh leases shall be sanctioned according to terms offered by Competent Authority.

105. In March, 1970, a G.O. was issued banning grant of renewal of leases all over the State, since Government was contemplating to bring out legislation on Urban Ceiling. This ban was lifted on 12.01.1972 but leases henceforth were to be sanctioned by State Government only. Commissioner and Collector could make recommendations only. Aforesaid G.O., however, provided that in all those cases where Government had sanctioned grant of leases but it could not be executed or registered because of ban imposed in 1970, steps may be taken immediately for its execution. Clause (ii) of G.O. provided that all those cases in which Collector or Commissioner had approved renewal but it could not be executed because of 1970 order, should be sent to Government immediately for acceptance. On 09.05.1972 Urban Building Ceiling Bill was introduced and on 11.07.1972 Uttar Pradesh Ceiling of Property (Temporary Restriction on Transfer), Ordinance, 1972 was promulgated in pursuance of Article 398 of Constitution of India. The Ordinance continued till it was replaced by Urban Land (Ceiling and Regulation) Act, 1976 *(hereinafter referred to as "U.P. Act, 1976")*. The said Act was enacted to prevent concentration of Urban Property and discourage construction of luxurious houses. On 19.12.1972, provisions pertaining to Nazul were amended providing for maximum area permissible for renewal of leases of 2000 sq. yards plus land on which building was constructed. Remaining area was to be surrendered to Housing Board and Lessees were prohibited from sub-dividing or transferring any land. On 10.12.1976, Government issued an order superseding all previous orders in respect of renewal of leases of Civil Lines, Allahabad in view of Act, 1976 and laid down fresh terms and conditions for renewal of leases.

106. Here leases were to be renewed in the light of Sections 2 and 4 of U.P. Act, 1976 and while doing so, all residents in one house were to be treated as one unit. This again resulted in representations of Lease-Holders to

Government requesting for reduction in rate of premium and ground rent. A G.O. was issued on 17.09.1979 superseding all previous orders and it provided for submission of details about extent and type of construction, utilisation of vacant land etc. Again representations, which culminated in G.O. dated 19.04.1981, which superseded all previous Orders and provided for renewal of leases on fresh and new terms. It is said that Leaseholders and their heirs shall be treated as one Unit. They were supposed to file details about land, constructed area, its user, time when it was taken on lease etc. before 30.06.1981. List of residents including out-houses dwellers was to be prepared by District Magistrate. Heirs of deceased lease-holders were to be treated as one unit. Area for which renewal could be made was reduced to building with 500 sq. metre of land appurtenant and 500 sq. metre open land or 1500 sq. metre whichever was more. Area of building for commercial purpose was fixed at 2000 sq. metres. Premium was fixed at 50 paisa per sq. metre. Thus, from 1976 onwards for the purpose of renewal, area was reduced from acre to square metre and unit for premium and ground rent became square feet instead of acre. All heirs of Lessees became one unit for renewal. Land covered by outhouses were to be excluded. Lessees could not even opt for it.

107. However, here is nothing on record to show that petitioners complied the above G.Os. and sought renewal or fresh lease hence petitioners cannot claim any benefit under the above mentioned G.Os.

108. Lease Holders, whose lease had already expired or those who were sitting Lease Holders and leases were going to expire in a short period, came to this Court in various writ petitions. This entire bunch was decided in **Purushottam Dass Tandon and others vs. State of U.P., Lucknow and others (supra)**. There were two categories of writ petitioners, before this Court, in **Purushottam Dass Tandon and others (supra)** as under :

(i) Those, to whom notices were given by Collector and who had complied with terms and conditions as laid down in various orders issued from time to time prior to 1965; and

(ii) Those, to whom no notice was sent and till matter filed before the Court, no steps were taken and no order was passed in their favour.

109. Court held :

(I) A Lessor may, after expiry of period for which lease is granted, renew the same or resume i.e. re-enter. But if out of the two i.e. re-entry or resumption, the two divergent courses, he chooses to grant fresh lease or at least creates that impression by his conduct spread over long time, it results in abandonment.

(II) If the land is needed or building has to be demolished in public interest for general welfare, probably no exception can be taken as the interest of individual has to be sacrificed for the society. But asking Lessee to vacate land or remove Malba for no rhyme or reason but because State is the owner, cannot be accepted to be in consonance with present day philosophy and thinking about role of State.

(III) After Act, 1976, no person can successfully or validly claim to hold land, more than the Ceiling limit.

(IV) Some part of G.O. of 1981 was not consistent with Act, 1976. The

rules contained in Nazul Manual are set of Administrative Orders or collections of guidelines issued by Government for the authorities to deal with Government property.

(V) When a G.O. was issued and its conditions are complied with, mere for bureaucratic delay, performance under the said G.O. cannot be denied. Therefore, Lessee, who had deposited first instalment, as directed in G.O. of 1965, were entitled for renewal of their lease.

(VI) After enactment of ceiling law, a Lessee cannot hold land more than the provided limit.

(VII) If leases were renewed in respect of those, who had acquired social or political status, whose names are given in para 15 of judgment, which includes, Dr. K. N. Katju, ex-Central Law Minister, Chief Minister and Governor, Dr. S. K. Verma, ex-Chief Justice and Governor, Sri B.L. Gupta, ex-Judge High Court, J. D. Shukla, I.C.S., O. N. Misra, I.A.S., then there was no justification not to give same benefit to others. Similar benefit must be given since most of them were also distinguished persons namely S.N. Kacker, ex-Central Law Minister, Solicitor General of India and Advocate General of the State, Sri S. S. Dhavan, ex-Judge, High Court and Governor and High Commissioner, Sri Lal Ratnakar Singh I.A.S. Ex-Member of Board of Revenue, M.L.Chaturvedi, ex-Judge, High Court and member of Union Public Service Commission, W. Broome, I.C.S. etc.

110. Aforesaid judgment was confirmed by Supreme Court by dismissing appeals preferred by State of U.P. and others in **State of U.P. and others vs. Purshottam Das Tandon and others 1989 Supp.(2) SCC 412.** Court clarified that renewal of leases shall be subject to the provisions of U.P.Act, 1976 and High Court judgment shall apply to all the leases to whom G.O. dated 23.04.1959, 02.07.1960 and 03.12.1965 were applicable and all those claiming under them. The order of Supreme Court reads as under :

"We have heard the learned counsel for both the parties at length. We do not find any infirmity in the judgment and order passed by the High Court against which these special leave petitions are preferred. We, however, make it clear that the leases that are going to be granted pursuant to the writ issued by the High Court will be subject to the provisions of the Urban Land (Ceiling and Regulation) Act, 1976. On the leases being granted, the Competent Authority under the Act shall be at liberty to apply the provisions of the Act and in particular section 15 thereof to all the leases and take away all the surplus lands in their hands after determining the surplus lands in accordance with law. The ***directions issued by the High Court can be availed of by all the lessees to whom the G.O. dated 23rd April, 1959, 2nd July, 1960 and 3rd December, 1965 were applicable and all those claiming under them.***

All the Special Leave Petitions are dismissed accordingly with these observations. If any further directions are needed, the persons interested may approach the High Court."
(Emphasis added)

111. Though, in the present case reliance has been placed on the aforesaid judgment, but, we do not find that aforesaid judgment is applicable to

petitioners or that petitioners have applied for renewal of lease in terms of above G.Os., applicable at the relevant point of time. Hence, their status is of 'occupant' without any authority, inasmuch as, lease having already expired, transfer of land to petitioners was without any authority, hence possession of petitioners or anybody else under them is without any authority of law.

112. It is contended that even if lease expired on 01.04.1962, possession of petitioners since 1980 has continued on disputed Nazul land and State has not taken any step for their eviction or dispossession, it amounts to 'tacit approval' or 'sanction' by Government or Lessor recognizing petitioners' aforesaid possession to be valid and for this purpose, reference is made to Section 116 of TP Act, 1882. It is also said that even if aforesaid right under Section 116 TP Act, 1882 could not have been made applicable in 1980, since at that time, GG Act, 1895 was operating, yet the time at which impugned notice has been issued, GG Act, 1895 had already been repealed and thereafter petitioners' right is entitled to be considered in terms of TP Act, 1882 and they are entitled to take recourse to Section 116 of Act, 1882.

113. Section 116 of TP Act, 1882 reads as under :

*"**116. Effect of holding over.-** If a lessee or under-lessee of property remains in possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee or under lessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased, as specified in section 106."*

114. Twin conditions to attract principle of holding over vide Section 116 of TP Act, 1882, which need be satisfied, are:

(i) After determination of lease, lessor or his representative has accepted rent from lessee or under lessee or accorded assent to his continuing in possession; and

(ii) Lessee or under-lessee has remained in possession.

115. In the present case, it is not the case of any of the petitioners that after expiry of lease on 01.04.1962, they were permitted to remain in possession of disputed Nazul land and rent has been accepted by respondents or they have paid rent. Even if what is said by petitioners is taken to be correct, we do not find that Section 116 is applicable in the case in hand at all.

116. Thus, in our view, Section 116 TP Act, 1882 is wholly inapplicable in the case in hand. In order to attract Section 116 of TP Act, 1882, it is necessary to obtain assent of landlord for continuation of lease after expiry of lease period. Mere acceptance of rent by Lessor, in absence of any agreement to the contrary, for subsequent months where Lessee continued to occupy lease premises cannot be treated to be a conduct signifying 'assent' on its part. This is what has been held in **Shanti Prasad Devi and others vs. Shankar Mahto and others (2005) 5 SCC 543** and followed in **Delhi**

Development Authority vs. Anant Raj Agencies Pvt. Ltd. (supra).

117. In the present case, even this fact is missing that petitioners while continuing in possession, paid lease rent and premium etc. to Lessor. Section 116 of TP Act, 1882, therefore, has no application either immediately after expiry of lease or much thereafter.

118. At this stage, learned counsel for petitioners sought to argue that petitioners are entitled to be given opportunity in terms of provisions of Section 106 read with 116 of TP Act, 1882 since petitioners are in continued possession after expiry of period of lease and are entitled to be treated as holding over and cannot be evicted without following procedure prescribed under TP Act, 1882, particularly in view of the fact that GG Act, 1895 has already been repealed by Repeal Act, 2017. Now, TP Act, 1882 will apply. He placed reliance on Supreme Court judgment in **State of U.P. vs. Zahoor Ahmad (supra)**. He also said that even if possession is unauthorized, petitioner cannot be evicted arbitrarily but State is bound to follow procedure consistent with law and principles of natural justice and for this purpose, reliance is placed on Supreme Court's judgments in **Bishan Das and others Vs. State of Punjab and others AIR 1961 SC 1570, Express Newspapers Pvt. Ltd. and others Vs. Union of India (1986) 1 SCC 133, Yar Mohammad and another vs. Lakshmi Das and others AIR 1959 Allahabad 1 and Lallu Yeshwant Singh (dead) by his legal representative vs. Rao Jagdish Singh and others, AIR 1968 SC 620.**

119. It is not in dispute that GG Act, 1895 has been repealed by Repeal Act, 2017. However, Section 4 thereof provides for saving of certain aspect and read as under :

*"**4. Savings.-** The repeal by this Act of any enactment shall not affect any other enactment in which the repealed enactment has been applied, incorporated or referred to;*

*and this Act shall not affect the validity, invalidity, **effect or consequences or anything already done or suffered, or any right, title, obligation or liability** already acquired, accrued or incurred, or any remedy or proceeding in respect thereof, or any release or discharge of or from any debt, penalty, obligation, liability, claim or demand, or any indemnity already granted, or the proof of any past act or thing;*

nor shall this Act affect any principle or rule of law, or established jurisdiction, form or course of pleading, practice or procedure, or existing usage, custom, privilege, restriction, exemption, office or appointment, notwithstanding that the same respectively may have been in any manner affirmed or recognized or derived by, in or from any enactment hereby repealed;

nor shall the repeal by this Act of any enactment revive or restore any jurisdiction, office, custom, liability, right, tittle, privilege, restriction, exemption, usage, practice, procedure or other matter or thing not now existing or any force.

120. Section 4 of Repeal Act, 2017 clearly protects effect or consequences or anything already done or suffered, which includes effect of expiry of lease and obligation of Lessee to surrender possession of leased land to State. Further, Lessee had already agreed that

State can re-enter land at any point of time. They are bound by said clause of lease-deed. This is an obligation as also liability of petitioners and right of State incurred, acquired and accrued in view of terms of lease-deed. Mere fact that it has been exercised after repeal of GG Act, 1895 would make no difference since all earlier situations/aspects have been protected by Section 4 of Repeal Act, 2017. Therefore, it cannot be said that after repeal of GG Act, 1895 by Repeal Act, 2017, petitioners' status would stood changed vis-a-vis disputed Nazul land in respect whereof State is entitled to re-entry and resume land in terms of conditions of lease.

121. The judgment cited by learned counsel for petitioners, in our view, are not at all applicable to the facts of this case as demonstrated hereinafter.

122. In **Bishan Das and others Vs. State of Punjab and others AIR 1961 SC 1570,** a Constitution Bench had an occasion to consider fundamental right of property vis-a-vis infringement therewith by executive orders. Therein, one Lala Ramji Das , carrying on a joint family business in the name and style of Faquir Chand Bhagwan Das, desired to construct a Dharmasala on a Nazul property of the then State of Patiala. In 1909, he sought permission of Government to construct a Dharmasala on the said land, since it situate near Barnala Railway Station, and therefore would have been convenient to Travellers who come to that place. It appears that initially for the same purpose, Patiala Government had granted permission to Choudhuris of Barnala bazar, but they could not do so for want of funds. Therefore when Ramji Das sought permission in the name of firm Faquir Chand Bhagwan Das in May, 1909, same was granted and communicated by Assistant Surgeon in-charge of Barnala Hospital, who was presumably in-charge of public health arrangements at Barnala. The sanction was subject to certain conditions, namely, no tax shall be taken for the land; shopkeepers will arrange 'Piao' for the passengers; plans of the building shall be presented before sanctioning authority; cleanliness and sanitary rules shall be followed by the persons maintaining Dharmasala and no permission to construct any shop will be granted and if any condition is violated, State shall dispossess them from the land in dispute.

123. Dharmasala was constructed in 1909 and inscription on the stone to the following effect was made:

"Dharmasala Lala Faquir Chand Bhagwan Das, mahajan, 1909."

124. Though a condition was imposed for not permitting construction of any shop, but as a matter of fact, a number of shops were later constructed, with the permission of authorities concerned, for meeting expenses of maintenance of Temple and Dharmasala. A complaint was made in 1911 against Ramji Das that he was utilizing Dharmasala for his private purpose but it remained unheeded. On the complaint made, some inquiry was also conducted by Tehsildar wherein Ramji Das got his statement recorded in January, 1925. On 07.04.1928, Revenue Minister, Patiala State, passed an order stating that though land on which Dharmasala had been built, was originally Government land (nazul property), it would not be proper to declare it as such and Dharmasala should

continue to exist for the benefit of the public. Ramji Das or any other person will not be competent to transfer land and if such transfer is made, it would be unlawful and invalid and in such event, Government will escheat. Some further inquiry were also made and it appears that Ramji Das was given permission to make a raised platform and other extensions etc. On 10.09.1954, one Gopal Das, Secretary, Congress Committee, Barnala, filed a petition to the Revenue Minister, Patiala, making various allegations against Ramji Das. Thereupon an inquiry was conducted by Tahsildar, who found that Dharmasala was constructed by Ramji Das on Government lands, that Dharmasala was for public benefit; and, that Ramji Das had been its Manager throughout. He, however, said that Ramji Das was bound to render accounts which he failed considering that property belong to him and, therefore, he should be removed and past accounts be called for. When the matter went for opinion of Legal Remembrancer of State Government, it was pointed out that Dharmasala and Temple, though built on Government land, but not Government property. It also said that though Ramji Das was repudiating the existence of a public trust, he was working as Trustee of a trust created for public purposes of a charitable or religious nature and could be removed by State only under Section 92 Civil Procedure Code. Ramji Das died on 10.12.1957. Petitioner Bishan Das and others came to manage Dharmasala, Temple and the shops etc. On 23.12.1957, Gopal Das and some others describing themselves as members of public, made an application that since Ramji Das was dead, new arrangements should be made for proper management of Dharmasala which is used for the benefit of the public. Again a search of old papers was made and this time Sub-Divisional Officer, Barnala, recommended that in the interest of Government, Municipal Committee, Barnala, should take immediate charge of the management of Dharmasala. This recommendation was affirmed by the Deputy Commissioner, Sangrur, and pursuant to the said order, Kanungo presumably dispossessed Bishan Das and others from part of Dharmasala on 07.01.1958 and charge thereof was given to Municipal Committee, Barnala. These orders were challenged by petitioners alleging that the same were without any authority of law and violative of fundamental rights enshrined under Articles 14, 19 and 31 of the Constitution.

125. The defence taken was that property is trust property of a public and charitable character, hence Bishan Das and others were not entitled to claim any property rights in respect thereof.

126. Supreme Court observed in Para-10 that even if it is assumed that the property is trust property, no authority of law authorizing State or its Executive Officers to take action against Bishan Das and others in respect of Dharmasala was shown. Government counsel sought to argue that Bishan Das and others were trespassers and land on which Dharmasala situate belong to Government, hence Government was entitled to use minimum of force to eject trespassers. But this defence was also rejected by Supreme Court holding that it is a clear case of violation of fundamental right of Bishan Das and others. Supreme Court said that nature of sanction granted in 1909 in respect of land whether it was a lease or licence, with a Grant or an irrevocable licence are questions of fact, need not be

gone into by it but admitted position is that land belonged to the Government who granted permission to Ramji Das on behalf of joint family firm to build a Dharmasala, Temple and Shops and manage the same during his life time. After his death his family members continued with management. Thus, they were not trespassers at all in respect of Dharmasala, Temple and Shops; nor could it be held that Dharmasala, Temple and Shops belong to the State. The question whether trust created was public or private is irrelevant. Court said that a Trustee, even of a public trust, can be removed only by procedure known to law. He cannot be removed by an executive fiat. The maxim, what is annexed to the soil goes with the soil, has not been accepted as an absolute rule of law in India and in this regard, Supreme Court referred to decision in **Thakoor Chunder Parmanick Vs. Ramdhone Bhuttacharjee (1866) 6 W.R. 228; Lala Beni Ram Vs. Kundan Lall (1899) L.R. 26 I.A. 58 and Narayan Das Khettry Vs. Jatindranath (1927) L.R. 54 I.A. 218.** Court said that a person who bona fide puts up constructions on land belonging to others with their permission would not be a trespasser, nor would the buildings so constructed vest in the owner of the land by application of maxim quicquid plantatur solo, solo credit. It said:

"It is, therefore, ***impossible to hold that in respect of the dharmasala, temples and shops, the State has acquired any rights whatsoever merely by reason of their being on the land belonging to the State.*** *If the State thought that the constructions should be removed or that the condition as to resumption of the land should be invoked, it was open to the State to take appropriate legal action for the purpose."*

(Emphasis added)

127. Court said that even if State proceeded on the assumption that there was a public trust, it could have taken appropriate legal action for removal of Trustees by way of Suit under Section 92 C.P.C. and not otherwise. Constitution Bench then said:

" .. that ***does not give the State or its executive officers the right to*** *take the law into their own hands and* ***remove the trustee by an executive order.***

(Emphasis added)

128. Court concluded its findings in Para-14 of the judgment as under:

"The facts and the position in law thus clearly are (1) that the buildings constructed on this piece of Government land did not belong to Government, (2) that the petitioners were in possession and occupation of the buildings and (3) that by virtue of enactments binding on the Government, the petitioners could be dispossessed, if at all, only in pursuance of a decree of a Civil Court obtained in proceedings properly initiated."

129. Court passed serious stricture against State authorities holding that the executive action taken by State and its Officers is destructive of the basic principle of the rule of law. Hence action of Government in taking law into their hands and dispossessing petitioners by display of force, exhibits a callous disregard of normal requirements of rule of law, apart from what might legitimately and reasonably be expected from a Government functioning in a society governed by a Constitution which

guarantees to its citizens against arbitrary invasion by the executive on peaceful possession of property. Supreme Court reiterated what was said in its earlier judgment in **Wazir Chand Vs. The State of Himachal Pradesh AIR 1954 SC 415** that State or its executive officers cannot interfere with the rights of others unless they can point out some specific rule of law which authorizes their acts. Supreme Court seriously deprecated State and said:

*"We have **here a highly discriminatory and autocratic act which deprives a person of the possession of property without reference to any law or legal authority.** Even if the property was trust property it is difficult to see how the Municipal Committee, Barnala, can step in as trustee on an executive determination only."*

130. Aforesaid decision has no application in the case in hand, inasmuch as, here State has exercised its power following terms and conditions laid down under lease-deed, which were made to prevail over any Statute providing otherwise, including TP Act, 1882 vide Section 2 of GG Act, 1895. Further, respondents, in exercise of right of resumption/re-entry, have not straightway went to dispossess petitioners but notice in question has been given to them giving time to vacate the premises whereafter respondents proposed to take further action for taking possession. Therefore, it cannot be said that no notice has been given to petitioners in the present case.

131. **Express Newspapers Pvt. Ltd. and others Vs. Union of India (1986) 1 SCC 133** is a matter which was decided in a Writ Petition filed under Article 32 of Constitution by the aforesaid Newspaper Company having its Establishment in Express Buildings at 9-10, Bahadurshah Zafar Marg, New Delhi, which was a land on perpetual lease from Union of India, under a registered Indenture of Lease, dated 17.03.1958. Five petitioners, who filed above Writ Petition before Supreme Court included Indian Express Newspaper (Bombay) Private Limited of which Express Newspapers Private Limited was a subsidiary and petitioners-3, 4 and 5, namely, Sri Ram Nath Goenka was Chairman of the Board of Directors, Nihal Singh was the Editor-in-chief of the Indian Express and Romesh Thapar was the Editor of the Seminar published from the Express Buildings. Union of India; Lt. Governor of Delhi, Sri Jagmohan; Municipal Corporation of Delhi; Zonal Engineer (Buildings) and Land and Development Officer were impleaded as respondents-1 to 5. The validity of notice of re-entry upon forfeiture of lease issued by Engineer Officer, Land and Development Office, New Delhi on 10.03.1980 was challenged. The notice required petitioners to show cause why Union of India should not re-enter upon and take possession of the demised premises i.e. plots nos. 9 and 10, Bahadurshah Zafar Marg, together with Buildings built thereon under Clause 5 of Indenture of Lease, dated 17.03.1958, for committing breach of Clauses 2(14) and 2(5) of lease-deed. Another notice was issued earlier on 01.03.1980 by Zonal Engineer (Buildings), Municipal Corporation, City Zone, Delhi requiring Express Newspapers Pvt. Ltd., New Delhi to show cause why aforesaid buildings being unauthorized be not demolished under Sections 343 and 344 of the Delhi Municipal Corporation Act, 1957 (hereinafter referred to as "DMC Act,

1957"). A challenge was made, besides others, on the ground of personal vendetta against Express Group of Newspapers and also being violative of Articles 14, 19(1)(a) and 19(1)(g) of the Constitution. The questions posed by Supreme Court, to be of far reaching consequence for maintenance of federal structure of Government, were:

(1) Whether the Lt. Governor of Delhi could usurp the functions of the Union of India, Ministry of Works and Housing and direct an investigation into the affairs of the Union of India i.e. question the legality and propriety of the action of the then Minister for Works and Housing in the previous Government at the center in granting permission to Express Newspapers Pvt. Ltd. to construct new Express Building with an increased FAR of 360 with a double basement for installation of a printing press for publication of a Hindi Newspaper on the western portion of the demised premises i.e. Plots No. 9 and 10, Bahadurshah Zafar Marg, New Delhi with the Express Buildings built thereon?

(2) Whether the grant of sanction by the then Minister for Works and Housing and the consequential sanction of building plans by him of the new Express Building was contrary to the Master Plan and the Zonal Development Plans framed under the Delhi Development Act, 1957 and the municipal bye-laws, 1959 made under the DMC Act, 1957 and therefore the lessor i.e. the Union of India had the power to issue a notice of re-entry upon forfeiture of lease under Clause 5 of the indenture of lease dated March 17, 1958 and take possession of the demised premises together with the Express Buildings built thereon and the Municipal Corporation had the authority to direct demolition of the said buildings as unauthorized construction under Sections 343 and 344 of the DMC Act, 1957?

(3) Whether the threatened action which the petitioners characterise as arbitrary, illegal and irrational was violative of Article 19(1)(a) read with Article 14 of the Constitution?

132. Thereafter Court analyzed the facts of case in detail and respective arguments and from Para-45 to 47 we find that Government of India and Lt. Governor of Delhi were head on to each other and even Council's role was not appreciated by Court. In the light of arguments advanced by parties, in para-59 of judgment, Court formulated eight questions. The issue of maintainability of writ petition under Article 32 was also raised and it was considered by Supreme Court in the judgment from para-66 onwards and it was held that building in question was necessary for running press. Any statutory or executive action to pull it down or forfeit the lease, would directly impinge on the right of freedom of speech and expression under Article 19(1)(a) and therefore, writ petition was maintainable. Court said:

"... impugned notices of re-entry upon forfeiture of lease and of the threatened demolition of the Express Buildings are intended and meant to silence the voice of the Indian Express. It must logically follow that the impugned notices constitute a direct and immediate threat to the freedom of the press and are thus violative of Article 19(1)(a) read with Article 14 of the Constitution."

133. Since, land in dispute was Government land, provisions of

Government Grants Act, 1895 (hereinafter referred to as "GG Act, 1985") were also relied on by Government and, therefore, Supreme Court examined provisions thereof also. It held that GG Act, 1895 is an explanatory or declaratory act. It said:

"Doubts having arisen as to the extent and operation of the Transfer of Property Act, 1882 and as to the power of the Government to impose limitations and restrictions upon grants and other transfers of land made by it or under its authority, the ***Act was passed to remove such doubts as is clear from the long title and the preamble.*** *The Act contains two sections and provides by Section 2 for the exclusion of the Transfer of Property Act, 1882 and, by Section 3 for the exclusion of, any rule of law, statute or enactment of the Legislature to the contrary."*
(Emphasis added)

134. In **Express Newspapers Pvt. Ltd. and others Vs. Union of India (supra)** Court further said:

"It is plain upon the terms that Section 2 excludes the operation of the Transfer of Property Act, 1882 to Government grants. While Section 3 declares that all provisions, restrictions, conditions and limitations contained over any such grant or transfer as aforesaid shall be valid and shall take effect according to their tenor, notwithstanding any rule of law, statute or enactment of the Legislature to the contrary. A series of judicial decisions have determined the overriding effect of Section 3 making it amply clear that ***a grant of property by the Government partakes of the nature of law since it overrides even legal provisions which are contrary to the tenor of the document."*** (Emphasis added)

135. Having said so, Supreme Court found that the stand taken on behalf of Union of India that there was non compliance of mandatory requirement of Clause-6, therefore notice of re-entry was valid, is not correct.

136. Court then noted some contradictions in Constitution Bench judgment in **Bishan Das and others Vs. State of Punjab and others (supra)** and **State of Orissa Vs. Ram Chandra Dev AIR 1964 SC 685.**

137. In **State of Orissa Vs. Ram Chandra Dev (supra),** Constitution Bench observed:

"Ordinarily, where property has been granted by the State on condition which make the grant resumable, after resumption it is the grantee who moves the Court for appropriate relief, and that proceeds on the basis that the grantor State which has reserved to itself the right to resume may, after exercising its right, seek to recover possession of the property without filing a suit. "
(Emphasis added)

138. It was observed that existence of a right is the foundation for a petition under Article 226 of the Constitution. In Para-84 Court said that in cases involving purely contractual issues, the settled law is, where statutory provisions of public law are involved, writs will be issued and referred to its earlier judgment in **Mohammed Hanif Vs. State of Assam (1969) 2 SCC 782.** Thereafter it also considered the provisions of Public Premises (Eviction of Unauthorized

Occupants) Act, 1971 *(hereinafter referred to as "Act, 1971")* and observed that Express building was constructed with the sanction of lessor, i.e., Union of India on plots demised on 'perpetual lease' by registered lease-deed dated 17.03.1958 hence cannot be regarded as 'public premises' belong to the Central Government under Section 2(e). That being so, Act, 1971 has no application.

139. Court then considered other provisions of power of Lt. Governor, and Central Government and factual aspects involved in the matter, and, in our view, the same are not relevant for the purpose of this Case. Court also examined applicability of doctrine of estoppel but that has also not been raised in these matters, hence it is not necessary to examine them.

140. One aspect we may notice hereat that detailed judgment has been written by Hon'ble A.P. Sen, J. Justice E.S. Venkataramiah has agreed with the judgment of Hon'ble A.P. Sen, J in relation to the aspect that Lt. Governor of Delhi, Sri Jagmohan, has taken undue interest in getting notices issued to Express Newspapers and this action is not consistent with normal standards of administration and issued under pressure of Lt. Governor of Delhi, notices were violative of Article 14, suffers with arbitrariness and non application of mind. His Lordship said that it was not necessary to express any opinion on the contention based on Article 19(1)(a) of Constitution. Hon'ble Venkataramiah further said that question relating to civil rights of the parties flowing from the lease deed cannot be disposed of in a petition under Article 32 of the Constitution since questions whether there has been breach of the covenants under the lease, whether lease can be forfeited, whether relief against forfeiture can be granted etc. are foreign to the scope of Article 32 of the Constitution which should be tried in a regular civil proceeding. His Lordship further said in Para-202 of judgment as under:

"One should remember that the property belongs to the Union of India and the rights in it cannot be bartered away in accordance with the sweet will of an Officer or a Minister or a Lt. Governor but they should be dealt with in accordance with law. At the same time a person who has acquired rights in such property cannot also be deprived of them except in accordance with law."

141. Having said so, while agreeing with ultimate order of quashing of notices, Hon'ble Venkataramiah, J. said:

"I express no opinion on the rights of the parties under the lease and all other questions argued in this case. *They are left open to be decided in an appropriate proceeding."*

(Emphasis added)

142. Hon'ble R.B. Misra, J. also agreed with Hon'ble A.P. Sen and E.S. Venkataramiah, JJ that the notice challenged in writ petition is invalid, having no legal consequences and must be quashed for reasons detailed in both the judgments. His Lordship, however, said that other questions involved in the case are based upon contractual obligations between the parties and can be satisfactorily and effectively dealt with in a properly instituted suit and not by way of writ petition on the basis of affidavits which are so discrepant and contradictory

in this case. Hon'ble R.B. Misra, J. in para 207 of judgment said:

*"207. The **right to the land and to construct buildings** thereon for running a business is not derived from Article 19(1)(a) or 19(1)(g) of the Constitution **but springs from terms of contract between the parties** regulated by other laws governing the subject, viz., the Delhi Development Act, 1957, the Master Plan, the Zonal Development Plan framed under the Delhi Municipal Corporation Act and the Delhi Municipal Bye-laws, 1959 irrespective of the purpose for which the buildings are constructed. **Whether there has been a breach of the contract of lease or whether there has been a breach of the other statutes regulating the construction of buildings are the questions which can be properly decided by taking detailed evidence involving examination and cross-examination of witnesses."*** (Emphasis added)

143. The above judgment also has no application to the facts of present case. On the contrary, majority view expressed in above judgment is that right to land and to construct building is not derived from Articles 19(1)(a) or 19(1)(g) of Constitution but springs from promise of contract between the parties. Whether there has been breach of contract of lease or there has been breach of any provision regulating lease rights and construction of building etc., are such questions which can be properly decided by taking detailed evidence involving examination and cross examination of witnesses and therefore, such rights can be enforced in common law proceedings by filing suit.

144. In **Yar Mohammad and another vs. Lakshmi Das and others AIR 1959 Allahabad 1,** a Full Bench of this Court considered following question :

"Whether the jurisdiction of the Civil Court is barred by virtue of Section 242 of the U. P. Tenancy Act in respect of suit filed under Section 9 of the Specific Relief Act for obtaining possession over agricultural land from which the plaintiff alleged his illegal dispossession within six months of the date of the-suit".

145. Therein plaintiffs instituted suit on 30.11.1948 for possession under Section 9 of Specific Relief Act, 1877 *(hereinafter referred to as "Act, 1877")* alleging that they were in actual possession of land in dispute (land was admittedly an agricultural land) but wrongfully dispossessed by defendants in November 1948. Defendants contested the suit and disputed correctness of above allegations of plaintiffs and pleaded that they were in possession of land as tenants of plaintiffs for more than 12 years, hence, plaintiffs cannot eject them. They also pleaded that suit was filed under Section 9 of Act, 1877 only to evade jurisdiction of Revenue Court. Trial Court i.e. learned Munsif rejected plea of lack of jurisdiction raised by defendants, accepted the case set up by plaintiffs and decreed the suit. Defendants then filed revision no.461 of 1952, which resulted in Reference, to a Larger Bench. The issue was with respect to applicability of Section 242 of U. P. Tenancy Act, 1939. Court said that Section 242 confers exclusive jurisdiction on Revenue Court and takes away jurisdiction of Civil Court only in respect of two kinds of actions.

(i) suits or application of the nature specified in the Fourth Schedule of the Act; and

(ii) suits or applications based on a cause of action in respect of which any relief can be obtained by means of a suit or application specified in that schedule.

146. It was held that in order to attract Section 242, one has to demonstrate that action would fall under either of the above-mentioned two categories and if does not, jurisdiction of Civil Court is not ousted and Revenue Court will have no jurisdiction to entertain the action.

147. Then construing the cases, which may resort to Section 9 of Act, 1877, Court said that Section 9 gives a special privilege to persons in possession who take action promptly. In case they are dispossessed, Section 9 entitles them to succeed simply by proving:

(1) that they were in possession,

(2) that they have been dispossessed by the defendant,

(3) that dispossession is not in accordance with law, and

(4) that dispossession took place within six months of the suit.

148. No question of title either of plaintiffs or of defendants can be raised or gone into in an action brought under Section 9 of Act, 1877. Plaintiffs will be entitled to succeed without proving any title on which he can fall back upon and defendant cannot succeed even though he may be in a position to establish the best of all titles. Restoration of possession under Section 9 is however subject to a regular suit and person who has real title or even better title cannot be prejudiced in any way by a decree of a suit under Section 9. A person having real or better title always has a right to establish his title in a regular suit and get the possession back. The objective and idea behind Section 9, as the Court observed is that law does not permit any person to take law in his own hands and to dispossess a person in actual possession without having recourse to a Court or Institution, in an illegal manner. In other words, objective of Section 9 is to discourage people from taking law in their own hands, how-ever good title they may have. In the interest of public order that self-help is not permitted so far as possession over Immovable property is concerned, Section 9 is intended to discourage and prevent proceedings which might lead to serious breaches of peace. It does not allow a person who has acted high-handedly by wrongfully dispossessing a person in possession from deriving any benefit from his own unjustified act. Section 9, infact, provides for a summary and quick remedy for a person who is in possession but illegally ousted therefrom without his consent. Court observed that 'Possession' is *prima facie* evidence of title and if a person who is in possession is dispossessed, he has a right to claim back possession from the person who dispossesses him. In an ordinary common law proceedings, a person who has a title, is entitled to possession and cannot be deprived of his right of possession by a person, who has no title or inferior to the former. Court said that for Section 9, claim of title is not allowed to be set up and possession wrongfully taken, has to be restored. Full Bench therefore, answered question formulated above in negative.

149. In our view, above judgment has no application to the facts of this case for the reason that title of land is not in dispute, inasmuch as, it is admitted case

of all the petitioners that land in dispute is 'Nazul', hence it is owned and vested in Government. It is also not in dispute that petitioners got possession of land in dispute being legal heirs of original Lessees. Petitioners have not been evicted, so far, hence Section 9 of Act, 1877 has no application. In the present case right of re-entry is being exercised by respondent-State in terms of lease-deed, pursuant whereto possession was given to Lessees and petitioners have derived their interest from such Lessees, and now are bound to restore possession in terms of lease whereunder even original lessee were obliged to surrender/hand over possession to State Government.

150. We may also note hereat that in the case in hand, lease was governed by provisions of GG Act, 1895 and Section 2, as amended in State of U.P., has excluded provisions of U.P. Tenancy Act, 1939 for governing rights etc. of parties. Only provisions contained in lease-deed shall apply and have to be given effect to as if U.P. Tenancy Act, 1939 was not passed. Therefore also, reliance placed on the aforesaid judgment in the case in hand is of no consequence.

151. **Lallu Yeshwant Singh (dead) by his legal representative vs. Rao Jagdish Singh and others, AIR 1968 SC 620** is a judgment which came before two Judges Bench of Supreme Court from a dispute raised under Qanoon Mal Riyasat Gwalior Samvat, 1983 *(hereinafter referred to as "Qanoon Mal")* that is from Madhya Pradesh. Under Section 326 of Qanoon Mal, a suit was filed by Yeshwant Singh and others i.e. plaintiffs against Rao Jagdish Singh and others (defendants) in the Court of Tehsildar for possession of some agricultural land. Plaintiffs set up a case that they were in possession of land and forcibly dispossessed by defendants, therefore, should be restored their possession. Tehsildar decreed the suit and order was affirmed in appeal by Collector as well as Commissioner. Revision was also dismissed by Board of Revenue and decree passed by Tehsildar was maintained. Section 326 of Qanoon Mal broadly provided summary remedy as is provided in Section 9 of Act, 1877. In para 7 of the judgment, Supreme Court has referred to both the provisions and said that both are broadly similar. High Court took a different view holding that it was not necessary for a Lessor to resort to Court for obtaining possession and if there is default by plaintiff, it could have been dispossessed by defendants. Supreme Court said that no person can take law in its own hand and in such matter, where provisions providing summary procedure for restoration of illegal dispossession of land have been made, the same can be resorted to by the person who has been illegally dispossessed. Supreme Court affirmed Full Bench judgment of this Court in **Yar Mohammad (supra)**. Here also we do not find applicability of this judgment to the case in hand for the reasons we have already said in respect of judgment in **Yar Mohammad (supra)**.

152. The **State of U.P. vs. Zahoor Ahmad and another (supra)** was a matter which came up before two Judges Bench of Supreme Court arising from action by State in respect of certain land falling within reserved forest in State of Uttar Pradesh. Zahoor Ahmad was granted lease of a plot of land at Chandan Chowki, Sonaripur Range in North Kheri

Forest Division for an annual rent of Rs.100/-. The aforesaid land was part of reserved forest of which State of U.P. is the proprietor. Lease was granted for one year commencing from 18.03.1947 for industrial purpose. It was renewed on 10.06.1948 with effect from 18.03.1948 for further one year and again in 1949 for one year. Ultimately lease expired on 18.03.1950. State of U.P., after termination of lease, allowed Zahoor Ahmad to continue in possession of land on condition settled between the parties that Licensee i.e. Zahoor Ahmad would pay Rs.1,000/- as annual rent for occupation till 15.07.1950. Even after determination of lease on 15.7.1950, Zahoor Ahmad i.e. Licensee continued in possession and State of U.P. allowed him to remain in possession for three years beyond 15.07.1950 though for this period Zahoor Ahmad did not agree to give any undertaking of making payment of annual rent of Rs.1,000/-. A letter dated 04.12.1951 was issued to Zahoor Ahmad asking him to pay Rs.3,000/- for the year 1950-51. Letter further provided that if Zahoor Ahmad did not agree to pay Rs.3,000/- for the year 1950-51, amount of rent would be reduced to Rs.1800/- but he would not be allowed lease in future in any circumstance. The fact remains that Zahoor Ahmad was allowed to continue in occupation of land without any agreement as to the amount of rent payable for 1950-51. On 29.10.1952, Conservator of Forests sent a letter that Zahoor Ahmad can be allowed to run the mill beyond 15.07.1950 for three years if he pays Rs.3,000/- per annum and for one year only, if he is ready to pay Rs.1,800/- but thereafter lease would not be renewed. Notice also said that he was only Licensee and should remove his plant and vacate the premises within one month and pay Rs.6,000/- as damages for use and occupation. Zahoor Ahmad did not pay the amount, hence, a suit for recovery of damages was filed by State of U.P. High Court came to the conclusion that Licensee (Zahoor Ahmad) was allowed to continue with the consent of State of U.P. though there was no written agreement about rate of rent and lease was granted for industrial purposes. Under Section 106 of TP Act, 1882, such lease is for year to year basis. The lease could have been terminated by six months notice and since no such notice was given, therefore, tenancy was not validly terminated. With respect to amount of rent, Court took the view that under Section 116, renewal would mean the same terms and conditions as made applicable in previous lease. High Court therefore decreed the suit for payment of rent of Rs.3,000/-. Possession was allowed by State with its consent. Thus, High Court took the view that 'holding over' was applicable under Section 116. State Government bye-passing provision of TP Act, 1882 sought to rely on GG Act, 1895. Whether the kind of above lease, granted by State could have been brought within the purview of GG Act, 1895, Supreme Court examined this issue by referring to two judgments. In one, lease of forest land of Sunderbans was held to be a 'Grant' while, in another, Grant of Khas Mahal was not held to be as 'Grant'. In **Jnanendra Nath Nanda vs. Jadu Nath Banerji AIR 1938 Cal 211** two leases of two lots were granted by Sunderban Commissioner on behalf of Secretary of State. The land comprised in the lots were 'waste lands' of the Government. 'Waste lands' of Sunderbans were not property of any subject. Sunderbans was vast impenetrable forest. It was the property of East India Company and later on vested in

Crown by virtue of an Imperial Statute. Court found that history of legislation showed that grants of Sunderbans lands were treated to be 'Crown Grants' within meaning of 'Crown Grants Act'. In another matter i.e. **Secretary of State for India in Council vs. Lal Mohan Chaudhuri, AIR 1935 Cal 746** in respect of Khas Mahal, lease was granted by Government. It was held that lease of Khas Mahal does not come within the category of 'Grant' as contemplated in GG Act, 1935. Having said so, in para 13 of judgment, Court said that lease granted to Zahoor Ahmad was for the purpose of erecting a temporary rice mill and for no other purpose. The mere fact that State is the lessor will not by itself make above lease a 'Government Grant' within the meaning of GG Act, 1895. We may reproduce para 13 of the judgment in **State of U.P. vs. Zahoor Ahmad (supra)** as under :

"The lease in the present case was for the purpose of erecting a temporary rice mill and for no other purpose. The mere fact that the State is the lessor will not by itself make it a Government grant within the meaning of the Government Grants Act. There is no evidence in the present case in the character of the land or in the making of the lease or in the content of the lease to support the plea on behalf of the State that it was a grant within the meaning of the Government Grants Act." (Emphasis added)

153. When a question arose whether High Court has rightly applied Section 116 of TP Act, 1882, Supreme Court, in this context, referred to a judgment of this Court in **Lala Kishun Chand vs. Sheo Dutta, AIR 1958 All. 879** wherein after expiry of lease of Nazul land, Licensee was permitted by Board of Revenue to continue in occupation as tenant and rent was also realized from him and held that in these facts, Section 116 of TP Act, 1882 was rightly applied. Then in paras 15 and 16, Court said as under:

"15. In the present case the High Court correctly found on the facts that the respondent after the determination of the lease held over. Even if the Government Grants Act applied Section 116 of the Transfer of Property Act was not rendered inapplicable. The effect of Section 2 of the Government Grants Act is that in the construction of an instrument governed by the Government Grants Act the court shall construe such grant irrespective of the provisions of the Transfer of Property Act. It does not mean that all the provisions of the Transfer of Property Act are inapplicable. To illustrate, in the case of a grant under the Government Grants Act Section 14 of the Transfer of Property Act will not apply because Section 14 which provides what is known as the rule against perpetuity will not apply by reason of the provisions in the Government Grants Act. The grant shall be construed to take effect as if the Transfer of Property Act does not apply.

16. Section 3 of the Government Grants Act declares the unfettered discretion of the Government to impose such conditions and limitations as it thinks fit, no matter what the general law of the land be. The meaning of Sections 2 and 3 of the Government Grants is that the scope of that Act is not limited to affecting the provisions of the Transfer of Property Act only. The Government has unfettered discretion to impose any conditions, limitations, or restrictions in

its grants, and the right, privileges and obligations of the grantee would be regulated according to the terms of the grant, notwithstanding any provisions of any statutory or common law. "

154. In **Bhawanji Lakhanishi vs. Himatlal Jamnadas AIR 1972 SC 819,** Court said that basis of Section 116 is a bilateral contract between erstwhile landlord and erstwhile tenant. It has been held that assent of lessor cannot be inferred merely from his delay in taking steps to evict lessee. We may also refer to Calcutta High Court decision in **Ratan Lal vs. Farshi Bibi (1907) ILR 34 Cal 396;** Madras High in **Govindaswami vs. Ramaswami (1916) 30 Mad LJ 492;** Patna High Court in **Christian vs. Hari Prasad AIR 1955 Pat 158 and Pritilata Devi vs. Banke Bihari Lal AIR 1962 Pat 446;** and Rajsthan High Court in **Gordhan vs. Ali Bux AIR 1981 Raj 206,** holding that to attract Section 116, therefore, it has to be shown that there was a bilateral act creating a new tenancy. There is no implication of holding over. In our view, there is neither any material nor pleading to attract Section 116 and therefore, judgment in **Zahoor Ahmad (supra)** on this aspect does not help petitioners. On the contrary, what has been said in para 16 of the judgment, quoted above, the conditions of 'Grant' would prevail over every law including TP Act, 1882.

155. Moreover, in respect of Section 116 TP Act, 1882, we have already discussed the matter earlier to demonstrate that it is not attracted in the present case.

156. There is one more aspect which may be considered at this stage. In State of U.P., a special Statute was enacted in 1972 i.e. U.P. Act, 1972. It also deals with a situation where a person has continued in possession over Government owned land after expiry of period for which he was authorized to remain in possession of such land and thereunder he is declared as 'Unauthorized Occupant'. We find that similar provision was also made by Parliament in Public Premises (Eviction of Unauthorised Occupants) Act, 1971 *(hereinafter referred to as "Act, 1971").*

157. In U.P. Act, 1972, Section 2(g) and 2(e) define "unauthorised occupation" and "public premises", and the same read as under :-

*"2(g) "unauthorised occupation", in relation to any public premises, means the occupation by any person of the public premises without authority for such occupation, and i**ncludes the continuance in occupation** by any person of the public premises **after the authority** (whether by way of grant or any other mode of transfer) **under which or the capacity in which he was allowed** to hold or occupy the premises **has expired** or has been determined for any reason whatsoever and also includes continuance in occupation in the circumstances specified in sub-section (1) of Section 7 and a person shall not, merely by reason of the fact that he had paid any amount as rent, be deemed to be in authorised occupation."*

*"2(e) "public premises" means **any premises belonging to or taken** on lease or requisitioned by or on behalf **of the State Government, and includes** any premises belonging to or taken on lease by or on behalf of-.*

(i) any company as defined in Section 3 of the Companies Act, 1956, in which not less than fifty-one per cent of

the paid-up share capitals held by the State Government: or

(ii) any local authority; or

(iii) any Corporation (not being a company as defied in Section 3 of the Companies Act, 1956 or a local authority) owned or controlled by the State Government: or

(iv) any society registered under the Societies Registration Act, 1860, the governing body whereof consists, under the rules or regulations of the society, wholly of public officers or nominees of the State Government or both:

and also includes-

(i) ***Nazul land or any other premises entrusted to the management of local authority*** *(including any building built with Government funds on land belonging to the State Government after the entrustment of the land to that local authority, not being land vested in or entrusted to the management of a Gaon Sabha or any other local authority, under any law relating to land tenures):*

(ii) any premises acquired under the Land Acquisition Act, 1894 with the consent of the State Government for a company (as defined in that Act) and held by that company under an agreement executed under Section 41 of that Act providing for re-entry by the State Government in certain conditions:" (Emphasis added)

158. Definition of "unauthorized occupation" clearly includes occupation of a public premises by a person after expiry of authority to occupy such land which includes a person whose period of lease has expired and still he or she is continuing in possession. "Public Premises" includes any premises belonging to or taken on lease including "nazul land".

159. Considering provisions of U.P. Act, 1972, in **Ashoka Marketing Ltd. And another vs. Punjab National Bank and others, (1990) 4 SCC 406,** a Constitution Bench held that U.P.Act, 1972 being a special Act will override a general statute and a person who may have entered tenancy legally may become "unauthorized occupant" subsequently, after expiry of lease period.

160. A similar issue in the context of 'Nazul', managed by Delhi Development Authority and Government under provisions of Act, 1971 was considered in **Delhi Development Authority Vs. Anant Raj Agencies Pvt. Ltd. (supra)**. In that case land belonged to Delhi Improvement Trust. It had executed a lease deed dated 6.1.1951 in favour of Balraj Virmani *(hereinafter referred to a "original lessee")*. After enactment of Delhi Development Act, 1957, Development Authority was constituted thereunder, namely, Delhi Development Authority *(hereinafter referred to as "DDA")*. Lease was initially for a period of 20 years i.e. from 11.8.1948 to 10.8.1968, liable for extension/renewal for further period of 20 years at the option of lessee. Original lessee on 23.2.1967 approached DDA for renewal of lease. DDA served notice on 16.2.1968 alleging breach of terms and conditions of lease deed. DDA vide notice dated 1.9.1972 terminated lease which was challenged by original lessee in Original Suit No. 47 of 1975 before Sub Judge, Delhi seeking restraint order against DDA. Suit was decreed by Sub Judge holding that notice dated 1.9.1972 terminating lease was illegal. DDA preferred appeal which was dismissed by Additional District Judge vide judgment dated 29.9.1982. DDA preferred Second Appeal in Delhi High

Court, being RSA No. 06 of 1983. During pendency of second appeal, an application under Order 22 Rule 10 of Code of Civil Procedure *(hereinafter referred to as "CPC")* was filed alleging that original lessee has sold disputed property through sale deed to M/s. Anant Raj Agencies Pvt. Ltd.(hereinafter referred to as "subsequent purchaser"). This sale deed was claimed to have been executed between original lessee and subsequent purchaser pursuant to some compromise decree dated 22.6.1988 passed by High Court in a matter between original lessee and subsequent purchaser. The application of subsequent purchaser for substituting as respondent in second appeal filed by DDA was allowed by High Court. Further subsequent purchaser also applied to DDA for conversion of lease land to freehold and deposited a sum of Rs.96,41,892/- towards conversion charges. DDA rejected the said application of subsequent purchaser. Aggrieved thereof, subsequent purchaser preferred writ petition no. 10015 of 2005 in Delhi High which was disposed of vide order dated 19.7.2007, directing DDA to decide subsequent purchase's request for conversion of premises from lease hold to freehold. Thereafter, High Court also dismissed DDA's second appeal holding that act of demand and acceptance of rent tantamounts to renewal of lease of disputed property. It is this judgment passed in second appeal which came to be considered before Supreme Court in the aforesaid matter. One of the contentions raised on behalf of DDA was that original lessee created interest in the disputed property in favour of subsequent purchaser during the period when original lessee itself was not a lease holder since lease stood terminated by efflux of time. It was contended that original lessee had no title or interest in property which could have been transferred to subsequent purchaser and said transfer is void and not binding on DDA. Next ground was that deposit of rent by original lessee and acceptance by office of DDA is something administrative in nature and would not be construed as estoppel or waiver on the part of DDA with regard to property unless a specific intention to this effect is communicated to original lessee. Supreme Court formulated following two questions:-

"1. Whether original lessee has acquired any right in respect of property in question ***after termination of lease by efflux of time on 10.8.1968*** *and also by termination notice dated 1.9.1972, in the absence of renewal of lease by DDA in writing as provided under Clause iii(b) of lease deed, by virtue of payment of rent in the office of the DDA?*

2.Whether Respondent(subsequent purchaser) acquires any right in respect of property in question by getting substituted in place of original lessee by virtue of a compromise decree, between original lessee and Respondent based on a sale deed dated 14.10.1998 executed by original lessee, by invoking Order 22 Rule 10 of CPC during pendency of appeal before High Court?"

161. While answering question no.1, Court held that there was no renewal of lease by DDA in favour of original lessee. Court also held that a lease if has expired, it would not be necessary for lessor to terminate the same since original lease stands terminated by efflux of time after expiry of period of lease. Court said that Principle of "holding over" under Section 116 of Act, 1882 would not be applicable

since there was no assent of landlord and mere acceptance of rent by lessor, in absence of an agreement to the contrary, would not render possession of lessee valid. In this regard, Court relied on its earlier decision in **Shanti Prasad Devi and Another vs. Shanker Mahto and others (supra)** and **Sarup Singh Gupta vs. S. Jagdish Singh and others (2006) 4 SCC 205**. There could not be an implied renewal to attract "holding over" on mere acceptance of rent offered by lessee.

162. In **Delhi Development Authority vs. Anant Raj Agencies Pvt. Ltd. (supra)** Court also held that land vested in DDA is a public premises and that being so, it is governed by Act, 1971, which shall prevail over Act, 1882, a general law governing landlord and tenant's relationship. Referring to definition of "Public Premises", Court said, *"It can be concluded that Act, 1882 is not applicable in respect of Public premises"*. Court held :-

"Therefore, in the instant case, as per Clause iii(b) of the lease deed and Sections 21 and 22 of the DD Act read with Rule 43 of the Nazul Land Rules and in the light of Shanti Prasad Devi, Sarup Singh Gupta and Ashoka Marketing Ltd. Cases (supra), ***there cannot be an automatic renewal of lease in favour of the original lessee once it stands terminated by efflux of time*** *and also by issuing notice terminating the lease.* ***Merely accepting the amount towards the rent by the office of the DDA after expiry of the lease period shall not be construed as renewal of lease of the premises in question in favour of the original lessee,*** *for another period of 20 years as contended by the Respondent."*

163. In **Delhi Development Authority vs. Anant Raj Agencies Pvt. Ltd. (supra)** Court also considered that land vested in DDA was a 'Nazul land' and that being so, power has been conferred upon DDA to grant lease which includes renewal of lease but in absence of said renewal of lease of property as required in law, original lessee cannot claim an automatic renewal in his favour. Court held as under:-

"Thus, it is abundantly clear from the aforesaid legal statutory provisions of the DD Act and terms and conditions of the lease deed and the case law referred supra that ***there is no automatic renewal of lease of the property in question in favour of the original lessee"*** (Emphasis added)

164. Having said so, Court held that in absence of renewal of lease, status of original lessee in relation to disputed property was that of an "unauthorized occupant" in terms of Section 2(g) of U.P. Act, 1972.

165. It also said that any act on the part of DDA in respect of other communication would make no difference, since a "Public Premises" is to be dealt with by relevant statutory provisions including Act, 1971, Nazul Land Rules and DDA Act, 1957. Thus question-1 was answered by Court as under:-

"30. Without examining the case in the proper perspective that the property in question being a Public Premises in terms of Section 2(e) of the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 and that ***after expiry of lease period the original lessee has become unauthorized occupant*** *in terms of Section 2(g) of the said Act in the*

light of relevant statutory provisions and Rules referred to supra and ***law laid down by the Constitution Bench of this Court in the Case of Ashoka Marketing Ltd. and Another (supra),*** *the concurrent findings of the courts below on the contentious issue is not only erroneous but also suffers from error in law and therefore, liable to be set aside.*

31.The grant of perpetual injunction by the Trial Court in favour of original lessee, restraining the DDA from taking any action under the said termination notice dated 01.09.1972, on the ground that the termination notice dated 01.09.1972 being illegal, arbitrary and without jurisdiction and the affirmation of the same by both the first appellate court, i.e. by the learned ADJ and further by the High Court by its impugned judgment and order are not only erroneous but also suffers from error in law. Thus, Point No.1 is answered in favour of the Appellant."

166. Thereafter, question-2 was considered by Court. It was held that compromise decree between original lessee and subsequent purchaser was void ab initio in law for the reason that original lessee in absence of renewal of lease in his favour himself has no right, title or interest at the time of execution of sale deed in respect of disputed property. Court said:

"It is well settled position of law that the ***person having no right, title or interest in the property cannot transfer the same by way of sale deed."***

(Emphasis added)

167. Thus, original lessee could not transfer a valid right to subsequent purchaser since itself had no right whatsoever in respect of land in dispute. Further, fact that subsequent purchaser deposited conversion charges in the office of DDA, also would make no difference. Original lessee in absence of renewal of lease, himself having become an "unauthorized occupant" of property, a transaction between original lessee and subsequent purchaser would have no legal consequence. Thus anything done between DDA and original lessee will also have no consequence. Court therefore, answered second question as under:-

"The instant case having peculiar facts and circumstances, namely, after 10.08.1968 the lease stands terminated by efflux of time, which is further evidently clear from the termination notice dated 01.09.1972 and thereafter, ***the original lessee becomes an unauthorised occupant*** *in terms of Section 2(g) of the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 and consequently,* ***not entitled to deal with the property in question in any manner. The very concept of conversion of leasehold rights to freehold rights is not applicable to the fact situation."*** (Emphasis added)

168. In the aforesaid backdrop, when we consider facts of present case, we find that entry of petitioners over land in dispute was wholly unauthorised. Therefore, their status is of 'rank trespassers'. It is true that petitioners have raised certain constructions over land in dispute but even that is without any authority and in violation of stiputations of lease deed. Morever, raising of such constructions will not validate what is illegal from very inception. Lessees under terms of lease were under an obligation to

surrender leased land to State after expiry of lease but such obligation was not discharged by lessees. The mere fact that State immediately after expiry of lease or within reasonable time did not take any action for restoration of possession of leased land does not mean that State's right of resumption and re-entry or that of taking possession of land in dispute which is owned by State, in any manner would stand hampered. It is also not the case of petitioners that their right with respect to title over land in dispute would stand matured by 'Prescription' i.e. by way of 'Adverse Possession'. Neither it is pleaded, nor any material in support thereof has been placed on record, nor in the facts of this case, doctrine of 'adverse possession' is attracted.

169. State, at no point of time, validated any action of petitioners in respect of land in dispute. It is interesting to see that petitioners have pleaded that they continuously paid rent of disputed Nazul land to Sri Harihar Nath Dhar, but State, the real owner of land, stood deprived of any payment even by way of lease rent or premium or otherwise, either by earlier Lessee or petitioners. There is nothing on record to show that any amount towards premium or lease rent has been paid to State after expiry of lease on 01.04.1962. In effect, land has been enjoyed by occupants including earlier lessees and then petitioners, free of any payment to owner, not for a short period but almost half a century and more. The land owned by State constitutes a 'public asset' in which people in general have a right to ensure that custodian of public asset i.e. State Government shall utilize such asset for maximum welfare and benefit of public at large but that has not been done and private individuals stood benefited in a most illegal manner.

170. So far as resumption is concerned, admittedly, State has sought to resume land for 'public purpose' i.e. for developing 'Sports Complex' on the land in dispute. It is not disputed by learned counsel for petitioners that Allahabad City has been chosen to be developed as "Smart City" for which land for developmental activities is required in large quantity. State Government required huge land for making construction of various establishments besides developing Green Area and places of other activities. Therefore, purpose for which land is sought to be acquired is undoubtedly a 'public purpose'. Mere fact that in case of some other persons, land has been made freehold or some other Nazul land has not been sought to be resumed, by itself, will not make resumption in question, arbitrary or discriminatory for the reason that every land situated in different location has its own identity, utility and suitability. One land in a particular location cannot claim parity with another land. Reasons may be hundred i.e. size of land, its topography and similar other aspects. It is not the case of petitioners that land in question cannot be developed as 'Sports Complex'. The mere fact that one 'Sports Complex is already existing in the city of Allahabad, does not mean that for developing Allahabad as 'Smart City', more than one Sports Complex should not or cannot be developed and constructed. This assumption on the part of petitioners is thoroughly unwarranted and misconceived.

171. Further, right of re-entry is not restricted under terms of lease, as we have already quoted. Right of re-entry also does not prejudice right of State to take appropriate steps for claiming damages for breach of covenants of lease-deed and

for recovery of rent/damages or other dues in respect of actual use of land by unathorized occupants. State has not chosen to take structure raised on land in dispute and opportunity has been given to petitioners to remove such structure from land in dispute and give vacant possession to respondent-State within fifteen days. It thus cannot be said that resumption of land in dispute by State is illegal or invalid or not in accordance with law.

172. Counsel for petitioners at this stage sought to argue that petitioners if treated as 'unauthorized occupant' in view of definition of term 'unauthorized occupant' provided in Section 2(g) of U.P.Act, 1972, in that case, they can be evicted from premises in question only in accordance with procedure prescribed therein and not otherwise.

173. Here also we find no substance in the submission. Provisions of lease-deed, as we have already said, provide a procedure for re-entry. Besides relevant clauses of lease-deed which we have already quoted, there is another provision in lease-deed providing for re-entry by Government at any time and the said clause of lease deed reads as under :

*"PROVIDED also that i**f the Government shall at any time require to re-enter on this site it can do so, on paying the value of all buildings that may be on this site, plus 10 per cent, as recompence for resumption of lease** and that the lessee **shall have no further claim of any sort against the Government."***

(Emphasis added)

174. Supreme Court has already said that terms of lease shall govern Nazul land in view of provisions of GG Act, 1895 and being a special procedure prescribed in lease deed, it shall prevail over any other law and no other procedure is required to be followed.

175. Therefore, State Government, when avail its right under terms of lease, cannot be compelled to chose another procedure. Moreover, under U.P.Act, 1972, State may proceed if it intends to recover the amount of damage, compensation etc. for unauthorized possession over public premises, which has to be ascertained by Prescribed Authority, which is not the case in hand. Therefore, it cannot be said that State Government is bound to follow procedure of U.P. Act, 1972 and cannot resort to the procedure prescribed for re-entry provided in lease-deed itself. This argument is contrary to what has been said by Supreme Court in **Azim Ahmad Kazmi and others (supra)**, hence rejected.

176. In this context and to justify possession of petitioners over land in dispute, it is also contended that in 1992, policy of conversion of Nazul land into freehold was adopted by Government and petitioners having applied for freehold, were entitled to continue for possession till their application is decided, hence State Government could not have re-entered or resumed land in dispute, instead, petitioners are entitled for conversion of lease into freehold. Reliance is placed on G.O. dated 23.05.1992 and subsequent ones.

177. The first such G.O. is dated 23.05.1992. The aforesaid G.O. was applicable to permanent leases given for **'residential purposes'** and 'current

leases', given for residential purposes. Para 1 of aforesaid G.O. reads as under :

''मुझे यह कहने का निर्देश हुआ है कि सम्यक विचारोपरान्त शासन द्वारा नजूल भूमि के प्रबन्ध एवं निस्तारण आदि की वर्तमान व्यवस्था में परिवर्तन करते हुए ***शाश्वत एवं चालू पट्टों के अन्तर्गत उपलब्ध नजूल भूमि का*** *स्वैच्छिक आधार पर फ्री–होल्ड घोषित करने एवं शेष रिक्त नजूल भूमि का निस्तारण इस शासनादेश में निर्धारित प्रक्रिया के अनुसार करने का निर्णय लिया गया है। तद्नुसार नजूल भूमि के प्रबन्ध एवं निस्तारण आदि के सम्बन्ध में निम्नलिखित व्यवस्था तात्कालिक रूप से लागू होगी।''*

"I am directed to say that after due consideration the government has while changing the extant policy of management and disposal of the Nazul land, decided to declare ***Nazul land available under the perpetual and current leases*** *to be freehold on voluntary basis and to dispose remaining vacant Nazul land as per procedure prescribed in this Government Order. Accordingly, in respect of the management and disposal, etc. of the Nazul land, the following policy shall come into force with immediate effect."*

(English Translation by Court)
(Emphasis added)

178. Those, who are governed by aforesaid G.O., were directed to submit their option for freehold within one year from the date of issue of G.O. and only they would be entitled for benefit under the said G.O. It also restrained any transfer of property if under lease deed, no transfer was permissible without permission. It also directed that where unauthorized possession is found, action for eviction shall be taken in accordance with law. Paras 7 and 8 of said G.O. read as under :

''(7) ***जिन पट्टों मे यह शर्त है कि पट्टाधिकारी बिना पट्टादाता की अनुमति के पट्टागत भूमि का हस्तान्तरण कर सकता है, वहॉ पट्टे की शर्त के विपरीत कोई हस्तक्षेप नही किया जाएगा,*** *किन्तु जहॉ बिना पट्टादाता की अनुमति के पट्टेदार द्वारा भूमि हस्तान्तरण करने का निषेध है वहॉ इस शासनादेश के लागू होने की तिथि से किसी भी प्रकार के हस्तान्तरण पर एक वर्ष तक के लिए रोक लगा दी जाएगी। यह योजना शासनादेश जारी होने की तिथि से लागू होगी।*

(8) इस बात का व्यापक प्रचार किया जाएगा कि उपरोक्त नीति ***अनधिकृत कब्जो के मामलों में लागू नहीं होगी और अनधिकृत कब्जों के मामलों में विधिक प्रक्रिया के अनुसार बेदखली आदि की कार्यवाही की जाएगी।''***

"(7) ***In leases where leaseholder can transfer lease land without permission of the lessor, in such a case no interference shall be made contrary to the terms and conditions of the lease.*** *But where transfer of land without permission of the lessor is prohibited, any transfer of land shall be stopped for a year from the date of enforcement of this Government Order. This policy shall come into force from the date of issue of the Government Order.*

(8) It shall be widely circulated that the aforesaid policy shall not be applicable to the cases related to unauthorized possessions ***and eviction proceedings, etc. in relation to the unauthorized possessions shall be held in accordance with the legal procedure."***

(English Transaction by Court)
(Emphasis added)

179. The second G.O. was issued on 02.12.1992 dividing Lease-Holders in two categories. One, who had not violated conditions of lease, and, another, who had violated conditions of lease. Those, who had not violated conditions were required to pay for conversion to freehold an amount equal to 50 percent of Circle Rate for residential purpose while those who had violated conditions of lease, were to

pay 100 percent. Same was in respect of Group Housing and Commercial use with the difference of amount to be paid for freehold. Para 4 thereof also provided that such current leases where 90 years period had expired, if Lease-holder had not violated any condition of lease and wants freehold, that can be allowed as per aforesaid G.O.. However, if he wants fresh lease, that can also be allowed for 30 years on payment of 20 percent of Circle rate as premium and 1/60th part of premium towards annual rent. Clause 4 of aforesaid G.O. reads as under :

*''4. **ऐसे चालू पट्टे जिनके 90 वर्ष की सम्पूर्ण अवधि समाप्त हो गई है** यदि कोई पूर्व पट्टाधारक **जिन्होंने पट्टे की शर्तों का उल्लंघन नहीं किया है,** भूमि फ्री–होल्ड कराना चाहता है तो ऐसी दशा में निर्धारित दरों के अनुसार फ्री–होल्ड कर दिया जाएगा। यदि वह फ्री–होल्ड नही कराना चाहते है बल्कि नया पट्टा लेना चाहते है तो ऐसी दशा में 30 वर्ष के लिए एक नया पट्टा वर्तमान शर्तों के आधार पर दिया जा सकता है जिसके लिए प्रीमियम की धनराशि प्रचलित सर्किल रेट की निर्धारित दर की 20 प्रतिशत होगी और वार्षिक किराया, प्रीमियम का 1/60वां भाग प्रतिवर्ष के हिसाब से भी लिया जाएगा।''*

*"4 . **In case of those current leases whose entire lease period of 90 years has expired,** if any previous leaseholder **who has not violated lease conditions,** wants to get the land converted into freehold, in such a circumstance it shall be converted into freehold against the payment of the prescribed rates. If he does not want to convert it into freehold and wants to get a new lease, in such a circumstance a new lease may be awarded for 30 years under the extant terms and conditions, for which premium amount @ 20 percent of the existing circle rates and annual rent @ 1/60 of the premium shall be paid."*

(English Translation by Court)

(Emphasis added)

180. The third G.O. dated 03.10.1994 again made amendment in earlier two G.Os. Relevant aspect is that vide para 2, provision made for execution of 30 years lease, where 90 years period had expired, was deleted. Para 2 of G.O. dated 03.10.1994 reads as under :

*''2. शासनादेश संख्या 3632/9–आ–4–92–293–एन/90, 2–12–1992 में ऐसे चालू पट्टे जिनके 90 वर्ष की सम्पूर्ण अवधि समाप्त हो चुकी है तथा पूर्व पट्टाधारक द्वारा पट्टे की शर्तों का उल्लंघन नहीं किया गया है, के सम्बन्ध में 30 वर्षीय पट्टा स्वीकृत किये जाने की व्यवस्था की गई थी। **इस व्यवस्था को तात्कालिक प्रभाव से समाप्त किया जाता है। अब ऐसे मामले में नया पट्टा स्वीकृत नहीं किया जाएगा बल्कि ऐसे मामले में जिनमें पट्टे की सम्पूर्ण अवधि समाप्त हो चुकी है उसको उपरोक्त निर्धारित दरों पर पूर्व पट्टेदार के पक्ष में फ्री–होल्ड में परिवर्तित करने की कार्यवाही की जाएगी।''***

*"2. A provision had been made in Government Order No. 3632/9-Aa-4-92-293-N/90, dated 02.12.1992 for grant of lease for 30 years for the current leases; where 90 years' tenure has expired and the terms and conditions of the lease have not been violated by the former lease holder. **This provision is annulled with immediate effect. Now in such cases, no new lease shall be granted; rather, in cases where entire period of lease has expired, proceedings shall be taken for converting such leases into freehold in favour of the former lease holders at the aforesaid prescribed rates."***

(English Translation by Court)

(Emphasis added)

181. Para 8 of aforesaid G.O. further provides that policy for freehold will be effective only upto 31.03.1995.

182. Considering that some very poor persons were also in occupation of 'Nazul land' and their eviction may result in serious problem of accommodation to such persons, another G.O. dated 01.01.1996 was issued making amendments in earlier three G.Os. stating that those persons whose monthly income is Rs.1,250/- or less, unauthorized possession of such persons on vacant Nazul land upto 01.01.1992 or prior thereto for residential purposes, shall be allowed freehold on payment of 25 percent premium and Rs.60/- annual rent for the said area upto 45 Sq. Meter and for more than 45 Sq.Meter but upto 100 Sq.Meter, 40 percent and Rs.120 annual rent. It clearly says that no regularization of unauthorized possession shall be made beyond 100 Sq.Meter and amount of premium shall be allowed to be paid in 10 years' interest free 6 monthly installments. Such unauthorized possession shall be regularized by approving 30 years' lease. Clauses 1, 2, 3 and 4 of aforesaid G.O. reads as under :

''(1) किसी भी दशा में ***100 वर्ग मीटर से अधिक क्षेत्रफल पर किये गये अवैध कब्जों का विनियमितीकरण नहीं किया जायेगा*** *तथा दिनांक 30.11.1991 की सर्किल रेट पर आंकलित सम्पूर्ण मूल्य पर निर्धारित यथास्थिति 25: या 40: नजराने की धनराशि 10 वर्षीय ब्याज रहित छमाही किस्तों में लिया जायेगा, परन्तु यदि कोई व्यक्ति सम्पूर्ण धनराशि या बकाया किस्तों की धनराशि एकमुश्त जमा करना चाहता है तो वह देय धनराशि जमा कर सकता है।*

(2) उपरोक्त प्रकार के मामले में विनियमितीकरण की कार्यवाही 30 वर्षीय पट्टा स्वीकृत करके की जायेगी। स्वीकृत पट्टे में 30–30 वर्षीय दो नवीनीकरण के प्राविधान सहित सम्पूर्ण पट्टे की कुल अवधि दो नवीनीकरण के प्राविधान सहित सम्पूर्ण पट्टे की कुल अवधि अधिकतम 90 वर्ष की होगी। ***जिसमें यह शर्त होगी कि सम्बन्धित व्यक्ति भूमि का पट्टाधिकार 30 वर्ष तक किसी व्यक्ति को हस्तानान्तरित नहीं कर सकता है पट्टा शासन द्वारा निर्धारित प्रारूप पर जारी किया जायेगा।***

(3) ***अनाधिकृत कब्जों के विनियमितीकरण की समस्त कार्यवाही जिलाधिकारी, की अध्यक्षता में गठित समिति की संस्तुति पर जिलाधिकारी द्वारा की जायेगी।*** *लखनऊ एवं देहरादून में समस्त कार्यवाही उपाध्यक्ष, विकास प्राधिकरण की अध्यक्षता में गठित समिति की संस्तुति पर उपाध्यक्ष द्वारा की जायेगी।*

(4) ***विनियमितीकरण हेतु परिवार को एक इकाई के रूप में माना जायेगा*** *तथा पट्टा परिवार के मुखिया के पक्ष में स्वीकृत किया जायेगा।''*

"(1) Under no circumstances, ***illegal possessions over an area measuring over 100 square metres shall be regularised*** *and an amount of earnest money, 25% or 40% as the case may be, on the entire amount calculated as per the circle rate as on 30.11.1991 shall be taken in half yearly interest free instalments over the period of 10 years. However, if any person wishes to deposit entire money or the amount of remaining instalments in lump sum, he/she may deposit the payable amount.*

(2) In the aforesaid type of cases, regularisation proceedings shall be done by granting a lease for a period of 30 years. The total period of the entire lease shall at most be 90 years with provision of two renewals, for 30 years each, in the lease so granted, subject to a restriction ***that the person concerned cannot transfer the lease rights to anybody until 30 years. The lease shall be issued on a format prescribed by the government.***

(3) ***All the proceedings of regularisation of unauthorised possessions shall be done by the District Magistrate on recommendation of a committee constituted under his/her chairmanship.*** *All the proceedings in Lucknow and Dehradun shall be done by the Vice Chairman, Development Authority, on recommendation of a committee constituted under his/her chairmanship.*

(4) ***For the purpose of regularisation, a family shall be deemed to be a unit*** *and lease shall be granted in the name of the head of the family."*
(English Translation by Court)
(Emphasis added)

183. Then vide G.O. dated 17.02.1996 again some amendments were made in respect of amount payable for freehold but earlier policy of categories of persons, who can claim freehold, was not changed. Vide G.O. dated 29.03.1996, period for giving benefit of freehold was extended from 01.4.1996 to 30.09.1996. G.O. dated 02.04.1996 only made some corrigendum in earlier G.O. dated 17.02.1996.

184. On 29.08.1996, G.O. was issued in furtherance of G.O. dated 17.02.1996 stating that under G.O. dated 17.02.1996, freehold rights to Nominees of Lease-Holders were allowed and in reference thereto, rates on which such Nominees shall be allowed freehold, were mentioned.

185. We find that G.O. dated 17.02.1996 nowhere permits conversion of Nazul land into freehold in favour of Nominees of Lessee. Thus, G.O. dated 29.08.1996, insofar as it refer to G.O. dated 17.02.1996, has erred in law and it is a clear misreading. If G.O. dated 17.02.1996 itself had not permitted freehold rights to Nominee(s) of Lessee, question of rights determined by G.O. dated 29.08.1996 is of no legal consequence and would remain inoperative.

186. Then vide G.O. dated 25.10.1996, implementation of freehold policy was extended upto 31.12.1996. Then G.O. dated 31.12.1996 was issued to clarify G.O. dated 17.02.1996 in respect of applicability of rate, where land use at the time of grant of lease has changed in Master plan.

187. G.O. dated 26.09.1997 made amendments in all earlier G.Os. in respect of rates for Nazul land being used for hospital and other charitable purposes. It also clarifies as to which contravention of lease deed will be treated as violation to attract higher rate. It also provided in para 6(2) that Government has got right of re-entry due to violation of any conditions of lease and lease has already expired, and such Lease-Holder may be informed of Nazul policy and be given an opportunity to apply for freehold whereafter action for dispossession will be taken. The policy of conversion of freehold was extended upto 25.12.1997.

188. Then comes G.O. dated 01.12.1998. Thereunder only two categories were made i.e. residential and non-residential. Restriction was also imposed on certain Nazul land in respect whereto conversion of freehold shall not be allowed.

189. Vide G.O. dated 10.12.2002, it was clarified that freehold conversion shall not be allowed to nominee of Lessee or his legal heirs. G.O. dated 31.12.2002 relates to rates and clarification hence are not relevant for the purpose of present case.

190. Vide G.O. dated 04.08.2006, provision for regularization of Nazul land which was in unauthorized possession, was deleted. It is also said that in all the matters, where freehold document has not been registered, application shall be

cancelled. Vide G.O. dated 15.02.2008 clarification was given in respect of G.O. dated 04.08.2006 and it was reiterated that in all those matters where freehold document has not been registered, application shall be rejected.

191. Vide G.O. dated 21.10.2008, Clause 3 of G.O. dated 10.10.2002, whereby provision for conversion of freehold to Nominee of Lessee or his legal heirs was ceased, was restored. It was also clarified that decision to convert freehold of Nazul land will apply only when such land is not found necessary for Government use.

192. G.O. dated 26.05.2009 made an amendment in para 2(6) of G.O. dated 21.10.2008 and substituted following paras therein :

*"**ऐसे नजूल भूमियां** जो भू–धारक या पट्टाधारक या उनके विधिक उत्तराधिकारी / **नामित की भूमि के साथ स्थित है तथा उनके लिए उपयोगी सिद्ध हो सकती हैं तथा किसी अन्य के उपयोग की सम्भावना नहीं प्रतीत होती है।** ऐसी भूमि का विनियमितीकरण भू–धारक या पट्टाधारक या उनके विधिक उत्तराधिकारी / नामित के पक्ष में वर्तमान सर्किल रेट शत प्रतिशत प्राप्त कर फ्री–होल्ड कर दिया जायेगा। **ऐसे मामलों में शासन की अनुमति आवश्यक होगी।"***

*"**Those nazul lands** which are lying adjacent to the land of land holder or lease holder or his legal successor/**his nominee, and which can be of utility to them and do not appear to have the potential of being used by any other person,** shall be regularised and converted into freehold in favour of the land holder or lease holder or his legal successor/nominee after receiving cent percent current circle rate. **In such matters, the permission of the government shall be necessary."***

(English Translation by Court)

(Emphasis added)

193. Further time for conversion into freehold was extended upto 31.12.2009.

194. G.Os. dated 29.01.2010, 17.02.2011 and 01.8.2011 contain amendments of minor nature hence not discussed further.

195. Then comes G.O. dated 28.09.2011. It talks of policy of conversion of Nazul land into freehold, which was not listed at any point of time but has been occupied unauthorizedly and occupants have raised their construction using land prior to 01.12.1998. However, land of public places, park, side-lanes of road and other Government uses was excluded and maximum area for such freehold was confined to 300 Sq.Meter. The incumbent had to apply within three months whereafter they have to be evicted. With respect to 'Nominees of Lessees', para 5 of said G.O. reads as under :

*''नामित व्यक्ति के पक्ष में नजूल भूमि को फ्रीहोल्ड किये जाने की व्यवस्था को समाप्त किया जाना– नजूल भूमि के पट्टेदार द्वारा **नामित व्यक्ति के पक्ष में नजूल भूमि को फ्रीहोल्ड किये जाने की व्यवस्था सर्वप्रथम** शासनादेश संख्या : 1300/9–आ–4–96–629एन/95, टी.सी. दिनांक 29–8–1996 के प्रस्तर–1 (3) (4) में की गयी थी और शासनादेश संख्या 2873/9–आ–4–2002–152–एन /2002, टी.सी. दिनांक 10–12–2002 के प्रस्तर 3 **द्वारा उक्त व्यवस्था समाप्त कर दी गयी** तथा शासनादेश संख्या : 1956/आठ–4–08–266एन/08, दिनांक **21–10–2008** के प्रस्तर– 2 (4) द्वारा उक्त व्यवस्था **पुनः बहाल कर दी गयी है।** इस व्यवस्था के सम्बन्ध में मा0 उच्च न्यायालय में विचाराधीन रिट याचिका (जनहित याचिका) संख्या : 35248/2010–जयसिंह बनाम उत्तर प्रदेश राज्य व अन्य में पारित अन्तरिम आदेश दिनांक 16–07–2010 में दिये गये निर्देशों के दृष्टिगत उपर्युक्त **शासनादेश***

दिनांक 21–10–2008 का प्रस्तर 2 (4) जिसके द्वारा नामिनी के पक्ष में नजूल भूमि को फ्रीहोल्ड किये जाने की व्यवस्था बहाल की गयी है, को समाप्त करते हुए अब ऐसे व्यक्ति जिनके पक्ष में क्रय की जा रही सम्पत्ति (नजूल भूमि) को पट्टेदार द्वारा रजिस्टर्ड एग्रीमेंट टू सेल किया गया हो और पूर्ण स्टाम्प शुल्क अदा किया गया हो, उसी व्यक्ति के पक्ष में ही नजूल भूमि को फ्रीहोल्ड किया जायेगा।"

"Cessation of the provision of converting the nazul land into freehold in favour of the nominee:- ***The provision of converting nazul land into freehold in favour of nominee by the lease holder of the land had first been provided in the para- 1 (3)(4)*** *of the Government Order No. 1300/9-Aa-4-96-629N/95, TC dated 29-08-1996; and by para 3 of the Government Order No. 2873/9-Aa-4-2002-152-N/2002, TC dated 10.12.2002, the* ***aforesaid provision was annulled;*** *and through para 2(4) of Government Order No. 1956/VIII-4-08-266N/08, dated 21.10.2008, the aforesaid provision has been restored again. Pursuant to the instructions, with respect to this provision, given in the interim order dated 16.07.2010 passed by the Hon'ble High Court in Writ Petition (Public Interest Litigation) No. 35248/2010 titled as Jai Singh Vs State of Uttar Pradesh and others, which is pending,* ***the provision of para 2(4) made in the aforesaid Government Order dated 21.10.2008 through which converting nazul land into in favour of the nominee was restored, is being annulled; and the nazul land shall be converted into freehold in favour of the person with whom the lease holder has entered in registered agreement to sale and who has paid the whole stamp duty."***

(Emphasis added)

(English Translation by Court)

196. Aforesaid G.Os. thus clearly show that eligibility of leases of Nazul land, as initially laid down in G.O. of 1992 remained some changed but in respect of land found suitable or needed by Government, no freehold was permissible. With respect to violation of terms and conditions of lease etc., some relaxation was given.

197. Lastly there are two more G.Os. i.e. 04.03.2014 and 15.01.2015 wherein policy of freehold has been virtually given a relook and substantial amendments have been made in earlier policy.

198. It is no doubt true that Government has promulgated policy of conversion of lease land into freehold even in those cases where lease has expired, but then question is "whether mere submission of application for freehold will confer a vested right upon petitioners to get Nazul land converted into freehold, which will override even power of re-entry of Lessor.

199. A Full Bench of this Court in **Anand Kumar Sharma vs. State of U.P. and others 2014(2) ADJ 742** has considered this aspect and held in para 42 of judgment that merely by making an application for grant of freehold right, a petitioner did not acquire a vested right. Para 42 of the judgment reads as under :

"We after considering the relevant Government Orders on the subject and pronouncements of the Apex Court as noted above, are of the view that ***merely by making an application for grant of freehold right, petitioner did not acquire a vested right."***

(Emphasis added)

200. A Division Bench of this Court in **Writ Petition No.62588 of 2010, M/s**

Madhu Colonizers Pvt. Ltd. vs. State of U.P. & Ors., decided on 02.04.2013 has held that if Government exercises right of re-entry, question of lessees to claim freehold would not arise and where such a right cannot be claimed by Lessee, right of nominee also cannot survive over such lessee. Court has said :

"It is also found that ***as nominee of the lessee, the petitioner-Company cannot have any larger rights than the lessee and once the order of the District Magistrate for resumption the land in exercise of power under Clause 3(c) of the lease deed is held to be valid, the petitioner-Company, as a nominee, cannot have any surviving right to claim conversion of the lease hold rights into . Infact, on valid resumption order being passed, the lease hold rights cease to exist*** *and there can be no occasion for conversion of lease hold rights into freehold rights in such circumstances."*

(Emphasis added)

201. The discussion made above leaves no manner of doubt that resumption of land in question is in accordance with law and petitioners have no right whatsoever to claim continued possession over land in dispute. Even scheme of freehold as governed by various Government Orders shows, wherever land is required by State Government for 'public purpose' for own use, it shall not allow freehold.

202. We, therefore, answer **questions (v) and (vi)** against petitioners and hold that petitioners had no right, legal, contractual or otherwise in respect of possession of land in dispute; they were not holding possession of land validly; once State exercises right of re-entry, question of conversion of freehold also would not arise, hence notice in question warrants no interference.

203. Before proceeding further, we find it difficult to desist from observing that freehold policy, commenced in 1992, took care of a limited category of occupants of Nazul land i.e. Lessees, who had perpetual lease or where lease was continuing and there was no violation of conditions of lease. Meaning thereby, Leaseholders, who had faithfully abided the terms and conditions of lease, were chosen as a class by themselves and provision was made to convert lease rights into freehold in such cases. One may not dispute about such policy in the light of the fact that these leases were several decades old and people holding such leases had developed some kind of possessory interest in property and recognizing such interest of Lessees, howsoever weak it was, if State Government chose to confer upon them benefit of conversion of lease right into freehold, one may not validly object to that and probably such policy may satisfy constitutional test of fairness, non-discrimination, non-arbitrariness etc. But with the passage of time, in the garb of improvement in the policy, amendments were made by numerous Government Orders issued from time to time, which we have referred hereinabove and that opened an unrestricted area of beneficiaries, i.e. wholly strangers namely mere Nominees of Lessee, who had no prior interest in property in question, flagrant defaulters and violators of terms of lease etc. Such provisions, in our view, are difficult to be sustained as to satisfy constitutional validity of policy of freehold under aforesaid Government Orders. In our view, such G.Os. are ex

facie arbitrary and violative of Article 14 of Constitution of India. One cannot lose sight and ignore historical backdrop of allotment of Nazul land. Persons who were sympathetic to Britishers and for services rendered by individuals in the interest of Colonial Forces, helping them in their administration; or some otherwise highly resourceful people, were given such Leases/Grants. After independence, if State wanted to distribute its largesse/assets, we can understand, if a scheme would have been evolved to distribute Nazul land, by terminating lease, to weaker and poor people or landless people or if objective was to augment revenue, then State largesse/assets, instead of distributing in a clandestine manner by confining such benefit to certain individuals, appropriate mode of auction of land to general public should have been adopted. We do not know what prevailed with State Government in making policy, which was initially not so apparently erratic, to become a boon to defaulters and also give opportunity to certain individuals in trading of land after getting land freehold on much lessor amount than what actually market value of land is. In the present case itself, petitioners have said that they paid money to Harihar Nath Dhar and therefore, Harihar Nath Dhar actually benefited himself of the property owned by State without any return to State and this had continued for decades together. Thus, *Prima facie*, we are satisfied that policy of freehold, as it stand today, helps scrupulous, resourceful land dealers, Land Mafias and similar other persons. It is neither in public interest nor satisfies test of fairness and reasonableness of public policy nor consistent with constitutional provisions, in particular, Article 14 of Constitution of India. However, we are not expressing any final opinion on this aspect but this Court desires that it is high time and sooner is the better, that State Government must re-examine entire policy and if purpose is only to augment revenue, Government should opt for public auction so that it may get best price or policy should be confined for the benefit of have-nots i.e. poor landless and weaker sections of the Society.

204. Now, we come to question (vii).

205. Petitioners are rank-trespassers, as we have already said. Therefore, they have no right over land in dispute. Still respondent's authority has given opportunity to petitioners by means of notice in question. Even otherwise, if petitioners would have been a valid leaseholder, their rights under lease would have been contractual and in the matter of contract, it has been repeatedly held that principles of natural justice are not applicable.

206. In **State of Gujarat and Ors. vs. Meghji Pethraj Shah Charitable Trust and Ors., 1994(3) SCC 552,** Court held:

"We are unable to see any substance in the argument that the termination of arrangement without observing the principle of natural justice (audi alteram partem) is void. The termination is not a quasi-judicial act by any stretch of imagination; hence it was not necessary to observe the principles of natural justice. It is not also an executive or administrative act to attract the duty to act fairly. It was- as has been repeatedly urged by Sri Ramaswamy - a matter governed by a contract/agreement

between the parties. If the matter is governed by a contract, the writ petition is not maintainable since it is a public law remedy and is not available in private law field, e.g., where the matter is governed by a non-statutory contract."
(Emphasis added)

207. Following aforesaid decision in **Pimpri Chinchwad Municipal Corporation and Ors. vs. Gayatri Construction Company and Anr., 2008(8) SCC 172** Court has held that in the matter of non-statutory contract, High Court should not have entertained writ petition under Article 226 of the Constitution.

208. No provision could be shown by counsel for petitioners which requires an opportunity of hearing to petitioners before resumption of land. In any case, by means of impugned notice, petitioners have been given enough time to vacate the land and thereafter only State shall take steps for possession, if vacant possession is not given by petitioners.

209. In the circumstances, **question (vii)** is answered against petitioners.

210. In view of above discussion, we do not find any merit in the petition. It is accordingly dismissed.

211. However, considering the facts and circumstances and also the fact that petitioners already enjoyed interim order passed by this Court and continued in possession over land in dispute for last almost more than a year, we direct petitioners to vacate disputed land within one month from the date of delivery of judgment.

212. No costs.

(2019)12 ILR A688

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.10.2019

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE VIRENDRA KUMAR SRIVASTAVA, J.

Writ C No: 33630 of 2018

The Allahabad Anglo Indian Association Branch Allahabad ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Subedar Mishra

Counsel for the Respondents:
C.S.C., Sri Ajit Kumar Singh (Addl. Advocate General), Sri Nimai Das & Sudhanshu Srivastava (Addl. C.S.C.)

A. Civil Law - Nazul property – Nature and meaning – Nazul is an Arabic word. It refers to a land annexed to Crown. During British Regime, immoveable property of individuals, Zamindars, Nawabs and Rajas when confiscated for one or the other reason, it was termed as 'Nazul property' – It was neither acquired nor purchased after making payment – In Legal Glossary 1992 meaning of the term 'Nazul' has been given as 'Rajbhoomi' – It is only such land which is owned and vested in the State on account of its capacity of Sovereign, and application of right of bona vacantia. (Para 16 and 17)

B. Constitution of India – Article 296 – Principle of escheat/ bona vacantia/ Doctrine of lapse – Empowering the king to take property – Recognized under common law of England – These principle would have been applicable prior to enforcement of Constitution of India – Article 296 has retained power of

State to get ownership of such land, in respect whereof principle of 'escheat', 'lapse' or 'bona vacantia' applied – This power continued to apply after enactment of Constitution with the only modification that if such land is situate within the territory of State Government, it will vest in State and in other cases, it will vest in Union of India. (Para 19 and 22)

Held **–** Thus the land in question which is admittedly 'Nazul', belonged to the category as discussed above i.e. it came to be vested and owned by State in its capacity of Sovereign and right of bona vacancia. When acquisition is made under the provisions of a Statute, purpose of acquisition is already known and State pay its price but when land is owned by State, which is Nazul, objective of use of such land is not predetermined but it can be utilized by State for larger public welfare and its benefit, as necessitated from time to time. In other words 'Nazul' land forms the asset owned by State in trust for the people in general who are entitled for its use in the most fair and beneficial manner for their benefit. State cannot be allowed to distribute such largesse by pick and choose or to some selected groups etc.

C. Civil Law - Government Grant Act, 1895 – Preamble – Purpose – Doubts have arisen to the extent and operation of T.P. Act, 1882 and to the power of Crown (later substituted by word "Government") to impose limitations and restrictions upon grants and other transfers of land made by it or under its authority, hence to remove such doubts, GG Act, 1895 was enacted. (Para 39)

D. Civil Law - Government Grant Act, 1895 – Section 2 and 3 – Transfer of Property Act, 1882 – Grant of Nazul – Governing factor – Where 'Nazul' land is let out to a person by Government under agreement of lease i.e. Grant, it is governed by GG Act, 1895 and rights of parties therefore have to be seen in the light of stipulations contained in the document of 'Grant' – 'Grant' includes a property transferred on lease though in some cases, 'Grant' may result in wider interest i.e. transfer of title etc. – Whatever may be nature of document of transfer i.e. instrument of 'Grant', the fact remains that terms and conditions of 'Grant' shall be governed by such document and it shall prevail over any other law including TP Act 1882 – One cannot take resort to TP Act, 1882 to wriggle out of any condition or limitation etc. imposed in terms of document of 'Grant'. (Para 68)

E. Civil Law - Government Grant Act, 1895 – Section 3 – Nazul Land – Procedure to take possession – Where a lease has been granted under the terms of GG Act, 1895, then what procedure has to be followed is provided by Section 3 of GG Act, 1895 which says that all provisions, restrictions, conditions and limitations contained in any such creation, conferment or Grant referred to in Section 2, shall be valid and take effect according to their tenor – Any decree or direction of a Court of Law or any rule of law, statute or enactments of the Legislature, to the contrary notwithstanding. (Para 72)

Held **–** Thus, for the purpose of resumption/ re-entry of land, State Government can follow procedure prescribed in the terms of lease as it is a special procedure for such purpose and it is not necessary to look into any other procedure prescribed in law.

F. Civil Law - Transfer of Property Act, 1882 – Section 106 and 116 – Application of benefit of Doctrine of Holding over – Effect of repeal of GG Act, 1895 – Section 4 of Repeal Act, 2017 clearly protects effect or consequences or anything already done or suffered, which includes effect of expiry of lease and obligation of Lessee to surrender possession of leased land to State – Repeal Act, 2017 does not have any effect upon the relationship of petitioner and respondents in respect of disputed land and all rights, obligations etc. shall continue to be governed under the said lease-deed. (Para 82 and 83)

G. Lease – Principle of natural justice – Application – Lease is a matter of contract where principles of natural justice are not applicable. (Para 84)
H. Civil Law - Transfer of property Act, 1882 – Section 106 – Tenant at sufferance – After expiry of lease, status of lessee, who has continued in possession, is that of 'Tenant at sufferance' – The tenant at sufferance is one who wrongfully continues in possession after extinction of a lawful title – It does not create relationship of landlord and tenant – Therefore, even a quit notice is not necessary to be given and Section 106 TP Act, 1882 is not at all attracted. (Para 96 and 97)

Writ Petition dismissed (E-1)

Cases relied on :-

1. Dyke v. Walford 5 Moore PC 434= 496-13 ER 557 (580)

2. Pierce Leslie and Co. Ltd. Vs. Miss Violet Ouchterlony Wapsnare, AIR 1969 SC 843

3. Collector of Masulipatam v. C. Vencata Narainapah 8 MIA 500, 525

4. Ranee Sonet Kowar v. Mirza Himmut Bahadoor (2) LR 3 IA 92, 101

5. Bombay Dyeing and Manufacturing Co. Ltd. v. State of Bombay [1958] SCR 1122, 1146

6. Superintendent and, Legal Remembrancer v. Corporation of Calcutta [1967] 2 SCR 170, 204

7. Cook v. Sprigg (1899) AC 572

8. Raja Rajinder Chand v. Mst. Sukhi, AIR 1957 SC 286

9. Nayak Vajesingji Joravarsingji v. Secretary of State for India in Council AIR 1924 PC 216

10. Dalmia Dadri Cement Co. Ltd. v. CIT [1958] 34 ITR 514 (SC) : AIR 1958 SC 816

11. Promod Chandra Deb v. State of Orissa AIR 1962 SC 1288

12. Amarsarjit Singh v. State of Punjab AIR 1962 SC 1305

13. Thakur Amar Singhji v. State of Rajasthan AIR 1955 SC 504

14. State of Rajasthan vs. Sajjanlal Panjawat AIR 1975 SC 706

15. Promod Chandra Deb vs. State of Orissa AIR 1962 SC 1288

16. Biswambhar Singh vs. State of Orissa 1964 (1) SCJ 364

17. State of U.P. vs. Zahoor Ahmad, 1973(2) SCC 547

18. Hajee S.V.M. Mohamed Jamaludeen Bros. & Co. vs. Government of Tamil Nadu (1997) 3 SCC 466

19. Azim Ahmad Kazmi and others vs. State of U.P. and Another (2012) 7 SCC 278

20. State of U.P. and others vs. United Bank of India and others (2016) 2 SCC 757

21. Mohsin Ali vs. State of M.P. AIR 1975 SC 1518

22. Pradeep Oil Corporation vs. Municipal Corporation of Delhi and others (2011) 5 SCC 270

23. State of U.P. vs. Zahoor Ahmad, 1973(2) SCC 547

24. Bishan Das and others Vs. State of Punjab and others AIR 1961 SC 1570

25. Express Newspapers Pvt. Ltd. and others Vs. Union of India (1986) 1 SCC 133

26. Yar Mohammad and another vs. Lakshmi Das and others AIR 1959 Allahabad 1

27. Lallu Yeshwant Singh (dead) by his legal representative vs. Rao Jagdish Singh and others, AIR 1968 SC 620

28. State of Gujarat and Ors. vs. Meghji Pethraj Shah Charitable Trust and Ors., 1994(3) SCC 552

29. Pimpri Chinchwad Municipal Corporation and Ors. vs. Gayatri Construction Company and Anr., 2008(8) SCC 172

30. Purushottam Dass Tandon and others vs. State of U.P., Lucknow and others AIR 1987 All. 56

31. State of U.P. and others vs. Purshottam Das Tandon and others 1989 Supp.(2) SCC 412

32. R.V. Bhupal Prasad vs. State of A.P. (1995) 5 SCC 698

33. Sevoke Properties Ltd. vs. West Bengal State Electricity Distribution Company Ltd. AIR 2019 SC 2664

34. Judgment dated 02.04.2013 of Allahabad High Court passed in Writ Petition No.62588 of 2010, M/s Madhu Colonizers Pvt. Ltd. vs. State of U.P. & Ors.

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

1. Allahabad Anglo Indian Association through its Secretary Mr. Larry Adrian Michael French has filed this petition under Article 226 of Constitution of India challenging order dated 31.08.2018 passed by Collector, Allahabad (respondent 2) informing petitioner that State Government has exercised right of resumption/re-entry over disputed Nazul land, therefore, it should be vacated by petitioner within two months failing which possession shall be taken forcibly at the cost of petitioner.

2. Dispute relates to Plot no.131, Civil Station Allahabad, area 11 acres 1730 square yards, situate at 9th Thornhill Road.

3. Secretary of State for India in Council executed a lease deed dated 07.05.1921 in favour of Anglo Indian Association granting lease of aforesaid Nazul Plot No.131 for a period of 50 years commencing from 12.06.1917. It was said in the lease deed that earlier lease was executed on 12.06.1867 in favour of one Robert Andrew Farhe for a period of 50 years and after expiry of said period a new lease was to be executed, hence, said lease was executed. Several bungalows were constructed over leased land for residence of Anglo Indian persons. Last extension of lease was vide renewal dated 07.03.1984 which commenced from 1967 and expired in 1997. Petitioner then made an application for renewal of lease but the same remained pending and ultimately vide order dated 12.03.2012 respondent-2 cancelled lease granted to petitioner and matter was referred to State Government. A meeting was held in the Office of Secretary, Housing and Urban Planning on 26.11.2015 in which Representatives of Petitioner-Association as also Additional District Magistrate (Nazul) Allahabad and Special Officer on Duty, Allahabad Development Authority *(hereinafter referred to as "ADA")* participated. Following decision was taken in the said meeting :

"(1) दि आल इण्डिया एग्लो इण्डियन एसोसिएशन, शाखा इलाहाबाद का पट्टा निरस्त किए जाने से सम्बन्धित जिलाधिकारी, इलाहाबाद के आदेश दिनांक 12.03.2012, जो तकनीकी दृष्टि से सही नहीं पाया गया है को शासन के आदेश के माध्यम से निरस्त करने की कार्यवाही की जाय।

(2) दि आल इण्डिया एग्लो इण्डियन एसोसिएशन, शाखा इलाहाबाद (पट्टेदार) द्वारा पट्टे के नवीनकरण हेतु जिलाधिकारी, इलाहाबाद को नियमानुसार आवेदन पत्र प्रस्तुत करेंगे।

(3) जिलाधिकारी, इलाहाबाद इस प्रकरण का परीक्षण कर तथ्यात्मक रिपोर्ट अपनी संस्तुति सहित राज्य सरकार को उपलब्ध करायेंगे। राज्य सरकार

द्वारा इस संबंध में मेरिट के आधार पर सुसंगत नियमों के अन्तर्गत सक्षम स्तर से निर्णय लेकर अग्रिम कार्यवाही की जायेगी।

"(1) Proceeding to be conducted through order of the Government for cancellation of order dated 12.03.2012 of District Magistrate, Allahabad pertaining to cancellation of lease granted to All Indian Anglo Indian Association, Branch Allahabad, which order has been found not to be technically correct.

(2) An application shall be presented as per Rules to the District Magistrate, Allahabad by All India Anglo Indian Association, Allahabad Branch (Lease Holder) for renewal of lease.

(3) District Magistrate, Allahabad after examining this matter shall make available the factual report along with his recommendation to State Government. Further action shall be taken by State Government after ensuring decision at the level of Competent Authority, on merits under the relevant Rules." (English translation by Court)

4. Thereafter respondent 2 has passed order dated 31.08.2018 pointing out that lease expired on 11.06.1997 and now land in dispute is required for "public purpose" in view of the fact that Allahabad has been selected to be developed as "Smart City" and disputed land which has total area of 11 acres and 203 square yards i.e. 44683.69 square meter is required for development of a 'Park', therefore, State Government has resumed/re-entered upon the land in dispute. Aforesaid order has been challenged on the ground that large number of families are residing in disputed land and they cannot be evicted in such arbitrary manner; Collector has passed order without giving any opportunity to show cause and in violation of principles of natural justice; petitioner has right of free hold in view of policy of State Government which cannot be defeated by exercising right of re-entry/resumption and petitioner cannot be evicted without following the procedure prescribed in law.

5. Respondents 2 and 3 have filed counter affidavit wherein it is admitted that Nazul Plot-131 Civil Station, Allahbad was demised to Petitioner-Association vide Indentures of lease dated 07.05.1921. The term of lease was lastly renewed for the period upto 11.06.1997 vide lease deed dated 07.03.1984 which commenced from 12.06.1967. Lease was governed by the provisions of Government Grants Act, 1895 (hereinafter referred to as "G. G. Act, 1895") and exercising its right as per terms and condition of lease read with G. G. Act, 1895, State Government has resumed/re-entered disputed land of which lease has already expired. The right of re-entry in the light of similar circumstances, has been upheld by this Court in **Chintamani Ghosh and another vs. State of U. P. and others, 2001 (2) UPLBEC 1003.** Respondents have also relied upon **Hajee S.V.M., Mohd. Jamaludeen Bros and Co. vs. Govt. of T. N., 1997 (3) SCC 456, State of U. P. Vs. Zahoor Ahmad, (1973) 2 SCC 457, State of Andhra Pradesh vs. Kaithala Abhishekam, AIR 1964 AP 450, Union of India and others vs. Harish Chand Anand, AIR 1996 SC 203, Express Newspapers Private Limited vs. Union of India, 1986 (1) SCC 133, Smt. Shakira Khatoon Kazmi and others vs. State of U. P. and others, 202 (1) AWC 226, Azim Ahmad Kazmi and others vs. State of U. P. and others,**

2012 (7) SCC 278 and Anand Kumar Sharam vs. State of U. P. and others, 2014 (2) ADJ 742.

6. Heard Sri Subedar Mishra, learned counsel for petitioner and Sri Ajit Kumar Singh, Additional Advocate General assisted by Sri Nimai Das, Additional Chief Standing Counsel and Sri Sudhanshu Srivastava, Additional Chief Standing Counsel for State Authorities.

7. Before proceeding to discuss rival issues raised in the matter, we find it appropriate to reproduce some relevant stipulations from last lease deed dated 07.3.1984, copy whereof has been filed as Annexure 5 to the writ petition, which read as under :

''1. वह उक्त अवधि में एतद्द्वारा निर्णीत वार्षिक किराये का ऊपर नियत दिनों पर एवं रीति से भुगतान करेगा।

2. वह ऐसे प्रत्येक प्रकार की दरों, करो, परिव्ययों और निर्धारित किये जाने वाले भवन पर अथवा उसके स्वामी या किरायेदार पर, इस समय अथवा इसके पश्चात्, किसी समय अवधारित, भारित अथवा आरोपित किये जाय।

3. वह उक्त भूखण्ड का भू विभाजन अथवा स्थानांतरण नहीं करेगा तथा उक्त भूखण्ड तथा उस पर निर्मित भवनों का प्रयोग ऐग्लो इन्डियन ऐसोसियेशन, इलाहाबाद द्वारा केवल दातव्य कार्य के लिए किया जायेगा।

4. उक्त भूखण्ड पर अवस्थित भवनों तथा बाह्य भवनों के बाह्य ***उद्धिक्षेप*** *या रेखा–चित्र के किसी भाग में किसी भी समय उक्त जिलाधीश / नगर महापालिका की लिखित अनुमति के बिना उसके मूल रेखा–चित्र तथा उद्धिक्षेप से भिन्न कोई परिवर्तन अथवा परिवर्धन न किया जायेगा और न उसकी इस प्रकार की अनुमति बिना किसी अन्य भवन का ही उक्त भूखण्ड पर निर्माण किया जायेगा।*

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7. वह पट्टादाता की पूर्व लिखित स्वीकृति प्राप्त किये बिना उक्त भू–गृहादि को कभी भी न तो स्वयं किसी प्रकार का वाणिज्य व्यापार करेगा न किसी दूसरे को करने देगा और न उसको दातव्य कार्य के अतिरिक्त किसी अन्य प्रयोजन के लिए कार्य में लायेगा।

.....

9. इस विलेख की अवधि समाप्त होने पर अथवा उसके पहले ही समाप्त कर दिये जाने पर वह उक्त भूखण्ड तथा उस पर निर्मित भवनों तथा वाह्य भवनों का अधिपत्य पट्टादाता को बिल्कुल अच्छी अवस्था में देगा।

किन्तु सदा प्रतिबन्ध यह है कि यह विलेख इस स्पष्ट शर्त पर निष्पादित किया जाता है कि अगर और जब कभी उपर्युक्त किरोय या लगान अथवा उसके किसी भाग का निश्चित तिथि के पश्चात एक माह तक भुगतान न होगा, चाहे वह विधितः मांगा गया हो या न मांगा गया हो, अथवा ***यदि उस पट्टे में वर्णित समनुबन्धों में से किसी एक को अथवा अधिक को पट्टेदार भंग करेगा अथवा उनका पालन न करेगा तब और ऐसी किसी भी दशा में पट्टादाता भले ही उसने पुनः प्रवेश करने के किसी वाद हेतु या अधिकार को छोड़ दिया जो, उक्त भू–गृहादि में पुनः प्रवेश कर सकता है और पट्टेदार तथा उसके समस्त अध्यासियों को वहॉ से निकाल सकता है*** *और वह हस्तान्तरण बिल्कुल निरस्त हो जायेगा तथा उक्त भूखण्ड पर निर्मित भवन को हटाने अथवा उसके संबंध में प्रतिकर पाने के पट्टेदार के समस्त अधिकार अपहृत हो जायेंगे।*

यह भी प्रतिबन्ध है कि इसमें ऊपर जो कुछ अंकित है उसके अतिरिक्त पट्टादाता को यह अधिकार होगा कि वह इस विलेख के अधीन देय समस्त धनराशि को सचिव आवास एवं नगर विकास विभाग, उ0प्र0 के प्रमाण पत्र पर जो अन्तिम निश्चायक तथा पट्टेदार पर बाध्यकारी होगा, मालगुजारी की बकाया के रूप में वसूल कर लें।

यह भी प्रतिबन्ध है कि ***यदि हस्तान्तरित भूखण्ड की पट्टादाता को किसी भी समय अपने या किसी सार्वजनिक कार्य के लिए आवश्यकता होगी तो उसको यह अधिकार हो गया कि पट्टेदार को हस्तान्तरित भूखण्ड पर उस समय बने किसी भवन को हटाने की एक मास की लिखित नोटिस दे और यह भी उक्त नोटिस के पट्टेदार द्वारा प्राप्त होने के दिनांक के पश्चात उक्त अवधि के समाप्ति होने पर दो मास के भीतर उस भूखण्ड पर अपना अधिपत्य प्राप्त कर ले,*** *किन्तु शर्त यह है कि यदि पट्टेदाता हस्तान्तरित भूखण्ड पर खड़े भवनों का क्रय करना चाहे तो पट्टेदार को उन भवनों के बदले में ऐसी धनराशि का भुगतान कर दिया जायेगा जो राज्य सरकार के आवास एवं नगर विकास के सचिव द्वारा अवधारित की जाये। .....*

और इस विलेख के दोनों पक्ष यह अनुबन्ध करते हैं कि:–

(क) इस विलेख के निष्पादन एवं पंजीयन के सम्बन्ध में जो कुछ भी व्यय होगा वह पट्टेदार सहन करेगा।

(ख) ***पट्टेदार हस्तान्तरित भूखण्ड अथवा उस पर निर्मित भवन को पट्टादाता की पूर्व अनुमति प्राप्त किये बिना किसी भी प्रकार न तो हस्तान्तरित करेगा और न शिकमी पट्टे या किराये पर उठायेगा।'***

"1. He shall, in the said period, pay annual rent hereby determined, on the days and in the manner as above.

2. He shall pay all rates, taxes, expenditures that may be determined, charged or levied on building or its owner or its tenants, at present or hereafter or at any time.

3. He shall not go for partition or transfer of the land; and the aforesaid plot or the buildings constructed thereon, shall be used only by Anglo Indian Association, Allahabad only for the charitable purposes.

4. There shall be no change or alteration in the layout plan or site map of the buildings and appended constructions situated on the said plot of land at any time without written approval of the aforesaid District Magistrate/City Municipality (Nagar Mahapalika); nor shall any construction be made on the aforesaid plot shall be undertaken without such approval.

....

7. Without obtaining the approval of lessor, he himself shall never trade on the land and buildings etc.; nor shall he allow others to do the same; and nor shall he allow the land to be used for any purpose other than charitable one.

....

9. ***On the expiration of the period mentioned in the deed or termination thereof even prior thereto, he shall hand over the possession of the said plot and other buildings and appended buildings constructed thereon to the lessor.***

But it is a standing condition that this deed is being executed on this clear terms that if and whenever the aforesaid rent or revenue or any part thereof is not paid in a month after the fixed date, whether demanded legally or otherwise, or if ***the lease holder violates any or more terms or does not comply therewith, then in such a condition, the lessor, even if he has given up the right of re-entry for any purpose, can re-enter the aforesaid land and buildings etc. and may expel the lease holder or its all occupants there-from*** *and then the transfer shall be terminated completely, and all rights of the lease holder to remove the buildings constructed on the aforesaid plot or to receive the compensation in relation to it shall be forfeited.*

It is also stipulated that in addition to the facts mentioned above, the lessor shall have a right to realize as revenue dues all the amount payable under this deed upon a certificate of the Secretary, Housing and Urban Planning Department, U.P. that shall be final, conclusive and binding on lease-holder.

It is also stipulated that ***if the lessor is in need of the transferred plot for personal or public use, he shall be entitled to give a written notice for demolishing within a month any such building constructed at the time and for taking possession of the said plot within two months from the expiry of the aforesaid period after the date of receipt of the said notice;*** *subject to the condition that if the lessor wants to purchase the constructions made on the transferred plot, the lease-holder shall be paid such an amount that is determined by the Secretary, Housing and Urban Development of the state government.*

...

Both the parties to this deed enter into an agreement:

a) That the lessee shall bear all the expenses related to the execution and registration of this deed.

b) ***That the lessee shall, without prior permission of the lessor, neither transfer in any way the transferred plot or the building constructed thereon nor subject the same to sub-lease or rent."***

(Emphasis added)

(English Translation by Court)

8. The terms and conditions thus clearly show that whenever land in dispute is required by Lessor for 'public purpose', it can require Lessee to remove constructions existing on disputed land by giving a month's notice and after expiry of one month, can take possession of disputed land within two months. If Lessor intends to purchase constructions existing on disputed land, it shall make payment of such amount, as determined by Secretary of U.P. Government, Department of Housing and Urban Development.

9. It is in terms of aforesaid stipulation of lease-deed that notice in question has been given for resumption/re-entry over land in dispute.

10. Counsel for petitioner has challenged impugned notice broadly on the ground that :

i. Issue of renewal of lease was already in progress and a meeting in this regard had already been held on 26.11.2015 wherein it was decided that petitioner shall submit application for renewal of lease in accordance with relevant provisions and thereafter District Magistrate shall examine the matter and submit report but without proceeding in the light of aforesaid decision, in an arbitrary and abrupt manner, impugned order has been passed.

ii. Petitioners' possession over property in dispute after expiry of lease was never obstructed and no action was taken for eviction or ejectment of petitioners from land in dispute. Meaning thereby respondents by conduct admitted lease rights of petitioners and valid possession over land in dispute. That being so, land in dispute could not have been resumed by exercising power with reference to GG Act, 1895 which was already repealed before impugned order was passed.

iii. In any case, if petitioner's continuation in possession after expiry of lease in 1986 was unauthorized in view of provisions of Uttar Pradesh Public Premises (Eviction of Unauthorised Occupants) Act, 1972 (hereinafter referred to as "U.P. Act, 1972"), petitioners cannot be evicted or ejected from disputed land without following procedure prescribed in the said Act.

iv. Right of resumption exercised by respondents under lease-deed, which has expired long back, is illegal since in 2018 no deed was operating and resumption by State vide impugned order cannot be read in continuation with lease deed which has already expired in 1997.

v. State Government has granted approval for resumption of land in dispute on proposal made by Collector without giving any opportunity to petitioners, therefore, impugned order including approval order granted by State Government is in violation of principles of natural justice.

11. Per contra, learned Additional Advocate General appearing for State of U.P. and Senior Counsel appearing on behalf of A.D.A. advanced argument virtually in the light of pleadings and objections raised in the counter affidavit, which we have already given in detail hereinabove and further elaborate while discussing issues raised in these writ petitions.

12. From rival submissions, issues which, in our view, require to be adjudicated in these writ petitions are :

i. What is "Nazul"?

ii. What is/are Statute(s) governing Crown (late, "Government") Grant of land owned by Crown (Government) i.e. Nazul? Its status and effect.

iii. Whether right of resumption exercised by State is in accordance with law?

iv. Whether petitioners can be evicted by State Government by giving a notice and following the condition prescribing procedure in the lease deed or State has to follow procedure laid down under U.P. Act, 1972?

v. Whether impugned notice and order of approval of State Government for resumption/re-entry over land in dispute is invalid on account of lack of opportunity granted to petitioners. In other words, "whether principles of natural justice are applicable when State Government chose to exercise right of resumption/re-entry in respect of land owned by it"?

13. We have framed above questions in the light of the fact that it is admitted by all the parties that land in dispute is 'Nazul' and owned by State Government.

14. Questions (i) and (ii), in our view, can be taken together.

15. Every land owned by State Government is not termed as 'Nazul' and therefore it has become necessary to understand, what is 'Nazul'. State Government may own land by having acquired and vested in various ways, which includes vesting of land in the capacity of a Sovereign body and having right of bona vacantia. Property may also be acquired and owned by State by way of acquisition under the Statute relating to acquisition of land or by purchase through negotiation or gift by an individual or in similar other manners. All such land, which is owned and vested in State Government results in making the State, owner of such land, but in legal parlance, the term "Nazul" is not applicable to all such land.

16. It is only such land which is owned and vested in the State on account of its capacity of Sovereign, and application of right of bona vacantia, which is covered by the term 'Nazul', as the term is known for the last more than one and half century. In Legal Glossary 1992, fifth edition, published by Legal Department of Government of India, at page 589, meaning of the term 'Nazul' has been given as 'Rajbhoomi, i.e., Government land'.

17. Nazul is an Arabic word. It refers to a land annexed to Crown. During British Regime, immoveable property of individuals, Zamindars, Nawabs and Rajas when confiscated for one or the other reason, it was termed as 'Nazul property'. The reason being that neither it was acquired nor purchased after making payment. In the old record, when such

land was referred in Urdu, this kind of land was shown as 'Jaidad Munzabta'.

18. For dealing with such property, under the authority of Lt. Governor of North Western Provinces, two orders were issued in October, 1846 and October, 1848. Therein, after the words "Nazul property", its english meaning was given as 'Escheats to the Government'. Sadar Board of Revenue on May 20, 1845 issued a circular order in reference to "Nazul land" and in para 2 thereof it mentioned, "The Government is the proprietor of those land and no valid title to them can be derived but from the Government". Nazul land was also termed as "Confiscated Estate". Under Circular dated July 13, 1859, issued by Government of North Western Provinces, every Commissioner was obliged to keep a final confiscation statement of each District and lay it before Government for orders.

19. Right of King to take property by 'escheat' or as 'bona vacantia' was recognized by common law of England. Escheat of property was Lord's right of re-entry on real property held by a tenant, dying intestate, without lawful heirs. It was an incident of Feudal Tenure and based on the want of a tenant to perform Feudal services. On the tenant dying intestate without leaving any lawful heir, his estate came to an end and Lord, by his own right and not by way of succession or inheritance from the tenant, re-entered real property as owner. In most cases, land escheated to Crown as the 'Lord Paramount', in view of gradual elimination of Intermediate or Mesne lords since 1290 AD. Crown takes as 'bona vacantia' goods in which no one else can claim property. In **Dyke v. Walford 5 Moore PC 434= 496-13 ER 557 (580)** it was said 'it is the right of the Crown to bona vacantia to property which has no other owner'. Right of the Crown to take as "bona vacantia" extends to personal property of every kind. The escheat of real property of an intestate dying without heirs was abolished in 1925 and Crown thereafter could not take such property as bona vacantia. The principle of acquisition of property by escheat, i.e., right of Government to take on property by 'escheat' or 'bona vacantia' for want of a rightful owner was enforced in Indian territory during the period of East India Company by virtue of Statute 16 and 17 Victoria, C. 95, section 27.

20. We may recollect, having gone through history, that prior to 1857, several Estates were taken over by British Company i.e. East India Company by way of annexation. Doctrine of lapse applied in Jhansi was another kind of above mentioned two principles.

21. The above provisions had continued by virtue of section 54 of Government of India Act, 1858, section 20(3)(iii) of Government of India Act, 1915 and section 174 of Government of India Act, 1935. After enactment of Constitution of independent India, Article 296 now continue above provision and says:

'Subject as hereinafter provided, ***any property in the territory of India which,*** *if this Constitution had not come into operation,* ***would have accrued to His Majesty or, as the case may be, to the Ruler of an Indian State by escheat or lapse, or as bona vacantia for want of a rightful owner, shall if it is property situate in a State, vest in such State,*** *and*

shall, in ***any other case, vest in the Union.'*** (Emphasis added)

22. Article 296, therefore, has retained power of State to get ownership of such land, in respect whereof principle of 'escheat', 'lapse' or 'bona vacantia' would have been applicable prior to enforcement of Constitution of India. The above power continued to apply after enactment of Constitution with the only modification that if such land is situate within the territory of State Government, it will vest in State and in other cases, it will vest in Union of India. Vesting of land and giving ownership to State Government or Union of India under Article 296 is clearly in respect of a land, which will come to it by way of 'escheat', 'lapse' or 'bona vacantia' and not by way of acquisition of land under some Statute or purchase etc.

23. In **Pierce Leslie and Co. Ltd. Vs. Miss Violet Ouchterlony Wapsnare, AIR 1969 SC 843,** Court has considered above principles in the context of 'Sovereign India' as stands under Constitution after independence, and, has observed :

"....in this country the Government takes by escheat immoveable as well as moveable property for want of an heir or successor. *In this country escheat is not based on artificial rules of common law and is not an incident of feudal tenure.* ***It is an incident of sovereignty and rests on the principle of ultimate ownership by the State of all property within its jurisdiction".*** (Emphasis added)

24. Court also placed reliance on **Collector of Masulipatam v. C. Vencata Narainapah 8 MIA 500, 525; Ranee Sonet Kowar v. Mirza Himmut Bahadoor (2) LR 3 IA 92, 101, Bombay Dyeing and Manufacturing Co. Ltd. v. State of Bombay [1958] SCR 1122, 1146, Superintendent and, Legal Remembrancer v. Corporation of Calcutta [1967] 2 SCR 170, 204.**

25. Judicial Committee in **Cook v. Sprigg (1899) AC 572** while discussing, 'what is an act of State', observed :

"The taking possession by Her Majesty, whether ***by cession or by any other means by which sovereignty can be acquired,*** *was an act of State."*
(Emphasis added)

26. This decision has been followed in **Raja Rajinder Chand v. Mst. Sukhi, AIR 1957 SC 286.**

27. In **Nayak Vajesingji Joravarsingji v. Secretary of State for India in Council AIR 1924 PC 216,** Lord Dunedin said :

"When ***a territory is acquired by a sovereign State for the first time, that is an act of State.*** *It matters not how the acquisition has been brought about. It may be* ***by conquest, it may be by cession following on treaty, it may be by occupation of territory hitherto unoccupied by a recognised ruler. In all cases the result is the same.*** *Any inhabitant of the territory can make good in the municipal courts established by the new sovereign only such rights as that sovereign has, through his officers, recognised. Such* ***rights as he had under the rule of predecessors avail him nothing."***

28. In **Dalmia Dadri Cement Co. Ltd. v. CIT [1958] 34 ITR 514 (SC) :**

AIR 1958 SC 816, Court said (page 523 of 34 ITR) :

*"The **expression 'act of State'** is, it is scarcely necessary to say, not limited to hostile action between rulers resulting in the occupation of territories. It **includes all acquisitions of territory by a sovereign State for the first time, whether it be by conquest or cession."*** (Emphasis added)

29. In **Promod Chandra Deb v. State of Orissa AIR 1962 SC 1288,** Court said, 'Act of State' is the taking over of sovereign powers by a State in respect of territory which was not till then a part of its territory, either by conquest, treaty or cession, or otherwise.

30. To the same effect was the view taken by a Constitution Bench in **Amarsarjit Singh v. State of Punjab AIR 1962 SC 1305,** where in para 12, Court said:

*"It is settled law that conquest is not the only mode by which one State can acquire sovereignty over the territories belonging to another State, and that the same result can be achiev*ed in any other mode which has the effect of establishing its sovereignty."

31. In **Thakur Amar Singhji v. State of Rajasthan AIR 1955 SC 504,** in para 40, Court said :

*"The **status of a person must be either that of a sovereign or a subject.** There is no tedium quid. The law does not recognise an intermediate status of a person being partly a sovereign and partly a subject and when once it is admitted that the Bhomicharas had acknowledged the sovereignty of Jodhpur their status can only be that of a subject. **A subject might occupy an exalted position and enjoy special privileges, but he is none the less a subject..."***

(Emphasis added)

32. In **State of Rajasthan vs. Sajjanlal Panjawat AIR 1975 SC 706** it was held that Rulers of the erstwhile Indian States exercised sovereign powers, legislative, executive and judicial. Their firmans were laws which could not have been challenged prior to Constitution. Court relied on earlier decisions in **Director of Endowments, Govt. of Hyderabad vs. Akram Ali, AIR 1956 SC 60, and Sarwarlal vs. State of Hyderabad, AIR 1960 SC 862.**

33. In **Promod Chandra Deb vs. State of Orissa AIR 1962 SC 1288** "act of the State" was explained in the following words :

*'an "act of State" may be the taking over of sovereign powers either **by conquest or by treaty or by cession or otherwise.** It may have happened on a particular date by a public declaration or proclamation, or it may have been the result of a historical process spread over many years, and sovereign powers including the right to legislate in that territory and to administer it may be acquired without the territory itself merging in the new State.'*

34. This decision has been followed later in **Biswambhar Singh vs. State of Orissa 1964 (1) SCJ 364,** wherein Court said:

*16. Thus, a **territory acquired by a sovereign State is an Act of State but the land comprising territory does***

not become the land owned by State. *The* ***land owned by State may come to it in various ways, like confiscation, purchase, escheat or bona vacantia, gift, etc.*** *In such a case the ownership vests in State, like any other individual and* ***State is free to deal with the same in a manner like any other owner may do so.***

*17. Thus '****Nazul****' is a land* ***vested in State for any reason whatsoever that is cession or escheat or bona vacantia, for want of rightful owner or for any other reasons and once land belong to State,*** *it will be difficult to assume that State would acquire its own land. It is per se impermissible to acquire such land by forcible acquisition under Act, 1894, since there is no question of any transfer of ownership from one person to another but here State already own it, hence there is no question of any acquisition.*

(Emphasis added)

35. Thus the land in question which is admittedly 'Nazul', belonged to the category as discussed above i.e. it came to be vested and owned by State in its capacity of Sovereign and right of bona vacancia. When acquisition is made under the provisions of a Statute, purpose of acquisition is already known and State pay its price but when land is owned by State, which is Nazul, objective of use of such land is not predetermined but it can be utilized by State for larger public welfare and its benefit, as necessitated from time to time. In other words 'Nazul' land forms the asset owned by State in trust for the people in general who are entitled for its use in the most fair and beneficial manner for their benefit. State cannot be allowed to distribute such largesse by pick and choose or to some selected groups etc.

36. Historical documents, record as also authorities discussed above show that earlier Government i.e. East India Company upto 1858 and thereafter British Government used to allot "Nazul land" to various persons, who had shown their alliance to such Government in various ways, sometimes by deceiving their Indian counter parts who had raised voice against British Rule, or otherwise remained faithful to Foreign regime and helped them for their continuation in ruling this country. Sometimes land was given on lease without any condition and sometimes restricted for certain period etc., but in every cases, lease was given to those persons who were faithful and shown complete alliance to British Rule. The reason was that in respect of Nazul, no predetermined objective was available as was the case in respect of land acquired by State by way of acquisition under Statute of Acquisition after paying compensation or purchase. Such allocation of land by English Rulers used to be called "Grant".

37. In other words, we can say that initially land owned by State used to be allotted in the form of 'Grant' by British Government. No specific statutory provisions were available to govern it. TP Act, 1882 was enacted to govern transfer of immovable property. Sections 10 to 12 of TP Act, 1882 made provisions invalidating, with certain exceptions, all conditions for forfeiture of transferred property on alienation by transferee and all limitations over consequent upon any such alienation or any insolvency of or attempted alienation by him.

38. Apprehending that above provisions of TP Act, 1882, may be construed as a fetter upon discretion of

Crown in creation of inalienable Jagirs in 'Grants', acting upon advice that it would not be competent for Crown to create an inalienable and impartible Estate in the land comprised in Crown Grant, unless such land has heretofore descended by custom as an impartible Raj, it sought to make a separate Statute to give supremacy to the provisions contained in Crown's Grant, notwithstanding any other law including TP Act, 1882. With this objective, 'GG Act 1895' was enacted.

39. Preamble of GG Act, 1895 gives purpose of its enactment stating that doubts have arisen to the extent and operation of TP Act, 1882 and to the power of Crown (later substituted by word "Government") to impose limitations and restrictions upon grants and other transfers of land made by it or under its authority, hence to remove such doubts, GG Act, 1895 was enacted.

40. Section 2 of GG Act, 1895, as it was initially enacted, read as under:

"2. Transfer of Property Act, 1882, not to apply to Government grants.- ***Nothing in the Transfer of Property Act, 1882,*** *contained* ***shall apply or be deemed ever to have applied to any grant or other transfer of land*** *or of any interest therein heretoforce made or hereafter to be made by or on behalf of Her Majesty the Queen Empress, Her heirs or successors, or by or on behalf of the Secretary of State for India in Council to, or in favour of, any person whomsoever; but* ***every such grant and transfer shall be construed and take effect as if the said Act had not been passed."*** (Emphasis added)

41. The above provision was amended in 1937 and 1950. The amended provision read as under :

"2. Transfer of Property Act, 1882, not to apply to Government grants.- ***Nothing in the Transfer of Property Act, 1882,*** *contained* ***shall apply or be deemed ever to have applied to any grant or other transfer of land or of any interest therein*** *heretoforce made or hereafter to be made by or on behalf of the Government to, or in favour of, any person whomsoever; but* ***every such grant and transfer shall be construed and take effect as if the said Act had not been passed."***

(Emphasis added)

42. Section 3 of GG Act, 1895 read as under :

"Government grants to take effect according to their tenor.- ***All provisions, restrictions, conditions*** *and* ***limitations*** *over* ***contained in any such grant or transfer*** *as aforesaid* ***shall be valid*** *and the* ***effect according to their tenor, any rule of law, statute or enactment of the Legislature to the contrary notwithstanding."***

(Emphasis added)

43. In the State of Uttar Pradesh, vide Government Grants (U.P. Amendment) Act, 1960 (U.P. Act No.XIII of 1960), Sections 2 and 3 of GG Act, 1895, were substituted by Section 2, as under :

"2. (1) Transfer of Property Act, 1882, not to apply to Government Grants.- ***Nothing contained in the Transfer of Property Act, 1882, shall apply or be deemed ever to have applied to any grant*** *or other transfer of land or of any interest therein, heretoforce made or hereafter to be made, by or on behalf of the Government to or in favour of any person whomsoever; and* ***every such***

grant and transfer shall be construed and take effect as if the said Act had not been passed."

(2) U.P. Tenancy Act, 1939 and Agra Tenancy Act, 1926 not to affect certain leases made by or on behalf of the Government.- ***Nothing contained in the U.P. Tenancy Act, 1938, or the Agra Tenancy Act, 1926, shall affect, or be deemed to have ever affected any rights, created, conferred or granted,*** *whether before or after the date of the passing of the Government Grants (U.P. Amendment) Act, 1960,* ***by leases of land by,*** *or on behalf of, the Government in favour of any person; and* ***every such creation, conferment or grant shall be construed and take effect, notwithstanding anything to the contrary contained in the U.P. Tenancy Act, 1939, or the Agra Tenancy Act, 1926.***

(3) Certain leases made by or on behalf of the Government to take effect according to their tenor.- ***All provisions, restrictions, conditions and limitations*** *contained in any such creation, conferment or grant referred to in Section 2,* ***shall be valid and take effect according to their tenor, any decree or direction of a court of law or any rule of law, statute or enactment of the Legislature, to the contrary notwithstanding :***

Provided that nothing in this section shall prevent, or be deemed ever to have prevented, ***the effect of any enactment relating to the acquisition of property, land reforms or the imposition of ceiling on agricultural land."***

(Emphasis added)

44. A perusal of Section 2 of GG Act, 1895 shows two things :

i. A declaration is made that any grant or other transfer of land or of any interest therein, made by or on behalf of Government, in favour of any person, on and after enactment of GG Act, 1895, would not be governed by provisions of TP Act, 1882 i.e. nothing contained in TP Act, 1882 shall apply to such Grant, transfer or interest.

ii. A clarification that a Grant or Transfer, referred to in Section 2, when is to be construed and given effect, it shall be done in such manner and by treating as if TP Act, 1882 has not been passed.

45. Thus, GG Act, 1895, in fact, was a declaratory Statute. First declaration is in respect of Grant or transfer of land or creation of any interest, as the case may be, to exclude TP Act, 1882 for all purposes. Second part of Section 2 clarified that while construing and giving effect to a Grant or Transfer, referred to in Section 2, it will be presumed that TP Act, 1882 has not been passed at all.

54. In Section 2(1) of GG Act, 1895, as amended in Uttar Pradesh, we do not find any distinction vis a vis what has been said in Section 2 of GG Act, 1895. There is an addition in GG Act, 1895 in its application to Uttar Pradesh, by inserting sub-section (2) in Section 2, a provision in respect of U.P. Tenancy Act, 1939 and Agra Tenancy Act, 1926 also, making a similar declaration, as made in sub section (1) in respect of TP Act, 1882.

47. Sub-section (3) of Section 2 of GG Act, 1895 protected certain leases, already made, declaring the same to be valid in the light of insertion of sub-section(1) of Section 2 in the State of Uttar Pradesh and that is why, notwithstanding any decree or direction of Court of law, leases already made, were validated, which otherwise might have

been affected by the provisions of U.P. Tenancy Act, 1938 or Agra Tenancy Act, 1926.

48. Proviso to sub-section (3) of Section 2 of GG Act, 1895 further declares that all provisions of Section 2 of GG Act, 1895 will have no effect when land is sought to be acquired under the provisions of Statute relating to acquisition or for giving effect to a Statute relating to land reforms or imposition of ceiling on agricultural land.

49. Section 3 of GG Act, 1895 is not available in State of U.P. after U.P. Amendment Act, 1960 since Sections 2 and 3 of Principal Act virtually got amalgamated in the form of Section 2, by Government Grants (U.P. Amendment) Act, 1960. However, intent, effect and declaration by legislature is almost pari materia with the only addition that in State of U.P., U.P. Tenancy Act, 1939 and Agra Tenancy Act, 1926 are also excluded in the same manner as was done in respect of TP Act, 1882.

50. Sections 2 and 3 of GG Act, 1895 were considered in **State of U.P. vs. Zahoor Ahmad, 1973(2) SCC 547** and in para 16, Court said :

*"**Section 3** of the Government Grants Act **declares the unfettered discretion of the Government to impose such conditions and limitations as it thinks fit, no matter what the general law of the land be.** The meaning of Sections 2 and 3 of the Government Grants is that the scope of that Act is not limited to affecting the provisions of the Transfer of Property Act only. The **Government has unfettered discretion to impose any conditions, limitations, or restrictions in its grants, and the right, privileges and obligations of the grantee would be regulated according to the terms of the grant, notwithstanding any provisions of any statutory or common law."***

(Emphasis added)

51. Again in **Hajee S.V.M. Mohamed Jamaludeen Bros. & Co. vs. Government of Tamil Nadu (1997) 3 SCC 466,** Court said that combined effect of two sections of GG Act, 1895 is that terms of any Grant or terms of any transfer of land made by Government would stand insulated from tentacles of any statutory law. Section 3 places terms of such Grant beyond reach of any restrictive provision contained in any enacted law or even equitable principles of justice, equity and good conscience adumbrated by common law, if such principles are inconsistent with such terms. Court said :

*"The two provisions are so framed as to **confer unfettered discretion on the government to enforce any condition or limitation or restriction in all types of grants made by the government to any person.** In other words, the rights, privileges and obligations of any grantee of the government would be **completely regulated by the terms of the grant, even if such terms are inconsistent with the provisions of any other law."***

(Emphasis added)

52. In **Azim Ahmad Kazmi and others vs. State of U.P. and Another (2012) 7 SCC 278** observations made in para 16 in **State of U.P. vs. Zahoor Ahmad (supra)** have been reproduced and followed.

53. In **State of U.P. and others vs. United Bank of India and others (2016)**

2 SCC 757, in para 30 of the judgment, Court said :

"Indisputably, the lease of nazul land is governed by the Government Grants Act, 1895. Sections 2 and 3 of the Government Grants Act, 1895 very specifically provide that the ***provisions of the Transfer of Property Act do not apply to government lands..."***

(Emphasis added)

54. Thus, a 'Grant' of a Nazul will be governed by terms and conditions contained in the instrument/deed of Grant, wholly unaffected by any Statute providing otherwise. It cannot be doubted that the lease granted in the case in hand is/was a 'Grant' governed by GG Act, 1895. Broadly, 'Grant' includes 'lease'.

55. The term "Grant" has not been defined in GG Act, 1895. What a 'Grant' would mean is of importance for the reason that GG Act, 1895 has used the term "Grant". Therefore, it has to be seen "whether a lease executed by State in respect of land owned by it and covered by the term "Nazul", through a lease deed or instrument of lease or indenture of lease, whatever the term used, will constitute a "Grant" of State or it is something else.

56. In **Black's Law Dictionary, Eighth Edition, at page 719,** the word "Grant" has been defined as under :

*"**Grant,** n. 1. An agreement that creates a right of any description other than the one held by the grantor.* ***Examples include leases,*** *easements, charges, patents, franchises, powers,and licenses. 2. The formal transfer of real property. 3. The document by which a transfer is effectd; esp., DEED. 4. The property or property right so transferred."*

57. Interestingly, in **Black's Law Dictionary,** 'Grant' has been said to be of various kinds and it has enumerated seven types of 'Grant' as under:

*"**Community grant.** A grant of real property made by a government (or sometimes by an individual)* ***for communal use,*** *to be held in common with no right to sell. A community grant may set out specific, communal uses for the p roperty, such as for grazing animals or a playground. Cf. Private grant.*

Escheat grant. A government's grant of escheated land to a new owner. - *Also termed escheat patent.*

imperfect grant. *1. A grant that requires the grantee to do something before the title passes to another. Cf. Perfect grant. 2. A grant that* ***does not convey all rights and complete title against both private persons and government, so that the granting person or political authority may later disavow the grant.*** *See Paschal v. Perex, 7 Tex. 368 (1851).*

inclusive grant. *A deed or grant that describes the boundaries of the land conveyed and excepts certain parcels within those boundaries from the conveyance, usu. Because those parcels of land are owned or claimed by others.- Also termed inclusive deed.*

office grant. *A grant made by a legal officer because the owner is either unwilling or unable to execute a deed to pass title, as in the case of a tax deed. See tax deed under DEED.*

Perfect grant. *A grant for which the grantor has done everything required to pass a complete title, and the grantee*

has done everything required to receive and enjoy the property in fee. Cf. Imperfect grant

private grant. *A grant of real property made to an individual for his or her private use, including the right to sell it. Private grants made by a government are often found in the chains of title for land outside the original 13 states, esp. in former Spanish and Maxican possession."*

58. In **Corpus Juris Secundum**, A Complete Restatement of the Entire American Law, as developed by All Reported Cases, Volume XXXVIII, word "Grant" has been defined at page 1066-1070, as under :

*"**Grant** - In General - A word which has a peculiar and appropriate meaning in the law, and is to be construed and understood according to such meaning; but its signification, in particular cases is to be determined from its connection and the manner of its use.*

As a Noun

*In General. **The act of granting;** a bestowing or conferring; a boon, a concession, a gift; also the thing granted or bestowed. As a**pplied to grants by public authority,** the word "grant" implies the conferring by the sovereign power of some valuable privilege, franchise, or other right of like character on a corporation, person, or class of persons; an act evidenced by letters patent under the great seal, **granting something from the king to a subject.** In a somewhat different sense, an admission of something as true.*

As a Contract. *A grant is said to be a contract executed, that is, one in which the object of the contract is performed. Ordinarily, the essential elements of a contract are necessary to constitute a grant, such as competent parties and a subject matter, a legal consideration, a mutuality of agreement and of obligation. As in the case of other contracts in writing, it ordinarily comprehends something more than the mere execution of the instrument; it includes a delivery of it. It is not indispensable, however, that technical words be used.*

Transfer of Property. *As a technical term, originally used to signify a conveyance of an incorporeal hereditament whereof livery could be had, but now of far more extended application, see Deeds (1 c notes 54 - 63). While the term is commonly used to denote private conveyances, it has been characterized as a nomen generalissimum, applicable to all sorts of conveyances, and in this sense has been defined as **a transfer of property, real or personal, by deed or writing.** The following notes contain examples of what, under particular circumstances and according to the subject matter and the context, the term may be applied to, or be held to include or what the term may be held not to include.*

...

Transferring property. An operative word of transfer, technically applicable to real estate, although not necessarily so. It is made use of in deeds of conveyance of lands to import a transfer; and in this application has been defined as meaning to convey; to make conveyance of; to transfer property by an instrument in writing.

As used in a will, to devise or to bequeath."

59. In **Words and Phrases, Permanent Edition, Volume 18A Gone-Gyrotiller,** word "Grant" has been defined at page 379, as under :

" ...

To grant means to give over, to make conveyance of, to give the possession or title to, to convey-usually in answer to petitioner; to confer or bestow, with or without compensation, particularly in answer to prayer or request; to admit as true when disputed or not satisfactorily proved; to yield belief to; to allow; to yield; to concede. Grant is usually regarded as synonymous with give, confer, bestow, convey, transfer, admit, allow, concede. As a noun, the term signifies: (1) The act of granting; a bestowing or conferring; concession; admission of something as true. (2) The thing granted or bestowed; a gift; a boon. (3) ***a transfer of property by deed or writing,*** *especially an appropriation or* ***conveyance made by the government, as a grant of land."***

60. In **Jowitts Dictionary of English Law, Second Edition by John Burke (Volume 1),** word "Grant" has been defined at page 870, as under:

"Grant :a common law conveyance.

... .

The sovereign's grants are matters of record, and are either letters patent or writs close.

"Grant" is the term commonly applied to rights created or transferred by the Crown, *e.g., grants of pensions, patents, charters, franchises. It is also used in reference to public money devoted to special purposes. See Exchequer Grants."*

61. In **Biswas Encyclopedic Law Dictionary (Legal & Commercial) Third Edition 2008,** word "Grant" has been defined at page 737, as under:

*"**GRANT**. The act of granting; something granted, especially a gift for a particular purpose; a* ***transfer of property by deed or writing; the instrument by which such a transfer is made; also the property so transferred.***

A grant may be defined generally as the transfer of property by an instrument in writing without the deliverty of possession of any subject-matter *thereof. Mozley & Whiteley's Law Dictionary, 8th edn."*

62. In **P Ramanatha Aiyar's "The Law Lexicon", Fourth Edition 2017,** word "Grant" has been defined at page 762-763, as under :

"...

An operative word of conveyance, *particularly appropriate to deeds of grant, properly so called, but used in other conveyances also, such as deeds of bargain and sale,* ***and leases.***

...

"This word is taken largely where any thing is granted or passed from one to another, and in this sense it doth comprehend feofments, bargains and sales, gifts, leases, charges, and the like; for he that doth give, or sell, doth grant also and ***thus it is sometimes in writing or by deed,*** *and sometimes it is by word without writing. But the word* ***being taken more strictly and properly, it is the grant, conveyance, or gift, by writing of such an Incorporeal thing as lieth in grant, and not in livery, and cannot be given or granted by word only without deed, or it is the grant by such persons as cannot pass anything from them but by deed,*** *as the King, bodies corporate, &c. And this albeit it may be made by other most proper to this purpose"*

The word "grant" in sec. 5 connotes transfer of property and mining

leases are property. Biswanath Prasad v. Union of India, AIR 1965 SC 821, 825. [Mines and Minerals (Regulation and Developments) Act (67 of 1957), S. 5(1)]

The expression "grant" is wide enough to take within its sweep a grant by the government to the Girasdar and is not limited to a grant by the Girasdar to the tenant. Digvijaysingh Ji v. Manji Savda, AIR 1969 SC 370, 372. [Saurashtra Land Reforms Act (25 of 1951), S. 18]

"GRANT, BESTOW, CONFER. Honours, distinctions, favours, privileges are conferred. Goods, gifts, endowments are bestowed. Requests, prayers, privileges, favours, gifts, allowances, opportunities are granted. ***A peculiar sense attaches to the word Grant as a legal term, as a piece of land granted to a noble or religious house.*** *So Blackstone speaks of "the transfer of property by sale, grant, or conveyance." (Smith. Syn. Dis.)"*

63. Under Indian Easements Act, 1882, (hereinafter referred to as "IE Act, 1882"), definition of "licence" in Section 52 says that it is the Grant of a right made by the Grantor. Sections 53 and 54 of IE Act, 1882 also refer to grant of licence. Thus, without a "Grant" in general sense, licence cannot be created. This is how definition of "licence" under IE Act, 1882 vis a vis the term "Grant" was considered in **Hajee S.V.M. Mohamed Jamaludeen Bros. & Co. (supra).**

64. Court also said that though the term "Grant" is not defined in GG Act, 1895, but it is quite evident that this word has been used in GG Act, 1895 in its ethnological sense and therefore, it should get its widest import.

65. In **Mohsin Ali vs. State of M.P. AIR 1975 SC 1518,** Court said :

*"in the widest sense '****grant' may comprehend everything that is granted or passed from one to another by deed.*** *But commonly the term is applied to rights created or transferred by the Crown e.g. grants of pensions, patents, charters, franchise."*
(Emphasis added)

66. Court in **Hajee S.V.M. Mohamed Jamaludeen Bros. & Co. (supra),** in para 16, said that word "Grant" used in GG Act, 1895 could envelop within it, everything granted by the government to any person. A licence obtained by a person by virtue of agreement would also fall within the ambit of "Grant" envisaged in GG Act, 1895.

67. In **Pradeep Oil Corporation vs. Municipal Corporation of Delhi and others (2011) 5 SCC 270,** Court said that GG Act, 1895 is a special Statute and will prevail over general Statute i.e. TP Act, 1882. It says:

"In the ***present case grant has been made by the President of India in terms of Section 2 of the Government Grants Act, 1895 and the Transfer of Property Act, 1882 may have little bearing in the instant case. The former,*** *i.e. the Government Grants Act, 1895 being* ***a special statute would prevail over the general statute, i.e. the Transfer of Property Act, 1882.*** *Accordingly, the rights and obligations of the parties would be governed by the terms of the provisions of Government Grants Act, 1895 whereunder the Government is entitled to impose limitations and restrictions upon the grants and other transfer made by it or under its authority."*

(Emphasis added)

68. Therefore, where 'Nazul' land is let out to a person by Government under agreement of lease i.e. Grant, it is governed by GG Act, 1895 and rights of parties therefore have to be seen in the light of stipulations contained in the document of 'Grant'. 'Grant' includes a property transferred on lease though in some cases, 'Grant' may result in wider interest i.e. transfer of title etc. Whatever may be nature of document of transfer i.e. instrument of 'Grant', the fact remains that terms and conditions of 'Grant' shall be governed by such document and it shall prevail over any other law including TP Act 1882. One cannot take resort to TP Act, 1882 to wriggle out of any condition or limitation etc. imposed in terms of document of 'Grant'.

69. In State of Uttar Pradesh, management of 'Nazul', in absence of statutory provisions, is governed by various administrative orders compiled in a Manual called "Nazul Manual". Government has made provisions for management of 'Nazul' through its own authorities namely District Magistrate or Commissioner, and, in some cases, through local bodies.

70. Nature of orders compiled in "Nazul Manual" in the context of 'Nazul' have been considered in **State of U.P. vs. United Bank of India (supra)** where Court has said that land and building in question is "Nazul" being property of Government maintained by State authorities in accordance with 'Nazul Rules' but not administered as a 'State property'. Court has also observed that lease of "Nazul" land is governed in accordance with GG Act, 1895. Sections 2 and 3 thereto very specifically provide that provisions of TP Act, 1882 do not apply to Government land. Section 3 says that all provisions, restrictions, conditions and limitations contained in any such 'Grant' or 'Transfer', as aforesaid, shall be valid and take effect according to their tenor, any rule of law statute or enactment of the Legislature to the contrary notwithstanding. Thus the stipulations in "lease deed" shall prevail and govern the entire relations of State Government and lessee.

71. Superiority of the stipulations of Grant to deal with the relation between Grantor and Grantee has been reinforced in **Azim Ahmad Kazmi and others (Supra).** Therein dispute related to Plot No. 59, Civil Station, Allahabad, area 1 acre and 4272 sq. yard, i.e., 9112 sq. yard or 7618 sq. meter. Initially a lease deed was executed on 11.01.1868 by Secretary of State for India in Council in favour of one, Thomas Crowby, for a period of 50 years and it was signed by Commissioner, Allahabad Division on behalf of Secretary of State for India in Council. After expiry of lease, a fresh lease was executed for another period of 50 years on 12.04.1923 w.e.f. 01.01.1918. Lease holder with permission of Collector, Allahabad transferred lease rights to Purshottam Das in 1945. The legal heirs of Sri Purshottam Das, on 31.10.1958, transferred leasehold rights in favour of Smt. Shakira Khatoon Kazmi, Smt. Sabira Khatoon Kazmi and Smt. Maimoona Khatoon Kazmi. After the death of Smt. Maimoona Khatoon Kazmi, her legal heirs, namely, Azim Ahmad Kazmi, Omar Ahmad Kazmi, Shamim Ahmad Kazmi, Alim Ahmad Kazmi and Maaz Ahmad Kazmi also claimed lease rights by succession. Lease granted on 12.04.1923 w.e.f. 01.01.1918 expired on 31.12.1967. It was renewed on

19.03.1996 for a period of 30 years w.e.f. 01.01.1968 which period expired on 31.12.1997. Again on 17.07.1998 it was renewed for a further period of 30 years w.e.f. 01.01.1998. While lease was continuing, vide Government Order dated 15.12.2000, right of resumption was exercised by State Government. It directed resumption of possession of plot in question and lease deed was cancelled. District Magistrate, Allahabad served a notice dated 11.01.2001 to lease holders intimating them that State Government's order dated 15.12.2000 has cancelled lease and resumed possession of land in question as the same was required for public purpose. Notice also directed lease holders to remove structures standing on plot, failing which possession would be taken in accordance with Clause 3(c) of lease deed. Lease holders filed objections against notice to District Magistrate and also stated that they have sent representation/ objection to Chief Minister praying for revocation of Government Order dated 15.12.2000. District Magistrate passed order on 24.08.2001 rejecting objection of lease holders and sent a cheque of Rs. 10 lacs representing compensation for the building standing over plot. State authorities claimed that they took possession of open land on 01.09.2001. Lease holders filed writ petition which was dismissed vide judgment dated 07.12.2001, **Shakira Khatoon Kazmi vs. State of U.P., AIR 2002 All 101.** Lease holders challenged judgment dated 07.12.2001 in Supreme Court to the extent they failed. State Government filed appeal against that part of order of this Court wherein an observation was made that State Government is not entitled to take forcible possession though it may take possession of demised premises in accordance with procedure established by law. After considering Clause 3(c) of lease deed which provides for resumption of land for public purpose after giving a month's notice to lessee to remove any building standing at the time on demised premises and within two months of receipt of notice to take possession thereof on expiry of that period, and Sections 2 and 3 of GG Act, 1895, Court said that Clause 3(c) of lease deed confers power upon State Government that plot in question, if required by State Government for its own purpose or for any public purpose, it shall have the right to give one month's notice in writing to lessees to remove any building standing on the plot and to take possession thereof on expiry of two months from the date of service of notice. Court said that land, if required for any public purpose, State Government has absolute power to resume leased property and under the terms of Grant it is absolute, therefore, order of resumption is perfectly valid and cannot be said to be illegal. It also refers to an earlier instance where Nazul Plot No. 13, Civil Station, Allahabad situate in Civil Lines area was resumed by State Government for the purpose of construction of a 'Bus Stand' by exercising similar power, without initiating any proceeding under Land Acquisition Act, 1894. Resumption in that case was also challenged in **Writ Petition No. 44517 of 1998, Sayed Shah Khursheed Ahmad Kashmi vs. State of U.P.** and said writ petition was **dismissed on 16.12.1999** by a Division Bench of this Court, whereagainst Special Leave Petition No. 4329 of 2000 was dismissed by Supreme Court on 07.09.2001. First question, therefore, in **Azim Ahmad Kaxmi and others (supra),** was answered in negative and in favour of Government.

72. With respect to procedure for taking possession, Supreme Court, while considering Question-2, said that in absence of any specific law, State Government may take possession by filing a suit. When a land is acquired under Land Acquisition Act, 1894 *(hereinafter referred to as "L.A. Act, 1894"),* Government can take possession in accordance with provisions of said Act and in case of urgency, Collector can take possession after publication of notice under Section 9 and no separate procedure is required to be followed. Court said that similarly where a lease has been granted under the terms of GG Act, 1895, then what procedure has to be followed is provided by Section 3 of GG Act, 1895 which says that all provisions, restrictions, conditions and limitations contained in any such creation, conferment or Grant referred to in Section 2, shall be valid and take effect according to their tenor; any decree or direction of a Court of Law or any rule of law, statute or enactments of the Legislature, to the contrary notwithstanding. It relied on earlier judgment in **State of U.P. vs. Zahoor Ahmad, 1973(2) SCC 547** holding that Section 3 of GG Act, 1895 declares unfettered discretion of Government to impose such conditions and limitation as it thinks fit, no matter what the general law of land be. Then Court construing Clause 3(C) of lease deed said that it provides procedure for taking possession of demised premises when State Government re-enter or resume possession of demised land. Court in para 30 and 32 of judgment said:

"30. In the case of ***The State of U.P. vs. Zahoor Ahmad and Another, 1973(2) SCC 547,*** *this Court held that the Section 3 of the Act declares the unfettered discretion of the Government to impose such conditions and limitation as it thinks fit, no matter what the general law of land be. From Clause 3(C) of the deed, it is clear that the* ***State of U.P. while granting lease made it clear that if the demised premises are at any time required by the lessor for his or for any public purpose, he shall have the right to give one month's clear notice to the lessee to remove any building standing at the time of the demised property and within two months' of the receipt of the notice to take possession thereof on the expiry of that period*** *subject to the condition that the lessor is willing to purchase the property on the demised premises, the lessee shall be paid for such amount as may be determined by the Secretary to the Government of U.P. in the Nagar Awas Department."*

"32. Under Clause 3(C) of the lease deed, the respondent-State was permitted resumption of the land which required for its own use or for public purpose and after giving one month's clear notice in writing is entitled to remove any building standing at the time on the demised premises and within two months of the receipt of the notice to take possession thereof subject to the condition that if the lessor is willing to purchase the building of the demised premises required to pay the lessee the amount for such building as may be determined by the Secretary to Government of U.P. in the Nagar Awas Department...."

(Emphasis added)

73. Having said so, Court said, *"we are of the view that there is no other procedure or law required to be followed, as a* ***special procedure for resumption of land has been laid down under the lease deed".***

74. Supreme Court then set aside direction of this Court that State will not take possession forcibly except in accordance with procedure established by any other law, by holding, that since special procedure for resumption is prescribed under lease deed, no direction otherwise could have been issued to State Government.

75. The above discussion makes it clear that 'Nazul' is a land owned and vested in State. It is such land which has vested in State by virtue of its 'Sovereignty' and incidence of 'Sovereignty' i.e. annexation, lapse and bona vacantia. Further, 'Grant' means transfer of property by a deed in writing and includes within its ambit, an instrument of lease/lease deed. Such 'Grant' is governed by provision of GG Act, 1895, which were applicable to 'Grants' executed on and after enforcement of GG Act, 1895 and rights and entitlement of private parties in respect of land, which was transferred to such person under such 'Grant' would be governed by terms and conditions contained in such 'Grant' and not by provisions of TP Act, 1882 or any other Statute. Moreover, in State of U.P., wherever applicable, U.P. Tenancy Act, 1939 and Agra Tenancy Act, 1926 will also be inapplicable to such 'Grant'.

76. Thus, for the purpose of resumption/ re-entry of land, State Government can follow procedure prescribed in the terms of lease as it is a special procedure for such purpose and it is not necessary to look into any other procedure prescribed in law.

77. We, therefore, answer **questions (i) and (ii)** and hold that Nazul is land owned by Government having vested by escheat, bona vacantia or lapse. Further the terms and conditions of 'Grant' a Nazul would govern relation of lessor and lessee and any other statute providing otherwise has no application.

78. Now we deal with questions (iii), (iv) and (v) together.

79. Learned Senior Counsel has founded his submissions on the basis of Section 106 read with 116 TP Act, 1882 that petitioners having continued in possession after expiry of period of lease, are entitled to be treated as 'holding over' and could not have been evicted without following procedure prescribed under TP Act, 1882. When impugned order was passed, GG Act, 1895 stood already repealed as a result whereof TP Act, 1882 would apply and for this purpose he placed reliance on **The State of U.P. vs. Zahoor Ahmad and another (supra).** He also said that even if possession is unauthorized, petitioner cannot be evicted arbitrarily but State is bound to follow procedure consistent with law and principles of natural justice and for this purpose, reliance is placed on Supreme Court's judgments in **Bishan Das and others Vs. State of Punjab and others AIR 1961 SC 1570, Express Newspapers Pvt. Ltd. and others Vs. Union of India (1986) 1 SCC 133, Yar Mohammad and another vs. Lakshmi Das and others AIR 1959 Allahabad 1 and Lallu Yeshwant Singh (dead) by his legal representative vs. Rao Jagdish Singh and others, AIR 1968 SC 620.**

80. First we propose to consider argument advanced in the light of Repealing and Amending (Second) Act, 2017 *(hereinafter referred to as "Repeal*

Act, 2017) and thereafter shall proceed to consider other aspects.

81. It is not in dispute that GG Act, 1895 has been repealed by Repeal Act, 2017. However, Section 4 thereof provides for saving of certain aspect and read as under :

*"**4. Savings.-** The repeal by this Act of any enactment shall not affect any other enactment in which the repealed enactment has been applied, incorporated or referred to;*

*and this Act shall not affect the validity, invalidity, **effect or consequences or anything already done or suffered, or any right, title, obligation or liability already acquired, accrued or incurred,** or any remedy or proceeding in respect thereof, or any release or discharge of or from any debt, penalty, obligation, liability, claim or demand, or any indemnity already granted, or the proof of any past act or thing;*

nor shall this Act affect any principle or rule of law, or established jurisdiction, form or course of pleading, practice or procedure, or existing usage, custom, privilege, restriction, exemption, office or appointment, notwithstanding that the same respectively may have been in any manner affirmed or recognized or derived by, in or from any enactment hereby repealed;

nor shall the repeal by this Act of any enactment revive or restore any jurisdiction, office, custom, liability, right, tittle, privilege, restriction, exemption, usage, practice, procedure or other matter or thing not now existing or any force.

82. Section 4 of Repeal Act, 2017 clearly protects effect or consequences or anything already done or suffered, which includes effect of expiry of lease and obligation of Lessee to surrender possession of leased land to State. Further, Lessee had already agreed that State can re-enter land at any point of time. They are bound by said clause of lease-deed. This is an obligation as also liability of petitioners and right of State incurred, acquired and accrued in view of terms of lease-deed. Mere fact that it has been exercised after repeal of GG Act, 1895 would make no difference since all earlier situations/ aspects have been protected by Section 4 of Repeal Act, 2017. Therefore, it cannot be said that after repeal of GG Act, 1895 by Repeal Act, 2017, petitioners' status would stood changed vis-a-vis disputed Nazul land in respect whereof State is entitled to re-entry and resume land in terms of conditions of lease.

83. Therefore, Repeal Act, 2017 does not have any effect upon the relationship of petitioner and respondents in respect of disputed land and all rights, obligations etc. shall continue to be governed under the said lease-deed.

84. So far as the application of principle of natural justice is concerned, lease is a matter of contract where principles of natural justice are not applicable. In State of **Gujarat and Ors. vs. Meghji Pethraj Shah Charitable Trust and Ors., 1994(3) SCC 552,** it has been held:

"We are unable to see any substance in the argument that the termination of arrangement without observing the principle of natural justice (audi alteram partem) is void. The termination is not a quasi-judicial act by

any stretch of imagination; hence it was not necessary to observe the principles of natural justice. It is not also an executive or administrative act to attract the duty to act fairly. It was - as has been repeatedly urged by Sri Ramaswamy - a matter governed by a contract/agreement between the parties. If the matter is governed by a contract, the writ petition is not maintainable since it is a public law remedy and is not available in private law field, e.g., where the matter is governed by a non-statutory contract."

85. Following aforesaid decision in **Pimpri Chinchwad Municipal Corporation and Ors. vs. Gayatri Construction Company and Anr., 2008(8) SCC 172** Court has held that in the matter of non-statutory contract, High Court should not have entertained writ petition under Article 226 of the Constitution.

86. The contention further is that despite expiry of lease, petitioner had continued in possession over land in dispute, therefore, tacit approval/validity of possession and status of petitioner as Lessee can be assumed. He also said that once State has accepted in its meeting that petitioner must apply renewal of lease, it was under an obligation to stick to the said stand and could not take any otherwise view in the matter. In this regard, reliance is placed on this Court's judgment in **Purushottam Dass Tandon and others vs. State of U.P., Lucknow and others AIR 1987 All. 56.**

87. We propose to examine the aforesaid judgment in the backdrop of various Government Orders, which were up for consideration therein and facts of that case. We are informed that with regard to renewal of lease, Government circulated its policy through various G.Os. The first being G.O. issued in March, 1958 whereby Chief Minister directed that case for renewal of leases may be taken individually and possession may be taken only if lessee surrenders or lease stood terminated in absence of any request from lessee for grant of fresh lease. Thereafter, on 23.04.1959, a G.O. was issued to grant fresh lease in cases where lease has already expired but has not been renewed so far, or which is likely to expire within the next 5 or 6 years, on the terms and conditions given in the said G.O. The proposed premium in the said G.O. was objected by Lease Holders, whose leases had already expired or likely to expire. Several representations were sent to the Government. Some house-owners met the then Prime Minister Late Pt. Jawahar Lal Nehru, who had visited Allahabad in November or December, 1959. It resulted in issue of another G.O. dated 07.07.1960 whereby rate of premium on first three acres was reduced to Rs.2,000/- in each slab. It also permitted payment of premium in five instalments and reduced ground rent to Rs.100/- per acre. In the earlier G.O., there was an insistence on construction of Community latrines till sewer lines were laid but this insistence was given up in G.O. dated 07.07.1960. Lessees were granted further three months' time to get leases renewed. Still lease-holders did not comply and made representations to Government. On 21.03.1963, again a G.O. was issued declaring rates of premium for commercial sites. On 3.12.1965 a G.O. was issued indicating terms and conditions for renewal of leases for commercial and residential purposes and it was said that rates of premium and annual rent shall be as fixed by G.O.

dated 07.07.1960. Payment in five equal yearly instalments was continued but in special cases, Commissioner, Allahabad Division, Allahabad, was authorized to make recommendations to Government for enhancing number of instalments. This G.O. further insisted for renewal of existing leases on payment of at least one instalment, within one month of receipt of intimation by Lessee from Collector, or within three months of the date of expiry of lease, whichever is earlier. Deposit was to be deemed to be proper step on the part of Lessee to get a fresh lease executed by the Lessor. The G.O. of 1965 itself made a distinction between those whose leases had expired and others by describing them as sitting and existing lessees.

88. There was a second phase which covered period from 1966 to 1981. On 16.02.1966, U.P. Awas Vikas Parishad Adhiniyam, 1965 *(hereinafter referred to as "U.P.Act, 1965")* was enacted for providing house sites and construction of building. G.O. dated 03.12.1965, thus was modified by G.O. dated 04.11.1968, and it was directed that leases of joint lessees should be renewed as far as possible for one acre only. Sub-division was permitted only where sub-divided plot was not less than 800 sq. yards. Concession in payment of lease money and ground rent was allowed on same terms and conditions as it was in G.O. dated 03.12.1965 but time was extended for payment of first instalment for those who had not received any intimation from Collector, by a further period of one month from the date of intimation by Collector. Clause (c) of G.O. dated 04.11.1968 categorically said that where steps have been taken for renewal of leases, as stated in earlier G.Os., fresh leases shall be sanctioned according to terms offered by Competent Authority.

89. In March, 1970, a G.O. was issued banning grant of renewal of leases all over the State, since Government was contemplating to bring out legislation on Urban Ceiling. This ban was lifted on 12.01.1972 but leases henceforth were to be sanctioned by State Government only. Commissioner and Collector could make recommendations only. Aforesaid G.O., however, provided that in all those cases where Government had sanctioned grant of leases but it could not be executed or registered because of ban imposed in 1970, steps may be taken immediately for its execution. Clause (ii) of G.O. provided that all those cases in which Collector or Commissioner had approved renewal but it could not be executed because of 1970 order, should be sent to Government immediately for acceptance. On 09.05.1972 Urban Building Ceiling Bill was introduced and on 11.07.1972 Uttar Pradesh Ceiling of Property (Temporary Restriction on Transfer), Ordinance, 1972 was promulgated in pursuance of Article 398 of Constitution of India. The Ordinance continued till it was replaced by Urban Land (Ceiling and Regulation) Act, 1976 *(hereinafter referred to as "U.P. Act, 1976")*. The said Act was enacted to prevent concentration of Urban Property and discourage construction of luxurious houses. On 19.12.1972, provisions pertaining to Nazul were amended providing for maximum area permissible for renewal of leases of 2000 sq. yards plus land on which building was constructed. Remaining area was to be surrendered to Housing Board and Lessees were prohibited from sub-dividing or transferring any land. On 10.12.1976, Government issued an order superseding all previous orders in respect of renewal of leases of Civil Lines, Allahabad in view of Act, 1976 and laid

down fresh terms and conditions for renewal of leases.

90. Lease Holders, whose lease had already expired or those who were sitting Lease Holders and leases were going to expire in a short period, came to this Court in various writ petitions. This entire bunch was decided in **Purushottam Dass Tandon and others vs. State of U.P., Lucknow and others AIR 1987 All 56.** In this bunch of writ petitions, facts, we have noted above with respect to various Government Orders, have been given in detail.

91. There were two categories of writ petitioners, before this Court, in **Purushottam Dass Tandon and others (supra)** as under :

(i) Those, to whom notices were given by Collector and who had complied with terms and conditions as laid down in various G.Os. issued from time to time prior to 1965; and

(ii) Those, to whom no notice was sent and till matter filed before the Court, no steps were taken and no order was passed in their favour.

92. Court held :

(I) A Lessor may, after expiry of period for which lease is granted, renew the same or resume i.e. re-enter. But if out of the two i.e. re-entry or resumption, the two divergent courses, he chooses to grant fresh lease or at least creates that impression by his conduct spread over long time, it results in abandonment.

(II) If the land is needed or building has to be demolished in public interest for general welfare, probably no exception can be taken as the interest of individual has to be sacrificed for the society. But asking Lessee to vacate land or remove Malba for no rhyme or reason but because State is the owner, cannot be accepted to be in consonance with present day philosophy and thinking about role of State.

(III) After Act, 1976, no person can successfully or validly claim to hold land, more than the Ceiling limit.

(IV) Some part of G.O. of 1981 was not consistent with Act, 1976. The rules contained in Nazul Manual are set of Administrative Orders or collections of guidelines issued by Government for the authorities to deal with Government property.

(V) When a G.O. is issued and its conditions are complied with, mere for bureaucratic delay, performance under the said G.O. cannot be denied. Therefore, Lessees, who had deposited first instalment, as directed in G.O. of 1965, were entitled to renewal of their lease.

(VI) After enactment of ceiling law, a Lessee cannot hold land more than the provided limit.

(VII) If leases were renewed in respect of those, who had acquired social or political status, whose names are given in para 15 of judgment, which includes, Dr. K. N. Katju, ex-Central Law Minister, Chief Minister and Governor, Dr. S. K. Verma, ex-Chief Justice and Governor, Sri B.L. Gupta, ex-Judge High Court, J. D. Shukla, I.C.S., O. N. Misra, I.A.S., when there was no justification not to give same benefit to others, similar benefit must have been given since most of them were also distinguished persons namely S.N. Kacker, ex-Central Law Minister, Solicitor General of India and Advocate General of the State, Sri S. S. Dhavan, ex-Judge, High Court and Governor and High Commissioner, Sri

Lal Ratnakar Singh I.A.S. Ex-Member of Board of Revenue, M.L.Chaturvedi, ex-Judge, High Court and member of Union Public Service Commission, W. Broome, I.C.S. etc.

93. Aforesaid judgment was confirmed by Supreme Court by dismissing appeals preferred by State of U.P. and others i.e. **State of U.P. and others vs. Purshottam Das Tandon and others 1989 Supp.(2) SCC 412.** Supreme Court clarified that renewal of leases shall be subject to the provisions of U.P.Act, 1976 and High Court's judgment shall apply to all the leases to whom G.O. dated 23.04.1959, 02.07.1960 and 03.12.1965 were applicable and all those claiming under them. The order of Supreme Court reads as under :

"We have heard the learned counsel for both the parties at length. We do not find any infirmity in the judgment and order passed by the High Court against which these special leave petitions are preferred. We, however, make it clear that the leases that are going to be granted pursuant to the writ issued by the High Court will be subject to the provisions of the Urban Land (Ceiling and Regulation) Act, 1976. On the leases being granted, the Competent Authority under the Act shall be at liberty to apply the provisions of the Act and in particular section 15 thereof to all the leases and take away all the surplus lands in their hands after determining the surplus lands in accordance with law. The ***directions issued by the High Court can be availed of by all the lessees to whom the G.O. dated 23rd April, 1959, 2nd July, 1960 and 3rd December, 1965 were applicable and all those claiming under them.***

All the Special Leave Petitions are dismissed accordingly with these observations. If any further directions are needed, the persons interested may approach the High Court."

(Emphasis added)

94. Though, in the present case also reliance has been placed on the aforesaid judgment, but, we do not find that aforesaid judgment is applicable to petitioners or that petitioners have applied for renewal of lease in terms of relevant G.O., applicable at the relevant point of time. Hence, their status is of 'occupant' without any authority, inasmuch as, lease having already expired, possession over disputed Nazul land of petitioners or anybody else under them is without any authority of law.

95. We may also notice at this stage that as per own showing of petitioner, it is said that in the meeting held on 26.11.2015, Government directed Collector to consider issue of renewal of lease but there is no pleading and material on record that pursuant to aforesaid decision, petitioner submitted any application for renewal of lease in accordance with provision available and applicable in this regard. On the contrary, matter has been examined by State in the light of fact that Allahabad has been selected for development as "Smart City" and now huge land is required for development of various kinds of constructions and other establishments and various departments have made demand of huge land. Land in question has been found suitable for development of 'Park' and cannot be doubted that it is a 'Public Purpose', hence State Government has exercised its right in terms of lease deed for re-entry over land in dispute. The

procedure for resumption/re-entry and eviction of petitioners is provided specifically in terms of lease deed and relevant clause we have already quoted hereinabove. The said procedure will override upon any other law.

96. After expiry of lease, status of lessee, who has continued in possession, is that of 'Tenant at sufferance', therefore, even a quit notice is not necessary to be given and Section 106 TP Act, 1882 is not at all attracted. Relying on earlier decision in **R.V. Bhupal Prasad vs. State of A.P. (1995) 5 SCC 698** in a recent decision in **Sevoke Properties Ltd. vs. West Bengal State Electricity Distribution Company Ltd. AIR 2019 SC 2664,** Court held that once it is admitted by lessee that term of lease has expired, lease stood determined by efflux of time and in such case, a quit notice under Section 106 is not required to be given. Court has said as under :

"Once the lease stood determined by efflux of time, *there* ***was no necessity for a notice of termination Under Section 106."*** (Emphasis added)

97. In the above authority, Court held that after expiry of period of lease, status of Lessee becomes that of 'Tenant at sufferance'. 'Tenant at sufference' is one who comes into possession of land by lawful title, but who holds it by wrong after termination of term or expiry of lease by efflux of time. The tenant at sufferance is one who wrongfully continues in possession after extinction of a lawful title. There is little difference between him and a trespasser. Quoting from Mulla's Transfer of Property Act (7th Edn.) at page 633, Court observed that tenancy at sufferance is merely a fiction to avoid continuance in possession operating as a trespass. It has been described as the least and lowest interest which can subsist in reality. It, therefore, cannot be created by contract and arises only by implication of law when a person who has been in possession under a lawful title continues in possession after that title has been determined, without consent of person entitled. A "tenancy at sufferance" does not create relationship of landlord and tenant. Court further quoted from page 769 of Mulla's transfer of Property Act (7th Edition), that act of holding over after expiration of term does not necessarily create a tenancy of any kind. If lessee remains in possession after determination of term, the common law Rule is that he is a tenant at sufferance.

98. Further, so far as applicability of UP Act, 1972 is concerned, when a procedure for re-entry/resumption is provided under lease-deed itself, State is justified in following the said procedure and if any other procedure is also provided, it is not necessary to resort thereto since State has right of election and follow procedure, which is a part of agreement, which has been given overriding effect over any other law by GG Act, 1895.

99. In fact, we find that issues in this regard raised in writ petition are squarely covered by judgment in **Azim Ahmad Kazmi and others vs. State of U.P. and Another (2012) 7 SCC 278.** The matter is also covered by a Division Bench judgment of this Court in **Writ Petition No.62588 of 2010, M/s Madhu Colonizers Pvt. Ltd. vs. State of U.P. & Ors.,** decided on 02.04.2013.

100. The **questions (iii), (iv) and (v)** therefore, are answered against petitioner.

101. We, therefore, find no merit in the writ petition and it is accordingly dismissed.

102. However, considering the facts and circumstances and also the fact that petitioner already enjoyed interim order passed by this Court and continued in possession over land in dispute for the last almost more than a year, we direct petitioner to vacate disputed land within one month from the date of delivery of judgment.

103. No costs.

(2019)12 ILR A718

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.10.2019

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE VIRENDRA KUMAR SRIVASTAVA, J.

Writ C No: 33740 of 2018

Parsi Panchayat, Surat ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sri Umesh Kumar Gupta, Sri Sunil Dutt Kautilya, Sri Satya Vrat Sahai

Counsel for the Respondents:
C.S.C., Sri Ajit Kumar Singh (Addl. Advocate General), Sri Nimai Das & Sudhanshu Srivastava (Addl. C.S.C.)

A. Nazul property – Nature and meaning – Nazul is an Arabic word. It refers to a land annexed to Crown. During British Regime, immoveable property of individuals, Zamindars, Nawabs and Rajas when confiscated for one or the other reason, it was termed as 'Nazul property' – It was neither acquired nor purchased after making payment – In Legal Glossary 1992 meaning of the term 'Nazul' has been given as 'Rajbhoomi' – It is only such land which is owned and vested in the State on account of its capacity of Sovereign, and application of right of bona vacantia. (Para 23, 24 and 25)

B. Constitution of India – Article 296 – Principle of escheat/ bona vacantia/ Doctrine of lapse – Empowering the king to take property – Recognized under common law of England – These principle would have been applicable prior to enforcement of Constitution of India – Article 296 has retained power of State to get ownership of such land, in respect whereof principle of 'escheat', 'lapse' or 'bona vacantia' applied – This power continued to apply after enactment of Constitution with the only modification that if such land is situate within the territory of State Government, it will vest in State and in other cases, it will vest in Union of India. (Para 27 and 30)

Held – Thus the land in question which is admittedly 'Nazul', belonged to the category as discussed above i.e. it came to be vested and owned by State in its capacity of Sovereign and right of bona vacantia. When acquisition is made under the provisions of a Statute, purpose of acquisition is already known and State pay its price but when land is owned by State, which is Nazul, objective of use of such land is not predetermined but it can be utilized by State for larger public welfare and its benefit, as necessitated from time to time. In other words 'Nazul' land forms the assets owned by State in trust for the people in general who are entitled for its user in the most fair and beneficial manner for their benefit. State cannot be allowed to distribute such largesse by pick and choose manner or to some selected groups or in a whimsical manner etc.

C. Civil Law - Government Grant Act, 1895 – Preamble – Purpose of enactment – Doubts have arisen to the extent and operation of TP Act, 1882 and to the power of Crown (later substituted by word

"Government") to impose limitations and restrictions upon grants and other transfers of land made by it or under its authority, hence to remove such doubts, GG Act, 1895 was enacted. (Para 47)

D. Civil Law - Government Grant Act, 1895 – Section 2 and 3 – Transfer of Property Act, 1882 – Grant of Nazul – Governing factor – Where 'Nazul' land is let out to a person by Government under agreement of lease i.e. Grant, it is governed by GG Act, 1895 and rights of parties therefore have to be seen in the light of stipulations contained in the document of 'Grant' – 'Grant' includes a property transferred on lease though in some cases, 'Grant' may result in wider interest i.e. transfer of title etc. – Whatever may be nature of document of transfer i.e. instrument of 'Grant', the fact remains that terms and conditions of 'Grant' shall be governed by such document and it shall prevail over any other law including TP Act 1882 – One cannot take resort to TP Act, 1882 to wriggle out of any condition or limitation etc. imposed in terms of document of 'Grant'. (Para 63)

E. Civil Law - Government Grant Act, 1895 – Section 3 – Nazul Land – Procedure to take possession – Where a lease has been granted under the terms of GG Act, 1895, then what procedure has to be followed is provided by Section 3 of GG Act, 1895 which says that all provisions, restrictions, conditions and limitations contained in any such creation, conferment or Grant referred to in Section 2, shall be valid and take effect according to their tenor – Any decree or direction of a Court of Law or any rule of law, statute or enactments of the Legislature, to the contrary notwithstanding. (Para 68)

Held **-** Above discussion, therefore, leaves no manner of doubt that Grant/Lease of Nazul land shall be exclusively governed by stipulations/conditions/terms contained in Grant/Indenture of Lease and no Statute can be resorted to govern rights of parties over Nazul land, which will be governed by aforesaid Grant/Indenture of Lease.

F. Lease of Nazul land – Determination – Effect of transfer of lease – Any transfer by Lessee in any manner without prior permission of Lessor i.e. Government or its Authorized Agent will result in determination of lease without any further notice – Meaning thereby, transfer of lease was clearly prohibited under terms of lease unless permission of Government has already been obtained. (Para 74)

G. Nazul land – Entitlement to freehold – Effect of pendency of application – Merely by making an application for grant of freehold right, applicant did not acquire a vested right. (Para 123)

Held **–** We repeatedly inquired from learned counsel for petitioner as to which G.O. applies to the present case so as to entitle petitioner to claim conversion of lease rights of land in dispute into freehold, particularly when petitioner is virtually a rank-trespassor and is not covered by any of aforesaid G.Os., none could be shown to us.

H. Civil Law - Transfer of Property Act, 1882 – Application to the Government Grant – In the matter of Government Grant, it is governed by provisions of GG Act, 1895 and no other Statute including TP Act, 1882 will have any application – Procedure prescribed under lease deed for re-entry / resumption of land is a special procedure and that can be followed for reentry and no other Statute and no other procedure is to be observed. (Para 128)

Held **–** So far as application of Section 116 of TP Act, 1882 is concerned we find nothing to show that Section 116 of TP Act, 1882 has any application in the case in hand. It is attracted only when an assent of landlord has been obtained for continuation of lease after expiry of lease period, which is not the case in hand.

I. Possession – *de facto* possession and *de jure* possession – Protection of

possession – De facto possession is when a person being in actual physical possession and *de jure* possession is possession in law. Constructive possession would be a possession through a representative, agent, tenant or a trustee. A person in de facto possession could be in adverse possession – Possession is a good title of right against anyone who cannot show a better title. However, when a person in possession may not be lawful, recovery of possession by owner must have sanction of law and it cannot proceed to dispossess the other in a forcible manner not recognized in law. (Para 133 and 135)

Held **-** In some authorities, possession of a person, who has entered therein initially, validly, but subsequently become unlawful, has been given a different meaning i.e. juridical possession. A tenant holding over without consent of landlord would be a juridical possession though his possession is not lawful. It is said that possession of tenant, post efflux of lease period, would not be treated as lawful possession still he would not be treated as a rank trespasser. Thus, here concept of possession as juridical possession has been introduced.

J. Constitution of India – Article 19(1)(a) and 19(1)(g) – Right to land – Right to land and to construct building is not derived from Articles 19(1)(a) or 19(1)(g) of Constitution, but springs from promise of contract between the parties. (Para 159)

Held **–** Whether there has been breach of contract of lease or there has been breach of any provision regulating lease rights and construction of building etc. are such questions which can be properly decided by taking detailed evidence involving examination and cross examination of witnesses and therefore, such rights can be enforced in common law proceedings by filing suit. In the present case, the right of re-entry is being enforced as per terms of Grant which prevailed over any other Law.

K. Civil Law - Transfer of property Act, 1882 – Section 106 – Tenant at sufferance – After expiry of lease, status of lessee, who has continued in possession, is that of 'Tenant at sufferance' – The tenant at sufferance is one who wrongfully continues in possession after extinction of a lawful title – It does not create relationship of landlord and tenant – Therefore, even a quit notice is not necessary to be given and Section 106 TP Act, 1882 is not at all attracted. (Para 184 and 185)

Writ Petition dismissed (E-1)

List of cases cited:-

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2. Pierce Leslie and Co. Ltd. Vs. Miss Violet Ouchterlony Wapsnare, AIR 1969 SC 843

3. Collector of Masulipatam v. C. Vencata Narainapah 8 MIA 500, 525

4. Ranee Sonet Kowar v. Mirza Himmut Bahadoor (2) LR 3 IA 92, 101

5. Bombay Dyeing and Manufacturing Co. Ltd. v. State of Bombay [1958] SCR 1122, 1146

6. Superintendent and, Legal Remembrancer v. Corporation of Calcutta [1967] 2 SCR 170, 204

7. Cook v. Sprigg (1899) AC 572

8. Raja Rajinder Chand v. Mst. Sukhi, AIR 1957 SC 286

9. Nayak Vajesingji Joravarsingji v. Secretary of State for India in Council AIR 1924 PC 216

10. Dalmia Dadri Cement Co. Ltd. v. CIT [1958] 34 ITR 514 (SC) : AIR 1958 SC 816

11. Promod Chandra Deb v. State of Orissa AIR 1962 SC 1288

12. Amarsarjit Singh v. State of Punjab AIR 1962 SC 1305

13. Thakur Amar Singhji v. State of Rajasthan AIR 1955 SC 504

14. State of Rajasthan vs. Sajjanlal Panjawat AIR 1975 SC 706

15. Promod Chandra Deb vs. State of Orissa AIR 1962 SC 1288

16. Biswambhar Singh vs. State of Orissa 1964 (1) SCJ 364

17. State of U.P. vs. Zahoor Ahmad, 1973(2) SCC 547

18. Hajee S.V.M. Mohamed Jamaludeen Bros. & Co. vs. Government of Tamil Nadu (1997) 3 SCC 466

19. Azim Ahmad Kazmi and others vs. State of U.P. and Another (2012) 7 SCC 278

20. State of U.P. and others vs. United Bank of India and others (2016) 2 SCC 757

21. Shakira Khatoon Kazmi vs. State of U.P., AIR 2002 All 101

22. State of U.P. vs. Zahoor Ahmad, 1973(2) SCC 547

23. Delhi Development Authority Vs. Anant Raj Agencies Pvt. Ltd. (2016) 11 SCC 406

24. Purushottam Dass Tandon and others vs. State of U.P., Lucknow and others AIR 1987 All. 56

25. State of U.P. and others vs. Purshottam Das Tandon and others 1989 Supp.(2) SCC 412

26. Anand Kumar Sharma vs. State of U.P. and others 2014(2) ADJ 742

27. Bishan Das and others Vs. State of Punjab and others AIR 1961 SC 1570

28. Express Newspapers Pvt. Ltd. and others Vs. Union of India (1986) 1 SCC 133

29. Yar Mohammad and another vs. Lakshmi Das and others AIR 1959 Allahabad 1

30. Lallu Yeshwant Singh (dead) by his legal representative vs. Rao Jagdish Singh and others, AIR 1968 SC 620

31. Azim Ahmad Kazmi and others vs. State of U.P. and Another (2012) 7 SCC 278

32. Shanti Prasad Devi and others vs. Shankar Mahto and others (2005) 5 SCC 543

33. Delhi Development Authority Vs. Anant Raj Agencies Pvt. Ltd. (supra)

34. Thakoor Chunder Parmanick Vs. Ramdhone Bhuttacharjee (1866) 6 W.R. 228

35. Lala Beni Ram Vs. Kundan Lall (1899) L.R. 26 I.A. 58

36. Narayan Das Khettry Vs. Jatindranath (1927) L.R. 54 I.A. 218

37. Wazir Chand Vs. The State of Himachal Pradesh AIR 1954 SC 415

38. Express Newspapers Pvt. Ltd. and others Vs. Union of India (1986) 1 SCC 133

39. State of Orissa Vs. Ram Chandra Dev AIR 1964 SC 685

40. Mohammed Hanif Vs. State of Assam (1969) 2 SCC 782

41. Jnanendra Nath Nanda vs. Jadu Nath Banerji AIR 1938 Cal 211

42. Secretary of State for India in Council vs. Lal Mohan Chaudhuri, AIR 1935 Cal 746

43. Lala Kishun Chand vs. Sheo Dutta, AIR 1958 All. 879

44. Bhawanji Lakhanishi vs. Himatlal Jamnadas AIR 1972 SC 819

45. Ratan Lal vs. Farshi Bibi (1907) ILR 34 Cal 396

46. Govindaswami vs. Ramaswami (1916) 30 Mad LJ 492

47. Christian vs. Hari Prasad AIR 1955 Pat 158
48. Pritilata Devi vs. Banke Bihari Lal AIR 1962 Pat 446

49. Gordhan vs. Ali Bux AIR 1981 Raj 206

50. Secretary of State Vs. Narain Khanna AIR 1942 Privy Council 35

51. Md. Wajeeh Mirza vs. Secretary of State for India in Council, AIR 1921 Oudh 31

52. Sharda Devi Vs. State of Bihar and another, 2003 (3) SCC 128

53. Collector of Bombay Vs. Nusserwanji Rattanji Mistri (1996) 10 SCC

54. State of U.P. and another Vs. Lalji Tandon (dead) through Legal Representatives (2004) 1 SCC 1

55. R.V. Bhupal Prasad vs. State of A.P. (1995) 5 SCC 698

56. Sevoke Properties Ltd. vs. West Bengal State Electricity istribution Company Ltd. AIR 2019 SC 2664

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

1. This writ petition has been filed under Article 226 of Constitution by Parsi Panchayat, Surat, through its General Attorney and Executor, Sri V.S. Pandey being aggrieved by order dated 18.08.2018 passed by District Magistrate, Allahabad (i.e. respondent-2) whereby he (respondent-2) has informed petitioner and two others that State Government has approved resumption/re-entry over land in dispute and therefore, it should be vacated by petitioners within fifteen days, whereafter possession shall be taken forcibly by respondents at the cost of petitioners.

2. Impugned order states that land in dispute is required by State for development of 'Parking place' in view of fact that Allahabad has been declared as 'Smart City' and has to be development accordingly and therefore, right of re-entry/resumption has been exercised by State.

3. Dispute relates to Nazul land, Plot H-1, Civil Station, area 1 Acre 2576 Square Yards whereupon a house is also constructed numbered as House No.24, Elgin Road, Allahabad.

4. A lease was executed by the Secretary of State for India in Council in favour of 'Roberston Karr' on 01.04.1862 in respect of Nazul Plot-H-1, Civil Station, area 3 acres, for a period of 50 years. After expiry of initial period of lease, it was renewed in favour of 'Marry Augustus Woolston' on 01.04.1912 for a period of 50 years which expired on 31.03.1962. Woolston transferred by sale, above plot in two parts, inasmuch as, vide sale deed dated 11.12.1945, House No.24 constructed on Nazul Plot H-1, Civil Station, area one acre and 2576 square yard, was transferred in favour of Sri K. S. Gandhi and his wife Smt. Tahmenna. Sri K. S. Gandhi applied for renewal of lease but no order was passed thereon. He died on 31.01.1978. Thereafter his legal heirs filed Writ Petition No.17616 of 1993 which came to be decided vide judgment dated 29.05.1998. As the case was covered by judgment of this Court in **Purshottam Dass Tandon and others vs, State of U.P. And others, AIR 1987 All 56,** a direction was issued by this Court to renew lease of disputed land. However, application for renewal was rejected by District Magistrate, Allahabad by order dated 11.07.1998. Petitioner filed Writ Petition No.34324 of 1998 challenging order dated 11.07.1998 but the same was dismissed on 29.11.2010 on the statement made by counsel for petitioner-Parsi Panchayat that writ petition has become infructuous.

5. State Government, in the meantime, brought in policy of allowing

free hold of Nazul Land. Pursuant to Government Order *(hereinafter referred to as "G.O.")* dated 01.12.1998, petitioner deposited Rs.6,19,980/- as requisite amount for claiming property in dispute to be converted into free hold.

6. Petitioner's application for free hold was rejected by Additional District Magistrate (Nazul), Allahabad by order dated 01.09.2003 observing that Nazul plot in dispute was given on lease on 24.07.1912 to Marry Augustus Woolston for a period of 50 years and, therefore, sale deed dated 11.12.1945 could have resulted in transferring only lease rights and not title or ownership of property in dispute which belong to State Government. Further lease expired on 31.03.1962 and erstwhile lessee thereafter had no right to make "Will" of Nazul land in dispute, vide Will Deed dated 09.10.1972, and that too by imposing conditions upon State Government. No rights, therefore, could have flown from 'Will' dated 09.10.1972 in respect of Nazul plot in question to anyone. Hence petitioner's claim for renewal of lease on the basis of above "Will" was already rejected and for the same reason petitioner's claim for making disputed land free hold, was also found not sustainable. This order dated 01.09.2003 was challenged by petitioner in Writ Petition No.4716 of 2004. It was disposed of vide judgment dated 29.11.2010 directing Collector, Allahabad to re-consider petitioner's application and pass fresh order ignoring earlier order of rejection. Judgment dated 29.11.2010 reads as under :

"The grievance of the petitioners are that the petitioner have applied for grant of free hold right of the land in dispute, though the State has given no objection to declare it free hold. It has further been submitted that similarly situated persons have been granted free hold right.

Considering the facts and circumstances of the case ***we direct the Collector, Allahabad to re-consider and decide the application of the petitioner ignoring the earlier order of rejection,*** *within a period of three months in the light of observations made above.*

With the aforesaid observations the writ petition is disposed of finally."

(Emphasis added)

7. Petitioner then made representation dated 16.12.2010. District Magistrate, Allahabad vide letter dated 28.07.2011 made certain queries, i.e. :

(1) Whether Nazul land in dispute is being used as desired in Will Deed dated 09.10.1972 as Nariman Home or is being used by anyone else and in what manner it is being used, should be informed?

(2) Whether D. F. Gandhi who has submitted various applications on behalf of Parsi Panchayat claiming himself to be General Attorney has got the said power of attorney registered, and if yes, its copy should be made available?

(3) Whether Sri D. F. Gandhi son of F. S. Gandhi resident of Gulista 18/30 Elgin Road, Lal Bahadur Shastri Marg, Allahabad is alive and if not, his death certificate be produced?

8. Petitioner submitted reply dated 18.08.2011 through his counsel wherein it was stated that building in question had several tenants and income from rent is used by Parsi Panchayat for running 'Nariman Home'; in the "Will" dated 09.10.1972 it is not mentioned anywhere

that building on the disputed Nazul land shall be run as 'Nariman Home'; Power of attorney of D. F. Gandhi was not registered and D. F. Gandhi has died, whose death certificate was not available with petitioner but must be available with legal heirs of D. F. Gandhi.

9. Since no further action was taken by respondent 2 with respect to claim of petitioner for freehold of disputed Nazul land, Writ Petition No.1305 of 2012 was filed wherein an interim order was passed directing parties to maintain status quo on 10.01.2012. During pendency of above writ petition, respondent 2 passed order dated 18.08.2018 which has been challenged on the ground that respondents have allowed free hold in respect of several other properties and petitioners have been discriminated; resumption of land is violative of petitioner's constitutional right under Article 300 A of Constitution; without acquiring land under the provisions of "The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013" *(hereinafter referred to as "Act, 2013)*, it could not have been taken by respondent 2; resumption cannot be made forcibly; procedure of Uttar Pradesh Public Premises (Eviction of Unauthorised Occupants) Act, 1972 *(hereinafter referred to as "U.P. Act, 1972")* has not been followed; petitioner's right of free hold cannot be defeated by exercising right of resumption and re-entry by respondents in a colourable manner; petitioner was allowed to deposit requisite amount for freehold, now respondents cannot turn otherwise; petitioner is entitled to freehold of land in dispute in the light of various Government Orders issued from time to time and the order impugned amounts to eviction of petitioner from house, standing on land in dispute and demolition thereof where they are residing for the last 30 years, it is arbitrary and illegal; similar orders were passed earlier in case of M/s Madhu Colonisers Pvt. Ltd Vs State of U. P. and others; and, Chintamani Ghose Trust and another Vs. State of U.P. and others, which were challenged in Writ Petitions No.31153 of 2009 and 35269 of 2009, and Division Bench of this Court vide judgment dated 27.05.2010 allowed writ petitions and set aside orders of District Magistrate and he was directed to pass fresh order with respect to claim of petitioners in those cases for conversion of lease right into free hold in accordance with law.

10. The writ petition has been contested by respondents and counter affidavit has been filed on behalf of respondent 2, sworn by Sri Gore Lal Shukla, Additional District Magistrate (Nazul), Prayagraj. It is said that Nazul Plot H-1, Civil Station initially demised by an Indenture of Lease dated 01.04.1862 to one Mr. Robert Carr. Disputed Nazul land, area 3 acres, was leased out for a period of 50 years for purpose of constructing a dwelling house. Thereafter lease was renewed by lease deed dated 24.07.1912 for a period of 50 years commencing from 01.04.1912. Lease was splitted into two parts comprising of Bungalow No.24, Elgin Road and Bungalow No.3, Strachey Road. In respect of site H-1, Bungalow No.24, Elgin Road, as desired by erstwhile lessee, in terms of earlier lease, another lease was executed on 18.06.1937 by Secretary of State for India in Council in favour of Mr. K.P. Modwell; period of lease remained the same and lease deed

dated 18.06.1937 was only to recognize split of lease land; lease came to an end on 31.03.1962; aforesaid lease was governed by provisions of Government Grants Act, 1895 *(hereinafter referred to as "GG Act, 1895");* Lease deed contained provision of re-entry and also obligation of surrender by lessee after expiry of period of lease; land in question was required for development as Parking Place and, therefore, a proposal was made to the Government for its resumption which was approved vide order dated 16.08.2018 and pursuant thereto, impugned order dated 18.08.2018 has been passed. It is further said that over land in dispute, illegally, a banquet hall namely 'Gangotri Garden' is being run; Government has right of resumption, and mere filing of application for free hold does not confer any right and in any case, the same has already been rejected. It is also pointed out that in respect of Nazul Plot 33 Civil Station, Allahabad land was resumed which was challenged by "M/S Madhu Colonisers Private Limited" in Writ Petition No.62588 of 2010 and reliance was placed on this Court's judgment dated 27.05.2010 in Writ Petitions 35269 of 2009 and 31153 of 2009 but Division Bench of this Court held that policy decision taken by Government for conversion of lease rights into free hold, will not have any adverse effect on the power of government to resumption of land under Clause 3 (c) of lease deed; this Court upheld the order of resumption by order dated 02.04.2013 and operative part of judgment reads as under :

"On a consideration of all the relevant materials, this Court finds that the State Government through the District Magistrate has committed no illegality in issuing the impugned notice and passing the impugned order. It is not possible to hold that the decision that the Multi Layer Parking facility is required to be constructed for public purpose suffers from any error or that the requirement is not for public purpose. It is also found that ***as nominee of the lessee, the petitioner-Company cannot have any larger rights that the lessee and once the order of the District Magistrate for resumption the land in exercise of power under Clause 3 (c) of the lease deed is held to be valid, the petitioner-Company, as a nominee, cannot have any surviving right to claim conversion of the lease hold rights into free hold. Infact, on valid resumption order being passed, the lease hold rights cease to exist and there can be no occasion for conversion of lease hold rights into freehold rights in such circumstances.***

As a result, we find no merit in this petition. It is, accordingly, dismissed, Interim order of stay shall stand vacated. There shall be no order as to costs."

(Emphasis added)

11. Respondents have also placed reliance on **Chintamani Ghosh and another vs. State of U. P. and others, 2001 (2) UPLBEC 1003, Anand Kumar Sharam vs. State of U. P. and others, 2014 (2) ADJ 742, State of Andhra Pradesh vs. Kaithala Abhishekam, AIR 1964 AP 450, Union of India and others vs. Harish Chand Anand, AIR 1996 SC 203, Smt. Shakira Khatoon Kazmi and others vs. State of U. P. and others, 202 (1) AWC 226 and Azim Ahmad Kazmi and others vs. State of U. P. and others, 2012 (7) SCC 278.**

12. In the rejoinder affidavit, petitioners have not stated anything new

but reiterated what they have already said in the writ petition, therefore, we are not repeating the same.

13. We have heard Sri Satya Vrat Sahai, Advocate, holding brief of Sri Sunil Dutt Kautilya, learned counsel for petitioner, and Sri Ajit Kumar Singh, Additional Advocate General assisted by Sri Nimai Das, Additional Chief Standing Counsel and Sri Sudhanshu Srivastava, Additional Chief Standing Counsel for State Authorities.

14. Learned counsel for petitioner broadly advanced his submissions as under :

i. It is true that lease expired on 31.03.1962 but before that disputed premises was already transferred to Sri K.S. Gandhi and his wife Smt. Tahmenna, therefore it has been succeeded by Sri D.F.Gandhi and in terms of Will of K.S.Gandhi, petitioner got possession and has applied for conversion of freehold. Petitioner has right of conversion of land in dispute as freehold, therefore, without taking any decision on said aspect, respondents cannot re-enter/resume land in dispute by means of impugned order.

ii. Petitioners' possession over property in dispute after expiry of lease was never obstructed and no action was taken for eviction or ejectment of petitioners from land in dispute. Meaning thereby respondents by conduct admitted lease rights of petitioners and valid possession over land in dispute. That being so, land in dispute could not have been resumed by exercising power with reference to GG Act, 1895 which was already repealed before impugned order was passed.

iii. State Government framed policy of conversion of lease into freehold and pursuant thereto petitioners submitted application for freehold of lease land but the said application was not decided for long. Petitioners are entitled to have lease rights converted into freehold as per relevant Government Orders.

iv. In any case, if petitioner's continuated possession after expiry of lease on 31.03.1962 was unauthorized in view of provisions of Uttar Pradesh Public Premises (Eviction of Unauthorised Occupants) Act, 1972 *(hereinafter referred to as "U.P. Act, 1972")*, he cannot be evicted or ejected from disputed land without following procedure prescribed in the said Act.

v. Right of resumption exercised by respondents under lease-deed, which has expired long back is illegal since in 2018 no deed was operating and resumption by State vide impugned order cannot be read in continuation with lease deed which had already expired 31.03.1962.

vi. Impugned order has been passed without any show cause notice or opportunity to petitioner, therefore, it is illegal.

15. Per contra, learned Additional Advocate General appearing for State of U.P. and Senior Counsel appearing on behalf of A.D.A. advanced argument virtually in the light of pleadings and objections raised in the counter affidavit, which we have already given in detail hereinabove and will further elaborate while discussing issues raised in this writ petition.

16. Before going into merits of rival submissions, some glaring important facts, we find necessary to recapitulate at this stage. Except lease deed dated 18.06.1937, copy of other lease-deeds

have not been placed on record. Lease deed dated 18.6.1937 was executed to recognize splitting of land in two parts, but, for remaining lease term, it is not disputed that terms and conditions of said lease was same as contained in lease deed dated 01.4.1862. Subsequent renewal was in continuation of same terms and conditions. Some of the relevant terms and conditions of lease deed, therefore, which govern relationship of Lessor and Lessee in this case, are reproduced as under :

AND ALSO will not ***without the previous consent in writing of the said Collector*** *erect or set up or suffer to be* ***erected or set up on any part of the said premises*** *hereby demised any messuage or building other than and except the messuage and buildings already erected and delineated upon the map hereto annexed.*

AND THAT ***if in breach of the said preceding*** *covenant any messuage or building is erected or set up or suffered to be erected or* ***set up without such permission as aforesaid it shall be lawful for the Collector or for any person or persons duly deputed by him to cause such messuage or building to be pulled down after the expiration of fourteen days of his giving or causing to be given notice to the said lessee his Executors,*** *Administrators and Assigns to remove the same which notice may be given either verbally or in writing upon the said premises. AND* ***will not without the previous consent in writing of the said Collector make any alteration in the plan or elevation*** *of the said buildings and out buildings or carry or permit to be carried on the said premises any trade or business whatsoever or use the same or permit the same to be used for any purpose other than that of a dwelling house*

AND ALSO will not without the previous consent in writing of the said Collector grow any crops/ or keep any horses, cattle or other animals for hire or profit or allow the same to be done in or upon the said demised premises but shall use the same for the purposes of a garden or pleasure grounds attached to the said dwelling house

AND ALSO upon the breach of any of the aforesaid covenant the said lessee his Executors, Administrators or Assigns shall and will on demand pay or cause to be paid to the Secretary of State the sum of Rs. 500 by way of liquidated damages and not penalty and that ***on a second breach of the same it shall be lawful for the said Secretary of State his Successors or Assigns into and upon the same demised premises or any part thereof in the name of the whole to re-enter and the same to have again repossess and enjoy as in their former*** *estate anything herein contain to the contrary notwithstanding*

AND ALSO that the said lessee his Executors, Administrators and Assigns ***will not without the permission in writing of the said Collector*** *or of some person authorized by him in that behalf construct thatch or cover or cause or permit to be constructed thatched or covered with grass reeds or other inflammable materials any building which shall or may be erected or constructed upon the said piece or parcel of land or ground, unless such thatch or roof or inflammable material shall be protected by a covering of tiles. And that if in breach of the said lastly preceding convent any building which shall or may be erected or constructed upon the said piece or parcel of land or ground be thatched or covered*

with grass reeds or other inflammable materials without such permission as aforesaid and without being protected by a covering of tiles, it shall be lawful for the said Collector or for any person duly deputed by him to cause such building, shed, roof, covering or other inflammable material to be pulled down after the expiration of twelve hours from the time of his giving or causing to be given notice to the said lessee his Executors, Administrators or Assigns to remove the same, which notice may be given either verbally or in writing upon the said premises

AND ALSO ***shall and will at the end, expiration or other sooner determination of the said term peaceably and quietly leave surrender*** *and yield up to the said Secretary of State his Successors or Assigns the said piece or parcel of land or ground together with all such of the said erection or building and all fixtures and things which at any time and during the said term shall be affixed or set up within or upon the said demised premises as the said Secretary of State, his Successors and Assigns shall desire to take over at a valuation according to the option hereinafter reserved to them subject however to the conditions hereinafter contained.*

PROVIDED ALWAYS and it is hereby understood and agreed that ***in case the said Secretary of State shall not at the expiration of the said term desire to take over the said buildings, erections or fixtures or things which shall have at any time during the said term granted under the lease dated 24th day of July, 1912 or during the said term hereby granted affixed to or set up within or*** *upon the said premises it shall be l****awful for the said lessee his Executors, Administrators or Assigns to remove and take away the same as and for his and their absolute property,*** *but in case the said Collector shall at the expiration of the said term hereby granted give notice to the said lessee his Executors, Administrators or Assigns of his intention to take over the buildings, erections, fixtures or things which shall have been at any time during the said term granted under the lease dated 24th day of July, 1912 or during the said term hereby granted set up within or upon the said premises or any part thereof, it shall be lawful for the said Secretary of State, his Successors and Assigns to take over the said buildings, erections, fixtures and things or any part thereof with the land, and in that case the said Secretary of State, his Successors and Assigns shall pay unto the said lessee his Executors, Administrators or Assigns the value of such buildings, erections, fixtures or other things or of such part thereof as they shall so take over as aforesaid, such value to be ascertained in case the parties themselves cannot agree, by the arbitration of two arbitrators, the one to be named by the Secretary of State, his Successors and Assigns and the other by the said lessee his Executors, Administrators, or Assigns, and in case they shall differ by an umpire to be appointed by the said two arbitrators, or in case either of the parties hereto shall neglect to appoint an arbitrator for more than one fortnight after notice has been served upon them or him by the other party to appoint such arbitrator, then by the sole arbitration of the arbitrator appointed by such other of the parties hereto which arbitration shall be final.*

PROVIDED ALWAYS and it is hereby declared and agreed that ***no compensation or payment shall be claimable by the said lessee*** *his*

Executors, Administrators or Assigns for any buildings, erections or fixtures erected, affixed or placed by him /them or any of them in or upon the said premises or any part thereof, ***in case these presents shall be determined by re-entry for forfeiture in which case the building, erections and fixtures shall rest absolutely in the said Secretary of State,*** *his Successors and Assigns as his own property* ***without any compensation*** *or payment in respect thereof.*

PROVIDED FURTHER and it is hereby agreed that the said lessee his Executors, Administrators or Assigns ***shall not assign or underlet or otherwise part with the possession of the said premises or any part thereof without the permission of the said Secretary of State his Successors or Assigns*** *(which permission may be signified by the said Collector or by such other person as the Government of the North-Western Provinces or the said Secretary of State may appoint in that behalf) for that express purpose had and obtained*

PROVIDED ALWAYS that if the said lessee his Executors, Administrators or Assigns ***shall assign or transfer these presents, or the lease or term hereby granted or created, or the unexpired portion of the said term,*** *or shall underlet the said premises or any part thereof with such permission as aforesaid unto any other person or persons of whom the said Collector shall approve, and if such person or persons shall engage and bind themselves to observe all the conditions, agreements and provisions of these presents in respect of such portion of the said term or of the said premises as shall have been so assigned or underlet to him as aforesaid and shall procure such assignments or sublease to be registered in such manner as shall be appointed by the said Secretary of State for the purpose of registering leases and other instruments of or relating to lands situate within the local limits of Allahabad (and for the registry of which assignments or subleases a fee of not more than Rs. 16 shall be paid by the person or persons tendering such assignments or sublease for registry) then and not otherwise the liability of the said lessee his Heirs, Executors and Administrators for the purpose or subsequent observance and performance of the covenants on the lessee's part therein contained, so far as relates to the portion of the said term or of the said premises so assigned or underlet as aforesaid, but not further or otherwise, shall cease and determine, but without prejudice however to the right of action of the said Secretary of State his Successors or Assigns in respect or on account of any previous breach of any covenant or covenants herein contained,*

PROVIDED ALWAYS and it is hereby desired that ***if the said yearly rents*** *hereby reserved or any part thereof shall at any time be in arrears and* ***unpaid for the space of 21 days next after any of the said days whereon*** *the same shall have become due whether the same shall have been lawfully demanded or not or if there shall be any breach or non-observance by the lessee of any of the covenants hereinbefore contained on his part to be observed and performed then and in any such case it shall be lawful for the Secretary of State notwithstanding the waiver of any previous cause or right of the re-entry to enter into and upon the said demised premises and the dwelling house and out buildings erected as aforesaid or any part thereof in the name of the whole and thereupon the same shall remain to the use of and be vested in the Secretary of State and* ***this demise shall***

absolutely determine but which entry if made shall not prejudice *the right of the said Secretary of State his Successors or Assigns to damages for the previous breach of any covenant on the part of the said lessee his Executors, Administrators or Assigns herein contained.*

AND the said Secretary of State doth hereby for himself his Successors and Assigns covenant with the said lessee his Executors, Administrators or Assigns that he the said lessee his Executors, Administrators or Assigns paying the rent hereinbefore reserved at the times and in manner hereinbefore appointed, and observing and performing all and singular the covenants, conditions and agreements herein contained and on his and their parts to be observed and performed according to the true intent and meaning of these presents, shall and may peaceably and quietly hold, use, occupy, possess and enjoy the said piece and parcel of land and ground and premises ***hereby demised during the said term of fifty years*** *hereby granted without any let, suit, denial, eviction or disturbance of or by the said Secretary of State, his Successors or Assigns or of or by any person or persons claiming or to claim through or under them.*

PROVIDED also that if the Government shall at any time require to re-enter on this site it can do so, on paying the value of all buildings that may be on the site, plus 10 per cent, as recompence for resumption of lease and that the lessee shall have no further claim of any sort against the Government."
(Emphasis added)

17. Some dates, which are relevant for adjudication of this case may be stated in chronological manner, and, in brief, as under :

18. In the backdrop of aforesaid facts, we proceed to consider merits of writ petition and relief claimed by petitioner.

19. It is not in dispute that land in question is 'Nazul' but interestingly lease holder had sold out land by sale deed to third party and also subjected it to 'Will' ignoring Lessor and its authority, altogether. The entire transfer was made illegally i.e. sale without permission of lessor, and 'Will', not only without permission but after 10 years of expiry of lease. In these circumstances, some questions relating to 'Nazul Land' and also the terms and conditions of Lease, having importance, have arisen.

20. The **first question** would be, *"what is Nazul?"*

21. Every land owned by State Government is not termed as 'Nazul' and therefore it has become necessary to understand, what is 'Nazul'.

22. State Government may own land by having acquired and vested in various ways, which includes vesting of land in the capacity of a Sovereign body and having right of bona vacantia. Property may also be acquired and owned by State by way of acquisition under the Statute relating to acquisition of land or by purchase through negotiation or gift by an individual or in similar other manners. All such land, which is owned and vested in State Government results in making the State, owner of such land, but in legal parlance, the term "Nazul" is not applicable to all such land.

23. It is only such land which is owned and vested in the State on account

of its capacity of Sovereign, and application of right of bona vacantia, which is covered by the term 'Nazul', as the term is known for the last more than one and half century.

24. In Legal Glossary 1992, fifth edition, published by Legal Department of Government of India, at page 589, meaning of the term 'Nazul' has been given as 'Rajbhoomi, i.e., Government land'.

25. Nazul is an Arabic word. It refers to a land annexed to Crown. During British Regime, immoveable property of individuals, Zamindars, Nawabs and Rajas when confiscated for one or the other reason, it was termed as 'Nazul property'. The reason being that neither it was acquired nor purchased after making payment. In old record, when such land was referred in Urdu, this kind of land was shown as 'Jaidad Munzabta'.

26. For dealing with such property, under the authority of Lt. Governor of North Western Provinces, two orders were issued in October, 1846 and October, 1848. Therein, after the words "Nazul property", its english meaning was given as 'Escheats to the Government'. Sadar Board of Revenue on May 20, 1845 issued a circular order in reference to "Nazul land" and in para 2 thereof it mentioned, "The Government is the proprietor of those land and no valid title to them can be derived but from the Government". Nazul land was also termed as "Confiscated Estate". Under Circular dated July 13, 1859, issued by Government of North Western Provinces, every Commissioner was obliged to keep a final confiscation statement of each District and lay it before Government for orders.

27. Right of King to take property by 'escheat' or as 'bona vacantia' was recognized by common law of England. Escheat of property was Lord's right of re-entry on real property held by a tenant, dying intestate, without lawful heirs. It was an incident of Feudal Tenure and based on the want of a tenant to perform Feudal services. On the tenant dying intestate without leaving any lawful heir, his estate came to an end and Lord, by his own right and not by way of succession or inheritance from the tenant, re-entered real property as Owner. In most cases, land escheated to Crown as the 'Lord Paramount', in view of gradual elimination of Intermediate or Mesne lords since 1290 AD. Crown takes as 'bona vacantia' goods in which no one else can claim property. In **Dyke v. Walford 5 Moore PC 434= 496-13 ER 557 (580)** it was said 'it is the right of the Crown to bona vacantia to property which has no other owner'. Right of the Crown to take as "bona vacantia" extends to personal property of every kind. The escheat of real property of an intestate dying without heirs was abolished in 1925 and Crown thereafter could not take such property as bona vacantia. The principle of acquisition of property by escheat, i.e., right of Government to take on property by 'escheat' or 'bona vacantia' for want of a rightful owner was enforced in Indian territory during the period of East India Company by virtue of Statute 16 and 17 Victoria, C. 95, section 27.

28. We may recollect, having gone through history, that prior to 1857, several Estates were taken over by British Company i.e. East India Company by way of annexation. Doctrine of lapse applied in Jhansi was another kind of above mentioned two principles.

29. The above provisions had continued by virtue of Section 54 of Government of India Act, 1858, section 20(3)(iii) of Government of India Act, 1915 and section 174 of Government of India Act, 1935. After enactment of Constitution of independent India, Article 296 now continues above provision and says :

'Subject as hereinafter provided, ***any property in the territory of India which,*** *if this Constitution had not come into operation,* ***would have accrued to His Majesty or, as the case may be, to the Ruler of an Indian State by escheat or lapse, or as bona vacantia for want of a rightful owner, shall if it is property situate in a State, vest in such State,*** *and shall, in* ***any other case, vest in the Union.'*** (Emphasis added)

30. Article 296, therefore, has retained power of State to get ownership of such land, in respect whereof principle of 'escheat', 'lapse' or 'bona vacantia' would have been applicable prior to enforcement of Constitution of India. The above power continued to apply after enactment of Constitution with the only modification that if such land is situate within the territory of State Government, it will vest in State and in other cases, it will vest in Union of India. Vesting of land and giving ownership to State Government or Union of India under Article 296 is clearly in respect of a land, which will come to it by way of 'escheat', 'lapse' or 'bona vacantia' and not by way of acquisition of land under some Statute or purchase etc.

31. In **Pierce Leslie and Co. Ltd. Vs. Miss Violet Ouchterlony Wapsnare, AIR 1969 SC 843** Court has considered the above principles in the context of 'Sovereign India' as stands under Constitution after independence, and, has observed :

"....in this country the Government takes by escheat immoveable as well as moveable property for want of an heir or successor. *In this country escheat is not based on artificial rules of common law and is not an incident of feudal tenure.* ***It is an incident of sovereignty and rests on the principle of ultimate ownership by the State of all property within its jurisdiction".***

(Emphasis added)

32. Court also placed reliance on **Collector of Masulipatam v. C. Vencata Narainapah 8 MIA 500, 525; Ranee Sonet Kowar v. Mirza Himmut Bahadoor (2) LR 3 IA 92, 101, Bombay Dyeing and Manufacturing Co. Ltd. v. State of Bombay [1958] SCR 1122, 1146, Superintendent and, Legal Remembrancer v. Corporation of Calcutta [1967] 2 SCR 170.**

33. Judicial Committee in **Cook v. Sprigg (1899) AC 572** while discussing, 'what is an act of State', observed :

"The taking possession by Her Majesty, whether ***by cession or by any other means by which sovereignty can be acquired,*** *was an act of State."*

(Emphasis added)

34. This decision has been followed in **Raja Rajinder Chand v. Mst. Sukhi, AIR 1957 SC 286.**

35. In **Nayak Vajesingji Joravarsingji v. Secretary of State for India in Council AIR 1924 PC 216,** Lord Dunedin said :

*"When **a territory is acquired by a sovereign State for the first time, that is an act of State.** It matters not how the acquisition has been brought about. It may be **by conquest, it may be by cession following on treaty, it may be by occupation of territory hitherto unoccupied by a recognised ruler. In all cases the result is the same.** Any inhabitant of the territory can make good in the municipal courts established by the new sovereign only such rights as that sovereign has, through his officers, recognised. Such **rights as he had under the rule of predecessors avail him nothing."***

36. In **Dalmia Dadri Cement Co. Ltd. v. CIT [1958] 34 ITR 514 (SC) : AIR 1958 SC 816,** Court said (page 523 of 34 ITR) :

*"The **expression 'act of State'** is, it is scarcely necessary to say, not limited to hostile action between rulers resulting in the occupation of territories. It **includes all acquisitions of territory by a sovereign State for the first time, whether it be by conquest or cession."***

(Emphasis added)

37. In **Promod Chandra Deb v. State of Orissa AIR 1962 SC 1288,** Court said, 'Act of State' is the taking over of sovereign powers by a State in respect of territory which was not till then a part of its territory, either by conquest, treaty or cession, or otherwise.

38. To the same effect was the view taken by a Constitution Bench in **Amarsarjit Singh v. State of Punjab AIR 1962 SC 1305,** where in para 12, Court said :

*"It is settled law that **conquest is not the only mode by which one State can acquire sovereignty over the territories belonging to another State,** and that the **same result can be achieved in any other mode which has the effect of establishing its sovereignty."***

(Emphasis added)

39. In **Thakur Amar Singhji v. State of Rajasthan AIR 1955 SC 504,** in para 40, Court said :

*"The **status of a person must be either that of a sovereign or a subject.** There is no tedium quid. The law does not recognise an intermediate status of a person being partly a sovereign and partly a subject and when once it is admitted that the Bhomicharas had acknowledged the sovereignty of Jodhpur their status can only be that of a subject. **A subject might occupy an exalted position and enjoy special privileges, but he is none the less a subject..."***

(Emphasis added)

40. In **State of Rajasthan vs. Sajjanlal Panjawat AIR 1975 SC 706** it was held that Rulers of the erstwhile Indian States exercised sovereign powers, legislative, executive and judicial. Their firmans were laws which could not have been challenged prior to the Constitution. Court relied on earlier decisions in **Director of Endowments, Govt. of Hyderabad vs. Akram Ali, AIR 1956 SC 60,** and **Sarwarlal vs. State of Hyderabad, AIR 1960 SC 862.**

41. In **Promod Chandra Deb vs. State of Orissa AIR 1962 SC 1288** "act of the State" was explained in the following words :

*"an "act of State" may be the taking over of sovereign powers either **by***

conquest *or* ***by treaty*** *or* ***by cession or otherwise.*** *It may have happened on a particular date by a public declaration or proclamation, or it may have been the result of a historical process spread over many years, and sovereign powers including the right to legislate in that territory and to administer it may be acquired without the territory itself merging in the new State."*

(Emphasis added)

42. This decision has been followed later in **Biswambhar Singh vs. State of Orissa 1964 (1) SCJ 364,** wherein Court said:

*"16. Thus, a t****erritory acquired by a sovereign State is an Act of State but the land comprising territory does not become the land owned by State.*** *The l****and owned by State may come to it in various ways, like confiscation, purchase, escheat or bona vacantia, gift, etc.*** *In such a case the ownership vests in State, like any other individual and* ***State is free to deal with the same in a manner like any other owner may do so.***

17. Thus ***'Nazul' is a land vested in State for any reason whatsoever that is cession or escheat or bona vacantia, for want of rightful owner or for any other reasons and once land belong to State,*** *it will be difficult to assume that State would acquire its own land. It is per se impermissible to acquire such land by forcible acquisition under Act, 1894, since there is no question of any transfer of ownership from one person to another but here State already own it, hence there is no question of any acquisition."* (Emphasis added)

43. Thus the land in question which is admittedly 'Nazul', belonged to the category as discussed above i.e. it came to be vested and owned by State in its capacity of Sovereign and right of bona vacantia. When acquisition is made under the provisions of a Statute, purpose of acquisition is already known and State pay its price but when land is owned by State, which is Nazul, objective of use of such land is not predetermined but it can be utilized by State for larger public welfare and its benefit, as necessitated from time to time. In other words 'Nazul' land forms the assets owned by State in trust for the people in general who are entitled for its user in the most fair and beneficial manner for their benefit. State cannot be allowed to distribute such largesse by pick and choose manner or to some selected groups or in a whimsical manner etc.

44. The **second question** up for consideration is "lease in question whether governed by provision of Transfer of Property Act, 1882 *(hereinafter referred to as "TP Act, 1882")* or GG Act, 1895 and what is inter-relationship of the two?"

45. Historical documents, record as also authorities discussed above show that earlier Government i.e. East India Company upto 1858 and thereafter British Government used to allot "Nazul land" to various persons, who had shown their alliance to such Government in various ways, sometimes by deceiving their Indian counter parts who had raised voice against British Ruler, or those who remained faithful to British regime and helped them for their continuation in ruling this country, and similar other reasons. Sometimes land was given on lease without any condition and sometimes restricted for certain period

etc., but in every case, lease was given to those persons who were faithful and had shown complete alliance to British Rule. The reason was that in respect of Nazul, no predetermined objective was available as was the case in respect of land acquired by State by way of acquisition under Statute of Acquisition after paying compensation or purchase. Further allocation of Nazul land by English Rulers used to be called "Grant".

46. In other words, we can say that initially land owned by State was used to be allotted in the form of 'Grant' by British Government. No specific statutory provisions were available to govern it. TP Act, 1882 was enacted to govern transfer of immovable property. Sections 10 - 12 of TP Act, 1882 made provisions invalidating, with certain exceptions, all conditions for forfeiture of transferred property on alienation by transferee and all limitations over consequent upon such alienation or any insolvency of or attempted alienation by him. Apprehending that above provisions of TP Act, 1882, may be construed as a fetter upon discretion of Crown in creation of inalienable Jagirs in 'Grants', acting upon advice that it would not be competent for Crown to create an inalienable and impartible Estate in the land comprised in the Crown Grant, unless such land has heretofore descended by custom as an impartible Raj, it was sought to make a separate Statute to give supremacy to the provisions contained in Crown's Grant, notwithstanding any other law including TP Act, 1882. With this objective, 'GG Act 1895' was enacted.

47. Preamble of GG Act, 1895 gives purpose of its enactment stating that doubts have arisen to the extent and operation of TP Act, 1882 and to the power of Crown (later substituted by word "Government") to impose limitations and restrictions upon grants and other transfers of land made by it or under its authority, hence to remove such doubts, GG Act, 1895 was enacted.

48. Section 2 of GG Act, 1895, as it was initially enacted, read as under :

"Transfer of Property Act, 1882, not to apply to Government grants.- ***Nothing in the Transfer of Property Act, 1882,*** *contained* ***shall apply or be deemed ever to have applied to any grant or other transfer of land*** *or of any interest therein heretoforce made or hereafter to be made by or on behalf of Her Majesty the Queen Empress, Her heirs or successors, or by or on behalf of the Secretary of State for India in Council to, or in favour of, any person whomsoever; but* ***every such grant and transfer shall be construed and take effect as if the said Act had not been passed."*** (Emphasis added)

49. The above provision was amended in 1937 and 1950 and the amended provision read as under :

"2. Transfer of Property Act, 1882, not to apply to Government grants.- ***Nothing in the Transfer of Property Act, 1882,*** *contained* ***shall apply or be deemed ever to have applied to any grant or other transfer of land or of any interest therein*** *heretoforce made or hereafter to be made by or on behalf of the Government to, or in favour of, any person whomsoever; but* ***every such grant and transfer shall be construed and take effect as if the said Act had not been passed."***

(Emphasis added)

50. Section 3 of GG Act, 1895 read as under :

"Government grants to take effect according to their tenor.- ***All provisions, restrictions, conditions*** *and* ***limitations*** *over* ***contained in any such grant*** *or* ***transfer*** *as aforesaid* ***shall be valid*** *and the* ***effect according to their tenor,*** *any* ***rule of law, statute or enactment of the Legislature to the contrary notwithstanding."***

51. In State of Uttar Pradesh, vide Government Grants (U.P. Amendment) Act, 1960 (U.P. Act No.XIII of 1960), Sections 2 and 3 of GG Act, 1895, were substituted by Section 2, as under :

"2. (1) Transfer of Property Act, 1882, not to apply to Government Grants.- ***Nothing contained in the Transfer of Property Act, 1882, shall apply*** *or* ***be deemed ever to have applied to any grant*** *or other transfer of land or of any interest therein, heretoforce made or hereafter to be made, by or on behalf of the Government to or in favour of any person whomsoever; and* ***every such grant and transfer shall be construed and take effect as if the said Act had not been passed."***

(2) U.P. Tenancy Act, 1939 and Agra Tenancy Act, 1926 not to affect certain leases made by or on behalf of the Government.- ***Nothing contained in the U.P. Tenancy Act, 1938, or the Agra Tenancy Act, 1926, shall affect,*** *or be* ***deemed to have ever affected any rights, created, conferred or granted,*** *whether before or after the date of the passing of the Government Grants (U.P. Amendment) Act, 1960,* ***by leases of land by,*** *or on behalf of, the Government in favour of any person; and* ***every such creation, conferment or grant shall be construed and take effect, notwithstanding anything to the contrary contained in the U.P. Tenancy Act, 1939, or the Agra Tenancy Act, 1926.***

(3) Certain leases made by or on behalf of the Government to take effect according to their tenor.- ***All provisions, restrictions, conditions and limitations*** *contained in any such creation, conferment or grant referred to in Section 2,* ***shall be valid*** *and* ***take effect according to their tenor,*** *any decree or direction of* ***a court of law or any rule of law, statute or enactment of the Legislature, to the contrary notwithstanding :***

*Provided that nothing in this section shall prevent, or be deemed ever to have prevented, t****he effect of any enactment relating to the acquisition of property, land reforms or the imposition of ceiling on agricultural land."***

(Emphasis added)

52. A perusal of Section 2 of GG Act, 1895 shows two things :

i. A declaration is made that any grant or other transfer of land or of any interest therein, made by or on behalf of Government, in favour of any person, on and after enactment of GG Act, 1895, would not be governed by provisions of TP Act, 1882 i.e. nothing contained in TP Act, 1882 shall apply to such Grant, transfer or interest.

ii. A clarification that a Grant or Transfer, referred to in Section 2, when is to be construed and given effect, it shall be done in such manner and by treating as if TP Act, 1882 has not been passed.

53. Thus, GG Act, 1895 in fact was a declaratory Statute. The first declaration

is in respect of Grant or transfer of land or creation of any interest, as the case may be, to exclude TP Act, 1882 for all purposes. The second part of Section 2 clarified that while construing and giving effect to a Grant or Transfer, referred to in Section 2, it will be presumed that TP Act, 1882 has not been passed at all.

54. In Section 2(1) of GG Act, 1895, as amended in Uttar Pradesh, we do not find any distinction vis a vis what has been said in Section 2 of GG Act, 1895. There is an addition in GG Act, 1895 in its application to Uttar Pradesh, by inserting sub-section (2) in Section 2, a provision in respect of U.P. Tenancy Act, 1939 and Agra Tenancy Act, 1926 also, making a similar declaration, as made in sub section (1) in respect of TP Act, 1882.

55. Sub-section (3) of Section 2 of GG Act, 1895 protect certain leases, already made, declaring the same to be valid in the light of insertion of sub-section(1) of Section 2 in the State of Uttar Pradesh and that is why, notwithstanding any decree or direction of Court of law, leases already made, were validated, which otherwise might have been affected by U.P. Tenancy Act, 1938 or Agra Tenancy Act, 1926.

56. Proviso to sub-section (3) of Section 2 of GG Act, 1895 further declares that all provisions of Section 2 of GG Act, 1895 will have no effect when land is sought to be acquired under the provisions of Statute relating to acquisition or for giving effect to a Statute relating to land reforms or imposition of ceiling on agricultural land.

57. Section 3 of GG Act, 1895 is not available in State of U.P. after U.P. Amendment Act, 1960 since Sections 2 and 3 of Principal Act virtually got amalgamated in the form of Section 2, by Government Grants (U.P. Amendment) Act, 1960. However, intent, effect and declaration by legislature is almost pari materia with the only addition that in State of U.P., U.P. Tenancy Act, 1939 and Agra Tenancy Act, 1926 are also excluded in the same manner as was done in respect of TP Act, 1882.

58. Sections 2 and 3 of GG Act, 1895 were considered in **State of U.P. vs. Zahoor Ahmad, 1973(2) SCC 547** and in para 16, Court said :

*"**Section 3** of the Government Grants Act **declares the unfettered discretion of the Government to impose such conditions and limitations as it thinks fit, no matter what the general law of the land be.** The meaning of Sections 2 and 3 of the Government Grants is that the scope of that Act is not limited to affecting the provisions of the Transfer of Property Act only. The **Government has unfettered discretion to impose any conditions, limitations, or restrictions in its grants, and the right, privileges and obligations of the grantee would be regulated according to the terms of the grant, notwithstanding any provisions of any statutory or common law."***

(Emphasis added)

59. Again in **Hajee S.V.M. Mohamed Jamaludeen Bros. & Co. vs. Government of Tamil Nadu (1997) 3 SCC 466,** Court said that combined effect of two sections of GG Act, 1895 is that terms of any Grant or terms of any transfer of land made by a Government would stand insulated from tentacles of any statutory law. Section 3 places terms

of such Grant beyond reach of restrictive provision contained in any enacted law or even equitable principles of justice, equity and good conscience adumbrated by common law, if such principles are inconsistent with such terms. Court said :

"The two provisions are so framed as to ***confer unfettered discretion on the government to enforce any condition or limitation or restriction in all types of grants made by the government to any person.*** *In other words, the rights, privileges and obligations of any grantee of the government would be* ***completely regulated by the terms of the grant, even if such terms are inconsistent with the provisions of any other law."***
(Emphasis added)

60. In **Azim Ahmad Kazmi and others vs. State of U.P. and Another (2012) 7 SCC 278** observations made in para 16 in **State of U.P. vs. Zahoor Ahmad (supra)** have been reproduced and followed.

61. In **State of U.P. and others vs. United Bank of India and others (2016) 2 SCC 757,** in para 30 of the judgment, Court said :

"Indisputably, the lease of nazul land is governed by the Government Grants Act, 1895. Sections 2 and 3 of the Government Grants Act, 1895 very specifically provide that the ***provisions of the Transfer of Property Act do not apply to government lands ....."***
(Emphasis added)

62. Thus, a 'Grant' of a Nazul will be governed by terms and conditions contained in the instrument/deed of Grant, wholly unaffected by any Statute providing otherwise.

63. It neither can be doubted nor actually so urged by petitioner that the lease granted in the case in hand is/was a 'Grant' governed by GG Act, 1895. Broadly, 'Grant' includes 'lease'. In other words, where 'Nazul' is let out to a person by Government under agreement of lease i.e. Grant, it is governed by GG Act, 1895 and rights of parties therefore have to be seen in the light of stipulations contained in the document of 'Grant'. 'Grant' includes a property transferred on lease though in some cases, 'Grant' may result in wider interest i.e. transfer of title etc. Whatever may be nature of document of transfer, i.e. instrument of 'Grant', the fact remains that terms and conditions of 'Grant' shall be governed by such document and it shall prevail over any other law including TP Act 1882. One cannot take resort to TP Act, 1882 to wriggle out of any condition or limitation etc. imposed in terms of document of 'Grant'.

64. In the State of Uttar Pradesh, management of 'Nazul', in absence of statutory provisions, is governed by various administrative orders compiled in a Manual called "Nazul Manual". Here Government has made provisions of management of 'Nazul' through its own authorities namely District Magistrate or Commissioner, or, in some cases, through local bodies.

65. Nature of orders compiled in "Nazul Manual" in the context of 'Nazul' have been considered recently in **State of U.P. vs. United Bank of India (supra)** where Court has said that land and building in question is "Nazul" being

property of Government, maintained by State authorities in accordance with 'Nazul Rules' but not administered as a 'State property'. Court has also observed that lease of "Nazul" land is governed in accordance with GG Act, 1895. Sections 2 and 3 thereto very specifically provide that provisions of TP Act, 1882 do not apply to Government land. Section 3 says that all provisions, restrictions, conditions and limitations contained in any such 'Grant' or 'Transfer', as aforesaid, shall be valid and take effect according to their tenor, any rule of law statute or enactment of the Legislature to the contrary, notwithstanding. Thus stipulations in "lease deed" shall prevail and govern the entire relation of State Government and lessee.

66. In **Pradeep Oil Corporation vs. Municipal Corporation of Delhi and others (2011) 5 SCC 270,** Court said that GG Act, 1895 is a special Statute and will prevail over general Statute i.e. TP Act, 1882. It says:

*"In the **present case grant has been made by the President of India in terms of Section 2 of the Government Grants Act, 1895 and the Transfer of Property Act, 1882 may have little bearing in the instant case. The former,** i.e. the Government Grants Act, 1895 being **a special statute** would **prevail over the general statute,** i.e. the **Transfer of Property Act, 1882.** Accordingly, the rights and obligations of the parties would be governed by the terms of the provisions of Government Grants Act, 1895 whereunder the **Government is entitled to impose limitations and restrictions upon the grants and other transfer made by it or under its authority."*** (Emphasis added)

67. Superiority of the stipulations of Grant to deal the relations between Grantor and Grantee has been reinforced in **Azim Ahmad Kazmi and others (Supra).** Therein dispute related to Plot No. 59, Civil Station, Allahabad, area 1 acre and 4272 sq. yard, i.e., 9112 sq. yard or 7618 sq. meter. Initially a lease deed was executed on 11.01.1868 by Secretary of State for India in Council, in favour of one, Thomas Crowby, for a period of 50 years and it was signed by Commissioner, Allahabad Division on behalf of Secretary of State for India in Council. After expiry of lease, a fresh lease was executed for another period of 50 years on 12.04.1923 w.e.f. 01.01.1918. Lease holder with permission of Collector, Allahabad transferred lease rights to Purshottam Das in 1945. The legal heirs of Sri Purshottam Das, on 31.10.1958, transferred leasehold rights in favour of Smt. Shakira Khatoon Kazmi, Smt. Sabira Khatoon Kazmi and Smt. Maimoona Khatoon Kazmi. After the death of Smt. Maimoona Khatoon Kazmi, her legal heirs, namely, Azim Ahmad Kazmi, Omar Ahmad Kazmi, Shamim Ahmad Kazmi, Alim Ahmad Kazmi and Maaz Ahmad Kazmi also claimed lease rights by succession. Lease granted on 12.04.1923 w.e.f. 01.01.1918 expired on 31.12.1967. It was renewed on 19.03.1996 for a period of 30 years w.e.f. 01.01.1968 which period expired on 31.12.1997. Again on 17.07.1998 it was renewed for a further period of 30 years w.e.f. 01.01.1998. While lease was continuing, vide Government Order dated 15.12.2000, right of resumption was exercised by State Government. It directed resumption of possession of plot in question and lease deed was cancelled. District Magistrate, Allahabad served a notice dated 11.01.2001 to lease holders intimating them that State Government's

order dated 15.12.2000 has cancelled lease and resumed possession of land in question, as the same was required for public purpose. Notice also directed lease holders to remove structures standing on plot, failing which possession would be taken in accordance with Clause 3(c) of lease deed. Lease holders filed objections against notice to District Magistrate and also stated that they have sent representation/ objection to Chief Minister praying for revocation of Government Order dated 15.12.2000. District Magistrate passed order on 24.08.2001 rejecting objection of lease holders and sent a cheque of Rs. 10 lacs representing compensation for the building standing over plot. State authorities claimed that they took possession of open land on 01.09.2001. Lease holders filed writ petition which was dismissed vide judgment dated 07.12.2001, **Shakira Khatoon Kazmi vs. State of U.P., AIR 2002 All 101.** Lease holders challenged judgment dated 07.12.2001 in Supreme Court to the extent they failed. State Government filed appeal against part of order of this Court wherein an observation was made that State Government is not entitled to take forcible possession though it may take possession of demised premises in accordance with procedure established by law. After considering Clause 3(c) of lease deed which provides for resumption of land for public purpose after giving a month's clear notice to lessee to remove any building standing at the time on demised premises and within two months of receipt of notice, to take possession thereof on expiry of that period and Sections 2 and 3 of GG Act, 1895, Court said that Clause 3(c) of lease deed confers power upon State Government that plot in question, if required by Government for its own purpose or for any public purpose, it shall have the right to give one month's notice in writing to lessees to remove any building standing on the plot and to take possession thereof on expiry of two months from the date of service of notice. Court said that land, if required for any public purpose, State Government has absolute power to resume leased property. Under the terms of Grant, it is absolute, therefore, order of resumption is perfectly valid and cannot be said to be illegal. It also refers to an earlier instance where Nazul Plot No. 13, Civil Station, Allahabad situate in Civil Lines area was resumed by State Government for the purpose of construction of a 'Bus Stand' by exercising similar power, without initiating any proceeding under Land Acquisition Act, 1894 (hereinafter referred to as "L.A. Act, 1894"). Resumption in that case was challenged in **Writ Petition No. 44517 of 1998, Sayed Shah Khursheed Ahmad Kashmi vs. State of U.P.** and said writ petition was **dismissed on 16.12.1999** by a Division Bench of this Court, whereagainst Special Leave Petition No. 4329 of 2000 was dismissed by Supreme Court on 07.09.2001. First question, therefore, was answered in negative and in favour of Government.

68. With respect to procedure for taking possession, Supreme Court, while considering Question-2, said that in absence of any specific law, State Government may take possession by filing a suit. When a land is acquired under L.A. Act, 1894, Government can take possession in accordance with provisions of said Act and in case of urgency, Collector can take possession after publication of notice under Section 9 and no separate procedure is required to

be followed. Court said that similarly where a lease has been granted under the terms of GG Act, 1895, then what procedure has to be followed is provided by Section 3 of GG Act, 1895 which says that all provisions, restrictions, conditions and limitations contained in any such creation, conferment or Grant referred to in Section 2, shall be valid and take effect according to their tenor; any decree or direction of a Court of Law or any rule of law, statute or enactments of the Legislature, to the contrary, notwithstanding. Court relied on its earlier judgment in **State of U.P. vs. Zahoor Ahmad, 1973(2) SCC 547** holding that Section 3 of GG Act, 1895 declares unfettered discretion of Government to impose such conditions and limitation as it thinks fit, no matter what the general law of land be. Then Court construing Clause 3(C) of lease deed said that it provides procedure for taking possession of demised premises when State Government re-enter or resume possession of demised land. Court in para 30 and 32 of judgment said:

"30. In the case of ***The State of U.P. vs. Zahoor Ahmad and Another, 1973(2) SCC 547,*** *this Court held that the Section 3 of the Act declares the unfettered discretion of the Government to impose such conditions and limitation as it thinks fit, no matter what the general law of land be. From Clause 3(C) of the deed, it is clear that the* ***State of U.P. while granting lease made it clear that if the demised premises are at any time required by the lessor for his or for any public purpose, he shall have the right to give one month's clear notice to the lessee to remove any building standing at the time of the demised property and within two months' of the receipt of the notice to take possession thereof on the expiry of that period*** *subject to the condition that the lessor is willing to purchase the property on the demised premises, the lessee shall be paid for such amount as may be determined by the Secretary to the Government of U.P. in the Nagar Awas Department."*

"32. Under Clause 3(C) of the lease deed, the respondent-State was permitted resumption of the land which required for its own use or for public purpose and after giving one month's clear notice in writing is entitled to remove any building standing at the time on the demised premises and within two months of the receipt of the notice to take possession thereof subject to the condition that if the lessor is willing to purchase the building of the demised premises required to pay the lessee the amount for such building as may be determined by the Secretary to Government of U.P. in the Nagar Awas Department...."

(Emphasis added)

69. Having said so, Court said, *"we are of the view that there is no other procedure or law required to be followed,* ***as a special procedure for resumption of land has been laid down under the lease deed".*** Supreme Court then set aside direction of this Court that State will not take possession forcibly except in accordance with procedure established by any other law, holding that since special procedure for resumption is prescribed under lease deed, no direction otherwise could have been issued to State Government.

70. The above discussion makes it clear that 'Nazul' is a land owned and vested in State. It is such land which has vested in State by virtue of its 'Sovereignty'

and incidence of 'Sovereignty' i.e. annexation, lapse and bona vacantia. Further, 'Grant' means transfer of property by a deed in writing and includes within its ambit, an instrument of lease/lease deed. Such 'Grant' is governed by provision of GG Act, 1895, which were applicable to 'Grants' executed on and after enforcement of GG Act, 1895. Rights and entitlement of private parties in respect of land, which was transferred under such 'Grant' would be governed by terms and conditions contained in such 'Grant' and not by provisions of TP Act, 1882 or any other Statute. The terms and conditions of 'Grant' shall override any statute providing otherwise. Moreover, in State of U.P., wherever applicable, U.P. Tenancy Act, 1939 and Agra Tenancy Act, 1926 will also be inapplicable to such 'Grant'.

71. Above discussion, therefore, leaves no manner of doubt that Grant/Lease of Nazul land shall be exclusively governed by stipulations/conditions/terms contained in Grant/Indenture of Lease and no Statute can be resorted to govern rights of parties over Nazul land, which will be governed by aforesaid Grant/Indenture of Lease.

72. The **third question** is, "Whether Lessee can transfer Nazul land itself to anyone or transfer, if any made, will result only transfer of lease rights or land itself, and, if transfer is not made in accordance with conditions of Indenture of Lease/Grant, what will be its effect and whether it will confer any valid right or interest in respect of Nazul land, subjected to transfer, upon such Transferree?"

73. We have reproduced contents of lease deed constituting terms and conditions to govern land in dispute. In almost every aspect, some restrictions on exercise of lease rights over Nazul land were imposed by Grantor/Lessor i.e. State and some of such instances are :

(i) Without permission, no erection etc. of building etc., except what was already existing and raised in accordance with map made part of lease deed dated 18.06.1937.

(ii) Without permission, no growing of any crop or keeping of horses, cattle or other animals for hire or profit was allowed.

(iii) Without permission, no construction of any thatched or covered with grass reeds or other inflammable material etc., was permissible.

(iv) At the end of tenure of lease or termination at will or determination, Lessee would peacefully and quietly leave, surrender and yield to the Lessor, the land together with all such erection etc., as were existing, if so desired by Lessor for taking over such erection etc. for valuation, but if it is not desired of taking such erection etc., then the same shall be removed by Lessee within such time, as directed by Lessor.

(v) No compensation was claimable by Lessee or his assign etc. for any building etc. in case lease is determined by re-entry for forfeiture and building etc. shall absolutely rest in Lessor as his own property.

(vi) Lessee or his agents shall not assign or underlet or otherwise part with the possession of the premises or any part thereof without permission of Secretary of State or his authorized person.

(vii) Any transfer without prior permission will cause lease-deed cease and determine but without prejudice however to the right of action of Lessor in

respect or on account of any previous breach of any covenant or covenants.

(viii) If Government, at any time require to re-enter on site, it can do so, on paying value of all buildings that may be on the site, plus 10 per cent for recompense for resumption of lease and Lessee shall have no further claim of any sort against the Lessor. If building is not required by Lessor, it has to be removed by Lessor

74. Above conditions show that any transfer by Lessee in any manner without prior permission of Lessor i.e. Government or its Authorized Agent will result in determination of lease without any further notice. Meaning thereby, transfer of lease was clearly prohibited under terms of lease unless permission of Government has already been obtained.

75. Herein, it is not stated anywhere that on 11.12.1945, when sale deed was executed by Marry Augustum Woolston in favour of Sri K.S.Gandhi and his wife Smt. Tahmenna, any such permission was obtained from Government or his Authorized Authority namely Collector, Allahabad.

76. What is effect of such transfer has been considered in **State of U.P. and others vs. United Bank of India and others (2016) 2 SCC 757.** Court has held that any transfer without sanction of Lessor will be invalid and would not confer any valid right upon Transferee. In paras 39 and 40 of judgment, Court said :

"39. This "within written lease" is the original lease deed as mentioned in the Form 2 of the Nazul Manual. Form 2 of lease of Nazul land for building purposes it is one of the condition between the lessor and the lessee that " the ***lessee will not in any way transfer or sublet the demised premises or buildings erected thereon without the previous sanction in writing of the lessor".***

40. In the present case ***there was nothing on the record to show that the lessee i.e. (ABP) has obtained any written sanction from the lessor i.e. Government before mortgaging his leasehold interest in the Nazul Land. Meaning thereby the mortgage done by the lessee in favour of the Bank itself is bad in law, which was done in clear violation of the terms of the lease deed i.e. mortgage of the Nazul land without previous sanction in writing of the State."*** (Emphasis added)

77. Further, Lessee i.e. Marry Augustum Woolston did not have any title or ownership over land in dispute. She had only lease rights over disputed land, therefore, she could have transferred only lease rights to Sri K.S.Gandhi and his wife Smt. Tahmenna and nothing more than that. Here, we remind ourselves with the principle that a person can transfer only such rights and interest which he or she possesses and not beyond that. If a Sub-Grantor did not possess any right of transfer or such right is subject to any restriction like prior permission of owner etc., it means that Grantee himself has no right of transfer and/or his right is restricted in a particular manner and such restriction is to be observed in words and spirit to validate such transfer, else transfer being illegal, will not result in bestowing any legal right upon Transferee. In other words, any otherwise transfer by Sub-Grantor of land subjected to Grant, will not confer any valid right or interest upon the person to whom Grantor had transferred property under 'Grant' in

violation of stipulations contained in Grant.

78. In **Delhi Development Authority Vs. Anant Raj Agencies Pvt. Ltd. (2016) 11 SCC 406** Court said :

"It is well settled position of law that the person having no right, title or interest in the property cannot transfer the same by way of sale deed."

79. Further, such invalid transfer can also be construed as breach of terms of Grant and would empower and enable Principal Grantor i.e. State, owner of property, to take such steps including resumption/re-entry upon the property under Grant, to itself, besides claiming damages, compensation, as the case may be, as law permits.

80. Therefore, firstly transfer of land in dispute to Sri K.S.Gandhi and Smt. Tahmenna vide sale deed dated 11.12.1945 had no legal consequence of transferring any title or other right or interest to said Transferree since aforesaid sale deed was clearly in breach of terms and conditions of lease deed. Secondly, it could have resulted in transfer of only lease rights, and that too, for remaining period of lease and not beyond that. Thus, whatever right, even if, could have been transferred by Marry Augustum Woolston to K.S.Gandhi and Smt. Tahmenna, that ceased on 31.03.1962 when term of lease expired. Thereafter transferrees had no valid right or interest over property in dispute.

81. When Sri Gandhi and his wife themselves had no valid right, question of transferring any right or interest through Will dated 09.10.1972 to petitioner also does not arise. It was not open to Sri K.S.Gandhi to execute 'Will' in respect of disputed land, which was owned by State Government as Sri K.S.Gandhi had no right or interest over property in dispute in 1972 to bequeath to anyone. Will dated 09.10.1972, insofar as disputed land is concerned, is nothing but a sheer waste paper and a nullity in the eyes of law resulting in transfer of no legal right or interest to petitioner Parsi Panchayat, Surat in respect of land in dispute.

82. Though, it is said that Sri K.S.Gandhi applied for renewal of lease before his death on 31.01.1978, but, no copy of such application has been placed on record. There is nothing on record to show that any such application was submitted by Sri K.S.Gandhi. On the contrary, impugned order shows that an application for renewal of lease was submitted by Sri D.F.Gandhi on 29.6.1981 claiming himself to be Executor of 'Will' and representative of petitioner, Parsi Panchyat, Surat. Sri D.F.Gandhi has no right or interest in respect of land in dispute in any manner. He was a stranger, a rank trespasser. His application therefore, was rightly rejected by Collector, Allahabad vide order dated 13.7.1998.

83. It is also on record that aforesaid order was challenged in Writ Petition No.34324 of 1998 which ultimately stood dismissed as infructuous on a statement made by counsel for petitioner. The fact remains that order dated 13.7.1998 remained intact and has not been set aside, nullified or made inoperative by any competent authority or Court till date. It therefore maintain all its legal consequences rendering petitioner a stranger having no right or interest, whatsoever in disputed land.

84. It is then contended that renewal was wrongly denied though in the light of

law laid down in **Purshottam Dass Tandon and others vs, State of U.P. And others (supra)** renewal of lease ought to have been granted.

85. We have already said that neither petitioner nor Sri D.F.Gandhi had any right whatsoever, legal or otherwise, to seek renewal of lease in respect of land in dispute. We have also examined judgment in detail rendered by this Court in **Purshottam Dass Tandon and others vs, State of U.P. And others (supra)** which has become final after dismissal of appeal by Supreme Court and find that the same has no application in respect of land in dispute as also qua petitioner and Sri D.F.Gandhi.

86. In **Purshottam Dass Tandon and others vs, State of U.P. And others, (supra)** question of renewal of lease came up for consideration in the light of Government Orders dated 23.4.1959, 02.07.1960 and 03.12.1965. Therein historical backdrop of various Government Orders dealing with policy of renewal of lease has been given in detail. The first G.O. was issued in March, 1958 whereby Chief Minister directed that case for renewal of leases may be taken individually and possession may be taken only if lessee surrender or lease stood terminated in absence of any request from lessee for grant of fresh lease. Thereafter, on 23.04.1959, a G.O. was issued to grant fresh lease in cases where lease has already expired but has not been renewed so far, or which is likely to expire within the next 5 or 6 years, on the terms and conditions given in the said G.O. The proposed premium in the said G.O. was objected by Lease Holders, whose leases were already expired or likely to expire. Several representations were sent to Government. Some house-owners met the then Prime Minister Late Pt. Jawahar Lal Nehru, who had visited Allahabad in November or December, 1959. It resulted in issue of G.O. dated 07.07.1960 whereby rate of premium on first three acres was reduced to Rs.2,000/- in each slab. It also permitted payment of premium in five instalments and reduced ground rent to Rs.100/- per acre. In the earlier G.O., there was an insistence on construction of Community latrines till sewer lines were laid but this insistence was given up in G.O. dated 07.07.1960. Lessees were granted further three months' time to get leases renewed. Still lease-holders did not comply and made representations to Government. On 21.03.1963, again a G.O. was issued declaring rates of premium for commercial sites. On 3.12.1965 a G.O. was issued indicating terms and conditions for renewal of leases for commercial and residential purposes and it was said that rates of premium and annual rent shall be as fixed by G.O. dated 07.07.1960. Payment in five equal yearly instalments was continued but in special cases, Commissioner, Allahabad Division, Allahabad, was authorized to make recommendations to Government for enhancing number of instalments. This G.O. further insisted for renewal of existing leases on payment of at least one instalment, within one month of receipt of intimation by Lessee from Collector, or within three months of the date of expiry of lease, whichever is earlier. Deposit was to be deemed to be proper step on the part of Lessee to get a fresh lease executed by the Lessor. The G.O. of 1965 itself made a distinction between those whose leases had expired and others by describing them as sitting and existing lessees.

87. There was a second phase which covered period from 1966 to 1981. On 16.02.1966, U.P. Awas Vikas Parishad Adhiniyam, 1965 *(hereinafter referred to as "U.P.Act, 1965")* was enacted for providing housing sites and construction

of building. G.O. dated 03.12.1965, thus was modified by G.O. dated 04.11.1968, and it was directed that leases of joint lessees should be renewed as far as possible for one acre only. Sub-division was permitted only where sub-divided plot was not less than 800 sq. yards. Concession in payment of lease money and ground rent was allowed on same terms and conditions as it was in G.O. dated 03.12.1965 but time was extended for payment of first instalment for those who had not received any intimation from Collector by a further period of one month from the date of intimation by Collector. Clause (c) of G.O. dated 04.11.1968 categorically said, where steps have been taken for renewal of leases, as stated in earlier G.Os., fresh leases shall be sanctioned according to terms offered by Competent Authority.

88. In March, 1970, a G.O. was issued banning grant of renewal of leases all over the State, since Government was contemplating to bring out legislation on Urban Ceiling. This ban was lifted on 12.01.1972 but leases henceforth were to be sanctioned by State Government only. Commissioner and Collector could make recommendations only. Aforesaid G.O., however, provided that in all those cases where Government had sanctioned grant of leases but it could not be executed or registered because of ban imposed in 1970, steps may be taken immediately for execution. Clause (ii) of G.O. provided that all those cases in which Collector or Commissioner had approved renewal but it could not be executed because of 1970 order, should be sent to Government immediately for acceptance. On 09.05.1972 Urban Building Ceiling Bill was introduced and on 11.07.1972 Uttar Pradesh Ceiling of Property (Temporary Restriction on Transfer), Ordinance, 1972 was promulgated in pursuance of Article 398 of Constitution of India. The Ordinance continued till it was replaced by Urban Land (Ceiling and Regulation) Act, 1976 *(hereinafter referred to as "Act, 1976")*. The said Act was enacted to prevent concentration of Urban Property and discourage construction of luxurious houses. On 19.12.1972, provisions pertaining to Nazul were amended providing for maximum area permissible for renewal of leases of 2000 sq. yards plus land on which building was constructed. Remaining area was to be surrendered to Housing Board and Lessees were prohibited from sub-dividing or transferring any land. On 10.12.1976, Government issued an order superseding all previous orders in respect of renewal of leases of Civil Lines, Allahabad in view of Act, 1976 and laid down fresh terms and conditions for renewal of leases.

89. Here leases were to be renewed in the light of Sections 2 and 4 of U.P. Act, 1976 and while doing so, all residents in one house were to be treated as one unit. This again resulted in representations of Lease-Holders to Government requesting for reduction in rate of premium and ground rent. A G.O. was issued on 17.09.1979 superseding all previous orders and it provided for submission of details about extent and type of construction, utilisation of vacant land etc. Again representations were made, which culminated in G.O. dated 19.04.1981, which superseded all previous Orders and provided for renewal of leases on fresh and new terms. It said that Leaseholders and their heirs shall be treated as one Unit. They were supposed to file details about land, constructed area,

its user, time when it was taken on lease etc. before 30.06.1981. List of residents including out-houses dwellers was to be prepared by District Magistrate. Heirs of deceased lease-holders were to be treated as one unit. Area for which renewal could be made was reduced to building with 500 sq. metre of land appurtenant and 500 sq. metre open land or 1500 sq. metre whichever was more. Area of building for commercial purpose was fixed at 2000 sq. metres. Premium was fixed at 50 paisa per sq. metre. Thus, from 1976 onwards for the purpose of renewal, area was reduced from acre to square metre and unit for premium and ground rent became square feet instead of acre. All heirs of Lessees became one unit for renewal. Land covered by outhouses were to be excluded. Lessees could not even opt for it.

90. When we consider the claim of petitioner in reference to above G.Os., nothing is on record to show that petitioner ever applied and sought renewal or fresh lease either before actual expiry of lease term or immediately thereafter, in terms of G.Os. hence petitioner cannot claim any benefit under the above mentioned G.Os. In fact, neither K.S. Gandhi nor D.F. Gandhi nor petitioner was eligible or entitled to seek renewal of lease since they were neither valid lessee nor legal heirs of valid lessee. They were unauthorized trespassers having no valid claim over disputed Land and above G.Os. were inapplicable to them.

91. Lease Holders, whose lease had already expired or those who were sitting Lease Holders and leases were going to expire in a short period, came to this Court in various writ petitions. This entire bunch was decided in **Purushottam Dass Tandon and others vs. State of U.P., Lucknow and others (supra).**

92. There were two categories of writ petitioners as under :

(i) Those, to whom notices were given by Collector and who had complied with terms and conditions as laid down in various orders issued from time to time prior to 1965; and

(ii) Those, to whom no notice was sent and till matter filed before the Court, no steps were taken and no order was passed in their favour.

93. Court held :

(I) A Lessor may, after expiry of period for which lease is granted, renew the same or resume i.e. re-enter. But if out of the two i.e. re-entry or resumption, the two divergent courses, he chooses to grant fresh lease or at least creates that impression by his conduct spread over long time, it results in abandonment.

(II) If the land is needed or building has to be demolished in public interest for general welfare, probably no exception can be taken as the interest of individual has to be sacrificed for the society. But asking Lessee to vacate land or remove Malba for no rhyme or reason but because State is the owner, cannot be accepted to be in consonance with present day philosophy and thinking about role of State.

(III) After Act, 1976, no person can successfully or validly claim to hold land, more than the Ceiling limit.

(IV) Some part of G.O. of 1981 was not consistent with Act, 1976. The rules contained in Nazul Manual are set of Administrative Orders or collections of guidelines issued by Government for the

authorities to deal with Government property.

(V) When a G.O. was issued and its conditions are complied with, mere for bureaucratic delay, performance under the said G.O. cannot be denied. Therefore, Lessee, who had deposited first instalment, as directed in G.O. of 1965, were entitled for renewal of their lease.

(VI) After enactment of ceiling law, a Lessee cannot hold land more than the provided limit.

(VII) If leases were renewed in respect of those, who had acquired social or political status, whose names are given in para 15 of judgment, which includes, Dr. K. N. Katju, ex-Central Law Minister, Chief Minister and Governor, Dr. S. K. Verma, ex-Chief Justice and Governor, Sri B.L. Gupta, ex-Judge High Court, J. D. Shukla, I.C.S., O. N. Misra, I.A.S., when there was no justification not to give same benefit to others. Similar benefits must be given since most of them were also distinguished persons namely S.N. Kacker, ex-Central Law Minister, Solicitor General of India and Advocate General of the State, Sri S. S. Dhavan, ex-Judge, High Court and Governor and High Commissioner, Sri Lal Ratnakar Singh I.A.S. Ex-Member of Board of Revenue, M.L.Chaturvedi, ex-Judge, High Court and member of Union Public Service Commission, W. Broome, I.C.S. etc.

94. Aforesaid judgment was confirmed by Supreme Court by dismissing appeals preferred by State of U.P. and others i.e. **State of U.P. and others vs. Purshottam Das Tandon and others 1989 Supp.(2) SCC 412.** Supreme Court clarified that renewal of leases shall be subject to the provisions of U.P.Act, 1976 and High Court judgment shall apply to all the leases to whom G.O. dated 23.04.1959, 02.07.1960 and 03.12.1965 were applicable and all those claiming under them. The order of Supreme Court reads as under :

"We have heard the learned counsel for both the parties at length. We do not find any infirmity in the judgment and order passed by the High Court against which these special leave petitions are preferred. We, however, make it clear that the leases that are going to be granted pursuant to the writ issued by the High Court will be subject to the provisions of the Urban Land (Ceiling and Regulation) Act, 1976. On the leases being granted, the Competent Authority under the Act shall be at liberty to apply the provisions of the Act and in particular section 15 thereof to all the leases and take away all the surplus lands in their hands after determining the surplus lands in accordance with law. ***The directions issued by the High Court can be availed of by all the lessees to whom the G.O. dated 23rd April, 1959, 2nd July, 1960 and 3rd December, 1965 were applicable and all those claiming under them.***

All the Special Leave Petitions are dismissed accordingly with these observations. If any further directions are needed, the persons interested may approach the High Court."

(Emphasis added)

95. Aforesaid judgment has no application to the case of petitioner at all since neither petitioner comes within the category of eligible person to apply for renewal of lease under Government Orders which were considered in **Purushottam Dass Tandon and others**

vs. State of U.P., Lucknow and others (supra) nor even otherwise petitioner has shown any provision, whether statutory or executive, including G.Os., which may confer entitlement upon petitioner to seek renewal of lease at all.

96. We therefore, find that transfer made by original Lessee Marry Augustum Woolston was wholly illegal, contrary to terms of lease deed and therefore, it did not confer any right or interest in property in dispute upon transferree Sri K.S.Gandhi and his wife Smt. Tahmenna and further transfer through Will by Sri K.S.Gandhi is also equally bad, illegal and, in fact, a nullity in the eyes of law so far as land in dispute is concerned. This denies any valid status to D.F. Gandhi and petitioner. We, therefore, answer Question-3 against petitioner.

97. The **forth question** is "whether petitioner or anyone else is/was entitled to ask for conversion to freehold of land in dispute in terms of policy of State Government for conversion of lease land into freehold and obstruct right of re-entry exercised by Lessor.?"

98. Though in the light of our answer to third question, we can straight-away hold that petitioner has no such right whatsoever but to further satisfy ourselves, we proceed to examine relevant G.Os. dealing with issue of conversion of lease land into freehold to find out whether there is any justification or legality in the claim of petitioner.

99. The first G.O. issued by State Government in order to execute its policy of conversion of lease land into freehold was issued on 23.5.1992. The aforesaid G.O. was applicable to permanent leases given for **'residential purposes'** and **'current leases'**, given for **residential purposes.** Para 1 of aforesaid G.O. reads as under :

''मुझे यह कहने का निर्देश हुआ है कि सम्यक विचारोपरान्त शासन द्वारा नजूल भूमि के प्रबन्ध एवं निस्तारण आदि की वर्तमान व्यवस्था में परिवर्तन करते हुए ***शाश्वत एवं चालू पट्टों के अन्तर्गत उपलब्ध नजूल भूमि का*** *स्वैच्छिक आधार पर फ्री–होल्ड घोषित करने एवं शेष रिक्त नजूल भूमि का निस्तारण इस शासनादेश में निर्धारित प्रक्रिया के अनुसार करने का निर्णय लिया गया है। तद्नुसार नजूल भूमि के प्रबन्ध एवं निस्तारण आदि के सम्बन्ध में निम्नलिखित व्यवस्था तात्कालिक रूप से लागू होगी।''*

"I am directed to say that after due consideration the government has while changing the extant policy of management and disposal of the Nazul land, decided to declare ***Nazul land available under the perpetual and current leases*** *to be freehold on voluntary basis and to dispose remaining vacant Nazul land as per procedure prescribed in this Government Order. Accordingly, in respect of the management and disposal, etc. of the Nazul land, the following policy shall come into force with immediate effect."*

(English Translation by Court)
(Emphasis added)

100. Those, who are governed by aforesaid G.O., were directed to submit their option for freehold within one year from the date of issue of G.O. and only they would be entitled for benefit under the said G.O. It also restrained any transfer of property if under lease deed, no transfer was permissible without permission. It also directed that where unauthorized possession is found, action for eviction shall be taken in accordance with law. Paras 7 and 8 of said G.O. read as under :

''(7) जिन पट्टों मे यह शर्त है कि पट्टाधिकारी बिना पट्टादाता की अनुमति के पट्टागत भूमि का हस्तान्तरण कर सकता है, वहॉ पट्टे की शर्त

के विपरीत कोई हस्तक्षेप नही किया जाएगा, *किन्तु जहॉ बिना पट्टादाता की अनुमति के पट्टेदार द्वारा भूमि हस्तान्तरण करने का निषेध है वहॉ इस शासनादेश के लागू होने की तिथि से किसी भी प्रकार के हस्तान्तरण पर एक वर्ष तक के लिए रोक लगा दी जाएगी। यह योजना शासनादेश जारी होने की तिथि से लागू होगी।*

(8) इस बात का व्यापक प्रचार किया जाएगा कि उपरोक्त नीति अनधिकृत कब्जो के मामलों में लागू नहीं होगी और ***अनधिकृत कब्जों के मामलों में विधिक प्रक्रिया के अनुसार बेदखली आदि की कार्यवाही की जाएगी।"***

"(7) ***In leases where leaseholder can transfer lease land without permission of the lessor, in such a case no interference shall be made contrary to the terms and conditions of the lease.*** *But where transfer of land without permission of the lessor is prohibited, any transfer of land shall be stopped for a year from the date of enforcement of this Government Order. This policy shall come into force from the date of issue of the Government Order.*

(8) It shall be widely circulated that the aforesaid policy shall not be applicable to the cases related to unauthorized possessions ***and eviction proceedings, etc. in relation to the unauthorized possessions shall be held in accordance with the legal procedure."***

(English Transaction by Court)

(Emphasis added)

101. The second G.O. was issued on 02.12.1992 dividing Lease-Holders in two categories. One, who had not violated conditions of lease, and, another, who had violated conditions of lease. Those, who had not violated conditions, were required to pay for conversion to freehold an amount equal to 50 percent of Circle Rate for residential purpose while those who had violated conditions of lease, were to pay 100 percent. Same was in respect of Group Housing and Commercial use with the difference of amount to be paid for freehold. Para 4 thereof also provided that such current leases where 90 years period had expired, if Lease-holder had not violated any conditions of lease and wants freehold, that can be allowed as per aforesaid G.O.. However, if he wants fresh lease, that can also be allowed for 30 years on payment of 20 percent of Circle rate as premium and 1/60th part of premium towards annual rent. Clause 4 of aforesaid G.O. reads as under :

"4. ***ऐसे चालू पट्टे जिनके 90 वर्ष की सम्पूर्ण अवधि समाप्त हो गई है*** *यदि कोई पूर्व पट्टाधारक* ***जिन्होंने पट्टे की शर्तों का उल्लंघन नहीं किया है,*** *भूमि फ्री–होल्ड कराना चाहता है तो ऐसी दशा में निर्धारित दरों के अनुसार फ्री–होल्ड कर दिया जाएगा। यदि वह फ्री–होल्ड नही कराना चाहते है बल्कि नया पट्टा लेना चाहते है तो ऐसी दशा में 30 वर्ष के लिए एक नया पट्टा वर्तमान शर्तों के आधार पर दिया जा सकता है जिसके लिए प्रीमियम की धनराशि प्रचलित सर्किल रेट की निर्धारित दर की 20 प्रतिशत होगी और वार्षिक किराया, प्रीमियम का 1/60वां भाग प्रतिवर्ष के हिसाब से भी लिया जाएगा।"*

"4 . ***In case of those current leases whose entire lease period of 90 years has expired,*** *if any previous leaseholder* ***who has not violated lease conditions,*** *wants to get the land converted into freehold, in such a circumstance it shall be converted into freehold against the payment of the prescribed rates. If he does not want to convert it into freehold and wants to get a new lease, in such a circumstance a new lease may be awarded for 30 years under the extant terms and conditions, for which premium amount @ 20 percent of the existing circle rates and annual rent @ 1/60 of the premium shall be paid."*

(English Translation by Court)

(Emphasis added)

102. The third is G.O. dated 03.10.1994, making amendment in earlier

two G.Os. Relevant aspect is that vide para 2, provision made for execution of 30 years lease, where 90 years period had expired, was deleted. Para 2 of G.O. dated 03.10.1994 reads as under :

''2. शासनादेश संख्या 3632/9–आ–4–92–293–एन/90, 2–12–1992 में ऐसे चालू पट्टे जिनके 90 वर्ष की सम्पूर्ण अवधि समाप्त हो चुकी है तथा पूर्व पट्टाधारक द्वारा पट्टे की शर्तों का उल्लंघन नहीं किया गया है, के सम्बन्ध में 30 वर्षीय पट्टा स्वीकृत किये जाने की व्यवस्था की गई थी। ***इस व्यवस्था को तात्कालिक प्रभाव से समाप्त किया जाता है। अब ऐसे मामले में नया पट्टा स्वीकृत नहीं किया जाएगा बल्कि ऐसे मामले में जिनमें पट्टे की सम्पूर्ण अवधि समाप्त हो चुकी है उसको उपरोक्त निर्धारित दरों पर पूर्व पट्टेदार के पक्ष में फ्री–होल्ड में परिवर्तित करने की कार्यवाही की जाएगी।''***

"2. A provision had been made in Government Order No. 3632/9-Aa-4-92-293-N/90, dated 02.12.1992 for grant of lease for 30 years for the current leases; where 90 years' tenure has expired and the terms and conditions of the lease have not been violated by the former lease holder. ***This provision is annulled with immediate effect. Now in such cases, no new lease shall be granted; rather, in cases where entire period of lease has expired, proceedings shall be taken for converting such leases into freehold in favour of the former lease holders at the aforesaid prescribed rates."***

(English Translation by Court)
(Emphasis added)

103. Para 8 of aforesaid G.O. further provides that policy for freehold will be effective only upto 31.03.1995.

104. Considering that some very poor persons were also in occupation of 'Nazul land' and their eviction may result in serious problem of accommodation to such persons, another G.O. dated 01.01.1996 was issued making amendments in earlier three G.Os. stating that those persons whose monthly income is Rs.1,250/- or less, and in unauthorized possession of vacant Nazul land upto 01.01.1992 or prior thereto for residential purposes, they shall be allowed freehold on payment of 25 percent premium and Rs.60/- annual rent for the area upto 45 Sq. Meter and for more than 45 Sq.Meter but upto 100 Sq.Meter, 40 percent and Rs.120 annual rent. It clearly says that no regularization of unauthorized possession shall be made beyond 100 Sq.Meter and amount of premium shall be allowed to be paid in 10 years' interest free 6 monthly installments. Such unauthorized possession shall be regularized by approving 30 years' lease. Clauses 1, 2, 3 and 4 of aforesaid G.O. read as under :

''(1) किसी भी दशा में ***100 वर्ग मीटर से अधिक क्षेत्रफल पर किये गये अवैध कब्जों का विनियमितीकरण नहीं किया जायेगा*** *तथा दिनांक 30.11.1991 की सर्किल रेट पर आंकलित सम्पूर्ण मूल्य पर निर्धारित यथास्थिति 25: या 40: नजराने की धनराशि 10 वर्षीय ब्याज रहित छमाही किस्तों में लिया जायेगा, परन्तु यदि कोई व्यक्ति सम्पूर्ण धनराशि या बकाया किस्तों की धनराशि एकमुश्त जमा करना चाहता है तो वह देय धनराशि जमा कर सकता है।*

(2) उपरोक्त प्रकार के मामले में विनियमितीकरण की कार्यवाही 30 वर्षीय पट्टा स्वीकृत करके की जायेगी। स्वीकृत पट्टे में 30–30 वर्षीय दो नवीनीकरण के प्राविधान सहित सम्पूर्ण पट्टे की कुल अवधि दो नवीनीकरण के प्राविधान सहित सम्पूर्ण पट्टे की कुल अवधि अधिकतम 90 वर्ष की होगी। ***जिसमें यह शर्त होगी कि सम्बन्धित व्यक्ति भूमि का पट्टाधिकार 30 वर्ष तक किसी व्यक्ति को हस्तानान्तरित नहीं कर सकता है पट्टा शासन द्वारा निर्धारित प्रारूप पर जारी किया जायेगा।***

(3) ***अनाधिकृत कब्जों के विनियमितीकरण की समस्त कार्यवाही जिलाधिकारी, की अध्यक्षता में गठित समिति की संस्तुति पर जिलाधिकारी द्वारा की जायेगी।*** *लखनऊ एवं देहरादून में समस्त कार्यवाही उपाध्यक्ष, विकास प्राधिकरण की अध्यक्षता में गठित समिति की संस्तुति पर उपाध्यक्ष द्वारा की जायेगी।*

(4) ***विनियमितीकरण हेतु परिवार को एक इकाई के रूप में माना जायेगा*** *तथा पट्टा परिवार के मुखिया के पक्ष में स्वीकृत किया जायेगा।''*

"(1) Under no circumstances, ***illegal possessions over an area measuring over 100 square metres shall be regularised*** *and an amount of earnest money, 25% or 40% as the case may be, on the entire amount calculated as per the circle rate as on 30.11.1991 shall be taken in half yearly interest free instalments over the period of 10 years. However, if any person wishes to deposit entire money or the amount of remaining instalments in lump sum, he/she may deposit the payable amount.*

(2) In the aforesaid type of cases, regularisation proceedings shall be done by granting a lease for a period of 30 years. The total period of the entire lease shall at most be 90 years with provision of two renewals, for 30 years each, in the lease so granted, subject to a restriction ***that the person concerned cannot transfer the lease rights to anybody until 30 years. The lease shall be issued on a format prescribed by the government.***

(3) ***All the proceedings of regularisation of unauthorised possessions shall be done by the District Magistrate on recommendation of a committee constituted under his/her chairmanship.*** *All the proceedings in Lucknow and Dehradun shall be done by the Vice Chairman, Development Authority, on recommendation of a committee constituted under his/her chairmanship.*

(4) ***For the purpose of regularisation, a family shall be deemed to be a unit*** *and lease shall be granted in the name of the head of the family."*

(English Translation by Court)

(Emphasis added)

105. Then vide G.O. dated 17.02.1996 again some amendments were made in respect of amount payable for freehold but earlier policy of categories of persons, who can claim freehold, was not changed. Vide G.O. dated 29.03.1996, period for giving benefit of freehold was extended from 01.4.1996 to 30.09.1996. G.O. dated 02.04.1996 only made some corrigendum in earlier G.O. dated 17.02.1996.

106. On 29.08.1996, G.O. was issued in furtherance of G.O. dated 17.02.1996 stating that under G.O. dated 17.02.1996, freehold rights to Nominees of Lease-Holders were allowed and in reference thereto, rates on which such Nominees shall be allowed freehold, were mentioned.

107. We find that G.O. dated 17.02.1996 nowhere permits conversion of Nazul land into freehold in favour of Nominees of Lessee. Thus we have no manner of doubt that G.O. dated 29.08.1996, insofar as it refers to G.O. dated 17.02.1996, above Nominees had erred in law and it is a clear misreading. If G.O. dated 17.02.1996 itself had not permitted freehold rights to Nominee(s) of Lessee, question of such rights to be determined by G.O. dated 29.08.1996 is non est of no legal consequence and inoperative.

108. Then vide G.O. dated 25.10.1996, implementation of freehold policy was extended upto 31.12.1996. G.O. dated 31.12.1996 was issued to clarify G.O. dated 17.02.1996 in respect of applicability of rate, where land use at the time of grant of lease was changed in Master plan.

109. G.O. dated 26.09.1997 made amendments in all earlier G.Os. in respect

of rates for Nazul land being used for hospital and other charitable purposes. It also clarifies as to which contravention of lease deed will be treated as violation to attract higher rate. It also provides in para 6(2) that Government has got right of re-entry due to violation of any conditions of lease and lease had already expired, and such Lease-Holder may be informed of Nazul policy and be given an opportunity to apply for freehold whereafter action for dispossession will be taken. The policy of conversion of freehold was extended upto 25.12.1997.

110. Then comes G.O. dated 01.12.1998. Thereunder only two categories were made i.e. residential and non-residential. Restriction was also imposed on certain Nazul land in respect whereto conversion of freehold was not to be allowed. Vide G.O. dated 10.12.2002, it was clarified that freehold conversion shall not be allowed to Nominee of Lessee or his legal heirs. G.O. dated 31.12.2002 relates to rates and clarification, hence, not relevant for the purpose of present case.

111. The application of petitioner for free hold was rejected vide order dated 01.09.2003 when above G.Os. including G.O. dated 10.12.2002 was holding the field. Petitioner is neither lessee nor legal heir of lessees. Petitioner is an unauthorised transferee of the land in dispute. It could not have been considered even nominee of lessee. Hence petitioner was not entitled for free hold and its application was rightly rejected.

112. Vide G.O. dated 04.08.2006, provision for regularization of Nazul land which was in unauthorized possession, was deleted. It is also said that in all the matters, where freehold document has not been registered, application shall be cancelled. Vide G.O. dated 15.02.2008 clarification was given in respect of G.O. dated 04.08.2006 and it was reiterated that in all those matters where freehold document has not been registered, application shall be rejected.

113. Vide G.O. dated 21.10.2008, Clause 3 of G.O. dated 10.10.2002, whereby provision for conversion of freehold to Nominee of Lessee or his legal heirs, ceased, was restored. It was also clarified that decision to convert freehold of Nazul land will apply only when such land is not found necessary for Government use.

114. G.O. dated 26.05.2009 made an amendment in para 2(6) of G.O. dated 21.10.2008 and substituted following paras therein :

*"**ऐसे नजूल भूमियां** जो भू–धारक या पट्टाधारक या उनके विधिक उत्तराधिकारी / **नामित की भूमि के साथ स्थित है तथा उनके लिए उपयोगी सिद्ध हो सकती हैं तथा किसी अन्य के उपयोग की सम्भावना नहीं प्रतीत होती है।** ऐसी भूमि का विनियमितीकरण भू–धारक या पट्टाधारक या उनके विधिक उत्तराधिकारी / नामित के पक्ष में वर्तमान सर्किल रेट शत प्रतिशत प्राप्त कर फ्री–होल्ड कर दिया जायेगा। **ऐसे मामलों में शासन की अनुमति आवश्यक होगी।"***

*"**Those nazul lands** which are lying adjacent to the land of land holder or lease holder or his legal successor/**his nominee, and which can be of utility to them and do not appear to have the potential of being used by any other person,** shall be regularised and converted into freehold in favour of the land holder or lease holder or his legal successor/nominee after receiving cent percent current circle rate. **In such***

matters, the permission of the government shall be necessary."

(English Translation by Court)
(Emphasis added)

115. Further time for conversion into freehold was extended upto 31.12.2009.

116. G.Os. dated 29.01.2010, 17.02.2011 and 01.8.2011 were issued with amendments of minor nature hence not discussed further.

117. Then comes G.O. dated 28.09.2011. It talks of policy of conversion of Nazul land into freehold, which was not listed at any point of time but has been occupied unauthorizedly and occupants have raised their construction, using land prior to 01.12.1998. However, land of public places, park, side-lanes of road and other Government use was excluded and maximum area for such freehold was confined to 300 Sq.Meter. The incumbents had to apply within three months whereafter they have to be evicted. With respect to 'Nominees of Lessees', para 5 of said G.O. reads as under :

"5. नामित व्यक्ति के पक्ष में नजूल भूमि को फ्रीहोल्ड किये जाने की व्यवस्था को समाप्त किया जाना– नजूल भूमि के पट्टेदार द्वारा ***नामित व्यक्ति के पक्ष में नजूल भूमि को फ्रीहोल्ड किये जाने की व्यवस्था सर्वप्रथम*** *शासनादेश संख्या : 1300/9–आ–4–96–629एन/95, टी.सी. दिनांक 29–8–1996 के प्रस्तर–1 (3) (4)* ***में की गयी थी*** *और शासनादेश संख्या 2873/9–आ–4–2002–152–एन/2002, टी.सी. दिनांक 10–12–2002 के प्रस्तर 3* ***द्वारा उक्त व्यवस्था समाप्त कर दी गयी*** *तथा शासनादेश संख्या : 1956/आठ–4–08–266एन/08, दिनांक* ***21–10–2008*** *के प्रस्तर– 2 (4) द्वारा उक्त व्यवस्था* ***पुनः बहाल कर दी गयी है।*** *इस व्यवस्था के सम्बन्ध में मा0 उच्च न्यायालय में विचाराधीन रिट याचिका (जनहित याचिका) संख्या : 35248/2010–जयसिंह बनाम उत्तर प्रदेश राज्य व अन्य में पारित अन्तरिम आदेश दिनांक 16–07–2010 में दिये गये निर्देशों के दृष्टिगत उपर्युक्त* ***शासनादेश*** *दिनांक 21–10–2008 का प्रस्तर 2 (4) जिसके द्वारा नामिनी के पक्ष में नजूल भूमि को फ्रीहोल्ड किये जाने की व्यवस्था बहाल की गयी है, को समाप्त करते हुए अब ऐसे व्यक्ति जिनके पक्ष में क्रय की जा रही सम्पत्ति (नजूल भूमि) को पट्टेदार द्वारा रजिस्टर्ड एग्रीमेंट टू सेल किया गया हो और पूर्ण स्टाम्प शुल्क अदा किया गया हो, उसी व्यक्ति के पक्ष में ही नजूल भूमि को फ्रीहोल्ड किया जायेगा।"*

"5. Cessation of the provision of converting the nazul land into freehold in favour of the nominee:- ***The provision of converting nazul land into freehold in favour of nominee by the lease holder of the land had first been provided in the para- 1 (3)(4)*** *of the Government Order No. 1300/9-Aa-4-96-629N/95, TC dated 29-08-1996; and by para 3 of the Government Order No. 2873/9-Aa-4-2002-152-N/2002, TC dated 10.12.2002,* ***the aforesaid provision was annulled;*** *and through para 2(4) of the Government Order No.1956/VIII-4-08-266N/08, dated 21.10.2008, the afore-said provision has been restored again. Pursuant to the instructions, with respect to this provision, given in the interim order dated 16.07.2010 passed by the Hon'ble High Court in Writ Petition (Public Interest Litigation) No. 35248/2010 titled as Jai Singh Vs State of Uttar Pradesh and others, which is pending,* ***the provision of para 2(4) made in the aforesaid Government Order dated 21.10.2008 through which converting nazul land into in favour of the nominee was restored, is being annulled; and the nazul land shall be converted into freehold in favour of the person with whom the lease holder has entered in registered agreement of sale and who has paid the whole stamp duty."***

(English Translation by Court)
(Emphasis added)

118. Aforesaid G.Os. thus clearly show that eligibility of Lessees of Nazul

land, as initially laid down in G.O. of 1992 underwent some changes but in respect of land, fount suitable or needed by Government, no freehold was permissible. With respect to violation of terms and conditions of lease etc., some relaxation was given.

119. Lastly there are two more G.Os. i.e. 04.03.2014 and 15.01.2015 wherein policy of freehold has been virtually given a relook and substantial amendments have been made in earlier policy.

120. We repeatedly inquired from learned counsel for petitioner as to which G.O. applies to the present case so as to entitle petitioner to claim conversion of lease rights of land in dispute into freehold, particularly when petitioner is virtually a rank-trespassor and is not covered by any of aforesaid G.Os., none could be shown to us.

121. Moreover, as we have already said, petitioner's application was rejected on 1.9.2003 as per G.Os. applicable till then and subsequent G.Os. have no application in this case.

122. It is then contended that in view of judgment dated 29.11.2010 passed in W.P. 4716 of 2004, Collector is bound to reconsider petitioner's application and hence it should be treated that his application for free hold is still pending.

123. Even this submission that application for freehold, if submitted and pending, whether would confer a vested right upon applicant, has already been settled by a Full Bench of this Court in **Anand Kumar Sharma vs. State of U.P. and others 2014(2) ADJ 742** wherein this Court has held that merely by making an application for grant of freehold right, applicant did not acquire a vested right. Para 42 of judgment reads as under :

"We after considering the relevant Government Orders on the subject and pronouncements of the Apex Court as noted above, are of the view that ***merely by making an application for grant of freehold right, petitioner did not acquire a vested right."***

(Emphasis added)

124. Therefore, above question is also answered against petitioner holding that petitioner had no right to resist claim of owner of land for re-entery/resumption of land asking petitioner to vacate the same.

125. The **fifth question** is, "whether mere possession of petitioner over land in dispute confers any right upon him to resist entry of owner of land and can it insist upon owner to follow any particular procedure before compelling petitioner to vacate land in dispute."

126. In this respect, it is contended that even if petitioner is a rank trespassor, the fact is that petitioner is in possession of land in dispute and, therefore, by application of force, petitioner cannot be evicted. Petitioner, at the best, is an unauthorized occupant in terms of U.P. Act, 1972 and therefore, atleast procedure prescribed in the said Act has to be followed. Further continued possession of petitioner over land in dispute entitles petitioner a notice under Section 106 read with Section 116 TP Act, 1882, since principle of 'holding over' will apply and in any case, State can evict petitioner by filing a suit for eviction, which is a

remedy available in common law. In this regard, reliance is placed on certain authorities namely **Bishan Das and others Vs. State of Punjab and others AIR 1961 SC 1570, Express Newspapers Pvt. Ltd. and others Vs. Union of India (1986) 1 SCC 133, Yar Mohammad and another vs. Lakshmi Das and others AIR 1959 Allahabad 1 and Lallu Yeshwant Singh (dead) by his legal representative vs. Rao Jagdish Singh and others, AIR 1968 SC 620.**

127. It is also contended that terms of lease read with GG Act, 1895 cannot be resorted to by respondents since GG Act, 1895 has already been repealed by Repealing and Amending (Second) Act, 2017 *(hereinafter referred to as "Repeal Act, 2017)* and therefore, provisions of GG Act, 1895 are not available to respondents to dispossess petitioner and cannot be resorted to.

128. With regard to applicability of TP Act, 1882 we have already discussed the matter in the light of GG Act, 1895. Law laid down in **Azim Ahmad Kazmi and others vs. State of U.P. and Another (2012) 7 SCC 278** is very clear and holds the field. At the pain of repetition, we may observe that Supreme Court has clearly held that in the matter of Government Grant, it is governed by provisions of GG Act, 1895 and no other Statute including TP Act, 1882 will have any application. Court has also said that procedure prescribed under lease deed for re-entry / resumption of land is a special procedure and that can be followed for re-entry and no other Statute and no other procedure is to be observed.

129. So far as application of Section 116 of TP Act, 1882 is concerned we find nothing to show that Section 116 of TP Act, 1882 has any application in the case in hand. It is attracted only when an assent of landlord has been obtained for continuation of lease after expiry of lease period, which is not the case in hand. These aspects have been dealt with in **Shanti Prasad Devi and others vs. Shankar Mahto and others (2005) 5 SCC 543,** which has been following in **Delhi Development Authority Vs. Anant Raj Agencies Pvt. Ltd. (supra).**

130. Now, we come to the question of applicability of UP Act, 1972.

131. As we have already said that in view of declaration made under Section 2 of GG Act, 1895, as amended in Uttar Pradesh, no Statute will govern conditions of Government Grant and instead it will specifically be governed only by terms of Government Grant. Therefore, it is not necessary for State to follow procedure of U.P. Act, 1972 though it is also available and under the provisions thereof admittedly petitioner is 'unauthorized occupant'.

132. Above contention can be examined from another angle. Petitioner's possession at the best can be juridical possession though it is admittedly unlawful and illegal. Property is a legal concept that grants and protects a person's exclusive right to own, possess, use and dispose of a thing. The term property does not suggest a physical item but describe a legal relationship of a person to a thing. Real property consists of lands, tenements and hereditaments. Land refers to ground, the air above, the area below the Earth's surface and everything that is erected on it. Tenements include land and certain intangible rights recognized by municipal

laws related to lands. A hereditaments embraces every tangible or intangible interest in real property that can be inherited. An interest describes any right, claim or privilege that an individual has towards real property. Law recognizes various types of interests in real property which may justify possession over property of person concerned. A non-possessory interest in land is right of one person to use or restricted use of land that belongs to other person such as easementary rights. Non-possessory interest do not constitute ownership of land itself. Holders of a non-possessory interest in real property does not have title and owner of land continues to enjoy full right of ownership, subject to any encumbrances. An encumbrance is a burden, claim or charge on real property that can affect the quality of title and value and/or use of property. Encumbrances can represent non-possessory interests in real property.

133. Possession is also of two kinds namely, (a) *de facto* possession, and (b) *de jure* possession. De facto possession is when a person being in actual physical possession and *de jure* possession is possession in law. Constructive possession would be a possession through a representative, agent, tenant or a trustee. A person in de facto possession could be in adverse possession. In a civilized society some protection of possession is essential. The methods of protection recognized are :

(i) Possessor can be given certain legal rights, such as a right to continue in possession free from interference by others; and

(ii) Protective possession by prescribing criminal penalties for wrongful interference and wrongful dispossession.

134. When certain legal right are given to a person, one of the mode is that possessory right in rem are supported by various rights in personam against those who violate possessor's right; he can be given a right to recover compensation for interference and for dispossession, and a right to have his possession restored to him. But, whenever such a person invoked such remedies, one of the question would be, whether a person invoking them actually has any possession to be protected. In other words, it has to be examined whether a person is in possession of an object? However, legal concept of possession is not restricted to commonsense concept of possession, namely physical control. Possession in fact is not a simple notion. Whether a person is in possession of an article depends on various factors namely nature of article itself and attitudes and activities of other persons.

135. Possession may be 'lawful' or 'unlawful' or even 'legal' or 'illegal'. Acquisition of legal possession would obviously be lawful and would, of necessity, involve occurrence of some event recognized by law whereby subject matter falls under the control of the possessor. Problem, however, arises where duration for which possession recognized is limited by Grantor or law. Continuance of possession beyond prescribed period is not treated as a 'lawful possession'. If a landlord does not consent to lease being continued, possession of tenant would not be lawful unless there is some Statute providing otherwise. Nature of possession being not lawful, would entitle landlord to regain

possession. Thus, a lawful possession is state of being a possessor in the eyes of law. Possession must be warranted or authorized by law; having qualifications prescribed by law and neither contrary to nor forbidden by the law. However, law recognizes possession as a substantive right or an interest. Continued possession of a person is recognized by law as a sufficient interest capable of being protected by possessor, right being founded on mere fact of possession. Possession is a good title of right against anyone who cannot show a better title. However, when a person in possession may not be lawful, recovery of possession by owner must have sanction of law and it cannot proceed to dispossess the other in a forcible manner not recognized in law. In some authorities, possession of a person, who has entered therein initially, validly, but subsequently become unlawful, has been given a different meaning i.e. juridical possession. A tenant holding over without consent of landlord would be a juridical possession though his possession is not lawful. It is said that possession of tenant, post efflux of lease period, would not be treated as lawful possession still he would not be treated as a rank trespasser. Thus, here concept of possession as juridical possession has been introduced.

136. A person having juridical possession though illegal and unlawful, by a sheer executive fiat cannot be thrown out of possession of the land. But where terms of lease, which is the genesis of claim of such person, provides manner in which Lessor can re-enter land and such procedure has been recognized by Statute and also upheld by Supreme Court in **Azim Ahmad Kazmi and others vs. State of U.P. and Another (supra),** when Lessor follows such procedure, it cannot be said that eviction is being resorted to illegally or without following lawful method.

137. It is in this backdrop we find that authorities relied by petitioner are inapplicable to the facts of this case and will not help petitioner at all.

138. The first authority cited is **Bishan Das and others Vs. State of Punjab and others (supra)** in which a Constitution Bench had an occasion to consider fundamental right of property vis-a-vis infringement therewith by executive orders. Therein, one Lala Ramji Das , carrying on a joint family business in the name and style of "Faquir Chand Bhagwan Das", desired to construct a Dharmasala on a Nazul property of the then State of Patiala. In 1909, he sought permission of Government to construct a Dharmasala on the said land, since it situate near Barnala Railway Station, and therefore would have been convenient to Travellers who come to that place. It appears that initially for the same purpose, Patiala Government had granted permission to Choudhuris of Barnala bazar, but they could not do so for want of funds. Therefore when Ramji Das sought permission in the name of firm Faquir Chand Bhagwan Das in May, 1909, same was granted and communicated by Assistant Surgeon In-charge of Barnala Hospital, who was presumably In-charge of Public Health Arrangements at Barnala. The sanction was subject to certain conditions, namely, no tax shall be taken for the land; shopkeepers will arrange 'Piao' for passengers; plans of building shall be presented before sanctioning authority; cleanliness and sanitary rules shall be followed by the

persons maintaining Dharmasala and no permission to construct any shop will be granted and if any condition is violated, State shall dispossess them from the land in dispute.

139. Dharmasala was constructed in 1909 and inscription on the stone to the following effect was made:

"Dharmasala Lala Faquir Chand Bhagwan Das, mahajan, 1909."

140. Though a condition was imposed for not permitting construction of any shop, but as a matter of fact, a number of shops were later constructed, with the permission of authorities concerned, for meeting expenses of maintenance of Temple and Dharmasala. A complaint was made in 1911 against Ramji Das that he was utilizing Dharmasala for his private purpose but it remained unheeded. On the complaint made, some inquiry was also conducted by Tehsildar wherein Ramji Das got his statement recorded in January, 1925. On 07.04.1928, Revenue Minister, Patiala State, passed an order stating that though land on which Dharmasala had been built, was originally Government land (nazul property), it would not be proper to declare it as such and Dharmasala should continue to exist for the benefit of the public. Ramji Das or any other person will not be competent to transfer land and if such transfer is made, it would be unlawful and invalid and in such event, Government will escheat. Further inquiry was also made and it appears that Ramji Das was given permission to make a raised platform and other extensions etc. On 10.09.1954, one Gopal Das, Secretary, Congress Committee, Barnala, filed a petition to Revenue Minister, Patiala, making various allegations against Ramji Das. Thereupon an inquiry was conducted by Tahsildar, who found that Dharmasala was constructed by Ramji Das on Government land, that Dharmasala was for public benefit; and, that Ramji Das had been its Manager throughout. He, however, said that Ramji Das was bound to render accounts which he failed considering that property belong to him and, therefore, he should be removed and past accounts be called for. When the matter went for opinion of Legal Remembrancer of State Government, it was pointed out that Dharmasala and Temple, though built on Government land, but not Government property. It also said that though Ramji Das was repudiating the existence of a Public Trust, he was working as Trustee of a Trust created for public purposes of a charitable or religious nature and could be removed by State only under Section 92 Civil Procedure Code. Ramji Das died on 10.12.1957. Petitioner Bishan Das and others came to manage Dharmasala, Temple and the shops etc. On 23.12.1957, Gopal Das and some others, describing themselves as members of public, made an application that since Ramji Das was dead, new arrangements should be made for proper management of Dharmasala which is used for the benefit of the public. Again a search of old papers was made and this time Sub-Divisional Officer, Barnala, recommended that in the interest of Government, Municipal Committee, Barnala, should take immediate charge of management of Dharmasala. This recommendation was affirmed by Deputy Commissioner, Sangrur, and pursuant to the said order, Kanungo presumably dispossessed Bishan Das and others from part of Dharmasala on 07.01.1958, and, charge thereof was given to Municipal Committee, Barnala. These orders were

challenged alleging that the same were without any authority of law and violative of fundamental rights enshrined under Articles 14, 19 and 31 of the Constitution.

141. The defence taken was that property is trust property of a public and charitable character, hence Bishan Das and others were not entitled to claim any property rights in respect thereof.

142. Supreme Court observed in Para-10 that even if it is assumed that the property is trust property, no authority of law authorised State or its Executive Officers to take action against Bishan Das and others in respect of Dharmasala. Government counsel sought to argue that Bishan Das and others were trespassers and land on which Dharmasala situate belong to Government, hence Government was entitled to use minimum of force to eject trespassers, but this defence was rejected by holding that it is a clear case of violation of fundamental right of Bishan Das and others. Supreme Court said that nature of sanction granted in 1909 in respect of land whether it was a lease or licence, with a Grant or an irrevocable licence are questions of fact, need not be gone into by it, but admitted position is that land belonged to Government who granted permission to Ramji Das on behalf of joint family firm to build a Dharmasala, Temple and Shops and manage the same during his life time. After his death his family members continued with management. Thus, they were not trespassers at all in respect of Dharmasala, Temple and Shops; nor could it be held that Dharmasala, Temple and Shops belong to State. The question whether trust created was public or private is irrelevant. Court said that a Trustee, even of a Public Trust, can be removed only by procedure known to law. He cannot be removed by an executive fiat. The maxim, what is annexed to the soil goes with the soil, has not been accepted as an absolute rule of law in India and in this regard, Supreme Court referred to the decisions in **Thakoor Chunder Parmanick Vs. Ramdhone Bhuttacharjee (1866) 6 W.R. 228; Lala Beni Ram Vs. Kundan Lall (1899) L.R. 26 I.A. 58 and Narayan Das Khettry Vs. Jatindranath (1927) L.R. 54 I.A. 218.** Court said that a person who bona fide puts up constructions on land belonging to others with their permission would not be a trespasser, nor would the buildings so constructed vest in the owner of the land by application of *maxim quicquid plantatur solo, solo credit.* It said:

"It is, therefore, ***impossible to hold that in respect of the dharmasala, temples and shops, the State has acquired any rights whatsoever merely by reason of their being on the land belonging to the State.*** *If the State thought that the constructions should be removed or that the condition as to resumption of the land should be invoked, it was open to the State to take appropriate legal action for the purpose."*

(Emphasis added)

143. Court said that even if State proceeded on the assumption that there was a Public Trust, it could have taken appropriate legal action for removal of Trustees by way of Suit under Section 92 C.P.C. and not otherwise. Constitution Bench then said:

" .. that ***does not give the State or its executive officers the right to*** *take the law into their own hands and* ***remove the trustee by an executive order.***

(Emphasis added)

144. Court concluded its findings in Para-14 of the judgment as under:

"The facts and the position in law thus clearly are (1) that the ***buildings constructed on this piece of Government land did not belong to Government,*** *(2) that the petitioners were in possession and occupation of the buildings and (3) that* ***by virtue of enactments binding on the Government, the petitioners could be dispossessed, if at all, only in pursuance of a decree of a Civil Court obtained in proceedings properly initiated."***

(Emphasis added)

145. Court passed serious stricture against State authorities holding that the executive action taken by State and its Officers is destructive of the basic principle of rule of law. Hence action of Government in taking law into their hands and dispossessing petitioners by sheer display of force, exhibits a callous disregard of normal requirements of rule of law, apart from what might legitimately and reasonably be expected from a Government functioning in a society governed by a Constitution which guarantees to its citizens against arbitrary invasion by the executive of peaceful possession of property. Supreme Court reiterated what was said in its earlier judgment in **Wazir Chand Vs. The State of Himachal Pradesh AIR 1954 SC 415** that State or its executive officers cannot interfere with the rights of others unless they can point out some specific rule of law which authorizes their acts. Supreme Court seriously deprecated State and said:

"We have ***here a highly discriminatory and autocratic act which deprives a person of the possession of property without reference to any law or legal authority.*** *Even if the property was trust property it is difficult to see how the Municipal Committee, Barnala, can step in as trustee on an executive determination only."*

146. Aforesaid decision has no application in the case in hand, inasmuch as, here State has exercised its power following terms and conditions laid down under lease-deed, which were made to prevail over any Statute providing otherwise, including TP Act, 1882 vide Section 2 of GG Act, 1895. Further, respondents, in exercise of right of resumption/re-entry, have not straightway went to dispossess petitioners but notice in question has been given to them giving time to vacate the premises whereafter respondents proposed to take further action for taking possession. Therefore, it cannot be said that no notice has been given to petitioners in the present case.

147. **Express Newspapers Pvt. Ltd. and others Vs. Union of India (1986) 1 SCC 133** is a matter which was decided in a Writ Petition filed under Article 32 of Constitution by aforesaid Newspaper Company having its Establishment in Express Buildings at 9-10, Bahadurshah Zafar Marg, New Delhi, which was a land on perpetual lease from Union of India, under a registered Indenture of Lease, dated 17.03.1958. Five petitioners, who filed above Writ Petition before Supreme Court included Indian Express Newspaper (Bombay) Private Limited of which Express Newspapers Private Limited was a subsidiary and petitioners-3, 4 and 5, namely, Sri Ram Nath Goenka was Chairman of the Board of Directors, Nihal Singh was the Editor-in-chief of the Indian Express and Romesh Thapar was

the Editor of the Paper published from Express Buildings. Union of India; Lt. Governor of Delhi, Sri Jagmohan; Municipal Corporation of Delhi; Zonal Engineer (Buildings) and Land and Development Officer were impleaded as respondents-1 to 5. The validity of notice of re-entry upon forfeiture of lease issued by Engineer Officer, Land and Development Office, New Delhi on 10.03.1980 was challenged. The notice required petitioners to show cause why Union of India should not re-enter upon and take possession of demised premises i.e. plots nos. 9 and 10, Bahadurshah Zafar Marg, together with Buildings built thereon under Clause 5 of Indenture of Lease, dated 17.03.1958, for committing breach of Clauses 2(14) and 2(5) of lease-deed. Another notice was issued earlier on 01.03.1980 by Zonal Engineer (Buildings), Municipal Corporation, City Zone, Delhi requiring Express Newspapers Pvt. Ltd., New Delhi to show cause why aforesaid buildings being unauthorized, be not demolished under Sections 343 and 344 of Delhi Municipal Corporation Act, 1957 (hereinafter referred to as "DMC Act, 1957"). A challenge was made, besides others, on the ground of personal vendetta against Express Group of Newspapers and also being violative of Articles 14, 19(1)(a) and 19(1)(g) of the Constitution. The questions posed by Supreme Court, to be of far reaching consequence for maintenance of federal structure of Government, were:

(1) Whether the Lt. Governor of Delhi could usurp the functions of the Union of India, Ministry of Works and Housing and direct an investigation into the affairs of the Union of India i.e. question the legality and propriety of the action of the then Minister for Works and Housing in the previous Government at the center in granting permission to Express Newspapers Pvt. Ltd. to construct new Express Building with an increased FAR of 360 with a double basement for installation of a printing press for publication of a Hindi Newspaper on the western portion of the demised premises i.e. Plots No. 9 and 10, Bahadurshah Zafar Marg, New Delhi with the Express Buildings built thereon?

(2) Whether the grant of sanction by the then Minister for Works and Housing and the consequential sanction of building plans by him of the new Express Building was contrary to the Master Plan and the Zonal Development Plans framed under the Delhi Development Act, 1957 and the municipal bye-laws, 1959 made under the DMC Act, 1957 and therefore the lessor i.e. the Union of India had the power to issue a notice of re-entry upon forfeiture of lease under Clause 5 of the indenture of lease dated March 17, 1958 and take possession of the demised premises together with the Express Buildings built thereon and the Municipal Corporation had the authority to direct demolition of the said buildings as unauthorized construction under Sections 343 and 344 of the DMC Act, 1957?

*(3) Whether the threatened action which the petitioners characterise as arbitrary, illegal and irrat*ional was violative of Article 19(1)(a) read with Article 14 of the Constitution?

148. Thereafter Court analyzed the facts of case in detail and respective arguments and from Para-45 to 47 we find that Government of India and Lt. Governor of Delhi were Head on to each other and even Counsel's role was not

appreciated by Court. In the light of arguments advanced by parties, in para-59 of judgment, Court formulated eight questions. The issue of maintainability of writ petition under Article 32 was also raised and it was considered by Supreme Court in the judgment from para-66 onwards. It held that building in question was necessary for running press, any statutory or executive action to pull it down or forfeit the lease, would directly impinge on the right of freedom of speech and expression under Article 19(1)(a) and therefore, writ petition was maintainable. Court said:

"... impugned notices of re-entry upon forfeiture of lease and of the threatened demolition of the Express Buildings are intended and meant to silence the voice of the Indian Express. It must logically follow that the impugned notices constitute a direct and immediate threat to the freedom of the press and are thus violative of Article 19(1)(a) read with Article 14 of the Constitution."

149. Since, land in dispute was Government land, provisions of Government Grants Act, 1895 (hereinafter referred to as "GG Act, 1985") were also relied on by Government and, therefore, Supreme Court examined provisions thereof also. It held that GG Act, 1895 is an explanatory or declaratory act. It said:

"Doubts having arisen as to the extent and operation of the Transfer of Property Act, 1882 and as to the power of the Government to impose limitations and restrictions upon grants and other transfers of land made by it or under its authority, the ***Act was passed to remove such doubts as is clear from the long title and the preamble.*** *The Act contains two sections and provides by Section 2 for the exclusion of the Transfer of Property Act, 1882 and, by Section 3 for the exclusion of, any rule of law, statute or enactment of the Legislature to the contrary."*

(Emphasis added)

150. Court in **Express Newspapers Pvt. Ltd. and others Vs. Union of India (supra)** further said:

"It is ***plain upon the terms that Section 2 excludes the operation of the Transfer of Property Act, 1882 to Government grants.*** *While Section 3 declares that all provisions, restrictions, conditions and limitations contained over any such grant or transfer as aforesaid shall be valid and shall take effect according to their tenor, notwithstanding any rule of law, statute or enactment of the Legislature to the contrary. A series of judicial decisions have determined the overriding effect of Section 3 making it amply clear that* ***a grant of property by the Government partakes of the nature of law since it overrides even legal provisions which are contrary to the tenor of the document."***

(Emphasis added)

151. Having said so, Supreme Court found that the stand taken on behalf of Union of India that there was non compliance of mandatory requirement of Clause-6, therefore notice of re-entry was valid, is not correct.

152. Court then noted some contradictions in Constitution Bench judgment in **Bishan Das and others Vs. State of Punjab and others (supra)** and **State of Orissa Vs. Ram Chandra Dev AIR 1964 SC 685.**

153. In **State of Orissa Vs. Ram Chandra Dev (supra),** Constitution Bench observed:

"Ordinarily, where property has been granted by the State on condition which make the grant resumable, after resumption it is the grantee who moves the Court for appropriate relief, and that proceeds on the basis that the ***grantor State which has reserved to itself the right to resume may, after exercising its right, seek to recover possession of the property without filing a suit. "***

(Emphasis added)

154. It was observed that existence of a right is the foundation for a petition under Article 226 of the Constitution. In Para-84 Court said that in cases involving purely contractual issues, the settled law is, where statutory provisions of public law are involved, writs will be issued and referred to its earlier judgment in **Mohammed Hanif Vs. State of Assam (1969) 2 SCC 782.** Thereafter it also considered the provisions of Public Premises (Eviction of Unauthorized Occupants) Act, 1971 *(hereinafter referred to as "Act, 1971")* and observed that Express building was constructed with the sanction of lessor, i.e., Union of India on plots demised on 'perpetual lease' by registered lease-deed dated 17.03.1958 hence cannot be regarded as 'public premises' belonging to the Central Government under Section 2(e). That being so, Act, 1971 has no application.

155. Court then considered other provisions relating to power of Lt. Governor, and Central Government and factual aspects involved in the matter, which, in our view, are not relevant for the purpose of this Case. Court also examined applicability of doctrine of estoppel but that has also not been raised in these matters, hence it is not necessary to examine it.

156. One aspect we may notice hereat that detailed judgment has been written by Hon'ble A.P. Sen, J. Justice E.S. Venkataramiah has agreed with the judgment of Hon'ble A.P. Sen, J in relation to the aspect that Lt. Governor of Delhi, Sri Jagmohan, has taken undue interest in getting notices issued to Express Newspapers and this action is not consistent with normal standards of administration. Notices were issued under pressure of Lt. Governor of Delhi, notices were violative of Article 14, suffers with arbitrariness and non application of mind. His Lordship said that it was not necessary to express any opinion on the contention based on Article 19(1)(a) of Constitution. Hon'ble Venkataramiah further said that question relating to civil rights of the parties flowing from lease deed cannot be disposed of in a petition under Article 32 of Constitution since questions whether there has been breach of the covenants under the lease, whether lease can be forfeited, whether relief against forfeiture can be granted etc. are foreign to the scope of Article 32 of Constitution which should be tried in a regular civil proceeding. His Lordship further said in Para-202 of judgment as under:

"One should remember that the property belongs to the Union of India and the rights in it cannot be bartered away in accordance with the sweet will of an Officer or a Minister or a Lt. Governor but they should be dealt with in accordance with law. At the same time a person who has acquired rights in such property cannot also be deprived of them except in accordance with law."

157. Having said so, while agreeing with ultimate order of quashing of notices, Hon'ble Venkataramiah, J. said:

"I express no opinion on the rights of the parties under the lease and

all other questions argued in this case. *They are left open to be decided in an appropriate proceeding."* (Emphasis added)

158. Hon'ble R.B. Misra, J. also agreed with Hon'ble A.P. Sen and E.S. Venkataramiah, JJ that the notices challenged in writ petition are invalid, having no legal consequences and must be quashed for reasons detailed in both the judgments. His Lordship, however, said that other questions involved in the case are based upon contractual obligations between the parties and can be satisfactorily and effectively dealt with in a properly instituted suit and not by way of writ petition on the basis of affidavits which are so discrepant and contradictory in that case. Hon'ble R.B. Misra, J. in para 207 of judgment said:

*"**207.** The **right to the land and to construct buildings** thereon for running a business is not derived from Article 19(1)(a) or 19(1)(g) of the Constitution **but springs from terms of contract between the parties** regulated by other laws governing the subject, viz., the Delhi Development Act, 1957, the Master Plan, the Zonal Development Plan framed under the Delhi Municipal Corporation Act and the Delhi Municipal Bye-laws, 1959 irrespective of the purpose for which the buildings are constructed. **Whether there has been a breach of the contract of lease or whether there has been a breach of the other statutes regulating the construction of buildings are the questions which can be properly decided by taking detailed evidence** involving **examination and cross-examination of witnesses.**"* (Emphasis added)

159. Thus, the above judgment also has no application to the facts of present case. On the contrary, majority view expressed in above judgment is that right to land and to construct building is not derived from Articles 19(1)(a) or 19(1)(g) of Constitution but springs from promise of contract between the parties. Whether there has been breach of contract of lease or there has been breach of any provision regulating lease rights and construction of building etc. are such questions which can be properly decided by taking detailed evidence involving examination and cross examination of witnesses and therefore, such rights can be enforced in common law proceedings by filing suit. In the present case, the right of re-entry is being enforced as per terms of Grant which prevailed over any other Law.

160. In **Yar Mohammad and another vs. Lakshmi Das and others AIR 1959 Allahabad 1,** a Full Bench of this Court considered following question :

"Whether the jurisdiction of the Civil Court is barred by virtue of Section 242 of the U. P. Tenancy Act in respect of suit filed under Section 9 of the Specific Relief Act for obtaining possession over agricultural land from which the plaintiff alleged his illegal dispossession within six months of the date of the-suit".

161. Therein plaintiffs instituted suit on 30.11.1948 for possession under Section 9 of Specific Relief Act, 1877 *(hereinafter referred to as "Act, 1877")* alleging that they were in actual possession of land in dispute (land was admittedly an agricultural land) but wrongfully dispossessed by defendants in November 1948. Defendants contested the suit and disputed correctness of above allegations of plaintiffs and pleaded that they were in possession of land as tenants

of plaintiffs for more than 12 years, hence, plaintiffs cannot eject them. They also pleaded that suit was filed under Section 9 of Act, 1877 only to evade jurisdiction of Revenue Court. Trial Court i.e. learned Munsif rejected plea of lack of jurisdiction raised by defendants, accepted the case set up by plaintiffs and decreed the suit. Defendants then filed revision no.461 of 1952, which resulted in Reference, to a Larger Bench. The issue was with respect to applicability of Section 242 of U. P. Tenancy Act, 1939. Court said that Section 242 confers exclusive jurisdiction upon Revenue Court and takes away jurisdiction of Civil Court only in respect of two kinds of actions.

(i) suits or application of the nature specified in the Fourth Schedule of the Act; and

(ii) suits or applications based on a cause of action in respect of which any relief can be obtained by means of a suit or application specified in that schedule.

162. It was held that in order to attract Section 242, one has to demonstrate that action would fall under either of the above-mentioned two categories and if does not, jurisdiction of Civil Court is not ousted and Revenue Court will have no jurisdiction to entertain the action.

163. Then construing the cases, which may resort to Section 9 of Act, 1877, Court said that Section 9 gives a special privilege to persons in possession who take action promptly. In case they are dispossessed, Section 9 entitles them to succeed simply by proving:

(1) that they were in possession,

(2) that they have been dispossessed by the defendant,

(3) that dispossession is not in accordance with law, and

(4) that dispossession took place within six months of the suit.

164. No question of title either of plaintiffs or of defendants can be raised or gone into in an action brought under Section 9 of Act, 1877. Plaintiffs will be entitled to succeed without proving any title on which he can fall back upon and defendant cannot succeed even though he may be in a position to establish the best of all titles. Restoration of possession under Section 9 is however subject to a regular suit and person who has real title or even better title cannot be prejudiced in any way by a decree of a suit under Section 9. A person having real or better title always has a right to establish his title in a regular suit and get possession back. The objective and idea behind Section 9, as the Court observed, is, that law does not permit any person to take law in his own hands and to dispossess a person in actual possession, without having recourse to a Court or Institution, in an illegal manner. In other words, objective of Section 9 is to discourage people from taking law in their own hands, how-ever good title they may have. In the interest of public order, self-help is not permitted so far as possession over Immovable property is concerned. Section 9 is intended to discourage and prevent proceedings which might lead to serious breaches of peace. It does not allow a person who has acted high-handedly by wrongfully dispossessing a person in possession from deriving any benefit from his own unjustified act. Section 9, infact, provides for a summary and quick remedy for a person who is in possession but illegally ousted therefrom without his

consent. Court observed that 'Possession' is prima facie evidence of title and if a person who is in possession is dispossessed, he has a right to claim back possession from the person who dispossesses him. In an ordinary common law proceedings, a person who has a title, is entitled to possession and cannot be deprived of his right of possession by a person, who has no title or inferior to the former. Court said that for Section 9, claim of title is not allowed to be set up and possession wrongfully taken, has to be restored. Full Bench therefore, answered question formulated above in negative.

165. In our view, above judgment has no application to the facts of this case for the reason that title of land is not in dispute, inasmuch as, it is admitted case of petitioner that land in dispute is 'Nazul', hence it is owned and vested in Government. It is also not in dispute that petitioner got possession of land in dispute vide a 'Will' executed by a person who had no valid claim over disputed land.

166. In the present case right of re-entry is being exercised by respondent-State in terms of lease-deed, whereunder even original lessee was obliged to surrender/hand over possession to State Government.

167. We may also note hereat that in the case in hand, lease was governed by provisions of GG Act, 1895 and Section 2, as amended in State of U.P., has excluded provisions of U.P. Tenancy Act, 1939 for governing rights etc. of parties. Only provisions contained in lease-deed shall apply and have to be given effect to as if U.P. Tenancy Act, 1939 was not passed. Therefore also, reliance placed on the aforesaid judgment is of no consequence.

168. **Lallu Yeshwant Singh (dead) by his legal representative vs. Rao Jagdish Singh and others, AIR 1968 SC 620** is a judgment which came before two Judges Bench of Supreme Court from a dispute raised under Qanoon Mal Riyasat Gwalior Samvat, 1983 *(hereinafter referred to as "Qanoon Mal")* that is from Madhya Pradesh. Under Section 326 of Qanoon Mal, a suit was filed by Yeshwant Singh and others i.e. plaintiffs against Rao Jagdish Singh and others (defendants) in the Court of Tehsildar for possession of some agricultural land. Plaintiffs set up a case that they were in possession of land and forcibly dispossessed by defendants, therefore, should be restored their possession. Tehsildar decreed the suit and order was affirmed in appeal by Collector as well as Commissioner. Revision was also dismissed by Board of Revenue and decree passed by Tehsildar was maintained. Section 326 of Qanoon Mal broadly provided summary remedy as is provided in Section 9 of Act, 1877. In para 7 of the judgment, Supreme Court has referred to both the provisions and said that both are broadly similar. High Court took a different view holding that it was not necessary for a Lessor to resort to Court for obtaining possession and if there is default by plaintiff, it could have been dispossessed by defendants. Supreme Court said that no person can take law in its own hand and in such matter, where provisions providing summary procedure for restoration of illegal dispossession of land have been made, the same can be resorted to by the person who has been illegally

dispossessed. Supreme Court affirmed Full Bench judgment of this Court in **Yar Mohammad (supra).** Here also we do not find applicability of this judgment to the case in hand for the reasons we have already said in respect of judgment in **Yar Mohammad (supra).**

169. The decision in **State of U.P. Vs. Zahoor Ahmad and another (supra),** we find, instead of helping petitioner, supports the view which we have taken hereinabove. **The State of U.P. vs. Zahoor Ahmad and another (supra)** was a matter which came up before two Judges Bench of Supreme Court arising from action by State in respect of certain land which fell within reserved forest in State of Uttar Pradesh. Zahoor Ahmad was granted lease of a plot of land at Chandan Chowki, Sonaripur Range in North Kheri Forest Division for an annual rent of Rs.100/-. The aforesaid land was part of Reserved Forest of which State of U.P. is the proprietor. Lease was granted for one year commencing from 18.03.1947 for industrial purpose. It was renewed on 10.06.1948 with effect from 18.03.1948 for further one year and again in 1949 for one year. Ultimately lease expired on 18.03.1950. State of U.P., after termination of lease, allowed Zahoor Ahmad to continue in possession of land on condition settled between the parties that Licensee i.e. Zahoor Ahmad would pay Rs.1,000/- as annual rent for occupation till 15.07.1950. Even after determination of lease on 15.7.1950, Zahoor Ahmad i.e. Licensee continued in possession and State of U.P. allowed him to remain in possession for three years beyond 15.07.1950 though for this period Zahoor Ahmad did not agree to give any undertaking of making payment of annual rent of Rs.1,000/-. A letter dated 04.12.1951 was issued to Zahoor Ahmad asking him to pay Rs.3,000/- for the year 1950-51. Letter further provided that if Zahoor Ahmad do not agree to pay Rs.3,000/- for the year 1950-51, amount of rent would be reduced to Rs.1800/- but he would not be allowed lease in future in any circumstance. The fact remains that Zahoor Ahmad was allowed to continue in occupation of land without any agreement as to the amount of rent payable for 1950-51. On 29.10.1952, Conservator of Forests sent a letter that Zahoor Ahmad can be allowed to run the mill beyond 15.07.1950 for three years if he pays Rs.3,000/- per annum and for one year only if he is ready to pay Rs.1,800/- but thereafter lease would not be renewed. Notice also said that he was only Licensee and should remove his plant and vacate the premises within one month and pay Rs.6,000/- as damages for use and occupation. Zahoor Ahmad did not pay the amount hence a suit for recovery of damages was filed by State of U.P. High Court came to the conclusion that Licensee (Zahoor Ahmad) was allowed to continue with the consent of State of U.P. though there was no written agreement about rate of rent and lease was granted for industrial purposes. Under Section 106 of TP Act, 1882, such lease is for year to year basis. The lease could have been terminated by six months notice and since no such notice was given, therefore, tenancy was not validly terminated. With respect to amount of rent, Court took the view that under Section 116, renewal would mean the same terms and conditions as made applicable in previous lease. High Court therefore decreed the suit for payment of rent of Rs.3,000/-. Possession was allowed by State with its consent. Thus, High Court took the view that 'holding over' was applicable under

Section 116. State Government bye-passing provision of TP Act, 1882 sought to rely on GG Act, 1895. Whether the kind of above lease, granted by State could have been brought within the purview of GG Act, 1895, Supreme Court examined this issue by referring to two judgments. In one, lease of forest land of Sunderbans was held to be a 'Grant' while, in another, Grant of Khas Mahal was not held to be as 'Grant'. In **Jnanendra Nath Nanda vs. Jadu Nath Banerji AIR 1938 Cal 211** two leases of two lots were granted by Sunderban Commissioner on behalf of Secretary of State. The land comprised in the lots were 'waste lands' of the Government. 'Waste lands' of Sunderbans were not property of any subject. Sunderbans was vast impenetrable forest. It was the property of East India Company and later on vested in Crown by virtue of an Imperial Statute. Court found that history of legislation showed that grants of Sunderbans lands were treated to be 'Crown Grants' within meaning of 'Crown Grants Act'. In another matter i.e. **Secretary of State for India in Council vs. Lal Mohan Chaudhuri, AIR 1935 Cal 746** in respect of Khas Mahal, lease was granted by Government. It was held that lease of Khas Mahal does not come within the category of 'Grant' as contemplated in GG Act, 1935. Having said so, in para 13 of judgment, Court said that lease granted to Zahoor Ahmad was for the purpose of erecting a temporary rice mill and for no other purpose. The mere fact that State is the lessor will not by itself make above lease a 'Government Grant' within the meaning of GG Act, 1895. We may reproduce para 13 of the judgment in **State of U.P. vs. Zahoor Ahmad (supra)** as under :

"The lease in the present case was for the purpose of erecting a temporary rice mill and for no other purpose. The mere fact that the State is the lessor will not by itself make it a Government grant within the meaning of the Government Grants Act. There is no evidence in the present case in the character of the land or in the making of the lease or in the content of the lease to support the plea on behalf of the State that it was a grant within the meaning of the Government Grants Act."

(Emphasis added)

170. When a question arose whether High Court has rightly applied Section 116 of TP Act, 1882, Supreme Court, in this context, referred to a judgment of this Court in **Lala Kishun Chand vs. Sheo Dutta, AIR 1958 All. 879** wherein after expiry of lease of Nazul land, Licensee was permitted by Board of Revenue to continue in occupation as tenant and rent was also realized from him and held that in these facts, Section 116 of TP Act, 1882 was rightly applied.

171. In the present case, it is not the case of petitioner that after expiry of lease on 31.3.1962, it has been permitted to remain in possession of disputed Nazul land and rent has been accepted by respondents or petitioner has paid rent. Even if what is said by petitioner is taken to be correct, we do not find that Section 116 is applicable in the case in hand at all. Section 116 of TP Act, 1882 reads as under :

"116. Effect of holding over.- *If a lessee or under-lessee of property remains in possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee or under lessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month,*

according to the purpose for which the property is leased, as specified in section 106."

172. Twin conditions to attract principle of 'holding over' vide Section 116 of TP Act, 1882, which need be satisfied are:

(i) After determination of lease, lessor or his representative has accepted rent from lessee or under lessee or assented to his continuing in possession; and

(ii) Lessee or under-lessee has remained in possession.

173. Both the above conditions are absent in this case. Here Section 116 of T.P. Act, 1882 has no application at all.

174. In **Bhawanji Lakhanishi vs. Himatlal Jamnadas AIR 1972 SC 819,** Court said that basis of Section 116 is a bilateral contract between erstwhile landlord and erstwhile tenant. It has been held that assent of lessor cannot be inferred merely from his delay in taking steps to evict lessee. We may also refer to Calcutta High Court decision in **Ratan Lal vs. Farshi Bibi (1907) ILR 34 Cal 396;** Madras High in **Govindaswami vs. Ramaswami (1916) 30 Mad LJ 492;** Patna High Court in **Christian vs. Hari Prasad AIR 1955 Pat 158** and **Pritilata Devi vs. Banke Bihari Lal AIR 1962 Pat 446;** and Rajsthan High Court in **Gordhan vs. Ali Bux AIR 1981 Raj 206,** holding that to attract Section 116, therefore, it has to be shown that there was a bilateral act creating a new tenancy. There is no implication of holding over. In our view, there is neither any material nor pleading to attract Section 116 and therefore, judgment in **Zahoor Ahmad (supra)** on this aspect does not help petitioners. On the contrary, what has been said in para 16 of the judgment, quoted above, the conditions of 'Grant' would prevail over every law including TP Act, 1882.

175. An argument was also advanced that resumption/re-entry amounts to acquisition of land without paying any compensation and in violation of Act, 2013.

176. This argument we have to reject for the simple reason that the State own the land in question, hence there is no occasion for its acquisition. At the time when re-entry/resumption is being made by State, petitioners neither had any title or ownership over land in dispute nor any existing lease rights, therefore, nothing has been acquisitioned by State. It is settled law that land, which is owned by State, cannot be acquired by it.

177. In **Secretary of State Vs. Narain Khanna AIR 1942 Privy Council 35,** it was held:

"where Government acquires any property consisting of land and buildings, and where land was the subject matter of Government grant, subject to power of resumption by Government at any time on giving one month's notice, then ***compensation was payable only in respect of such buildings as may have been authorized to be erected and not in respect of land."*** (Emphasis added)

178. A Division Bench of Judicial Commissioner in **Md. Wajeeh Mirza vs. Secretary of State for India in Council, AIR 1921 Oudh 31,** said as under:

"when Government itself claims to be owner of the land, there can be no

question of its acquisition and the provisions of the Land Acquisition Act cannot be applicable. This opinion expressed by Judicial Commissioner has been approved in ***Sharda Devi vs. State of Bihar and another (supra).*** *Court reiterate in* ***Sharda Devi vs. State of Bihar and another (supra)*** *that land or an interest in land pre-owned by State cannot be subject-matter of acquisition by State.* ***If the land in question is Government land, there is no question of initiating proceedings of acquisition at all. Government would not acquire the land, which already vests in it."***

(Emphasis added)

179. In **Sharda Devi Vs. State of Bihar and another, 2003 (3) SCC 128,** Court has said as under:

"the State does not acquire its own land for it is futile to exercise the power of eminent domain for acquiring rights in the land, which had already vests in the State. It would be absurdity to comprehend the provisions of Land Acquisition Act being applicable to such land wherein ownership or the entirety of rights already vests in State. In other words, ***land owned by State on which there are no private rights or encumbrances is beyond the preview of provisions of Land Acquisition Act."***

(Emphasis added)

180. In **Collector of Bombay Vs. Nusserwanji Rattanji Mistri (1996) 10 SCC 150,** it was held:

"under the provision of Land Acquisition Act, Government acquires the sum total of all private interests subsisting in them. ***If Government has itself an interest in land, it has only to acquire other interest outstanding thereof so that it might be in a position to pass it on absolutely for public user."***

(Emphasis added)

181. In **State of U.P. and another Vs. Lalji Tandon (dead) through Legal Representatives (2004) 1 SCC 1** referring to the decision in **Sharda Devi vs. State of Bihar (supra),** court said as under:

"the notification and declaration under Sections 4 and 6 of the Land Acquisition Act for acquisition of the land i.e. the site below the bungalow are meaningless. It would have been different if the State would have proposed the acquisition of lease hold rights and/or the superstructure standing thereon, as the case may. But that has not been done."

182. In view thereof, this submission is also rejected.

183. One more aspect was pressed that even if lease expired, petitioners being in possession of land in dispute, their tenancy will be governed by provisions of Section 106 of TP Act, 1882 and without quit notice, petitioner cannot be evicted.

184. This submission is also misconceived. Once period of lease has expired or determined and this is admitted fact, status of Lessee becomes that of "Tenant at Sufference", therefore, even a quit notice is not necessary to be given and Section 106 TP Act, 1882 is not at all attracted. Relying on earlier decision in **R.V. Bhupal Prasad vs. State of A.P. (1995) 5 SCC 698** in a recent decision in **Sevoke Properties Ltd. vs. West Bengal**

State Electricity Distribution Company Ltd. AIR 2019 SC 2664, Court held that once it is admitted by lessee that term of lease has expired, lease stood determined by efflux of time and in such case, a quit notice under Section 106 is not required to be given. Court has said as under :

"Once the lease stood determined by efflux of time, *there* ***was no necessity for a notice of termination Under Section 106."***

(Emphasis added)

185. In the above authority, Court held that after expiry of period of lease, status of Lessee becomes that of 'Tenant at sufferance'. 'Tenant at sufference' is one who comes into possession of land by lawful title, but who holds it by wrong after termination of term or expiry of lease by efflux of time. The tenant at sufferance is one who wrongfully continues in possession after extinction of a lawful title. There is little difference between him and a trespasser. Quoting from Mulla's Transfer of Property Act (7th Edn.) at page 633, Court observed that tenancy at sufferance is merely a fiction to avoid continuance in possession operating as a trespass. It has been described as the least and lowest interest which can subsist in reality. It, therefore, cannot be created by contract and arises only by implication of law when a person who has been in possession under a lawful title continues in possession after that title has been determined, without consent of person entitled. A "tenancy at sufferance" does not create relationship of landlord and tenant. Court further quoted from page 769 of Mulla's transfer of Property Act (7th Edition), that act of holding over after expiration of term does not necessarily create a tenancy of any kind. If lessee remains in possession after determination of term, the common law Rule is that he is a tenant at sufferance. The fifth question is answered accordingly.

186. The **sixth and last question** up for consideration is "whether re-entry/resumption of land by Lessor i.e. State Government is valid?"

187. So far as validity of resumption of land for 'public purpose', it could not be disputed that land has been sought to be required by State in 'public interest'. Allahabad City has been selected for development as a 'Smart City' and respondents have pleaded that demand of lot of land has been made by various Government departments since various Offices, Workshops, Parks, Parking places etc. have to be constructed. The land in dispute has been found suitable by A.D.A. for 'Parking Place' and development of 'Parking Place' is a public purpose. In fact, on this aspect, no substantial argument has been made and in our view, resumption of land by State is for 'public purpose'. Hence resumption/re-entry by respondents is valid and legal.

188. Having answered above issues, we may also observe that litigation initiated by petitioners on the one hand has given enough time to continue to hold and enjoy land in dispute and simultaneously denied opportunity to respondent authorities to take possession of land in question for the purpose of carrying out developmental activities where time is a matter of essence. Impugned notice was issued on 18.08.2018 and for more than fifteen months petitioners have already availed

benefit of possession of land in dispute and enjoyed the same without spending even a single penny towards rent, damages, compensation etc. for such enjoyment. Land in question is required for developmental activities in furtherance of developing Prayagraj City as "Smart City". Developmental activities required an early action, but, by indulging in litigation, petitioners have already delayed it sufficiently, therefore, even if what petitioners' claim that they should have been given notice or sufficient time to vacate, the same has already been achieved as petitioners had already enough time with them. It is, thus, a fit case where we do not find that any other technicality should be allowed to intervene and, earliest is the better that possession of land is transferred to respondents so that developmental activities may proceed without any further delay.

189. However, considering the facts and circumstances and also the fact that petitioner has already enjoyed interim order passed by this Court and continued in possession over land in dispute for the last almost more than a year, we direct the petitioner to vacate disputed land within one month from the date of delivery of judgment.

190. In view of above discussion, we do not find any merit in the petition. Subject to observations about vacation of land in dispute, the writ petition is dismissed.

191. No costs.

(2019)12 ILR A773

ORIGINAL JURISDICTION
CIVIL SIDE

DATED: ALLAHABAD 27.09.2019
BEFORE
THE HON'BLE PANKAJ MITHAL, J.
THE HON'BLE SARAL SRIVASTAVA, J.

Writ C No: 68915 of 2014

Ram Nivas ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Rahul Agarwal

Counsel for the Respondents:
C.S.C., Sri M.C. Chaturvedi

A. Civil Law - Land Acquisition Act, 1894 – Section 6(1) – Proviso (1) – Explanation 1 – Limitation – It is mandatory to make a declaration under Section 6 of the Act within one year from such notification – In computing the aforesaid period of one year the period during which any action or proceedings remained stayed by the order of the court shall stand excluded in view of Explanation 1 to proviso of Section 6(1). (Para 13 & 19)

Held - In view of above legal position and the mandatory requirement of issuing a declaration within a year from the date of publication of notification under Section 4 of the Act excluding period of stay, the impugned declaration made under Section 6 of the Act on 11.05.2012 is patently beyond time and is not only illegal but a nullity.

B. Civil Law - Land Acquisition Act, 1894 – Proviso (ii) of Section 6 – Computation of limitation – Effect of Court's order to the period of limitation – Argument that in a situation, where there is direction from the court to act upon pursuant to the notification issued under Section 4 of the Act and to complete the exercise of making the declaration within the time permitted, the limitation provided stands circumscribed or automatically extended – Held **– The decision of Supreme Court was rendered on the basis of the concession or the consent of the parties**

and was not a decision on merits. The court in passing the said order had not adjudicated the point of limitation – Pooran Mal's case is distinguishable as it does not lay down a binding precedent. (Para 42, 43, 52 & 58)

C. Interpretation of statute – Legal maxim – *Expressio unius est exclusio alterius* – It means that if a statute provides for a thing to be done in a particular manner, then it has to be done in that manner alone and that no other manner is open and permissible in law. (Para 30)

Held **-** In view of the above well acknowledged legal principle since proviso(ii) to Section 6 of the Act mandates for issuing of the declaration within a year from the date of notification under Section 4 of the Act, the declaration has to be made within the said period and not otherwise.

D. Civil Law - Land Acquisition Act, 1894 – Section 5A – Competency of Special Land Acquisition Officer to decide the objection – Under the provision, objection is to be decided by the 'Collector' – S.L.A.O. is not the Collector or the person in-charge of the revenue- administration. He is not even an Additional Collector. He is simply an Assistant Collector of the First Class. He cannot discharge the functions of the Collector either under the Code or under any other Act – SLAO has no authority or jurisdiction to discharge the functions of the Collector as envisaged under Section 5A of the Act. (Para 76 & 77)

E. Civil Law - U.P. Revenue Code, 2006 – Section 4(8) and 12 – Definition of Collector – Section 4(8) of the Code defines 'Collector' to be an Officer appointed by the State Government under Section 12 and to include an Additional Collector and Assistant Collector of the First Class empowered by the State Government by notification to discharge all or any of the functions of a Collector under the Code – Assistant Collector however is not entitled to discharge any other functions of the Collector other than those under the Code such as those conferred upon the Collector under the other Acts. (Para 71 & 74)

Writ Petition allowed. (E-1)

List of cases cited: -

1. Deep Chand Vs. State of Rajasthan AIR 1961 S.C. 1527

2. Padmasundara Rao (Dead) Vs. State of Tamil Nadu & others (2002) 3 SCC 533

3. Ashok Kumar & others Vs. State of Haryana and another (2007) 3 SCC 470

4. Mahavir Sahkari Awas Samiti Ltd. Vs. State of U.P. and another (2007) 2 AWC 1162 (DB)

5. Vijay Narayan Thatte & others Vs. State of Maharastra & others (2009) SCC 92

6. Oxford English School Vs. Government of Tamil Nadu & others (1995) (5) SCC 206

7. State of Punjab and another Vs. Rajesh Syal (2002) 8 SCC 158

8. Anil Kumar Gupta Vs. State of Bihar & others (2012) 12 SCC 443

9. Mishra Sugandhi Karyalaya Vs. State of U.P. and others 2011 (40) VST 364 (All).

10 M/s S.K. Traders Vs. Additional Commissioner of Trade Tax, Ghaziabad and another 2007 NTN (34) 345

11. Director of Inspection of Income Tax (Investigation) New Delhi and another Vs. Pooran Mal and sons AIR (1975) (4) SC 67

(Delivered by Hon'ble Pankaj Mithal, J.
Hon'ble Saral Srivastava, J.)

1. The petitioner has invoked the writ jurisdiction of this Court under Article 226 of the Constitution of India questioning the validity of the declaration dated 11.5.2012 issued under Section 6 of

the Land Acquisition Act, 1894 (hereinafter referred to as "the Act") in respect of the land of various villages in district Agra notified for acquisition under Section 4 of the Act on 3.10.2005 lastly published on 28.11.2005 for the benefit of the Agra Development Authority.

2. The petitioner apart from seeking quashing of the aforesaid declaration has also made a prayer for the quashing of the entire acquisition proceedings pursuant to the notifications dated 3.10.2005 and 11.05.2012 issued under Sections 4 and 6 of the Act respectively.

3. The primary ground for attacking the declaration made under Section 6 of the Act is that it is beyond time of one year from the date of publication of the notification under Section 4 of the Act as provided under proviso (ii) to Section 6(1) of the Act; and that the objections filed by the petitioner under Section 5-A of the Act were not decided by the Collector who is the competent authority but by the Special Land Acquisition Officer who was not notified for the purposes of dealing with the said objections and that no personal hearing was given to the petitioner while dealing with the said objections and thereafter making recommendation to the State Government.

4. First, the facts in brief for the better and complete appreciation of controversy vis-a-vis the legal position involved and the reasoning for its resolution.

5. On the proposal of the Collector, Agra dated 21.12.2004 proceedings were initiated for the acquisition of the land for the Taj Nagar Housing Scheme Phase-III promoted by the Agra Development Authority. A notification under Section 4(1) read with Section 17(4) of the Act was issued on 3.10.2005 dispensing with the enquiry under Section 5A of the Act. Apart from the Gazette and news-papers it was last published on 28.11.2005 in the locality.

6. The said notification was challenged by many tenure holders by filing separate writ petitions. The main one was by Kashma Sahkari Avas Samiti Ltd. i.e. Writ Petition No.72063 of 2005. The High Court vide interim order dated 23.11.2005 directed the authorities to maintain status quo till 28.11.2005. Thereafter on 12.12.2005 the parties were directed to maintain status quo until further orders and they were directed to exchange the pleadings. The said writ petition and several other writ petitions connected with the same were decided vide judgment and order dated 25.8.2006. The writ petitions were allowed and the application of the provision of Section 17(1) and (4) of the Act was held to be invalid and the liberty was given to the respondents to proceed with the acquisition afresh in accordance with law from the stage of issuance and publication of the notification under Section 4 of the Act by affording opportunity to the petitioners or to the tenure holders to file objections under Section 5A of the Act and thereafter, if necessary, to issue a declaration under Section 6 of the Act.

7. The State of U.P. as well as the Agra Development Authority aggrieved by the aforesaid judgment and order dated 25.8.2006 preferred three special leave petitions i.e. Special Leave Petition (Civil) No.19602 of 2006 (State of U.P. Vs. Kshama Sahkari Avas Samiti Ltd. and others); Special Leave Petition (Civil)

No.20149 of 2006 (Agra Development Authority Vs. Kshama Sahkari Avas Samiti Ltd.) and Special Leave Petition (Civil) No.20489 of 2006 (Agra Development Authority Vs. Sahab Singh). All the three special leave petitions were taken up together on 8.12.2006 and apart from issuing notice to the contesting parties, a direction was issued to maintain status quo. These special leave petitions were finally decided by the Supreme Court vide its judgment and order dated 13.5.2011 and the State/authorities were directed to publish notice inviting objections under Section 5A of the Act to be filed within two months and to be dispose them of in accordance with law within three months thereafter.

8. Consequent to the above decision of the Supreme Court, notice inviting objections was published on 11.6.2011 in the news-papers pursuant to which a total 213 objections were filed in relation to the land of eight villages notified for acquisition. The objections were rejected by eight separate orders all dated 3.11.2011 passed by the Special Land Acquisition Officer. Thereafter on report being submitted to the State Government, the impugned declaration dated 11.5.12 was issued under Section 6 of the Act.

9. It is in this background that the petitioner alleges that the declaration issued under Section 6 of the Act is bad in law as it is not within time of one year as stipulated vide proviso (ii) to Section 6(1) of the Act and that the Special Land Acquisition Officer was not competent to consider and decide the objections of the petitioner filed under Section 5A of the Act.

10. We had heard Sri Rahul Agarwal, learned counsel for the petitioner and Sri M.C. Chaturvedi, Additional Advocate General representing the State Authorities and also the Agra Development Authority. They had consented for the final disposal of the writ petition on the basis of the pleadings on record.

11. Before adverting to the legal aspects it would be important to recapitulate the relevant dates in a tabular form which would be convenient for dealing with the first issue regarding the limitation of issuing declaration under Section 6 of the Act:

S.No.	Particulars	Date
1.	Date of Notification under Section 4	03.10.2005
2.	Last date of the publication of the aforesaid notification.	28.11.2005
3.	Interim order in the writ petition of Kshama Sahkari Avas Samiti Ltd.	23.11.2005
4.	Date of expiry of the above interim order	28.11.2005
5.	Date of further stay order in the above writ petition	12.12.2005
6.	Writ petition of Kshama Sahkari Avas Samiti Ltd. allowed.	25.08.2006
7.	Date of interim order passed by the Supreme Court in the three special leave petitions.	08.12.2006
8.	Special leave petitions finally decided	13.05.2011
9.	Declaration under Section 6 of the Act	11.05.2012

12. In order to examine the issue of limitation of declaration under Section 6 of the Act, it would be profitable to quote the relevant provisions of Sections 4 and 6 of the Act:

*"**4. Publication of preliminary notification and power of officers thereupon. -** (1) Whenever it appears to the appropriate Government or Collector that land in any locality is needed or is likely to be needed for any public purpose or for a company, a notification to that effect shall be published in the Official Gazette and in two daily newspapers circulating in that locality of which at least one shall be in the regional language, and the Collector shall cause public notice of the substance of such notification to be given at convenient places in the said locality (the last of the dates of such publication and the giving of such public notice, being hereinafter referred to as the date of the publication of the notification).*

(2) ....."

*"**6. Declaration that land is required for a public purpose. -** (1) Subject to the provision of Part VII of this Act, when the appropriate Government is satisfied, after considering the report, if any, made under section 5A, sub-section (2), that any particular land is needed for a public purpose, or for a Company, a declaration shall be made to that effect under the signature of a Secretary to such Government or of some officer duly authorized to certify its orders and different declarations may be made from time to time in respect of different parcels of any land covered by the same notification under section 4, sub-section (1) irrespective of whether one report or different reports has or have been made (wherever required) under section 5A, sub-section (2):*

Provided that no declaration in respect of any particular land covered by a notification under section 4, sub-section (1)-

(i) published after the commencement of the Land Acquisition (Amendment and Validation) Ordinance, 1967 (1 of 1967), but before the commencement of the Land Acquisition (Amendment) Act, 1984, shall be made after the expiry of three years from the date of the publication of the notification; or

(ii) published after the commencement of the Land Acquisition (Amendment) Act, 1984, shall be made after the expiry of one year from the date of the publication of the notification:

Provided further in computing the period of three years referred to in the preceding proviso, the time during which the State Government was prevented by or in consequence of any order of any Court from making such declaration shall be excluded.

Provided further that no such declaration shall be made unless the compensation to be awarded for such property is to be paid by a Company, or wholly or partly out of public revenues or some fund controlled or managed by a local authority.

***Explanation 1. -** In computing any of the periods referred to in the first proviso, the period during which any action or proceeding to be taken in pursuance of the notification issued under section 4, sub-section (1), is stayed by an order of a Court shall be excluded.*

***Explanation 2. -** Where the compensation to be awarded for such property is to be paid out of the funds of a corporation owned or controlled by the State, such compensation shall be deemed to be compensation paid out of public revenues.*

(2) Every declaration shall be published in the Official Gazette, and in two daily newspapers circulating in the

locality in which the land is situated of which at least one shall be in the regional language, and the Collector shall cause public notice of the substance of such declaration to be given at convenient places in the said locality (the last of the dates of such publication and the giving of such public notice, being hereinafter referred to as the date of the publication of the declaration), and such declaration shall state the district or other territorial division in which the land is situate, the purpose for which It is needed, its approximate area, and, where a plan shall have been made of the land, the place where such plan may be inspected.

(3) The said declaration shall be conclusive evidence that the land is needed for a public purpose or for a company, as the case may be; and, after making such declaration, the appropriate Government may acquire the land in manner hereinafter appearing."

13. The provisions as quoted above clearly reflects that the last date of publication of the notification under Section 4 of the Act is referred to as the date of the notification and that it is mandatory to make a declaration under Section 6 of the Act within one year from such notification. In computing the aforesaid period of one year the period during which any action or proceedings remained stayed by the order of the court shall stand excluded.

14. In the instant case the date of the notification under Section 4 of the Act is 03.10.2005 but as it was last published on 28.11.2005 the said date i.e. 28.11.2005 shall be the date of the publication of the notification. Thus a declaration under Section 6 of the Act in ordinary course was supposed to be made on or before 28.11.2006. However as there were interim orders affecting the proceedings in pursuance to the notification under Section 4 of the Act, the periods of the said stay orders are liable to be excluded and the limitation for making the declaration would stand extended by such excluded periods.

15. A perusal of the chart of dates would indicate that the limitation for issuing declaration under Section 6 of the Act commenced on 28.11.2005, the date on which the notification under Section 4 of the Act was last published. The interim order in the writ petition of Kshama Sahkari Avas Samiti Ltd. remained in operation from 23.11.2005 till 28.11.2005 and then from 12.12.2005 till 25.8.2006. Thus, there was no interim order between 29.11.2005 and 11.12.2005.

16. The Supreme Court passed interim order on 8.12.2006 which remained in operation till 13.5.2011. Thus, there was no interim order from the date of the judgment of the High Court ie. 25.08.2006 till the grant interim order by the Supreme Court on 8.12.2006. Again there was no interim stay order from the date of dismissal of SLPs by the Supreme Court ie. from 13.05.2011 till the date of declaration ie. 11.05.2012.

17. In other words, there was no stay order operating during the following periods:-

(i) 28.11.2005 to 11.12.2005
(ii) 26.08.2006 to 07.12.2006
(iii) 14.05.2011 to 10.05.2012

The stay was operative only during the following periods:-

(i) 12.12.05 to 25.08.2006
(ii) 08.12.06 to 13.05.2011

18. It may be worth noting that there is no other date except 11.05.2012 on record of the publication of the declaration under Section 6 of the Act. Therefore, 11.05.2012 is taken as the last date of its publication and thus the date of the said declaration.

19. In view of the explanation 1 to proviso to Section 6(1) of the Act in computing the period of one year for issuing declaration under Section 6 of the Act from the date of last publication of notification under Section 4 of the Act, the period during which the interim order had remained in operation is liable to be excluded.

20. Accordingly, the periods of stay from 12.12.2005 to 25.8.2006; and 8.12.2006 to 13.5.2011 are liable to be excluded in computing the period of one year which commenced on 28.11.05. To put it differently, the period of limitation of one year which commenced on 28.11.2005 was interrupted by the above periods during which the stay remained in operation but as there was no interim orders between 28.11.2005 to 12.12.2005 and 25.8.2006 to 8.12.2006 the period of limitation continued to run in these two periods.

21. It is in view of the above factual background, we have to examine whether the declaration made under Section 6 of the Act on 11.5.2012 is within time of one year from the date of last publication of notification under Section 4 of the Act i.e. 28.11.2005 excluding the period in which interim orders remained operative and whether in view of the direction of the Supreme Court contained in its judgment and order dated 13.5.2011 permitting the State authorities to publish notice inviting objections and to decide the objections in accordance with law within the time fixed by it would override the statutory limitation or extend the same, making the declaration to be a valid one.

22. The date of the notification under Section 4 of the Act is 28.11.2005 and that of the declaration under Section 6 of the Act is 11.05.2012. Now, let us examine if the said declaration is within time of one year from the date of the notification under Section 4 of the Act excluding the period during which stay orders have remained operative.

23. The period of one year referred to in the proviso (ii) to Section 6(i) of the Act means a year of 365 days according to the British Calendar. Section 3(6) of the General Clauses Act, 1897 also defines "a year" to mean a year according to the British Calendar.

24. The Ninth Edition of the Black's Law Dictionary defines a year to be a period of 12 calendar months beginning from January 1 and ending on 31st December. In other words, a consecutive period of 365 days beginning from any point is reckoned as a year as per the British Calendar.

25. In view of above, the primary issue is whether the declaration under Section 6 of the Act in the instant case has been made within a period of 365 consecutive days commencing from 28.11.2005 excluding the period of the stay orders.

26. The limitation of the above one year or 365 days commenced on 28.11.2005. It started running as under:-

1. November-2005 (29 - 30 Nov.) 2 days

2. December-2005 (1 - 11 Dec.)
11 days

Note:- Interrupted from 12.12.05 to 25.08.06 due to the stay order of High Court.

1. August-2006 (26 - 31 Aug.)
6 days
2. September-2006
30 days
3. October-2006
31 days
4. November-2006
30 days
5. December-2006
7 days

Note:- Interrupted from 08.12.06 to 13.05.2011 due to the stay order of Supreme Court.

1. May-2011 (14 - 31 May)
18 days
2. June-2011
30 days
3. July-2011
31 days
4. August-2011
31 days
5. September-2011
30 days
6. October-2011
31 days
9. November-2011
30 days
10. December-2011
31 days
11. January-2011
16 days

Total of 1 to 11
365 days

Note:-A total of 365 days from 28.11.05 excluding period of stay. Therefore, Limitation of one year expires on this day.

12. January-2012
15 days
13. February-2012
28 days
14. March-2012
31 days
15. April-2012
30 days
16. May-2012
10 days (up date of decl-
-aration i.e.11.05.2012

Total of 12 to 16
114 days

Note:- A total of (365+114) 479 days from 28.11.05 excluding periods of stay. Therefore, the declaration is beyond time of one year by 114 days from 28.11.05 till the date of declaration on 11.05.12

27. It is pertinent to mention that the Supreme Court in the case of **R. Indira Saratchandra Vs. State of Tamil Nadu (2011) 10 SCC 344** has held that once a stay order passed by the court is vacated, it comes to an end and the clog put on the running of the limitation gets removed.

28. The above computation of the limitation would show that on the date of the declaration made under Section 6 of the Act a period of 479 days have lapsed from the date of notification under Section 4 of the Act excluding the periods during which the stay orders of the High Court and the Supreme Court have remained in operation. The period of one year 28.11.2005 expired on 16.01.2012.

Thus, making the declaration dated 11.05.2012 beyond limitation of one year by 114 days.

29. Thus the declaration made under Section 6 of the Act is on the face of it beyond one year and is barred by statutory limitation.

30. Legal maxim---*Expressio unius est exclusio alterius*- means that if a statute provides for a thing to be done in a particular manner, then it has to be done in that manner alone and that no other manner is open and permissible in law.

31. The above maxim has been consistently followed by the Supreme Court right from 1961 in the case of **Deep Chand Vs. State of Rajasthan AIR 1961 S.C. 1527** till date.

32. In view of the above well acknowledged legal principle since proviso(ii) to Section 6 of the Act mandates for issuing of the declaration within a year from the date of notification under Section 4 of the Act, the declaration has to be made within the said period and not otherwise.

33. In **Padmasundara Rao (Dead) Vs. State of Tamil Nadu & others (2002) 3 SCC 533,** the Five Judges of the Supreme Court in reference to the period of limitation regarding declaration under Section 6 of the Act observed that language of Section 6(1) is plain and unambiguous. There is no scope for reading something into it. If the legislature has specifically provided for the period of limitation and to exclude periods covered by the stay orders, it clearly means that no other period is intended to be excluded and that there is no scope for providing any other period of limitation other than which is prescribed under the Act.

34. In **Ashok Kumar & others Vs. State of Haryana and another (2007) 3 SCC 470** the Apex Court held that the limitation provided in proviso (ii) appended to Section 6(1) of the Act is mandatory in nature. Any declaration made after the expiry of one year from the date of the notification issued under Section 4 of the Act would be void and will have no effect.

35. A Division Bench of this court in **Mahavir Sahkari Awas Samiti Ltd. Vs. State of U.P. and another (2007) 2 AWC 1162 (DB)** of which one of us (P. Mithal J.) was the member in context to the validity of a declaration made under Section 6 of the Act on the ground of its limitation held that the court had no competence to extend the period of limitation and that direction of the court to deal with the mater in accordance with law does not extend the statutory limitation. Therefore, a declaration or a fresh declaration under Section 6 of the Act could not have been made after the expiry of one year excluding period of stay, from the date of issuance of the publication of the notification under Section 4 of the Act.

36. In **Vijay Narayan Thatte & others Vs. State of Maharastra & others (2009) SCC 92** again in reference to a declaration under Section 6 of the Act it was held since the statute is very clear, the period of limitation provided in proviso (ii) to Section 6 of the Act has to be followed and even the concession of the counsel cannot obliterate the same as it is mandatory in nature and must operate with its full rigour.

37. In **Oxford English School Vs. Government of Tamil Nadu & others**

(1995) (5) SCC 206 it has been laid down that the High Court could not have given any direction permitting issuance of the declaration under Section 6 of the Act from the date of its judgement if otherwise the limitation is over.

38. In the **State of Punjab and another Vs. Rajesh Syal (2002) 8 SCC 158** the Supreme Court observed that it has ample jurisdiction to pass orders under Article 142 (1) of the Constitution of India that may be necessary for doing complete justice in any case but even in exercise of that power it is more than doubtful, if it can pass order contrary to law. Thus, it was held that court can not extend the period of limitation.

39. Thus, even the Supreme Court in exercise of its jurisdiction under Article 142 of the Constitution of India would not ordinarily grant a relief that would be in violation of statutory provision or to do an act which may be contrary to the express provisions of Law.

40. In **Anil Kumar Gupta Vs. State of Bihar & others (2012) 12 SCC 443** the court opined that a declaration issued under Section 6 of the Act after the expiry of one year from the date of notification under Section 4 of the Act, is a nullity.

41. In view of above legal position and the mandatory requirement of issuing a declaration within a year from the date of publication of notification under Section 4 of the Act excluding period of stay, the impugned declaration made under Section 6 of the Act on 11.05.2012 is patently beyond time and is not only illegal but a nullity.

42. This takes us to the second limb of the arguments of Sri M.C. Chaturvedi, Additional Advocate General that the limitation provided proviso (ii) to Section 6 of the Act has no applicability where there is direction from the court to act upon pursuant to the notification issued under Section 4 of the Act and to complete the exercise of making the declaration within the time permitted. In such a situation the limitation provided stands circumscribed or automatically extended.

43. First of all the above argument is based upon complete misreading of the directions of the Supreme Court dated 13.05.2011 issued while deciding the three special leave petitions in the matter of **Kshama Sahkari Avas Samiti Ltd.**

44. The relevant part of the aforesaid order of the Supreme Court reads as under:-

"Accordingly, we dispose of the two Special Leave Petitions by directing the Land Acquisition Authorities to publish Notice inviting objections under Section 5 of the Land Acquisition Act, 1894 in 'Amar Ujala' and 'Dainik Jagran', both local daily newspapers, and the said Notice shall indicate that objections could be filed within two months from the date of publication and upon receipt of such objections, if any, the concerned authorities shall dispose of the same in accordance with law within three months thereafter.

The interim orders passed in SLP (C) No.19602 of 2006 are vacated.

Consequently, SLP (C) No.20489 of 2006, filed by the Agra Development Authority against the same judgment of the Division Bench of the High Court, as impugned in the other

Special Leave Petitions is also disposed of in the above terms."

45. A plain reading of the above directions would reveal that the Apex Court had not granted any liberty to the respondents to publish a declaration under Section 6 of the Act even if the time for making it had expired.

46. In fact the court had not dealt with the period of limitation for making the declaration under Section 6 of the Act. It only permitted the respondents to invite objections under Section 5A of the Act by publication of notice in the newspapers and had prescribed time limit for filing objections and for its disposal that too in accordance with law.

47. In accordance with law means within the time provided under the Act itself and not otherwise.

48. In view of above, it cannot be said that the Supreme Court has consciously waived the period of limitation provided for making declaration under Section 6 of the Act or has extended the same or has otherwise permitted the respondents to make it even if the limitation has expired.

49. This apart the period of limitation provided under the statute cannot be extended and it is not open for the court to confer jurisdiction upon any authority which it had ceased to exercise. In this regard a reference may be had to **Oxford English School (Supra)** and **Mahavir Sahkari Awas Samiti Ltd. (Supra).**

50. Even though no contrary decision has been cited to dislodge the principle that the statutory period of doing a thing can be extended or ignored may be due to the directions of the court, we have ourselves laboured hard and have come across few decisions not in context with the acquisition of the land but in reference to tax proceedings wherein a different view appears to have been expressed. Therefore, we consider it appropriate to deal with those decisions also before expressing our final opinion upon the validity of the impugned declaration.

51. The convssing that where proceedings were taken pursuant to the directions of the court to pass a fresh order, the statutory limitation provided would not be a bar can be supported by a decision in **Mishra Sugandhi Karyalaya Vs. State of U.P. and others 2011 (40) VST 364 (All)**. In the said case the order of assessment pursuant to notice under Section 21(2) of the U.P. Trade Tax Act, 1948 (hereinafter referred to as the Trade Tax Act) was the subject matter of challenge on the ground that the submissions made by the petitioners were not considered at all. Learned Standing Counsel conceded and requested that the matter be remanded with the direction to pass a fresh order. Accordingly, the order impugned therein was set aside and the matter was remanded to pass a fresh order and it was observed that in view of the decision in **M/s S.K. Traders Vs. Additional Commissioner of Trade Tax, Ghaziabad and another 2007 NTN (34) 345** the limitation would not be a hindrance.

52. Thus, the aforesaid decision was rendered on the basis of the concession or the consent of the parties and was not a decision on merits. The court in passing the said order had not adjudicating point

of limitation but simply applying the ratio of **S.K. Traders (Supra)** observed that the limitation would not come in way of passing a fresh assessment order.

53. In the case of **S.K. Traders (Supra)** the court held that where proceedings have been set aside by the High Court under Article 226 of the Constitution of India the period of limitation shall not apply in initiating proceedings thereafter.

54. A reading of the above decision would reveal that it was rendered primarily based upon the decision of the Supreme Court in **Director of Inspection of Income Tax (Investigation) New Delhi and another Vs. Pooran Mal and sons AIR (1975) (4) SC 67** which had laid down that once an order had been passed within the period of limitation, the subsequent order made in pursuance to the order or remand or direction of the High Court would not be barred by limitation and can be made at any time.

55. In **Pooran Mal's case (Supra)** the controversy was with regard to the period of time under Section 132(5) of the Income Tax Act, 1961. The earlier order was quashed by the High Court with liberty to the department to look into the matter afresh. The said order was passed with the consent of the parties. On the fresh order being passed, a question of limitation arose. The Supreme Court upheld the order as it was passed in pursuance of the agreement of the parties and held that the period limitation mentioned in Section 132(5) of the Income Tax Act stood waived as the parties have agreed for an order and are not entitle to take the plea of limitation on the principle of estoppal.

56. The very fact that the order permitting passing of a fresh order was based upon the consent of the parties and was with their agreement, the decision of **Pooran Mal's case** does not be lay down a binding precedent. Moreover, particularly as the principle of waiver and estoppal was applied therein which are not attracted in the case at hand, the above decision is of no relevance in the present context.

57. It is settled law that the court should not place reliance a decision without discussing the factual situation and comparing the same with the fact situation of the case at hand as there is always a peril in treating the words of a speech or judgement as though they are words in a legislative enactment. A decision is only an authority for what is actually decided. The essence of the decision is its ratio and not every observation or what logically follows from those.

58. The aforesaid decision was considered in extenso by the Five Judges Bench of the Supreme Court in **Padmasundara Rao's case** and the same was not applied as it was based on the principle of waiver and estoppal.

59. It would be very fruitful to reproduce the observation of the Supreme Court in the case of **Padmasundara Rao** distinguishing the above decision of **Pooran Mal's case.**

Padmasundara Rao case:-

"Learned counsel for the respondents referred to some observations in Pooran Mal case which form the foundation for decisions relied upon by him. It has to be noted that

Pooran Mal Case was decided on entirely different factual and legal backgrounds. The Court noticed that the assessee who wanted the Court to strike down the action of the Revenue Authorities on the ground of limitation had himself conceded to the passing of an order by the Authorities. This court, therefore, held that the assessee can not take undue advantage of his own action. Additionally, it was noticed that the time limit was to be reckoned with reference to the period prescribed in respect of Section 132(5) of the IT Act. It was noticed that once the order has been made under Section 132 (5) within ninety days, the aggrieved person has got the right to approach the notified authority under Section 132 (11) within thirty days and that authority can direct the Income Tax Officer to pass a fresh order. This is the distinctive feature vis-a-vis Section 6 of the Act. The Court applied the principle of waiver and inter alia held that the period of limitation prescribed therein was one intended for the benefit of the person whose property has been seized and it was open to that person to waive that benefit. It was further observed that if the specified period is held to be mandatory, it would cause more injury to the citizens than to the Revenue. A distinction was made with status providing periods of limitation for assessment. It was noticed that Section 132 does not deal with taxation of income. Considered in that background, ratio of the decision in Pooran Mal case has no application to the case at hand."

60. In view of the above, the decision of **Pooran Mal's case** and those of **S.K. Traders (Supra)** and others do not affect the reasoning drawn by us on the point of limitation.

61. Now we deal with the second argument advanced on behalf of the petitioners that as the objections filed under Section 5A of the Act were not decided by the Collector but by the SALO who was not competent, the rejection of the objections and the consequent report to the government is a nugatory.

62. The objections of the tenure holders objecting to the acquisition of the land are required to be heard in accordance with Section 5A of the Act. It provides that every objection to the acquisition of the land as a consequence of the notification issued under Section 4 of the Act shall be made to the Collector in writing and the Collector shall give such objectors an opportunity of hearing and thereafter if necessary after making further enquiry submit a report or reports to the appropriate government with his recommendations whereupon the government shall take a final decision and proceed to make a declaration under Section 6 of the Act if necessary.

63. Section 5A(2) of the Act which is relevant in this regard reads as under:-

"Every objection under sub-section(1) shall be made to the Collector in writing, and the Collector shall give the objector an opportunity of being heard in person or by any person authorised by him in this behalf or by pleader and shall, after hearing all such objections and after making such further inquiry, if any, as he thinks necessary, either make a report in respect of the land which has been notified under section 4, sub-section (1), or make different reports in respect of different parcels of such land, to the appropriate Government, containing his recommendations on the objections, together with the record of the proceedings held by him, for the decision

of that Government. The decision of the appropriate Government on the objections shall be final."

64. On the plain reading of the aforesaid provision the Collector is the competent authority before whom objections have to be filed and who is vested with the power to hear the objections in making report for the purposes of acquisition of the land to the State Government.

65. The word 'Collector' has not been defined under the Act but in Section 3(11) of the General Clauses Act, 1897 it has been defined to mean in places other than the Presidency-towns as chief officer- in-charge of the revenue-administration of the district.

66. In the State of U.P. previously United Provinces later U.P. Land Revenue Act, 1901 used to govern the law relating to land revenue and the jurisdiction of the officers thereto.

67. Section 14 of the said Act provides that the State Government shall appoint in each district an officer who shall be a Collector of the district exercise all the powers and to discharge all the duties conferred and imposed on a Collector by the said Act or any other law for the time being in force.

68. According to Section 14-A of the Act an Additional Collector exercise such powers and discharge such duties of the Collector as may be prescribed and directed by the Collector concerned and in exercising such powers, he acts as the Collector of the district. At the same time, Section 15 of the said Act provides for the appointment of Assistant Collectors of the first or the second class who shall also be the Revenue Officers in the district but subordinate to the Collector. In other words Assistant Collector is not a Collector but a Revenue Officer subordinate to the Collector.

69. Now the administration of the revenue in the districts is governed by the U.P. Revenue Code, 2006. Section 12 of the Code provides that the State Government shall appoint a Collector in each district, who shall be in-charge of the revenue-administration thereof and shall exercise all powers and discharge all duties conferred and imposed upon him by or under the Code or any other law for the time being enforced meaning thereby that the Collector appointed therein addition to revenue-administration may also be conferred with powers and duties not only under the code but also under other laws in force such as the Land Acquisition Act.

70. The above provision also contemplates of the appointment of one or more AdditionalCollector in the district to exercise and discharge all powers and duties of the Collector.

71. Section 4(8) of the Code defines 'Collector' to be an Officer appointed by the State Government under Section 12 of the Act and to include an Additional Collector and Assistant Collector of the First Class empowered by the State Government by notification to discharge all or any of the functions of a Collector under the Code.

72. For the sake of convenience Section 12 of the Code and the definition of the Collector contained in 4(8) of the Code are reproduced herein below:-

'Collector' means an officer appointed as such by the State Government under sub-section (1) of Section 12, and shall include--

(a) an Additional Collector appointed by the State Government under sub-section (2) of the said section: and

(b) an Assistant Collector of the first call empowered by the State Government by notification to discharge all or any of the functions of a Collector under this Code;

73. On the conjoint reading of the above two provisions it is implicit that the Collector is the Officer appointed by the State Government as the person in-charge of the revenue-administration of the district Additional Collector and other functions and duties provided under the Code and includes an Assistant Collector of the First Class who is so empowered by the State Government by notification to discharge all or any of the functions of the Collector under the Code.

74. In other words, in addition to the Collector and the Additional Collector an Assistant Collector of the First Class can discharge the functions of the Collector under the Code if he is so empowered by the State Government by a notification, such Assistant Collector however is not entitle to discharge any other functions of the Collector other than those under the Code such as those conferred upon the Collector under the other Acts including the Act.

75. In view of the aforesaid facts and circumstances, an Assistant Collector of the First Class is not entitle to function as Collector unless he is so notified by the Collector. Secondly, even if he is so notified he can only discharge functions of the Collector under the Code and not those that are conferred upon the Collector under the other Acts.

76. The Special Land Acquisition Officer who dealt with the objections of the petitioner/tenure holders and rejected the same is not the Collector or the person in-charge of the Revenue-administration. He is not even an Additional Collector. He is simply an Assistant Collector of the First Class but he cannot discharge the functions of the Collector either under the Code or under any other Act as there is nothing on record to establish that he has been so empowered by the State Government by means of a notification.

77. Even if there is a notification of the State Government empowering the Assistant Collector First Class or the SLAO to discharge functions of the Collector, he would be entitle only to carry out only those functions of the Collector which are given under the Code. It means the SLAO has no authority or jurisdiction to discharge the functions of the Collector as envisaged under Section 5A of the Act as he is not the Collector or officer-in-charge of the revenue administration of the district or the Additional Collector.

78. In view of the aforesaid legal position, the rejection of the objections of the petitioner/tenure holders by the SLAO vide order dated 03.11.2011 is wholly illegal and without jurisdiction.

79. The Collector could not have made any report or recommendation on the basis of the said orders of the SLAO to permit the State Government to make a valid declaration under Section 6 of the Act.

80. In the light of the above discussion, we conclude that the declaration dated 11.05.2012 made under Section 6 of the Act is beyond time as prescribed by proviso (ii) to Section 6(1) of the Act and is a nullity and as the objections filed by the tenure holders under Section 5A of the Act were not dealt with by the Competent Authority their rejection is without jurisdiction and on that basis no report or recommendation could have been made for issuing the declaration under Section 6 of the Act.

81. Accordingly, on both the counts the petition succeeds and the declaration dated 11.05.2012 issued under Section 6 of the Act is quashed, in so far as the petitioners or their heirs and legal representatives are concerned.

82. The writ petition is **allowed** with no order as to costs.

(2019)12 ILR A788

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.10.2019

BEFORE
THE HON'BLE BHARATI SAPRU, J.
THE HON'BLE ROHIT RANJAN AGARWAL, J.

Central Excise Appeal No. 16 of 2017
connected with
Central Excise Appeal No. 92 of 2017

Commissioner of Central Excise, Kanpur ...Appellant

Versus

M/s Trimurti Fragrances Pvt. Ltd, Kanpur ...Respondent

Counsel for the Appellant:
Sri Parv Agarwal

Counsel for the Respondent:
Sri Nishant Mishra, Sri Prashant Shukla, Sri Salig Ram Agrawal

A. Tax Law – Central Excise Act, 1944: Sections 3-A, 35-G; Pan Masala Packing Machines (Capacity Determination and Collection of Duty), Rules, 2008: Rules 7, 8, 9, 10 – The assessee is entitled to abatement of duty, in the event of closure of factory for continuous period of 15 days or more, without first depositing the duty in terms of Rule 10. Provided, the assessee complies with the statutory requirement. (Para 22, 23, 25)

When the rules do not provide for the manner in which duty is required to be abated, nor do they provide that abatement shall be by an order of the Commissioner or any authority, but nonetheless provide for abatement of duty and extent of entitlement to such abatement, the action of assessee in *suo moto* taking the benefit of abatement is not contrary to the statutory scheme, if he has correctly calculated the proportion of duty and set off the same against the duty payable for the next month. (Para 19, 20)

Central Excise Appeal dismissed. (E-4)

Precedent followed:
1. Commissioner Vs. Thakkar tobacco Products Pvt. Ltd., 2016 (332) E.L.T. 785 (Gujarat) (Para 19, 22, 24, 25)

Notifications/Circulars:
1. Circular No. 1063/2/2018-CX dated 16.02.2018, issued by Ministry of Finance (Department of Revenue) Central Board of Excise and Customs, New Delhi

Present appeal is against order dated 07.06.2016, passed by Customs, Excise and Service Tax Appellate Tribunal, Allahabad bench.

(Delivered by Hon'ble Rohit Ranjan Agarwal,J.)

1. These two appeals filed under Section 35-G of the Central Excise Act, 1944 arise against the order of the

Customs, Excise and Service Tax Appellate Tribunal, Allahabad (hereinafter called as "CESTAT"), dated 7.6.2016. As the issue in both the appeals are same, hence they are heard and decided together.

2. Appeal No.16 of 2017 was admitted on 23.5.2019 on the following questions of law:

"(i) Whether the Hon'ble CESTAT has erred in not taking the cognizance of the provision of Rule 7 and Rule 9 of Pan Masala Packing Machines (Capacity Determination and Collection of Duty), Rules, 2008 which provides that:

Rule 7. Duty payable to be calculated. -

The duty payable for a particular month shall be calculated by application of the appropriate rate of duty specified in the notification of the Government of India in the Ministry of Finance (Department of Revenue), No.42/ 2008-CE, dated the 1st July, 2008 to the number of operating packing machines in the factory during the month.

Rule 9. Manner of payment of duty and interest.-

The monthly duty payable on notified goods shall be paid by the 5th day of same month and an intimation in Form - 2 shall be filed with the Jurisdictional Superintendent of Central Excise before the 10th day of the same month:

Provided that monthly duty payable for the month of July, 2008 shall be paid on or before 15th day of July, 2008:

Provided further that if the manufacturer fails to pay the amount of duty by due date, he shall be liable to pay the outstanding amount along with the interest at the rate specified by the Central Government vide notification under section 11AB of the Act on the outstanding amount, for the period starting with the first day after due date till the date of actual payment of the outstanding amount:

Provided also that in case of increase in the number of operating packing machines in the factory during the month on account of addition or installation of packing machines, the differential duty amount, if any, shall be paid by the 5th day of the following month:

Provided also that in case a manufacturer permanently discontinues manufacturing of goods of existing retail sale price or commences manufacturing of goods of a new retail sale price during the month, the monthly duty payable shall be recalculated pro-rata on the basis of the total number of days in that month and the number of days remaining in that month counting from the date of such discontinuation or commencement and the duty liability for the month shall not be discharged unless the differential duty is paid by the 5th day of the following month and in case the amount of duty so recalculated is less than the duty paid for the month, the balance shall be refunded to the manufacturer by the 20th day of the following month:

Provided also that if there is revision in the rate of duty, the monthly duty payable shall be recalculated pro-rata on the basis of the total number of days in that month and the number of days remaining in that month counting from the date of such revision and the duty liability for the month shall not be discharged unless the differential duty is paid by the 5th day of the following

month and in case the amount of duty so recalculated is less than the duty paid for the month, the balance shall be refunded to the manufacturer by the 20th day of the following month:

Provided also that in case it is found that a manufacturer has manufactured goods of those retail sale prices, which have not been declared by him in accordance with provisions of these rules or has manufactured goods in contravention of his declaration regarding the plan or details of the part or section of the factory premises intended to be used by him for manufacture of notified goods of different retail sale prices and the number of machines intended to be used by him in each of such part or section, the rate of duty applicable to goods of highest retail sale price so manufactured by him shall be payable in respect of all the packing machines operated by him for the period during which such manufacturing took place:

Provided also that in case a manufacturer does not pay the duty payable by the due date, and continues to operate any packing machine, then till the time such non-payment continues, he shall be liable to pay the monthly duty based on the number of operating packing machines declared in the month for which duty was last paid by him or the total number of packing machines found available in
his premises at any time thereafter, whichever is higher:

Provided also that in case a new manufacturer commences production of notified goods in a particular month, his monthly duty payable for that month shall be calculated pro-rata on the basis of the total number of days in the month and the number of days remaining in that month starting from the date of commencement of the production of such notified goods and shall be paid within five days of such commencement.

(ii) Whether the Hon'ble CESTAT has erred in not taking cognizance that neither the party is a new manufacturer nor they have changed their Retail Sale Price (RSP) of 05 machines, which were used for the manufacture of Gutkha of MRP of Rs.2.00 during the month of November, 2012.

During the month of November, 2012, the parety operated the following machines for 12 days (i.e. 19.11.2012 to 30.11.2012)

- 06 Pouch Packing Machines of Gutkha of MRP Rs.1.00; and

- 05 Pouch Packing Machines of Gutkha of MRP Rs. 2.00.

As per Notification *No. 42/ 2008-CE, dated the 1st July 2008 read with Rule 7* of the Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008, during the month of November-2012, the rate of duty per machine per month for Pouch of MRP. 1.00 was Rs. 19 lakhs and for Pouch of MRP Rs. 2.00 was Rs. 36 lacs.

It is stipulated under proviso 4 of Rule 9 of the Pan Masala Rules, 2008 that if a manufacturer commences manufacturing of goods of a new retail sale price during the month, the monthly duty payable shall be recalculated pro-rata on the basis of the total number of days in that month and the number of days remaining in that month counting from the date of such commencement and the duty liability for the month shall not be discharged unless the differential duty is paid by the 5th day of the following month. Therefore, in view of the above proviso 4 of Rule 9 of the Pan Masala Rules, 2008, applicable for computation

of their duty liability for the month of November, 2012 as under:-

- the party was required to pay the Central Excise duty on pro-rata basis for total 12 days (from 19.11.2012 to 30.11.2012) on 06 pouch packing machines of MRP Rs. 1.00 that remained operative during the said period, which comes to Rs.45,60,000/- @ 19.00 lakhs per machine per month and this duty was to be paid by the 5th day of the following month [i.e. 5th December, 2012], as the pouches of MRP Rs. 1.00 was new retail price for the said party.

- the party was required to pay full duty on 05 machines used for the manufacture of Gutkha of MRP Rs. 2.00, which works out to Rs. 1,80,00,000/- @ Rs.36.00 lakhs per machine per month and this duty was to be paid by 5th of the same month, as the pouches of MRP Rs. 2.00 was not a new retail price for the party.

- thus, the total duty liability of the party for the month of November, 2012 works out to Rs. 2,25,60,000/- [Rs. 45,60,000/- of Gutkha MRP Rs. 1.00 on 06 machines + Rs. 1,80,00,000/- of Gutkha MRP Rs. 2.00 on 05 machines] as per the provisions of Pan Masala Rules, 2008 but the party paid Rs. 1,17,60,000/- only for the month of November, 2012 which resulted into short payment of Rs. 1,08,00,000/- for the month of November-2012.

(iii) When the Apex Court in the case of M/s Madhumilan Syntax Ltd vs Union of India- 2007(210) ELT 484 (SC), the Apex Court held that once a statute requires to pay tax and stipulates period within which such payment is to be made, the payment must be made within that period.

(iv) When the Apex Court in the case of State of Jharkhand & Others vs. Ambey Cement & Anr. [2004(178) ELT 055(SC)], has held that it is a cardinal rule of the 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.

(v) When the judgment of the Hon'ble High Court, Delhi relied on by the CESTAT in the instant case in the case of CCE vs. Shakti Fragrances Pvt. Ltd. [2015(324) E.L.T. 390] does not appear to be identical to the instant case.

(vi) Whether, in view of the provisions of Rule 7 & 9 of Pan Masala Packing Machines (Capacity Determination and Collection of Duty), Rule, 2008 and aforementioned rulings by Apex Court, the confirmation of demand & recovery of the short paid duty amounting to Rs.1,08,00,000/- for the month of November, 2012 alongwith interest and penalties should have been upheld by the Hon'ble CESTAT?

3. On 19.9.2019, learned counsel for the appellant was permitted to add the following substantial question of law, which reads as under:

"1). Whether in view of the provisions of Rule 9 and Rule 10 of the Pan Masala Packing Machine (Capacity Determination and Collection of Duty) Rules 2008, the manufacture is required to pay the duty for the whole month and thereafter seek rebate for non working days or the manufacture can suo moto take the benefit of abatement by not depositing the duty for non working days ?"

5. Brief facts of the case are, that respondent-assessee is a registered dealer and is paying duty on manufacture of Pan Masala containing tobacco (Gutkha)

under the Central Excise Tariff Act, 1985. Respondent-assessee on 13.9.2012 intimated the Department intending to start commercial production w.e.f. 12.9.2012 and requested for unsealing of 11 machines to manufacture Gutkha. 7 machines for manufacture of Gutkha of MRP Rs.2.00 and on 4 machines for manufacture of Gutkha of MRP Rs.1.50.

6. In the month of September, 2012, assessee intimated the Department that it will stop production/clearance w.e.f. 6.10.2012 and the Department pursuant thereto sealed the machines in the midnight of 5.10.2012.

7. On 5.10.2012, assessee paid central excise duty of Rs.3,68,000/- for the month of October, 2012 as there were 11 machines installed in the factory

8. Since production was closed for 26 days in the month of October, assessee applied for abatement of Rs.3,08,64,516/- which was granted by the Assistant Commissioner on 29.11.2012, who allowed the said amount to be adjusted while discharging duty for subsequent month.

9. The assessee on 12.11.2012 informed the Assistant Commissioner intending to start production of Gutkha of MRP Rs.1.00 on 6 machines and Gutkha of MRP Rs.2.00 on 5 pouches packing machine from 19.11.2012. On 16.11.2013, the Assistant Commissioner directed Superintendent, Central Excise to unseal and install the 11 machines in the midnight of 18.11.2012. The assessee started manufacture of pouches of Gutkha of MRP Rs.1.00 and MRP Rs.2.00 from 19.11.2012. The assessee calculated that he was liable to pay excise duty of Rs.1,17,60,000/- on pro-rata basis for 12 days, i.e., from 19.11.2012 to 31.11.2012 (duty of Rs.45,60,000/- and Rs.72,00,000/-) on Gutkha MRP Rs.1.00 and MRP Rs.2.00 respectively.

10. After adjusting Rs.1,17,60,000/- from abatement of Rs.3,08,64,516/-, sanctioned earlier on 29.11.2012, an amount of Rs.1,91,04,516/- remained from the abated amount. The assessee informed the Department of the payment by way of adjustment on 6.12.2012 by submitting Form-2.

11. The Department was of the opinion that assessee started manufacturing Gutkha on new retail price, i.e., MRP of Rs.1.00 during November, 2012, hence, duty on the same was payable on pro-rata basis, but, since Gutkha of MRP Rs.2.00 was not a new retail price, hence duty on the same was payable for the entire month and not for a period of 12 days provided under Rule 10 of the Pan Masala Packing Machines (Capacity Determination and Collection of Duty), Rules, 2008 (hereinafter called as "PMPM Rules, 2008"). The Superintendent, Central Excise through letters dated 4.3.2013 and 12.3.2013 required the assessee to deposit the central excise duty of Rs.1,08,00,000/-. The said letters were replied by assessee, but a show cause notice was issued on 25.9.2013 proposing for recovery of excise duty of Rs.1,08,00,000/- along with interest and penalty. The said show cause notice was adjudicated by Commissioner vide order dated 29.9.2014 confirming the proposed duty along with interest and equal amount of penalty under Rule 17 of PMPM Rules, 2008 read with Section 11AC of the Central Excise Act. Further, penalty of Rs.5000/- was imposed under Rule 27 of the Central

Excise Rules, 2002 for contravening Rule 12 of the Central Excise Rules, 2002 read with Rules 7 and 9 of the PMPM Rules, 2008.

12. Aggrieved by the said order, assessee filed an appeal No.E/50211/2015(DB), and against the order dated 30.9.2014 passed by the Commissioner of Central Excise and Service Tax, Kanpur, Appeal No.E/50222/2015/EX(DB) before CESTAT. On 7.6.2016, CESTAT while deciding the Appeal No.E/50211/ 2015(DB) set aside the order passed by Commissioner Central Excise and Service Tax holding it to be bad and against the provisions of Section 3-A of the Act read with Rules, 7, 8, 9 and 10 of the PMPM Rules, 2008. Similarly, on 10.8.2016 the other appeal of the assessee was also allowed and the order of the Commissioner Central Excise and Service Tax was set aside.

13. Sri Parv Agarwal, learned counsel appearing for the Department, submitted that assessee on 12.11.2012 had submitted a letter declaring that w.e.f. 19.11.2012 the assessee is going to start production of notified goods, i.e., Gutkha of MRP Rs.1.00 with the aid of 6 pouches packing machine and Gutkha of MRP Rs.2.00 with the aid of 5 pouches of packing machine. It is submitted that assessee is neither a new manufacturer nor has changed the retail price of 5 machines, which were used for manufacture of Gutkha of MRP Rs.2.00 during the month of November, 2012. Thus, as per proviso 4 of Rule 9 of the PMPM Rules, 2008 applicable for computation of excise duty is liable for the relevant month. He further submitted that the assessee was required to pay excise duty on pro-rata basis for 12 days on 6 pouches packing machines of MRP Rs.1.00 that remained operative during the said period, which comes to Rs.45,60,000/- @ Rs.19,00,000/- per machine, per month and the same was to be paid by 5th day of the following month (i.e. 5th December, 2012), as the pouches of MRP Rs.1.00 was new retail price of the assessee. Further, the assessee was required to pay full excise duty on 5 machines, which were used for manufacture of Gutkha of MRP Rs.2.00, which works out to Rs.1,80,00,000/- @ Rs.36,00,000/- per machine, per month and this was to be paid by 5th day of the same month as the MRP Rs.2.00 was not a new retail price for the party. According to him total excise duty liability for the month of November, 2012 was Rs.2,25,60,000/- but the assessee had paid only Rs.1,17,60,000/- and there was a short fall of Rs.1,08,00,000/-.

14. Learned counsel for the Department further submitted that Rule 10 of PMPM Rules,2008 provides for abatement in the case of non-production of notified goods and abatement is subject to condition stipulated therein and the assessee cannot on his own calculate the excise duty and set off the same against the duty payable under Rule 9 of the PMPM Rules, 2008.

15. Sri Agarwal submitted, that settled principle of law is that once the statute requires to pay tax within stipulated period then such payment is to be made within that period, otherwise it would render the provision redundant and nugatory.

16. Replying the averments made by counsel for the Department, Sri Nishant

Mishra, learned counsel appearing for the respondent-assessee submitted that sub-section 3 of Section 3-A of the Central Excise Act provides that if a factory producing notified goods did not produce the same during any continuous period of 15 days or more, duty calculated on proportionate basis shall be abated in respect of such period, subject to conditions as may be prescribed.

17. Rule 10 of the PMPM Rules, 2008 provides condition for abatement, i.e. if a manufacturer files intimation with the Deputy/Assistant Commissioner with a copy to Superintendent at least three working days prior to commencement of such period. According to him, in the present case, conditions prescribed under Rule 10 were complied and assessee had intimated the Assistant Commissioner on 25.9.2012 regarding stoppage of production from 6.10.2012 and again by letter dated 12.11.2012 regarding starting of production from 19.11.2012.

18. Sri Mishra submitted that intimation as required under Rule 10 was given by the assessee. Thus, he was entitled to abatement in terms of Rule 10 of the PMPM Rules, 2008 in respect of Gutkha of MRP Rs.2.00. He further submitted that provision to Rule 9 cannot be interpreted in a manner so as to levy duty in circumstances, specifically barred by the parent statute, i.e., proviso to Section 3A of the Act.

19. Sri Nishant Mishra, relied upon a judgment of the Gujrat High Court in the case of **Commissioner vs. Thakkar tobacco Products Pvt. Ltd. 2016 (332)E.L.T. 785** (Gujarat) wherein the same issued was under consideration and was decided in favour of the assessee. Relevant paragraph nos.12, 13, 14 and 15 of the said judgment are extracted hereunder:-

"12. In the above backdrop, the merits of the impugned order may be examined. The Tribunal, in the impugned order, has recorded that in none of the orders impugned before it, it is in dispute that there was a closure of the factory for more than fifteen days and the required procedure of due intimation of closure, sealing and due intimation or reopening was followed. Thus, there was no dispute that the requirements of rule 10 of the PMPM Rules had been fulfilled. There was also no dispute that the amount adjusted was not more than the amount of duty mandated to be abated in terms of rule 10 of the PMPM Rules. The Tribunal has taken note of the fact that rule 10 of the PMPM Rules does not make any stipulation about abatement having to be claimed by filing an application, though it also does not imply to the contrary. Referring to rule 9 of the PMPM Rules, it was observed that when the intention of the Government is that the amount is to be refunded and an express provision is provided therefor, whereas rule 10 does not make any such provision. It may be noted that insofar as rule 96ZO of the Central Excise Rules is concerned, sub-rule (2) thereof expressly provides for claim of abatement being made under sub-section (3) of section 3A of the Act, which would be allowed by an order passed by the Commissioner of Central Excise of such amount as may be specified in such order. Similarly, sub-rule (7) of rule 96ZQ provides for abatement being allowed by an order passed by the Commissioner of Central Excise of such amount as may be specified in such order, subject to the conditions enumerated thereunder.

Similarly, sub-rule (2) of rule 96ZP provides for abatement being allowed by an order passed by a Commissioner of Central Excise of such amount as may be specified in such order subject to the fulfillment of the conditions laid down thereunder. Thus, in relation to independent processors of textile fabrics, manufacturers of non-alloy steel hot re-rolled products and manufacturers of non-alloy steel ingots, who were also assessed on the basis of annual production capacity under section 3A of the Act, there was an express provision for making an order of abatement whereas the PMPM Rules are totally silent in that regard. There is no provision for making an order of abatement under rule 10 of the PMPM Rules.

13. As noticed earlier, rule 10 of the PMPM Rules provides for abatement of duty calculated on proportionate basis in case where the factory does not produce notified goods during any continuous period of fifteen days or more. However, such abatement is subject to the conditions stipulated thereunder as referred to hereinabove. Once such conditions are satisfied, the assessee becomes entitled to abatement of duty to the extent of the days the factory did not produce the notified goods.

14. On a plain reading of rule 10 of the PMPM Rules, it is apparent that while the same provides that duty calculated on a proportionate basis shall be abated, it does not provide for any procedure for doing so. Thus, whereas rules 96ZQ, 96ZO and 96ZP of the Central Excise Rules, 1944, which also are schemes under the compounded levy scheme, there were express provisions for making an order of abatement by the Commissioner, rule 10 of the PMPM Rules is wholly silent in that regard. Under the circumstances, having regard to the fact that rules 96ZQ, 96ZP and 96ZO provided for making an order of abatement, however, there is no corresponding provision in the PMPM Rules, it can be inferred that the rule making authority has consciously omitted making such provision. Therefore, in the absence of any specific provision for making an order of abatement, it cannot be said that the action of the assessee in calculating the duty on a proportionate basis and setting off the same against the duty payable in the succeeding month is, in any manner, violative of the rules or the statutory scheme.

15. Besides, in the light of the findings recorded by the Tribunal to the effect that it is not disputed that the adjustments made were not more than the amounts of duties mandated to be abated as per rule 10 of the PMPM Rules, the action of the respondent assessee in computing the proportionate amount of duty towards the abatement and setting it off against the duty payable in the next month does not adversely affect the revenue in any manner. The abatement, in the opinion of this court, is not akin to refund and means reduction or diminution of the duty. Therefore, when the duty stands reduced to the extent provided in the rule, there is no liability to pay the same, inasmuch as, to that extent the duty stands abated. Therefore, if the assessee has correctly calculated the proportion of duty and set off the same against the duty payable for the next month, it cannot be said that the said action is contrary to the statutory scheme. When the rules do not provide for the manner in which duty is required to be abated, nor do they provide that abatement shall be by an order of the Commissioner or any authority, but nonetheless provide for abatement of duty

and the extent of entitlement to such abatement, no fault can be found in the approach of the assessee in suo motu taking the benefit of such abatement."

20. Sri Mishra also placed reliance upon circular issued by the Ministry of Finance (Department of Revenue) Central Board and Excise & Customs, New Delhi dated 16.2.2016 wherein the Department has accepted the judgment of the High Court of Gujarat in case of M/s Thakkar Tobacco (supra). Relevant portion of the circular No.1063/2/2018-CX dated 16.2.2018 is extracted hereunder:

"7.1 Department has accepted the aforementioned order of the Hon'ble High Court of Gujarat where the Hon'ble Court dismissed the departmental appeal on the question of law, whether manufacturer has the option of suo-moto abatement of duty in the event of closure of factory for a continuous period of 15 days or more without first depositing the duty in terms of rule 10 of Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008, on the following grounds,

a) As per provisions of the Central Excise Act, 1944 and the PMPM Rules abatement is to be granted and the statute does not prescribe any order of abatement to be passed by the any authority such as DC/AC.

b) In the erstwhile Central Excise Rules, 1944, there was an express provision which provides for claim of abatement would be allowed by an order passed by the Commissioner of Central Excise. When the intention of the government is that amount is to be refunded in as specific manner, then an express provision is provided. However the impugned rule does not make any such provision.

c) The Board Instruction from F.No.267/16/2009-CX-8 dated 12.03.2009 is not applicable in the present case as Rule of PMPM rules does not speak of any order of abatement."

21. We have heard learned counsel for the parties and perused the materials on record.

22. The sole issue under consideration is as to giving benefit of abatement for non-production, whether the assessee could on their own calculate excise duty and set off the same against the duty payable in the next month. The argument of the Department relying upon Rule 9 of the PMPM Rules, 2008 claiming that the monthly duty on notified goods is to be paid by 5th day of the month and the assessee cannot simpliciter claim set off without first depositing the same had been repelled by the Gujarat High Court in the case of Thakker Tobacco (supra) holding that Rule 10 of the PMPM Rules, 2008 envisages a situation and provides for abatement of excise duty calculated on proportionate basis, in case where factory does not produces notified goods during continuous period of 15 days or more.

23. Moreover, the statue, that is proviso to Sub-section (2) of Section 3A itself provides for abatement where a factory producing notified goods did not produce the same during any continuous period of 15 days or more, the duty calculated on the proportionate basis shall be abated in respect of such period, if the manufacturer of such goods fulfills such condition as may be prescribed. In the present case as the assessee having

complied the statutory requirement, is entitled to the benefit claimed by him.

24. The judgment in case of Thakker Tobacco (supra) having been accepted by the C.B.D.T. in its circular dated 16.2.2018, the controversy does not remain any longer as the matter is not res integra any more.

25. In view of the above, we are of the considered opinion that once the Department has accepted the judgment in case of Thakker Tobacco (supra) and has issued circular holding that assessee is entitled to abatement of duty, in the event of closure of factory for continuous period of 15 days or more, without first depositing the duty in terms of Rule 10 of PMPM Rules, 2008, the appeal of the revenue has no force and is hereby **dismissed**.

26. The question of law are, therefore, answered in favour of the assessee and against the revenue.

(2019)12 ILR A797

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.12.2019

BEFORE
THE HON'BLE BISWANATH SOMADDER, J.
THE HON'BLE AJAY BHANOT, J.

Central Excise Appeal No. 89 of 2019 with
Central Excise Appeal No. 88 of 2019

Commissioner, Central Goods & Services Tax Commissionerate, Ghaziabad
...Appellant
Versus
M/S International Tobacco Co. Ltd.
...Respondent

Counsel for the Appellant:
Sri Dhananjay Awasthi

Counsel for the Respondent:
Sri Shubham Agrawal, Sri Ajay Agarwal

A. Tax Law – Central Excise Act, 1944: 11A, 11AB, 11AC, 35-G; Central Excise Rules, 2002: Rules 16(1), 16(2), 26; CENVAT Credit Rules, 2004: 14, 15(2) – Scrapping of goods does not fall within the ambit and scope of Rule 16(1).

B. Interpretation of phrase "or for any other reason" in Rule 16(1), CER, 2002 – The phrase has to be necessarily read on the construction canon of *ejusdem generis.* The three preceding phrases ('re-made', 'refined' and 're-conditioned') depicting three similar processes qualify and restrict the scope of the phrase "or for any other reason". (Para 24 to 27)

"Re-made", "refined" and "re-conditioned" are processes akin to manufacture; while scrapping involves destruction of the original identity of the goods. Scrapping is neither a species not in the likeness of "re-made", "refined" or "re-conditioned". Consequently, when goods are scrapped, it cannot be stated that the said goods were brought to the factory for being "re-made", "refined", "re-conditioned", "or for any other reason" provided in Rule 16(1). (Para 31)

CENVAT Credit denied and penalty has been upheld.

Central Excise Appeal allowed. (E-4)

Precedent followed:

1. Gyanwati Devi Vs. State of U.P. and 5 others, Special Appeal No. 33og 2019 (Para 26)

Present appeal is against order dated 03.04.2018, passed by Customs, Excise and Service Tax Appellate Tribunal, Allahabad.

(Delivered by Hon'ble Ajay Bhanot,J.)

1. Both the Central Excise Appeals instituted under section 35-G of the Central Excise Act, 1944 arise from the same judgment and order passed by the learned Customs, Excise & Service Tax Appellate Tribunal, Allahabad, dated 3rd April, 2018, which sets aside the Order-in-Original dated 21st October, 2010 passed by the Commissioner of Customs, Central Excise & Service Tax, Ghaziabad.

2. The appeals raise two separate substantial questions of law but the facts are the same. The substantial questions of law arising in both the appeals respectively can be decided conveniently by one judgment.

3. The learned Customs, Excise & Service Tax Appellate Tribunal (CESTAT), Allahabad, in its order dated 03.04.2018 held that the assessee - respondent is entitled to CENVAT credit and has lawfully taken and utilized CENVAT credit under Rule 16 of the Central Excise Rules, 2002. The Commissioner of Customs, Central Excise & Service Tax, Ghaziabad, had in the Order-in-Original dated 21st October, 2010, found that the assessee had wrongly availed of the CENVAT credit under Rule 16(1) of the Central Excise Rules, 2002 and accordingly ordered recovery of evaded liability and imposed penalty.

4. The connected Central Excise Appeal No.88 of 2019 (Commissioner, Central Goods and Service Tax Commissionerate, Ghaziabad Versus R.K. Gupta) has also been filed against the said judgment and order of the learned Customs, Excise & Service Tax Appellate Tribunal (CESTAT), Allahabad, dated 3rd April, 2018, in regard to reversal of the penalty imposed upon Sri R.K.Gupta under Rule 26 of the Central Excise Rules, 2002 by the Order-in-Original dated 21.10.2010.

5. The respondent - assessee is engaged in the manufacture of various brands of cigarettes on job work basis for M/s Godfrey Philips India Limited. During the period under assessment, certain cigarettes manufactured and removed by the appellant on payment of Central Excise duty were returned by Godfrey Philips India Limited for various reasons. The respondent - assessee claimed that the goods were brought back to the factory for refining.

6. The respondent - assessee took CENVAT credit by treating the said returned goods as inputs for the period November, 2006 to May, 2007 and for the period August, 2008 to April, 2009.

7. The respondent - assessee claimed entitlement to credit under Rule 16(1) of the Central Excise Rules, 2002 and availed of the CENVAT credit under Rule 16(2) of the Central Excise Rules, 2002, when the goods were removed from the factory after "refining". Principally, the controversy in the instant appeal centres around Rule 16(1) of the Central Excise Rules, 2002.

8. When the offending transactions were noticed by the Revenue, show cause notices were issued to the respondent - assessee. The show cause notices recorded that "refining" of cigarettes is not covered under Rule 16 of the Central Excise Rules, 2002. The sum and substance of the case of the Revenue against the respondent - assessee was that the respondent - assessee engineered the return of the so-called non marketable/non saleable cigarettes, with the intent to unlawfully avail the benefits

of CENVAT credit under Rule 16 (1) of the CENVAT Credit Rules, by misleading the Revenue.

9. The show cause notice specifically asserted that the respondent - assessee had wilfully, knowingly and with a mala fide intention, wrongly availed CENVAT credit which is recoverable from it under Rule 14 of the CENVAT Credit Rules, 2004, read with proviso to section 11A of the Central Excise Act, 1944, along with interest under section 11AB of the said Act. The respondent - assessee was also liable for penal action under Rule 15(2) of the CENVAT Credit Rules, 2004, read with section 11AC of the Central Excise Act, 1944.

10. Sri R.K.Gupta is the appellant in the connected appeal who was "the sole In-charge and responsible person for day-to-day working in respect of all excise matters in the factory" was also noticed for having concealed facts to mislead the department and was liable to penal action under Rule 26 of the Central Excise Rules, 2002, read with section 11AC of the Central Excise Act, 1944.

11. The respondent - assessee showed cause and tendered its defence before the noticing authority and contested the proceedings.

12. The assessing officer adjudicated the controversy by order dated 21.10.2010 wherein it found in favour of the Revenue and held that the assessee had wrongly claimed CENVAT credit under Rule 16(1) of the Central Excise Rules, 2002 and Sri R.K.Gupta, Deputy General Manager (IT & Accounts) was liable to pay penalty under Rule 26 of the Central Excise Rules, 2002.

13. The assessing officer found that the assessee - respondent had wrongly availed CENVAT credit, amounting to Rs.6,83,28,039/- (Rupees six crores eighty three lakhs twenty eight thousand thirty nine only) under Rule 16 of the CENVAT Credit Rules, 2004.

14. A penalty to the tune of Rs.6,83,28,039/- (Rupees six crores eighty three lakhs twenty eight thousand thirty nine only) was also imposed upon the respondent – assessee.

15. A penalty of Rs.5,00,000/- (Rupees five lakhs only) was imposed on Sri R.K.Gupta in the connected appeal under Rule 26 of the Central Excise Rules, 2002. Sri R.K.Gupta suffered the penalty for his involvement in wrong availment of the above mentioned amount of CENVAT credit in contravention of the provisions of CENVAT Credit Rules, 2004, & Central Excise Act, 1944 and the Rules framed thereunder. This penalty is the subject matter of Central Excise Appeal No.88 of 2019 (Commissioner, Central Goods and Service Tax Commissionerate, Ghaziabad Versus R.K. Gupta).

16. The adjudicating authority in its Order-in-Original dated 21.10.2010 fixed the aforesaid liabilities under the CENVAT Credit Rules, 2004 and Central Excise Act, 1944 and Central Excise Rules, 2002 on the foot of such reasons as set forth hereinunder:

"6.4 From the contents of show cause notice I find that there are following basic issues raised-

(i) The cigarettes received back from sale offices or C & F agents are not returned by the said sale offices or C & F

Agents against damage or defects but are returned as per guidance from ITC only for want of reasons not disclosed to the Department. It has been brought out in the notice that memos are issued to the sale offices for return of goods as per directions of ITC themselves against which the cigarettes are returned without any remarks as to why the same have been returned. The challans accompanying returned cigarettes contain note "please receive following brands of cigarettes against your order". On receipt of cigarettes, ITC had informed the Department the reasons like "Brand not marketable", cigarettes giving bad smell". However, it was found that the cigarettes of same brand which was claimed to be not marketable were again dispatched to the same sale office from where they received the returned cigarettes. In every case, ITC informed the Department that the cigarettes were received for refreshing. The cigarettes received back were found in original packing and even outer cartons were intact. It has been alleged in the SCN that the claim of the party that the same found defective were received back for refreshing is not true as even without removing the outer carton, how one can come to know that the cigarettes are not in a condition to be marketed.

(ii) The process of refreshing has been elaborated in the SCNs. It has been found that on receipt of returned cigarettes, the same are scrapped and the outer cartons, cigarette packets, cigarette wrapper, filter almost every cenvatable material on which Cenvat credit had been availed by ITC are thrown away without payment of duty. It is only the tobacco of the returned cigarettes which is recovered (to the extent of around 80%) and the same is reused for the manufacture of fresh cigarettes. It has thus been alleged that all the inputs except tobacco are separated first and disposed off and then only the tobacco portion is used in manufacturing of fresh cigarettes.

6.5 From the above I find that cigarettes received back for refreshing are not put to use as inputs for the manufacture of finished goods. These are actually put to the process of separation of all inputs other than tobacco by method of scrapping and to my opinion, the said process cannot be treated as a manufacturing process. The returned cigarettes as such can also not be treated as inputs as the same cannot be put to use as inputs in the manufacture of cigarettes. I also feel that the use of retrieved tobacco by mixing with fresh tobacco is done by the party with the sole aim to avail credit on returned goods as the value of such tobacco is very low as compared to the credit available to them on returned cigarettes.

6.6 As discussed above, the value of tobacco is comparatively much smaller as compared to the value of all other goods which are scrapped and thrown away without payment of duty. Going into the process of refreshing, I find that the entire material received back is put to scrapping process and two things are obtained namely, (1) scrapped cartons/packet/cigarette paper/ filter and (2) tobacco. The scrapped material is a non excisable material and is disposed off without payment of duty and the tobacco so recovered is put to use for the manufacture of cigarettes. Thus it is evident that the returned cigarettes are actually used in the manufacture of scrapped goods (non dutiable) and only tobacco can be said to be used in the manufacture of dutiable goods. Thus it is evident that the purpose of receipt of

cigarettes is to remove them from the market stream and to destroy them and not to use them as inputs in the manufacture of fresh goods. As such I feel that the returned cigarettes do not come within the purview of rule 16 of CER, 2002 under the provisions of which ITC have availed credit on them."

17. The respondent - assessee carried the Order-in-Original passed by the adjudicating authority in appeal before the learned Customs, Excise and Service Tax Appellate Tribunal. The learned Customs, Excise and Service Tax Appellate Tribunal, by its judgment dated 15.10.2018, held in favour of the assessee and quashed the order passed by the adjudicating authority. The learned Appellate Tribunal found the assessee to be entitled for CENVAT credit under Rule 16(1) on the following understanding of the said Rule:-

"A bare perusal of Rule 16(1) supports the contention of the learned counsel for the Appellants inasmuch as it enacts a fiction of law to the effect that the goods on which duty has already been paid at the time of removal thereof are brought into any factory for various reasons mentioned in the Rule, including but not limited to any other reason, they are entitled to take CENVAT Credit of duty paid on such goods, as if such goods are received as inputs under the CENVAT Credit Rules, 2002 and is entitled to utilize this credit according to the said Rule. These returned cigarettes were brought back into the factory under conditions specified under Rule 16 of the Central Excise Rules, 2002 alongwith the Forwarding Challan-cum-Invoice counter signed by the Officer of the Department. From the record, we find that the adjudicating authority while coming to the conclusion in para 6.2 has observed that:

"6.2. The issue in the present proceedings before me is whether cigarettes received back from sale offices or from clearing and forwarding agents are eligible for credit of duty paid on them originally at the time of their clearance from the factory under the provisions of rule 16 of CER, 2002. I would like to analyze the provisions of this rule under which the impugned credit has been availed by the party. In terms of this rule, goods should be brought back for being re-made, refined re-conditioned or for any other reason and the assessee is entitled to take credit of duty paid if such goods are received as inputs under the Cenvat credit rules, 2002. I find that ITC, in their reply have given force on the words "for any other reason". I find that the availment of Cenvat credit is primarily governed by CCR, 2002/2004 and thus the availment of Cenvat credit provided by any other rule like CER, 2002 cannot be beyond the provisions of Central Credit Rules. Here I also find that in the said rule 16 of CER, 2002, there is clear mention that goods must be received to be used as inputs in term of CCR, 2002. Thus the very first condition for eligibility of credit on returned goods is that the goods must be usable and used as inputs in the manufacture of finished goods. I find that the very basis of the present dispute is that Department has alleged that the goods have not been brought back for being used as inputs but only to take credit in the guise of rule 16 of CER, 2002. On the other hand, ITC have stressed that conditions of Rule 16 of CER, 2002 have been satisfied by them for availment of credit on returned cigarettes."

From the above, we find that the reasoning given by the adjudicating authority with respect to Rule 16 is by assuming that it deals with inputs "as such" and not inputs "as if".

6. We further find that Rule 16 is wide enough to cover the case of the Appellants in view of the wordings used in it which inter alia includes "any other reason" for receiving the duty paid goods. The duty paid character of the goods, being not disputed in the present case, Rule 16 is squarely applicable and accordingly the Appellants have rightly taken the CENVAT Credit and utilized the same."

18. The following are the substantial questions of law which fall for determination in these appeals:

1. "Whether the learned Customs, Excise & Service Tax Appellate Tribunal (CESTAT) was misdirected in law in its interpretation of Rule 16 (1) of the Central Excise Rules, 2002, by unlawfully including scrapping within the scope of Rule 16(1) of the Central Excise Rules, 2002 ? Further, whether the learned Customs, Excise & Service Tax Appellate Tribunal (CESTAT) erred in law by finding that the respondent - assessee had lawfully availed CENVAT credit in the offending transactions ?"

2. "Whether the learned Customs, Excise & Service Tax Appellate Tribunal (CESTAT) was justified in law to revoke the penalty imposed upon the appellant under Rule 26 of the Rules by the Order-in-Original dated 21st October, 2010 ?"

19. Rule 16(1) is germane to the controversy and thus needs careful consideration. For ease of reference, Rule 16 (1) of the Central Excise Rules, 2002, is being extracted in its entirety:

"**Rule 16. Credit of duty on goods brought to the factory**. - (1) Where any goods on which duty had been paid at the time of removal thereof are brought to any factory for being re-made, refined, re-conditioned or for any other reason, the assessee shall state the particulars of such receipt in his records and shall be entitled to take CENVAT credit of the duty paid as if such goods are received as inputs under the CENVAT Credit Rules, 2002 and utilise this credit according to the said rules."

20. Rule 16 states the procedure and eligibility to avail credit of duty on goods brought to the factory. Various ingredients of Rule 16(1) will now be discussed.

21. Rule 16(1) is applicable to goods on which duty had been paid at the time of removal of such goods and the same are brought back to the factory. The goods are brought back to the factory for being "re-made, refined, re-conditioned or for any other reason". The assessee is also required to state the particulars of such receipt of goods in his records.

22. Once the above conditions are fulfilled, the assessee becomes entitled under Rule 16(1) to take CENVAT credit of the duty paid on the returned goods as if such goods are received as inputs under the CENVAT Credit Rules, 2002. The credit shall be utilised by the assessee according to the latter Rules.

23. The purpose of manufacture of goods in this case is sale. Bringing the goods back to the factory after they have been removed for sale does not ordinarily

make good business sense. However, at times for some valid reasons, the goods cannot be sold or they are not fit for retention in the market. In such circumstances, the goods may be recalled and brought to the factory. In terms of Rule 16(1), these goods are brought to the factory for being "re-made, refined, re-conditioned or for any other reason". After being subjected to said processes, the goods are again removed having become saleable commodities and worthy of acceptance in the market.

24. The phrase "or for any other reason", in Rule 16(1) of the Central Excise Rules, 2002, has to be necessarily read on the construction canon of *ejusdem generis.* Any other rule of interpretation would make the Rule unworkable and defeat the clear intention of the legislature.

25. The learned Customs, Excise & Service Tax Appellate Tribunal (CESTAT), proceeded to give a wide interpretation to the phrase "or for any other reason" and thus included the offending transaction within its scope. The legislative intent was not to read the phrase in isolation and give it such a wide berth. Otherwise, there would be no necessity to precede the phrase "or for any other reason" by the three processes of "re-made", "refined" and "re-conditioned". The three preceding phrases depicting three similar processes qualify and restrict the scope of the phrase "or for any other reason".

26. While explaining the concept of *ejusdem generis* this Court in ***Special Appeal No.33 of 2019*** in ***Gyanwati Devi v State of U.P. and 5 others*** held:

"The reason is, when a general word or phrase follows a list of specifies, the general word or phrase will be interpreted to include only items of the same class as those already listed."

27. The phrase "for any other reason" has to be interpreted in light of the preceding expressions of "re-made, refined, re-conditioned". The processes coming under the category of "for any other reason", have to be in the likeness of the processes which immediately precede the aforesaid phrase. All the processes should have such similarities so as to be constituted into the same class.

28. The legislature has employed the words "re-made", "refined", "re-conditioned" and the phrase, "or for any other reason" and eschewed the phrase "for being scrapped". Understanding this distinction is the key to interpreting the scope of "re-made", "refined", "re-conditioned" and the phrase, "or for any other reason".

29. The essential characteristics of the brought back goods survive even after they are "re-made", "refined" or "re-conditioned". The original identity of the goods is retained even after the goods undergo the said processes.

30. When goods are scrapped, all the constituent components of the goods may be reclaimed. After scrapping, the original identity of the manufactured goods completely perishes. Scrapping of goods is done for various purposes, including cannibalisation and extraction of vital or valuable parts of the original goods.

31. "Re-made", "refined" and "re-conditioned" are processes akin to manufacture; while scrapping involves destruction of the original identity of the goods. Scrapping is neither a species nor

in the likeness of "re-made", "refined" or "re-conditioned". Consequently, when goods are scrapped, it cannot be stated that the said goods were brought to the factory for being "re-made", "refined", "re-conditioned", "or for any other reason" provided in Rule 16(1). Scrapping of goods does not fall within the ambit and scope of Rule 16(1).

32. Ordinary business prudence requires that valid commercial reasons must exist for bringing the goods back to the factory. The validity of these reasons is the test of the bona fides of the assessee. These can be ascertained from authentic records, relating to receipts of goods and particulars contained therein. Scrutiny of such records and the contents of the receipts will help determine the bona fides of the assessee to bring back the goods.

33. Offending transactions and the findings of the Assessing Officer as well as learned Appellate Tribunal have to be examined in the light of the true scope and correct interpretation of Rule 16(1), as stated in the preceding paragraphs of this judgment.

34. We find that the learned Appellate Tribunal, while interpreting the phrase, "any other reason", in Rule 16(1) and held that the same was "wide enough to cover the case of the appellants". Consequentially, the learned appellate Tribunal included scrapping within the fold of Rule 16(1).

35. It is evident that the learned Appellate Tribunal has incorrectly interpreted the scope of Rule 16(1) by bringing scrapping within the embrace of Rule 16(1) and has proceeded to legitimise the benefit of CENVAT availed by the respondent - assessee. These fault-lines vitiate the judgment of the learned Customs, Excise & Service Tax Appellate Tribunal (CESTAT), Allahabad. The judgment of the learned Customs, Excise & Service Tax Appellate Tribunal (CESTAT), Allahabad, is therefore unsustainable in law.

36. The findings of facts returned by the Assessing Officer thus attain finality since they were not successfully impeached by the learned Appellate Tribunal. These findings extracted in extenso in the earlier part of the judgment are set forth, in brief, hereinafter to take the discussion forward and to its logical conclusion.

37. The cartons containing cigarettes were not even opened and found in packed condition. The alleged defects in goods, as claimed by the assessee, thus could not be ascertained without opening the cartons. The goods were actually sent back to the same purchasers in the self-same condition in which they were received.

38. The receipts were not found to be reliable. There are no records of the reasons given by the purchasers for rejecting the consignments of goods. On this foot, the reasons for bringing back the goods to the factory, as adduced by the assessee, were disbelieved.

39. The scrapping of the goods stood established by reliable evidence and cogent findings in the record. The assessee, in fact, scrapped the goods and tried to pass it as "refining" the goods.

40. Clearly, the goods were not brought back to the factory by the

assessee to be "re-made", "refined", "re-conditioned", "or for any other reason" as contemplated in Rule 16(1) of the Central Excise Rules, 2002. The transactions were devices to illegally avail CENVAT credit. The intent to illegal avail CENVAT credit and escape duty was fully established.

41. In wake of the preceding narrative, we find that the ingredients to avail credit of duty of goods brought back to the factory, as contemplated under Rule 16(1) of the Central Excise Rules, 2002, were not satisfied. The assessee was not entitled to avail the benefit of CENVAT credit of the duty paid on the aforesaid goods and illegally availed such credit. The intent of the assessee to defraud the revenue and escape tax is thus proved.

42. The controversy in the connected Central Excise Appeal No.88 of 2019 (Commissioner, Central Goods and Service Tax Commissionerate, Ghaziabad Versus R.K. Gupta) in respect of imposition of penalty upon Sri R.K.Gupta turns on the construction of and observance of the ingredients of Rule 26 of the Central Excise Rules, 2002. For facility of reference, Rule 26 is extracted hereunder:-

"RULE 26. Penalty for certain offences.--(1) Any person who acquires possession of, or is in any wayconcerned in transporting, removing, depositing, keeping, concealing, selling or purchasing, or in any other manner deals with, any excisable goods which he knows or has reason to believe are liable to confiscation under the Act or these rules, shall be liable to a penalty not exceeding the duty on such goods or [two thousand rupees], whichever is greater:

(2) Any person, who issues-

(i) an excise duty invoice without delivery of the goods specified therein or abets in making such invoice; or

(ii) any other document or abets in making such document, on the basis of which the user of said invoice or document is likely to take or has taken any ineligible benefit under the Act or the rules made thereunder like claiming of CENVAT credit under the CENVAT Credit Rules, 2004 or refund, shall be liable to a penalty not exceeding the amount of such benefit or five thousand rupees, whichever is greater."

43. Rule 26 of the Central Excise Rules, 2002, has to be read in conjunction with the findings of facts narrated in the preceding part of the judgment. The ingredients of Rule 26 for imposing the penalty upon Sri R.K.Gupta, Deputy General Manager (IT & Accounts), are fully satisfied. The provisions of the Rule 26 have been duly adhered to. The order imposing penalty against Sri R.K.Gupta under Rule 26, is a lawful and just order, in the facts and circumstances of this case.

44. Accordingly, the substantial questions of law are answered against the assessee and in favour of the Revenue in the following terms:-

I. The learned Customs, Excise & Service Tax Appellate Tribunal (CESTAT) was clearly misdirected in law in its interpretation of Rule 16(1) of the Central Excise Rules, 2002 by unlawfully including "scrapping" within the scope of Rule 16(1) of the Central Excise Rules, 2002. The learned Customs, Excise & Service Tax Appellate Tribunal (CESTAT) also erred in law by finding that the respondent - assessee had

lawfully availed CENVAT credit in the offending transaction.

II. The learned Customs, Excise & Service Tax Appellate Tribunal (CESTAT) was completely unjustified in law by setting aside the penalty imposed upon R.K. Gupta, in connected Central Excise Appeal No.88 of 2019 (Commissioner, Central Goods and Service Tax Commissionerate, Ghaziabad Versus R.K. Gupta), even in the face of the fact that the ingredients of Rule 26 of the Central Excise Rules, 2002, were fully satisfied. R.K.Gupta, in law, was liable to pay the penalty imposed in the Order-in-Original passed by the Commissioner of Customs, Central Excise & Service Tax, Ghaziabad.

46. As a consequence, the judgment of the learned Customs, Excise & Service Tax Appellate Tribunal (CESTAT), Allahabad, dated 3rd April, 2018, is liable to be set aside and is set aside. The judgment of the Commissioner of Customs, Central Excise & Service Tax, Ghaziabad, dated 21st October, 2010, is upheld to the extent and manner indicated in the body of this judgment.

47. Both the appeals are accordingly allowed.

(2019)12 ILR A806

REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.10.2019

BEFORE
THE HON'BLE SAUMITRA DAYAL SINGH, J.

Commercial Tax Revision No. 125 of 2013

L.G Electronics India Pvt. Limited, Gautam Budh Nagar ...Revisionist
Versus
Commissioner of Commercial Taxes, U.P., Lucknow ...Opposite Party

Counsel for the Revisionist:
Sri Tarun Gulati, Sri Nishant Mishra, Sri Dev Nath

Counsel for the Opposite Party:
C.S.C.

A. Tax Law – Uttar Pradesh Trade Tax Act, 1948: Sections 4-A – Interpretation of Statutes - The rule of strict construction may be applied only for the purposes of determining the eligibility to exemption and no further.

Provision granting incentive for promoting economic growth and development in taxing statues should be liberally construed and restriction placed on it by way of exception should be construed in a reasonable and purposive manner so as to advance the objective of the provision. (Para 26). Assessee's application could not be rejected merely because two separate applications had been filed. (Para 19, 20 & 27)

The burden to establish single diversification, is on the assessee and it was for the revenue authorities to rebut such evidence as the assessee may produce. (Para 27).

B. Distinguished from *Kajaria Ceramics* - The Supreme Court did not lay any rule of evidence required to be brought on record for a single diversification or expansion. No specific rule or evidence has been prescribed either under the Act or the Rule framed thereunder. It would remain a matter to be considered and decided on the facts of each case. The assessee was not obliged to lead any particular evidence to establish its claim or else to face rejection. (Para 32 to 35)

In the present case, assessee has led evidence in support of its case, and substantiated the same by adducing corroborative evidence, unlike *Kajaria Ceramics*, where not a single piece of evidence was given. (Para 29, 30)

Matter remitted. (E-4)

Precedent followed:

1. Commissioner, Trade Tax, U.P. Vs. DSM Group of Industries, (2005) 1 SCC 657) (Para 17, 24, 25)

2. G.P. Ceramics Private Limited Vs. Commissioner, Trade Tax, Uttar Pradesh, (2009) 2 SSC 90 (Para 17)

3. Commissioner of Sales tax Vs. Industrial Coal Enterprises, (1999) 2 SCC 607 (Para 18, 26)

4. Bajaj Tempo Ltd., Bombay Vs. Commissioner of Income Tax, Bombay City-III, Bombay, (1992) 3 SCC 78 (Para 18)

Precedent distinguished:

1. Commissioner of Trade Tax, U.P. and Anr. Vs. Kajaria Ceramics Ltd., (2005) 11 SCC 1 (Para 24, 31, 35)

Notifications/Circulars:

1.Notification nos. 780 and 781, both dated 31.03.1995

2. Notification no. 2760, dated 16.11.1995

3. Notification nos. 640 and 641, both dated 21.02.1997

Present revision is against order dated 22.10.2012, passed by Commercial Tax Tribunal, Lucknow Bench.

(Delivered by Hon'ble Saumitra Dayal Singh, J.)

1. Present revision has been filed by the assessee against the order of the Full Bench of the Commercial Tax Tribunal, Lucknow dated 22.10.2012 passed in Appeal No. 16 of 2008 [under Section 4-A of the U.P. Trade Tax Act, 1948 (hereinafter referred to as the Act)]. By that order, the Tribunal has dismissed the appeal filed by the assessee and confirmed the order passed by the Divisional Level Committee (In short "DLC') depriving the assessee of an eligibility certificate viz-a-viz investment of Rs. 8,13,30,080/- made in diversification of it's new unit to manufacture monitors.

2. The assessee, an Indian company is a subsidiary of L.G. Electronics, Korea (hereinafter referred to as the 'parent company'). As early as on 29.01.1997, the parent company was granted approval by the Government of India (Ministry of Industry), to set up the assessee company - a 100% owned subsidiary company in India to manufacture and market various electrical and electronic appliances including washing machines, refrigerators, air conditioners, colour televisions, audio and video equipments. Then, on 04.11.1997, the Government of India amended its approval letter dated 29.01.1997 and granted further approval to the parent company to manufacture and market (by the assessee company) various electrical and electronic appliances mentioned in the letter dated 29.01.1997 and also Microwaves ovens and PC monitors. In light of such approval letters, it has been contended, the assessee company was incorporated and it has engaged in the activity of manufacture and marketing of various electrical appliances and electronic goods.

3. In the context of the dispute that had arisen, it is seen that the State Government had, vide notification nos. 780 and 781, both dated 31.03.1995, provided for schemes to grant exemption to 'new units' established inside the State and to units engaged in expansion, diversification and modernisation, during the period 01.04.1995 and 31.03.2000. It

is a common case between the parties that the aforesaid notifications came to be amended on 16.11.1995, by notification nos. 2760 and 2761, whereby instead of providing for exemption by way of monetary limit, with respect to other than electronic goods, exemption was provided only with reference to time from the date of start of production. Again, by notification nos. 640 and 641, both dated 21.02.1997, the scheme for exemption was supplemented. Thereby, the State Government notified further exemptions to 'new units' undertaking expansion, diversification, backward integration and modernisation between 01.12.1994 and 31.03.2000, subject to they are having invested Rs. 50 crores or more.

4. It is not in dispute that initially, the assessee did establish a 'new unit' to manufacture colour televisions, washing machines and air conditioners. Upon application made in that regard, DLC granted exemption to the assessee on a total fixed capital investment of Rs. 51,37,35,446/- with effect from the date of first sale - 27.03.1998, for a period of 15 years, upto 200% of that fixed capital investment.

5. Thereafter, the assessee first diversified to manufacture PCB (Printed Circuit Board) and Microwave Ovens. Though the two commodities PCB and Microwave Oven would have been separately manufactured and investment made in that regard may have been segregated in two parts, however, upon a single application made by the assessee, it was granted exemption on that investment, vide eligibility certificate issued by the DLC dated 27.09.2000. To that extent, there is absolutely no dispute.

6. Thereafter, the assessee claims to have carried out a second diversification, which for unexplained reasons came to be described (by the assessee) as a joint-venture to manufacture refrigerators and PC monitors. This, the revenue authorities have treated as two separate diversifications whereas according to the assessee, it was also a single diversification to manufacture refrigerators and monitors. That decision had also been implemented simultaneously. However, it is the further case of the assessee, that PC monitors are electronic goods whereas the refrigerators were electrical goods. Therefore, there existed certain doubts, as to which of the above noted three notifications would apply to each of those items. To that extent, the assessee has tried to explain its conduct of filing two separate applications - one to seek exemption on manufacture of refrigerators (electrical goods), and other to seek exemption to manufacture PC monitors (electronic goods), upon a legal opinion obtained by it. In any case, the assessee first filed an application on 10.01.2002 with respect to manufacture of refrigerators, and another on 28.12.2002 for manufacture of monitors.

7. It is also a fact that the aforesaid two applications came to be considered separately by the DLC. The application to claim exemption for manufacture of refrigerators was allowed by the DLC, vide its order dated 12.05.2003, and in that regard, the assessee was granted exemption on the entire investment of Rs. 42 crores made by it. However, the second application filed with respect to PC monitors was rejected by the DLC by its order dated 07.07.2005 treating the same to be diversification separate and distinct from diversification to manufacture refrigerators. Accordingly,

the investment of Rs. 8.13 crores, made by the assessee, was found to be below the qualifying limit of 25% of the original fixed capital investment (Rs. 51,37,35,446/-). This order was sought to be reviewed. However, the review application was rejected by the DLC on 24.05.2006. Upon appeal, the Tribunal allowed the assessee's appeal and remitted the matter to the DLC with a finding to the effect that it was clear that the purchases regarding machineries to manufacture both products (that is refrigerators and monitors) was carried out during the same period. Also, the Tribunal found that the DLC had not taken into consideration this material fact while rejecting the application for grant of exemption with respect to investment made to manufacture PC monitors. Accordingly, the Tribunal directed the DLC to record a clear finding considering the relevant material that was also referred to in that order, by describing it as Annexure No.1 to the paper book at paper nos. 73-86 and other documents as well.

8. Upon remand, the DLC again rejected the application filed by the assessee by its order dated 25.04.2008. This order became the subject matter of second challenge before the Tribunal that came to be decided on 16.05.2012. The Tribunal again allowed the assessee's appeal and set aside the order passed by the DLC and specifically held that there was no bar in two applications being filed by the assessee claiming exemption for single diversification, expansion etc. Thus, the Tribunal observed as under:

"Therefore, a second or supplementary application may be moved and to our mind, there appears no bar in moving separate applications within the time prescribed for grant of Eligibility Certificate."

9. It was further observed by the Tribunal:

"The issue as to whether diversification undertook by appellant dealer regarding manufacture of refrigerator and monitor is a joint venture, is very material for determination of application moved by appellant dealer regarding grant of Eligibility Certificate for monitor. Therefore, without deciding this issue, the rejection of appellant's application on the ground that two separate applications are not maintainable, appears incorrect."

10. The matter was again remitted to the DLC to pass a fresh order in view of the observations made by the Tribunal.

11. The aforesaid order became subject matter of challenge at the instance of the assessee (only), in **Sales/Trade Tax Revision No. 815 of 2012** that came to be decided by order dated 22.08.2012. This Court set aside the order of the Tribunal insofar as it had remitted the matter to the DLC and required the Tribunal itself to decide that issue. Relevant to our purpose, the revision was disposed of with the following direction:

"Thus this Court directs the tribunal to decide the issues relating to diversification by way of adding new item of manufacture such as T.V. and monitor on merits and in accordance with law within a period of three months from the date of production of a certified copy of this order being placed by the petitioner within 15 days from today. Needless to

say that a proper opportunity shall be given to the assessee. The impugned order of the tribunal dated 16.5.2012 is set aside.

The revision is disposed of as above. No costs."

12. In compliance of the aforesaid order, the Tribunal has again adjudicated the issue which has given rise to the present revision.

13. Heard Sri Tarun Gulati, learned Senior Counsel assisted by Sri Nishant Mishra, learned counsel for the assessee and Sri B.K. Pandey, learned Standing Counsel for the revenue.

14. Present revision was itself admitted on the following questions of law:

"A. Whether under clause (d) of Explanation (5) of the Section 4A of UPTT Act additional fixed capital investment of Rs.42 crores in refrigerator and Rs.8,13,30,080/- in monitor should be treated as joint diversification in terms of the judgment of Hon'ble Supreme Court in the case of DSM Group of Industries and according the Applicant should be granted exemption under Section 4A?

B. Whether for the purposes of clause (d) of Explanation (5) of Section 4-A of the Act, additional fixed capital investment of the 'industrial undertaking' as a whole has to be taken into account or item-wise additional fixed capital investment has to be seen?

C. Whether the Applicant can be denied the benefit of exemption under Section 4-A, when admittedly the Applicant's industrial undertaking has made additional fixed capital investment of more than 25% of the original fixed capital investment?

D. Whether the Tribunal has wrongly relied upon Clause (d) of the above explanation (4) of Section 4A of UPTT Act to hold that the Applicant has himself separately shown the investment in refrigerator and monitor, therefore it cannot be considered jointly for the purpose of Section 4A?"

15. Relying on the plain language of Section 4-A(1) read with proviso as also sub-section 2(c) and 5(b) of the Act as also notification nos. 780 and 781, both dated 31.03.1995, notification no. 2760 dated 16.11.1995 as also notification nos. 640 and 641, both dated 21.02.1997, it has been submitted - plainly, the object for grant of exemption under Section 4-A of the Act was to encourage new investment by the industry to bolster industrial growth in the state. The intent of legislature had been to encourage investment in 'new unit' or any existing unit for expansion, diversification and modernisation and or backward integration or in one of them. With respect to claim of diversification, the only further requirement appears to be that the goods manufactured as a result of diversification must be different from those manufactured before diversification.

16. Insofar as the exemption notifications are concerned, it has been submitted that there is no dispute that the assessee had made investments to carry out diversification to manufacture such goods as were different from the goods earlier manufactured by it. The only doubt that the revenue authorities have raised and persisted with is that the investment made to establish the PC monitor unit, by way of diversification, did not qualify for exemption as investment of Rs. 8.13 crores was not below the statutory limit of 25% initial fixed capital.

17. Heavy reliance has been placed first on the decision of the Supreme Court in **Commissioner, Trade Tax, U.P. Vs. DSM Group of Industries, (2005) 1 SCC 657**, to submit that the foundation for a valid claim for exemption does not depend on whether there were two applications or whether there were two or more units in which an establishment may have made investment. Referring to the facts in the case of **DSM Group (supra)**, it has been submitted, in that case, there were three separate units established in three separate districts of the State. It had been claimed that investments made by the company which owned all the three units exceeded the prescribed limit of 50 crores. Therefore, that fact alone was held to be determinative to hold the assessee eligible to exemption. The exact investment made in individual units was found to affect the determination of the limit of exemption available on goods manufactured by each unit. That law is stated to have been followed by the Supreme Court till as late as in **G.P. Ceramics Private Limited Vs. Commissioner, Trade Tax, Uttar Pradesh, (2009) 2 SCC 90**.

18. Also, the principle of purposive construction has been invoked by relying on the decision of the Supreme Court in **Commissioner of Sales Tax Vs. Industrial Coal Enterprises, (1999) 2 SCC 607** and **Bajaj Tempo Ltd., Bombay Vs. Commissioner of Income Tax, Bombay City-III, Bombay, (1992) 3 SCC 78** to submit that the rule of strict construction may be applied only for the purposes of determining the eligibility to exemption and no further.

19. In so far as there exists credible and sufficient evidence to establish that the assessee had engaged in a common diversification exercise to manufacture both refrigerators and PC monitors, at a single point in time, at the same unit, the investment made in that exercise had to be taken as composite whole and not truncated by looking at the investment made to manufacture refrigerators as distinct and independent of that made to manufacture PC monitors. The fact that the assessee was forced to or; chose to file two separate applications would remain a factor extraneous to the dispute, inasmuch as, such application became necessary on account of separate notifications providing for separate methods of computation of exemption on manufacture of electronic goods and electrical goods. Since the State treated refrigerators and PC monitors differently, the assessee had no choice in the matter but to file separate applications to disclose the facts relevant to each of those two items, more specifically by filing separate applications. In any case that fact has not been found to be adverse to the assessee.

20. In that regard, it has also been submitted, even at the stage of first diversification, while granting the eligibility certificate, the DLC itself clearly specified the items PCB and microwaves separately in the eligibility certificate dated 27.09.2000 for the purpose of computation of exemption on each of those commodities. Therefore, it has been submitted that, the State authorities themselves construed scheme of exemption and implemented scheme of exemption so as to treat the total investment as a composite investment to fix eligibility to exemption and to bifurcate the same only for the purpose of computing the limit or extent of that exemption.

21. As to the facts of the case, relying on various documents that are

stated to have been filed by the assessee before the Tribunal, it has been submitted, besides the original approval letters issued by the Government of India wherein refrigerators and PC monitors were clearly mentioned as goods to be manufactured by the assessee, the annual report of the assessee for the period ending 31.03.2000, contained a clear recital and announcement of the management of the assessee company to start manufacture of refrigerators and PC monitors, which manufacturing units were projected to commence production in July, 2001 and May, 2001 respectively. Then, as a fact, it has been claimed that the assessee simultaneously carried out the diversification work to set up a manufacturing unit for manufacture of refrigerators and monitors, by way of a single diversification exercise.

22. Relying on a list of details of plants, machinery, equipment, apparatus and component to manufacture refrigerators and monitors, it has been submitted that the diversification into manufacture of refrigerators and PC monitors was carried out simultaneously during the year 2000-01. Emphasis has been laid on the fact that the assembly lines that were the main component of the plant and machinery used to manufacture those goods were purchased by two separate invoices raised on the assessee on same date, being February 26, 2001. All these documents are claimed to be existing on the record of the Tribunal. Then referring to the written arguments that were placed before the Tribunal, it has been further emphasised that this issue was specifically raised by disclosing (based on evidence on record), the date of Commercial Invoice to purchase separate assembly lines for the two products as common i.e. 26.02.2001 and the date of first investment in plant and machinery for refrigerators as 01.02.2001 whereas that for PC monitors as 15.11.2000. Further, the date of starting production of PC monitors was 11.5.2001 whereas that of refrigerators was 11.07.2001. It also, established existence of a single diversification.

23. Also, it has been submitted, no evidence was led by the revenue to rebut the claim made by the assessee on the strength of the evidence noticed above. The revenue authorities relied on presumptions solely occasioned by the fact that the assessee had filed two separate applications for grant of exemption on manufacture of refrigerators and PC monitors, which ground was found to be irrelevant by the Tribunal itself.

24. Coming to the impugned order of the Tribunal, learned Senior Counsel would submit that the Tribunal has completely failed to appreciate the applicability of the ratio of the decision in the case of **DSM Group (supra)**. Referring to that decision, it has been emphasised that the decision of the Supreme Court in **Commissioner of Trade Tax, U.P. and Anr. Vs. Kajaria Ceramics Ltd., (2005) 11 SCC 1** was a case which would fall in the exception to the rule laid down by the Supreme Court in **DSM Group (supra)**.

25. Opposing the present revision, learned Standing Counsel would submit that sufficient opportunity had been granted to the assessee by the Tribunal to bring on record the evidence to establish that the diversification exercise was a single business venture. In fact, the

assessee failed to bring such evidence on record the minutes of the meeting of it's own Board of Directors indicating that the diversification exercise was carried out as a single exercise. Referring to the same, the Tribunal has rightly rejected the claim made by the assessee. Insofar as the present assessee has also not brought on record any estimate, plan, drawing, etc to establish that the exercise of diversification was one and not two, the Tribunal has not erred in dismissing the appeal filed by the assessee and in distinguishing the ratio in the case of **DSM Group (supra)**. As to rule to be applied, learned Standing Counsel would submit that the Tribunal has not erred in placing the burden on the assessee to establish that it was the a single diversification. In absence of the burden to prove being discharged, the Tribunal has rightly rejected the appeal.

26. Having heard learned counsel for the parties and having perused the record, in the first place, as a rule, it cannot be disputed that at the threshold i.e. to determine whether the assessee was eligible to exemption a strict rule of interpretation had to be enforced. However, undisputedly, the assessee did engage in diversification upon establishing manufacturing facility to manufacture refrigerators and PC monitors. No goods similar to those were being manufactured by it, earlier. Thereafter, a purposive construction has to be made. In paragraph nos. 11 and 12 of the Supreme Court decision in **Industrial Coal (supra)** held as:

11. *In CIT v. Straw Board Mfg. Co. Ltd.[1989 Supp (2) SCC 523 : 1990 SCC (Tax) 158] this Court held that in taxing statutes, provision for concessional rate of tax should be liberally construed. So also inBajaj Tempo Ltd.v.CIT[(1992) 3 SCC 78] it was held that provision granting incentive for promoting economic growth and development in taxing statutes should be liberally construed and restriction placed on it by way of exception should be construed in a reasonable and purposive manner so as to advance the objective of the provision.*

12. *We find that the object of granting exemption from payment of sales tax has always been for encouraging capital investment and establishment of industrial units for the purpose of increasing production of goods and promoting the development of industry in the State. If the test laid down inBajaj Tempo Ltd. case[(1992) 3 SCC 78] is applied, there is no doubt whatever that the exemption granted to the respondent from 9-8-1985 when it fulfilled all the prescribed conditions will not cease to operate just because the capital investment exceeded the limit of Rs 3 lakhs on account of the respondent becoming the owner of land and building to which the unit was shifted. If the construction sought to be placed by the appellant is accepted, the very purpose and object of the grant of exemption will be defeated. After all, the respondent had only shifted the unit to its own premises which made it much more convenient and easier for the respondent to carry on the production of the goods undisturbed by the vagaries of the lessor and without any necessity to spend a part of its income on rent. It is not the case of the appellant that there were any mala fides on the part of the respondent in obtaining exemption in the first instance as a unit with a capital investment below Rs 3 lakhs and increasing the capital investment subsequently to an amount exceeding Rs 3*

lakhs with a view to defeat the provisions of any of the relevant statutes. The bona fides of the respondent have never been questioned by the appellant."

27. It also cannot be disputed that the burden to establish that the assesse had made a single diversification to manufacture refrigerators and PC monitors rested on the assessee. It was a special fact in the knowledge of the assessee. Therefore, the burden would remain on the assessee to prove the same and for the revenue authorities to rebut such evidence as the assesse may produce. To that extent, the Tribunal has not erred in its approach. In fact, the Tribunal has also itself found (in its order dated 16.5.2012) that mere filing of two separate applications for diversification to manufacture refrigerators and monitors would be inconsequential. That finding was never assailed by the revenue. In fact, the Tribunal had gone to the extent of holding that the assessee's application could not be rejected merely because two separate applications had been filed. Thus, it is to be seen whether thereafter, the Tribunal has correctly dealt with the matter.

28. It is here that the Tribunal's approach is lacking. The Tribunal appears to have completely over-looked the most material part of the evidence relied upon by the assessee. In that, it had relied on the original approval letters issued by the Government of India dated 29.1.1997 and 4.11.1997 wherein it clearly disclosed its intent to set up a unit to manufacture, amongst others, refrigerators and PC monitors. Then the assessee is a public limited company. In its annual report for the period ending 31 March, it appears, it had been specifically stated as under:

"Despite increased competition, your Company is confident of garnering a higher growth in its products during the year 2001. The Company is planning to introduce many new models, thus making the company with the widest range of models in all its product category. During the year 2000, the Company has started work to add a Refrigerator Plant to its existing production facilities which would be operational by July 2001. The Company is planning to start assembling of Monitors in India in May 2001."

29. Not only such position appears to have been made clear in such public document, but also the assessee substantiated the same by adducing corroborative evidence in the shape of same date invoices dated 26.2.2001 to purchase vital machineries, being separate assembly lines to manufacture PC monitors and refrigerators. Further corroborative evidence appears to have been filed in the shape of details of plant and machinery, equipments, parts and components, etc. purchased to set up the manufacturing facilities for refrigerators and monitors. Those dates overlapped or ran parallel. Moreover, the date of first investment; starting production and; first sale for the two goods PC monitors and refrigerators were very close to each other as appear to be *prima facie* supportive of the claim made by the assessee - 15.11.2000 and 01.02.2001 being the dates of first purchase of plant and machinery for PC monitors and refrigerators respectively. Similarly, 11.05.2001 and 11.7.2001 were the closely arising dates of start of production of PC monitors and refrigerators, respectively. Even the date of first sale of PC monitors was 30.05.2001 whereas that of refrigerators was 18.07.2001.

30. Therefore, the contention of the assessee that there was evidence existing on record to establish that the entire diversification exercise to manufacture refrigerators and PC monitors was a single step diversification, is *prima facie* found to be based on evidence on record before the Tribunal. It is not a case where the assessee may not have led any evidence in support of its case. The observations and conclusions of the Tribunal, to the contrary, are found to be perverse.

31. In the case of **Kajaria Ceramics (supra)**, that assessee had consistently claimed to have filed three separate applications to the DLC stating therein that it had started production on specified dates and that it had undertaken three successive expansions during the period 1990 to 1994. Subsequently, that is on 21.11.1994 i.e. after the last expansion claimed by **Kajaria Ceramics (supra)**, it withdrew all earlier applications and filed a revised application thereby claiming, for the first time, that it had carried out a single expansion during the period 12.08.1988 to 28.03.1994. Such claim came to be rejected by the DLC, which order was rejected by the Tribunal, however, this Court had allowed the claim made by **Kajaria Ceramics (supra)**. Upon appeal filed by the State before the Supreme Court framed issue no.2 as below:

"II. Whether the respondent's claim of one integrated expansion from 12,000 TPA to 60,000 TPA during the period 12-8-1988 to 28-3-1994 is sustainable in fact or in law?"

32. Dealing with that issue, the Supreme Court had held that it was never the onus of the revenue to prove that there were three separate expansions. Admittedly Kajaria Ceramics had later changed its stand and claimed existence of a single scheme of expansion carried out in three phases as against its earlier stand of having engaged in three separate expansions. Considering that crucial fact, the Supreme Court reasoned that the onus to establish a single expansion in three phases remained undischarged at the hands of that assessee/Kajaria Ceramics.

33. It was in that factual context, the Supreme Court further observed that the scheme of expansion would necessarily warrant estimates, plants, drawings etc. It then observed, there was not a single piece of evidence, to establish that the expansion was a single step exercise carried out by that assessee. On the contrary, it was found that with respect to each three expansions, separate industrial licences had been applied for and obtained by that assessee. Moreover, separate negotiations had also been entered into at each stage. Therefore, in the face of such evidence, it was concluded that there were three separate expansions carried out by that assessee.

34. Such evidence has not been shown to exist in the present case. In fact, at present, the entire evidence appears to indicate at least on *prima facie* basis that the decision to diversify and its implementation was a single effort made by the assesse, which for unexplained reasons, came to be described as joint-venture. However, that word description is of no legal consequence. Therefore, the Tribunal has failed to consider material evidence filed by the assesse and record any finding on that. It also appears, at least at this stage, that the revenue

authorities had not rebutted such evidence by filing any other evidence.

35. In the facts of this case, the finding recorded by the Tribunal that the case of the assessee is similar to that of the **Kajaria Ceramics (supra)** and invoking that rule is wholly misplaced. In any case, in the case of **Kajaria Ceramics (supra)**, the Supreme Court did not lay down a rule of evidence that for a single diversification or expansion, it was always necessary for the assessee to bring on record estimates, plants, drawing, etc. It was in the facts of that case that such observations appear to have been made. No specific rule or evidence has been prescribed either under the Act or the Rule framed thereunder. It would remain a matter to be considered and decided on the facts of each prescribed case. Thus, the assessee was not obliged to lead any particular evidence to establish its claim or else to face rejection. However, it was always open to the revenue to rebut that evidence or lead its own evidence to defeat the claim of the assessee. At present, it is not clear if that evidence had been led. In any case the findings of the Tribunal are found to be lacking.

36. Again, reference made by the order of the Tribunal to the minutes of the Board of Directors, though relevant, but as noted above, the same was not the only evidence to be considered by it. On the face of it, the minutes of the meeting, as extracted in the order of the Tribunal, referred to the date of start of production of two items, namely refrigerators and PC monitors. However, the same are not such as may lead to the conclusion that, two mutually exclusive or separate diversification had been taken by the assessee to manufacture those items.

37. There is also no apparent self-contradiction in the claim made by the assessee. It had consistently stated that it had filed two applications under legal advice owing to different treatment of the two items, namely refrigerators and monitors under the relevant exemption notifications. It had also referred to the own interpretation/treatment offered by the State authorities in granting exemption, specific to the investment made to manufacture each commodity. Thus, the assessee had relied on the certificate issued with respect to the diversification to manufacture PCB and Microwave Ovens vide eligibility certificate dated 27.9.2000. That issue has also remained from being thrashed out by the Tribunal.

38. Accordingly, I find that the Tribunal has misdirected itself in approach and, therefore, its order cannot be sustained. As to what would be the conclusion to be drawn on facts, is not being commented upon in this order. That would remain for the Tribunal to consider and decide on the strength of evidence placed before it. Insofar as the correct approach to be followed, that has been settled above.

39. In view of the above, the questions of law (as framed above) remain unanswered.

40. Accordingly, the order of the Tribunal is set aside and the matter is remitted to it to pass a fresh, strictly in accordance with law, keeping in mind the observations made above.

41. The aforesaid exercise may be completed as expeditiously as possible, preferably within a period of six months

from the date of production of certified copy of this order.

42. With the aforesaid observations, the present revision stands **disposed of**.

(2019)12 ILR A817

REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.10.2019

BEFORE
THE HON'BLE SAUMITRA DAYAL SINGH, J.

Commercial Tax Revision No. 169 of 2018

M/S Parishudh Machines Pvt. Ltd., Ghaziabad ...Revisionist
Versus
Commissioner of Commercial Taxes, U.P., Lucknow ...Opposite Party

Counsel for the Revisionist:
Sri Nishant Mishra, Sri Rahul Agarwal

Counsel for the Opposite Party:
C.S.C.

A. Tax Law – Uttar Pradesh Value Added Tax, 2008: Entry 26 of Schedule -II Part A; Sections 2(f), 4(1)(a) - Resort has to be had to the residuary heading only when by a liberal construction the specific heading cannot cover the goods in question. (Para 12)

If 'crankshaft' and 'camshaft' manufactured by the assessee were not machinery, then in absence of any other or alternative claim, the Tribunal could treat the goods to be unclassified under Schedule V to the Act. But if they were machinery, they could not have been treated as unclassified by relying on Section 2(f) of the Act, which has no bearing to classification of any goods for taxation purpose. (Para 13)

The words 'machinery' and phrase 'capital goods' are different and may overlap or remain mutually exclusive depending upon the facts of each case, in the context of the particular fiscal statute wherein they may have been used. (Para 15)

Any machinery that may be put to use in manufacture of goods may be treated as capital goods in the context of any particular legislation, especially fiscal statutes. Certain other goods may continue to be machinery, though not capital goods. Treatment of any goods as capital or non-capital goods, would remain extraneous so far as the taxability of those goods is concerned. (Para 16)

Matter remitted. (E-4)

Precedent followed:
1. State of Maharashtra Vs. Bradma of India Ltd., (2005) 2 SCC 669 (Para 12)

Present revision is against order dated 07.03.2018, passed by Commercial Tax Tribunal, Ghaziabad, U.P. for the A.Y. 2008-09.

(Delivered by Hon'ble Saumitra Dayal Singh,J.)

1. Present revision has been filed by the assessee against the order of the Commercial Tax Tribunal Ghaziabad dated 7.3.2018, passed in second appeal no. 518 of 2013, for the A.Y. 2008-09 (U.P.). By that order, the Tribunal has dismissed the appeal filed by the assessee against the order of the first appeal authority dated 12.7.2013. The first appeal authority had held 'crankshaft' and 'camshaft' used in the compressors in refrigerators are not machinery. However, with respect to rejection of books of accounts and best judgement assessment, the matter had been remitted to the assessing authority. The proceedings, thus remanded, have given rise to two separate revisions being Sales/Trade Tax Revision Nos. 298 of 2018 for A.Y. 2008-09 (U.P.)

and 299 of 2018 for A.Y. 2008-09 (Central). Those revisions would be dealt with separately.

2. Heard Sri Rahul Agrawal, learned counsel for the applicant-assessee and Sri B.K. Pandey, learned Standing Counsel for the opposite party-revenue.

3. The present revision has been pressed on the following question of law:

"A. Whether goods in question 'crankshaft' and 'camshaft' are covered within the ambit of Entry No. 26 of Schedule-II Part-A of the U.P. VAT Act, 2008?"

4. During the assessment year in question, the assessee was engaged in manufacture of 'crankshaft' and 'camshaft' used in manufacture of compressors for refrigerators. It sold the same to a manufacturer of refrigerators. Treating the items 'crankshaft' and 'camshaft' to be component parts of machinery, the assessee charged those goods @ 4% under Entry 26 of Schedule-II Part-A of the Uttar Pradesh Value Added Tax Act, 2008 (hereinafter referred to as the Act). However, the assessing authority took a different view and treated the same as unclassified goods and subjected the same to tax @ 12.5%. Upon first appeal, the first appeal authority upheld this view of the assessing authority, however, it remitted the matter on quantification issues. Upon further appeal, the Tribunal has confirmed the order of the assessing authority.

5. Having heard learned counsel for the parties and having perused the record, it appears, the revenue authorities have taken a view that 'crankshaft' and 'camshaft' cannot be taxed as machinery or component parts of the machinery on the reasoning that such 'crankshaft' and 'camshaft' are used in compressors used in the refrigerators and air-conditioners, which in turn are consumer goods or home appliances, and not machinery. To reach that conclusion, the Tribunal has reasoned that machineries are only such items as are used for production and manufacture of other goods. The Tribunal has relied on the definition of capital goods under Section 2(f) of the Act and observed,it includes machinery used for production and manufacture of goods. On such reasoning, the Tribunal has dismissed the appeal filed by the assessee.

6. The aforesaid reasoning appears to be wholly erroneous, inasmuch as, the Tribunal has completely misdirected itself in approach and thus, reached wholly unacceptable conclusions.

7. Entry no. 26 of Schedule-II Part-A reads as under:

"26. Machinery, equipment, apparatus, tools, moulds, dies and component spare parts, accessories thereof."

8. Section 2(f) of the Act reads as under:

(f) "capital goods" means any plant, machine, machinery, equipment, apparatus, tool, appliance or electrical installation used for manufacture or processing of any goods for sale by the dealer and includes:-

(i) components, spare parts and accessories of such plant, machine, machinery, equipment, apparatus, tool, appliance or electrical installation;

(ii) moulds and dies;

(iii) storage tank;

(iv) pollution control equipment;

(v) refractory and refractory materials;

(vi) tubes and pipes and fittings thereof,

(vii) lab equipments, instruments and accessories,

(viii) machinery, loader, equipment for lifting or moving goods within factory premises, or

(ix) generator and boiler used in manufacture of goods for sale by him but for the purpose of section 13, does not include:-

(i) air-conditioning units or air conditioners, refrigerators, air coolers, fans, and air circulators if not connected with manufacturing process;

(ii) an automobile including commercial vehicles, and two or three wheelers, and parts, components and accessories for repair and maintenance thereof;

(iii) goods purchased and accounted for in business but utilised for the purpose of providing facility to the employees.

(iv) vehicle used for transporting goods or passengers or both;

(v) capital goods used in the execution of a works contract; and

[(vi) .....]Omitted"

9. Section 4(1)(a) of the Act reads as under:

"4. Levy of tax on turnover of sale.-

(1) The tax, payable on sale of goods under this Act, shall be levied and paid on the taxable turnover of sale of-

(a) goods named or described in column 2 of the Schedule II, at every point of sale and at the rate of four percent."

10. Thus, in the first place, Section 4(1)(a) read with Schedule-II of the Act provides for rate of tax on goods that have been described in column-2 Schedule-II. Thus, everything else apart, the rate of tax on goods falling under Schedule-II would remain 4%. There exist other Schedules to the Act and parts thereof providing different categorization of goods both on the basis of rates and also use. However, no classification or categorization of any goods by virtue of those being 'capital goods'.

11. On the other hand, Section 2(f) of the Act is not a provision affecting the rate of tax. There is no taxing entry of 'capital goods' existing or relied upon by the revenue. Inasmuch as, such an entry had not been provided for by the legislature, the line of reasoning adopted by the Tribunal, is wholly extraneous and therefore irrelevant.

12. What was required to be seen first was - whether 'crankshaft' and 'camshaft' of compressors used in refrigerators and air-conditioners manufactured and sold by the assessee were items as would fall within any of the description of the taxing entry 26 of Schedule II, Part A of the Act. While examining that claim the Tribunal could not have looked into the residuary entry that in effect is Schedule V of the Act. In **State of Maharashtra v. Bradma of India Ltd., (2005) 2 SCC 669**, the Supreme Court held:

*"**7.** We are of the opinion that the High Court was wrong. Both the Tribunal and the High Court commonly enunciated the principle that a specific entry would override a general entry. In addition we would add, and as has been*

held in CCE v. Wood Craft Products Ltd., (1995) 3 SCC 454, at p. 462, resort has to be had to the residuary heading only when by a liberal construction the specific heading cannot cover the goods in question. The language of Entry 97(b) clearly shows, by use of the phrase "other than those specified elsewhere" that it is not only a residuary entry but also that electronic systems, instruments, etc. may be classified under other entries. Entry 90 on the other hand does not contain any words of limitation. The items mentioned therein would cover every species thereof irrespective of the mode of their operation. Cash registering machines are specifically mentioned. In the absence of any limitation or qualification as to the different kinds of cash registering machines, there is no reason to read in any such qualification and limit the entry to particular kinds of cash registering machines. It is significant that by contrast, data processing machines have expressly excluded computers. Were it not so excluded, computers would have also fallen within Entry 90. In fact computers are separately dealt with in Entry 97(a). But the exclusion of computers from data processing machines would indicate that the items mentioned in Entry 90 are generic covering all species of such items. Given the language of the two entries we fail to understand how the High Court could have come to the conclusion that Entry 97(b) was the specific entry and that Entry 90 was the general entry. Such an interpretation goes against the express language of the two entries."

13. Thus, if the answer to the above were in the negative and it were to be found that the 'crankshaft' and 'camshaft' manufactured by the assessee were not machinery, then, in absence of any other or alternative claim, the Tribunal could treat the goods to be unclassified under Schedule V to the Act. If however, that answer were in the affirmative, they could not be treated as unclassified by relying on Section 2(f) of the Act, which has no bearing to classification of any goods for taxation purpose. For the purposes of interpreting a taxing entry and to determine the classification of goods, section 2(f) of the Act and its effect would remain wholly irrelevant. It may be clarified, as there is complete absence of any taxing entry of 'capital goods' under any of the Schedules, hence there exists no occasion to examine that issue any further or to determine whether there exists a special entry (of capital goods) and a general entry (of machinery) under entry no. 26, Schedule II, Part A.

14. No such exercise has been carried out by the Tribunal. In fact the Tribunal has got misdirected in forming its opinion on the reasoning, treating the goods to be non-capital goods and therefore not machinery. In that regard the Tribunal has not examined the true scope and ambit of entry 26 Schedule II, Part A, in correct light and it has further erred in relying on section 2(f) of the Act, which is not relevant to interpret the taxing entry, in absence of use of the words 'capital goods', under any of the Schedules to the Act.

15. Even as a general principle, the word 'machinery' and the phrase 'capital goods' are different and may overlap or remain mutually exclusive depending upon the facts of the each case, in the context of the particular fiscal statute wherein they may have been used. While the phrase 'capital goods' may take within its ambit goods and items other than

machinery also, insofar as machinery is concerned, it may remain both capital goods as also non-capital goods including consumer goods as well.

16. Any machinery that may be put to use in manufacture of goods may be treated as capital goods in the context of any particular legislation, especially fiscal statutes. However, that treatment given to some machineries for specified purposes would not have any impact on the identity of certain other goods that may continue to be machinery, though not capital goods. Thus, even as to principle, treatment of any goods as non-capital goods, would remain extraneous so far as the taxability of those goods is concerned. That issue would have to be decided purely on the basis of treatment given by the legislature under the taxing provision and entry. In the context of the Act, the legislature has not classified 'capital goods' as a class of goods to be taxed as such. Only "List of Industrial Inputs" have been so identified and classified under Part C, Schedule II of the Act.

17. Commonly, even in homes and non-commercial or non-industrial establishment machines come to be used on a daily basis. A common example of such machine is a ceiling fan. In absence of a special taxing entry to categorize it otherwise, merely because a ceiling fan may be used both in an industrial establishment and also at a residential establishment would not change its identity and therefore its taxability as a machine. It cannot be treated both as an classified and unclassified goods solely on the basis of its installation, whether at an industrial establishment or a home.

18. In view of the above, order passed by the Tribunal is wholly unsustainable. The same is set aside and the matter is remitted to the Tribunal to pass a fresh order in accordance with law, keeping in mind the observations made above.

19. Accordingly, the question of law is left unanswered. The proceedings in remand may be completed as expeditiously as possible, preferably within a period of six months from the date of production of a certified copy of this order.

20. With the aforesaid observations, the revision stands **disposed of**.

(2019)12 ILR A821

REVISIONAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 05.12.2019

BEFORE
THE HON'BLE PIYUSH AGRAWAL, J.

Trade Tax Revision No. 268 of 2010

M/S Awadh Timber Merchant and Commission Agent Semri Road
...Revisionist
Versus
Commissioner Trade Tax U.P. Gomti Nagar Lucknow ...Opposite Party

Counsel for the Revisionist:
N.C. Mishra

Counsel for the Opposite Party:
C.S.C.

A. Tax Law – Uttar Pradesh Trade Tax Act, 1948: Section 2(e-1); Notification dated 23.11.1998 – TIF-2-2375/XI-9 (251)/97-UP Act 15/48-order 98 - Only one set of tax can be levied by the State in the event the commodity remains the same. For imposition of tax, after processing, some new commercial commodity must come into existence

which may be identified differently from its original.

The wood log, purchased by the revisionist as timber, remains the same even after obtaining veneer (*chiran)* as it does not loose its original identity of timber and it does not undergo any physical/commercial or any kind of change. The process of cutting and converting timber from wood log does not come under the definition of "Manufacturing" as provided u/s 2(e-1) of the Act. (Para 33, 34, 37)

B. Notification dated 15.01.2000 – KA. NI-2-101/XI-9 (231)/94-UP Act 15/48-order 2000 – It is not justified to impose increased tax on timber during the period 01.02.2000 to 31.03.2000 as notification came into existence w.e.f. 01.01.2000, by which the rate of tax was enhanced from 15% to 16%, which is not relevant for assessment year in dispute. (Para 36)

Trade Tax Revision allowed. (E-4)

Precedent followed:

1. Deputy Commissioner of Sales Tax Vs. Pio food Packers, 1981 UPTC 667 (Para 12, 17)

2. Commissioner of Sales Tax, UP Lucknow Vs. M/s Packing Aids, Agra, 1980 UPTC, 901 (Para 12, 19)

3. Commissioner Sales Tax Vs. Murlidhar and sons, 2006 (29) NTN 154 (Para 12, 21)

4. State of Tamil Nadu Vs. C. Kanchanamala, (1994) 93 STC 87 (Para 12, 22)

5. G. Ramaswamy and others Vs. State of Andhra Pradesh and others, (1973) 32 STC 309 AP (Para 12, 24)

6. Commissioner State Tax Vs Lal Kuwa Stone Crusher Pvt. Ltd., 2000 UPTC 463 (SC) (Para 12, 25)

7. Kalptaru Agro Forest Enterprises Pvt. Ltd. Vs. Commissioner Commercial Tax, UP Lucknow, 2016 NTN (Vol. 61) 143 (Para 26)

Precedent distinguished:

1. Commissioner of Commercial Tax Vs. Om Trading, TTR No. 1237 of 2000, decided on 22.08.2008 (Para 13, 28)

Present revision is against order dated 20.05.2010, passed by Commercial Tax Tribunal, Faizabad Bench, Faizabad. (Assessment Year 1999 – 2000)

(Delivered by Hon'ble Piyush Agrawal,J.)

1. The present revision has been filed against the order dated 20.5.2010 passed by Commercial Tax Tribunal, Faizabad Bench, Faizabad in Second Appeal No. 126 of 2008 (Assessment Year 1999-2000).

2. During pendency of the present revision, the revisionist filed an amendment application, which was allowed by this Court by order dated 25.4.2019. The revisionist by way of amendment has raised the following questions of law for consideration of this Court:-

"1. Whether tribunal was justified in law to impose tax both on timber in log and timber in chiran?

2. Whether tribunal was justified in law to impose tax on timber @ 16 % during period 01.02.2000 to 31.03.2000?"

3. The counsel for the revisionist submits that he only wants to press the aforesaid question of law.

4. It has been averred that the revisionist being registered dealer is engaged in the business of timber and manufacture and sale of veneer *(chiran)*. The business premises of the revisionist was surveyed on 22.12.1999 on the basis of which the best judgement assessment

was made. On the purchase of timber log tax was levied as purchase tax and after manufacture of veneer (chiran) from it, tax was levied on its sale amounting double taxation, which is not permissible under the law. The said imposition of tax has been confirmed up to the stage of Tribunal by the impugned order.

5. Heard Sri N.C. Mishra, learned counsel for the revisionist and learned Standing Counsel and perused the records.

6. The counsel for the revisionist submits that as per the provisions and notification either the items in which the revisionist is dealing can be taxed at the point of import or manufacturing. In other words only one set of tax can be charged. Tax can be levied either at the time of its import in the State or in the hand of its manufacturer.

7. The counsel for the revisionist further submitted that in the present case revisionist accepts the levy of tax on the purchase of timber log even on the best judgement assessment i.e. enhancement of its turnover. But after manufacture of veneer (chiran) from it no tax can be charged on its sales subsequently.

8. It was further argued that rate of tax can be levied only as per the rate mentioned in the notification and not otherwise.

9. In support of his contention the counsel for the revisionist has relied upon **Notification No. T.I.F.-2-2375/XI-9(251)/97-U.P. Act-15-48-order-98 dated 23.11.1998** which is quoted below:

In exercise of powers under clause 9d) of sub-section (1) of section 3-A of the Uttar Pradesh Trade Tax Act, 1948 (UP Act No. 15 of 1948) , read with section 21 of the Uttar Pradesh General Clauses Act, 1904 (U.P. Act No. 1 of 1904) and in supersession of all previous notifications issued in this behalf, the Governor is pleased to declare that with effect from December 1, 1998, turnover in respect of the goods mentioned in column 2 of the Schedule below shall be liable to tax at the point of sale specified in column 3 of the said Schedule at the rate specified against each in column 4 thereof.

Woods and timber of all kinds and of all trees of whatever species including ballies and bamboos whether growing or cut or sawn but excluding their products and fire wood.	Sale by Forest department, the UP Forest Corporation or by private owner of forest or by importer or manufacturer; Provided that where the sale is by the forest department to the UP Forest Corporation the tax shall be levied on the point of sale by the said Corporation and not at the point of sale by the Forest Department.	15%

10. The aforesaid notification was modified by **Notification KA. NI. -2-101/XI-9(231)/94-UPAct-15-48- order-2000 dated Lucknow:15 January, 2000**, which is quoted below :-

In exercise of the powers under clause (e) of sub section (1) of section 3 - A of the Uttar Pradesh Trade Tax Act, 1948 (UP Act No. XV of 1948) read with Section 21 of the Uttar Pradesh General Clauses Act, 1904 (UP Act No. 1 of

1904), and in supersession of all previous notifications issued in this behalf, the Governor is pleased to declare that, with effect from January 17, 2000, the turnover in respect of the goods mentioned in column 2 of the List below shall be liable to tax at the point of sale specified in column 3 of said List at the rate specified against each in column 4 thereof.

29(i) Woods and timber of all kinds and of all trees of whatever species including ballies and bamboos, whether growing or cut or sawn imported from out side india.	Importer	20%
(ii) Woods and timber of all kinds or by private owner of forest or by and of all trees of importer or manufacturer. whatever species Provided that where the sale is by the forest whether growing department to the UP Forest Corporation the or cut or sawn not tax shall be levied on the point of sale by the included above but said corporation and not at the point of sale by excluding their Forest Department. products and firewoods.	Sales by Forest Department the UP Forest Corporation	16%

By the aforesaid notifications rate of tax has been enhanced from 15 % to 20 % and there was no change in levy of tax on timber.

11. The counsel for the revisionist submitted that neither tax can be levied twice i.e. one as purchase tax and the other on its sale nor the rate of tax can be enhanced to 16% instead of 15 %. More precisely 1 % enhanced tax cannot be levied on the sale of veneer (chiran).

12. The counsel for the revisionist has relied upon the certain judgements of Supreme Court, this Court as well as other High Courts i.e. **Deputy Commissioner of Sales Tax Vs. Pio Food Packers, Commissioner of Sales Tax, UP Lucknow Vs. M/s Packing Aids, Agra, Commissioner Sales Tax Vs. Murlidhar and sons, State of Tamil Nadu Vs. C. Kanchanamala, G. Ramaswamy and others Vs. State of Andra Pradesh and others, Commissioner Sales Tax Vs. Lal Kuwa Stone Crusher Pvt. Ltd.** and **Kalptaru Agro Forest Enterprises Pvt. Ltd. Vs Commissioner Commercial Tax.**

13. Rebutting the submissions of the learned counsel for the revisionist, the learned Standing Counsel submits that timber log was purchased by the revisionist from an unregistered dealer so that the tax was levied, therefore, commercial commodity i.e. veneer (chiran) has been produced. Therefore the tax has rightly been imposed. He relied upon the judgement of this Court in **Trade Tax Revision No. 1237 of 2000, Commissioner of Commercial Tax Vs. Om Trading decided on 22.8.2008**. He submits that the issue involved in the present revisionist is squarely covered by the aforesaid judgement.

14. It is not disputed by either of the parties that the revisionist has purchased timber log on which the tax was levied.

The only dispute for consideration of this Court is that whether the sale of veneer (chiran) can again be taxed from 1.4.1999 to 31.4.2000 @ 15 % and from 1.2.2000 to 31.3.2000 @ 16 %.

15. It is admitted between the parties that after purchase of timber log, the same was cut in different sizes and planks were obtained, which were used by the revisionist as veneer (chiran). Tax has been levied on the basis of best judgement assessment which has not been disputed by either of the parties.

16. According to the counsel for the revisionist once the tax has been charged on the purchase of timber log even on the best judgement assessment, there is no justification to levy tax on the sale of veneer (chiran) again. He further argued that timber remain timber even after cut to small sizes/planks/chiran.

17. Apex Court is the case of **Deputy Commissioner of Sales Tax Vs. Pio Food Packers 1981 UPTC 667**, has held as follows:-

5.Section 5-A(1)(a) of the Kerala General Sales Tax Act envisages the consumption of a commodity in the manufacture of another commodity. The goods purchased should be consumed, the consumption should be in the process of manufacture, and the result must be the manufacture of other goods. There are several criteria for determining whether a commodity is consumed in the manufacture of another. The generally prevalent test is whether the article produced is regarded in the trade, by those who deal in it, as distinct in identity from the commodity involved in its manufacture. Commonly, manufacture is the end result of one or more processes through which the original commodity is made to pass. The nature and extent of processing may vary from one case to another, and indeed there may be several stages of processing and perhaps a different kind of processing at each stage. With each process suffered, the original commodity experiences a change. But it is only when the change, or a series of changes, take the commodity to the point where commercially it can no longer be regarded as the original commodity but instead is recognised as a new and distinct article that a manufacture can be said to take place. Where there is no essential difference in identity between the original commodity and the processed article it is not possible to say that one commodity has been consumed in the manufacture of another. Although it has undergone a degree of processing, it must be regarded as still retaining its original identity.

6. A large number of cases has been placed before us by the parties, and in each of them the same principle has been applied: Does the processing of the original commodity bring into existence a commercially different and distinct article ? Some of the cases where it was held by this Court that a different commercial article had come into existence include Anwarkhan Mehboob Co. v. The State of Bombay and Others (where raw tobacco was manufactured into bidi patti), A Hajee Abdul Shukoor and Co. v. The State of Madras (raw hides and skins constituted a different commodity from dressed hides and skins with different physical properties), The State of Madras v. Swasthik Tobacco Factory (raw tobacco manufactured into chewing tobacco) and Ganesh Trading Co. Karnal v. State of Haryana and Another, (paddy

dehusked into rice). On the other side, cases where this Court has held that although the original commodity has undergone a degree of processing it has not lost its original identity include Tungabhadra Industries Ltd., Kurnool v. Commercial Tax Officer, Kurnool (where hydrogenated groundnut oil was regarded as groundnut oil) and Commissioner of Sales Tax, U.P., Lucknow v. Harbilas Rai and sons (where bristles plucked from pigs, boiled, washed with soap and other chemicals and sorted out in bundles according to their size and colour were regarded as remaining the same commercial commodity, pigs bristles).

....

12.The comment applies fully in the case before us. Although a degree of processing is involved in preparing pineapple slices from the original fruit, the commodity continues to possess its original identity, notwithstanding the removal of inedible portions, the slicing and thereafter canning it on adding sugar to preserve it. It is contended for the Revenue that pineapple slices have a higher price in the market than the original fruit and that implies that the slices constitute a different commercial commodity. The higher price, it seems to us, is occasioned only because of the labour put into making the fruit more readily consumable and because of the can employed to contain it. It is not as if the higher price is claimed because it is a different commercial commodity. It is said that pineapple slices appeal to a different sector of the trade and that when a customer asks for a can of pineapple slices he has in mind something very different from fresh pineapple fruit. Here again, the distinction in the mind of the consumer arises not from any difference in the essential identity of the two, but is derived from the mere form in which the fruit is desired.

...

14. In the result, we hold that when pineapple fruit is processed into pineapple slices for the purpose of being sold in sealed cans there is no consumption of the original pineapple fruit for the purpose of manufacture.

18. Apex Court has very clearly said that even after pineapple have been slices and canned does not changes its identity.

19. This Court in **Commissioner of Sales Tax, UP Lucknow Vs. M/s Packing Aids, Agra reported in 1980 UPTC, 901** has held here in below:

"7. Now coming to the other question the Assessing Officer observed that the claim made by the assessee that batton and shooks fell in the category of timber was incorrect because it was only making planks or joining planks by nails and that was treated by the assessee as shooks and the same could not be treated as timber. The Revising Authority has, however, observed that batton and bhooks appear to be nothing but wooden planks or pieces used for making wooden cases or Pattis and hence the case of the assessee was correct that what it was dealing with was timber. In my opinion no clear finding has been recorded either by the Assessing Authority or by the Revising Authority in regard to the nature of the products which the assessee is making. If the assessee is only making planks, that would come in the category of timber because the planks would be sawn timber or wood and would be covered by Entry 97 aforesaid. But if the assessee is further joining the planks by nails, that would have to be treated as timber product. The import of the expression "product" came up for consideration before a Division

Bench of this Court in Commissioner of Sales Tax v. B.M. Wood Works No.1, (1973) 32 STC 66. The question referred to this Court was : "Whether boxes made of Chir are timber products as contemplated by Notification No. ST-3393 dated 1st July, 1962, as amended by Notification No. 6869 dated 19th January, 1963". The view taken was that the word product in the notification was intended to be used in its full and comprehensive meaning viz. A thing produced by any action, operation or work, and not in the narrow and restricted meaning of something produced by nature or a natural process. Now sawn timber has been placed specifically in the category of timber under Entry 97 aforesaid, but the joining of planks by nails would certainly be a thing produced by an action or operation of work and would have to be treated as timber product and not as timber. Both the Department and the assessee have not been, in their minds, clear about the nature of the assessee's business and it needs consideration afresh. The occasion for carrying out the direction given by the Revising Authority would arise only if it is found that batton and shooks in which the assessee dealt are covered by Entry 97 aforesaid. If, however, it is found that they are timber products, there would be no occasion for any such further enquiry."

20. The court has held that if the dealer is making planks then it will come in the category of timber. But if the joining of planks by nails would have to be treated as timber product.

21. This Court in the case of **Commissioner Sales Tax Vs. Murlidhar and sons, 2006 (29) NTN 154** has held herein below:

1…..

"2. Heard the counsel for the parties. The dispute relates to the Assessment Year 1988-89. The dealer opp. Party deals in timber, timber product and burada etc. In the assessment year in question the Assessing Authority held that planks made by the assessee is a timber product. The said finding has been set aside by the First Appellate Authority which has been confirmed by the Tribunal. This Court in the case of C.S.T Vs. M/s Packing AIDS, Agra 1980 UPTC 901 has held that the wooden planks and pieces used for making wooden goods fall within the category of timber. Respectfully following the aforesaid decision, I do not find any legal error in the order of the Tribunal. The revision is dismissed."

22. Similar view has been taken by Madras High Court in the case of **State of Tamil Nadu Vs. C. Kanchanamala (1994) 93 STC 87** in which it has held as follows:-

3. The finding of the Tribunal is as follows :

"..... It is found that the appellant had effected purchase of timber, sliced the same into splints and sold the splints to various dealers among the match manufacturers. Hence, we are of the view that provisions of section 7-A cannot be applied to the purchase turnover of timber and accordingly we set aside the assessment of the purchaser turnover ……"

...

8. From a perusal of the ratios laid down in all these cases, there is no difficulty in upholding the view taken by the Tribunal as the splints obtained by slicing the timber definitely retain the identity of timber and, therefore, it cannot

be said that the timber has been consumed in the manufacture of splints.

9. Now, coming to the decision on which reliance was placed by the learned Additional Government Pleader, it is seen that no facts, it is entirely a different one. In that case, the assessee purchased timber in logs, cut the same into slices and planks and thereafter manufactured packing cases. In those circumstances, this Court held that a packing case in any sense of the term, cannot be called timber. ...

23. Madras High Court has clearly opined that slicing of timber definitely retain the identity of timber.

24. Similar view has been taken by Andra Pradesh High Court in the case of **G. Ramaswamy and others Vs. State of Andra Pradesh and others 1973 32 STC 309 AP** in which it has held as follows

3. Under Section 5(2)(a) read with item "63. Timber" in the First Schedule to the Act a dealer in timber is liable to pay sales tax thereon at 3 pies in a rupee at the point of first sale. The petitioners are sought to be taxed on "planks, rafters, cut sizes, etc.," which they sell to the customers under Section 5 of the Act treating them as general goods. The contention of the petitioners is that they deal in timber and since the sales which they effect are not the first sales, they are not therefore liable to pay any tax under item 63 of the First Schedule to the Act. They submit that since the transactions fall under item 63 as they deal in timber, they cannot be taxed under Section 5 of the Act.

....

14. Thus the word "timber" may in the context mean the timber tree; when it is felled, the wood; when it is cut into logs for convenience of transport, the ballis cut to sizes or even the planks, rafters, cut sizes, etc., for the use of construction of buildings or such other like purpose.

37. It will thus be plain that right from the inception, the Commercial Taxes Department has been treating planks, rafters and cut sizes as timber and never taxed them till the attention of the Government was drawn by the Accountant-General, Andhra Pradesh. Realising that the commodity was not so taxed in view of the construction which the Government had placed on the word "timber" for a considerably long time, the Government directed to tax these goods prospectively under Section 5 treating them as general goods. One thing which is conspicuous is that even in the subsequent stand the Government has taken, they do not say that the planks, rafters, etc., do not come within the meaning of timber used in item 63. What they say is that "planks, rafters and cut sizes, etc., obtained from nascent timber have to be treated as falling under general goods".

38. What must follow is that planks, rafters, cut sizes, etc., obtained from logs of wood according to the popular or commercial usage or the interpretation placed by the administration is "timber" within the meaning of item 63 of Schedule I to the Act.

45. Applying these principles thus decided to the facts of the present cases, we have no hesitation in reaching the conclusion that merely because planks, rafters and cut sizes, etc., are sawn or cut from logs of wood, they do not alter their character. They still continue to be raw materials which by

themselves and in the same form cannot be directly put to use for construction purposes. The log of wood purchased by the timber merchant is merely cut or sawn to sizes for convenience sake and to make them acceptable to the customers. They do not in that process lose their character as timber. They retain the same character. What the merchants purchased in the form of log of wood was timber. What they sold to their customers in the shape of planks, rafters and cut sizes after processing them was also timber. The customers purchased timber. There is no other name suggested to such planks, rafters, etc., except timber.

47. It was a common ground that since timber is taxed at first point of sale, when the Forest Department sells the standing timber trees, is the first sale and the sale by the timber merchants in the form of planks, rafters and cut sizes, etc., cannot be taxed a second time, as item 63 permits levy of tax at the point of first sale. The timber having suffered tax once cannot be taxed again.

25. Supreme Court in the case of **Commissioner Sales Tax Vs. Lal Kuwa Stone Crusher Pvt. Ltd. 2000 UPTC 463 (SC)** has held that converting the stone from boulder to small pieces i.e. stone chip, gitti etc. will not amount to change the nature of the commodity and boulder will remain boulder and no tax can be imposed as such.

26. This Court in **Kalptaru Agro Forest Enterprises Pvt. Ltd. Vs Commissioner Commercial Tax, UP Lucknow, 2016 NTN (Vol.61) 143** has held that every type of operation of the goods or finishing of goods would not amount to manufacture unless it results in emergence of a new commercial commodity.

27. In view of the aforesaid judgments the view emerges that no new commercial commodity come into existence which could be said to be a different commodity. Wooden log (timber) will remain wooden log (timber) in its original character even after cutting the same into sizes.

28. The Standing Counsel has relied upon the judgment of ***Om Trading (supra)*** wherein it has been held that the goods were admittedly purchased from an unregistered dealer without payment of any tax and after purchase, it was cut into sizes and new commodity was admittedly be manufactured as pulp wood. The tax was imposed under Section 3 AAAA of UP Trade Tax Act on the purchase of goods and thereafter when new commodity as pulp wood was sold, again tax was imposed.

29. The case-law cited by the learned Standing Counsel is not applicable to the facts of this case as no new commercial commodity come into existence, which has been sold by the revisionist.

30. The Standing Counsel has placed emphasis on the definition of Section 2(e1) of UP Trade Tax Act and has tried to convince the Court that in view of the definition, the manufacturing and cutting of wood into sizes amounts to new commercial commodity comes into existence.

31. The provision of section 2(e-1) of the Act is quoted below:-

"2(e-1): "Manufacture' means producing, making, mining, collecting, extracting, altering, ornamenting, finishing, or otherwise processing, treating or adapting any goods; but does not include such manufactures or manufacturing processes as may be prescribed;"

32. Section 2 (e-1) of the UP Trade Tax Act shows that the process of cutting is not being included within the definition of manufacturing. Thus the process of cutting the wood from different sizes and converting the wood log into plank, no new commercial commodity comes into existence. Timber remain timber and after cutting the timber it does not loose its original identity of timber and it does not undergo any physical/commercial or any kind of change. The identity of timber remains same. Thus the process of cutting and converting timber for log does not come under the definition of manufacturing as provided under Section 2 (e-1) of the UP Trade Tax Act.

33. In view of the aforesaid observation of the Hon'ble Apex Court as well as of this Court and other High Courts, the position of law, which emerges, is that after processing, some new commercial commodity must come into existence which may be identified differently from its original.

34. In the case in hand, timber logs were purchased and the same were sliced converting into veneer *(chiran)* and the same were sold by cutting the wood log converting into veneer *(chiran)*, no new commercial commodity come into existence. Timber does not looses its original identity of timber and it remains the same.

35. In view of the aforesaid observation of the various Courts, the Tribunal was not justified in confirming imposition of tax at the time of purchase of timber (as purchase tax), which has not been challenged by the revisionist and has accepted even in the best judgement assessment, by which its turnover was enhanced, the veneer *(chiran)*, which has been obtained after cutting wood log into small sizes and have been sold, cannot be taxed again.

36. The notification, as mentioned above, clearly shows that the subsequent notification came into existence with effect from 01.01.2000, by which the rate of tax was enhanced from 15% to 16%, which is not relevant for the assessment year in dispute.

37. Moreover, when only one set of tax can be levied by the State in the event the commodity remains the same. In the case in hand, the wood log, which was purchased by the revisionist as timber, remains the same even after obtaining veneer *(chiran)* as it does not looses its original identity of timber and it does not undergo any physical/commercial or any kind of change. Thus, the process of cutting and converting timber from wood log does not come under the definition of "Manufacturing" as provided under section 2(e-1) of the Act.

38. In the results, the impugned order is modified to that extent. The question of law is answered accordingly in favour of the assessee and against the department.

39. The revision is **allowed**.

(2019)12 ILR A831

REVISIONAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 05.12.2019

BEFORE
THE HON'BLE PIYUSH AGRAWAL, J.

Trade Tax Revision No. 269 of 2010

M/S Awadh Timber Merchant And Commissioner Agent Semri Road ...Revisionist

Versus

Commissioner Trade Tax U.P. Gomti Nagar Lucknow ...Opposite Party

Counsel for the Revisionist:
N.C. Mishra

Counsel for the Opposite Party:
C.S.C.

A. Tax Law - Central Sales Tax Act, 1956: Section 8(2), 14(ia); Notification dated 23.11.1998 – TIF-2-2372/XI-9 (251)/97-UP Act 15/48-order 98

The sale of coal was made without requisite Form-C as prescribed under the Act. Coal is a declared commodity u/s 14 (ia) and the rate of tax as per notification is 4%. Therefore, revisionist can be taxed at twice the rate applicable i.e. 8% and not beyond that. (Para 11, 12, 13)

Trade Tax Revision allowed. (E-4)

Present revision is against order dated 20.05.2010, passed by Commercial Tax Tribunal, Faizabad Bench, Faizabad.

(Delivered by Hon'ble Piyush Agrawal, J.)

1. The present revision has been filed by the assessee against the order dated 20.5.2010 passed by Commercial Tax Tribunal, Faizabad Bench, Faizabad in Second Appeal No. 120 of 2008 (Assessment Year 1999-2000) under Central Sales Tax Act (hereinafter referred to as the Act).

2. It has been averred that the revisionist is engaged in the business of manufacturing and sale of veneer (chiran) as well as trading of coal. The business premises of the revisionist was surveyed on 27.12.1999, in which some loose papers were found and it has also been found that the revisionist had made sale of coal without Form-C on the basis of which the tax was imposed @ 10 % on the sale of coal and best judgment assessment was made. Feeling aggrieved by the said order, the revisionist preferred a first appeal, which was partly allowed and taxable turnover was reduced and thereafter the second appeal was filed before the Tribunal. The Tribunal by the impugned has confirmed the tax on the sale of coal without Form-C @ 10 %. Hence the present revision has been filed.

3. During pendency of the present revision, the revisionist filed an amendment application, which was allowed by this Court by order dated 25.4.2019. The revisionist by way of amendment has raised the following questions of law for consideration of this Court:-

"1. Whether tribunal was justified in law to impose tax @ 10 % on sale of coal against the provisions of section 8 (2) of CST Act."

4. Heard Sri N.C. Mishra, learned counsel for the revisionist and learned Standing Counsel.

5. The counsel for the revisionist submits that he only want to press the

aforesaid question of law. He argued that coal is special importance goods and declared commodity under Section 14 (ia) of the Act and as per Section 8 (2) (a) of the Act, no tax can be imposed twice the rate of tax levy on coal in Uttar Pradesh.

6. The Standing Counsel rebutting the submission of the learned counsel for the revisionist, has submits that the order passed by the tribunal is justified.

7. This Court has perused the Record. The relevant part of Section 8(2) (a) and Section 14(ia) of the Act is quoted below for ready reference:-

8. (1) .....

(2) The tax payable by any dealer on his turnover in so far as the turnover or any part thereof relates to the sale of goods in the course of inter-State trade or commerce not falling within sub-section (1)--

(a) in the case of declared goods, shall be calculated 3 [at twice the rate] applicable to the sale or purchase of such goods inside the appropriate State;

(b) in the case of goods other than declared goods, shall be calculated at the rate of 5 [ten per cent.] or at the rate applicable to the sale or purchase of such goods inside the appropriate State, 6 [whichever is higher; and

(c) in the case of goods, the sale or, as the case may be, the purchase of which is, under the sales tax law of the appropriate State, exempt from tax generally shall be nil, and for the purpose of making any such calculation under clause (a) or clause (b), any such dealer shall be deemed to be a dealer liable to pay tax under the sales tax law of the appropriate State, notwithstanding that he, in fact, may not be so liable under that law.

14. Certain goods to be of special importance in inter-State trade or commerce.--

It is hereby declared that the following goods are of special importance in inter-State trade or commerce:--

.....

(ia) coal, including coke in all its forms, but excluding charcoal:

8. Bare perusal of Sections clearly shows that the declared goods sold without Form -C can be subjected to tax twice as the rate of tax applicable in the appropriate State. Section 14 (ia) of the Act also declared coal as a special importance goods i.e. coal is a declared goods.

9. By Notification- TIF-2-2372/XI-9 (251)/97-UP Act 15/48-order 98, dated 23.11.1998 the State of Uttar Pradesh has prescribed the rate of tax on the sale of coal @ 4 %. The aforesaid notification has been amended from time to time but the rate of tax on the sale of coal has remained unchanged.

10. The said fact in regard to rate of tax has not been disputed by the learned Standing Counsel.

11. The records reveals that the dispute in relation to sale of coal has admittedly been made without requisite Form -C as prescribed under the Act and it is not disputed that the coal is a declared commodity under Section 14 (ia) of the Act and rate of tax as per the above notification is only @ 4 % which is leviable in the State of Uttar Pradesh.

12. In view of above provision of the Act as well as rate of tax applicable at the relevant time, the tax on the sale of coal within the said limit was @ 4 %. In view of Section 8 (2) (a) of the Act, sale of coal made by the revisionist without Form-C can be taxed at twice as the rate applicable in State i.e. @ 4 +4 =8 % and not above that.

13. In such circumstances, the Tribunal was not justified in imposing the tax on the sale of coal without Form-C @ 10 % treating the same under Section 8 (2-b) as undeclared goods.

14. In the results, the impugned order is modified to that extent. The question of law is answered accordingly in favour of the assessee and against the department.

15. The revision is **allowed.**

(2019)12 ILR A833

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.11.2019

BEFORE
THE HON'BLE BHARATI SAPRU, J.
THE HON'BLE ROHIT RANJAN AGARWAL,J.

Income Tax Appeal No. 357 of 2010

Sri Ajay Gupta ...Appellant
Versus
Commissioner of Income Tax (Appeals) Meerut & Anr. ...Respondents

Counsel for the Appellant:
Sri Shubham Agrawal, Sri Parv Agarwal

Counsel for the Respondents:
C.S.C., Sri Krishna Agrawal, Sri Shubham Agarwal, Sri D. Awasthi

A. Tax Law – Income Tax Act, 1961: Section 131, 132, 132(4A), 142(1), 158-BC, 250, 263 – Presumption provided u/s 132 (4A) is not in absolute terms but is subject to corroborative evidence.

The presumption u/s 132 (4A) is not provided in absolute terms and the word used is "may" and not "shall", as such the revenue has to corroborate the entries made in the seized documents before presuming that transactions so entered were made by the assessee. (Para 11, 12)

Appeal partly allowed. Matter remitted back to Tribunal. (E-4)

Precedent followed:

1. CIT, Kanpur Vs. Shadiram Ganga Prasad, 2010 UPTC 840 (Para 11)

Present appeal is against order dated 12.03.2010, passed by Income Tax Appellate Tribunal, New Delhi.

(Delivered by Hon'ble Rohit Ranjan Agarwal, J.)

1. This appeal under Section 260-A of the Income Tax Act has been filed by the assessee challenging the order of the Income Tax Appellate Tribunal Delhi Bench "A" New Delhi (hereinafter called as ITAT) dated 12.03.2010, partly allowing the appeal of the department.

2. This appeal was admitted on 22.11.2010 on the following questions of law:

"1. Whether the presumption under Section 132(4A) of the Income Tax Act can be raised in the assessment proceeding?

2. Whether apart from from section 132(4A) of the Income Tax Act, the burden to explain the documents

seized from the possession of the assessee during search is upon him and if it so, then has he discharge the burden."

3. Brief facts of case are that residential premises of the assessee was searched under Section 132 of Income Tax Act (hereinafter called as the 'Act') on 28.02.2000. Locker No. 64 Dena Bank, Abu Lane Branch, Meerut, which is in the joint name of assessee and his wife Smt. Aneeta Gupta, was also searched. During search, jewellery worth Rs.7.44 lakhs was found from the assessee, while jewellery worth Rs.13.55/- lakhs was found in the locker of assessee, out of which, jewellary worth Rs.8.87/- lakhs was seized.

4. Notice under Section 158-BC was issued to the assessee on 03.12.2001 for filing return of income. In compliance thereof, assessee filed return of income declaring NIL undisclosed income. Assessment for block period was completed on 27.03.2002 on undisclosed income. CIT, Kanpur on 23.05.2003 passed order under Section 263 of the Act. In compliance to the order under Section 263, notices under Section 142 (1) of the Act was issued on 25.08.2003 and questionnaire on 04.08.2003. In compliance of the said notice, assessee appeared through his legal representatives and filed his detailed reply. The Assessing Officer passed order under Section 158-BC read with Section 263 of the Act, assessing the undisclosed income at Rs.65,33,302/- as against the declared undisclosed income of NIL.

5. Aggrieved by the said order, assessee filed appeal before CIT (Appeals) Meerut under Section 250 of the Act on 20.01.2009. CIT (Appeals) Meerut partly allowed the appeal of the assessee.

6. Against said order, the revenue filed appeal before ITAT on two grounds, firstly, that CIT (A) had erred in law and fact in deleting the addition of Rs.51,432/- made by A.O. on account of undisclosed jewellery. The second ground was for deletion made by CIT (A) of Rs.5,58,870/- on account of papers found during search from premises of the assessee, and the CIT had overlooked the provisions of Section 132 (4A) of the Act. The ITAT while partly allowing the appeal of revenue rejected the first ground of appeal taken by revenue and upheld the order passed by CIT (A), while deciding ground no. 2 it reversed the order of the CIT (A) and restored that of A.O.

7. Sri Parv Agarwal, learned counsel appearing for the assessee submitted that Tribunal while deciding the appeal failed to consider that revenue did not establish any connection between the entries recorded in loose papers found during search with the books of accounts. Further, the assessee on 29.11.2004 had made written submission that he does not have any knowledge about persons mentioned in the papers, as well as categorically denied the transaction. It was also submitted that the assessee denied both the papers before DDI investigation in his statement recorded under Section 131, which is part of the record at page 42 of paper book.

8. It was also contended that Tribunal while reversing the finding of CIT (A) has only considered the three judgments relied upon by First Appellate Authority, and it being the last fact finding authority did not record any finding as to how the papers found during search corroborated with the findings recorded by the A.O., and on the basis of presumption available to the revenue

under Section 132 (4A) reversed the orders of CIT (A).

9. Per contra Sri Krishna Agarawal, learned counsel appearing for the department submitted that the assessee failed to rebut the presumption under Section 132 (4A) regarding correctness of the documents found and seized during search. He further contended that the documents relied upon by A.O. was found during search, as such the Tribunal had rightly reversed the finding of CIT (A) and restored the order of A.O., as far as addition of Rs.5,58,870/- is concerned which was made on account of papers found from the premises of assessee during search.

10. We have heard counsel for the parties and perused the material on record. It is not in dispute that two loose papers were found during search from the premises of assessee, however, during block assessment proceedings, the assessee had denied the documents and statement was recorded by Deputy Director of Investigation, he had submitted that he had no concern with the said documents, so seized. Further, the A.O. while passing the assessment order had only on basis of the loose papers found during search made addition to the undisclosed income of assessee while the entries of said papers remained uncorroborated.

11. This Court, in the case of ***CIT, Kanpur Vs. Shadiram Ganga Prasad, 2010 UPTC 840*** has held that the loose parchas found during search at the most could lead to a presumption, but the department cannot draw inference unless the entries made in the documents, so found are corroborated by evidence.

12. As, Section 132(4A) of the Act provides that any books of account, documents, money, bullion, jewellary or other valuable articles or things found in possession or in control of any person in course of search may be presumed to be belonging to such person, and further, contents of such books of account and documents are true. But this presumption is not provided in absolute terms and the word used is "may" and not "shall", as such the revenue has to corroborate the entries made in the seized documents before presuming that transactions so entered were made by the assessee. Presumption so provided is not in absolute terms but is subject to corroborative evidence.

13. In the present case, Tribunal only on basis of presumption under Section 132 (4A) of the Act, reversed the finding of CIT (A), without recording any finding as to how the loose sheets which were recovered during search, were linked with the assessee. In the absence of corroborative evidence, the Tribunal was not justified in reversing the finding by the CIT (Appeals).

14. In view of the above, we are of the considered view that order passed by Tribunal reversing the finding of CIT (A) in regard to deletion of addition made of Rs.5,58,870/- and restoring the order of A.O. on mere presumption is unsustainable. The order dated 12th March, 2010 is set aside to that extent, and the matter is remitted back to Tribunal to decide afresh, as far as addition of Rs.5,58,870/- is concerned, within a period of three months from today.

15. The appeal stands ***partly allowed.***

(2019)12 ILR A836

REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.09.2019

BEFORE
THE HON'BLE SAUMITRA DAYAL SINGH, J.

Commercial Tax Revision No. 872 of 2008
and
Sales/Trade Trade Revision No. 873 of 2008
and
Sales/Trade Tax Revision No. 874 of 2008

Sardar Vallabh Bhai Patel University of Agriculture and Technology,Meerut ...Revisionist

Versus

The Commissioner Commercial Tax U.P. Lucknow ...Opposite Party

Counsel for the Revisionist:
Sri P.K. Ganguly, Sri Amrendra Pratap Singh

Counsel for the Opposite Party:
C.S.C.

A. Tax Law – Uttar Pradesh Trade Tax Act, 1948: Sections 8-D (1), 8-D (6); Notification No. 2401 dated 27.04.1987 - A university established under a separate enactment was not included as a person made liable to comply with Section 8-D(1) in notification. Persons not specified in the notification would stand excluded from the requirement to make deduction of tax at source. (Para 8)

B. Interpretation of clause (c) of notification – The words 'corporation' and 'undertaking' clearly refer to status of the person as a corporation or an undertaking only, while university is primarily seen and understood as an educational institution and not a corporation or undertaking**.** (Para 10 & 11)

Commercial Tax Revision allowed. (E-4)

Precedent followed:

1. A.V. Fernandez Vs. State of Kerala, AIR 1957 SC 657 (Para 12)

Present revisions are against order dated 11.04.2008, passed by Commercial Tax Tribunal, Meerut.

(Delivered by Hon'ble Saumitra Dayal Singh, J.)

1. The present revisions have been filed by the assessee against common order of the Tribunal dated 11.4.2008 passed in Second Appeals No.254/04, 255/04 and 256/04 for A.Y. 2001-02, 2002-03 and 2003-04 respectively, by which the revenue's appeals have been allowed and the order passed by the first appeal authority, deleting the penalties under Section 8-D(6) of the U.P. Trade Tax Act, 1948 (hereinafter referred to as the Act), has been reversed.

2. Undisputedly, facts of the case are that the assessee is a university established under the *Uttar Pradesh Evam Prodyogik Vishwavidalaya Adhiniyam* 2000 (U.P. Act No.19 of 2000). During the assessment years in question, the assessee awarded contracts, for construction of college and residence for staff etc., to three contractors. It made payments to them without making any deduction of tax at source. This became subject matter of penalty proceedings under Section 8-D (6) of the Act. According to the assessing officer, the assessee was obliged to make deduction of tax at source under Section 8-D (6) of the Act. Since entire payments were made without necessary deductions, the assessee was visited with penalty orders for the three assessment years.

3. The amount of penalties apart, the main issue raised by the assessee was that

it was not liable to make deduction of tax at source and therefore, it did not infringe the law. That submission found favour with the first appeal authority which deleted the penalty. However, the tribunal has reversed the findings and restored the penalties.

4. Heard Sri Amarendra Pratap Singh, learned counsel for the revisionist-assessee and Sri B.K. Pandey, learned counsel for the respondent-revenue.

5. The present revision has been pressed on the following ground:-

(i) Whether penalty under Section 8-D (6) could have been imposed on the assessee though it was not obliged to make deduction of tax at source under notification No. 2401 dated 27.4.1987?"

6. Notification No.2401 dated 27.4.1987 reads as below:

"In exercise of the powers under sub-section (1) of Section 8-D of the U.P. Sales Tax Act, 1948 (U.P. Act No. XV of 1948). The Governor is pleased to notify in the public interest that the provisions of the aforesaid section shall not apply to a building contract other than that between a contractor and

(a) the Central Government or any State Government or

(b) any local authority; or

(c) any corporation or undertaking established or constituted by or under a Central Act or State Act; or

(d) any company; or

(e) any co-operative society or other society club, firm or other association of persons, whether incorporated or not."

7. Clearly, the applicability of Section 8-D (1) and therefore, requirement to make deduction of tax at source, had been created specifically with respect to payments made under contracts awarded by specified persons, namely, the Central Government, State Government, local authorities, a corporation or undertaking established under a Central or State Act or a company or a co-operative society, or club or firm or other association of person, whether incorporated or not.

8. In the first place, a university established under a separate enactment was not specifically mentioned or included as a person made liable to comply with Section 8-D (1) of the Act. Second, separate categories of persons having been specified under each clause (a) to (e) of the aforesaid notifications and thus, made liable to make deduction of tax at source, all other persons not so specified, would stand necessarily excluded from the requirement to make deduction of tax at source.

9. Though the assessee is a university, established under a State enactment, clearly, it is not specified under the notification in question and therefore, it is not obliged to make deduction of tax at source. The fact that there may be some differences in the status of the assessee university as compared to the Aligarh Muslim University, would not be decisive, inasmuch as, the applicability of notification No. 2401 dated 27.4.1987 did not hinge on the constitutional or other status of the university (such as the Aligarh Muslim University).

10. Keeping in mind the different category of persons specified under the aforesaid notification, the assessee clearly

does not fall under the description of persons of clauses (a), (b), (d) or (e). While clause (c) does appear to include corporations and undertakings established or undertakings constituted by or under a Central or State Act, however, it cannot be read to include within its ambit a university that primarily is a center for higher education. Though not defined under the Act, it is a specie apart from normal or usual corporate entities. It derives its identity and character, different and distinct from statutory corporations by it's activities, privileges and academic content. Halsbury's Laws of England (4th Edition) describes 'Universities' as:

"Para 256. General. A university is the whole body of teachers and scholars engaged, at a particular place, in giving and receiving instruction in the higher branches of learning; such persons associated together as a society or corporate body, with definite organization and acknowledged powers and privileges (especially that of conferring degrees), and forming an institution for the promotion of education in the higher or more important branches of learning; also, the colleges, buildings and other property belonging to such a body. Although the institutions to which it refers are readily identifiable, precise and accurate definition is difficult. The essential feature of a university seems to be that it was incorporated as such by the sovereign power.

Other attributes of a university appear to be the admission of students from all parts of the world, a plurality of masters, the teaching of one at least of the higher faculties, namely, theology, law or philosophy (which in some definitions are regarded as identical) and medicine, provision for residence and the right to confer degrees, but possession of these attributes will not make an institution a university in the absence of any express intention of the sovereign power to make it one. A university involves the relation of tutor and pupil; it is charged with the supervision and upbringing of the pupil under tuition. Incorporation was anciently effected by papal grant or charter and later by royal charter or Act of Parliament.

The practice adopted in the case of the most recent foundations is to incorporate the university by royal charter, to which there is annexed a schedule containing the original statutes of the university, and thereafter to obtain the passing of a local Act of Parliament vesting in the university the property and liabilities of any institution which it replaces and making other necessary provisions.

A copy of any application for a charter for the foundation of any college or university which is referred by the Queen in Council for the report of a committee of the Privy Council must be laid before Parliament, together with a copy of the draft charter, for not less than 30 days before the committee reports upon it.

The functions of the Secretary of State for Education and Science, in relation to universities in Wales, have not been transferred to the Secretary of State for Wales."

11. Thus, in the modern sense of the term, departed from it's origin, it is difficult to treat universities such as the assessee as a corporation or undertaking, especially in the context of the aforesaid taxing notification, that apparently seeks to identify different categories of persons, made liable to deduct tax at source. Used in that sense, the words corporation and

undertaking clearly refer to status of the person as a corporation or an undertaking only, while university is primarily seen and understood as an educational institution and not a corporation or undertaking.

12. Being a provision creating liability under a taxing status, it has to be strictly read and no other rule of interpretation is required to be invoked. In that regard in **A.V. Fernandez Vs. State of Kerala** A.I.R. 1957 S.C. 657, it was held-

"29. It is no doubt true that in construing fiscal statutes and in determining the liability of a subject to tax one must have regard to the strict letter of the law and not merely to the spirit of the statute or the substance of the law. If the Revenue satisfies the Court that the case falls strictly within the provisions of the law, the subject can be taxed. If, on the other hand, the case is not covered within the four corners of the provisions of the taxing statute, no tax can be imposed by inference or by analogy or by trying to probe into the intentions of the legislature and by considering what was the substance of the matter."

13. Inasmuch as, the assessee being a university does not naturally or freely fall within the description of any of the persons specified under Clause (a) (e) of the Notification No. 2401 dated 27.4.1987. No attempt is to be made to force it to fit into description of any person made liable under the notification. Hence, the assessee was never required to make deduction of tax at source on payment made to its contractors. Therefore, no penalty was leviable on that count.

14. In view of the above, question of law is answered in the affirmative i.e. in favour of revisionist-assessee and against the respondent-revenue. The revision is **allowed.**

(2019)12 ILR A839

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.11.2019
BEFORE
THE HON'BLE BISWANATH SOMADDER, J.
THE HON'BLE AJAY BHANOT, J.

Writ Tax No. 1057 of 2019

Omveer Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Hemendra Kumar

Counsel for the Respondents:
C.S.C., Sri Akhilesh Kumar Mishra, Sri Ashok Kumar Mishra

A. Relocation of premises - Uttar Pradesh Number and Location of Excise Shops Rules, 1968: Rule 5(2) – There cannot be any change in the site of any shop or sub-shop except for "very cogent reasons" and that too, such reasons are required "to be recorded in writing". (Para 6)

Excise Commissioner while passing the order, merely referred to the proposal of District Magistrate, Bijnor who merely reiterated the observations made by District Excise Officer, Bijnor. Above mentioned authorities are ordered to examine the issue afresh, in accordance with the provisions of law.

Writ Petition allowed. (E-4)

Present petition is against order dated 02.08.2019, passed by Excise Commissioner, Prayagraj, Uttar Pradesh.

(Delivered by Hon'ble Biswanath Somadder, J.)

1. The subject matter of challenge in the instant writ proceeding is an order dated 2nd August, 2019, of the Excise Commissioner, Prayagraj, Uttar Pradesh [as communicated by the Deputy Excise Commissioner (Licensing)].

2. By the impugned order, the Excise Commissioner, Prayagraj, Uttar Pradesh, has allowed transfer of a foreign liquor shop belonging to the private respondent no. 8 from one site to another. The site where the shop is sought to be transferred is a site where the petitioner has an existing licence to sell foreign liquor. The writ petitioner, feeling aggrieved, has thus filed the writ petition.

3. For convenience, the impugned order dated 2nd August, 2019, issued by respondent no. 3 is set out hereinbelow:-

"फाइल संख्या– 1057/19

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मेल/रजिस्टर्ड

कार्यालय आबकारी आयुक्त, उत्तर प्रदेश, प्रयागराज

संख्या– 12932 /दस लाई0–11/जी–12ग/2019–20/बिजनौर

प्रेषक,
आबकारी आयुक्त,
उत्तर प्रदेश।

सेवा में,
जिलाधिकारी,
बिजनौर। दिनांकः अगस्त 02, 2019

विषयः– जनपद बिजनौर में व्यवस्थित विदेशी मदिरा दुकान का स्थानान्तरण किये जाने के सम्बंध में।

महोदय,
कृपया उपर्युक्त विषयक प्रकरण में प्रेषित अपने पत्र संख्या–779/जि0आ0अधि0/दुकान स्था0/2019–20/बिजनौर/
दिनांक :29.07.2019 का संदर्भ ग्रहण करने का कष्ट करें। संदर्भित प्रत्रान्तर्गत प्रेषित प्रस्ताव एवं किये गये अनुरोध पर विचारोपरान्त आबकारी आयुक्त, उत्तर प्रदेश द्वारा आदेश दिनांकः 02.08.2019 के अन्तर्गत जनपद की 01 विदेशी मदिरा दुकान को अधोलिखित तालिका के कालम–3 से कालम–06 के स्थल पर स्थानान्तरित किये जाने की अनुमति निम्न प्रतिबंधो के अधीन प्रदान कर दी हैः–

	मद	स्थानान्तरण हेतु प्रस्तावित दुकान का नाम/वर्तमान अवस्थिति	निकाय की प्रास्थिति	वार्षिक एम.जी.क्यू/बेसिक लाइसेंस फीस	प्रस्तावित अवस्थिति का स्पष्ट उल्लेख अक्षांश/देशान्तर	प्रस्तावित अवस्थिति पर निकाय की प्रास्थिति	प्रस्तावित निकाय व प्रास्थिति पर वार्षिक एम.जी.क्यू/बेसिक लाइसेंस फीस
1	2	3	4	5	6	7	8
1	विदेशी मदिरा	स्योहरा नं0–1 (समवार का बाजार) 29,20347/78,58071	नगर पालिका	रू0 1994521	स्योहरा नं0–1 (फब्बारा चौक) 29,21251/78,58411	नगर पालिका	रू0 1994521

प्रतिबन्ध–

1– स्थानान्तरित नवीन स्थल पर दुकानों की प्रास्थिति उ0प्र0 आबकारी (दुकानों की संख्या एवं स्थिति) नियमावली–1968 (यथा संशोधित) में निहित प्राविधानानुसार सुनिश्चित की जाय।

2– दुकानों की प्रास्थिति निर्धारण में इस कार्यालय द्वारा पूर्व में जारी मार्गदर्शक सिद्धान्त दिनांक 15.02.2002 के प्राविधानों को भी दृष्टिगत रखा जाय।

3– नवीन स्थलों पर दुकानों के स्थानान्तरण से उसके आस–पास पहले से व्यवस्थित/ संचालित दुकानें कुप्रभावित न हो।

4– नवीन स्थलों /अवस्थिति पर दुकानों को स्थानान्तरित करने से किसी प्रकार के विवाद/विधिक विवाद की स्थिति उत्पन्न न हो।

5– यदि कोई दुकान निम्न निकाय की प्रास्थिति से उच्च निकाय की प्रास्थिति में स्थानान्तरित की जा रही है तो नियमानुसार वांछित धनराशि जमा कराई जाये।

6– प्रत्येक दशा में अनिवार्य रूप से मा0 सर्वोच्च न्यायालय के द्वारा पारित निर्णय दिनांक 15.12.2016 एवं 31.03.2017 एवं 11.07.2017 का अनुपालन सुनिश्चित किया जाये।

कृपया तदनुसार आवश्यक कार्यवाही अमल में लाने का कष्ट करें।

भवदीय

ह0 अपठनीय

02.08.19

(डा0 सुरेश चन्द्र)

उप आबकारी आयुक्त (लाइसेसिंग)

कार्यालय आबकारी आयुक्त, उत्तर प्रदेश।

संख्या /दस लाई0–11/जी–12ग/2019–20/ बिजनौर/तददिनांक।

प्रतिलिपि निम्नलिखित को सूचनार्थ एवं आवश्यक कार्यवाही हेतु प्रेषितः–

1– संयुक्त आबकारी आयुक्त, मेरठ जोन, मेरठ।
2– उप आबकारी आयुक्त, मोरादाबाद प्रभार।
3– जिला आबकारी अधिकारी, बिजनौर।

/

(डा0 सुरेश चन्द्र)

उप आबकारी आयुक्त (लाइसेसिंग)

कार्यालय आबकारी आयुक्त, उत्तर प्रदेश।"

4. A bare perusal of the impugned order reveals that the Excise Commissioner, Prayagraj, Uttar Pradesh, has merely acted on the proposal forwarded by the District Magistrate, Bijnor, being the respondent no. 4 before us. This proposal dated 29th July, 2019, is also required to be noticed and is set out hereinbelow:-

"प्रेषक,
जिलाधिकारी,
बिजनौर।

सेवा में,
आबकारी आयुक्त
उ0प्र0 प्रयागराज।

संख्या 779/जि0आ0अधि0/दुकान स्था0/2019–20 /बिजनौर/दिनांक जुलाई, 29 2019

विषयः– विदेशी मदिरा दुकान स्योहारा नं0–1 का स्थानान्तरण सोमवार का बाजार से फववारा चौक किये जाने सम्बन्ध में।

महोदय,

कृपया उपरोक्त विषयक आपको सम्बोधित श्रीमती निशा अग्रवाल अनुज्ञापी विदेशी मदिरा दुकान स्योहारा नं0–1 के प्रार्थना पत्र का संदर्भ ग्रहण करने का कष्ट करें, उप आबकारी आयुक्त, मुरादाबाद प्रभार के माध्यम से जिला अबकारी अधिकारी बिजनौर की आख्या मॉगी गयी थी। जिस पर जिला आबकारी अधिकारी, बिजनौर द्वारा सोमवार का बाजार में उक्त दुकान का भारी जनविरोध होने तथा दुकान के संचालन में आ रही कठिनाई के कारण उक्त दुकान का स्थानान्तरण करने हेतु आख्या दी गयी थी तथा स्थानान्तरण का प्रस्ताव चूॅकि मेरे माध्यम से प्रेषित किया जाना था।

अतएव आबकारी निरीक्षक क्षेत्र–3 एवं जिला अबकारी अधिकारी बिजनौर की आख्या के अनुसार मेरे द्वारा विदेशी मदिरा दुकान स्योहारा नं0–1 के स्थानान्तरण का प्रस्ताव निर्धारित प्रारूप में निम्नवत् है :–

क0सं0	मद	स्थानान्तरण हेतु प्रस्तावित दुकान का नाम/वर्तमान अवस्थिति अक्षांस/देशान्तर	निकाय की प्रास्थिति	वार्षिक लाइसेंस फीस/एम0जी0क्यू0	प्रस्तावित अवस्थिति का स्पष्ट उल्लेख। अक्षांश/देशान्तर	वर्तमान स्थल से प्रस्तावित स्थल की दूरी	प्रस्तावित अवस्थिति पर निकाय की प्रास्थिति	प्रस्तावित निकाय की प्रास्थिति पर वार्षिक/एम0जी0क्यू
1	2	3	4	5	6	7	8	9
1	1	स्योहरा नं0–1 (सोमवार का बाजार) 29.20347/78.58071	नगर पालिका	रू0 1994521/–	स्योहारा नं0–1 (फव्वारा चौक) 29.212251/78.584111	1.4 कि0मी0	नगर पालिका	रू0 1994521/–

प्रस्तावित अवस्थिति के आस–पास पहले से संचालित दुकानों का विवरण।			
मद	दुकान का नाम	वार्षिक लाइसेंस फीस	प्रस्तावित अवस्थिति से दूरी (कि0मी0)
10	11	12	13
1	स्योहरा नं0–2 (रामलीला ग्राउण्ड)	रू0 3290000/–	1.3 कि0मी0
2	स्योहरा नं0–3 (मो0 इस्लामनगर स्टेशन रोड़)	रू0 1010000/–	0.8 कि0मी0

उक्त दुकान का प्रस्तावित नवीन स्थल माननीय सर्वोच्च न्यायालय के निर्णय दिनांक 15.12.2016, 31.03.2017 एवं 11.07.2017 से बाधित नही है।

अतः राजस्व एवं जनहित मे उक्त मदिरा की दुकान का स्थानान्तरण स्योहारा नं0–1(फव्वारा चौक) की स्वीकृति करने का कष्ट करें।

भवदीय
ह0 अपठनीय
29.7.19
रमाकान्त पाण्डेय)
जिलाधिकारी,

बिजनौर।"

5. In order to examine as to whether the impugned order dated 2nd August, 2019, requires intervention by the writ Court one needs to consider the relevant provision of the Uttar Pradesh Number and Location of Excise Shops Rules, 1968. The relevant provision, in the facts of the instant case, is sub rule (2) of Rule 5 of Uttar Pradesh Number And Location of Excise Shops Rules, 1968, which reads as follows:-

"(2). No change in the site of any shop or sub-shop shall, except for very cogent reasons to be recorded in

writing, shall be permitted during the currency of a settlement. The location of all shops and sub-shops shall be clearly defined at settlement in order to prevent any shifting of sites."

6. The above quoted sub rule makes it clear that there cannot be any change in the site of any shop or sub-shop except for "very cogent reasons" and that too, such reasons are required "to be recorded in writing". Therefore, we need to consider, at first, as to whether reasons have been recorded in writing and, secondly, whether those reasons are very cogent reasons or not.

7. The impugned order dated 2nd August, 2019, reveals the following reason for the purpose of allowing the site of the foreign liquor shop belonging to the private respondent no.8 to be changed:-

"संदर्भित पत्रान्तर्गत प्रेषित प्रस्ताव एवं किये गये अनुरोध पर विचारोपरान्त आबकारी आयुक्त, उत्तर प्रदेश द्वारा आदेश दिनांक 02.08.2019 के अन्तर्गत जनपद की 01 विदेशी मदिरा दुकान को अधोलिखित तालिका के कालम –3 से कालम–06 के स्थल पर स्थानान्तरित किये जाने की अनुमति निम्न प्रतिबंधो के अधीन प्रदान कर दी है:.

"On consideration of the proposal forwarded vide the letter in question and the request made therein, the Excise Commissioner, Uttar Pradesh, vide order dated 02.08.2019 has permitted for shifting of 01 English Wine Shop of the district from the place mentioned in column-3 to the place mentioned in column 6 of the table given below subject to the following restriction:-"
(English translation)

8. It is palpably evident from a plain reading of the above sentence that the Excise Commissioner, Prayagraj, Uttar Pradesh, has merely referred to the proposal of the District Magistrate, Bijnor, dated 29th July, 2019, as a basis for consideration of change of site of the foreign liquor shop. On the face of it, this sentence clearly reflects non-application of mind on the part of the Excise Commissioner, Prayagraj, Uttar Pradesh, as well as the respondent no. 3 (under whose signature the impugned order dated 2nd August 2019 has been communicated). It cannot, by any stretch of imagination, be construed as a "very cogent reason" which is a condition required to be followed for the purpose of permitting change in the site of any shop or sub-shop.

9. At this stage, we must also take notice of the proposal dated 29th July, 2019, which was issued by the District Magistrate, Bijnor. This proposal of the District Magistrate, Bijnor, also reveals non-application of mind inasmuch as the District Magistrate, Bijnor, has merely parroted the observations made by the District Excise Officer, Binjor. The District Magistrate, Bijnor, never applied his independent mind while making such a proposal which may have an adverse effect upon the existing business of the writ petitioner. That apart in any event, even the proposal of the District Magistrate, Bijnor, dated 29th July, 2019, is bereft of "very cogent reasons" being the sine qua non for the purpose of allowing change in the site of any shop or sub-shop selling foreign liquor in the State of Uttar Pradesh.

10. For reasons stated above, we have no hesitation to set aside not only the order dated 2nd August, 2019, but also the proposal of the District Magistrate,

Bijnor, dated 29th July, 2019, which forms the basis of issuance of the impugned order dated 2nd August, 2019.

11. The District Magistrate, Bijnor, shall examine the matter afresh and communicate his decision to the Excise Commissioner within a period of three weeks from date. The Excise Commissioner, Prayagraj, Uttar Pradesh, thereafter, shall take a decision in the matter strictly in accordance with the provision as contained under sub rule (2) of Rule 5 of Uttar Pradesh Number And Location of Excise Shops Rules, 1968, after giving adequate opportunity of hearing to all concerned including the writ petitioner and the private respondent no. 8.

12. The entire exercise, in terms of this order, shall be completed by the Excise Commissioner, Prayagarj, Uttar Pradesh, being the respondent no. 2, as expeditiously as possible, preferably within a period of three weeks, but not later than four weeks from the date of receipt of the decision from the office of the respondent no. 4, being the District Magistrate, Bijnor.

13. The writ petition is allowed accordingly.

(2019)12 ILR A844

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.11.2019

BEFORE
THE HON'BLE BISWANATH SOMADDER, J.
THE HON'BLE AJAY BHANOT, J.

Writ Tax No. 1120 of 2019

M/s Ingersoll- Rand Technologies & Services Private Limited ...Petitioner

Versus

Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Atul Gupta, Sri Abhishek Kumar Tripathi, Sri Pulak Maheshwari

Counsel for the Respondents:
A.S.G.I.,C.S.C., Sri Om Prakash Srivastava

A. Tax Law – Uttar Pradesh Goods & Services Tax Rules, 2017: Section 140(3), Rules 117, 118, 119, 120-A

Every registered person who has submitted a declaration electronically in Form G.S.T. T.R.A.N – 1 within the period specified in Rule 117 or Rule 118 or Rule 119 or Rule 120 is allowed to revise such declaration once and submit the revised declaration in Form G.S.T T.R.A.N – 1 electronically on the common portal, but cannot go beyond the time-frame provided under Rule 117 of the Act of 2017. The period of extension has been statutorily circumscribed at 90 days and that too is possible only on recommendation of the Council. (Para 7, 8)

The Court refused to interfere but held it open for the Council to take a decision in the matter.

Writ Petition disposed of. (E-4)

(Delivered by Hon'ble Biswanath Somadder, J.)

1. The writ petitioner - company has approached this Court essentially seeking its intervention to allow the writ petitioner to file a revised declaration in FORM G.S.T. T.R.A.N-1 or manually accept the same to enable the writ petitioner - company to avail the credit pertaining to SAD (Special Additional Duty) amounting to Rs. 22,51,380.21/-; which, according to the writ petitioner was not claimed by it, inadvertently.

2. The question as to whether we can issue a writ in the nature of

mandamus as prayed for can be answered if we look into the applicable provisions of law in the facts of the instant case. However, before we do so, certain facts relevant to the issue before us are required to be taken note of.

3. The writ petitioner intends to avail the credit pertaining to SAD (Special Additional Duty) amounting to Rs. 22,51,380.21/- in respect of goods held in stock as on 30th June, 2017. It is the admitted position that the writ petitioner has already submitted FORM G.S.T. T.R.A.N-1 on 10th October, 2017, to carry forward the credits available to it as on 30th June, 2017. By a letter dated 28th March, 2019, addressed to the Hon'ble Chairman, Goods and Services Tax Council, Government of India, the writ petitioner requested the Council to consider its case and to allow the writ petitioner to re-submit FORM G.S.T. T.R.A.N-1 within the extended period in order to enable the writ petitioner - company to carry forward the credit of SAD amount of Rs. 22,51,380.21/- in relation to stock of goods lying as on 30th June, 2017, under the transitional provisions of section 140(3) of the Uttar Pradesh Goods & Services Tax Rules, 2017. Relevant portion of the letter dated 28th March, 2019, is reproduced hereinbelow;-

"In view of the above, we request the council to consider our case and allow us the extended period to re-submit Form GST TRAN-1 in order to enable us to carry forward the credit of SAD amounting to Rs.22,51,380.21/- in relation to stock of goods lying as on 30.06.2017 under the transitional provisions of Section 140(3) of CGST Act. We would again like to submit that as we were entitled to carry forward the credit of the said amount of SAD under the transitional provisions, such substantive benefit should not be denied to us due to a procedural lapse."

4. However, in spite of the above letter being on record, the writ petitioner has now come forward before this Court claiming that it is the Commissioner, Commercial Tax, U.P. who has the power to extend the time period for the purpose of submitting a revised declaration in FORM G.S.T. T.R.A.N-1.

5. The first of the relevant rules which we need to take notice of in the facts of the instant case is Rule 120-A of the Uttar Pradesh Goods & Services Tax Rules, 2017, which reads as follows;-

*"[120-A. **[Revision of declaration in FORM G.S.T. T.R.A.N.-1]** - Every registered person who has submitted a declaration electronically in **FORM G.S.T. T.R.A.N.-1** within the period specified in Rule 117, Rule, 118, Rule 119 or Rule 120 may revise such declaration once and submit the revised declaration in **FORM G.S.T. T.R.A.N.-1** electronically on the Common Portal within the period specified in the said rules or such further period as may be extended by the Commissioner in this behalf.]"*

6. The other rule which we need to take notice of is Rule 117 of the Uttar Pradesh Goods & Services Tax Rules, 2017, which reads as follows;

***"117. Tax or duty credit carried forward under any existing law or on goods held in stock on the appointed day.**-(1) Every registered person entitled to take credit of input tax*

under Section 140 shall, within ninety days of the appointed day, submit a declaration electronically in ***FORM G.S.T. T.R.A.N.-1****, duly signed, on the Common Portal specifying therein, separately, the amount of input tax credit [x x x] to which he is entitled under the provisions of the said section:*

Provided that the Commissioner may, on the recommendations of the Council, extend the period of ninety days by a further period not exceeding ninety days:

Provided that in the case of a claim under sub-section (1) of Section 140, the application shall specify separately-

(i) the value of claims under Section 3, sub-section (3) of Section 5, Sections 6 and 6A and sub-section (8) of Section 8 of the Central Sales Tax Act, 1956 made by the applicant; and

(ii) the serial number and value of declarations in Forms C or F and certificates in Forms E or H or Form I specified in Rule 12 of the Central Sales Tax (Registration and Turnover) Rules, 1957 submitted by the applicant in support of the claims referred to in sub-clause (I);

[(1A) Notwithstanding anything contained in sub-rule (1), the Commissioner may, on the recommendations of the Council, extend the date for submitting the declaration electronically in FORM GST TRAN-1 by a further period not beyond 31st March, 2019, in respect of registered persons who could not submit the said declaration by the due date on account of technical difficulties on the common portal and in respect of whom the Council has made a recommendation for such extension.]

(2) Every declaration under sub-rule (1) shall,-

(a) in the case of a claim under sub-section (2) of Section 140, specify separately the following particulars in respect of every item of capital goods as on the appointed day-

(i) the amount of tax or duty availed or utilised by way of input tax credit under each of the existing laws till the appointed day; and

(ii) the amount of tax or duty yet to be availed or utilised by way of input tax credit under each of the existing laws till the appointed day;

(b) in the case of a claim under sub-section (3) or Clause (b) of sub-section (4) or sub-section (6) or sub-section (8) of Section 140, specify separately the details of stock held on the appointed day;

(c) in the case of a claim under sub-section (5) of Section 140, furnish the following details, namely:

(i) the name of the supplier, serial number and date of issue of the invoice by the supplier or any document on the basis of which credit of input tax was admissible under the existing law;

(ii) the description and value of the goods or services;

(iii) the quantity in case of goods and the unit or unit quantity code thereof;

(iv) the amount of eligible taxes and duties or, as the case may be, the value added tax [or entry tax] charged by the supplier in respect of the goods or services; and

(v) the date on which the receipt of goods or services is entered in the books of account of the recipient.

(3) The amount of credit specified in the application in FORM G.S.T. T.R.A.N.-1 shall be credited to the electronic credit ledger of the applicant

maintained in FORM G.S.T. P.M.T.-2 on the Common Portal.

(4)(a)(i) A registered person, holding stock of goods which have suffered tax at the first point of their sale in the State and the subsequent sales of which are not subject to tax in the State availing credit in accordance with the proviso to sub-section (3) of Section 140 shall be allowed to avail input tax credit on goods held in stock on the appointed day in respect of which he is not in possession of any document evidencing payment of value added tax.

(ii) The credit referred to in sub-clause (i) shall be allowed at the rate of sixty per cent. on such goods which attract State tax at the rate of nine per cent, or more and forty per cent, for other goods of the State tax applicable on supply of such goods after the appointed date and shall be credited after the State tax payable on such supply has been paid:

Provided that where integrated tax is paid on such goods, the amount of credit shall be allowed at the rate of thirty per cent and twenty per cent, respectively of the said tax;

(iii) The scheme shall be available for six tax periods from the appointed date.

(b) The credit of State tax shall be availed subject to satisfying the following conditions, namely:

(i) such goods were not wholly exempt from tax under the (Name of the State) Value Added Tax Act; ….

(ii) the document for procurement of such goods is available with the registered person;

[(iii) the registered person availing of this scheme and having furnished the details of stock held by him in accordance with the provisions of clause (b) of sub-rule (2), submits a statement in FORM G.S.T. T.R.A.N.-2 by 31st March, 2018, or within such period as extended by the Commissioner, on the recommendations of the Council, for each of the six tax periods during which the scheme is in operation indicating therein, the details of supplies of such goods effected during the tax period:]

[Provided that the registered persons filing the declaration in FORM GST TRAN-1 in accordance with sub-rule (1A), may submit the statement in FORM GST TRAN-2 by 30th April, 2019.]

(iv) the amount of credit allowed shall be credited to the electronic credit ledger of the applicant maintained in FORM G.S.T. P.M.T.-2 on the Common Portal; and

(v) the stock of goods on which the credit is availed is so stored that it can be easily identified by the registered person."

7. A conjoint reading of the above two rules clearly reveals that every registered person who has submitted a declaration electronically in FORM G.S.T. T.R.A.N-1 within the period specified in Rule 117 or Rule 118 or Rule 119 or Rule 120 is allowed to revise such declaration once and submit the revised declaration in FORM G.S.T. T.R.A.N-1 electronically on the common portal, **"within the period specified in the said rules or such further period as may be extended by the Commissioner in this behalf."** This further period - as may be extended by the Commissioner -which is provided under Rule 120-A, therefore, cannot go beyond the time-frame provided under Rule 117 of the Uttar Pradesh Goods & Services Tax Rules, 2017. The period of extension has been statutorily circumscribed at 90 days and

that too is possible only on the recommendation of the Council.

8. If we are to assume that the Commissioner while exercising his powers under Rule 120-A of the Uttar Pradesh Goods & Services Tax Rules, 2017 can extend the time period for the purpose of filing of a revised declaration by a registered person in FORM G.S.T. T.R.A.N-1 for an unlimited or an indefinite period, it would simply mean that any registered person can avail the benefit of filing a revised declaration in FORM G.S.T. T.R.A.N-1 for an unlimited or indefinite period of time after submitting a declaration electronically in FORM G.S.T. T.R.A.N-1 under Rule 117 of the Uttar Pradesh Goods & Services Tax Rules, 2017. That surely could not have been the purpose and intention of the legislature. Rather, the legislature in its wisdom has noticed Rule 117, Rule 118, Rule 119 and Rule 120, while framing Rule 120-A of the Uttar Pradesh Goods & Services Tax Rules, 2017. The first proviso attached to Rule 117 of the Uttar Pradesh Goods & Services Tax Rules, 2017, reads as follows;-

"Provided that the Commissioner may, on the recommendations of the Council, extend the period of ninety days by a further period not exceeding ninety days."

9. In such circumstances as stated above, a writ in the nature of mandamus, as prayed for, cannot be granted by this Court. However, it is open to the Council to take a decision in the matter in the light of the writ petitioner's letter dated 28th March, 2019.

10. The writ petition is accordingly, disposed of.

(2019)12 ILR A848

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.12.2019

BEFORE
THE HON'BLE BISWANATH SOMADDER, J.
THE HON'BLE AJAY BHANOT, J.

Writ Tax No. 1288 of 2019

Phool Chandra ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Rajesh Kumar Tiwari

Counsel for the Respondents:
C.S.C.

A. Constitution of India: Article 226; United Provinces Excise Act, 1910: Section 11(1) – Alternative remedy

S.11(1) provides statutory appeal in respect of the impugned order in which petitioner's licence to operate a country liquor shop has been cancelled. In absence of any demonstration of palpable arbitrariness, mala fides or procedural impropriety, Court cannot exercise discretionary jurisdiction u/Art. 226. (Para 5, 6, 7)

Writ Petition disposed of. (E-4)

Present writ petition is against order dated 25.10.2019, issued by District magistrate/LicensingAuthority, Prayagraj.

(Delivered by Hon'ble Biswanath Somadder,J. & Hon'ble Ajay Bhanot,J.)

1. This writ petition has been taken out by one Phool Chandra, seeking this Court's interference in respect of an order dated 25th October, 2019, issued by the District Magistrate / Licensing Authority, Prayagraj, whereby the petitioner's licence

to operate a country liquor shop stood cancelled. A further prayer has been made by the writ petitioner to restore his license so that he is allowed to run his country liquor shop, which is situated in village - Sithauli, Police Station - Utraon, District - Prayagraj, till 31st March, 2020.

2. A report in the form of an affidavit was called for in terms of our order dated 25th November, 2019, from the concerned respondent authority to enable the said authority to respond to the specific allegations as sought to be made in the writ petition. Such report in the form of an affidavit has been filed by the District Excise Officer, Prayagraj, which is on record.

3. A plain reading of the report reveals the following facts which appear at paragraphs 4, 5, 6, 7 and 8 therein :-

"4. That on 12.08.2019, a surprise inspection of the country liquor shop Sitholi was done. During the inspection 33 duplicate quarters of Windies Lime brand were recovered from the shop in the presence of the Salesman of the Shop Hariom Pal S/o Ram Sumer Pal but his relative Kamlesh Pal is supplying this duplicate liquor. The Salesman of the shop was taken in the custody and an F.I.R. was lodged in Police Station Utraon, Prayagraj. Sample of the recovered spurious liquor were drawn and sent to Assistant Excise Commissioner, Radico Khetan Distillery, Rampur for laboratory testing.

5. That by an order of District Magistrate / Licencing Authority dated 14.08.2019 the license of the Country Liquor Shop Sitholi was suspended and Show Cause Notice was served to petitioner. In the interest of the revenue the shop was resettled on temporary daily basis by tender offer method.

6. That the laboratory testing report proves that the liquor recovered from Country Liquor Shop Sitholi was duplicate liquor as Liquor, Bottle, Cap seal, Label, QR Code all were found duplicate. **A copy of lab report** is being filed herewith and marked as **Annexure No. 1** to this affidavit.

7. That by selling Spurious Liquor, the petitioner was not causing loss to Government Revenue but was also putting health hazards to consumers of his shop. This may kindly noted that in many districts of Uttar Pradesh more that 150 people have died by consuming spurious liquor in recent months.

8. That the representation 20.08.2019 filed by the petitioner was found unsatisfactory and after receipt of Laboratory Report, in the interest of public health and life safety as also for the protection of the government revenue, the Licencing Authority cancelled licence of the petitioner's shop by Order dated 25.10.2019."

4. Apart from the above statements made by the District Excise Officer, Prayagraj, we find from a reading of the impugned order dated 25th October, 2019, that the writ petitioner was, in fact, given an opportunity of hearing by the District Magistrate / Licensing Authority, Prayagraj, and he participated in the adjudicatory process by responding to the said notice. The following sentence in the impugned order dated 25th October, 2019, is a clear pointer in this direction:-

"उक्त नोटिस के
प्रतिउत्तर में

अनुज्ञापी द्वारा अपना
उत्तर उपलब्ध कराया
गया। "

English translation:-

"In response to the said notice, reply was made available by the licensee.

5. Section 11(1) of the United Provinces Excise Act, 1910, provides for statutory appeal in respect of the impugned order dated 25th October, 2019.

6. In the facts and circumstances of the instant case, the writ petitioner - in the absence of any demonstration of palpable arbitrariness or *mala fides* or perversities (all of which could have vitiated the due process of law being followed) and particularly in the absence of any procedural impropriety, ought to have approached the statutory appellate authority instead of rushing to the writ Court.

7. We are, therefore, not inclined to exercise our discretionary jurisdiction under Article 226 of the Constitution of India and leave it open to the writ petitioner to proceed in accordance with law.

8. However, we wish to observe that in the event, statutory appeal is filed within a period of fortnight from date, the appellate authority is requested to dispose of the appeal as expeditiously as possible.

9. The writ petition stands disposed of accordingly.

(2019)12 ILR A850

REVISIONAL JURISDICTION

CIVIL SIDE
DATED: LUCKNOW 17.12.2019

BEFORE
THE HON'BLE VIVEK CHAUDHARY, J.

Civil Revision Defective No. 67 of 2019

Syed Mehdi Hasan Nizami ...Revisionist
Versus
Syed Mahfooz Hasan Nizami & Ors. ...Opposite Parties

Counsel for the Revisionist:
Najam Zafar

Counsel for the Opposite Parties:
Q.H. Rizvi

A. Civil Law - Code of Civil Procedure, 1908 - Waqf Act, 1995 - Section 83(9) & Limitation Act, 1963 - Article 137 - The petition is an application falling within the scope of Article 137 of the 1963 Limitation Act - The alteration of the division as well as the change in the collocation of words in Article 137 of the Limitation Act, 1963 compared with Article 181 of the 1908 Limitation Act shows that applications contemplated under Article 137 are not applications confined to the Code of Civil Procedure- Article 137 of the Limitation Act is applicable on proceedings held under any Special Act for which no period of limitation is provided.

In the present case, the revision is filed under Section 83(9) of the Waqf Act for which no period of limitation is provided in the said Act. Article 137 of the Limitation Act would be applicable to such revisions filed under Section 83(9) of the Waqf Act, 1995 and, therefore, limitation for filing such revision is three years and not three months.

Civil Revision allowed. (E-6)

List of cases cited: -

1. Ganesan represented by its Power Agent G. Rukmani Ganeshn Vs. Commissioner, Tamil

Nadu Hindu Religious and Charitable Endowments Board and Others reported in (2019) 7 SCC 108.

2. The Kerala State Electricity Board, Trivandrum Vs. T.P. Kunhaliumma reported in AIR 1977 Supreme Court 282.

3. Addl. Spl. Land Acquisition Officer, Bangalore Vs. Thakoredas, Major and others reported in (1997) 11 Supreme Court Cases 412.

4. Raichurmatham Prabhakar and Another Vs. Rawatmal Dugar reported in (2004) 4 SCC 766.

5. U.P. Sunni Central Board of Waqf and Others Vs. Khursheed Haider and Others reported in 1971 ALJ 1126

(Delivered by Hon'ble Vivek Chaudhary,J.)

(Order on application for Condonation of Delay in filing Revision-C.M. Application No.81056 of 2019)

1. Present revision is filed under Section 83(9) of the Waqf Act, 1995.

2. Office has submitted a report dated 16.07.2019 noting that revision is filed beyond a period of 90 days and, hence, the same is barred by the provisions of Limitation Act, 1963.

3. Counsel for revisionist submits that the revision is filed within a period of three years and, therefore, same is maintainable under Article 137 of the Limitation Act, 1963. Counsel for revisionist submits that the Waqf Act is a special Act and, therefore, it is not the period of 90 days but the period of three years available as per Article 137 of the Schedule to the Limitation Act, 1963.

4. Counsel for opposite party states that the report submitted by the registry is correct and the Article 137 is not applicable.

5. The law with regard to applicability of Article 137 of the Limitation Act to a Special Act has been considered in number of cases by the Supreme Court. Some of them are:-

(i) ***Ganesan represented by its Power Agent G. Rukmani Ganeshn Vs. Commissioner, Tamil Nadu Hindu Religious and Charitable Endowments Board and Others*** reported in ***(2019) 7 SCC 108.*** Relevant paragraphs of the said judgment read as follow:-

"33. In The Kerala State Electricity Board, Trivandrum Vs. T.P. Kunhaliumma, (1976) 4 SCC 634, this Court had occasion to consider applicability of Article 137 of Limitation Act, application filed under Section 16 of the Telegraphs Act, 1885. This Court in the above case differing with the view taken by the two Judge Bench in Athani?s case held that application under Article 137 of Limitation Act is not confined to application contemplated by or under the C.P.C. However, the application contemplated under Telegraphs Act has to be an application to a Court. In paragraphs 18 and 22 following has been laid held:

?18. The alteration of the division as well as the change in the collocation of words in Article 137 of the Limitation Act, 1963 compared with Article 181 of the 1908 Limitation Act shows that applications contemplated under Article 137 are not applications confined to the Code of Civil Procedure. In the 1908 Limitation Act there was no division between applications in specified cases and other applications as in the

1963 Limitation Act. The words ?any other application? under Article 137 cannot be said on the principle of ejusdem generis to be applications under the Civil Procedure Code other than those mentioned in Part I of the third division. Any other application under Article 137 would be petition or any application under any Act. But it has to be an application to a court for the reason that Section 4 and 5 of the 1963 Limitation Act speak of expiry of prescribed period when court is closed and extension of prescribed period if applicant or the appellant satisfies the court that he had sufficient cause for not preferring the appeal or making the application during such period.

22. The conclusion we reach is that Article 137 of the 1963 Limitation Act will apply to any petition or application filed under any Act to a civil court. With respect we differ from the view taken by the two judge bench of this Court in Athani Municipal Council case and hold that Article 137 of the 1963 Limitation Actis not confined to applications contemplated by or under the Code of Civil Procedure. The petition in the present case was to the District Judge as a court. The petition was one contemplated by the Telegraph Act for judicial decision. The petition is an application falling within the scope of Article 137 of the 1963 Limitation Act.?

34. In the above case since the application under the Telegraphs Act was filed before the Court, this Court held that Article 137 of the Limitation Act was applicable. It is to be noticed that in the above mentioned cases this Court held that applications contemplated under Limitation Act are applications to a Court but in the above cases the Court did not refer to Section 29(2) of the Limitation Act."

(ii) The Kerala State Electricity Board, Trivandrum Vs. T.P. Kunhaliumma reported in ***AIR 1977 Supreme Court 282.*** Relevant paragraphs of the said judgment reads as:-

"10. In Nityananda M. Joshi and Ors. v. Life Insurance Corporation of India and Ors. the appellants filed applications against the respondent under Section 33C(2) of the Industrial Disputes Act for computing in terms of money, the benefit of holidays and for recovering the amount. The Labour Court dismissed the applications in so far as the claim was for a period beyond three years on the ground that the applications were barred under Article 137 of the Limitation Act. In Nityananda Joshi's case (supra) this Court held as follows : Article 137 contemplates applications to ordinary courts. Section 4 of the Limitation Act provides for the contingency when the prescribed period for any application expires on a holiday and the only contingency contemplated is "when the court is closed". Further under Section 5 of the Limitation Act only a court is enabled to admit an application after the prescribed period has expired if the court is satisfied that the applicant had sufficient cause for not preferring the application. The Labour Court is not a court within the meaning of the Limitation Act.

18. The alteration of the division as well as the change in the collocation of words in Article 137 of the Limitation Act 1963 compared with Article 181 of the 1908 Limitation Act shows that applications contemplated under Article 137 are not applications confined to the CPC. In the 1908 Limitation Act there was no division between applications in specified cases

and other application as in the 1963 Limitation Act. The words "any other application" under Article 137 cannot be said on the principle of ejusdem generis to the applications under the Civil Procedure Code other than those mentioned in Part I of the third division. Any other application under Article 137 would be petition or any application under any Act. But it has to be an application to a court for the reason that Section 4 and 5 of the 1963 Limitation Act speak of expiry of prescribed period when Court is closed and extension of prescribed period if applicant or the appellant satisfies the court and he had sufficient cause for not preferring the appeal or making the application during such period."

(iii) ***Addl. Spl. Land Acquisition Officer, Bangalore Vs. Thakoredas, Major and others*** reported in ***(1997) 11 Supreme Court Cases 412.*** Paragraph-3 of the said judgment reads as:-

"3. Admittedly, the cause of action for seeking a reference had arisen on the date of service of the award under Section 12(2) of the Act. Within 90 days from the date of the service of the notice, the respondents made the application requesting the Deputy Commissioner to refer the cases to the Civil Court under Section 18. Under the amended Sub-section 3(a) of the Act, the Deputy Commissioner shall, within 90 days from September 1, 1970 make reference under Section 18 to the Civil Court which he failed to do. Consequently by operation of Sub-section 3(b) with the expiry of the aforestated 90 days, the cause of action had accrued to the respondents to make an application to the Civil Court with a prayer to direct the Deputy Commissioner to make a reference. There is no period of limitation prescribed in Sub-section 3(b) to make that application but it should be done within limitation prescribed by the Schedule to the Limitation Act. Since no Article expressly prescribed the limitation to make such application, the residuary Article under Article 137 of the Schedule to the Limitation Act gets attracted. Thus, it could be seen that in the absence of any special period of limitation prescribed by Clause (b) of Sub-section (3) of Section 18 of the Act, the application should have been made within three years from the date of expiry of 90 days prescribed in Section 18(3)(b) i.e. the date on which cause of action had accrued to the respondent-claimant. Since the applications had been admittedly made beyond three years, it was clearly barred by limitation. Since, the High Court relied upon the case in Municipal Corporation of Athani , which has stood overruled, the Order of the High Court is unsustainable. The appeals are accordingly allowed, and the application made to the Court by the respondent stands rejected."

(iv) ***Raichurmatham Prabhakar and Another Vs. Rawatmal Dugar*** reported in ***(2004) 4 SCC 766.*** Paragraph 26 of the said judgment reads as:-

"26. Where the tenant fails to deliver possession on or before the specified date to the landlord, the landlord may execute the order of the Controller by filing an execution petition which will be governed by Rule 23 and hence shall have to be filed within a period of six months from the date of the order. The application is by landlord who is a decree-holder having an executable order in his favour in his hands. A tenant exercising his right of re-entry is neither a

decree-holder nor seeking execution of any order in his favour; he is seeking enforcement of a solemn undertaking given by the landlord but for which the Controller would not have made an order under sub-section (1) of Section 12 of the Act. The tenant's application is not an application for execution and hence does not attract applicability of Rule 23. It would be governed by Article 137 of the Limitation Act, 1963; it being an application for which no period of limitation is provided elsewhere and the period of three years shall begin to run when the right to apply accrues. The right to apply will accrue on the date specified by the Controller under sub-section (2) in this behalf. The period of limitation prescribed by Rule 23 may become otiose if applied to tenant as the period for completion of building by landlord may itself be more than six months and the period of limitation for tenant if governed by Rule 23 would have already expired by that time. An application filed before Rent Controller can attract applicability of Limitation Act, 1963 (See Mukri Gopalan Vs. Cheppilat Puthanpurayil Aboobacker (1995) 5 SCC 5. There are three single-Judge Bench decisions of Andhra Pradesh High Court, namely, K.S. Hanumantharayappa Vs. A.N. Vittal Rao 1987 (1) ALT 474, K.Manik Rao and Ors. Vs. Smt. M. Bikshapamma & Anr. 1987 (2) ALT (Notes on Cases) 15 and Navin Chandra Vs. Smt. Prema Bai Pitti 1992(3) ALT 181, taking the view that the limitation for application by tenant seeking restoration of possession to him is governed by Rule 23. These decisions do not lay down the correct law and are overruled."

6. Further even this Court in case of ***U.P. Sunni Central Board of Waqf and Others Vs. Khursheed Haider and Others*** reported in ***1971 ALJ 1126*** has held:-

"7. It was then contented by the learned counsel for the Board that Article 137 in the Schedule of the new Act being a substitute for Article 181 of the Schedule of the Old Act will bear the same meaning and Board's application under Section 63(5) of the Act not being an application under the Civil Procedure Code would not be governed by Article 137 of the New Limitation Act. It was suggested that there is no period of limitation prescribed by any law for an application under Section 63(5) of the Act. I am conscious of law as laid down by the Supreme Court relating to Article 181 of the Schedule of the Limitation Act of 1918 that it was not applicable to applications under any other Act and it was limited in its scope and only covered applications under the Civil Procedure Code. The reason being that the schedule to the old Limitation Act dealt throughout with applications under the Civil Procedure Code and as a residuary Article it would partake of the same colour as if the words "under the Code" were written it it.

8. I do not think in considering the scope of Article 137 of the Limitation Act of 1963 I am bound by the interpretation or the meaning put on Article 181 in the schedule of the old Act. It would be found that in the third division of the schedule of the new Limitation Act applications under the Constitution of India, namely, for the fitness of appeal to the Supreme Court and for special leave to appeal directly to the Supreme Court also find a mention at serial Nos. 132 and 133. Such applications are not covered by the Limitation Act which provides for an

application for revision under the Criminal Procedure Code 1898. In the definition clause of the Limitation Act 1963 the word 'application' under Section 2(b) includes a petition. The intention is manifest that motions apart from the Civil Procedure Code were contemplated which required initiation by petitions. Under the Civil Procedure Code motions by petitions are not contemplated. In the statement of Objects and Reasons when introducing the Bill it was stated that : "A new definition of 'application' is being inserted so as to include a petition, original or otherwise. The object is to provide a period of limitation for original applications and petitions under special laws as there is no such provision now. Consequential changes have been made in the definition of 'appellant'." It appears to me that there is no good reason why should the residuary Article 137 of the Schedule to the Limitation Act, 1963 be not held to cover in its ambit applications and objections under the special laws or any other law and its language ought not to be interpreted narrowly so as to keep it confined to applications under the Civil Procedure Code, there being no warrant for it in the phraseology of that Article or in the scheme of the schedule to the New Limitation Act. Even if it be held that the remedy for the first time was available to the Board when Act of 1960 came into force the application under Section 63(5) of the Act should have been filed much earlier and there was so justification for the Board not to act for 6 years almost. I am in agreement with the finding of the court below that the application of the Board under Section 63(5) of the Act was time barred."

7. The above clearly shows that Courts have already laid down the law that Articel 137 of the Limitation Act is applicable on proceedings held under any Special Act for which no period of limitation is provided. In the present case also, the revision is filed under Section 83(9) of the Waqf Act for which no period of limitation is provided in the said Act. Article 137 of the Limitation Act would be applicable to such revisions filed under Section 83(9) of the Waqf Act, 1995 and, therefore, limitation for filing such revision is three years and not three months.

8. In view thereof, the objections of the registry are set aside and the revision is treated to be filed within time.

9. List this case in week commencing 03.01.2020.

(2019)12 ILR A855

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.11.2019

BEFORE
THE HON'BLE RAJUL BHARGAVA, J.

Crl. Misc. Ist Bail Application No. 18724 of 2019

Ahtesham Ahmad Zaidi ...Applicant
(In Jail Since 29.03.2019)
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Pradeep Kumar Rai, Sri Kamal Krishna

Counsel for the Opposite Party:
A.G.A., Sri Vindeshwari Prasad Gupta

A. Criminal Law - Indian Penal Code, 1860- Sections 147, 148, 149, 302, 307 & 120-B and 7 Criminal Law Amendment Act-application-rejection-bail refused by the court merely on the basis of the

criminal history of accused- The prosecution must prima facie place some evidence before Court regarding his involvement in a case and thus the bail cannot be refused to accused merely on the basis of criminal history or his past antecedents-the informant except laying strong emphasis on the criminal history of the applicant-accused, could not establish a prima facie case except confessional statement of co-accused which, too, has no legal sanctity in the eye of law. (Para 8)

The confession of a co-accused person cannot be treated as substantive evidence and can be pressed into service only when the Court is inclined to accept other evidence and in support its conclusion deducible from the said evidence. In criminal trials, there is no scope for applying the principle of moral conviction or grave suspicion. In criminal cases where the other evidence adduced against an accused person is wholly unsatisfactory and the prosecution seeks to rely on the confession of a co-accused person, the presumption of innocence which is the basis of criminal jurisdiction assists the accused-person and compels the Court to render the verdict that the charge is not proved against him, and so, he is entitled to the benefit of doubt.(Para 5)

Crl. Misc. Ist Bail application allowed. (E-6)

List of cases cited: -

1. Haricharan Kurmi Versus State of Bihar, AIR 1964 Supreme Court 1184 (V 51 C 149)

2. Surinder Kumar Khanna Versus Intellligence Officer, Directorate of Revenue Intelligence, (2018) 8 Supreme Court Cases, 271

3. Neeru Yadav Versus State of U.P. and another passed in the Criminal Appeal No.1272 of 2015 (@ SLP (Crl) No.1596 of 2016) decided on 29.09.2015.

4. State of Orissa Versus Mahimananda Mishra, 2018 Law Suit (SC) 902

(Delivered by Hon'ble Rajul Bhargava,J.)

1. Heard Sri Kamal Krishna, learned Senior Advocate assisted by Sri Pradeep Kumar Rai, learned counsel for the applicant and Sri Vindeshwari Prasad Gupta, learned counsel for the first informant and Shri Pankaj Saxena, learned A.G.A. for the State and perused the record.

2. The present bail application has been filed by the applicant- Ahtesham Ahmad Zaidi in Case Crime No.132 of 2018, under Sections 147, 148, 149, 302, 307, 120-B I.P.C. and 7 Criminal Law Amendment Act, Police Station Phoolpur, District-Allahabad with the prayer to enlarge him on bail.

3. According to the prosecution, the incident took placed on 8.05.2018 at 9.30 p.m. whose F.I.R. was lodged on the next day at 10.55 a.m. by the brother of the deceased against two named and two unknown persons. During investigation, names of unknown accused were also disclosed by the witnesses.

4. Learned Senior Advocate appearing for the applicant has submitted that none of the eye-witnesses cited in the F.I.R. and other witnesses have stated a word against the applicant to have taken part in the incident. However, statement of Sajan alias Babar alias Irshad was recorded, who in his confessional statement stated that amount of Rs.25 lacs was paid by Sattar through the applicant to co-accused Sonu and Sanu to commit the murder of the deceased, Pawan Kesari. It is stated that except aforesaid confessional statement of co-accused, Sajan alias Babbar alias Irshad before the police, the investigating officer could not collect an iota of evidence that any money was passed on by the applicant to the

named assailants and his bail application has been refused by the court only on the basis of his involvement in 14 criminal cases. Learned Senior Counsel has argued that in the absence of any reliable and cogent evidence to connect the applicant with the present crime of hatching conspiracy with the main assailants, his bail may not be rejected solely on the basis of criminal history of the applicant.

5. Learned counsel has relied upon the Constitution Bench judgement of Hon'ble Apex Court in **Haricharan Kurmi Versus State of Bihar, AIR 1964 Supreme Court 1184 (V 51 C 149) which is quoted below:**

"Thus, the confession of a co-accused person cannot be treated as substantive evidence and can be pressed into service only when the Court is inclined to accept other evidence and in support its conclusion deducible from the said evidence. In criminal trials, there is no scope for applying the principle of moral conviction or grave suspicion. In criminal cases where the other evidence adduced against an accused person is wholly unsatisfactory and the prosecution seeks to rely on the confession of a co-accused person, the presumption of innocence which is the basis of criminal jurisdiction assists the accused-person and compels the Court to render the verdict that the charge is not proved against him, and so, he is entitled to the benefit of doubt."

6. The aforesaid judgement has been relied upon by Apex Court in the recent judgement rendered in **Surinder Kumar Khanna Versus Intellligence Officer, Directorate of Revenue Intelligence, (2018) 8 Supreme Court Cases, 271.** Thus in the light of aforesaid judgement, it is stated that confessional statement of co-accused before police cannot be relied upon in the absence of any other supporting evidence to reject bail to the applicant. Therefore, the applicant, who is in jail since 29.03.2019, may be released on bail.

7. Per contra, learned counsel for the informant as well as learned A.G.A. appearing for the State have vehemently opposed the bail and submitted that the applicant is a hardened criminal and he is involved in the cases of extortion from businessmen and grabbing land of poor persons after forming a gang. However, in the counter affidavit by the first informant except repetition of criminal history of applicant, the informant could not point out any evidence of passing on of Rs.25 lacs to the main assailants for eliminating the deceased. ***In para-18 of the counter affidavit, he has reaffirmed the defence argument that in the confessional statement of co-accused, Sajan alias Babar alias Irshad stated that it is the applicant who was made culprit in the case and murder was committed after obtaining Rs.25 lacs from the accused, applicant.*** However, he has not disclosed any witness or any person whose presence the money was passed on by the applicant to the assailants. Learned counsel for the informant has placed reliance on the judgment of Hon'ble Apex Court in the case of **Neeru Yadav Versus State of U.P. and another passed in the Criminal Appeal No.1272 of 2015 (@ SLP (Crl) No.1596 of 2016) decided on 29.09.2015.**

8. Before dealing with the ratio of said case, I may record that it was a murder case in which the applicant along with other accused were actively involved

in the commission of crime. However, the bail was granted to the accused-respondent no.2 on the ground of parity that other co-accused were enlarged on bail. The Apex Court, however, cancelled the bail of the accused-respondent no.2 on the ground that criminal history of seven cases was not taken into account by the High Court. In Neeru Yadav's case, the Apex Court has held that while dealing with the application for grant of bail, it is the duty of the Court to take into consideration certain factors i.e. the nature of accusation and the severity of punishment in cases of conviction and the nature of supporting evidence and the criminal antecedent of the accused. Similarly in the case of **State o Orissa Versus Mahimananda Mishra, 2018 LawSuit (SC) 902**, the Hon'ble Apex Court has held: it is by now well settled that at the time of considering an application for bail, the Court must take into account certain factors such as the existence of a prima facie case against the accused including the criminal history. The existence of a prima facie case showing the involvement of accused is absolutely necessary for the Court to decide the bail application. Hon'ble Apex Court though has held in various judgements that the criminal antecedent of the accused carries a huge importance as to whether bail should be allowed to hardened criminal or not but, in my considered opinion, merely on the basis of the criminal history of accused, bail cannot be denied to him. The prosecution must prima facie place some evidence before Court regarding his involvement in a case and thus the bail cannot be refused to accused merely on the basis of criminal history or his past antecedents. Learned counsel for the informant except laying strong emphasis on the criminal history of the applicant-accused, could not establish a prima facie case except confessional statement of co-accused which, too, has no legal sanctity in the eye of law. in the light of judgement of Full Bench apex court (supra).

9. Considering the facts and circumstances of the case as also the submissions advanced by learned counsel for the parties, without expressing any opinion on merits of the case, I am of the view that the applicant is entitled to be released on bail.

10. Let applicant-Ahtesham Ahmad Zaidi be released on bail in the aforesaid case crime number on his furnishing a personal bond of Rs.5,00,000/- and two reliable sureties of the like amount to the satisfaction of the court concerned subject to following conditions that:-

1.The applicant shall not tamper with the prosecution evidence;

2.The applicant shall not pressurize the prosecution witnesses;

3.The applicant shall appear on the date fixed by the trial court.

11. In case of default of any of the conditions enumerated above, the courts below shall be at liberty to cancel bail of the applicant.

(2019)12 ILR A858

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.11.2019

BEFORE
THE HON'BLE RAHUL CHATURVEDI, J.

Crl. Misc. Bail Application No. 30621 of 2019

Sunil Dua ...Applicant
(In Jail Since 18.04.2019)
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Arvind Verma, Ms. Swati Agrawal Srivastava

Counsel for the Opposite Parties:
G.A., Sri Chetan Chaterjee

A. Criminal Law - Indian Penal Code, 1860- Sections 376(2)(f)(i)(n), 506 & Protection of Children From Sexual Offences (POCSO) Act- Section 5/6 –application-rejection-victim was student, she was sexually assaulted by her tutor-on attaining majority victim lodged FIR- accused pleads for sympathetic treatment as he is suffering from Metastatic Cancer of Prostate-the court found no reasonable justification as to why victim falsely implicate the accused after lapse of six years-hence, the application for bail is rejected with the direction that trial would gear up. (Para 5,18, 21 & 22)

The relationship between the applicant and the informant/victim at the relevant point of time was a pious one as a tutor and taught. After an elapse of six years she has narrated her nightmare and thereafter she was constantly being harassed and maltreated by the applicant on telephone or by following her, while going to school or market. The conduct is an unbecoming for a tutor. (Para 12)

Crl. Misc. Bail application dismissed. (E-6)

(Delivered by Hon'ble Rahul Chaturvedi,J.)

1. Heard Ms. Swati Agrawal Srivastava, learned counsel for the applicant, Sri Chetan Chaterjee, learned counsel for the complainant, Sri S.K.Pal, learned G.A. and perused the record.

2. Pleadings between the parties have been exchanged and the matter has ripen for final argument.

3. Pursuant to the earlier order of this Court, today, the Court is in receipt of the sealed cover letter from Senior Jail Superintendent, Central Jail, Naini, Prayagraj dated 07.11.2019 annexing the report given by given by Dr. Paul Thaliath, Additional Director Medical & Chief Consultant, Regional Cancer Centre, Kamla Nehru Memorial Hospital, Allahabad, regarding alleged "Malignancy" of the accused-applicant and perused the entire record.

4. The long and short of the FIR, as canvassed by the learned counsel for the applicant, is that on 14.04.2019 the victim herself lodged the instant FIR against sole named accused person Sunil Dua, narrating her tale of woes suffered in her childhood. The chick FIR unveils the dates of incident from 01.01.2012 to 01.01.2013, however, this FIR was got registered on 14.04.2019 i.e., after elapse of six years, when the victim attained the age of majority. The FIR was got registered under Sections 376(2)(f)(i)(n), 506 IPC and Section 5/6 Protection of Children From Sexual Offences (POCSO Act, P.S. Civil Lines, District Allahabad.

5. The contents of the FIR is that the named accused person was her private tutor and was sacked from his job in February 2013 and since then he was constantly chasing the victim girl, extending her threats on telephone blackmailing the victim/informant to mentally and emotionally exploiting her by the ultimate peril of committing suicide. In sum and substance of the FIR that during her childhood when she was student of Class VII, she was sexually assaulted by the accused applicant Sunil Dua, who was a private tutor and on account of this constant

physical/mental/psycholigical assault, the victim suffered deep depression and mental trauma for which she is undergoing the treatment from psychiatrist since then. Of late when she attained the age of majority she lodged the instant FIR narrating the sad saga of her nightmare suffered by her during childhood. On the very next date of lodging of the aforesaid FIR, her 161 Cr.P.C. statement was recorded referring to the period when she was student of class VII and the ways and means by which she was sexually maltreated by the aforesaid accused applicant. Rest of the averments are almost the same, identical and reiteration of FIR.

6. The 164 Cr.P.C. statement, which was recorded on 18.04.2019, is a long statement given by the prosecutrix herself, which is unfortunate saga of a young girl, who was forced to face all sorts of rough sexual treatment to the extent that her private organs were touched by lascivious hands of a lecherous debouch, who is herein the accused. In 164 Cr.P.C. statement she has given every minutest details of the vulgar treatments time and again, received by her, when she was a minor student of Class VII.

7. Learned counsel for the applicant tried to raise castle of her argument by submitting that the victim declined to get herself medically examined by the doctor so as to substantiate the allegation of sexual assault upon her. It is further contended by the learned counsel for the applicant that in the absence of any corroborative evidence it is highly risky to blindly rely upon the 164 Cr.P.C. statement of the alleged victim girl. It is further submitted that the allegation of deep mental depression that she is reeling under deep depression is absolutely canard as she has secured a Grade-A in her ICSC Examination of Class-X in the year 2017 and thus a girl, who was suffering with mental trauma, cannot secure this grade in her High School examination. It is further submitted by the learned counsel for the applicant that there are inconsistencies in the date/duration of sexual harassment which are not compatible to each other and cast serious doubt about the prosecution story. More over there is no allegation of rape under Section 164 Cr.P.C. statement. It is further contended by the counsel that since the applicant was a hard task master and laborious teacher in the profession, therefore, after the period of six years she has come up with false story falsely implicating the applicant. Furthermore, it is contended that since the applicant hails from a affluent family and just to grab his property, a false and imaginary story was tailored by the girl to robe him in this filthy and dirty case. Lastly, it is submitted that the applicant is suffering from Metastatic Cancer of Prostate, which is at advance stage and therefore he should be given sympathetic treatment by this Court.

8. Per contra, Sri Chetan Chaterjee, learned counsel for the complainant vehementally refuted each and every submission made by the learned counsel for the applicant. Learned counsel for the complainant submitted that the FIR is not an encyclopedia whereby every minute detail could be given in it. The girl, who was student of Class VII, facing turmoil for a complete six years on being sexually abused by none other than her own tutor, turned petrified so much as that she could not open her mouth before her parents during the entire period. In fact, the

applicant initially terrorized the victim girl to such an extent that she could not dare to open her mouth before her parents and misadventuring the dark moments, he used to quench the animal instinct with the victim girl. The matter of fact is that the applicant is suffering from psychological disorder, which is termed as PAEDOPHILA (a person who is sexually infatuated towards adoloscent), which is defined as psychiatric disorder wherein an adult or older adolescent is sexually attracted/infatuated towards prepubescent children. The statement recorded under section 164 Cr.P.C. of the victim girl, reveals that the victim girl in no uncertain terms has vomitted out the gray experience faced by her during the rough and tough time of her childhood. The applicant used to insist her pupil (the victim) to remain in seclusion in the garb of imparting education, he while petting, used to cut luscivious remarks on her private organs. All these misdeeds and misadventures of the applicant imprinted adverse impact on psychae of the victim.

9. So far as the financial and family background of the victim is concerned, the same is quite descent. Her mother is an Associate Professor in Sam Higginbottom University of Agriculture, Technology and Science (SHUATS), Naini Allahabad whereas her father is a Teacher in Basent School at Varanasi. Besides this, the parent also run a prestigious restaurant at Civil Lines, Allahabad and they are financially sound well off.

10. Learned counsel for the complainant has earnestly challenged the medical prescription annexed with the affidavit, establishing the precarious health condition of the applicant and vehemently opposed the bail application moved by the applicant.

11. This Court has heard learned counsel for the parties at great length, perused the annexures with the respective affidavits and perused the document in support of the averments made in their respective affidavits.

12. Admittedly, the relationship between the applicant and the informant/victim at the relevant point of time was a pious one as a tutor and taught. After an elapse of six years she has narrated her nightmare and thereafter she was constantly being harassed and maltreated by the applicant on telephone or by following her, while going to school or market. The conduct is an unbecoming for a tutor.

13. Ms. Swati Agrawal Srivastava, learned counsel for the applicant submitted that since the applicant was a hard task master and this is the sole motive for his false implication in the instant case.

14. The aforesaid is an absurd argument as in the society we all have passed through the same phases of life and still cherish the childhood period, therefore, deed and misdeeds of our childhood sometimes go nostalgic and sometimes haunts. Here in the instant case, the misdeeds of the applicant seems to be her haunting memory.

15. So far as grabbing of property is concerned, this argument too, do not carry much weight. Both of the families belongs to descent financial background and this submission of false implication on account of extracting money also

carries no weight. In paragraphs 14, 15 and 16 of the affidavit, it has been averred that the victim used to ask money (Rs. 1000/-2000/-) from the applicant every day as her pocket money and thereafter she demanded Rs. 10,000/- from the applicant, on being refused to the unreasonable demand by the applicant, she threatened him to falsely implicate in a criminal case. The entire scene painted by the accused seems to be fanciful as it has been suggested that a minor girl, studying in class VII, would demand money from her tutor instead her parent.

16. After hearing the submissions at great length, this Court reaches at loss to gather any reasonable justification as to why the victim would falsely implicate the accused-applicant in the instant case, that too, after an elapse of six years.

17. No doubt there are certain discrepancies with regards to date and time of the incident but particularly the allegation of ravishment to young girl by a person who is having a fiduciary relationship, which brings the accused in a vulturous shady and dark charactered man.

18. So far as the applicant's personal physical condition is concerned, it has been argued by learned counsel for the applicant that he is suffering from Metastatic Cancer of Prostate and the report of Dr. B. Paul also corroborate the same. It is submitted in the said report that he is under treatment from AIMS and at present his physical condition is stable at present. As his PSA report which was conducted on 02.10.2019 shows that they are in the normal range.

19. The Court has got every sympathy for the applicant but but facts remains, that he is an accused of molestation, misbehavior and breach of trust of fiduciary relationship qua with her taught.

20. In our shastra, a teacher is bound to have good moral character without having any ambition of materialistic pleasure and is restrained to make false speeches to his pupil. One of the shlokas, mentioned in the shastra in this regard, is enumerated as below:-

सर्वाभिलाषिणः
सर्वभोजिनः सपरिग्रहाः।
अब्रह्मचा रिणो
मिथ्योपदेशा गुरवो न तु ॥

भावार्थ :

अभिलाषा रखनेवाले , सब भोग करनेवाले , संग्रह करनेवाले , ब्रह्मचर्य का पालन न करनेवाले , और मिथ्या उपदेश करनेवाले , गुरु नहीं है ।

21. Therefore, under the prevailing circumstances, I find no good reason to exercise my discretion in favour of the applicant, the bail application of the applicant is hereby **rejected.**

22. However, keeping in view the health condition of the applicant, it is directed that the learned trial judge would gear up the trial and would make all necessary endeavour to conclude the same by 15.05.2020 positively provided the prosecution and defence would render sufficient cooperation and not to seek any unwarranted adjournments in the matter in early conclusion of the trial.

23. It is further directed that Senior Jail Superintendent, Naini would have a

close vigil over the health condition of the applicant and would send the applicant to the AIIMS, New Delhi for his periodical medical check up as and when required at the expenses born by the Government during the period of trial only.

(2019)12 ILR A863

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 26.11.2019

BEFORE
THE HON'BLE KARUNA NAND BAJPAYEE, J.

Crl. Misc. First Anticipatory Bail Application No. 51463 of 2019

Ram Kishun Fauji ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Birendra Singh, Sri Anoop Kumar

Counsel for the Opposite Party:
A.G.A., Sri Vipin Kumar

A. Criminal Law - Code of Criminal Procedure, 1973 - Section 438 & Indian Penal Code, 1860 - Sections 376, 452, 504 & 506 - application-rejection-applicant committed rape - five criminal cases registered against the applicant-having criminal history the anticipatory bail is rejected. (Para 5)

this is a serious matter in which the allegations are to the effect that the applicant who is having a revolver & rifle license had under the coercion and show of force committed rape upon her and kept the victim at the pain of death. The father of victim has already died and her mother is a widow helpless lady. The applicant is an ex-army man and has already been a Pradhan and wields enormous criminal clout having a criminal history also, and by using his muscle power he continued to molest and outrage the modesty of the victim for a long period of time and the first informant and her mother could not dare to come out and could not muster up courage to raise their voice under the fear of being eliminated.in matters like this, brute display of muscle power is capable to subjugate the helpless girls and the belated reporting of the offence and its late disclosure by itself remains self-explained and on that ground the gravity of the accusation does not get mitigated. (Para 4)

Crl. Misc. first Anticipatory Bail application dismissed. (E-6)

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

1. Shri Vipin Kumar, Advocate has filed his Vakalatnama in the Court today on behalf of complainant which is taken on record.

This anticipatory bail u/s 438 Cr.P.C. has been moved seeking the bail of applicant namely Ram Kishun Fauji, involved in Case Crime No.93 of 2019, under sections 376, 452, 504, 506 I.P.C., Police Station- Chandpur, District-Fatehpur.

2. Heard learned counsel for the applicant, learned counsel for the complainant and learned A.G.A. for the State and perused the record.

3. Submission of the counsel is that actually the first informant had some illicit relationship with a different person and as the applicant had raised objection regarding the same he has been falsely implicated in this case to continue their illicit relationship. The delay in lodging the F.I.R. has also been pointed out by the counsel.

4. Heard learned A.G.A. as well as counsel appearing for complainant who has opposed this application and have

submitted that this is a serious matter in which the allegations are to the effect that the applicant who is having a revolver & rifle license had under the coercion and show of force committed rape upon her and kept the victim at the pain of death. The father of victim has already died and her mother is a widow helpless lady. The applicant is an ex-army man and has already been a Pradhan and weilds enormous criminal clout having a criminal history also, and by using his muscle power he continued to molest and outrage the modesty of the victim for a long period of time and the first informant and her mother could not dare to come out and could not master up and mobilize courage to raise their voice under the fear of being eliminated. The details of the molestation have been given in the F.I.R. and the sadism of the accused has been described as to how he gained sexual contentment by being cruel with the victim while doing the activity of coitus. It transpires that when at some stage of this continued history of torture the accused also attempted to drag the victim and take her to a tube-well that appears to have proved the last straw on the camel's back and the F.I.R. was then lodged. It has also been pointed out by learned A.G.A. that not less than 5 criminal cases have been registered against the applicant in the past including the present one. It has further been contended that in matters like this, brute display of muscle power is capable to subjugate the helpless girls and the belated reporting of the offence and its late disclosure by itself remains self-explained and on that ground the gravity of the accusation does not get mitigated.

5. Without expressing any opinion on the ultimate merits of the case and after considering the submissions advanced at the bar, keeping in perspective, the nature and gravity of the accusation and material in support of the same and also keeping in view the criminal antecedents of the accused-applicant, I find no good ground for grant of bail to the applicant.

6. Accordingly, the anticipatory bail application is ***rejected.***

(2019)12 ILR A864

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.11.2019

BEFORE
THE HON'BLE KARUNA NAND BAJPAYEE, J.

Crl. Misc. (Anticipatory Bail) Application No. 52922 of 2019

Abhhey Chopra ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri G.S. Chaturvedi, Priyanka Midha, Sri Ram M. Kaushik

Counsel for the Opposite Parties:
A.G.A.

Criminal Law - Code of Criminal Procedure, 1973 - Section 438 - application- allowed without expressing any opinion upon ultimate merits of the case- while granting bail the court observes the nature and gravity of the accusation, antecedents of the applicant, his undertaking to make himself available to the authorities whenever required, and the overall facts and circumstances of the case. (Para 5,6 & 7)

The matter deserves a deeper probe to ascertain the truth and find out whether it was just a case of consensual sex which continued for some time between them or that it was a case of a calculated sexual exploitation perpetrated by the accused against the victim

playing a deceitful emotional fraud upon her in order to obtain her misguided consent. (Para 3)

Crl. Misc. (Anticipatory Bail) application allowed. (E-6)

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

1. Heard Shri G.S. Chaturvedi, learned Senior counsel assisted by Shri Ram M. Kaushik, learned counsel for the applicant and learned A.G.A. appearing for the State who has opposed the prayer for anticipatory bail.

2. Record has been perused.

3. It appears that the victim developed a friendly acquaintance with the accused-applicant and then on her own volition started meeting him. Though the allegations have been made that in the process of their meetings at some point of time the applicant tried to take undue advantage but it is deducible from a reading in between the lines that the proposals of marriage were also made and physical relationship also got established. It appears that the victim was also given some contraceptive pills (i-pill tablet). It further appears that the victim became pregnant because of the physical relationship. Though the allegations are that all the physical relationship and consumption of i-pill were not voluntary acts of victim but looking to the fact that the victim is a self employed mature lady doing the job of being an Anchor having sufficient exposure in the society, it will be too much to believe that all what has been done was either against her will or without her consent. Though the act and conduct of the applicant as has been alleged may not be vindicated on the moral side and to some extent even legally but prima facie there appears serious doubt in the correctness of the prosecutrix version and it appears to be more a case of failed relationship after some misunderstanding crept in or at the most a case of failed promise which was made but could not be kept. At any rate at this stage this Court is of the view that the matter deserves further investigation into the case in order to ascertain the correct facts and the intentions of accused. The matter deserves a deeper probe to ascertain the truth and find out whether it was just a case of consensual sex which continued for some time between the unorthodox couple who were irreverent to the social morality or that it was a case of a calculated sexual exploitation perpetrated by the accused against the victim playing a deceitful emotional fraud upon her in order to obtain her misguided consent.

4. It has been submitted by the learned counsel for the applicant that the applicant has no serious criminal history and he has not undergone any imprisonment after conviction by any court in respect of any cognizable offence previously. It has been assured on behalf of the applicant that he is ready to cooperate with the process of law and he undertakes to make himself available to the police authorities or the court whenever required, and shall not flee from justice. The applicant is also ready to accept all the conditions which the Court may deem fit to impose upon him. Learned counsel has also tried to submit that the accusation against the applicant has been made with the object of besmirching his reputation and belittle him in the public estimate. 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 some length. It has been submitted that the applicant has reason to believe that he may be arrested on the basis of accusation that has been made against him for having committed the alleged offence even though the material collected by the investigation so far is not credible or adequate enough to substantiate the indictment made against the applicant and the matter deserves deeper and fair investigation into the case, therefore, in the event of such arrest he may be released on bail.

5. Learned counsel for the applicant has also tried to canvass before the Court that there has been a consensus of judicial opinion on the point that the provisions under Section 438 Cr.P.C. intend to extend a protective arm in support of implicated accused saving him from unnecessary incarceration and minimize the period of detention as much as it is practically possible to do in matters where the Court prima facie feels satisfied that the indicted accused deserves the relief contemplated by law as has been enacted by the legislature in this regard. Contention is that, therefore, the provision ought to be exercised liberally and be given full play, lest the same may fail to meet out its objective and the accused should not be called upon to establish a "special case" in order to get the benefit of this provision which is well in keeping with the spirit of Article 21 of the Constitution of India.

6. After considering the record of the case as is available before the Court in the light of rival submissions made at the Bar and keeping in perspective the nature and gravity of the accusation, antecedents of the applicant, his undertaking to make himself available to the authorities whenever required, and the overall facts and circumstances of the case, this Court feels satisfied that it would be expedient to grant an interim order of anticipatory bail in favour of the applicant at this stage.

7. Without expressing any opinion upon ultimate merits of the case, this Court directs that in the event of arrest, the accused-applicant Abhhey Chopra involved in Case Crime No.1077 of 2019, under Sections-376 and 120-B I.P.C., Police Station-Sector 49 NOIDA, District-Gautam Budh Nagar shall be released on bail on furnishing a personal bond of Rs. 50,000/- with two sureties each in the like amount to the satisfaction of the Arresting Officer.

8. In order to ensure that the interim bail is not subjected to any misuse and in order to ensure that the statutory powers of investigation and its scope may not get impaired, it is being observed and directed that the accused-applicant shall not in any manner indulge in any activities or attempts which may adversely influence or impair the fair investigation of the case and he will make himself available to the police authorities or the Court, as the case may be, whenever required for the purpose of investigation or inquiry. The accused shall also not leave India without the permission of the Court during the subsistence of this order.

9. The papers regarding bail submitted to the police officer on behalf of the accused/applicant shall form part of the case diary and would be submitted to

the court concerned along with same at the time of submission of report under Section 173(2) Cr.P.C.

10. The application for grant of anticipatory bail shall be finally heard under Section 438(5) Cr.P.C. for passing the order thereupon on 22.01.2020.

11. Learned A.G.A has accepted notice on behalf of the State who may obtain instructions or, if desired, may file counter affidavit within two weeks positively. Rejoinder affidavit, if any, may be filed within a week thereafter.

12. A.G.A. may obtain copy of this order if required, and make necessary communication with S.P./S.S.P. concerned in this regard.

(2019)12 ILR A867

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.12.2019

BEFORE
THE HON'BLE YASHWANT VARMA, J.

Crl. Misc. Anticipatory Bail Application 53729 of 2019

Vinod Kumar ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Virendra Singh Tomar, Sri Rajiv Sisodia

Counsel for the Opposite Parties:
A.G.A.

A. Criminal Law - Code of Criminal Procedure, 1973 - Section 438 - application-rejection-no allegation or affirmation that the applicant apprehends arrest-no ground for grant of anticipatory bail. (Para 58 & 59)

Before power under sub-section (1) of Section 438 of the Code is exercised, the court must be satisfied that the applicant invoking the provision has reason to believe that he is likely to be arrested for a non-bailable offence and that belief must be founded on reasonable grounds. Mere "fear' is not belief, for which reason, it is not enough for the applicant to show that he has some sort of vague apprehension that someone is going to make an accusation against him, in pursuance of which he may be arrested. The grounds on which the belief of the applicant is based that he may be arrested for a non-bailable offence, must be capable of being examined by the court objectively. Specific events and facts must be disclosed by the applicant in order to enable the court to judge the reasonableness of his belief, the existence of which is the sine qua non of the exercise of power conferred by the section. (Para 57)

Crl. Misc. Anticipatory Bail application dismissed. (E-6)

List of cases cited: -

1. Neeraj Yadav And Anr. Vs. St. of U.P. And 2 Ors. (Cri. Misc. Bail Application No. 44895 of 2019)

2. Harendra Singh @ Harendra Bahadur Vs. The St. of U.P. (Cri. Misc. Bail Application No. 6478 of 2019)

3. Mohan Lal & Ors. etc. Vs. Prem Chand and Ors. etc (1980) AIR HP 36

4. Jagdish Kumar Vs. District Judge, Budaun and Ors. (1998) 33 ALR 400

5. Gurbaksh Singh Sibbia Vs. The St. of Punjab (1980) 2 SCC 565

6. Mubarik & Anr. Vs. St. of Uttarakhand & Ors. (Cri. Writ Pet. No. 2059 of 2018/decided 2Nov 2018)

7. Onkar Nath Agrawal & Ors. Vs. State (1976) All LJ 223

8. Harendra Singh @ Harendra Bahadur Vs. The St. of U.P. (Cri. Misc.Bail appl. No.6478 of 2019)

9. Diptendu Nayek Vs. St. of W. B. (1988) 2 Cal LJ 447

10. Ranchhoddas Atmaram & Anr. Vs. Union of India And Ors. (1961) AIR SC 935

11. Sushila Aggarwal & Ors. Vs. St. (NCT Of Delhi) & Anr S.L.P. (Cri.) Nos. 7281-7282 of 2017/15 May 2018

12. Siddharam Satlingappa Mhetre Vs. St.of Mah. & Ors.(2011) 1 SCC 694
13. HDFC Bank Limited Vs. J.J. Mannan (2010) 1 SCC 679

14. Satpal Singh Vs. The St. of Punjab (2018) SCC Online SC 415

15. Rashmi Rekha Thatoi Vs. St.of Orissa(2012) 5 SCC 690

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

1. Almost four decades post the deletion of Section 438 Cr.P.C. insofar as it applied to the State of Uttar Pradesh, the Legislature reintroduced that provision on 6 June 2019. The legislative essay was a reaffirmation of the constitutional guarantee of personal liberty accorded to all citizens and to provide a salutory safeguard against the ignominy of arrest and deprivation of liberty. This nascent and resurrected jurisdiction has, however, in a short span of time raised questions which merit an authoritative pronouncement. It is in that backdrop that the Court takes up the instant petition.

2. This petition along with other applications for grant of anticipatory bail were taken up on 4 December 2019. Upon preliminary submissions being advanced, the Court on that date framed the following questions which appeared to principally arise:-

"The present application under Section 438 Cr.P.C. for anticipatory bail has been moved after rejection of a similar application by the Sessions Judge. The issue which would consequently arise would be whether the application would be maintainable since as per the provision, an order once passed shall not be construed as an interlocutory order for the purposes of the Code.

Learned counsels have also referred to the views expressed by two learned Judges in **Criminal Misc. Bail Application No. 44895 of 2019 [Neeraj Yadav And Another Vs. State of U.P. And 2 Others]** and **Bail Application No. 6478 of 2019 [Harendra Singh @ Harendra Bahadur Vs. The State of U.P.].** According to learned counsels since the statute confers concurrent jurisdiction, it would be incorrect for the Court to take the view that the applicant must first exhaust the remedy before the Sessions Court before applying to the High Court. The perceived inconsistency is addressed on the basis of the views expressed on the two applications aforementioned. The third issue which would arise for consideration would be that if the Court were to accept the view expressed in Harendra Singh what would be the special circumstances in which the High Court could be moved first without the applicant being asked to invoke the jurisdiction of the Sessions Judge.

As requested by learned counsels appearing in similar matters as well as Sri Sisodia in this application, include in the list of fresh cases of 06 December 2019."

3. In order to facilitate learned counsels to address further submissions,

the application and other matters on that date were placed for disposal today. All members of the Bar were requested to address submissions bearing in mind the importance of the questions which stood raised and the impact which they would have on matters likely to come before the Court in future. The Court for the purposes of convenience, shall firstly proceed to note and dispose of the questions which arise and thereafter deal with the merits of the instant application separately.

4. The issues themselves arise in the backdrop of the reintroduction of Section 438 Cr.P.C. by virtue of U.P. Act No. 4 of 2019 w.e.f. 6 June 2019. It would be apposite to recollect that Section 438 Cr.P.C. stood as part of the Code applicable to the State till it was deleted with retrospective effect from 28 November 1975 by U.P. Act No. 16 of 1976. The provision as it originally existed on the statute book was as follows:

"438. Direction for grant of bail to person apprehending arrest.-(1) When any person has reason to believe that he may be arrested on an accusation of having committed a non- bailable offence, he may apply to the High Court or the Court of Session for a direction under this section; and that Court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail.

(2)When the High Court or the Court of Session makes a direction under sub- section (1), it may include such conditions in such directions in the light of the facts of the particular case, as it may think fit, including--

(i) a condition that the person shall make himself available for interrogation by a police officer as and when required;

(ii) a condition that the person shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer;

(iii) a condition that the person shall not leave India without the previous permission of the Court;

(iv) such other condition as may be imposed under sub-section (3) of section 437, as if the bail were granted under that section.

(3) If such person is thereafter arrested without warrant by an officer in charge of a police station on such accusation, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, be shall be released on bail; and if a Magistrate taking cognizance of such offence decides that a warrant should issue in the first instance against that person, he shall issue a bailable warrant in conformity with the direction of the Court under sub- section (1)."

5. The said provision as re-enacted in 2019 reads thus:-

"438. *Direction for grant bail to person apprehending arrest.*--(1) Where any person has reason to believe that he may be arrested on accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section that in the event of such arrest he shall be released on bail; and that Court may, after taking into consideration, inter alia, the following factors, namely--

(i) the nature and gravity of the accusation;

(ii) the antecedents of the applicant including the fact as to whether he has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;

(iii) the possibility of the applicant to flee from justice; and

(iv) where the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested;

either reject the application forthwith or issue an interim order for the grant of anticipatory bail:

Provided that where the High Court or, as the case may be, the Court of Session, has not passed any interim order under this sub-section or has rejected the application for grant of anticipatory bail, it shall be open to an officer in-charge of a police station to arrest, without warrant, the applicant on the basis of the accusation apprehended in such application.

(2) Where the High Court or, as the case may be, the Court of Session, considers it expedient to issue an interim order to grant anticipatory bail under sub-section (1), the Court shall indicate therein the date, on which the application for grant of anticipatory bail shall be finally heard for passing an order thereon, as the Court may deem fit, arid if the Court passes any order granting anticipatory bail, such order shall include inter alia the following conditions, namely--

(i) that the applicant shall make himself available for interrogation by a police officer as and when required;

(ii) that the applicant shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer,

(iii) that the applicant shall not leave India without the previous permission of the Court; and

(iv) such other conditions as may be imposed under sub-section (3) of Section 437, as if the bail were granted under that section.

Explanation.--The final order made on an application for direction under sub-section (1); shall not be construed as an interlocutory order for the purpose of this Code.

(3) Where the Court grants an interim order under sub-section (1), it shall forthwith cause a notice being not less than seven days notice, together with a copy of such order to be served on the Public Prosecutor and the Superintendent of Police, with a view to give the Public Prosecutor a reasonable opportunity of being heard when the application shall be finally heard by the Court.

(4) On the date indicated in the interim order under sub-section (2), the Court shall hear the Public Prosecutor and the applicant and after due consideration of their contentions, it may either confirm, modify or cancel the interim order.

(5) The High Court or the Court of Session, as the case may be, shall finally dispose of an application for grant of anticipatory bail under sub-section (1), within thirty days of the date of such application;

(6) Provisions of this section shall not be applicable,--

(a) to the offences arising out of,--

(i) the Unlawful Activities (Prevention) Act, 1967;

(ii) the Narcotic Drugs and Psychotropic Substances Act, 1985;

(iii) the Official Secret Act, 1923;

(iv) the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986.

(b) in the offences, in which death sentence can be awarded.

(7) If an application under this section has been made by any person to the High Court, no application by the same person shall be entertained by the Court of Session."

[Vide U.P. Act No. 4 of 2019, S. 2 (Received the assent of the President on 1-6-2019 and published in the U.P. Gazette, Extra., Part 1, Section (Ka), dated 6-6-2019).]"

6. It would also be pertinent to extract the SOR of the amending Act by virtue of which the provisions was reintroduced. The SOR reads thus:-

STATEMENT OF OBJECTS AND REASONS

Section 438 of the Code of Criminal Procedure 1973, regarding the provision of anticipatory bail, was omitted by the Code of Criminal Procedure (Uttar Pradesh Amendment) Act, 1976 (U.P. Act no. 16 of 1976). There is continuous demand for its revival. Writ petitions have also been filed before the Hon'ble Courts for its revival in Uttar Pradesh. The State Law Commission has, in its third report in 2009, also recommended for reviving the provisions of the said section. With a view to considering the revival of the provisions of the said section, a committee has been constituted under tie chairmanship of the Principal Secretary to the Government of Uttar Pradesh in Home Department, consisting of the Special Secretary of Judicial Department, Special Secretary of the Legislative. Department, Director General of Prosecution and Additional Director General of Police (Crime), as the members thereof. The said committee has recommended that the provisions of the said section should be revived with certain modifications. After considering the recommendation of the said Committee, it has been decided to amend the Code of Criminal Procedure, 1973 in its application to Uttar Pradesh to revive the provisions of section 438 thereof with certain modifications. The Code of Criminal Procedure (Uttar Pradesh Amendment) Bill, 2018 is introduced accordingly.

7. The issues framed principally arose in the context of the newly framed Section 438 in purported implementation of the report of the State Law Commission tabled in 2009. For the purposes of rendering clarity, it would be appropriate to set forth the questions which principally fall for determination:-

A. The nature of the concurrent jurisdiction conferred by Section 438 Cr.P.C.

B. Whether parties should be commanded to necessarily approach the Sessions Court first before invoking the jurisdiction of this Court under Section 438 Cr.PC

C. In what circumstances can the High Court be approached directly under Section 438 Cr.P.C.

D. Exceptional or Special circumstances.

E. The perceived conflict between the decisions rendered in **Harendra Singh @ Harendra Bahadur**

Vs. The State of U.P.1 and Neeraj Yadav And Another Vs. State of U.P.2

F. Impact of the Explanation to Section 438(2) Cr.P.C.

G. The period for which anticipatory bail should operate.

8. Leading submissions on behalf of the applicants, Sri Imran Ullah firstly referred the Court to the 203rd Report of the Law Commission of India submitted in December 2007. According to Sri Imran Ullah it is the recommendations contained in this report that appear to have guided the Legislature in framing Section 438 as it stands introduced in its application to the State of U.P. Taking the Court through the note on concurrent jurisdiction Sri Imran Ullah drew the attention of the Court to paragraph 6.4.1 of the report which reads thus:-

"6.4.1 One of the objections raised against the amended section has been that if the applicant seeking anticipatory bail is required to be compulsorily present in the Court in terms of new sub-section (1B), he is most likely to be arrested from the Court precincts in the event of rejection of his bail. Such an arrest of the applicant will deprive him of his right otherwise available to him to move the alternative forum provided in Section 438 of the Code. Concurrent jurisdiction of the Court of Session and the High Court under Section 438 has generated much litigation. The Code has not prescribed any specific order in which the two alternative forums are to be approached. It is left to the option of the applicant to move either the Court of Session or the High Court for anticipatory bail one after another or in reverse order. There is conflict of opinion amongst various High Courts as to whether the Court of Session should originally be approached in the first instance or the High Court can be straightaway approached for grant of anticipatory bail without first taking recourse to the Court of Session. It may be noted that both Court of Session and the High Court exercised original jurisdiction underSection 438. However, when the High Court is moved after the anticipatory bail application has been dismissed by the Court of Session, the petition for anticipatory bail in the High Court is required to be accompanied with a copy the Session Court's order from which reason for dismissal of anticipatory bail application can be gathered. In such a case, the High Court essentially exercises revisionary powers over the order of the Court of first instance. i.e. Session Court though purporting to be exercising original jurisdiction under Section 438. On the other hand, it has been held in some cases that where the applicant moved High Court for anticipatory bail which was rejected then the Court of Session should not grant anticipatory bail to the applicant on the same facts and material as otherwise it would be an act of judicial impropriety. There are also cases where similar view has been taken in reverse order in respect of rejection of application for anticipatory bail by Court of Session. Accordingly, it has been held in some cases that if an application for anticipatory bail is rejected by the Court of Session, then similar application on the same fact would not lie in the High Court unless there is some new material or facts. There are cases also where contrary view has been taken whereby no such fetter is admitted on the powers of the High Court."

9. After noticing the judgments rendered by different High Courts of the country it proceeded to observe as follows:-

"6.4.19 There are a lot many more cases on the above aspects. Suffice it to say that the section has generated much litigation that could have been avoided. There are certain other provisions inthe Code which have vested concurrent jurisdiction in the High Court and the Court of Session. For example, both the High Court and the Court of Session have concurrent jurisdiction of revision underSection 397. However, underSection 397if a person approaches either of these Court, he cannot again agitate that matter by way of revision in the other Court. Whereas there seems to be justifiable reason for conferring concurrent jurisdiction on the High Court and the Court of Session, yet the person seeking anticipatory bail should have been given an option on the lines ofSection 397(3). Accordingly, if he approaches either of these two Courts, he should not be allowed again to seek the same relief by way of a substantive application underSection 438in the other Court. It may be noted as observed by Karnataka High Court in K.C. Iyya and etc. Vs State of Karnataka, 1985 Cri. L.J. 214 that in the matter of bail, either anticipatory as regular, the voice of the Court of Session is not final but is subject to revisional or appellate jurisdiction of the High Court and the Supreme Court. Also in these matters of bail, either anticipatory or regular, the Court of Session is given as wide a power of discretion as vests in the High Court. In this connection, the followingobservations of Chandrachud, C.J. in Gurbaksh Singh Sibbia etc. Vs The State of Punjab, AIR 1980 SC 1632 may be noted.

"There is no risk involved in entrusting wide discretion to the Court of Session and the High Court in granting anticipatory bail because firstly, these are higher Courts manned by experienced persons; secondly, their orders are not final but are open to appellate or revision scrutiny."

6.4.20 It may be noted in this regard that Inspectors General of Police Conference, 1981, inter alia suggested thatSection 438be amended so as to take away the powers to grant anticipatory bail from the Session Court and vest it only in the High Courts. A Group of officers, constituted pursuant to the decision taken at the meeting of Secretaries held on 2nd July, 1982, too concurred with it when it observed that "as sometimes, the Courts take a very liberal view in granting anticipatory bail to criminals, it was considered that such powers should be taken from the Court of Session and vest only in the High Court even though it will make difficult for the poor persons to avail of the provisions of anticipatory bail. A Parliamentary Bill being No. 56 of 1988 was introduced in the Lok Sabha on 13th may, 1988, clause 49 of which related to amendment ofSection 438, providing, inter alia, omission of the words or the Court of Session" from sub-section (1) and (2) of that section. However, these proposed amendments were ultimately not carried out and both the High Court andthe Court of Session continued to have concurrent jurisdiction underSection 438in the matter of anticipatory bail and in our opinion, rightly so. There are certainly distinct advantages of vesting concurrent jurisdiction in the two judicial forums and giving an option to an applicant to choose one of two, depending upon his convenience or otherwise. These advantages have been referred to in some of the decided cases. (See Shivasubramanyam Vs State of Karnataka and another, 2002 Cri.L.J. 1998; Y.

Chendrasekhara Rao Vs Y.V. Kamala Kumari, 1993 Cri.L.J. 3508 (A.P.); Rameshchandra Kashiram Vora Vs State of Gujarat, 1988 Cri.L.J.210 (Guj.). However, it is not readily discernible as to why same relief or facility has been made available to same persons at the hand of two different judicial forums one after another in exercise of their respective original jurisdiction when efficacious remedy is otherwise available against the order of the Court which may have been chosen by an applicant for relief in the first instance. One fails to understand as to why a provision on the lines ofSection 397(3)has not been made inSection 438whereby once the applicant has availed his option to choose one of the two alternative forums, his recourse to the other forum is foreclosed, if he fails to get the desired relief from the forum he has earlier chosen. Thus, if a person moves the Court of Session for anticipatory bail and fails to get it, then why he should again be allowed to file another substantive application to anticipatory bail to High Court instead of revision, or, as the case may be, appeal against the order ofrejection of the application by the Session Court. Again, if the person has moved the High court in the first instance, does it not look apparently anomalous for the same person to move the lower Court, namely, the Court of Session for the same relief on the same facts that has been denied to him by the High Court? Theoretically, it is permissible. But, as a matter of propriety and policy, should that person not be made to move the higher judicial forum instead of a lower one in such cases. It is inherent in the scheme of things that when two alternative forums are provided in law for seeking directions for anticipatory bail, one lower and another higher, then the lower should be first resorted to as a matter of principle except in exceptional cases in which event the applicant should be deprived of his option to move the lower forum afresh on the same facts and material. Any different approach may lead to anomalous results where the relief sought at the hands of the High Court having been denied, can again be sought from the lower court without there being any change in the circumstances in which the relief has been denied by the High Court. Theoretically, it may be feasible but in practice it will not be. Such a scenario might not have been in the contemplation of the framers of the law. If that be so, then we fail to understand as to what distinct advantage is intended to be conferred on persons seeking anticipatory bail by allowing them to move the two alternative forums one after another in their original jurisdiction for the same relief on the same facts. One reason for this could be that an order rejecting anapplication bail is interlocutory [See Zubair Ahmad Bhat Vs State of Jammu and Kashmir, 1990 Cri.L.J. 103 (J&K), Joginder Singh Vs State of Himachal Pradesh, ILR (1975) HP 181. A different view was, however, expressed in Mohan Lal and other Vs Prem Chand and others, AIR 1980 HP 36 (FB)] wherein it was held that Sessions Judge's order refusing anticipatory bail was not an interlocutory order. The power of revision conferred by sub-section (1) ofSection 397is not exercisable in relation to any interlocutory order in any appeal, inquiry, trial or other proceeding. (SeeSection 397(2)of the Code of Criminal Procedure, 1973). The conflicting views of High Courts in various cases in this regard have led to varied judicial practices whereby recourse is sometime taken to the powers of revision of the High Courts against orders

of Courts of Session declining anticipatory bails and in other cases inherent powers of the High Courts are invoked in such matters. The High Courts exercise their inherent powers to redress the grievance of the aggrieved person or to prevent the use of the process of the Court and to secure the ends of justice or to prevent miscarriage of justice or illegal exercise of jurisdiction underSection 482of the Code of Criminal Procedure, 1973 or underArticle 227in exceptional cases. [See Shyam M. Sachdev Vs State and another, 1991 Cri.L.J. 300 (Delhi)]; Ram Prakash Vs State of H.P. 1979 Cri.L.J. 750 (HP); Bhola and others Vs State 1979 Cri.L.J. 718 (Allahabad); Kamal Krishna De Vs State 1977 Cri.L.J. 1492 (Calcutta)]. The Supreme Court in a number of cases has laiddown the scope and ambit of the powers of the courts underSection 482Cr.P.C. Every High Court has inherent power to act ex debito justitiae to do real and substantial justice, for the administration of which alone if exists, or to prevent abuse of the process of the court. Inherent power underSection 482Cr.P.C. can be exercised: (i) to give effect to an order underthe Code; (ii) to prevent abuse of the process of court; and (iii) to otherwise secure the ends of justice. Inherent powers underSection 482Cr.P.C. though wide have to be exercised sparingly, carefully and with great caution and only when such exercise is justified by the tests specifically laid down in this section itself. Authority of the court exists for the advancement of justice. If any abuse of the process leading to injustice is brought to the notice of the court, then the Court would be justified in preventing injustice by invoking inherent powers in absence of specific provisions in the Statute...The powers possessed by the High Court underSection 482of the Code are very wide and the very plenitude of the power requires great caution in its exercise. (See Inder Mohan Goswami and another Vs State of Uttaranchal and others, 207(12) SCALE 15 at 25).Section 482is not controlled bySection 397(2)or 397(3). The inherent powers of the High Court are not subjected to the bar contained inSection 397as the powers of the High Court under these two Sections are distinct, different and mutually exclusive and ought not to be equated. Nothing inthe Codenor even the bar underSection 397affect the amplitude of the High Court'sinherent power if glaring injustice stares the Court in the face [See Govind Das Biyani and others Vs Badrinarayan Rathi (1995) 4 Crimes 755 (M.P.); Smt. Chander Mohini Khuller Vs State of West Bengal and another, 1995(4) Crimes 289 (Cal.); Rajeev Bhatia Vs Abdulla Mohmed Gani and another, 1992 Cri.L.J. 2092 (Bom.); Binod Sitha Vs Suna Devi 1986(1) Crimes 208 (Ori); Raj Kapoor and others Vs State (Delhi Administration)and others, AIR 1980 SC 258); Malam Singh Vs State of Rajasthan, 1977 Cri.L.J. 730 (Raj.)]. Thus, where an application for anticipatory bail has been rejected by the Court of Session and no revision lies against it for the order of rejection being an interlocutory order, then the remedy of the applicant will be to invoke the inherent powers of the High Court underSection 482or the constitutional powers underArticle 227of the Constitution of India, in a case a provision is inserted inSection 438on the lines ofSection 397(3). It may be seen that there is lack of uniformity in judicial practices in these matters that needs to be remedied. One way of doing this is to extend the benefit of revision by suitably amending the law. It may be noted that the amended provision envisages passing

of ad interim order on an application for anticipatory bail application in the first instance, followed by a final order after hearing the Public Prosecutor. Besides, such an application need not necessarily be filed in any pending case as registration of a FIR is not considered necessary. To add to it, the applicant may not be ultimately put up for trial if the investigation of the case does not reveal any materialagainst the applicant. In such a scenario, the final order on the application may not be in the nature of interlocutory as the case may stand disposed of finally. Besides, the use of legal fiction is not unknown to Law and it is quite often applied to meet a given exigency or to secure certain ends. It is thus legally feasible to expressly provide in the Law that final orders on an anticipatory bail application may not be construed as interlocutory for the purposesof the Code. And, we recommend accordingly."

10. In conclusion the Law Commission summarised the position in paragraph 6.4.21 as under:-

"6.4.21 Accordingly, the position that will so emerge will proceed on the following lines, viz.,

(i) Both the High Court and the Court of Session will have concurrent jurisdiction to deal with application for directions underSection 438and it will be open to a person to move either of these two Courts at his option;

(ii) Once that option is exercised and that person decides to move one of these Courts, then the person will not have any further option to move the other Court;

(iii) Where the person chooses to move the Court of Session in the first instance, a revision will lie in the High Court against the order of Court of Session on the application for issue of directions under Section 438;

(iv) Where the person chooses to straightaway move the High Court in the first instance, subject to Court's satisfaction of the special or exceptional circumstances justifying such move, the person will stand deprived of the aforesaid remedy of revision. In such a case the person if aggrieved of the High Court's order on his application for direction underSection 438may have to invoke the extraordinary constitutional powers of the Supreme Court by seeking special leave to appeal in the Supreme Court.

6.4.22 We are, therefore, of considered view thatSection 438should be amended so as to contain a provision on the lines ofSection 397(3). All other remedies that are presently provided inthe Codeor otherwise against the final order on an application for anticipatory bail, will, however, continue to be available. This will also take away much of the sting of lawyers' objections against the amendments, particularly those contained in sub-section (1B), that the applicants have been so denied the right to move the other forum against the rejection of his application as he could be arrested being present in the Court, though we have recommended omission of that sub-section, albeit, on different grounds."

11. It ultimately made the following recommendations:-

"7.1 We recommend that:

(I) The proviso to sub-section (1) of Section 438 shall be omitted.

(ii) Sub-section (1B) shall be omitted.

(iii) A new sub-section on the lines of Section 397(3) should be inserted.

(iv) An Explanation should be inserted clarifying that a final order on an application seeking direction under the section shall not be construed as an interlocutory order for the purposes of the Code."

12. Sri Imran Ullah then drew the attention of the Court to the Report submitted by the U.P. State Law Commission on 28 July 2009. The State Law Commission while dealing with the imperative need of reintroduction of the provisions for anticipatory bail amongst other factors also noticed the large number of cases traveling to the High Court under Section 482 Cr.P.C. as well as 226 of the Constitution in light of the hightened perception of arrest and undue harassment.

13. Dealing with the question of concurrent jurisdiction, the State Law Commission framed its opinion in the following terms:-

"**8.20** As far as jurisdiction is concerned, as stated earlier, the Commission is of the opinion that:

(i) Both the High Court and the Court of Session will have concurrent jurisdiction to deal with application for directions under Section 438 and it will be open to a person to move either of these two Courts at his option:

(ii) Once that option is exercised and that person decides to move one of these Courts, then the person will not have any further option to move the other Court;

(iii) Where the person chooses to move the Court of Session in the first instance, he may move to the High Court against the order of Court of Session on the application for issue of directions under Section 438;

(iv) Where the person chooses to straightaway move the High Court in the first instance, in such a case the person if aggrieved of the High Court's order on his application for direction under Section 438 may have to invoke the extraordinary constitutional powers of the Supreme Court by seeking special leave to appeal in the Supreme Court."

14. It ultimately and in its recommendations proposed the text of Section 438 to be in the following terms :-

"438. Direction for grant of bail to person apprehending arrest-

(1) Where any person has reason to believe that he may be arrested on accusation of having committed a non-bailable offence, he may apply either to the Court of Session or the High Court for a direction under this section that in the event of such arrest he shall be released on bail; and that Court may, after taking into consideration, inter alia, the following factors, namely,-

(2)

(i) The nature and gravity of the accusation;

(ii) the antecedents of the applicant including the fact as to whether he has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;

(iii) the possibility of the applicant to flee from justice, repeat the offence and tamper the witnesses; and

(iv) where the accusation has been made with the object of injuring or

humiliating the applicant by having him so arrested;

either reject the application forthwith or issue an order for the grant of anticipatory bail:

Provided that where an application is moved, the Court shall forthwith cause a notice being not less than forty eight hours notice, together with a copy of such application to be served on the Public Prosecutor with a view to give the Public Prosecutor a reasonable opportunity of being heard when the application shall be heard by the Court.

(2) When the Court of Session or the High Court makes a direction under sub-section (1), it may include such directions in the light of the facts of the particular case, as it may think fit, including:-

(i) a condition that the person shall make himself available for interrogation by a Police Officer as and when required;

(ii) a condition that the person shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any Police Officer;

(iii) a condition that the person shall not leave India without the previous permission of the Court;

(iv) a condition that the person shall not leave India without the previous permission of the Court;

(v) such other condition as may be imposed under sub-section (3) of Section 437, as if the bail were granted under that section.

(3) If such person is thereafter arrested without warrant by an officer-in-charge of a police station on such accusation, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, he shall be released on bail; and if a Magistrate taking cognizance of such offence decides that a warrant should be issued in the first instance against that persons, he shall issue a bailable warrant in conformity with the direction of the court under sub-section (1).)"

9.2 If an application under this section has been made by any person either to the Court of Session or the High Court, no further application by the same person shall be entertained by either of them.

We recommend accordingly."

15. According to Sri Imran Ullah, the language employed by Section 438 as introduced clearly establishes the conferment of concurrent jurisdiction on the High Court as well as the Court of Sessions. In view thereof it was his submission that no fetter or restraint can consequently be placed on the exercise of choice by an individual. Sri Imran Ullah would submit that the provision grants complete freedom to the individual to choose to approach either the High Court or the Sessions Court subject to percieved expediencies. In view thereof, it was submitted that no rule or dictum can possibly be formulated requiring individuals to first exhaust the remedy as provided before the Court of Sessions and only thereafter to approach the High Court. Taking the Court both through the recommendations of the Law Commission of India as well as the State Law Commission it was submitted that though both had recommended the introduction of a provision to the effect that once upon exercise of choice by a person to move one of the concurrent jurisdictions, he

should not have the option to move the other, it was submitted that the aforesaid recommendation was ultimately not accepted by the Legislature. This submission was addressed in light of the provisions made in sub-section (7) which provides that in case the High Court is moved by an application for grant of anticipatory bail, then that individual cannot thereafter invoke the jurisdiction of the Court of Sessions. Sri Imran Ullah highlighted the fact that while a restriction is so placed in case the High Court is moved first, no corresponding prohibition has been engrafted to deal with a situation where the Court of Sessions may have been moved initially and the applicant failing to obtain redress. Both in light of the language employed in sub-section (7) as well as the recommendations framed by the Law Commissions which were not accepted, it was vehemently contended that it would be wholly incorrect for the Court to take the view that once an application for anticipatory bail comes to be rejected by the Court of Sessions, that applicant would stand precluded from invoking the jurisdiction of this Court as independently conferred by Section 438.

16. Dealing then with the impact of the Explanation appended to sub-section (2), Sri Khan contended that the Explanation appears to be in tune with the recommendations framed by the Law Commission of India which had opined that a remedy of revision may be provisioned for in case an applicant fail to obtain relief before the Court of Sessions. According to the learned counsel, it is to overcome the hurdle on orders passed on bail applications being construed as interlocutory in character alone which appears to have guided the framing of the Explanation. It was further submitted that while an avenue to assail an order of the Court of Sessions may have been created by virtue of the Explanation, that could not be construed as barring the jurisdiction of the Court otherwise vested by Section 438. Sri Khan then referred the Court to the decision rendered by a Full Bench of the Himanchal High Court which had dealt with an identical controversy albeit in the context of anticipatory bail and a revision under Section 397 of the Code. The Full Bench of the Himanchal High Court in **Mohan Lal and others etc. v. Prem Chand and others etc3** held thus:-

" 10. S. 438 of the new Code makes a specific provision, unlike the old Code, for anticipatory bail. The relevant part of this Section reads thus:-

"438 (1). When any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this Section; and that Court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail.....…."

It is obvious that the High Court as well as the Court of Session have been given concurrent jurisdiction to grant anticipatory bail.

11. A bare reading of the Section shows that no restriction, unlike Ss. 397 (3) and 399 (3), has been placed on a person wishing to move the High Court for anticipatory bail. A person is not required to move the Sessions Judge first.

It is true that under the old Code wherever a concurrent jurisdiction was conferred on more than one court, the inferior Court was expected, as a matter of practice, to be approached first.

However, in the case of anticipatory bail to force a person to move the Sessions Judge first may result in uncalled for curtailment of his right. For various reasons a person may like to move the High Court straightway and may not like to approach the Sessions Judge. Since the Section relates to the liberty of a person, we would not like to impose any kind of restriction on his right to move the High Court in the first instance.

12. A Division Bench of this Court in Joginder Singh v. State of Himachal Pradesh (ILR (1975) Him Pra 181) held that though a person is at liberty to apply for anticipatory bail to the High Court straightway he could not approach the High Court if his application had been rejected by the Sessions Judge. The reason for coming to this conclusion was that the order refusing anticipatory bail being interlocutory in character could not be revised because of the bar placed by Sub-Sec. (2) of S. 397 of the new Code. This judgment is by D. B. Lall and Chet Ram Thakur, JJ. But in Vijay Nand v. State of Himachal Pradesh (ILR (1975) Him Pra 556) D. B. Lall, J., held that an order of the High Court granting anticipatory bail will be an order in the exercise of jurisdiction conferred by S. 439, and so the bar of Sub-Sec. (2) of S. 399 did not apply. It was observed that the ratio of Joginder Singh (supra) would not apply since the matter was being decided under S. 439.

13. We have given our earnest consideration the reason given in Joginder Singh's case. We are afraid we cannot agree with that view. When a person makes an application for anticipatory bail in the High Court after a similar application of his has been rejected by the Sessions Judge, he does not invoke the revisional jurisdiction of the High Court but applies under S. 438. Assuming that revisional jurisdiction is invoked, we are not prepared to hold that Sessions Judge's order refusing anticipatory bail is an interlocutory order. "

17. It ultimately recorded its conclusion as follows:-

"15. Our answers to the questions referred to the Full Bench are that persons can apply for revision or anticipatory bail to the High Court direct without first invoking the jurisdiction of the Sessions Judge."

18. Learned counsel then referred the Court to a judgment rendered by a learned Judge of this very Court in **Jagdish Kumar Vs. District Judge, Budaun and Others4** where the question which arose for consideration was the ambit of the concurrent jurisdiction conferred upon the High Court and the District Court by Section 24 of the Civil Procedure Code. Sri Imran Ullah referred the Court specifically to the following paragraphs of that decision:

"21. The jurisdiction conferred under Section 24 of the Code is concurrent does not conceive of any scope of doubt. But whether the concurrent jurisdiction means that both the jurisdiction can be availed together or one after the other. The concurrence means both the courts having jurisdiction, the parties are free to approach one or the other. Whenever concurrent jurisdiction has been conferred on the High Court and the District Court, it is provided that if one of the forum is approached, the party would be precluded from approaching the other forum. Inasmuch as in the West Bengal amendment of Section 115 of the

Code by which Section 115A has been, inserted. Under the said provisions both High Court and District Court have been empowered to entertain an application under Section 115 of the Code. Under sub-sections (3) and (4) thereof it has been provided that if either of the court is approached, no further revision shall be entertained between the same parties either by the High Court or the District Court as the case may be. Similar provision has also been incorporated in Section 397 of the Cr.P.C. where in sub-section (3) similar exclusion of jurisdiction by the High Court or Sessions Court having concurrent jurisdiction has been provided. In the absence of specific prohibition or exclusion of jurisdiction, Section 24 of the Code cannot be interpreted to mean that the jurisdiction of the one court is to the exclusion of the other. But a situation may arise where the High Court having been unsuccessfully approached, a party may approach to the District Court thereafter. If such a situation is permitted, it would work out a judicial anarchy. After having unsuccessful before the District Court, a party may approach the High Court. Such position is in conformity with the system of judicial hierarchy. If the party approaches the High Court then it cannot come back to the District Court. Such an interpretation would not be in conformity with the judicial system of hierarchy.

.....

24.Thus the outcome of the above discussion indicates that when an application for transfer before the District Court fails, the party applying may approach the concurrent jurisdiction of the High Court under the same provision but the party opposing though may apply for retransfer before the District Judge but cannot challenge the said order under Section 115 of the Code though, however, on the principle on which Article 227 of the Constitution can be exercised he may invoke the power of superintendence conferred upon the High Court by the Constitution under Article 227 of the Constitution thereof. But if the party approaches the concurrent jurisdiction of the High Court straightaway then the applicant and Opposite Party both may approach the Supreme Court under Section 25 of the Code, if aggrieved by the order of the High Court. But once the High Court passes an order under Section 24 on an application of an unsuccessful applicant before the District Judge, the order of the District Judge stands overruled by implication on passing of the order by the High Court. As such in the facts and circumstances of the present case, the application under Section 24 of the Code before this Court is maintainable."

19. Sri Dayashankar Mishra, learned Senior Counsel placed his submissions in the backdrop of the decision of the Constitution Bench in **Gurbaksh Singh Sibbia Vs. The State of Punjab5** as also on a judgment rendered by a Division Bench of the High Court of Uttarakhand in **Mubarik & another v. State of Uttarakhand & others6**. According to Sri Mishra, the provisions made in Section 438 are an extension of the guarantee of personal liberty as accorded to all citizens by Article 21 of the Constitution. Sri Mishra contended that any restraint on the right of an individual to approach the High Court for grant of anticipatory bail or being relegated to the Court of Sessions as a matter of rule before being permitted to approach this Court would be in clear violation of the constitutional guarantee enshrined in

Article 21. Sri Mishra submitted that where issues of personal liberty stand raised, the statutory discretion as conferred can neither be placed in shackles nor can the exercise of choice by the individual be fettered by any restraint. Turning then to the decision rendered by the High Court of Uttarakhand in **Mubarik**, it was submitted that the said authority applies to the questions raised on all fours since that High Court had clearly recognised the unfettered right of the accused to choose the forum and that the said right could not be restricted by construing the provisions of Section 438 narrowly. Sri Mishra also referred the Court to the provisions made in Section 397(3) to submit that wherever the Legislature had though fit to bar the jurisdiction of a particular Court once a remedy had been availed either before the lower court or the superior court, a specific provision had been made and put in place in the statute itself. It becomes relevant to note that Section 397(3) provides that where any person has moved the High Court or the Court of Sessions by way of a revision, he stands debarred from moving any further application before *"the other of them"*. Sri Mishra submitted that the provisions engrafted in Section 397(3) stand in clear distinction to the provisions made ins Section 438(7) where the fetter stands placed only in case the High Court has been moved initially. According to Sri Mishra, the bar to the jurisdiction of a Court cannot be presumed or assumed unless a specific provisions in that respect comes to be introduced by the Legislature. Insofar as Section 438 is concerned, Sri Mishra submitted that in the absence of any provision akin to Section 397(3) having been made therein, it could not be said that the jurisdiction of the Court stands barred once an application for anticipatory bail has come to be rejected by the Sessions Court.

20. Sri Vimlendu Tripathi, learned counsel addressed submissions on similar lines and contended that the rights of an individual where issues of personal liberty are raised cannot be curtailed by way of statutory interpretation. It was also submitted that any view taken to the contrary would clearly fall foul of the dictum laid down by the Full Bench of this Court in **Onkar Nath Agrawal And Others Vs. State7**. It was submitted further that since the Full Bench had clearly ruled that a bail application under Section 438 may be moved in the High Court without the applicant being forced to take recourse to the Court of Sessions, the decision rendered in **Harendra Singh @ Harendra Bahadur Vs. The State of U.P.8** was per incuriam.

21. Sri Saghir Ahmad learned Senior Counsel adopting and elaborating upon the submissions noted above, drew the attention of the Court to a decision rendered by a Full Bench of the Calcutta High Court in **Diptendu Nayek Vs. State of West Bengal9.** According to learned Senior Counsel the aforesaid authority had in unequivocal term answered the questions as framed by the Court by holding that where a party unsuccessfully moved the Court of Sessions initially he would not stand debarred from invoking the powers of this Court as independently conferred by Section 438. Learned Senior Counsel referred to the following principles as enunciated in that decision.

"22. Broadly speaking, Section 438 of the Code of Criminal Procedure consists of two parts. The first part sets

out the conditions under which a person can make an application for anticipatory bail. The second part confers jurisdiction on the High Court or the Court of Session. Thus the second part can be viewed as strictly jurisdictional; the High Court and the Court of Session have concurrent jurisdiction. Once a Court is invested with jurisdiction, that jurisdiction subsists all along unless taken away expressly or by implication. There are no express words in the Section itself, indicating that the jurisdiction is taken away under any circumstances. It does not appear that by implication even the jurisdiction of either of the Courts is taken away or put an end to. Mr. Chowdhury, the learned Additional P.P., has contended that the use of the conjunction "or" in between the High Court and the Court of Session clearly indicates that a party has only one choice of approaching one Court or the other. That was also the view of the Division Bench of the Calcutta High Court in the case of Amiya Kumar, reported in 1979 Cr. LJ 288. The learned Judges in that case referred to Rowe and Webb for a grammatical construction. Four uses have been referred to by the learned authors with reference to "or" but for our present purpose, it is sufficient to note that the learned authors themselves have pointed out that "or" is sometimes used in a strongly alternative sense and sometimes in no alternative sense. Similarly, Nesfield's grammar, also quoted by the learned Judges of the Division Bench, refers to different uses of the conjunction "or" sometimes it is uses in alternative or exclusive sense, and sometimes in inclusive or non-alternative sense where "or" is merely equivalent to "and". Thus contrary positions may be reached if we confine ourselves to strictly grammatical constructions. The learned Judges of the Division Bench in the case of Amiya Kumar have accepted the alternative or exclusive sense with regard to Section 438 of the Code of Criminal Procedure, but with regard to Section 439, Code of Criminal Procedure, they are of the view that "or" has been used in the non-alternative sense equivalent to "and". The reasoning for accepting one meaning in one case and another meaning in another case for the same word "or" appears to be obscure. It seems that there should not be any exclusive concentration on grammar, as thereby we might lose contact with the current of thoughts communicated by the language. It has been shown before that the word "or" is capable of elasticity even according to grammatical constructions. Such being the position, the real attention should be focused on the intendment of the provision, making a broad reading of the Section itself and placing it in juxtaposition with the other comparable provisions. It seems that the legislators did not intend to exclude the one or the other of the two Courts-the High Court or the Court of Session. Had it been so intended, the legislators would have taken care to express that clearly, as they have done in sub-Section (3) of Section 397 and sub-Section (3) of Section 399 of the Code of Criminal Procedure. Mr. Chowdhury has argued that the word "or" occurring in Section 438 is disjunctive in nature. It seems that has, also weighed with A. C. Sen Gupta, J. But the mere fact that it is disjunctive does not mean much in this case. It may be disjunctive, but necessarily not exclusive. This disjunction is merely temporal; it disjoins but does not exclude the other. At any given point of time, one can approach only one Court and not both the Courts simultaneously. That does not mean that the choice of a

person to approach the other Court is foreclosed for ever. There are no, such words that the choice exercised once would become final, so that afterwards he cannot move another Court having competent jurisdiction. The learned Judges of the Division Bench in the case of Amiya Kumar have also observed that the restriction as to the choice of the Court would also be further evidenced from the use of the words "that court may" in the Section indicating singular number. It is not felt how the use of the singular number can connote anything, because, as has been pointed out before, at any point of time, a party can approach a single Court and not two or more Courts simultaneously. In the Full Bench case of the Himachal Pradesh, report in AIR 1980 Himachal Pradesh 36, it has been held that a person can move an application for anticipatory bail in the High Court even though a similar application of his has been rejected by the Sessions Judge, for, while doing so he does not invoke the revisional jurisdiction of the High Court but applies under Section 438 of the Code of Criminal Procedure. With respect, we agree to the proposition. In the case reported in 1986 Cr. LJ 1742, a learned single-Judge of the Kerala High Court has laid down the same proposition. It has been observed that Section 438 was not intended to give a restricted forum in the sense that when one forum is chosen the jurisdiction of the other is excluded. It has been further observed that the freedom of applying to the High Court or to the Court of Session need not necessarily mean that when the Court of Session is moved the option has become final and the approach to the High Court is thereafter barred. We respectfully say that this is the correct law.

23. In the case of Onkar Nath Agarwal and Ors. (1976 Cr. LJ 1142) the Full Bench of the Allahabad High Court seems to have accepted the same view by implication. It has been settled that a bail application under Section 438 may be moved in the High Court without the applicant taking recourse to the Court of Session. The question referred to the Full Bench was whether the application for anticipatory bail under Section 438 of the Code of Criminal Procedure was maintainable in the High Court without such an application having been moved and rejected by the Court of Session. The answer to the question, as indicated earlier, is in the affirmative. So it is implied that an application can be moved in the Court of Sessions Judge, and then after being rejected, in the High Court. We are incline to accept the ratio of the decisions of the Himachal Pradesh, Kerala and the Allahabad High Courts. For the reasons mentioned before, we are not inclined to accept the decision of the Division Bench of the Calcutta High Court, reported in 1979 Cr. LJ 288.

24. Thus the conclusion is reached that a party, after unsuccessfully moving the Court of Session for anticipatory bail can again approach the High Court for the same purpose, as that is not expressly or by implications barred. The view of Khastgir, J. in the Division Bench out of which this reference arises is the correct view. The matter should now go back to the Division Bench for disposal of the petition on merits. Haridas Das, J. I agree. Application disposed of."

22. Sri Sushil Shukla learned counsel submitted that the reading of any restriction bearing upon the concurrent jurisdiction as conferred by Section 438 Cr.P.C. upon the High Courts and the Courts of Sessions would run contrary to the principles enunciated by the Constitution Bench in **Sibbia**. It was

submitted that where the statute itself did not place any fetter on the exercise of power by the Courts, it would be wholly impermissible to read a restriction by way of statutory interpretation. According to Sri Shukla it was the evolution of standards and restrictions not otherwise finding place in Section 438 Cr.P.C. by the Full Bench of the Punjab and Haryana High Court which were ultimately set aside by the Constitution Bench in **Sibbia**. Insofar as the Explanation appended to sub section (2) was concerned, Sri Shukla also contended that while that provisions may have created a remedy of a revision, the same cannot be read as ousting or debarring the jurisdiction of this Court even though an earlier application may have been rejected by the Courts of Sessions.

23. Sri Yadav learned counsel placed reliance upon the principles elucidated by the Constitution Bench in the matter of **Ranchhoddas Atmaram And Another v. Union of India And Others10** to submit that the opening part of Section 438 Cr.P.C. is framed and couched in positive terms. In view thereof it was his submission that the use of the word 'or' between the High Court and the Court of Sessions clearly evidences the intent of the legislature for it to mean 'either'. Reliance was principally placed on the following propositions as laid down in that decision:-

"13. It is clear that if the words form an affirmative sentence, then the condition of one of the clauses only need be fulfilled. In such a case , "or" really means "either" "or". In the Shorter Oxford Dictionary one of the meanings of the word "or" is given as "a particle co-ordinating two (or more) words, phrases or clauses between which there is an alternative." It is also there stated, "The alternative expressed by" "or" is emphasised by prefixing the first member or adding after the last, the associated adv. EITHER," So, even without "either," "or" alone creates an alternative. If, therefore, the sentence before us is an affirmative one, then we get two alternatives, any one of which may be chosen without the other being considered at all. In such a case it must be held that a penalty exceeding Rs. 1,000 can be imposed.

14. If,. However, the sentence is a negative one, then the position becomes different. The word "or" between the two clauses would then spread the negative influence over the clause following it. This rule of grammar is not in dispute. In such a case the conditions of both the clauses must be fulfilled and the result would be that the penalty that can be imposed can never exceed Rs. 1,000. "

24. Sri Yadav however submitted that the insertion of the Explanation to sub section (2) is clearly indicative of the intent of the Legislature to bar a second application before this Court once a prayer for anticipatory bail had come to be rejected by the Court of Sessions. According to Sri Yadav once the Court of Sessions has proceeded to reject a prayer for anticipatory bail, the only remedy available to an individual would be to assail the same by way of revision.

25. Sri I.P. Srivastava and Sri Vikas Sahai learned A.G.As. have contended that the provisions of Section 438 Cr.P.C. as introduced do not appear to debar the jurisdiction of this Court notwithstanding an application for grant of anticipatory bail having been rejected by the Court of

Sessions. It was however contended that **Harendra Singh** lays down the correct position in law when it requires parties to establish the existence of exceptional and special circumstances. According to learned A.G.As. if such a restraint were not to be not read in Section 438 Cr.P.C., it would lead to a situation where this Court would be flooded with applications for anticipatory bail and thus the legislative intent of conferring Courts of Sessions with concurrent jurisdiction itself be rendered nugatory. Learned A.G.As. relied upon the decisions of different High Courts as noticed in **Harendra Singh** to submit that the principle so formulated clearly placed the rights of parties in the balance and must consequently be affirmed as being the correct position in law.

26. Having noticed the rival submissions, the Court proceeds to rule upon the questions as formulated.

QUESTION A - The nature of the concurrent jurisdiction conferred by Section 438 Cr.P.C.

QUESTION B - Whether parties should be commanded to necessarily approach the Sessions Court first before invoking the jurisdiction of this Court under Section 438 Cr.PC.

27. Since Questions A and B are interlinked, they can be conveniently considered and disposed of together.

28. On a plain reading of Section 438 Cr.P.C., it is evident that both the High Court and the Court of Sessions are conferred with a concurrent jurisdiction to entertain an application for anticipatory bail. It essentially enables the party to exercise a choice of moving either the High Court or the Sessions Court for the consideration of an application seeking anticipatory bail depending upon the exigencies of the situation. The statute, as is manifest, places no restriction on the exercise of this choice. It is in this sense akin to Section 439 Cr.P.C. which too confers concurrent jurisdiction on the Court of Sessions and the High Court. The distinction between the two only being that while Section 438 Cr.P.C. deals with pre-arrest bail, Section 439 Cr.P.C. is liable to be invoked once a person has been arrested and taken into custody.

29. Section 438 Cr.P.C. as introduced by the Legislature thus puts in place two possible avenues for redress leaving it open to the individual to exercise a choice to move either the High Court or the Court of Sessions for consideration of a prayer for grant of anticipatory bail. The Court consequently finds itself unable to either recognize or read that provision as mandating the Court of Sessions being necessarily moved in the first instance before the jurisdiction of this Court is invoked. The Court also finds itself unable to discern any legislative intendment that may support the contention that the jurisdiction of this Court may be invoked only once an applicant has exhausted the remedy as available before the Court of Sessions. More importantly, it must be borne in mind that a bar to the jurisdiction of a superior Court should neither be and cannot be readily inferred. For the purposes of identifying such a bar to actually exist, it must be apparent and clearly evidenced either from a reading of the statute itself or from a specific provision made in this respect.

30. Insofar as Section 439 Cr.P.C. goes, undisputedly a practice appears to have evolved over the decades of parties approaching the Sessions Court by way of an application for bail initially and only after its disposal to move the High Court. This, however, appears to have come to hold the field merely as a rule of convenience since parties do not dispute that the High Court could be independently moved under Section 439 irrespective of whether the avenue as available before the Court of Sessions has been exhausted or not. Practice, however, cannot be elevated to the position of an inviolable rule or one that brooks of no exception. In any case a practice cannot be conferred a judicial imprimatur when such construction would run contrary to the plain language and intendment of the statutory provision. Practice also cannot be accorded a status that either subsumes the clear intent of the statute or restrict its operation. On a fundamental level, therefore, it would be incorrect to hold that Section 438 Cr.P.C. either mandates or envisages the Court of Sessions being moved first before a party becomes entitled to approach this Court by way of an application seeking anticipatory bail.

31. Dealing with the issue of practice of parties being compelled to approach the Court of Sessions first under Section 439 Cr.P.C., the Full Bench of this Court in **Onkar Nath Agrawal** observed thus: -

9. We may now consider the authorities cited by the learned Government Advocate in support of his contention. These authorities relate to applications for revision under the provisions of Sections 435 and 439 of the Code of Criminal Procedure, 1898. In the authority reported in *Shailabala Devi v. Emperor* (1) one of the questions was whether an application in revision should be entertained by the High Court when the mater has not first been taken to the District Magistrate or the Sessions Judge. Sir, Shah Sulaiman, C. J., held that the High Court has full jurisdiction to entertain such an application even though the District Magistrate or the Sessions Judge has not been approached in the first instance. At the same time he observed:

"It is quite clear that a practice has grown up in this Court to refuse to entertain applications direct, until the District Magistrate or the Sessions Judge has been approached. This practice is based largely on convenience, and seems to me to be sound. The District Magistrate or the Sessions Judge is on the spot and easily accessible and the record can be locally called for promptly without any loss of time and without the necessity of sending it through the post. The proceedings are also likely to be less expensive. The High Court is a superior Court and its time would not be unnecessarily spent in examining the record and in some cases even considering the evidence, when a subordinate court has already considered the matter and made its report. Further, the High Court would have the opinion of another Court before it which would be of help. In practice no great harm is likely to be suffered by the accused, if he is required to go to the District Magistrate or the Sessions Judge in the first instance. When a practice of this kind becomes well known to the members of the Bar in the Mofussil and in the High Court the accused would be advised to approach the subordinate court forthwith and not attempt to file a revision in the High Court direct. In many cases, if the District

Magistrate or the Sessions Judge reports in favour of the accused, be need not be represented in the High Court, particularly when the illegality of the conviction or the severity of the sentence is patent. On the other hand, if such a salutary rule of practice were not to prevail, there would be a temptation, and even an encouragement, to accused persons to come up straight to the High Court over the head of the District Magistrate or the Sessions Judge concerned, because the latter can only report to the High Court and cannot themselves pass an order in favour of the accused. Many accused persons may therefore think it more expeditious and much cheaper to come up straight to the High Court. The High Court would then be flooded with such applications.

On these grounds it seems that a practice of a long standing has grown up under which the High Court does not ordinarily, entertain an application in revision unless the District Magistrate or the Sessions Judge has been moved first."

10. There are, however, several authorities in support of the view that the practice recognised in the case of *Shailabala Devi v. Emperor AIR (1)* is not an absolute one and there may be exceptions to it. Accordingly in the case of *S. P. Dubay v. Narsingh Bahadur* (supra) it was held that though the normal practice for the High Court is to refuse to entertain application where the applicant did not approach the Sessions Judge first, but there is no hard and fast rule and in suitable cases the High Court has been known to depart from this practice and to accept revisions that have not been previously considered by a Sessions Judge..... Similarly in *Municipal Board v. Bhim Singh* (supra) D.S. Mathur, J. as he then was observed:

"But where the High Court entertains a revision directly without the party having approached the Sessions Judge there would be no illegality but a mere departure from the above practice....."

11. The recent view, therefore, appears to be that the Courts should have unfettered discretion and may entertain revision notwithstanding the prevailing practice if they feel justified on the basis of facts and circumstances of each case. **We may also add that there is no authority in support of the contention that the 'practice of convenience' recognised in Shailabala's case in respect of revisions is applicable to bail or anticipatory bail and that the discretion of the court Should be fettered by such a practice.** We are, therefore, of the view that the Courts should have an unfettered discretion in the matter of bail under Section 438, Cr. P. C. to be exercised according to the exigencies of each case." (emphasis supplied)

32. While dealing with this contention the Court cannot loose sight of the fact that it is called upon to interpret a provision that has a direct relation to the issue of personal liberty of an individual. It would, therefore, be manifestly incorrect for the Court to invent or construct restrictions on the discretion so conferred reading constraints in the statute which otherwise do not exist. The exercise of discretion as conferred by Section 438 Cr.P.C. was eloquently explained by the Constitution Bench in **Sibbia** as under: -

"13. This is not to say that anticipatory bail, if granted, must be granted without the imposition of any

conditions. That will be plainly contrary to the very terms of Section 438. Though sub-section (1) of that section says that the court "may, if it thinks fit" issue the necessary direction for bail, sub-section (2) confers on the court thepower to include such conditions in the direction as it may think fit in the light of the facts of the particular case, including the conditions mentioned in clauses (i) to (iv) of that sub-section. The controversy therefore is not whether the court has the power to impose conditions while granting anticipatory bail. It clearly and expressly has that power. The true question is whether by a process of construction, the amplitude of judicial discretion which is given to the High Court and the Court of Session, to impose such conditions as they may think fit while granting anticipatory bail, should be cut down by reading into the statute conditions which are not to be found therein, like those evolved by the High Court or canvassed by the learned Additional Solicitor General. Our answer, clearly and emphatically, is in the negative. The High Court and the Court of Session to whom the application for anticipatory bail is made ought to be left free in the exercise of their judicial discretion to grant bail if they consider it fit so to do on the particular facts and circumstances of the case and on such conditions as the case may warrant. Similarly, they must be left free to refuse bail if the circumstances of the case so warrant, on considerations similar to those mentioned in Section 437or which are generally considered to be relevant under Section 439 of the Code.

….

26. We find a great deal of substance in Mr. Tarkunde's submission that since denial of bail amounts to deprivation of personal liberty, the court should lean against the imposition of unnecessary restrictions on the scope of Section 438, especially when no such restrictions have been imposed by the legislature in the terms of that section. Section 438 is a procedural provision which is concerned with the personal liberty of the individual, who is entitled to the benefit of the presumption of innocence since he is not, on the date of his application for anticipatory bail, convicted of the offence in respect of which he seeks bail. An over-generous infusion of constraints and conditions which are not to be found in Section 438 can make its provisions constitutionally vulnerable since the right to personal freedom cannot be made to depend on compliance with unreasonable restrictions. The beneficent provision contained in Section 438must be saved, not jettisoned. No doubt can linger after the decision in Maneka Gandhi vs. Union of India (1978) 1 SCC 248, that in order to meet the challenge of Article 21 of the Constitution, the procedure established by law for depriving a person of his liberty must be fair, just and reasonable. Section 438, in the form in which it is conceived by the legislature, is open to no exception on the ground that it prescribes a procedure which is unjust or unfair. We ought, at all costs, to avoid throwing it open to a Constitutional challenge by reading words in it which are not be found therein."

33. The discretion so wisely conferred by Section 438 Cr.P.C. consequently should not be shackled or cabbined by judicial artifices or the interpretative construction of barriers not otherwise placed by the statute. This position is also evident from the

conclusions recorded by the Full Bench of this Court in **Onkar Nath Agrawal**. The Court deems it apposite to extract the following parts of the decision rendered therein:-

"6. The words 'that Court may, if it thinks fit. direct etc.' make it also clear that the Sessions Judge or the High Court thus a discretionary power to give a direction for release of the applicant on bail. It does not lay down any condition on the existence of which bail can be granted. When a tribunal is invested by an Act or by rules with discretion without any indication in the Act or rules of the grounds upon which the discretion is to be exercised, the Courts have declined to lay down any rules with a view to indicate the particular grooves in which the discretion should run on the ground that if the Act or rules do not fetter the discretion of the Judge why should the courts do so. (See Gardner v. Jay (1885) 29 Ch D 50 and Hume v. Poresh Chunder AIR 1914 Cal 597 : 15 Cri LJ 49 (SB)).

.....

12. We therefore answer the question under reference in the affirmative and hold that a bail application under Section 438, Code of Criminal Procedure, 1973 may be moved in the High Court without the applicant taking recourse to the court of Sessions. "

34. It must therefore, be held that Section 438 Cr.P.C. on its plain terms does not mandate or require a party to first approach the Sessions Court before applying to the High Court for grant of anticipatory bail. The provision as it stands does not require an individual first being relegated to the Court of Sessions before being granted the right of audience before this Court.

QUESTIONS C - In what circumstances can the High Court be approached directly under Section 438 Cr.P.C.

35. That then takes the Court to consider the question of when should the High Court entertain an application for anticipatory bail directly. Hon'ble Chandra Dhari Singh, J. after noticing the views taken by different High Courts in **Harendra Singh** has proceeded to hold that in extraordinary circumstances and where special reasons exist, the party can also approach the High Court directly. The only note of caution which was entered by the learned Judge was that the Court cannot entertain an application for grant of anticipatory bail as a matter of routine and without examining whether any special reasons or circumstances exist justifying the application being considered by the High Court directly. Noticing the decisions rendered by the Karnataka High Court as well as the Gauhati High Court, the learned Judge identified and assigned valid and cogent reasons for parties being relegated to move the Sessions Court first. It would be appropriate to reproduce the following principles as elucidated by the learned Judge in **Harendra Singh**:-

"16. In a decision reported in 1983(2) KLJ 8 in the case of K.C. Iyya Vs. State of Karnataka, the High Court of Karnataka has observed as follows:

"7. Since both the Courts, the Court of Sessions and this Court have concurrent powers in the matter, it appears desirable, for more than one reason, that the Sessions Court should be approached first in the matter."

17. In the case of Shivasubramanyam Vs. State of Karnataka and another; 2002 CRL.LJ

1998, the Karnataka High Court has re-iterated the abovesaid principles and ultimately held that the application filed under Section 438 of Cr.P.C. directly to the High Court is maintainable only under exceptional and under special circumstances, but not as a routine and the party cannot come before the Court as a matter of right.

18. By looking into the abovesaid discussions, I am of the opinion that the party has to approach the Sessions Court first and then he has to approach the High Court which is the normal course. But the courts have also observed that in extraordinary circumstances with special reasons, the party can also approach the High Court. The High Court cannot entertain Section 438 of Cr.P.C. as a matter of routine without examining whether there are any special reasons or special circumstances to entertain the said application.

19. In the case of Sri Kwmta Gwra Brahma Vs. State of Assam (Bail No.3024 of 2014), The Gauhati High Court has also expressed similar view and held that the party has to approach the Court of Sessions first under Section 438 of Cr.P.C. and he can later approach the High Court.

20. The intention of bringing out Section 438 of Cr.P.C. is enabling each and every person in the country if under extraordinary circumstances under exigencies either to approach the Court of Sessions or the High Court which can be concurrently exercised by both the courts. Though such remedy, cannot be riddled down by imposing any extraordinary condition but still the Court can refuse to entertain the bail petition and direct the party to approach the Court of Sessions first because Section 438 of Cr.P.C. shall not be exercised as a matter of right by the party, though it can be invoked either before the Sessions Court or before the High Court. It is purely the discretionary power of the Court to exercise power depending upon the facts and circumstances of each case. Therefore, the High Court can direct the party to go first before the Court of Sessions and then come to the High Court though there is no embargo under the statute itself, but the Court can do so on the basis of various factors.

21. It is worth to note here that whenever the concurrent jurisdiction is vested under the statute simultaneously in two courts of one is superior to the other, then it is appropriate that the party should apply to the subordinate Court first, because the higher Court would have the advantage of considering the opinion of the Sessions Court. Moreover, the party will get two opportunities to get the remedy either before the Sessions Court or before the High Court but if once he approaches the High Court, he would run the risk that, the other remedy is not available to him if he failed to get the order in the High Court, he cannot go before the Sessions Court for the same remedy. However, vice versa is possible.

22. It is also to be notable that the Sessions Court will always be nearest and accessible Court to the parties. Moreover, considering the work load of the courts in the country, the superior courts particularly, the High Courts are flooded with heavy pendency of cases. In order to facilitate the other parties who come before the Court with other cases before the High Court (which has got exclusive Jurisdiction) and also in order to provide alternative remedy to the parties, it is just and necessary that the party shall first approach the Sessions Court under Section 438 of Cr.P.C. so that the High

Court can bestow its precious time to deal with other pending cases which requires serious attention and expeditious disposal, where the parties who have come to the High Court after exhausting remedy before the Magistrate Court or the Sessions Court for grant of bail and for other reliefs.

.....

24. It is also worth to note here that the Sessions Court and the High Court are concurrently empowered to grant bail under Section 438 of Cr.P.C. The object is that if the party who is residing in the remote area can directly approach the Sessions Court which is easily accessible. In order to obviated the very object and purpose, the party has to explain why he did not go to that Court. Otherwise, it amounts to making that provision redundant, so far as the Sessions Courts are concerned. Even once again re-looking into structure of Section 438 of Cr.P.C., it is purely the discretionary power given to the Court to entertain the Petition. It is the discretion given to the Courts to exercise that power. When discretion vests with Court, the party has to explain why he has come to the High Court directly, for the discretionary relief under the said provision."

36. On an ultimate analysis of the law rendered on the subject, the learned Judge recorded the the following conclusions:-

"26. Hence, I answer the point raised as follows:

"The bail application filed under Section 438 of Cr.P.C. is not maintainable before the High Court without exhausting remedy before the Court of Sessions, which has got concurrent jurisdiction. However, for **extraneous or special reasons**, the High Court can also exercise such power for grant of the remedy under the said provision."

37. The reasons which are assigned by Hon'ble Chandra Dhari Singh, J. in **Harendra Singh** are not only convincing and compelling, but also clearly appear to be expedient and prudent. The Legislature in its wisdom conferred concurrent jurisdiction on the Court of Sessions perhaps bearing those very reasons in mind. The constraints of access to justice, of distances, the expense of litigation are all relevant factors which appear to have guided the Legislature in clothing the Court of Sessions with contemporaneous jurisdiction. However and notwithstanding the compelling and judicious imperatives in favor of the formulation of these factors in justification of relegation to the Court of Sessions, it must be remembered that the said caveat can only be recognised as an exercise of self restraint by the Court itself and nothing more. In fact as is evident upon a holistic reading of **Harendra Singh**, it is apparent that it was not the intent of the learned Judge to lay down the rule of restraint and abstention as an absolute proposition. This is also the position which clearly emerges when one bears in mind the following observations entered by the Full Bench in **Onkar Nath Agrawal**:-

"8. It may, however, be mentioned that inasmuch as Section 438 of the Code of Criminal Procedure, 1973 gives a discretionary power to grant bail, this discretion is to be exercised according to the facts and circumstances of each case. There may be cases in which it may be considered by the High Court to be

proper to entertain an application without the applicant having moved the Court of Sessions initially. Similarly there may be cases in which the Court may feel justified in asking the applicant to move the Sessions Court or to refer the matter to that Court. In any case all depends upon the discretion of the Judge hearing the case. "

38. On a conjoint reading of the aforesaid two decisions, it is manifest that all that was intended was to put in place a rule of abstinence and require the individual to establish the existence of special and compelling circumstances constraning him to move the the High Court in the first instance. On an overall analysis of those decisions, it may, therefore, be conclusively held that while there exists no fetter or restriction upon the High Court entertaining an application under Section 438 Cr.P.C. directly it would ultimately depend upon the discretion of the Judge available to be exercised in the facts and circumstances of each case and upon finding special circumstances which warrant this Court to invoke its jurisdiction in the first instance rather than relegating the party to the Court of Sessions.

QUESTION D - Exceptional or Special Circumstances

39. **Harendra Singh** leaves a window open with the learned Judge observing that requiring the party to invoke the jurisdiction conferred on a Court of Sessions must be recognized as the normal course and the High Court entitled to be moved only in extraordinary circumstances and special reasons. The learned Judge further went on to observe in the ultimate conclusion drawn that for *"extraneous"* (sic) or special reasons the High Court could also exercise the powers conferred by Section 438 Cr.P.C. notwitstanding the Court of Sessions having not been moved. What appears upon a holistic reading of that decision is the intent of the learned Judge to convey the duty of the applicant approaching the High Court to establish the existence of exceptional and special circumstances. The only clarification which, therefore, would merit being entered is with regard to the requirement of proving the existence of extraordinary or exceptional circumstances. The words "exceptional" or "extraordinary" are understood to mean atypical, rare, out of the ordinary, unusual or uncommon. If the jurisdiction of the Court as conferred by Section 438 Cr.P.C. be circumscribed or be recognised to be moved only in exceptional situations it would again amount to fettering and constricting the discretion otherwise conferred by Section 438 Cr.P.C. Such a construction would perhaps run the risk of being again viewed as being in conflict of the statutory mandate and the discretion conferred. In the considered view of the Court what the learned Judge did seek to convey and hold in **Harendra Singh** was the requirement of establishing the existence of special, weighty, compelling reasons and circumstances justifying the invocation of the jurisdiction of this Court even though a wholesome avenue of redress was available before the Court of Sessions.

40. Regard must be had to the fact that the Constitution Bench in **Sibbia** had an occasion to deal with the correctness of the restrictions as formulated by the Full Bench of the Punjab and Haryana High Court on the exercise of power under Section 438 Cr.P.C. Dealing with that aspect the Constitution Bench clearly held that the exercise of discretion as

statutorily conferred cannot be confined in a straitjacket. This simply since it would be impossible to either prophesize or foresee the myriad situations in which the jurisdiction of the Court may be invoked. It was for the aforesaid reasons that the Constitution Bench held that this aspect must be left to the judgment and wisdom of the Court to evaluate and consider whether special circumstances exist or are evidenced by the facts of a particular case. The Court deems it apposite to extract the following paragraphs from the decision rendered by the Constitution Bench:-

"13. This is not to say that anticipatory bail, if granted, must be granted without the imposition of any conditions. That will be plainly contrary to the very terms of Section 438. Though sub-section (1) of that section says that the Court "may, if it thinks fit" issue the necessary direction for bail, sub-section (2) confers on the Court thepower to include such conditions in the direction as it may think fit in the light of the facts of the particular case, including the conditions mentioned in clauses (i) to (iv) of that sub-section. The controversy therefore is not whether the Court has the power to impose conditions while granting anticipatory bail. It clearly and expressly has that power. The true question is whether by a process of construction, the amplitude of judicial discretion which is given to the High Court and the Court of Session, to impose such conditions as they may think fit while granting anticipatory bail, should be cut down by reading into the statute condition which are not to be found therein, like those evolved by the High Court or canvassed by the learned Additional Solicitor General. Our answer, clearly and emphatically, is in the negative. The High Court and the Court of Session to whom the application for anticipatory bail is made ought to be left free in the exercise of their judicial discretion to grant bail if they consider it fit so to do on the particular facts and circumstances of the case and on such conditions as the case may warrant. Similarly, they must be left free to refuse bail if the circumstances of the case so warrant, on considerations similar to those mentioned in Section 437 or which are generally considered to be relevant under Section 439 of the Code.

14. Generalisations on matters which rest on discretion and the attempt to discover formulae of universal application when facts are bound to differ from case to case frustrate the very purpose of conferring discretion. No two cases are alike on facts and therefore, courts have to be allowed a little free play in the joints if the conferment of discretionary power is to be meaningful. There is no risk involved in entrusting a wide discretion to the Court of Session and the High Court in granting anticipatory bail because, firstly, these are higher courts manned by experienced persons, secondly, their orders are not final but are open to appellate or revisional scrutiny and above all because, discretion has always to be exercised by courts judicially and not according to whim, caprice or fancy. On the other hand, there is a risk in foreclosing categories of cases in which anticipatory bail may be allowed because life throws up unforeseen possibilities and offers new challenges. Judicial discretion has to be free enough to be able to take these possibilities in its stride and to meet these challenges. While dealing with the necessity for preserving judicial discretion

unhampered by rules of general application, Earl Loreburn, L. C. said in Hyman v. Rose :

"I desire in the first instance to point out that the discretion given by the section is very wide..... Now itseems to me that when the Act is so express to provide a wide discretion,... it is not advisable to lay down any rigid rules for guiding that discretion. I do not doubt that the rules enunciated by the Master of the Rolls in the present case are useful maxims in general, and that in general they reflect the point of view from which judges would regard an application for relief. But I think it ought to be distinctly understood that there may be cases in which any or all of them may be disregarded. If it were otherwise, the free discretion given by the statute would be fettered by limitations which have nowhere been enacted. It is one thing to decide what is the true meaning of the language contained in an Act of Parliament. It is quite a different thing to place conditions upon a free discretion entrusted by statute to the court where the conditions are not based upon statutory enactment at all. It is not safe, I think, to say that the court must and will always insist upon certain things when the Act does not require them, and the facts of some unforeseen case may make the court wish it had kept a free hand."

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.

.....…

26. We find a great deal of substance in Mr. Tarkunde's submission that since denial of bail amounts to deprivation of personal liberty, the Court should lean against the imposition of unnecessary restrictions on the scope of Section 438, especially when no such restrictions have been imposed by the legislature in the terms of that section. Section 438 is a procedural provision which is concerned with the personal liberty of the individual, who is entitled to the benefit of the presumption of innocence since he is not, on the date of his application for anticipatory bail, convicted of the offence in respect of which he seeks bail. An overgenerous infusion of constraints and conditions

which are not to be found in Section 438 can make its provisions constitutionally vulnerable since the right to personal freedom cannot be made to depend on compliance with unreasonable restrictions. The beneficient provision contained in Section 438must be saved, not jettisoned. No doubt can linger after the decision in Maneka Gandhi that in order to meet the challenge ofArticle 21of the Constitution, the procedure established by law for depriving a person of his liberty must be fair, just and reasonable.Section 438, in the form in which it is conceived by the legislature, is open to no exception on the ground that it prescribes a procedure which is unjust or unfair. We ought, at all costs, to avoid throwing it open to a Constitutional challenge by reading words in it which are not be found therein"

41. On an overall consideration of the above the Court is of the considered view that **Harendra Singh** when interpreted and understood in the manner indicated above, rightly balances the issues that arise. While it was urged that the aforesaid decision would be per incuriam the views expressed by our Full Bench in **Onkar Nath Agarwal** and the decision of the Constitution Bench in **Sibbia**, this Court finds no merit in that submission since as noted above, even **Onkar Nath Agarwal** had envisaged situations where the High Court may relegate parties to the Court of Sessions and refuse to invoke its jurisdiction. Insofar as **Sibbia** is concerned, it becomes relevant to bear in mind that the Constitution Bench was not dealing with the issue that arises for our consideration directly. The observations with regard to the exercise of discretion as appearing therein were entered in the context of the principles formulated by the Full Bench of the Punjab and Haryana High Court relating to the exercise of power under Section 438 itself. The issue of a self imposed restraint exercised by the High Court in light of the contemporaneous jurisdiction conferred on the Court of Session was not a question directly in issue. The argument of per incuriam is thus liable to be and is consequently rejected.

42. The legal position which consequently emerges is that notwithstanding the concurrent jurisdiction being conferred on the High Court and the Court of Session for grant of anticipatory bail under Section 438 Cr.P.C., strong, cogent, compelling reasons and special circumstances must necessarily be found to exist in justification of the High Court being approached first and without the avenue as available before the Court of Sessions being exhausted. Whether those factors are established or found to exist in the facts of a particular case must necessarily be left for the Court to consider in each case.

43. What would constitute "special circumstances" in light of the nature of the power conferred, must also be left to be gathered by the Judge on a due evaluation of the facts and circumstances of a particular case. It would perhaps be imprudent to exhaustively chronicle what would be special circumstances. As noticed above, it would be impossible to either identify or compendiously propound what would constitute special circumstances. **Sibbia** spoke of the *"imperfect awareness of the needs of new situations"*. It is this constraint which necessitates the Court leaving it to the

wisdom of the Judge and the discretion vested in him by statute. Without committing the folly of attempting to exhaustively enunciate what would constitute special circumstances or being understood to have done so, the High Court would be justified in entertaining a petition directly in the following, amongst other, circumstances:-

(A) Where bail, regular or anticipatory, of a coaccused has already been rejected by the Court of Sessions;

(B) Where an accused not residing within the jurisdiction of the concerned Sessions Court faces a threat of arrest;

(C) Where circumstances warrant immediate protection and where relegation to the Sessions Court would not subserve justice;

(D) Where time or situational constraints warrant immediate intervention.

These and other relevant factors would clearly constitute special circumstances entitling a party to directly approach the High Court for grant of anticipatory bail.

QUESTION E - The perceived conflict between the decisions rendered in Harendra Singh @ Harendra Bahadur Vs. The State of U.P.11 and Neeraj Yadav And Another Vs. State of U.P

44. Turning then to the issue of the perceived conflict between the views expressed in **Harendra Singh** and **Neeraj Yadav**, it becomes pertinent to note the following aspects. While **Harendra Singh** fails to notice the decision of the Full Bench in **Onkar Nath Agrawal**, the conclusions ultiamtely recorded by the learned Judge are in tune with what was ultimately laid down as the law by the Full Bench. It must also be borne in mind that **Neeraj Yadav** is firstly not a judgment but an interlocutory order. Although the same came to be passed after the final judgment was rendered in **Harendra Singh**, the learned Judge has not noticed the principles expounded in **Harendra Singh**. Notwithstanding these aspects surrounding the decisions aforementioned, this Court is of the firm view that there is essentially no conflict in the two decisions. While the the Full Bench in **Onkar Nath Agrawal** did hold that an application for anticipatory bail may be moved in the High Court without the applicant taking recourse to the Court of Sessions, it had also pertinently observed that there may be cases where the High Court may feel justified in asking the applicant to move the Sessions Court or even refer the matter to that Court on its own. The Full Bench clearly left it upon the discretion of the Judge hearing the case. The ultimate conclusion which came to be recorded cannot possibly be read oblivious of the observations as appearing in paragraph-8 of the report extracted above. As this Court reads the two decisions referred to by parties, it is manifest that there is no irreconcilable conflict in the views expressed. The decision in **Harendra Singh** as well as the interlocutory order made in **Neeraj Yadav** must be read in light of the authoritative pronouncement rendered by the Full Bench in **Onkar Nath Agarwal** and this Court finds no justification in the submission that the two take divergent or incompatible views.

QUESTION - F Impact of the Explanation to Section 438(2) Cr.P.C.

45. The Court then takes up for consideration the Explanation appended to sub-section (2) of Section 438 Cr.P.C.

As is evident from a bare reading of the Explanation, an order passed under sub-section (1) is not liable to be construed as an interlocutory order for the purposes of the Code. There are only two types of orders which can possibly be passed under sub-section (1) of Section 438. Significantly, no provision similar to the Explanation as inserted insofar as the provision applies and operates in the State of U.P., finds place either in the principal Act or in any of the other State Amendments made to Section 438 Cr.P.C. In terms of the provisions made in sub section (1), the particular Court which is moved by way of an application for grant of an anticipatory bail may either reject the application outrightly or issue an interim order of protection. It is only these two specie of orders which are dealt with by the Explanation. The final order to be passed on the application for grant of anticipatory bail is the one which is envisaged and provisioned for in sub-section (4) of that Section. Although the Explanation uses the expression "final order" that is clearly circumscribed by its connection to orders made under sub-section (1). All that consequently flows from the Explanation is that an order rejecting the application or any interim order made on the application pending final disposal ought and are to be viewed as final in character and in any case and for the purposes of the Code not to be construed as interlocutory orders. As this Court reads the Explanation, it appears that the legislative intent was for the creation of a remedy to a party aggrieved by an order either rejecting the anticipatory bail application or an interim order of protection made thereon. The principal remedy under the Code against orders made in proceedings taken therein stands enshrined in Section 397 which creates the remedy of a revision. A revision is liable to be preferred only against a final order as distinct from an interlocutory order made in the course of proceedings. Ordinarily and as is well settled an order granting or refusing bail has always been understood as being interlocutory in nature. This since and as has been repeatedly held an order on an application of bail is ordinarily interim and temporary in character. It is always open to a party to revive a prayer for the grant of bail notwithstanding the rejection of an earlier application. No finality stands attached to an order granting or refusing bail since it can always be renewed from time to time. The legislative intent underlying the insertion of this Explanation appears to be only to obviate and overcome this particular situation alone. Consequently, all that can possibly be deduced from the Explanation is that a party would have the right to assail and challenge an order rejecting an application for grant of anticipatory bail or an interim measure of protection passed on such an application in accordance with law and the provisions made in the Code. On such challenges being initiated, the orders passed under sub-section (1) of Section 438 would not be liable to be construed as interlocutory orders. The Explanation also appears to be a clear manifestation and adoption of the recommendations made by the Law Commission in its reports noticed hereinbefore, namely, of the need to create an avenue to challenge orders passed on applications for anticipatory bail.

46. The question which however remains to be answered is whether the Explanation so appended would foreclose the right of parties to move the High

Court even after an application for anticipatory bail has come to be rejected by the Court of Sessions. The answer to this question must necessarily be in the negative for reasons which follow. At the very outset, it must be noted that Section 438 on its plain terms does not engraft or put in place such a bar. An order passed by the Sessions Court rejecting an application for grant of anticipatory bail is not conferred any finality. Of more significant import is the provision made in sub-section (7) which provides that if an application under Section 438 has been made by any person to the High Court, no application by the same person shall be entertained by the Court of Sessions. Accordingly once the High Court has been moved under Section 438 Cr.P.C. by way of an application, the same applicant cannot then and thereafter move the Court of Sessions. However and significantly no converse restriction stands placed so as to denude the High Court of the jurisdiction to entertain an application for grant of anticipatory bail even at the instance of a person who may have initially approached the Court of Sessions. The Court notes the provisions made in Section 397(3) of Cr.P.C. which do place such a restriction. However the absence of a similar provision speaks eloquently of a lack of legislative intent for such a prohibition being envisaged.

47. The insertion of the Explanation does not lead this Court to hold that it denudes this Court of the jurisdiction to entertain and decide an application for anticipatory bail notwithstanding a similar application having been denied by the Court of Sessions. The mere creation of a remedy cannot be read as debarring the jurisdiction of a superior Court. There must necessarily be an express legislative command and intendment in support of such a contention. The Court also bears in mind that while the Law Commission Reports did recommed the insertion of a provision denying the right of a second application for grant of anticipatory bail, that recommendation was not accepted. The Legislature while having the benefit of both those reports, chose not to introduce such a restriction. This only leads the Court to hold that there was a conscious decision to not introduce such a restraint and consequently the right of the High Court to entertain a prayer for anticipatory bail notwithstanding the rejection of such a prayer by the Court of Sessions stands preserved and affirmed.

48. On an overall analysis of the aforesaid legal position, it is therefore evident that while the Explanation may have created an avenue for an aggrieved person to challenge an order passed under Section 438(1), it cannot be construed or viewed as barring the jurisdiction of the High Court from entertaining an application for grant of anticipatory bail notwithstanding that prayer having been refused by the Court of Sessions.

QUESTION G- The period for which anticipatory bail should operate.

49. That then leaves the Court to deal with the last question which was framed relating to the period for which an anticipatory bail should operate. Undisputedly, the question of whether protection accorded under Section 438 should be limited to a fixed period or not has been referred for the consideration of a Larger Bench of the Supreme Court in terms of the order passed in **Sushila Aggarwal & Ors. Vs. State (NCT Of Delhi) & Anr**12. The questions formulated for the consideration of the Larger Bench read thus:

"(1) Whether the protection granted to a person under Section 438 CrPC should be limited to a fixed period so as to enable the person to surrender before the Trial Court and seek regular bail.

(2) Whether the life of an anticipatory bail should end at the time and stage when the accused is summoned by the court."

50. It becomes relevant to note that this issue was firstly dealt by the Constitution Bench in **Sibbia**, where the following observations came to be entered:

"42. There was some discussion before us on certain minor modalities regarding the passing of bail orders under Section 438(1). Can an order of bail be passed under that section without notice to the Public Prosecutor? It can be. But notice should issue to the Public Prosecutor or the Government Advocate forthwith and the question of bail should be re-examined in the light of the respective contentions of the parties. The ad-interim order too must conform to the requirements of the section and suitable conditions should be imposed on the applicant even at that stage. Should the operation of an order passed underSection 438(1)be limited in point of time? Not necessarily. The court may, if there are reasons for doing so, limit the operation of the order to a short period until after the filing of an FIR in respect of the matter covered by the order. The applicant may in such cases be directed to obtain an order of bail underSection 437 or 439 of the Codewithin a reasonably short period after the filing of the FIR as aforesaid. But this need not be followed as an invariable rule. The normal role should be not to limit the operation of the order in relation to a period of time."

51. Subsequently, in **Siddharam Satlingappa Mhetre Vs. State of Maharashtra and Others**13, the learned Judges of the Supreme Court summarize the legal position in the following terms:

"94. The proper course of action ought to be that after evaluating the averments and accusation available on the record if the court is inclined to grant anticipatory bail then an interim bail be granted and notice be issued to the Public Prosecutor. After hearing the Public Prosecutor the court may either reject the bail application or confirm the initial order of granting bail. The court would certainly be entitled to impose conditions for the grant of bail. The Public Prosecutor or the complainant would be at liberty to move the same court for cancellation or modifying the conditions of bail any time if liberty granted by the court is misused. The bail granted by the court should ordinarily be continued till the trial of the case.

95. The order granting anticipatory bail for a limited duration and thereafter directing the accused to surrender and apply for a regular bail is contrary to the legislative intention and the judgment of the Constitution Bench in *Sibbia case.*"

52. However, in **HDFC Bank Limited Vs. J.J. Mannan**14 after noticing the Constitution Bench decision in **Sibbia**, it was held:

"14. Referring to the decision of the Constitution Bench in *Gurbaksh Singh Sibbia* v. *State of Punjab*, wherein the application of Section 438 CrPC had been considered in detail, Mr Dutta submitted

that the said provision had been interpreted to be a beneficent provision relating to personal liberty guaranteed under Section 21 of the Constitution. Mr Dutta submitted that the Constitution Bench had observed that since denial of bail amounts to deprivation of personal liberty, the court should lean against the imposition of unnecessary restrictions on the scope of Section 438 CrPC.

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18. Furthermore, it has also been consistently indicated that no blanket order could be passed under Section 438 CrPC to prevent the accused from being arrested at all in connection with the case. To avoid such an eventuality it was observed in *Adri Dharan Das case* that anticipatory bail is given for a limited duration to enable the accused to surrender and to obtain regular bail. The same view was reiterated in *Salauddin case* wherein it was, inter alia, observed that anticipatory bail should be of limited duration only and primarily on the expiry of that duration or extended duration, the court granting anticipatory bail should leave it to the regular court to deal with the matter on an appreciation of evidence placed before it after the investigation has made progress or the charge-sheet is submitted.

19. The object of Section 438 CrPC has been repeatedly explained by this Court and the High Courts to mean that a person should not be harassed or humiliated in order to satisfy the grudge or personal vendetta of the complainant. But at the same time the provisions of Section 438 CrPC cannot also be invoked to exempt the accused from surrendering to the court after the investigation is complete and if charge-sheet is filed against him. Such an interpretation would amount to violence to the provisions of Section 438 CrPC, since even though a charge-sheet may be filed against an accused and charge is framed against him, he may still not appear before the court at all even during the trial.

20. Section 438 CrPC contemplates arrest at the stage of investigation and provides a mechanism for an accused to be released on bail should he be arrested during the period of investigation. Once the investigation makes out a case against him and he is included as an accused in the charge-sheet, the accused has to surrender to the custody of the court and pray for regular bail. On the strength of an order granting anticipatory bail, an accused against whom charge has been framed, cannot avoid appearing before the trial court.

21. If what has been submitted on behalf of the appellant that Respondent 1 has never appeared before the trial court is to be accepted, it will lead to the absurd situation that charge was framed against the accused in his absence, which would defeat the very purpose of sub-section (2) of Section 240 CrPC."

53. Again and more recently, three learned Judges in **Satpal Singh Vs. The State of Punjab**15 held:

"14. In any case, the protection under Section 438, Cr.P.C. is available to the accused only till the court summons the accused based on the charge sheet (report under Section 173(2), Cr.P.C.). On such appearance, the accused has to seek regular bail under Section 439 Cr.P.C. and that application has to be considered by the court on its own merits. Merely because an accused was under the protection of anticipatory bail granted under Section 438 Cr.P.C. that does not

mean that he is automatically entitled to regular bail under Section 439 Cr.P.C. The satisfaction of the court for granting protection under Section 438 Cr.P.C. is different from the one under Section 439 Cr.P.C. while considering regular bail."

54. **Mhetre** was a decision rendered by two learned Judges of the Supreme Court. The decision in **HDFC Bank Limited** was rendered by a Bench of coordinate strength. However, **Satpal Singh** which is the latest decision before us has been rendered by a Larger Bench comprising of the three learned Judges of the Court. Even the Bench of three learned Judges who presided over the matter of **Sushila Aggarwal & Ors** have made the following observations:

"9. Also having heard learned counsel appearing on both sides, we are of the *prima facie* view that the Constitution Bench in **Sibbia** (supra) has not laid down the law that once an anticipatory bail, it is an anticipatory bail forever.

10. In Sibbia (supra), this Court has briefly dealt with the question of duration of anticipatory bail. It seems to us that the discussion primarily pertained to grant of anticipatory bail at the pre-FIR stage (see paragraph 43 quoted below). It appears that there are indications in Sibbia (supra) that anticipatory bail may be for a limited period. To quote paragraphs 19, 40, 42 and 43:-

"19. ... While granting relief under Section 438(1), appropriate conditions can be imposed under Section 438(2) so as to ensure an uninterrupted investigation. One of such conditions can even be that in the event of the police making out a case of a likely discovery under Section 27 of the Evidence Act, the person released on bail shall be liable to be taken in police custody for facilitating the discovery. Besides, if and when the occasion arises, it may be possible for the prosecution to claim the benefit of Section 27 of the Evidence Act in regard to a discovery of facts made in pursuance of information supplied by a person released on bail by invoking the principle stated by this Court in *State of U.P. v. Deoman Upadhyaya* to the effect that when a person not in custody approaches a police officer investigating an offence and offers to give information leading to the discovery of a fact, having a bearing on the charge which may be made against him, he may appropriately be deemed so have surrendered himself to the police. The broad foundation of this rule is stated to be that Section 46 of the Code of Criminal Procedure does not contemplate any formality before a person can be said to be taken in custody: submission to the custody by word or action by a person is sufficient. For similar reasons, we are unable to agree that anticipatory bail should be refused if a legitimate case for the remand of the offender to the police custody under Section 167(2) of the Code is made out by the investigating agency.

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40. We have said that there is one proposition formulated by the High Court with which we are inclined to agree. That is proposition (2). We agree that a "blanket order' of anticipatory bail should not generally be passed. This flows from the very language of the section which, as discussed above, requires the applicant to show that he has "reason to believe" that he may be arrested. A belief can be said to be founded on reasonable grounds only if there is something tangible to go by on the basis of which it can be said that the

applicant's apprehension that he may be arrested is genuine. That is why, normally, a direction should not issue underSection 438(1)to the effect that the applicant shall be released on bail "whenever arrested for whichever offence whatsoever". That is what is meant by a "blanket order' of anticipatory bail, an order which serves as a blanket to cover or protect any and every kind of allegedly unlawful activity, in fact any eventuality, likely or unlikely regarding which, no concrete information can possibly be had. The rationale of a direction underSection 438(1)is the belief of the applicant founded on reasonable grounds that he may be arrested for a non-bailable offence. It is unrealistic to expect the applicant to draw up his application with the meticulousness of a pleading in a civil case and such is not requirement of the section. But specific events and facts must be disclosed by the applicant in order to enable the court to judge of the reasonableness of his belief, the existence of which is the sine qua non of the exercise of power conferred by the section.

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42. There was some discussion before us on certain minor modalities regarding the passing of bail orders under Section 438(1). Can an order of bail be passed under that section without notice to the Public Prosecutor? It can be. But notice should issue to the Public Prosecutor or the Government Advocate forthwith and the question of bail should be re-examined in the light of the respective contentions of the parties. The ad-interim order too must conform to the requirements of the section and suitable conditions should be imposed on the applicant even at that stage. Should the operation of an order passed underSection 438(1)be limited in point of time? Not necessarily. The court may, if there are reasons for doing so, limit the operation of the order to a short period until after the filing of an FIR in respect of the matter covered by the order. The applicant may in such cases be directed to obtain an order of bail underSection 437 or 439 of the Codewithin a reasonably short period after the filing of the FIR as aforesaid. But this need not be followed as an invariable rule. The normal role should be not to limit the operation of the order in relation to a period of time.

43. During the last couple of years this Court, while dealing with appeals against orders passed by various High Courts, has granted anticipatory bail to many a person by imposing conditions set out in Section 438(2)(i), (ii) and (iii). The court has, in addition, directed in most of those cases that (a) the applicant should surrender himself to the police for a brief period if a discovery is to be made under Section 27 of the Evidence Act or that he should be deemed to have surrendered himself if such a discovery is to be made. In certain exceptional cases, the court has, in view of the material placed before it, directed that the order of anticipatory bail will remain in operation only for a week or so until after the filing of the FIR in respect of matters covered by the order. These orders, on the whole, have worked satisfactorily, causing the least inconvenience to the individuals concerned and least interference with the investigational rights of the police. The court has attempted through those orders to strike a balance between the individual's right to personal freedom and the investigational rights of the police. The appellants who were refused anticipatory bail by various courts have

long since been released by this Court under Section 438(1) of the Code."

(Emphasis supplied)

11. In the light of the conflicting views of the different Benches of varying strength, we are of the opinion that the legal position needs to be authoritatively settled in clear and unambiguous terms."

55. Judicial propriety and discipline mandates this Court following the view expressed by a larger Bench in a subsequent decision. It would therefore be appropriate and correct to follow the view expressed by the Larger Bench of the Supreme Court in the decisions rendered after **Mhetre** as laying down the principle liable to be followed till such time as the question is authoritatively settled by the Larger Bench of the Supreme Court. Consequently, it must be held that an order granting anticipatory bail would be entitled to continue only till the Court summons the accused based on the report that may be submitted under Section 173(2) Cr.P.C. whereafter it would be open for the applicant on appearance to seek regular bail in accordance with the provisions made in Section 439 Cr.P.C.

CONCLUSIONS

56. In light of what has been held above, the Court records its conclusions on the questions formulated as under:-

A. Section 438 Cr.P.C. on its plain terms does not mandate or require a party to first approach the Sessions Court before applying to the High Court for grant of anticipatory bail. The provision as it stands does not require an individual first being relegated to the Court of Sessions before being granted the right of audience before this Court.

B. Notwithstanding concurrent jurisdiction being conferred on the High Court and the Court of Session for grant of anticipatory bail under Section 438 Cr.P.C., strong, cogent, compelling and special circumstances must necessarily be found to exist in justification of the High Court being approached first without the avenue as available before the Court of Sessions being exhausted. Whether those factors are established or found to exist in the facts of a particular case must necessarily be left for the Court to consider in each individual matter.

C. The words "exceptional" or "extraordinary" are understood to mean atypical, rare, out of the ordinary, unusual or uncommon. If the jurisdiction of the Court as conferred by Section 438 Cr.P.C. be circumscribed or be recognised to be moved only in exceptional situations it would again amount to fettering and constricting the discretion otherwise conferred by Section 438 Cr.P.C. Such a construction would be in clear conflict of the statutory mandate. The ratio of **Harendra Singh** must be recognised to be the requirement of establishing the existence of special, weighty and compelling reasons and circumstances justifying the invocation of the jurisdiction of this Court even though a wholesome avenue of redress was available before the Court of Sessions

D. What would constitute "special circumstances" in light of the nature of the power conferred, must be left to be gathered by the Judge on a due evaluation of the facts and circumstances of a particular case. It would be imprudent to exhaustively chronicle what would be special circumstances. It is impossible to either identify or compendiously postulate what would constitute special circumstances. **Sibbia** spoke of the

"imperfect awareness of the needs of new situations". It is this constraint which necessitates the Court leaving it to the wisdom of the Judge and the discretion vested in him by statute.

E. While the Explanation may have created an avenue for an aggrieved person to challenge an order passed under Section 438(1), it cannot be construed or viewed as barring the jurisdiction of the High Court from entertaining an application for grant of anticipatory bail notwithstanding that prayer having been refused by the Court of Sessions.

F. Till such time as the question with respect to the period for which an order under Section 438 Cr.P.C. should operate is answered by the Larger Bench, the Court granting anticipatory bail would have to specify that it would continue only till the Court summons the accused based on the report that may be submitted under Section 173(2) Cr.P.C. whereafter it would be open for the applicant on appearance to seek regular bail in accordance with the provisions made in Section 439 Cr.P.C.

57. Before parting and proceeding to deal with individual matters, it would be pertinent to enter the following note of caution. Section 438 Cr.P.C. came to be reintroduced in the State in June 2019. It provides a salutary and meaningful remedy to individuals in tune with the constitutional guarantee of personal liberty and provides a remedy to persons against the ignominy of unwarranted harassment and arrest. However in order to avail the remedy, it must be substantively and conclusively established that there is a genuine and imminent threat of arrest. An application for grant of anticipatory bail cannot rest on vague and unsubstantiated allegations nor can the application be instituted without the disclosure of material particulars in support of the percieved threat. An application under Section 438 Cr.P.C. would also not be entitled to be entertained at the behest of one who has failed to join or cooperate with the investigation or one against whom a proclamation of being absconding has come to be made. It would be worthwhile to recollect the following pertinent observations as made by the Supreme Court in **Rashmi Rekha Thatoi Vs. State of Orissa**16 while expounding on the parameters of the jurisdiction conferred by that provision:-

"25. In *Savitri Agarwal v. State of Maharashtra* [(2009) 8 SCC 325 : (2009) 3 SCC (Cri) 683] the Bench culled out the principles laid down in *Gurbaksh Singh* [(1980) 2 SCC 565 : 1980 SCC (Cri) 465 : AIR 1980 SC 1632] . Some principles which are necessary to be reproduced are as follows: (*Savitri Agarwal case* [(2009) 8 SCC 325 : (2009) 3 SCC (Cri) 683] , SCC pp. 333-34, para 24)

"24. ... (ii) Before power under sub-section (1) of Section 438 of the Code is exercised, the court must be satisfied that the applicant invoking the provision has reason to believe that he is likely to be arrested for a non-bailable offence and that belief must be founded on reasonable grounds. Mere "fear' is not belief, for which reason, it is not enough for the applicant to show that he has some sort of vague apprehension that someone is going to make an accusation against him, in pursuance of which he may be arrested. The grounds on which the belief of the applicant is based that he may be arrested for a non-bailable offence, must be capable of being examined by the court

objectively. Specific events and facts must be disclosed by the applicant in order to enable the court to judge the reasonableness of his belief, the existence of which is the sine qua non of the exercise of power conferred by the section.

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(vii) The provisions of Section 438 cannot be invoked after the arrest of the accused. After arrest, the accused must seek his remedy under Section 437 or Section 439 of the Code, if he wants to be released on bail in respect of the offence or offences for which he is arrested.

(viii) An interim bail order can be passed under Section 438 of the Code without notice to the Public Prosecutor but notice should be issued to the Public Prosecutor or to the Government Advocate forthwith and the question of bail should be re-examined in the light of respective contentions of the parties. The ad interim order too must conform to the requirements of the section and suitable conditions should be imposed on the applicant even at that stage."

58. Reverting to the facts of the present application, the Court notes that the FIR was registered on 11 July 2019. The Court of Sessions was moved sometime in October 2019 and the said application came to be dismissed by the Sessions Judge on 16 October 2019. In the entire petition, there is no allegation or affirmation that the applicant apprehends arrest. No factual foundation has been laid in the application except to the extent of an assertion that the applicant has been falsely implicated in the case. In the absence of even a rudimentary foundation having been laid with respect to the perceived apprehension of arrest, the Court comes to the conclusion that no ground has been made out for the grant of anticipatory bail to the applicant in the facts and circumstances of the present case.

59. Accordingly the prayer so made is **refused.**

(2019)12 ILR A906

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.12.2019

BEFORE
THE HON'BLE SURYA PRAKASH KESARWANI, J.

Election Petition No. 8 of 2017

Nawab Kazim Ali Khan ...Petitioner
Versus
Mohd. Abdullah Azam Khan...Respondent

Counsel for the Petitioner:
Sri Sayed Fahim Ahmad, Sri Anurag Asthana, Ms. Kalpana Sinha, Sri N.K. Ali Khan (In Person), Sri Raghav Nayar, Sri Rahul Agarwal, Sri Syed Fahim Ahmed, Ms. Archi Agarwal, Sri Shubham Agarwal, Sri Navin Sinha

Counsel for the Respondent:
Sri N.K. Pandey, Nazia Rafiq Khan, Sri R.P.S. Chauhan, Sri Safdar Ali Kazmi, Sri H.N. Mishra

A. Constitution of India - Article 173(b) - Representation of the People's Act 1951 – Disqualification of member - State Legislative election – a candidate is not qualified unless he has attained the age specified in the clause on the date fixed for scrutiny of nominations - it is beyond any cavil that in the event a person is elected who does not fulfill the constitutional requirements, the election would be void despite the fact that the

Returning Officer has accepted his nomination paper.

The respondent was not qualified to contest the election for member of legislative assembly in view of Article 173(b) of the constitution of India, inasmuch as the respondent was less than 25 years of age when he filed his nomination papers. (Para 4)

B. Evidence Law - Indian Evidence Act, Section 103 - Burden of Proof - the burden of proof to show that a candidate who was disqualified as on the date of the nomination would be on the election petitioner - the initial burden of proof that nomination paper of an elected candidate has wrongly been accepted is on the election petitioner. (Para 21, 56 & 57)

C. Evidence Law - Indian Evidence Act, Section 106 – Burden of proving fact especially within knowledge.

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 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. (Para 21)

Held: **-** The respondent was less than Twenty-Five Years of age on the date of filing nomination in State Legislative Election.(Para 55)

Election Petition Allowed. (E-7)

List of cases cited: -

1.Sushil Kumar Vs. Rakesh Kumar 2003 8 SCC 673, (paras 23 to 41, 44, 51, 79 and 80),

2. Mukarrab and others Vs. State of U.P. (2017) 2 SCC 210 (paras 26 to 29)

3.Misc. Bench No.13419 of 2018 (Smt. Parwati Kumari and others Vs. State of U.P. and others, (paras 8 and 13)

4.Zeba Haseeb @ Ankita Vs. State of U.P. And others 2015 (2) ADJ 215 (paras 16 and 17).

5.Brij Mohan Singh Vs. Priya Brat Narain Sinha, AIR 1965 SC 282 (para 20 and 21)

6.Birad Mal Singhvi Vs. Anand Purohit, 1988 Suppl. (1) SCC 604,

7.Thiru John Vs. The Returning Officer, AIR 1977 SC 1724 (paras 13,17,21,32,33)

8.Ravinder Singh Gorkhi Vs. State of U.P. (2006) 5 SCC 585

9.Sushil Kumar Vs. Rakesh Kumar 2003, 8 SCC 673 (paragraphs 28 to 36).

10.Hon'ble Supreme Court in Union of India and others Vs. Sugauli Sugar Works (P) Ltd. (1976) 3 SCC (para 36)

11.Zeba Haseeb @ Ankita and another Vs. State of U.P. And others 2015(2) ADJ 215 (Para 17, 24 & 26),

12.Mukarrab and others Vs. State of U.P. (2017) 2 SCC 210 (paras 20 to 29),

13.Sushil Kumar Vs. Rakesh Kumar 2003 (8) SCC 673, (paras 32).

14.Bench No.13419 of 2018 (Smt. Parvati Kumari and Ors. Vs. State of U.P. Thru. Principal Secretary Home & Ors.)

15.S.G. Vombatkere & Anr. Vs. Union of India

16.A. Shanmugam vs. Ariya Kshatriya Rajakula Vamsathu Madalaya Nandhavana Paripalanai Sangam and others, [(2012) 6 SCC 430] (Para-43.1 to 43.5)),

17.Amrit Lal Ambalal Patel Vs. Himathbhai Gomanbhai Patel, 1968 AIR 1455 1969 SCR (1) 277

18.Durga Shanker Mehta Vs. Thakur Raghuraj Singh, AIR 1954 SC 520

19.Sushil Kumar Vs. Rakesh Kumar 2003 8 SCC 673, (paras 23 to 41, 44, 51, 79 and 80),

20.Mukarrab and others Vs. State of U.P. (2017) 2 SCC 210 (paras 26 to 29)

21.Misc. Bench No.13419 of 2018 (Smt. Parwati Kumari and others Vs. State of U.P. and others, (paras 8 and 13)

22.Zeba Haseeb @ Ankita Vs. State of U.P. And others 2015 (2) ADJ 215 (paras 16 and 17).

23.Brij Mohan Singh Vs. Priya Brat Narain Sinha, AIR 1965 SC 282 (para 20 and 21)

24.Birad Mal Singhvi Vs. Anand Purohit, 1988 Suppl. (1) SCC 604,

25.Thiru John Vs. The Returning Officer, AIR 1977 SC 1724 (paras 13,17,21,32,33)

26.Ravinder Singh Gorkhi Vs. State of U.P. (2006) 5 SCC 585

27.Sushil Kumar Vs. Rakesh Kumar 2003, 8 SCC 673 (paragraphs 28 to 36).

28.Hon'ble Supreme Court in Union of India and others Vs. Sugauli Sugar Works (P) Ltd. (1976) 3 SCC (para 36)

29.Zeba Haseeb @ Ankita and another Vs. State of U.P. And others 2015(2) ADJ 215 (Para 17, 24 & 26),

30.Mukarrab and others Vs. State of U.P. (2017) 2 SCC 210 (paras 20 to 29),

31.Sushil Kumar Vs. Rakesh Kumar 2003 (8) SCC 673, (paras 32).

32.Bench No.13419 of 2018 (Smt. Parvati Kumari and Ors. Vs. State of U.P. Thru. Principal Secretary Home & Ors.)

33.S.G. Vombatkere & Anr. Vs. Union of India,

34.A. Shanmugam vs. Ariya Kshatriya Rajakula Vamsathu Madalaya Nandhavana Paripalanai Sangam and others, [(2012) 6 SCC 430] (Para-43.1 to 43.5)),

35.Amrit Lal Ambalal Patel Vs. Himathbhai Gomanbhai Patel, 1968 AIR 1455 1969 SCR (1) 277

36.Durga Shanker Mehta Vs. Thakur Raghuraj Singh, AIR 1954 SC 520

37.Sushil Kumar Vs. Rakesh Kumar 2003 8 SCC 673, (paras 23 to 41, 44, 51, 79 and 80),

36.Mukarrab and others Vs. State of U.P. (2017) 2 SCC 210 (paras 26 to 29)

37.Misc. Bench No.13419 of 2018 (Smt. Parwati Kumari and others Vs. State of U.P. and others, judgment dated 09.01.2019 (paras 8 and 13)

38. Zeba Haseeb @ Ankita Vs. State of U.P. And others 2015 (2) ADJ 215 (paras 16 and 17).

39. Brij Mohan Singh Vs. Priya Brat Narain Sinha, AIR 1965 SC 282 (para 20 and 21)

40. Birad Mal Singhvi Vs. Anand Purohit, 1988 Suppl. (1) SCC 604,

41.Thiru John Vs. The Returning Officer, AIR 1977 SC 1724 (paras 13,17,21,32,33)

42.Ravinder Singh Gorkhi Vs. State of U.P. (2006) 5 SCC 585

43.Sushil Kumar Vs. Rakesh Kumar 2003, 8 SCC 673 (paragraphs 28 to 36).

44.Hon'ble Supreme Court in Union of India and others Vs. Sugauli Sugar Works (P) Ltd. (1976) 3 SCC (para 36)

45.Zeba Haseeb @ Ankita and another Vs. State of U.P. And others 2015(2) ADJ 215 (Para 17, 24 & 26),

46.Mukarrab and others Vs. State of U.P. (2017) 2 SCC 210 (paras 20 to 29),

47.Sushil Kumar Vs. Rakesh Kumar 2003 (8) SCC 673, (paras 32).

48. Bench No.13419 of 2018 (Smt. Parvati Kumari and Ors. Vs. State of U.P. Thru. Principal Secretary Home & Ors.)

49. S.G. Vombatkere & Anr. Vs. Union of India,

50.A. Shanmugam vs. Ariya Kshatriya Rajakula Vamsathu Madalaya Nandhavana Paripalanai Sangam and others, [(2012) 6 SCC 430] (Para-43.1 to 43.5)),

51.Amrit Lal Ambalal Patel Vs. Himathbhai Gomanbhai Patel, 1968 AIR 1455 1969 SCR (1) 277

52.Durga Shanker Mehta Vs. Thakur Raghuraj Singh, AIR 1954 SC 520

(Delivered by Hon'ble Surya Prakash Kesarwani,J.)

1. Heard Shri Naveen Sinha, learned Senior Advocate, assisted by Ms. Kalpana Sinha and Shri Raghav Nayar, learned counsel for the election petitioner and Sri N.K. Pandey along with Sri S.A. Kazmi, learned counsel for the respondent - returned candidate.

Facts

2. Briefly stated facts of the present case are that notification under the Representation of the People's Act 1951 (hereinafter referred to as "the Act 1951") was issued notifying for election of U.P. State Legislative Assembly from 34-Suar, District - Rampur constituency. A public notice was also issued by the Returning Officer fixing the following programme for holding the election from the aforesaid constituency :-

(a) Date of filing nomination 25.01.2017

(b) date of scrutiny of nomination papers 28.01.2017

(c) Date of Withdrawal of nomination papers 30.01.2017

(d) Date of allotment of symbols 01.02.2017

(e) Date of poll 15.02.2017

(f) Date of counting 11.03.2017

3. After scrutiny and withdrawal of nomination papers, the election petitioner and six other persons including the respondent were the candidates who remained in the field for the election. Before the Returning Officer the Election petitioner filed an objection against the respondent alleging that the respondent is less than 25 years of age and, therefore, he is not qualified to contest the election in view of Article 173(b) of the Constitution of India. The objection was rejected by the Returning Officer. The election took place as per schedule in which the respondent - Mohd. Abdullah Azam Khan, son of Mohd. Azam Khan who had filed his nomination papers on 24.1.2017, was declared elected on 11.3.2017. He secured 1,06,443 votes. The petitioner stood 3rd and had secured 42,233 votes.

4. The election petitioner has filed the **present election petition** on the sole **ground** that *"the respondent was not qualified to contest the election for member of legislative assembly in view of Article 173(b) of the constitution of India, inasmuch as the respondent was less than 25 years of age when he filed his nomination papers and when he contested the election from 34 Suar, District-Rampur constituency."*

5. The **concise statement of material fact** in respect of ground reproduced above, have been mentioned in paragraphs 25 to 28 of the election petition, which are reproduced below :-

25. That the concise statement of material facts, in respect of ground A are as follows:

(i) That the respondent was born on 01.01.1993, and, therefore, as on the date of the nomination of scrutiny, the said Mohd. Abdullah Azam Khan, respondent was much below 25 years of age.

(ii) That the said Mohd. Abdullah Azam Khan - respondent appeared in Secondary School (Class-X) Examination in the year 2007. When he appeared for Secondary School examination, his roll number was 5260139. He appeared from St. Paul's School, Rampur, which was affiliated with the Central Board for Secondary Education, New Delhi.

(iii) That the respondent Mohd. Abdulla Azam Khan himself filled-up the admission form and examination form, and in his own handwriting, mentioned his date of birth as 01.01.1993. The record of the appearance and examination of respondent Mohd. Abdullah Azam Khan are available with the Central Board for Secondary Education, New Delhi.

(iv) That the Central Board for Secondary Education has issued the Secondary School Examination (Class-X) result bearing the roll number, name, mother's name and father's name and date of birth of respondent Mohd. Abdullah Azam Khan. As per the certificate, the mother of respondent is Tazeen Fatima and his father is Mohd. Azam Khan. The date of birth as recorded in the certificate for Secondary School Examination (Class-X) results of the respondent Mohd. Abdullah Azam Khan is 01.01.1993. A copy of the certificate for Secondary School Examination (Class-X) results of respondent Mohd. Abdullah Azam Khan obtained from the Central Board for Secondary Education is enclosed and marked as Annexure-4 to this petition.

(v) That the respondent Mohd. Abdullah Azam Khan appeared in Intermediate examination in the year 2009 from St Paul's School, Rampur. The said papers and records are available with St Paul's School, Rampur and the Central Board for Secondary Education (CBSE) Delhi.

(vi) That the petitioner has made best efforts to get the admission form, examination form as also documents pertaining to the Intermediate Examination of the respondent Mohd. Abdullah Azam Khan, but has not been able to get the same. The petitioner has only been able to get the certificate for Secondary School Examination (Class X) results of the respondent from the Central Board for Secondary Education.

(vii) That the respondent Mohd. Abdullah Azam Khan thereafter joined Galgotias University, Greater Noida for his Master's Degree where he has filled-up form for admission with the same date of birth. The record of respondent Mohd. Abdullah Azam Khan in respect of his Master's Degree is available with Galgotias University, Greater Noida.

26. That apart from the above facts, documents will be available to prove that the respondent Mohd. Abdullah Azam Khan was disqualified from contesting the election and, therefore, he should be treated as not eligible to contest the election.

27. That the election of the respondent Mohd. Abdullah Azam Khan is void on the facts and ground stated in the petition.

28. That in view of these facts and circumstances, it is abundantly clear that the respondent was no qualified to

contest the election for being elected as member from 32-Suar assembly constituency as he was less than 25 years either on the date of scrutiny or even on the date of the election; therefore, his election from 34-Suar assembly constituency in District Rampur is liable to be set aside by this Hon'ble Court.

6. It is admitted to the respondent that he is the son of Mohd. Azam Khan, who was MLA and the then Cabinet Minister (Urban Planning, Development and Local Bodies) in Government of Uttar Pradesh, during the year 2012 to 2017. The respondent filed written statement dated 11.11.2017 (paper No.A-7).

7. The **following issues** have been framed in the present election petition:-

ISSUES

(a) Whether as on the date of filing of nomination papers i.e. on 25.1.2017 and on the date of scrutiny of nomination papers i.e. 28.1.2017 and on the date of declaration of result i.e. 11.3.2017, the respondent had attained 25 years of age in terms of Article 173 (b) of the Constitution of India for contesting the election of Legislative Assembly from 34-Suar Constituency, District Rampur ?

(b) Whether under the facts and circumstances of the case, the respondent was eligible to contest the election of Legislative Assembly from 34-Suar Constituency of District Rampur on 25.1.2017 or 28.1.2017 or 11.3.2017 in terms of the provisions of Article 173(b) of the Constitution of India ?

(c) If the answer to Issue Nos. 1 and 2 are in negative, i.e. against the respondent, then its effect and to what relief the election petitioner is entitled ?

8. Both the parties have led documentary and oral evidences. Following papers have been admitted in evidence and have been marked as Exhibits as under :-

Petitioner's Evidences:

Ex. No.	**Paper No.**	**Brief particulars**
P1	**A 49/1-4 (A-49/1 to A 53/1)**	**Pass port application dated 06.07.2012** of the respondent **under his signature** mentioning his **date of birth 01.01.1993**, and **place of birth Rampur.** Earlier Pass port No.F-8757022, was issued on 28.08.2006 which expired on 31.12.2010. The new passport No. K7951741 was issued by the Pass Port Officer, Bareilly on 13.07.2012 for the period till 12.7.2022. Some papers of Ex.P-1 are mentioned below.
	A 50/1 - A 50/4	**Copy of Bank Pass Book** of the respondent of his bank account in State Bank of India, Nawab Gate, Rampur.
	A 51/1	Copy of **birth certificate No.3857 issued by Nagar Palika Parishad, Rampur** mentioning **date of birth** of the respondent as 01.01.1993, Place of birth Rampur, Registration No. RNPB 2012 - 03857, **date of Registration 28.06.2012** and date of issue 28.06.2012

A 52/2 – A52/3 Copy of respondent's **pass port no. F8757022**, dated 28.08.2006 mentioning date of birth as 01.01.1993

A 53/1 :Passport **preview details of pass port No.K-7951741, dated 13.07.2012** mentioning respondent's **date of birth as 01.01.1993** and old pass port No.F8757022, dated 28.08.2006

P-2 A-60/1-2 :Copy of the **respondent's pass port application (A-60/1 dated 10.01.2018** mentioning his **date of birth as to A-78) 30.09.1990** and **place of birth Lucknow**

A-61/1 "on line appointment receipt" issued by Ministry of External Affairs, Government of India for the aforesaid Passport application dated 08.01.2018

A-62/1-3 Copy of the respondent's **pass port No. K7951741**, **dated 13.07.2012** bearing his **date of birth as 01.01.1993** and **entries of**

departure/arrival dated 30.04.2013, 05.05.2013, 09.06.2015 and 26.07.2016. A-62/3 is

respondent's **Visa dated 09.07.2014** mentioning his **date of birth as 01.01.1993**

A-63/1 Birth certificate dated 21.1.2015 issued by Registrar Birth and Death, Lucknow, mentioning date of birth 30.09.1990, place of birth - Queen Mary's Hospital, Lucknow, U.P., and Registration **No.NNLKO - B-2015-292611 and date of registration 21.01.2015**

A 64/1 Order of registrar birth and death, Nagar Palika Parishad, Rampur, dated 30.1.2015, cancelling the birth certificate of the respondent dated 28.6.2012, as under :-

"**श्री मोहम्मद अब्दुल्ला आजम खान पुत्र श्री मोहम्मद आज़म खान निवासी मो 0 घेर मीर बाज खां ए जेल रोड रामपुर को इस कार्यालय द्वारा दिनांक** 28.06.12 **को निर्गत जन्म प्रमाण पत्र आज दिनांक** 30.01.15 **को निरस्त किया जाता है।** ठ

A-65/1 Copy of respondent's U.P. Legislative Assembly Identity Card dated 14.03.2017

A-66/1 Copy of Adhar Card of the respondent's dated 7.3.2015

A-67/1 Copy of respondent's driving licence

A-68/1 Copy of respondent's voter I.D. Card dated 18.07.2016.

A-69/1 Copy acknowledgment dated 10.1.2018 issued by Regional Passport Officer, Bareilly for application dated 10.1.2018

A-70/1 Copy of respondent's application dated 10.1.2018 to the Regional Passport Officer Bareilly stating that "**I had applied for reissue of passport due to change of date of birth and place of birth.**".

A-75/2 Letter of Regional Passport Officer, Bareilly, dated 11.01.2018 to Registrar birth and death, Municipal Corporation, Lucknow for verification of birth certificate of the respondent.

A-76/1 Letter of the Registrar Birth and death, Nagar Palika Parishad, Rampur, addressed to Regional Passport Officer, Bareilly, confirming issuance of letter dated 30.1.2015 about cancellation of birth certificate of the respondent.

P3 A-80/1 Copy of birth certificate of Mohd. Abdulla Azam Khan (Respondent) dated 28.06.2012 bearing to date of registration RNPB 9012-03857, dated 28.06.2012 issued by Nagar Palika Parishad, Rampur on the basis of original record of birth.

This birth certificate was got cancelled by the respondent by order of the Registrar dated 30.01.2015

P4 **A-25/1 Copy of Secondary School examination Class X result 2007**, issued by Central Board of Secondary Education showing respondent's **date of birth of as 01.01.1993**

Oral evidence of Election-petitioner

P.W. 1- Kazim Ali Khan (Election-petitioner)
P.W. 2 - Mohd. Naseem, Passport Officer, Bareilly
P.W. 3 - Mohd. Ateer Ansari, Junior Passport Assistant, Bareilly
P.W. 4 - Tej Pal Singh Verma, Chief Sanitation and Food Inspector /Deputy Registrar Birth and Death, Nagar Palika Parishad, Rampur

Defendant's/respondent's Evidences

Documentary Evidence

9.

Ex. No.	Paper No.	Brief Particular
R 1	A 30	List of candidates who filed nomination papers
R 2	A 31	Symbol allotment list issued by Returning Officer
R	A32	Declaration of results by Returning Officer on

3		11.03.2017
R 4	A100/1-2	Copy of page no.174 of **EOT Register of Queen Mary's Hospital, Lucknow,** containing **entries of admission of patients dated 29.09.1990**, and **thereafter entries dated 7th August 1990, 22.09.1990 and 24.09.1990**
R 5	A101/1-2	Copy of page No.225 of **MLR Register of Queen Mary's Hospital** bearing cuttings and overwriting and no date of admission of Mrs. Tazeen Fatima (mother of the respondent)
R 6	A37	**Duplicate birth certificate dated 21.04.2015** issued by **Queen Mary's Hospital** of K.G. Medical University containing **baby's name** "baby of Tazeen Fatima" born on 30.09.1990
R 7	A38/1-2	**Discharge ticket** of indoor patient Tazeen Fatima in Queen Mary's Hospital admitted on 07.08.1990 and discharge on 24.10.1990
R 8	A41/1-3	**Information dated 12.09.2017 given by Professor Vineeta Das,** HOD King George Medical University to the mother of the respondent **under the RTI Act 2005** intimating that **as per rules of the hospital,** record of **only 10 years is kept.** Since matter is of 1990, therefore, true copy of admission register containing entries is not possible to be given. Admission slip is kept by the patient, **discharge certificate (paper No. A38/1-2) as produced by Tazeen Fatima is attested.**
R 9	A42/1-5	**Information given by King George Hospital** by letter dated 19.09.2017 to the respondent **under the RTI Act based on the information of Professor Vineeta Das,** HOD King George Medical University by letter dated 12.09.2017 addressed to the Information Officer and mentioning that : "**मोहम्मद अब्दुल्लाह आज़म खान के जिस पृष्ठ पर जन्म का विवरण अंकित है** उसकी सत्यापित प्रतिलिपि एवं उसके प्रथम पृष्ठ की सत्यलिपि इस पत्र के साथ संलग्न है। सूचनार्थ प्रेषित "(paper No.A100/2)
R 10	A47/1-7	Copy of pay bill Register of Rajkiya Mahila PG College, Rampur for the month of August 1990, December 1992, January 1993 and February 1993
R 11	**A95/1-34**	Copy of service book of Tazeen Fatima, lecturer, political science who was made permanent by Government Order dated 11.02.1997 w.e.f. 20.04.1988. She submitted her **GIS nomination form under his own signature on 26.04.2001**(A95/25) nominated Mohd. Azam Khan (husband) 53 years -50%, Mohd Adeel Ajam Khan (Bitu) (son) 15 years - 25% and **Mohd. Abdullah Azam Khan (son) 8 years** - 25 %
R 12	A-96/1-5	**Application of Dr. Tazeen Fatima, dated 17.01.2015** (mother of the respondent) **to Nagar Swastha Adhikari, Nagar Nigam, Lucknow,** requesting him **to issue birth certificate of her son Mohd. Abdullah Azam Khan as per enclosed affidavit.** Her son's birth may be got verified from the records of Queen Mary's Hospital.
	A96/3	**Computer generated sheet of Nagar Nigam, Lucknow,** mentioning date of birth registration 21.012015, date of birth 30.09.1990 and name Mohd. Abdullah Azam Khan, place of birth - Queen Mary's Hospital, dated 21.4.2015
	A96/4-5	**Photostat copy of birth register of Nagar Nigam, Lucknow containing entry in the name of Abdullah Mohd. Azam Khan recorded in the register on 30.09.1990. Above it on A95/4 are two entries of birth recorded on 07.02.1992 and 25.06.1993 bearing order of some officer to record the birth. The next page (A95/5) starts with the date 02.10.1990 but at the bottom of the page dates are 26.09.1990 and 27.09.1990**

Oral Evidence of Defendant/respondent

10.

D.W.-1 - Dr. Shailendra K. Tiwari, Assistant Director of Higher Education, U.P. Prayagraj

D.W.-2 - Dr. Archana Dwivedi, Additional Municipal Commissioner, Lucknow.

D.W.-3 - Dr. Uma Singh, Sr. Gynecologist Queen Mary's Hospital (Department of Obst. & Gyno.)

D.W.-4 - Dr. Vineeta Das - HOD Obst. & Gyno., Queen Mary's Hospital, Lucknow

D.W.-5 - Dr. Tazeen Fatima, (mother of the respondent)

D.W.-6 - Dr. Vandana Sharma - Principal Rajkiya Mahila Post Graduate Degree College, Rampur.

D.W.-7 - Arun Josheph Dayal. Director Saint Paul School, Civil Line, Rampur

D.W.-8 - Dr. Satibir Sing Ken, Radiologist, District Hospital, Rampur

D.W.-9 - Shahzeb Khan, friend of father of the respondent

D.W.-10 - Mohd. Abdullah Azam Khan, respondent

11. The witnesses as aforementioned were examined and cross examined by the parties.

Submissions on behalf of Election-petitioner

12. **Sri Navin Sinha, learned counsel for the petitioner submits as under:**

(i) Article 173 (b) of the Constitution of India provides that person shall not be qualified to be chosen to fill a seat in the legislature of a State unless he is, in the case of a seat in the legislative assembly, not less than 25 years of age and, in the case of a seat in the legislative council not less than 30 years of age. Therefore, the respondent being less than 25 years of age as on the date of filing of nomination papers, on the date of scrutiny and on the date of declaration of result was not qualified to contest the election of the State legislative assembly. Therefore, his election is null and void.

(ii) The facts in support of the ground to challenge the election of the respondent are mentioned in paragraph 25 and sub paragraph of the election petition which are reiterated.

(iii) Ex. P-4 (Paper No. A25/1) is the Class X mark sheet/certificate of the respondent issued by the Central Board of Secondary Education in the year 2007 in which respondent's date of birth is recorded as 01.01.1993. As per Ex. P-1, P-2 and P-3, also the date of birth of the respondent is 01.01.1993. In paragraph 13 of the Election petition, the election petitioner has clearly stated that the date of birth 30.09.1990 as mentioned in the Adhar Card is not the correct date of birth of the respondent - Mohd. Abdullah Azam Khan and infact the certificate of Secondary School Examination (Class 10th) of the respondent issued by Central Board of Secondary Education New Delhi correctly reflects his date of birth. This paragraph has been replied by the respondent in paragraph 13 of the written statement in which he has not denied the Ex. P4 which has also been filed as Annexure 4 to the Election-petition and instead he merely stated that his date of birth is incorrectly mentioned or recorded as 01.01.1993 in the certificate for Secondary School Examination (Class 10th) issued by CBSE, New Delhi, for which he has already taken steps for correction. Thus, it has been well proved that the date of birth of the respondent has always been recorded as 01.01.1993 from the very beginning. He has also disclosed his date of birth as 01.01.1993 while obtaining passport in the year 2006 and in the year 2012. As per birth certificate issued by Registrar of Birth and Death, Nagar Palika Parishad, Rampur, the date of birth of the respondent is 01.01.1993. The witness have also proved his date of birth as 01.01.1993. Even her mother has filed a nomination form for group insurance scheme in the year 2001 in which she has mentioned age of the respondent to be 8 years which also shows the birth year of the respondent to be the year 1993. Thus, from the evidences it has been well established that the respondent was born in the year 1993 and not on 30.09.1990.

(iv) **In paragraphs 54 and 55 of the written statement the respondent has stated that in the year 2015 while he was pursuing his studies of M.Tech and was forwarding towards his carrier/job, he scrutinised his educational records and then came to know that his date of birth is incorrectly recorded as 01.01.1993 in place of 30.09.1990 and then he took immediate steps for correction of the same by filing an application on 23.03.2015** under the provisions of the Examination bye laws of the CBSE, New Delhi. The CBSE has not accepted the application of the respondent. Thus, his date of birth as per Clause 10th mark sheet/certificate continues to be 01.01.1993 which is also supported by various documentary and oral evidences on record.

(v) The alleged Adhar Card and voter ID Card are not proof of age or birth. That apart all these papers being relied by the respondent were obtained after March 2015. The evidence of D.W. 3 - Dr. Uma Singh to prove the duplicate birth certificate dated 21.04.2015 and that a male child born to the mother of the respondent are wholly untrustworthy and has no basis. That apart D.W. 3 herself stated that she can not say that the child was born to Tazeen Fatima on 30.09.1990 is the respondent. She admitted that the register produced by her is not authenticated and does not bear signatures of any Officer or staff of the hospital. She also admitted that she has not made entries regarding birth of a child by Tazeen Fatima on 30.09.1990. As per witnesses of the respondent the entries in the birth register of Nagar Nigam, Lucknow, is made on the basis of intimation received from the hospital but no evidence has been led either that the hospital sent the intimation to the Nagar Nigam, Lucknow or the Nagar Nigam, Lucknow, received such an intimation. In any case if actually any intimation was given by the Hospital to the Nagar Nigam, Lucknow, regarding birth of the respondent then the birth would have been registered on 30.09.1990 or within one or two days of the receipt of the alleged intimation from the Hospital but the birth certificate of the respondent has been issued by the Nagar Nigam, Lucknow, on mere asking by few lines affidavit of the mother of the respondent asking the Nagar Nigam, Luckow, to issue birth certificate. The Birth certificate so issued is a complete nullity particularly in view of the provisions of Section 13 of the Registration of Birth and Death Act. The birth certificate issued by the Nagar Nigam, Lucknow dated 21.01.2015 is manipulated and bogus.

(vi) The copy of EOT register and MLR register as well as oral evidence led by the respondent are untrustworthy and does not prove that the respondent's date of birth is 30.09.1990. Infact these evidences are the result of manipulation and fabrication of record.

(vii) Father of the respondent Mohd. Azam Khan, was the Cabinet Minister in the U.P. Government in the year 2015 holding portfolio "Urban Planning and Development and Local Bodies" and the Nagar Nigam, Lucknow and Nagar Palika Parishad, Rampur both were under his ministry. The birth certificate issued by Nagar Nigam, Lucknow and cancellation order of the old birth certificate of Nagar Palika Parishad, Rampur are false, fabricated and procured manipulated piece of papers. These papers have been procured in breach of the Provisions of the Act. The alleged birth register shown by D.W. 2 is based on

manipulation. After the birth certificate was procured by the respondent from the Nagar Nigam, Lucknow, then the entire papers relating to his birth certificate issued by Nagar Palika Parishad, Rampur were shown to have been burnt in an alleged fire on 08.05.2015 in the office of the Nagar Palika Parishad, Rampur.

(viii) The Nagar Nigam, Lucknow has shown the date of registration of birth of the respondent on 21.01.2015 but shown the receipt of information of birth of the respondent in the month of April 2015 which shows that the birth certificate issued by the Nagar Nigam, Lucknow is false and is the result of manipulation and influence.

(ix) No conclusion can be drawn regarding the age of the respondent on the basis of Medical Board report dated 27.01.2017 (paper No.A-40 filed by the respondent alongwith list of papers). D.W. 8 - Dr Satibir Singh in his cross examination could not explain the conclusion of average age of 26 years. Therefore, no conclusion can be drawn about the age of the respondent on the basis of opinion of the medical board and that too against the documentary evidences.

(x) Entire family of the respondent is well educated. He himself is M.Tech. Her mother was a Professor of Political Science in a Degree College. His father is also highly educated and is a very active politician and has been Cabinet Minister in the State Government. From the very beginning his date of birth has always been recorded in various Government record as 01.01.1993. The respondent himself has applied for various certificates, PAN and Pass Port mentioning his date of birth as 01.01.1993. Therefore, the stand taken by the respondent in the present election-petition that while scrutinising his educational certificate in the year 2015 he came to know that his date of birth is incorrectly mentioned in Class 10th marksheet/certificate as 01.01.1993 is false. It is merely to contest the election that the respondent got falsely changed his date of birth.

(xi) The question of burden of proof has become academic inasmuch as both the parties have led their evidences on the point of age of the respondent.

(xii) Section 35 of the Evidence Act only provides for presumption of relevant fact of entries made by a public servant to discharge his official duty. Entries of such record can be proved by producing in evidence the person responsible for maintaining the register and for making entries therein. No such person responsible for maintaining the register and for making entries in EOT register, MLR register and birth register of the Nagar Nigam, Lucknow, were produced by the respondent in evidence. Even D.W. 4 is the head of the Department of Obst. & Gyno. of King George Hospital/Queen Mary's Hospital and she has stated in a letter addressed to the Information Officer that no record is kept by the Hospital beyond 10 years and, therefore, it is not possible to give copy of entries of the year 1990. However, surprisingly unauthinticated unsigned EOT and MLR registers were produced by D.W.-3 and D.W.-4 in evidence. D.W.-2 Dr. Archana Dwivedi, Assistant Municipal Commissioner is not the person who has maintained or made entries in the birth register of the Nagar Nigam, Lucknow. The alleged birth register also does not bear signature of any Officer or employee. It is not an authenticated register. It has not been maintained in terms of the provisions of

the Registration of Birth and Death Act and the Rules framed thereunder. Therefore, the birth certificate issued by the Nagar Nigam, Lucknow on the basis of such a register is of no consequence, unproved and totally irrelevant. Even the procedure as stated by D.W.-3 and D.W. 4 was not adopted while issuing duplicate birth certificate of Queen Mary's Hospital.

13. Lastly, he submitted that as per documentary evidences on record the date of birth of respondent is 01.01.1993 and he was below 25 years of age at the time of filing of his nomination papers, scrutiny of the nomination papers and declaration of the result. Therefore, his election is null and void as he was not qualified to contest the election. Consequently, his election deserves to be set aside.

14. Sri Sinha has relied upon judgments of Hon'ble Supreme Court in the case of **Sushil Kumar Vs. Rakesh Kumar 2003 8 SCC 673, (paras 23 to 41, 44, 51, 79 and 80), Mukarrab and others Vs. State of U.P. (2017) 2 SCC 210 (paras 26 to 29)** on the point of Ossification test and the judgment of this Court in **Misc. Bench No.13419 of 2018 (Smt. Parwati Kumari and others Vs. State of U.P. and others, judgment dated 09.01.2019 (paras 8 and 13) and in Zeba Haseeb @ Ankita Vs. State of U.P. And others 2015 (2) ADJ 215 (paras 16 and 17).**

Submissions on behalf of the respondent

15. Sri N.K. Pandey, learned counsel for the respondent submits as under:-

(i) Onus is on the election petitioner to adduce evidence in support of Issue Nos.(a) & (b) in view of the provisions of Order XVIII Rule 2(1) of the CPC.

(ii) The election-petitioner has failed to file a certified copy of the Class 10th marksheet/certificate of the respondent issued by CBSE. Therefore, such a certificate can not be relied. It is an internet copy downloaded from the website of the CBSE Board and not a copy issued by the CBSE Board.

(iii) The news paper cutting etc. as alleged in the election petition, have neither been filed in evidence nor could be proved by the election-petitioner.

(iv) The respondent has clearly stated in paragraph 16 of the written statement that his date of birth was incorrectly recorded as 01.01.1993 in the certificate of Class 10th examination.

(v) In paragraph 51 of the written statement it was explained that four issues were born to the mother of the respondent out of which only two survived, namely, the respondent and his elder brother Mohd. Adil. Complete details in this regard has been given in paragraphs 48 and 49 of the written statement.

(vii) Document No.1 filed alongwith the election petition contains some document which were not even part of nomination papers.

(viii) The date of birth mentioned in the pass port of the respondent issued on 10.01.2018 correctly records his date of birth as 30.09.1990 and the date of birth was lawfully got corrected.

(viii) The P.W.- 4 is which the authorised Officer/Deputy Registrar of Nagar Palika Parishad, Rampur, who has stated that entire records relating to birth of the respondent were burnt in fire on 28.05.2015.

(ix) Respondent has well proved by documentary as well as oral evidence that he was born on 30.09.1990 and not on 01.01.1993.

(x) The birth of the respondent on 30.09.1990 is further proved from the facts that mother of the respondent's took maternity leave from 07.08.1990 to 04.11.1990(Ex R11).

16. In support of his submissions Sri Pandey has relied upon the judgments of Hon'ble Supreme Court in **Brij Mohan Singh Vs. Priya Brat Narain Sinha, AIR 1965 SC 282 (para 20 and 21)** regarding mentioning of wrong date of birth in School Certificate, **Birad Mal Singhvi Vs. Anand Purohit, 1988 Suppl. (1) SCC 604**, regarding burden of proof to be on the election-petitioner, **Thiru John Vs. The Returning Officer, AIR 1977 SC 1724 (paras 13,17,21,32,33)** holding that since birth certificate was lost it could not be produced and, therefore, it must be held to be a neutral circumstances, **Ravinder Singh Gorkhi Vs. State of U.P. (2006) 5 SCC 585** on the point of Section 35 of the Evidence Act and the judgment of Hon'ble Supreme Court in **Sushil Kumar Vs. Rakesh Kumar 2003, 8 SCC 673 (paragraphs 28 to 36)**.

Discussion, Analyses of Evidences and Findings

17. I have carefully considered the submissions of learned counsels for the parties and perused the records of the case and evidences led by the parties. Since issues No. (a) & (b) are interlinked, therefore, both these issues are being decided together.

Issue No. (a) & (b)

18. The whole controversy involved in the present election-petition is as to whether the respondent-winning candidate was below 25 years of age and thus not qualified to contest election from legislative assembly 34-Suar, District - Rampur, assembly constituency, under Article 173(b) of the Constitution of India, as on the date of filing nomination paper i.e. 25.01.2017, on the date of scrutiny of nomination paper i.e. 28.01.2017 or on the date of declaration of result i.e. 11.03.2017.

19. The respondent-winning candidate has set up the case in defence that his date of birth in Secondary School examination Class X result 2007 mark sheet was incorrectly mentioned as 01.01.1993 instead of 30.09.1990 and he came to know about it for the first time in the year 2015 while he was pursuing his studies of M.Tech. and was forwarding towards his carrier/job. Therefore, he took steps for correction of his date of birth as 30.09.1990 in place of wrongly mentioned date of birth 01.01.1993. However, date of birth has not yet been corrected in Class X CBSE Marksheet certificate 2007. On the other hand the election-petitioner has taken the stand that the respondent was born in the year 1993 and thus being below 25 years of age, he was not qualified to contest election of legislative assembly in view of provisions of Article 173(b) of the Constitution of India and, therefore, his election as member legislative assembly from 34-Suar, District - Rampur, assembly constituency, is liable to be set aside and be declared null and void. The election petitioner as well as the winning candidate/respondent have led various oral and documentary evidences as aforementioned.

Evidence of Birth Year 1993

20. **Following documentary evidences, record birth year of the respondent to be the year 1993** (01.01.1993) :-

(i) Ex. P4 - paper No.A-25/1 - **Copy of secondary school examination Class 10th result 2007** issued by Central Board of Secondary Education.

(ii) Ex. P1 - paper No.A-52/2-3, copy of respondent's **pass port no. F8757022, dated 28.08.2006** mentioning his date of birth 01.01.1993.

(iii) Ex. P1 - paper No.A-51/1 - copy of **birth certificate No.3857 of the respondent issued by Nagar Palika Parishad, Rampur,** showing date of birth of the respondent as 01.01.1993 and date of Registration 28.06.2012.

(iv) Ex. P1 - paper No.A-49/1-4, **respondent's pass port application dated 06.07.2012, filed by him under his signature** mentioning his date of birth as 01.01.1993, and place of birth Rampur.

(v) Ex. P-1 - paper No.53/1, **Pass port preview details of respondent's pass port No. K-7951741, dated 13.07.2012** and Ex. P-2 - paper No.A62/1-3, copy of respondent's pass port No. K-7951741, dated 13.07.2012 bearing date of birth as 01.01.1993 and entries of departure/arrival dated 30.04.2013, 05.05.2013, 09.06.2015 and 26.07.2016 and **Visa dated 09.07.2014** all mentioning date of birth as 01.01.1993.

(vi) Ex.R-11 (Paper No.A95/1-34) is the copy of service book of the respondent's mother filed by the respondent in evidence and proved by the D.W.-1. It contains **G.I.S. Nomination form signed and submitted by the respondent's mother (D.W.-5) on 26.04.2001** mentioning respondent's age to be 8 years.

(vii) Ex. P3 - paper No.80/1, copy of respondent's birth certificate dated 28.06.2012, issued by Nagar Palika Parishad, Rampur, issued on the basis of original record of birth. This birth certificate was subsequently cancelled by the Registrar on 30.01.2015 on the application of the respondent.

Burden of Proof

21. The law with regard to burden of proof in election-petitions with regard to the age of a person and Section 103 of the Indian Evidence Act, has been authoritatively pronounced by Hon'ble Supreme Court in paragraphs 28 to 32 of the judgment in the case of **Sushil Kumar (supra)** which is reproduced below:-

"28. It is no doubt true that the ***burden of proof*** *to show that a candidate who was disqualified as on the date of the nomination would be* ***on the election petitioner.***

29. It is also true that the initial burden of proof that nomination paper of an elected candidate has wrongly been accepted is on the election petitioner.

30. In ***terms of Section 103 of the Indian Evidence Act, however, the burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.***

31. Furthermore, in relation to certain matters, ***the fact being within the special knowledge of the respondent, the burden to prove the same would be on him in terms of Section 106 of the Indian Evidence Act.*** *However, the question as to whether the burden to prove a particular matter is on the plaintiff or the defendant would depend upon the nature*

of the dispute. [See Orissa Mining Corporation and another vs. Ananda Chandra Prusty, AIR 1997 SC 2274].

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 and Others vs. Sugauli Sugar Works (P) Ltd., (1976) 3 SCC 32,(Para 14) and Cox and Kings (Agents) Ltd. vs. Their Workmen and Others, AIR 1977 SC 1666, (Para 36)].* ***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."***

(Emphasis supplied by me)

22. Applying the aforesaid settled principles of law, I find that the election-petitioner has discharged the initial burden of proof with regard to the age of the petitioner as has already been discussed in earlier paragraphs of this judgment. That apart in the present set of facts both the parties have adduced evidence on the question of age, therefore, the question of onus of proof becomes academic as held by **Hon'ble Supreme Court in Union of India and others Vs. Sugauli Sugar Works (P) Ltd. (1976) 3 SCC (para 36)** which have been relied by the Hon'ble Supreme Court in para 32 of the judgment in the case of **Sushil Kumar (supra).**

Educational Certificate, Passports & Visa

23. The petitioner has set up case that the respondent was below 25 years of age when he filed nomination to contest the aforesaid assembly election. To prove this fact the election-petitioner has filed in evidence Ex.P-1, P-3 and P-4 as mentioned in Para 20 above in which respondent's date of birth is mentioned as 01.01.1993. The respondent has not disputed this fact but stated in paragraph 54 and 55 of the written statement that while scrutinising his Educational records in the year 2015 he came to know that his date of birth is incorrectly recorded as 01.01.1993 in place of 30.09.1990. The respondent and his parents are highly educated and socially and politically active. His father was Cabinet Minister in the U.P. State Government, His mother has been Professor and is sitting Member of Rajya Sabha. He himself is M.Tech. He has travelled to foreign countries several times on the basis of his passport obtained in the year 2006 and 2012 and visa in the year 2014 in which his date of birth was recorded as 01.01.1993 as disclosed by him. He obtained the pass port by moving an application under his own signature in the year 2006 and thereafter in the year 2012 (Ex. P-1 - Paper No.A-49/1-4) in which he himself mentioned his date of birth as 01.01.1993. He obtained visa and travelled to foreign countries prior to and subsequent to the year 2015 and always mentioned his date of birth as 01.01.1993. **His parents got registered his birth with the Registrar of Birth Nagar Palika Parishad, Rampur, mentioning his date of birth as 01.01.1993.** When the Officer-in-charge/Sub-Registrar, Birth

and Death, Nagar Palika Parishad, Rampur, appeared in witness box as P.W.4, he did not produce the original records on the basis of which the birth certificate of the respondent bearing **Registration No. RNPB-03857, dated 28.06.2012 Rampur** was issued and instead merely produced the computer generated copy of birth certificate of the respondent. He stated that the entire record of the aforesaid birth certificate has burnt in fire on 08.05.2015 after the Registrar Birth and Death, Nagar Palika Parishad, Rampur, cancelled it on 30.01.2015. Thus, the stand taken by the respondent in paragraph 54 and 55 of the written statement is not true. **The respondent Has always been aware of the fact that in educational certificates and pass port etc. his date of birth is mentioned as 01.01.1993.**

24. In his cross examination the respondent i.e. D.W.-10 has stated that he came to know in the year 2015 that his date of birth is mentioned as 01.01.1993 in Class 10th mark sheet. This is wholly unbelievable and apparently untrue in view of the fact that the respondent has obtained passport in the year 2006 and thereafter in the year 2012 and also obtained visa in the year 2014 and in all these papers his date of birth is mentioned as 01.01.1993. He travelled several times to foreign countries on the basis of the aforesaid passport and visa in which his date of birth is clearly mentioned as 01.01.1993. Facts in detail in this regard have already been discussed in earlier paragraphs of this judgment. In his evidence the respondent has not denied the passport obtained by him in the year 2006 and in the year 2012 or the visa obtained in the year 2014.

Birth Certificate issued by Nagar Nigam, Lucknow

25. **Now, I proceed to examine whether birth certificate bearing Registration No.NNLKO - B-2015-292611 and date of registration 21.01.2015, issued by Registrar Birth and Death, Lucknow, on 21.01.2015 showing date of birth of the respondent as 30.09.1990, is a valid piece of paper/reliable evidence?**

26. **D.W.-2 - Dr. Archana Dwivedi,** Additional Municipal Commissioner, Municipal Corporation, Lucknow, produced the complete original file relating to issuance of birth certificate of the respondent dated 21.01.2015 which contains merely the application of the respondent's mother and her affidavit both dated 17.01.2015 and a computerised sheet bearing particulars of registration of birth of the respondent. Copy of the aforesaid application and affidavit both dated 17.01.2015 submitted by the mother of the respondent before the Nagar Nigam Lucknow and filed in evidence as Ex.R-12 are pasted below (scanned copy):-

A-96/1

दिनांकः 17.01.2015

सेवा में,

नगर स्वास्थ्य अधिकारी,
नगर निगम लखनऊ।

विषयः तत्काल एवं अपरिहार्य आवश्यकता के दृष्टिगत जन्म प्रमाण–पत्र निर्गत करने हेतु प्रार्थना–पत्र।

महोदय,

निवेदन है कि मेरे पुत्र मोहम्मद अब्दुल्लाह आज़म ख़ाँ का जन्म लखनऊ महानगर में दिनांक 30 सितम्बर, 1990 को क्वीन मेरीस हास्पिटल, (किंग जॉर्ज मेडिकल यूनिवर्सिटी) में हुआ था। किन्हीं अति आवश्यक एवं अपरिहार्य कारणों से मुझे अपने पुत्र के जन्म प्रमाण–पत्र की तत्काल आवश्यकता है।

अतः अनुरोध है कि कृपया प्रार्थना–पत्र के साथ संलग्न शपथ–पत्र के आधार पर मुझे मेरे पुत्र मोहम्मद अब्दुल्लाह आज़म ख़ाँ का जन्म प्रमाण–पत्र निर्गत करने का कष्ट करें। यह भी अनुरोध करना है कि यथा आवश्यकता क्वीन मेरीस हास्पिटल के अभिलेखों में मेरे पुत्र के जन्म की पुष्टि करायी जा सकती है।

पुनः अनुरोध है कि कृपया यथाशीघ्र जन्म प्रमाण–पत्र निर्गत करने का कष्ट करें।

संलग्नकः शपथ–पत्र
(मूल रूप में)

भवदीय,

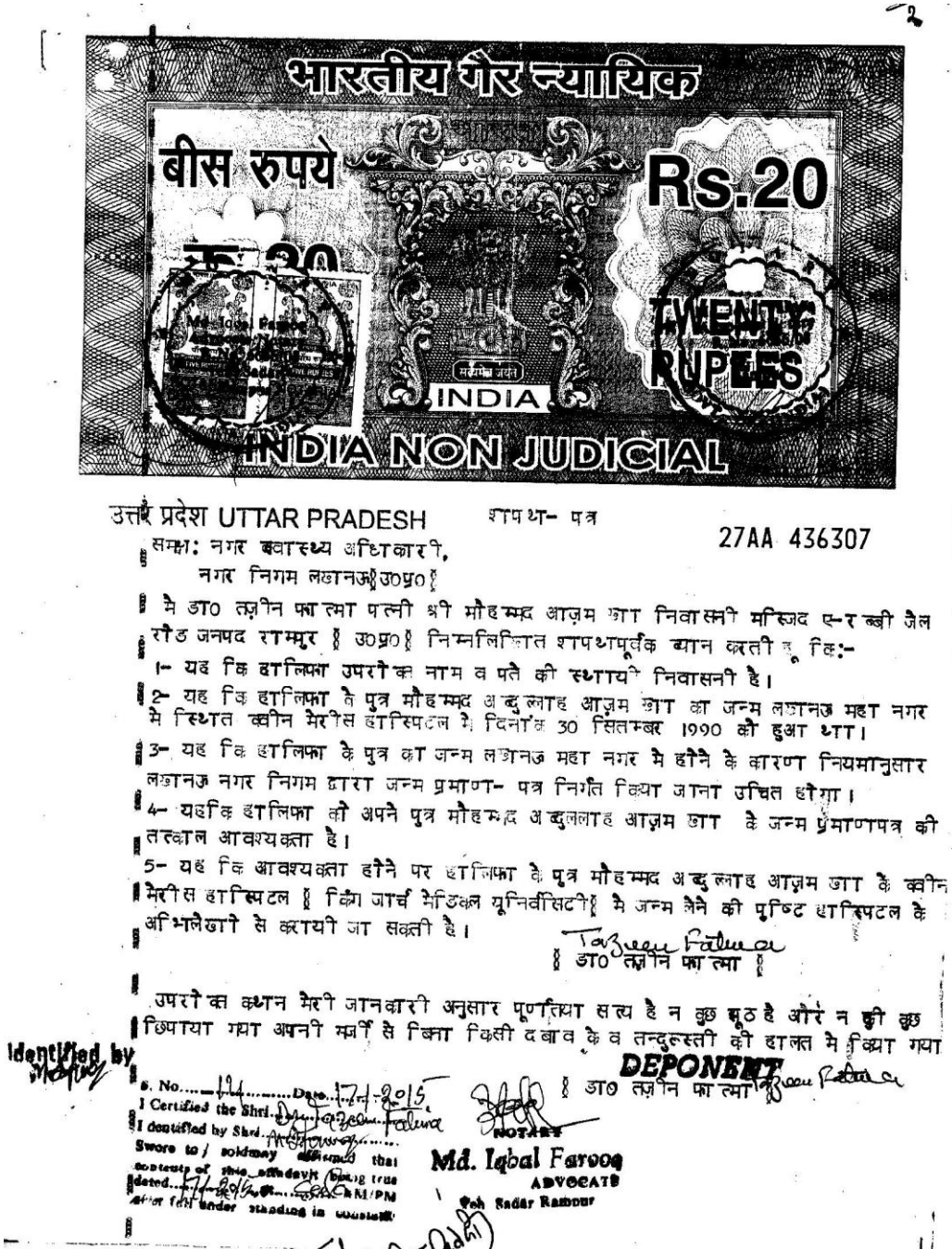
Tazeen Fatima

(डा0 तज़ीन फ़ात्मा)
पत्नी श्री मोहम्मद आज़म ख़ाँ
नि0– मस्जिद–ए–रब्बी, जेल रोड
रामपुर (उ0प्र0)

Shashi Mishra/Sudhir
19/1/15

Attested
(डॉ0 अर्चना द्विवेदी)
10/07/19
अपर नगर आयुक्त
नगर निगम लखनऊ

Ex. R-12
Paper No. A-96/1 to A-96/5
Surya Prakash
Hon'ble Judge



Attested
(अधिवक्ता)
10/07/19
अपर नगर आयुक्त
नगर निगम लखनऊ

27. **The D.W. -2 Dr. Archana Diwedi,** Additional Municipal Commissioner, Municipal Corporation, Lucknow produced a birth register which is neither authenticated nor certified by any competent Officer nor paginated. In her cross examination she stated that the birth register is maintained by a clerk which is not in prescribed form as provided in the Registration of Birth and Death Act, 1969. She stated that list of Queen Mary's Hospital on the basis of which entry of the respondent's birth has been made in the birth register is not available. She stated that birth of the respondent was registered on 21.01.2015. Copy of the **relevant two pages of the aforesaid birth register filed and attested by the D.W.-2 has been marked as Ex.12 (paper No.A-96/4-5)** which are pasted below (scanned copy):-

तारीख	नाम मुहल्ला	नाम पिता मय वल्दियत	जाति	ईसाई लड़का	ईसाई लड़की	हिन्दू लड़का	हिन्दू लड़की	मुसलमान लड़का	मुसलमान लड़की	अन्य लड़का	अन्य लड़की	योग लड़का	योग लड़की
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29-9-90		[illegible]											
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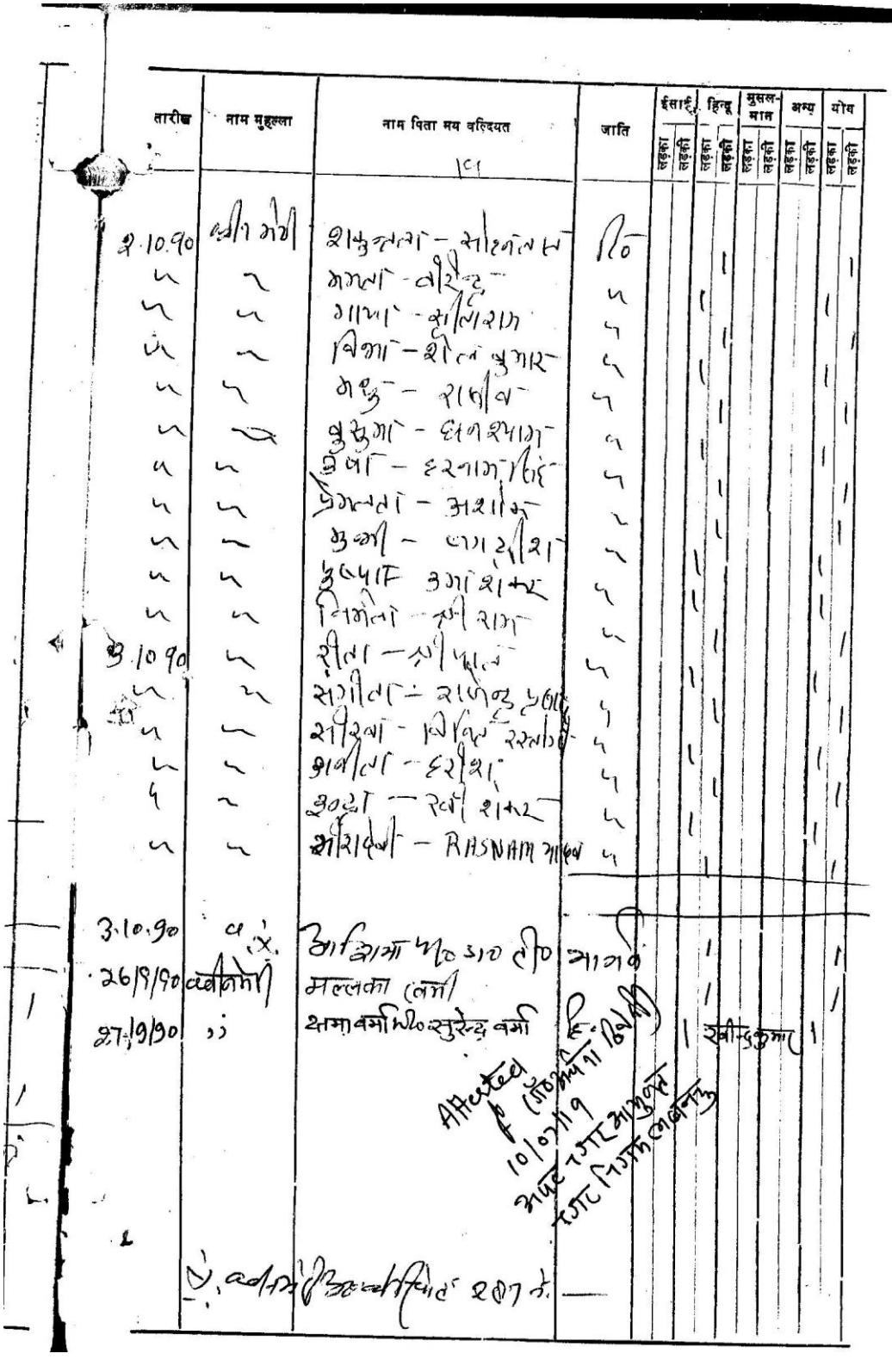
30-9-90	[illegible]	[illegible]	[illegible]										

Attested



तारीख	नाम मुहल्ला	नाम पिता मय वल्दियत	जाति	ईसाई		हिन्दू		मुसलमान		अन्य		योग	
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26/9/90	[illegible]	[illegible]	[illegible]										
27/9/90	"	[illegible]	[illegible]										

Affected
[illegible]
10/2/19
[illegible]

28. The entry made in the aforesaid birth register of Nagar Nigam, Lucknow (Ex. R-12 - paper No. A 96/4-5) is a clear case of manipulation and interpolation. The entry of the respondent's birth has been inserted in the very little space at the bottom of the page showing it to have been made on 30.09.1990 mentioning the name of the respondent Mohd. Abdullah Azam Khan as HINDU male baby of Mrs. Tazeen Fatima, wife of Mohd. Azam Khan. **Just one entry above the aforesaid entry of the respondent, is the entry in the name of one Sangeeta wife of Pankaj Gupta which as per endorsement of some officer, was made on 25.06.1993.** Above the aforesaid entry dated 25.06.1993 is another entry in the name of one Vandana wife of R.N. Srivastava, made on 24.07.1992. The entries subsequent to the entry of the respondent's birth, appearing on the next page are the entries dated 02.10.1990, 03.10.1990,

26.09.1990 and 27.09.1990. The entries of the respondent's birth made in the aforesaid alleged birth register does not bear signature or order of any authority of the Nagar Nigam, Lucknow, or a Sub-Divisional Magistrate. Thus, entry in the aforesaid birth register in the name of the respondent was not made on 30.09.1990

29. In paragraph No.5 of her affidavit (Ex. R-12) the **D.W. -5 Mrs. Tazeen Fatima (mother of the respondent) herself stated that the birth of the respondent may be got verified from Hospital record of Queen Mary's Hospital. This clearly indicates that as on 17.01.2015 there was no entry in the name of the respondent in the alleged birth register of Nagar Nigam Lucknow (Ex. R-12 - paper No. A-96/4-5), otherwise she would have merely asked to issue birth certificate on the basis of the alleged entry in the birth register.**

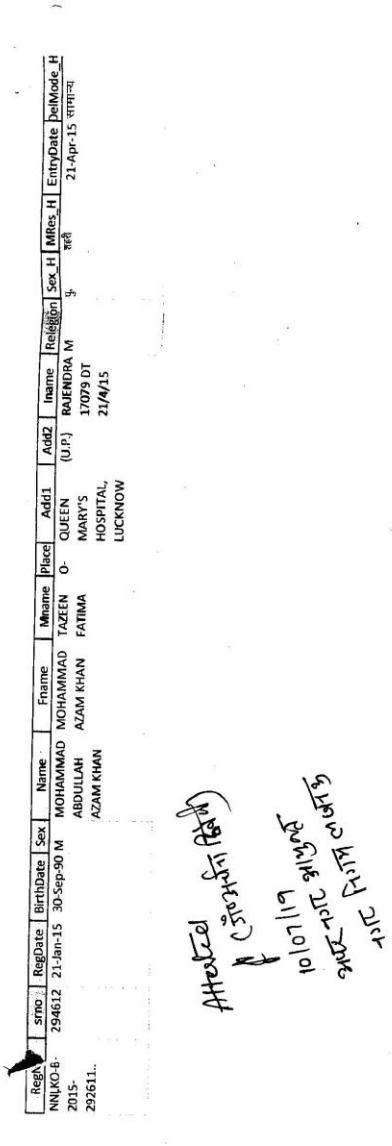
30. **These facts leave no manner of doubt that the entry of respondent's birth in the alleged Birth Register of Nagar Nigam, Lucknow, showing his birth on 30.09.1990, was inserted much after 25.06.1993 and in all probabilities in the year 2015.**

31. Facts aforestated leave no manner of doubt that the entry of the respondent's birth in the aforesaid birth register (Ex. R-12 - Paper No. A-96/4-5), was made by interpolation at the instance or under pressure of the interested parties. It was manipulation and fabrication. It shall not be out of place to mention that when the birth certificate dated 21.01.2015 of the respondent was got issued from Nagar Nigam, Lucknow, at that time the respondent's father was the Cabinet Minister of the Department of Urban Development and Local Bodies. Nagar Nigam, Lucknow, was under his ministry. Thus, the evidence of D.W.-5 - Mrs. Tazeen Fatima (mother of the respondent) and D.W. 10 (respondent) are false and wholly untrustworthy in so far as it relates to the entries of birth of the respondent on 30.09.1990.

32. That apart the respondent's mother Mrs. Tazeen Fatima (D.W.-5) moved the aforesaid application dated 17.01.2015, supported by an affidavit of the same date (Ex. R-12) to obtain birth certificate of the respondent from Nagar Nigam, Lucknow, in which she very **conveniently concealed the fact of the then existing birth certificate of the respondent issued by the Registrar Birth and Death, Nagar Palika Parishad, Rampur** (Ex. P-3 paper No.A-80/1), which she got cancelled subsequently on 30.01.2015.

33. **The aforesaid application dated 17.01.2015 for issuance of birth certificate of the respondent was submitted by the mother of the respondent** before the Nagar Swastha Adhikari, Nagar Nigam, Lucknow, **after about 25 years of the alleged date of birth of the respondent which was endorsed by the some Officer of the Nagar Nigam, Lucknow, on 19.01.2015 and a day thereafter birth certificate was issued to the respondent by the Registrar (Birth & Death) Nagar Nigam, Lucknow,** without observance of mandatory provisions of **Section 13 of the Registration of Births and Deaths Act, 1969** (hereinafter referred to as **the Act, 1969**) and **Rule 9 of the U.P. Registration of the Birth and Death Rules 2002** (hereinafter referred to as the

U.P. Rules 2002). Copy of the computer generated sheet of birth registration filed by the D.W.-2 and marked as Ex. R-12 (Paper No.A-96/3) is pasted below (scanned copy):-



Regn	sno	RegDate	BirthDate	Sex	Name	Fname	Mname	Place	Add1	Add2	Iname	Religion	Sex_H	MRes_H	EntryDate	DelMode_H
NNLKO-B-2015-292611..	294612	21-Jan-15	30-Sep-90	M	MOHAMMAD ABDULLAH AZAM KHAN	MOHAMMAD AZAM KHAN	TAZEEN FATIMA	O-	QUEEN MARY'S HOSPITAL, LUCKNOW	(U.P.)	RAJENDRA 17079 DT 21/4/15	M	पु.	मऱी	21-Apr-15	सामान्य

Delayed Registration of Birth

34. The relevant **provisions for delayed registration of birth or death are the provisions of Section 13 of the Registration of Births and Deaths Act, 1969 and Rule 9 of the U.P. Registration of Birth and Death Rules, 2002** which are reproduced below:

*"**Section 13. Delayed registration of births and deaths-** **(1)** Any birth or death of which information is given to the Registrar after the expiry of the period specified therefore, but within thirty days of its occurrence, shall be registered on payment of such late fee as may be prescribed.*

***(2)**Any birth or death of which delayed information is given to the Registrar after thirty days but within one year of its occurrence shall be registered only with the written permission of the prescribed authority and on payment of the prescribed fee and the production of an affidavit made before a notary public or any other officer authorized in this behalf by the State Government.*

(3)Any birth or death which has not been registered within one year of its occurrence shall be registered only on an order made by a magistrate of the first class or a Presidency Magistrate after verifying the correctness of the birth or death and on payment of the prescribed fee.

***(4)**The provisions of this section shall be without prejudice to any action that may be taken against a person for*

failure on his part to register any birth or death within the time specified therefore and any such birth or death may be registered during the pendency of any such action."

*"**Rule 9. Authority for delayed registration under Sec. 13 and fee payable therefor- (1)** Any birth or death of which information is given to the Registrar after the expiry of the period specified in Rule 5, but within thirty days of its occurrence, shall be registered on payment of a late fee of rupees two.*

***(2)** Any birth or death of which information is given to the registrar after thirty days but within one year of its occurrence, shall be registered only with the written permission of the Additional District Registrar (Deputy Chief Medical Officer for Urban Areas and District Panchyat Raj Officer for Rural areas) and on payment of a late fee of rupees five.*

(3) Any birth or death which has not been registered within one year of its occurrence, shall be registered only on an order of Sub-Divisional Magistrate and on payment of late fee of rupees ten."

35. Sub Section (3) of Section 13 of the Act, 1969 specifically provides that **any birth or death which has not been registered within one year of its occurrence, shall be registered only on an order made by a Magistrate of Ist Class** or a Presidency Magistrate after verifying the correctness of the birth or death **and on payment of the prescribed fee. Sub Rule 3 of Rule 9 specifically provides that any birth or death which has not been registered within one year of its occurrence shall be registered only on an order of Sub Divisional Magistrate** and on payment of late fee of Rs. 10.

36. In Judgment dated 21.11.2014 in **Zeba Haseeb @ Ankita and another Vs. State of U.P. And others 2015(2) ADJ 215 (Para 17, 24 & 26),** this court considered question of validity of registration of birth after one year and issuance of birth certificate without following provisions of Section 13 of the Act 1969 and Rule 9 of the U.P. Rules 2002 and held/directed as under:-

"17..... ***Thus the birth certificate of petitioner No.2 of 8th September, 2014 was issued by the Birth/Death Registrar Kanpur Nagar Nigam, without following the due procedure of law. No verification of the correctness of the birth was made by the authorized officer i.e. S.D.M.*** *Even the prescribed fee was deposited about a month after the birth certificate was issued. The application for issuing birth certificate was allegedly moved by the petitioner No.2 before an unauthorized officer on 4th September, 2014 and the certificate was issued in haste by an unauthorized officer.* ***Thus the birth certificate dated 8.9.2014 of the petitioner No.2 is a complete nullity****. The authorities have acted unlawfully and in complete defiance of the provisions of the Act and the Rules. Even after filing of the affidavits no action has been taken by the Birth/Death, Registrar, Kanpur Nagar Nigam to delete immediately the entry of alleged birth recoded on the basis of the alleged birth certificate of the petitioner No.2 dated 8th September, 2014. The manner in which the authorities acted to issue birth certificate of petitioner No.2 shows that the delayed birth certificates are issued by the authorities on mere asking.* ***This not only violates the provisions of Section 13 (3) of the Act and Rule 9 of the Rules but also may facilitate misuse of birth certificates.***

24. In view of the above discussions, the writ petition is dismissed. Looking into the facts and circumstances of the case, the arguments advanced by the learned counsel for Nagar Nigam Kanpur and the averments made by District Magistrate, Kanpur Nagar in her affidavits, following directions are issued:

(I) delayed registration of birth or death be made only on an order of the prescribed authority and strictly in accordance with the provisions of Section 13 of the Act and Rule 9 of the Rules.

(ii) The prescribed authority for the purposes of sub Section 3 of Section 13 of the Act read with Rule 9 (3) of the Rules is the Sub Divisional Magistrate of the area concerned and only he can pass an order for delayed registration of birth or death which has not been registered within one year of its occurrence. He can pass order for registration of birth or death only after verifying the correctness of the birth or death and on payment of the prescribed fee.

*(iii)**Chief Secretary of the State Government shall issue strict instructions to all the District Magistrates, Sub-Divisional Magistrates and Local Bodies in the State for compliance of the above directions.***

26. Let a copy of this judgment be sent by the Registrar General of this Court to the Chief Secretary of the Government of U.P. for strict compliance of the directions given in para 24 above. "

(Emphasis supplied by me)

37. Thus, the Nagar Nigam, Lucknow, was having no jurisdiction to register birth of the respondent after 25 years of the alleged birth and to issue birth certificate of the respondent dated 21.01.2015 (Ex. R-12) without an order of a Sub-Divisional Magistrate under Section 13(3) of the Act, 1969 readwith Rule 9(3) of the U.P. Rules, 2002 and on payment of prescribed late fees but the aforesaid birth was registered and the birth certificate was issued without any order of the Sub-Divisional Magistrate. **Therefore, the aforesaid birth certificate of the respondent dated 21.01.2015 (Ex.P-2-Paper No.A-63/1) issued by the Registrar (Birth & Death), Nagar Nigam, Lucknow, registering 30.09.1990 as birth of the respondent is null and void.** Apart from this, **the entries of birth of respondent in the aforesaid birth register is the result** of manipulation. Therefore, it is nullity and liable to be ignored.

Proving of Birth on 30.09.1990 by Entries in Hospital Papers & Oral Evidences

38. Ex. R-4 (paper No. A100/1-2) E.O.T. Register of Queen Mary's Hospital, Lucknow, showing entry of admission of **TANZEEM FATIMA** and birth of a male baby, is not trustworthy inasmuch as the entry at Annual No.5097 at Page 174 bears cuttings and overwriting and does not match with the entries of MLR Register (labour room register), (Ex. R-5-paper No.101/2). **The fact of cuttings and overwriting and non matching of entries of the aforesaid two registers of** Queen Mary's Hospital **have also been admitted by the D.W.3 - Dr. Uma Singh**, Sr. Gynecologist Queen Mary's Hospital (Department of Obst. & Gyno.), in her oral evidence dated 31.07.2019. **She also admitted** in her evidence that the aforesaid **two register are neither authenticated nor have been counter signed by any Officer or Doctor of the Hospital nor she has signed entries** regarding birth of a baby on 30.09.1990. **She further stated that**

she can not say that the baby born as mentioned in the aforesaid two register on 30.09.1990 is the respondent. She admitted that it is the responsibility of the Chief Medical Superintendent to give information of births to Nagar Nigam and she was never given this responsibility and there is no post of Chief Medical Superintendent in the Hospital and the aforesaid register has been maintained by a clerk. The concerned clerk has not been produced in evidence by the respondent to prove alleged entries of the aforesaid two register. The D.W. 3 also stated in her oral evidence the procedure for issuance of duplicate birth certificate but could not produce the application of the respondent's mother for issuance of duplicate birth certificate. **D.W.4 - Dr. Vineeta Das - HOD Obst. & Gyno., Queen Mary's Hospital, Lucknow,** has stated that she has not made entries at Annual No.5097 page No. 174 of E.O.T. Register and she was never related to that delivery. She also stated in her cross examination that duplicate birth certificate is issued on the application received by the Chief Medical Superintendent. She neither named the medical consultant nominated to prepare the duplicate birth certificate nor could produce any document relating thereto.

39. The respondent could not prove that he was born on 30.09.1990. The evidence of his mother (D.W.-5) regarding his birth on 30.09.1990 in Queen Mary's Hospital, Lucknow, can not be relied in the absence of any corroborative evidence. Dr. Uma Singh (D.W.-3) whose evidence has been heavily relied by the respondent, has stated in her cross-examination that she can not say that the baby born on 30.09.1990 in Queen Mary's Hospital is the respondent. That apart, **the mother of the respondent (D.W.-5) has her self submitted her G.I.S. Nomination form dated 26.04.2001 (Ex. R-11-Paper No.A95/25) under her own signature which is part of her service book, and which has been proved by the respondent's own witness D.W.-1 Sri Shailendra Kumar Tiwari, Assistant Director, Higher Education Directorate, U.P. Prayagraj. In her aforesaid nomination from dated 26.04.2001 D.W.-5 (mother of the respondent) has mentioned age of the respondent to be 8 years. Therefore, as per Ex.R-11 Paper No.A95/25, the respondent was born in the year 1993.**

40. Ex. R-4 is the photostat copy of a page No.174 Emergency O.T. (E.O.T.) Register and Ex.R-5 is the photostat copy of the page No.225 Labor Register (MLR). Original of the aforesaid two registers were produced by the D.W.-3 Dr. Uma Singh.

41. Six questions put to the D.W. -3 by the petitioner's counsel with regard to the E.O.T. and MLR Registers (Ex. R-4 and Ex. R-5) and the answer given by her are reproduced below:-

प्रश्न– क्या आप अपने साथ लाये हुए ई0ओ0टी0 रजिस्टर के पृष्ठ संख्या 174 के एनुअल नं0 5097 की प्रविष्टि देखकर यह बता सकती है कि इसमें ओवर राइटिंग की गयी है या नहीं?

उत्तर– जी हॉ इसमें ओवर राइटिंग की गयी है। इसके कालम नं0 3 में ओवर राइटिंग दिख रही है।

प्रश्न– क्या आप उक्त रजिस्टर के कालम सं0 16 में अंकित विवरण को देखकर यह बता सकती है कि क्या यह उक्त रजिस्टर के शेष कालम में अंकित सूचनाओं से मेल खाती है?

उत्तर– जी नही।

प्रश्न– क्या ई0ओ0टी0 रजिस्टर के पृष्ठ संख्या 174 के एनुअल नं0 5097 के कालम संख्या 10 में अंकित पीरियड आफ प्रेगनेंसी,एम0एल0आर0 रजिस्टर (लेबर रजिस्टर) के पृष्ठ संख्या 225 एनुअल नं0 1826 के कालम संख्या 10 में अंकित **पीरियड ऑफ प्रेगनेंसी से भिन्न है?**

उत्तर– जी हॉ।

प्रश्न– क्या एम0एल0आर0 रजिस्टर के पृष्ठ संख्या 225 के एनुअल नं0 1826 में जिस प्रकार से प्रविष्टियां की गयी है क्या वह उक्त पृष्ठ में अन्य एनुअल नं0 पर की गयी **प्रविष्टियों से मेल खाती है?**

उत्तर– पूर्णतया मेल नहीं खाती है।

प्रश्न– क्या यह आप अपने साथ जो रिकार्ड हास्पिटल से सम्बन्धित लायी है और जिसे न्यायालय के समक्ष प्रस्तुत किया है उसके आधार पर क्या केवल यह कहा जा सकता है कि 30.09. 1990 को एक मेल बेबी का जन्म हुआ था?

उत्तर– जी हॉ उक्त रजिस्टर यह बताता है कि सम्बन्धित महिला ने एक मेल बेबी को जन्म दिया था।

प्रश्न– क्या **जो रजिस्टर आप आज लाई है और न्यायालय के समक्ष प्रस्तुत किया है उसके आधार पर आप निश्चित रूप से यह कह सकती है कि 30.09.1990 को जिस मेल बेबी का जन्म हुआ था वह इस मुकदमें में रिसपान्डेन्ट मोहम्मद अब्दुला आजम खान ही है?**

उत्तर– जी नहीं।

प्रश्न– ई0ओ0टी0 रजिस्टर एंव एम0एल0आर0 रजिस्टर जो आप अपने साथ आज न्यायालय में लाई है और न्यायालय में प्रस्तुत किया है वो क्या क्विन मैरी हास्पिटिल या किंग जार्ज मेडिकल के **किसी भी अधिकरी अथवा विभागाध्यक्ष द्वारा सत्यापित अथवा हस्ताक्षरित है और क्या इसमें अंकित प्रविष्टियॉ अथवा कोई भी पृष्ठ किसी भी हास्पिटल के किसी भी अधिकारी अथवा डाक्टर द्वारा हस्ताक्षारित अथवा प्रतिहस्ताक्षरित है एंव क्या उक्त दोनो रजिस्टर हास्पिटल के किसी अधिकारी या विभागाध्यक्ष द्वारा अथेन्टीकेटेड है?**

उत्तर– उपरोक्त दोनो रजिस्टर क्विन मैरी हास्पिटल अथवा किंग जार्ज यूनीवर्सिटी के अधिकारी द्वारा **अथेन्टीकेटेड नही** है। उक्त दोनो राजिस्टर **सत्यापित भी नहीं है**। परन्तु कुछ पृष्ठों पर हास्पिटल के कन्सलटेन्ट द्वारा हस्ताक्षर किया गया है।

प्रश्न– क्या उक्त रजिस्टर में सभी प्रविष्टिया आपके द्वारा की गयी है? या आपके द्वारा हस्ताक्षरित की गयी है? यदि नहीं तो आप किस आधार पर यह कह रही है कि उक्त दोनो रजिस्टर की समस्ट प्रविष्टियॉ जेनुइन है?

उत्तर– न तो मैने उक्त दोनो रजिस्टर में प्रविष्टियॉ की है और न ही मेरे द्वारा हस्ताक्षरित है। मै अस्पताल की कार्यशैली पर विश्वास करते हुए यह कहा कि यह जेनुइन हैं।

42. Perusal of the Page 174 of **E.O.T. Register (Ex. R-4)** shows cutting and overwriting in the entry made in the name of **"TANZEEM FATIMA".** Column 13 (labour record) and column 16 (sex, weight and condition of child at birth) also do not contain material particulars as have been noted in the matter of other patients appearing on the same page i.e. page No.174. **Page 225 of the MLR Register** (Ex R-5) is the entry in the name of one **"TAZEEM FATIMA"** also contains cutting in annual number, does not contain date of admission and Registration Number. It records the period of pregnancy of 38 weeks as against the pregnancy of 32 weeks noted in the Ex. R-4.The D.W.-4 has stated that neither she has made the entries nor she was ever related to the said delivery. She stated that entries are made in both the registers by resident doctor on duty after delivery. Therefore, if it was so, there was no occasion to make entries in question in EOT register and MLR register in different names with different

particulars and non matching of particulars etc. The D.W. -3 although supported the entries of the aforesaid two registers but admitted in her cross examination, the overwritings and non matching of the entries etc. **She also stated that the register only says that a male baby was born but it can not be said that the baby born on 30.09.1990 is the respondent**. She also admitted in her cross examination that both the aforesaid **registers are neither authenticated nor verified by any Officer or the Head of the Department nor the entries made therein bear signature of any Officer or Doctor of the Hospital.** She also **admitted that she has neither made the entries in the aforesaid two registers nor that has been signed by her.** The aforesaid entry in E.O.T. Register (Labour room) is in the name of one **"TANZEEM FATIMA"** while in the MLR Register it is in the name of "Mrs. **TAZEEM FATIMA**" which is written in a different hand writing with a different pen as compared to other particulars. The discharge Ticket is shown in the name of **"TAZEEN FATIMA". Thus, entries of Ex. R-4 and R-5 could neither be proved by the respondent to be genuine nor it could be established that the baby shown in the aforesaid two registers to have born on 30.09.1990 is the respondent.** The evidence of the D.W.-5 (respondent's mother) also does not inspire confidence inasmuch as she herself has submitted her GIS nomination form dated 26.04.2001 under her own signature which shows that the respondent was born in the year 1993. Ex.R-11 (paper No. A95/14-15 which is part of the service book of the respondent's mother reflects that she was on medical leave for 60 days from 17.08.1993 to 15.10.1993. For major period between 12.07.1993 to 23.12.1993 she took either medical leave or earned leave.

43. The discharge ticket (**Ex. R-7**-paper No. A38/1) is the phtostat copy of some paper which is said to have been verified by Professor Vineeta Das (D.W.-4), Head of the Department Obst. & Gyno., King George Hospital, Lucknow. **Ex. R-8** (paper No. A-41/1) is the letter of the Public Information Officer/Chief Medical Superintendent of the King George Medical University, Lucknow, dated 21.09.17 whereby the information asked by the respondent's mother has been replied by the **D.W.-4 by letter dated 12.09.2017 (Ex. R-8-Paper No. A-41/2). Perusal of this letter of the D.W. -4 shows that she stated that the hospital maintains records of only 10 years and, therefore, it is not possible to give copy of admission register. She also stated that the discharge ticket (Ex. R-7) as produced by the respondent's mother is being enclosed. Therefore, the Ex. No. R-7 i.e. photostat copy of discharge ticket Gandhi Memoria and Associated Hospital for indoor patient in the name of "TAZEEN FATIMA" is the paper which was produced by the respondent's mother before the D.W.-4 and in the absence of availability of admission register of the year 1990 it was not possible for the D.W.-4 to verify it.**

44. **The respondent also sought information from the King George Medical University, Lucknow, regarding his birth** which was **replied by** the Public Information Officer vide letter dated 19.09.2017 **(Ex. R-9- paper No. A42/1) enclosing therewith the information submitted by D.W.-4 in her letter dated 12.09.2017 (Ex. R9 -**

paper No.A42/3). Although **there is no mention of name of the baby in the alleged E.O.T. Register (Ex. R-4) and MLR Register (Ex. R-5) yet the D.W.-4 stated in her aforesaid letter dated 12.09.2017 as under:-**

पत्रांक–OG/1881/17
दिनांक 12/9/17

सेवा में,
जन सूचना अधिकारी/मुख्य चिकित्सा अधीक्षक,
गॉधी स्मारक एंव सम्बद्ध चिकित्सालय,
किंग जार्ज चिकित्सा विश्वविद्यालय,
लखनऊ।

विषयः– सूचना का अधिकार अधिनियम –2005 के सम्बन्ध में।

महोदय,
कृपया आप अपने कार्यालय के पत्र संख्या 17176/आर0टी0आई0एक्ट/सी0एम0एस/2017 दिनॉक 31/08/17 का सन्दर्भ ग्रहण करने का कष्ट करें जो सूचना का अधिकारी अधिनियम–2005 के अन्तर्गत **श्री अब्दुल्लाह आजम खॉ, विधायक 34 स्वार, नि0 घेर मीर बाज खॉ, जेल रोड, रामपुर द्वारा मांगी गयी सूचना उपलब्ध कराने के सम्बन्ध में है।**

उक्त के सम्बन्ध में **अवगत कराना है कि मोहम्मद अब्दुल्लाह आजम खॉ पुत्र श्री मोहम्मद आजम खॉ, का जन्म 30 सितम्बर 1990 को क्वीन मेरी अस्पताल में हुआ था।**

उक्त के सम्बन्ध में बिन्दुवार सूचना निम्न है–

1. **आप द्वारा प्रेषित मोहम्मद अब्दुल्लाह आजम खॉ के जन्म प्रमाण पत्र की सत्यापित प्रतिलिपि इस पत्र के साथ संलग्न है।**

2. **मोहम्मद अब्दुल्लाह आजम खॉ के जिस पृष्ठ पर जन्म का विवरण अंकित है उसकी सत्यापित प्रतिलिप एंव उसके प्रथम पृष्ठ की सत्यालिपि इस पत्र के साथ संलग्न है।** सूचनार्थ प्रेषित।

भवदीया
(प्रो0 विनीता दास)
विभागाध्यक्ष
संलग्नकः उपरोक्तानुसार।

45. The correctness of the contents of the aforequoted letter of the D.W.-4 - Professor Vineeta Das, dated 12.09.2017 stand completely lost in view of the fact that in the relevant page of the E.O.T. Register (Ex. R-4) and MLR Register (Ex. R-5) there is no mention of the name of the respondent. The D.W.-4 admitted in her cross examination on 31.07.2019 that she was neither related to the case of delivery nor entries in EOT Register at page 174 was made by her. **She has stated in her letter dated 12.09.2017 (Ex.R-8)** as under:-

पत्रांक 0G/1882/17
दिनांक 12.9.17

सेवा में ,
जन सूचना अधिकारी ध्मुख्य चिकित्सा अधीक्षक
गाँधी स्मारक एवं सम्बद्ध चिकित्सालय ए
किंग जार्ज चिकित्सा विश्वविद्यालय ए
लखनऊ।

विषयः सूचना का अधिकार अधिनियम 2005 के सम्बन्ध में।

महोदय ए

कृपया आप अपने कार्यालय के पत्र संख्या 17174/आर0टी 0आई0 एक्ट /सी 0एम 0एस 0/2017 दिनाँक 31/08/17 का सन्दर्भ ग्रहण करने का कष्ट करें जो सूचना का अधिकार अधिनियम . 2005 व अन्तर्गत डा 0 तजीन फातिमा ए सांसद राज्यसभा , नि 0 घेर मीर बाज खाँ , जेल रोड रामपुर द्वारा मांगी गयी सूचना उपलब्ध कराने के सम्बन्ध में है।

1. **चिकित्सालयों के नियमों के अनुसार केवल 10वर्ष का रिकार्ड रखा जाता है।** अतः आपका प्रकरण सन् 1990 का है इसलिए एडमिश रजिस्टर की इण्ट्री वाले पृष्ठ की सत्यापित प्रतिलिपि दे पाना सम्भव नहीं है।

2. एडमिशन स्लिप मरीज के पास होती है।

3. आपके द्वारा प्रस्तुत की गई डिस्चार्ज टिकट को सत्यापित कर इस पत्र के साथ संलग्न किया जा रहा है। सूचनार्थ प्रेषित।

ह0 अप0

भवदीय

11.9.17

ह0 अप0

संलग्नकः

उपरोक्तानुसार

(प्रो 0 विनीता दास)

विभागाध्यक्ष

46. **The D.W.-3 who is said to be attending Doctor has herself stated in her Cross-examination that she can not say that the baby born as shown in the Ex. R-4 and Ex. R-5 is the respondent. Therefore, without there being any record before the D.W. -4 it was not possible for her to certify on 12.09.2017 (Ex. R-8) that the respondent was born in Queen Mary's Hospital, Lucknow, U.P., on 30.09.1990 and that true copy of page of the register containing particulars of birth of the respondent is enclosed. The copy enclosed with Ex. R-8 is the photostate copy of page 174 of the E.O.T. Register (Ex. R4) as admitted by the D.W.-4 in her cross examination in which there is no whisper of the birth of a baby mentioning name of the respondent. It is well know that a man may lie but the circumstances do not.**

47. **For all the reasons aforestated, I find that Ex. R-4, R-5, R-6, R-7, R-8 and R-9 and the evidences of D.W.-3 and D.W.10 do not established that the respondent was born on 30.09.1990 in Queen Mary's Hospital, Luknow.**

Medical Examination Report

48. The respondent filed a copy of medical report dated 27.01.2017 issued by the Chief Medical Officer, Rampur, to contend that the Medical Board has determined the respondent's average age of 26 years on 27.01.2017. **To prove this paper, he produced D.W.-8 - Dr. Satya Veer Singh Ken.** In his cross examination the D.W.-8 stated that he is

merely a Radiologist and has given merely X-Ray report. He also could not produce original report or records. Thus, the aforesaid medical report could not be proved. That apart, in **Mukarrab and others Vs. State of U.P. (2017) 2 SCC 210 (paras 20 to 29)**, Hon'ble Supreme Court referred to its earlier judgments and held that *"**the age determination based on ossification test though may be useful is not conclusive.** An X-ray ossification test can by no means be so infallible and accurate a test as to indicate the correct number of years and based of a person's life."* Hon'ble Supreme Court further held that the **age determination using ossification test does not yield accurate and precise conclusions. The general rule about age determination is that it can vary plus or minus two years.** The date of birth is to be determined on the basis of material on record and on appreciation of evidence adduced by the parties. **The medical evidence may be useful as guiding factor but it is not conclusive and has to be considered along with other cogent reasons.** Thus, even if the aforesaid medical Board dated 27.01.2017 could be looked into then applying the plus minus two years factor, the age of the respondent in 2017 would come to 24 indicating birth year of the respondent to be the year 1993.

Evidence of D.W.-7 AND D.W.-9

49. The respondent's mother (D.W.-5) has been Reader of Political Science in Government P.G. College at Rampur between 09.07.1994 till the year 2004 and even thereafter (Ex. R-11) while father was M.L.A. yet the respondent in para 53 of the written statement and the mother (D.W.-5) in para 12 of her examination-in-chief have stated that D.W.-9 Sri Shahzeb Khan, has got admitted the respondent in nursery class in the year 1995 in St. Paul School, Rampur and inadvertently furnished/written date of birth of the respondent in the admission form whereas the D.W.-9 has stated in para 5 of his examination-in-chief that teacher has written date of birth of the respondent in the admission form. When the D.W.-7 (Arun Josheph Dayal. Director Saint Paul School) was cross-examined and a question was asked whether he has brought original record of admission, he replied: No, since he was not informed about it. He has not produced even school register. Thus, the evidence of the D.W.-7 and D.W.-9 do not prove the case of the respondent that the respondent was born on 30.09.1990.

Own declaration of respondent's mother while submitting GIS Nomination Form

50. As already discussed above, the respondent has filed in evidence **Ex.R-11 (paper No.A95/1-34)** which is copy of service book of the respondent's mother. The said Ex. R-11 has been proved by D.W.-1 Dr. Shailendra K. Tiwari, Assistant Director of Higher Education, U.P. Prayagraj. **Paper No. A95/25 (part of Ex. No.R-11) is the GIS Nomination form submitted by the respondent's mother under his own signature on 26.04.2001** whereby she nominated the respondent and two others. **She has specifically declared and mentioned the age of the respondent to be eight years in the aforesaid GIS nomination form on 26.4.2001. Thus as per her own declaration of the respondent's mother (D.W.-5) the year of the birth of the respondent comes to the year 1993.** The arguments in this regard was also specifically raised by the Election-petitioner as noted in paragraph 12(iii)

above and yet the respondent has not made any submission in this regard. **Thus, the Ex. R-11 (paper No. A-95/25) is an undisputed piece of own evidence of the respondent which established that the respondent was born in the year 1993.**

51. **In view of the facts and evidences noted in the aforesaid paragraphs, it stands established that declaration of age of the respondent in Ex. R-11 (paper No.A95/25) is an admitted piece of evidence on the part of the respondent. Therefore, an admission on the part of the respondent to the lis shall be binding on him and in any event the presumption has to be made that the same is taken to be established.** This principle also find support from the judgment of Hon'ble Supreme Court in the case of **Sushil Kumar Vs. Rakesh Kumar 2003 (8) SCC 673, (paras 32).**

Adhar Card, Voter I.D. Card and Driving Licence

52. Ex. P-2 (paper No. A66/1, A67/1 and A68/1) are copies of Adhar Card, driving licence and Voter I.D. Card respectively. The Adhar Card of the respondent's is dated 07.03.2015. The voter I.D. Card is dated 18.07.2015. The driving licence was corrected subsequently. All these papers are not evidence of date of birth of the respondent. Besides this the basis of date of birth mentioned in these papers is the respondents birth certificate dated 21.01.2015, issued by Nagar Nigam, Lucknow, which has been held to be nullity. Therefore, the date of birth of the respondent mentioned in paper Nos. A66/1, A67/1 and A68/1 is not the proof date of birth of the respondent. **Adhar Card is means of identity and not proof of date of birth** as has also been held by a Division Bench of this Court in judgment dated 09.01.2019 in Misc. **Bench No.13419 of 2018 (Smt. Parvati Kumari and Ors. Vs. State of U.P. Thru. Principal Secretary Home & Ors.)** in which several judgments of Hon'ble Supreme Court including the judgment of Hon'ble Supreme Court dated 24.08.2017 in **S.G. Vombatkere & Anr. Vs. Union of India,** has been relied. In **Sushil Kumar (supra) (para 51)** Hon'ble Supreme Court held that date of **birth of a voter contained in the voter list and the Election Identity Card issued by the Election Commission of India is not conclusive since they are recorded as per the statements made by the person concerned. Therefore, these papers do not conclusively establish that the respondent was above 25 years of age as on the date of filing of nomination paper or the declaration of result of legislative assembly election in question.**

Effect of False Statements

53. The consequence of false statement is that adverse inference should be drawn. The discussion made in various paragraphs of this judgment particularly in relation to the procurement of birth certificate from Nagar Nigam, Lucknow, leaves no manner of doubt that the respondent has knowingly made false averment in the written statement. Hon'ble Supreme Court vide paragraphs 64 and 65 of the judgment in the case of **Sushil Kumar (supra)** has held as under:-

"64. Even otherwise, making a false statement before the court whether on affidavit or not is not to be treated lightly. The court acts on the basis of the

statement made by a party to the lis. ***Whether such defence has been accepted or not is not of much importance but whether a false statement to the knowledge of the party has been made or not is. In any view of the matter, the court must draw an adverse inference in this behalf against the respondent.***

65. Furthermore, a person should not be permitted to take advantage of his own wrong. He should either stand by his statement made before a court of law or should explain the same sufficiently. In absence of any satisfactory explanation, the court will presume that the statement before a court is correct and binding on the party on whose behalf the same has been made."

(Emphasis supplied by me)

54. In **A. Shanmugam vs. Ariya Kshatriya Rajakula Vamsathu Madalaya Nandhavana Paripalanai Sangam and others, [(2012) 6 SCC 430] (Para-43.1 to 43.5)), Hon'ble Supreme Court held as under:-**

"43.1. It is the ***bounden duty of the Court to uphold the truth*** *and do justice.*

43.2. ***Every litigant is expected to state truth before the law court whether it is pleadings, affidavits or evidence. Dishonest and unscrupulous litigants have no place in law courts.***

43.3. ***The ultimate object of the judicial proceedings is to discern the truth and do justice. It is imperative that pleadings and all other presentations before the court should be truthful.***

43.4. Once the court discovers falsehood, concealment, distortion, obstruction or confusion in pleadings and documents, the court should in addition to full restitution impose appropriate costs. The court must ensure that there is no incentive for wrong doer in the temple of justice. Truth is the foundation of justice and it has to be the common endeavour of all to uphold the truth and no one should be permitted to pollute the stream of justice.

43.5. It is the bounden obligation of the Court to neutralize any unjust and/or undeserved benefit or advantage obtained by abusing the judicial process.

(Emphasis supplied by me)

55. The upshot of all the discussions made above is that the materials on record taken in their entirety together with the circumstantial evidence establishes that the respondent was less than Twenty Five Years of age on the date of filing nomination in State Legislative Election 2017 from 34 Suar Constituency of District Rampur.

56. In **Amrit Lal Ambalal Patel Vs. Himathbhai Gomanbhai Patel, 1968 AIR 1455 1969 SCR (1) 277**, Hon'ble Supreme Court held that the effect of Article 173 is that a candidate is not qualified unless he has attained the age specified in the clause on the date fixed for scrutiny of nominations.

57. In **Durga Shanker Mehta Vs. Thakur Raghuraj Singh, AIR 1954 SC 520** Hon'ble Supreme Court held that it is beyond any cavil that in the event a person is elected who does not fulfill the constitutional requirements, the election would be void despite the fact that the Returning Officer has accepted his nomination paper.

58. In Sushil Kumar Vs. Rakesh Kumar (2003) 8 SCC 673 (para 79)

Hon'ble Supreme Court held that Article 173(b) of the Constitution of India provides for a disqualification. A person can not be permitted to occupy an office for which he is disqualified. The endeavour of the Court therefore should be to see that a disqualified person should not hold the office but should not at the same time unseat a qualified person therefor.

Conclusion on Issue No.(a) and (b)

59. For all the reasons aforestated, I answer issues No.(a) and (b) in Negative, i.e. against the respondent that as on the date of filing of nomination paper on 25.1.2017 and on the date of scrutiny of nomination paper on 28.01.2017 and on the date of declaration of result of Legislative Assembly Election of 34-Suar Assembly Constituency of District Rampur on 11.03.2017 the respondent was less than Twenty Five Years of age and thus was not qualified to be chosen to fill the seat in legislature of the State in terms of Article 173 (b) of the Constitution of India.

Conclusion on Issue No.(c)

60. In view of my answer to issues No.(a) and (b) in NEGATIVE i.e. against the respondent, the Election Petition is **allowed.** The election of the respondent from 34-Suar Assembly Constituency is declared void and consequently it is set aside.

Order

61. In view of the aforesaid, the Election-Petition is **Allowed**. The election of the respondent from 34-Suar Assembly Constituency of District Rampur is declared void and consequently it is set aside. Let the substance of this decision be intimated by the Registrar General of this Court to the Election Commission and the Speaker of the Uttar Pradesh Legislative Assembly . A certified copy of this decision be sent to the Election Commission of India forthwith.

There shall be no order as to costs.

(2019)12 ILR A939

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.12.2019
BEFORE
THE HON'BLE MANOJ KUMAR GUPTA, J.

Election Petition No. 17 of 2019

Tej Bahadur ...Petitioner
Versus
Sri Narendra Modi ...Respondent

Counsel for the Petitioner:
Sri Shailendra, Sri Dharmendra Singh, Sri Tej Bahadur(In Person)

Counsel for the Respondent:
Sri K.R. Singh, Sri Dheeraj Jain, Dr. Santosh Jain, Sri Satya Pal Jain

Representation of the People Act, 1951 - Section 80, 80-A ,81 and 100 - Section 123(2), read with Section 134 of the Act - Lok Sabha election – election petition is not an action at common law, nor in equity, but statutory in nature - the person filing election petition if not a "duly nominated candidate", will have "no locus standi to file an election petition .

An election petition, which does not disclose 'a cause of action', has to be dismissed at the threshold - 'Cause of action' invests the person with right to sue - When a person has no interest at all, or no sufficient interest to support a particular legal claim or action, he will have no locus standi to sue - Locus to maintain action in court of law, is threshold test, an integral part of cause of action,

entitling a person to the relief claimed - Bereft of locus, no action, however sacrosanct, could survive - Thus, a plaint filed by a person having no locus to maintain the claim is but to be rejected. (Para 22)

Held: - The petitioner is neither an elector nor a candidate at the election which he seeks to challenge and would therefore have no locus to file election petition. (Para 60 & 71)

Election Petition dismissed. (E-7)

List of cases cited: -

1.Jyoti Basu & Others vs. Debi Ghoshal & Others, AIR 1982 SC 983

2.Sunil Kumar Kori vs. Gopal Das Kabra, (2016) 10 SCC 467,

3.Azhar Hussain vs. Rajiv Gandhi, AIR 1986 SC 1253

4.Madiraju Venkata Ramana Raju vs Peddireddigari Ramachandra Reddy, (2018) 14 SCC 1

5.Ashraf Kokkur vs, K.V Abdul Khader, (2015) 1 SCC 29

6T. Arivandandam vs. T.V. Satyapal (1977) 4 SCC 467)

7.Uttamrao Shivdas Jankar v. Ranjitsinh Vijaysinh Mohite Patil, (2009) 13 SCC 131

8.Ramesh Rout v. Rabindra Nath Rout, 2012(1) SCC 762

9.M. Narasappa v. M. Krishna Reddy, MANU/AP/0258/ 1984.

10.Sundar Lal v. Sampat Lal, AIR 1963 Raj. 226

11.S.M. Banerji v. Sri Krishna Agarwal, AIR 1960 SCC 368

12.Durga Shankar Mehta v. Raghuraj Singh, AIR 1954 SC 520

13.Charan Lal Sahu v. Dr. APJ Abdul Kalam and others, (2003) 1 SCC 609

14.Charan Lal Sahu Vs. Neelam Sanjeeva Reddy, 1978 (2) SCC 500

15.Charan Lal Sahu Vs. Giani Zail Singh, 1984 (1) SCC 390

16.Charan Lal Sahu Vs. K.R. Narayanan & Ors., 1998 (1) SCC 56

17.Mithilesh Kumar Sinha v. Returning Officer for Presidential Election and others, 1993 Supp (4) SCC 386

18.Devendra Patel vs. Ram Pal Singh & Others, 2013 (10) SCC 80

19.Hari Kishan Lal vs. Atal Bihari Bajpai, AIR 2003 Alld 128

20.Nandiesha Reddy vs Mrs. Kavitha Mahesh, 2011 (7) SCC 721

21.Rakesh Kumar vs. Sunil Kumar, (1999) 2 SCC 489

(Delivered by Hon'ble Manoj Kumar Gupta,J.)

1. By means of the present petition, filed under Section 80, 80-A and 100 of the Representation of the People Act, 1951 (hereinafter referred to as "the Act'), the petitioner has called in question the election of the respondent to the 17th Lok Sabha from 77th Parliamentary Constituency (Varanasi), held in April - May 2019. The petitioner has sought a declaration to the effect that the election of the respondent be declared void and the order passed by the Returning Officer dated 1.5.2019, rejecting his nomination, be set aside. He has also made a prayer for taking action against the Returning Officer for misuse of official powers by invoking Section 123(2), read with Section 134 of the Act.

2. The petition was entertained by this court and notice was issued to the respondent, calling for his reply. In response thereto, the respondent entered

appearance. An application was filed by him under Order 6 Rule 16 C.P.C. and Order VII Rule 11 C.P.C., read with Section 86(1) of the Act, praying for striking off paragraphs-4 to 28 of the petition and also for dismissing the same by exercising power under Order VII Rule 11 C.P.C., as it discloses no cause of action and also for the reason that the petitioner has no locus standi to file the same. The petitioner filed a reply to the said application by way of a counter affidavit. Thereafter, Sri Shailendra, learned Senior Counsel for the petitioner, assisted by Sri Dharmendra Singh, and Sri Satya Pal Jain, learned Senior Advocate for the respondent, assisted by Sri Dheeraj Jain, Sri K.R. Singh and Dr. Santosh Jain, were heard at length on the said application.

3. The case set up by the petitioner is that he filed his nomination for the election as an independent candidate on 24.4.2019. Subsequently, he filed another nomination as official candidate of Samajwadi Party on 29.4.2019, the last date for filing of nomination. He was issued a checklist by Returning Officer on the same date at 1:43 p.m., without raising any objection in regard to the nomination papers. On 30.4.2019, the date fixed for scrutiny, he received a notice from the Returning Officer at 3:03 p.m., followed by another notice on the same date, at 6:15 p.m., alleging that the petitioner had not filed certificate from the Election Commission to the effect that he had not been dismissed from the service of Government of India, on ground of corruption or disloyalty to the State, albeit, a period of five years had not expired from the date of his dismissal on the date of filing of the nominations, in terms of Section 9, read with Section 33(3) of the Act. The petitioner claims to have responded to the said notice by filing his dismissal order dated 19.4.2017, before the Returning Officer, pointing out that although he was dismissed from service of Government of India, but the dismissal was not on the ground of corruption or disloyalty to the State. It is also asserted that after receipt of second notice, he approached the Election Commission of India on the same day, by making an application be registered post and also be sending the same by E-mail, requesting it to issue the certificate contemplated under Section 9(2) of the Act. It is also asserted that on the next date, i.e. 1.5.2019, his Power of Attorney submitted application by hand in the office of the Election Commission of India at 9:00 a.m., but the certificate was not made available to him. His nomination paper was rejected on 1.5.2019 at 11:00 a.m. It is also alleged that till the filing of the election petition, he had not been informed about the fate of his application. He clams to have filed a writ petition, bearing number 646 of 2019, before the Supreme Court, under Article 32 of the Constitution of India, challenging the order of Returning Officer dated 1.5.2019, but which was rejected by the Supreme Court by order dated 9.5.2019, declining to entertain the same. It is asserted that News Channel ABP telecasted a programme on 16.5.2019 mentioning that the nomination of the petitioner was rejected on extraneous considerations and under pressure. The Returning Officer, as well as the Central Observer Praveen Kumar had not acted fairly, but in a partisan manner, in rejecting the nomination of the petitioner. The petitioner initially also impleaded the District Election Officer and the Election Observer, as party-respondents to the

election petition, alleging that they did not discharge their functions objectively and action be taken against them for misusing their official powers by invoking Section 134 of the Act. However, on the very first date of hearing of the election petition, he got their names deleted from the array of parties. The petitioner has prayed for declaring the election of respondent to be void on the ground that his nomination was improperly rejected; that nomination of the respondent was wrongly accepted; and on account of misuse of official powers by the Returning Officer and the Central Observer.

4. It is clear from the facts stated in the election petition that the petitioner was in service of Government of India (Border Security Force) and was dismissed on 19.4.2017. On 24.4.2019, as well as on 29.4.2019, the two dates on which two different sets of nominations were filed, the period of five years had not elapsed, since the dismissal of the petitioner from service. It is also an admitted fact that along with his nomination papers, the petitioner did not file any certificate from the Election Commission of India to the effect that he had not been dismissed on ground of corruption or disloyalty to the State.

5. The application filed by the respondent under Order VII Rule 11 C.P.C is primarily on the ground that the petitioner whose nomination was rejected, could not claim himself to be a candidate at the election, nor he was elector from the parliamentary constituency from where he filed his nomination and therefore, in view of Section 81 of the Act, he is not competent to file the election petition. It has also been alleged that the election petition is devoid of material facts, nor discloses any cause of action. The averments made are wholly vague and does not raise any triable issue for consideration by this court. It is also the case of the respondent that the pleadings are frivolous, vexatious, unnecessary, irrelevant and are of such nature which would prejudice and delay the fair trial of the election petition. Consequently, paragraphs-4 to 28 of the election petition are liable to be struck off. The allegations regarding wrongful acceptance of the nomination papers of the respondent is devoid of material particulars. Moreover, the allegation of alleged corrupt practice against officials of Election Commission of India, without stating any basis for the same and without giving any supporting facts or particulars, do not call for any detailed trial. The pleadings made in this regard without furnishing material facts and particulars, being frivolous and vexatious, are liable to be struck off, in exercise of power under Order 6 Rule 16 C.P.C.

6. The petitioner filed a counter affidavit to the said application and asserted that since he was not dismissed on the ground of corruption or disloyalty to the State, therefore, he would not fall within the ambit of Section 9 and 33 of the Act. There is presumption that every nomination paper is valid, unless the contrary is prima facie obvious, or has been made out. In case of doubt as to validity of a nomination paper, the benefit of such doubt must go to the candidate concerned and the nomination should be held to be valid. The Returning Officer has misused his power in rejecting the nominations of the petitioner. It has been denied that the averments made in the election petition are vague or that the election petition does not disclose any

cause of action; or that, he has no locus to file the election petition.

7. Counsel for the petitioner has raised objection against the maintainability of the application filed by the respondent on the ground that it contains two prayers i.e., one for striking off the pleadings of the election petition in exercise of power under Order 6 Rule 16 CPC and the other for rejection of the petition under Order VII Rule 11 CPC. He has placed reliance on Rule 28 of the General Rule Civil, which provides that separate application should be made in regard to distinct matter in contending that the application should be rejected for the said reason.

8. The objection does not have any force. Both the prayers are interlinked with each other and relate to the same subject matter. The contention of the respondents is that the pleadings in the election petition are wholly vague, frivolous and vexatious, therefore, such pleadings should be struck off. The application goes on to mention that once the pleadings, as contained in paragraphs 4 to 28 of the election petition are struck off, apart from the fact that the petitioner has no locus to file the instant election petition, it will also be bereft of any cause of action. Even otherwise, the power under Order 6 Rule 16 CPC as well as Order VII Rule 11 CPC could be exercised by the Court even suo moto without any application from the rival side.

9. It is next submitted that the petitioner has controverted the averments made in the application by filing counter affidavit but the respondent has failed to file any affidavit in rebuttal, therefore the averments made in the counter affidavit should be taken to be true. Accordingly, the application deserves to be rejected. The argument is wholly misconceived in as much as both the prayers contained in the application filed by the respondent have to be decided on basis of assertions made in the election petition and not on basis of the stand taken by the petitioner in the counter affidavit.

10. It is next urged that the affidavit filed in support of the application having been sworn before Notary Public, New Delhi, does not comply with the requirement of Rule 11 of Ch. XV-A of the Allahabad High Court Rules. Ch. XV-A of the Allahabad High Court Rules regulates the filing of election petition and its trial before this Court. Rule 11 stipulates that an application shall ordinarily be accompanied by an affidavit. It also provides that subject to the proviso to sub-section (1) of Section 83 of the Act, the provisions of Ch. IV as to affidavits shall apply to proceedings under this Chapter. The provision does not postulates filing of affidavit alongwith every application. Since the power to reject election petition under Order VII Rule 11 could be exercised even suo moto, therefore, the application even unsupported by an affidavit would suffice. Moreover, the provisions of Ch. IV which relates to affidavits and Oath Commissioner, particularly, Rule 5 thereof, on which emphasis was laid by learned counsel for the petitioner, does not make it imperative that the affidavit filed in support of the application could only be sworn before Oath Commissioner appointed by this Court. It only speaks of duty of the Oath Commissioner that he shall not allow an affidavit to be sworn before him, unless it complies with the

provisions of the said Chapter. Thus, the objection has no force.

11. Coming to the merits, the first issue which requires to be answered is whether an election petition filed under Section 81 of the Act could be dismissed,exercising power under Order VII Rule 11 C.P.C.

12. Article 329(b) of the Constitution of India provides that "no election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature".

13. In **Jyoti Basu & Others vs. Debi Ghoshal & Others, AIR 1982 SC 983**, the Supreme Court has held that right to elect, right to be elected and right to dispute an election, are not fundamental rights, but pure and simple statutory rights. *"Outside of statute, there is no right to elect, no right to be elected and no right to dispute an election. Statutory creations they are, and therefore, subject to statutory limitation. An election petition is not an action at Common Law, nor in equity. It is a statutory proceeding to which neither the common law nor the principles of equity apply butonly those rules which the statute makes and applies. It is a special jurisdiction, and a special jurisdiction has always to be exercised in accordance with the statute creating it. Concepts familiar to Common Law and Equity must remain strangers to Election Law unless statutorily embodied. A Court has no right to resort to them on considerations of alleged policy because policy in such matters as those, relating to the trial of election disputes, is what the statute lays down. In the trial of election disputes, Court is put in a straight jacket."*

14. The above first principle of election law was reiterated by the Supreme Court in **Sunil Kumar Kori vs. Gopal Das Kabra, (2016) 10 SCC 467**, observing that an election petition is not an action at common law, nor in equity, but statutory in nature.

15. On 12th May 1950, the Parliament enacted the Representation of the People Act, 1950, providing for allocation of seats in and the delimitation of constituencies for the purpose of election to, the House of the People and the Legislatures of States, the qualiifications of voters at such elections, the preparation of electoral rolls, the manner of filling seats in the Council of States to be filled by representatives of Union Territories, and matters connected therewith. In quick succession, on 17.7.1951, the Parliament enacted the Representation of the People Act, 1951, providing for the conduct of elections of the Houses of Parliament and to the House or Houses of the Legislature of each State, the qualifications and disqualifications for membership of those Houses, the corrupt practices and other offences at or in connection with such elections and the decision of doubts and disputes arising out of or in connection with such elections.

16. Section 80 of the Act stipulates that no election shall be called in question, except by an election petition, presented in accordance with the provisions of this part. Section 81 of the Act relates to presentation of election petition; Section 82 specifies the person

who have to be joined in an election petition; Section 83 prescribes for the contents of an election petition and it reads thus: -

83. Contents of petition.*--(1) An election petition-*

(a) shall contain a concise statement of the material facts on which the petitioner relies;

(b) shall set forth full particulars of any corrupt practice that the petitioner alleges, including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice; and

(c) shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 (5 of 1908) for the verification of pleadings:

Provided that where the petitioner alleges any corrupt practice, the petition shall also be accompanied by an affidavit in the prescribed form in support of the allegation of such corrupt practice and the particulars thereof.

(2) Any schedule or annexure to the petition shall also be signed by the petitioner and verified in the same manner as the petition.

17. Section 86 relates to the trial of election petition by High Court and Section 87 embodies the procedure to be followed by High Court in trying an election petition and reads thus: -

87. Procedure before the High Court.*--(1) Subject to the provisions of this Act and of any rules made thereunder, every election petition shall be tried by the High Court, as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure, 1908 (5 of 1908) to the trial of suits:*

Provided that the High Court shall have the discretion to refuse, for reasons to be recorded in writing, to examine any witness or witnesses if it is of the opinion that the evidence of such witness or witnesses is not material for the decision of the petition or that the party tendering such witness or witnesses is doing so on frivolous grounds or with a view to delay the proceedings.

(2) The provisions of the Indian Evidence Act, 1872 (1 of 1972), shall, subject to the provisions of this Act, be deemed to apply in all respects to the trial of an election petition.

18. Section 87 of the Act thus makes applicable, as nearly as may be, the procedure provided under the Code of Civil Procedure to election petition. Consequently, Order VII Rule 11 C.P.C. applies to an election petition, filed under the Act. Order VII Rule 11 C.P.C. reads thus: -

11. Rejection of plaint *-- The plaint shall be rejected in the following cases:--*

(a) where it does not disclose a cause of action;

(b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;

(c) where the relief claimed is properly valued, but the plaint is returned upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper

within a time to be fixed by the Court, fails to do so;

(d) where the suit appears from the statement in the plaint to be barred by any law :

Provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp-paper shall not be extended unless the Court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature from correcting the valuation or supplying the requisite stamp-paper, as the case may be, within the time fixed by the Court and that refusal to extend such time would cause grave injustice to the plaintiff.

19. In **Azhar Hussain vs. Rajiv Gandhi, AIR 1986 SC 1253**, the Supreme Court, after considering a catena of previous decisions on the point, held that an election petition could be dismissed summarily in exercise of power under Order VII Rule 11 C.P.C., if it does not furnish a cause of action. It would be advantageous to quote: -

"11. In view of this pronouncement there is no escape from the conclusion that an election petition can be summarily dismissed if it does not furnish cause of action in exercise of the powers underthe Codeof Civil Procedure. So also it emerges from the aforesaid decision that appropriate orders in exercise of powers underthe Codeof Civil Procedure can be passed if the mandatory requirements enjoined by Section 83of the Act to incorporate the material facts in the election petition are not complied with. This ....."

"12. Learned counsel for the petitioner has next argued that in any event the powers to reject an election petition summarily under the provisionsof the Codeof Civil Procedure should not be exercised at the threshold. In substance, the argument is that the court must proceed with the trial, record the evidence, and only after the trial of the election petition is concluded that the powers underthe Codeof Civil Procedure for dealing appropriately with the defective petition which does not disclose cause of action should be exercised. With respect to the learned counsel, it is an argument which it is difficult to comprehend. The whole purpose of confernment of such powers is to ensure that a litigation which is meaningless and bound to prove abortive should not be permitted to occupy the time of the court and exercise the mind of the respondent. The sword of Damocle need not be kept hanging over his head unnecessarily without point or purpose."

20. The Supreme Court, in **Madiraju Venkata Ramana Raju vs Peddireddigari Ramachandra Reddy, (2018) 14 SCC 1**, explained the difference in scope between Order VII Rule 11 C.P.C. and Order 14 Rule 2 C.P.C. and thereafter held that an application under Order 7 Rule 11 CPC deserves consideration at the threshold -

"24. Ordinarily, an application for rejection of election petition in limine, purportedly under Order VII Rule 11 for non-disclosure of cause of action, ought to proceed at the threshold. For, it has to be considered only on the basis of institutional defects in the election petition in reference to the grounds specified in clauses (a) to (f) of Rule 11. Indeed, non-disclosure of cause of action is covered by clause (a) therein.

Concededly, Order VII of the CPC generally deals with the institution of a plaint. It delineates the requirements regarding the particulars to be contained in the plaint, relief to be specifically stated, for relief to be founded on separate grounds, procedure on admitting plaint, and includes return of plaint. The rejection of plaint follows the procedure on admitting plaint or even before admitting the same, if the court on presentation of the plaint is of the view that the same does not fulfill the statutory andinstitutional requirements referred to in clauses (a) to (f) of Rule 11. The power bestowed in the court in terms of Rule 11 may also be exercised by the court on a formal application moved by the defendant after being served with the summons to appear before the Court. Be that as it may, the application under Order VII Rule 11 deserves consideration at the threshold."

"45. In Kuldeep Singh Pathania (supra), the decision of the High Court which is similar to one under consideration (namely the impugned judgment) had accepted the explanation offered by the respondents and meticulously dealt with it to conclude that the petition did not disclose any cause of action since it lacked material facts. The High Court passed that order purportedly in exercise ofpower under Order XIV Rule 2. This Court pointed out the distinction between an order under Order VII Rule 11 to reject the election petition in limine for non disclosure of cause of action and an order under Order XIV Rule 2 for disposal of the petition on a preliminary issue. In that case, the order passed by the High Court was relatable only to Order VII Rule 11. This Court adverted to the decisions in Mayar (H.K.) Ltd. and Ors. Vs. Owners and Parties Vessel M.V. Fortune Express and Ors. 40 and Virendra Nath Gautam Vs. Satpal Singh and Ors.,41 and explicated that under Order VII Rule 11(a), only the pleadings of the plaintiff-petitioner can be looked at as a threshold issue. Whereas, entire pleadings of both sides can be looked into for considering the preliminary issue under Order XIV Rule 2. Neither the written statement nor the averments or case pleaded by the opposite party can be taken into account for answering the threshold issue for rejection of election petition in terms of Order VII Rule 11 (a) of the Act.

46. Whether the material facts as asserted by the appellant can stand the test of trial and whether the appellant would be able to(2006) 3 SCC 100(2007) 3 SCC 617bring home the grounds for declaring the election of respondent No.1 to be void, is not a matter to be debated at this stage. Suffice it to observe that the averments in the concerned paragraphs of the election petition, by no standard can be said to be frivolous and vexatious as such. The High Court committed manifest error in entering into the tenability of the facts and grounds urged in support thereof by the appellant on merit, as is evident from the cogitation in paragraphs 16 to 22 of the impugned judgment."

21. Again in **Ashraf Kokkur vs, K.V Abdul Khader, (2015) 1 SCC 29**, heavily relied upon by learned counsel for the election petitioner, the Supreme Court defined the limits of enquiry under Order VII Rule 11 C.P.C. as under: -

"22. After all, the inquiry under Order VII Rule 11(a) CPC is only as to whether the facts as pleaded disclose a cause of action and not complete cause of action. The limited inquiry is only to see

whether the petition should be thrown out at the threshold. In an election petition, the requirement under Section 83 of the RP Act is to provide a precise and concise statement of material facts. The expression "material facts' plainly means facts pertaining to the subject matter and which are relied on by the election petitioner. If the party does not prove those facts, he fails at the trial (see Philipps v. Philipps and others, (1878) LR 4 QBD 127 (CA); Mohan Rawale v. Damodar Tatyaba, (1994) 2 SCC 392."

22. Thus, it is clear that an election petition, which does not disclose 'a cause of action', has to be dismissed at the threshold. 'Cause of action' invests the person with right to sue. When a person has no interest at all, or no sufficient interest to support a particular legal claim or action, he will have no locus standi to sue. Locus to maintain action in court of law, is threshold test, an integral part of cause of action, entitling a person to the relief claimed. Bereft of locus, no action, however sacrosanct, could survive. Thus, a plaint filed by a person having no locus to maintain the claim is but to be rejected. In the words of Justice V.R. Krishnaiyer **(T. Arivandandam vs. T.V. Satyapal (1977) 4 SCC 467)** *"if on a meaningful-not formal - reading of the plaint it is manifestly vexatious, and meritless, in the sense of not disclosing a clear right to sue, it should be nipped in the bud at the first hearing"*. Order VII Rule 11 C.P.C. is a tool in the hand of courts to keep irrespoinsible law suits out of its bounds.

23. A claim which is destined to fail should be throttled at its very inception. This is exactly the purpose of investing courts with the power to reject plaint itself. No doubt, while exercising the power under Order VII Rule 11 C.P.C., only assertions made in the plaint/petition have to be seen. If the facts stated can stand the test of trial, then whether or not plaintiff will be able to prove his case, is not a matter to be debated at this stage. On the other hand, if the case stated in the plaint, even if taken to be correct, do not disclose any cause of action, or locus in favour of the plaintiff, it is duty of the court to nip into bud such a litigation. Keeping the above broad principles in mind, I now proceed to examine the issue as to whether the petitioner has locus to maintain the instant election petition, or not.

24. The main thrust of the argument of learned counsel for the respondent is that the petitioner is neither an elector, nor a candidate at the election which he seeks to question, therefore, in view of Section 81 of the Act, he cannot maintain the election petition. To wit, once the petitioner is not entitled to maintain the election petition, he also would have no cause of action. Consequently, the petition is liable to be rejected under Order VII Rule 11 C.P.C., read with Section 81 of the Act. Relevant part of Section 81 reads thus: -

***81. Presentation of petitions.**--(1) An election petition calling in question any election may be presented on one or more of the grounds specified in sub-section (1) of section 100 and section 101 to the High Court by any candidate at such election or any elector within forty-five days from, but not earlier than the date of election of the returned candidate, or if there are more than one returned candidate at the election and the dates of their election are different, the later of those two dates.*

25. Thus, an election petition, calling in question an election, could be

filed only by (i) an elector and/or (ii) by any candidate at such election. The Explanation defines the 'elector' as a person *who was entitled to vote at the election to which the election petition relates, whether he has voted at such election or not.*

26. The petitioner is enrolled as an elector from Bhiwani, Mahendragarh Parliamentary Constituency, Haryana (as per Form 26, Para 2, page 50 of the petition). He does not claim to be elector from Parliamentary Constituency, Varanasi, the election of which is sought to be challenged. He is thus not covered by the definition of 'elector'. He however, claims to be a 'candidate' at such election and on its strength asserts his locus to maintain the instant petition.

27. The word 'candidate' is defined by Section 79(b) thus :-

"(b) "candidate" means a person who has been or claims to have been duly nominated as a candidate at any election;

28. For being a candidate at an election one has to file nomination in the prescribed manner. The procedure for nomination of candidate is provided under Part V. Ch.1. Section 30 empowers the Election Commission to issue notification in the Official Gazette specifying last dates for making nominations, for scrutiny, for withdrawal of candidature, the date of polling and the date before which election shall be completed. Section 32 stipulates that :-

"32. Nomination of candidates for election *- Any person may be nominated as a candidate for election to fill a seat if he is qualified to be chosen to fill that seat under the provisions of the Constitution and this Act or under the provisions of the Government of Union Territories Act, 1963 (20 of 1963), as the case may be."*

29. Section 33 (so much as is relevant) reads thus :-

"33. Presentation of nomination paper and requirements for a valid nomination - *(1) On or before the date appointed under clause (a) of Section 30 each candidate shall, either in person or by his proposer, between the hours eleven o'clock in the forenoon and three o'clock in the after noon deliver to the returning officer at the place specified in this behalf in the notice issued under Section 31 a nomination paper completed in the prescribed form and signed by the candidate and by an elector of the constituency as proposer:*

Provided that a candidate not set up by a recognised political party, shall not be deemed to be duly nominated for election from a constituency unless the nomination paper is subscribed by ten proposers being electors of the constituency:

Provided further that no nomination paper shall be delivered to the Returning Officer on a day which is a public holiday.

Provided also that in the case of a local authorities' constituency, graduates' constituency or teachers' constituency, the reference to 'an elector of the constituency as proposer' shall be construed as a reference to ten per cent of the electors of the constituency or ten such electors, whichever is less, as proposers."

(1-A).....

(2) In a constituency where any seat is reserved, a candidate shall not be qualified to be chosen to fill that seat unless his nomination paper contains a declaration by him specifying the particular caste or tribe of which he is a member and the area in relation to which that caste or tribe is a Scheduled Caste or, as the case may be, a Scheduled Tribe of the State.

(3) Where the candidate is a person who, having held any office referred to in Section 9, has been dismissed and a period of five years has not elapsed since the dismissal, such person shall not be deemed to be duly nominated as a candidate unless his nomination paper is accompanied by a certificate issued in the prescribed manner by the Election Commission to the effect that he has not been dismissed for corruption or disloyalty to the State.

(4) On the presentation of a nomination paper, the returning officer shall satisfy himself that the names and electoral roll numbers of the candidate and his proposer as entered in the nomination paper are the same as those entered in the electoral rolls :

Provided that no misnomer or inaccurate description or clerical, technical or printing error in regard to the name of the candidate or his proposer or any other person, or in regard to any place, mentioned in the electoral roll or the nomination paper and no clerical, technical or printing error in regard to the electoral roll numbers of any such person in the electoral roll or the nomination paper, shall affect the full operation of the electoral roll or the nomination paper with respect to such person or place in any case where the description in regard to the name of the person or place is such as to be commonly understood; and the returning officer shall permit any such misnomer or inaccurate description or clerical, technical or printing error to be corrected and where necessary, direct that any such misnomer, inaccurate description, clerical, technical or printing error in the electoral roll or in the nomination paper shall be overlooked.

(5) Where the candidate is an elector of a different constituency, a copy of the electoral roll of that constituency or of the relevant part thereof or a certified copy of the relevant entries in such roll shall, unless it has been filed along with the nomination paper, be produced before the returning officer at the time of scrutiny.

(6) Nothing in this section shall prevent any candidate from being nominated by more than one nomination paper:

Provided that not more than four nomination papers shall be presented by or on behalf of any candidate or accepted by the returning officer for election in the same constituency.

(7).....…"

30. Section 33-A makes it obligatory for a candidate to furnish information regarding his criminal antecedents etc. and reads thus :-

***"33-A. Right to information.**--(1) A candidate shall, apart from any information which he is required to furnish, under this Act or the rules made thereunder, in his nomination paper delivered under sub-section (1) or section 33, also furnish the information as to whether -*

(i) he is accused of any offence punishable with imprisonment for two years or more in a pending case in which

a charge has been framed by the court of competent jurisdiction;

(ii) he has been convicted of an offence other than any offence referred to in sub-section (1) or sub-section (2), or covered in sub-section (3), of section 8 and sentenced to imprisonment for one year or more.

(2) The candidate of his proposer, as the case may be, shall, at the time of delivering to the returning officer the nomination paper under sub-section (1) of section 33, also deliver to him an affidavit sworn by the candidate in a prescribed form very fine the information specified in sub-section (1)."

31. Section 34 relates to deposit of certain amount in Government Treasury and provides as follows :-

*"**34. Deposits.**--(1) A candidate shall not be deemed to be duly nominated for election from a constituency unless he deposits or causes to be deposited,--*

(a) in the case of an election from a Parliamentary constituency, 4 a sum of twenty-five thousand rupees or where the candidate is a member of a Scheduled Caste or Scheduled Tribe, a sum of twelve thousand five hundred rupees; and

(b) in the case of an election from an Assembly or Council constituency, a sum of ten thousand rupees or where the candidate is a member of a Scheduled Caste or Scheduled Tribe, a sum of five thousand rupees :

Provided that where a candidate has been nominated by more than one nomination paper for election in the same constituency, not more than one deposit shall be required of him under this sub-section.

(2) Any sum required to be deposited under sub-section (1) shall not be deemed to have been deposited under that sub-section unless at the time of delivery of the nomination paper under sub-section (1) or, as the case may be, sub-section (1A) of section 33 the candidate has either deposited or caused to be deposited that sum with the returning officer in cash or enclosed with the nomination paper a receipt showing that the said sum has been deposited by him or on his behalf in the Reserve Bank of India or in a Government Treasury."

32. Section 35 deals with the notice of nomination and the time and place for their scrutiny. Section 36 deals with scrutiny of nominations. It embodies the entire procedure to be followed during nomination, power of the Returning Officer to decide objections against the nominations, the manner of holding enquiry, and grounds on which nomination could be rejected. Section 36 reads thus :-

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

(2) The returning officer shall then examine the nomination papers and shall decide all objections which may be

made to any nomination and may, either on such objection or on his own motion, after such summary inquiry, if any, as he thinks necessary, reject any nomination on any of the following grounds:--

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

Articles 84, 102, 173 and 191,

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

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

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

(3) Nothing contained in 11 clause (b) or clause (c) of sub-section (2) shall be deemed to authorise the rejection of the nomination of any candidate on the ground of any irregularity in respect of a nomination paper, if the candidate has been duly nominated by means of another nomination paper in respect of which no irregularity has been committed.

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

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

Provided that in case an objection is raised by the returning officer or is made by any other person the candidate concerned may be allowed time to rebut it not later than the next day but one following the date fixed for scrutiny, and the returning officer shall record his decision on the date to which the proceedings have been adjourned.

(6) The returning officer shall endorse on each nomination paper his decision accepting or rejecting the same and, if the nomination paper is rejected, shall record in writing a brief statement of his reasons for such rejection.

(7) For the purposes of this section, a certified copy of an entry in the electoral roll for the time being in force of a constituency shall be conclusive evidence of the fact that the person referred to in that entry is an elector for that constituency, unless it is proved that he is subject to a disqualification mentioned in section 16 of the Representation of the People Act, 1950 (43 of 1950).

(8) Immediately after all the nomination papers have been scrutinised and decisions accepting or ejecting the same have been recorded, the returning officer shall prepare a list of validly nominated candidates, that is to say, candidates whose nominations have been found valid, and affix it to his notice board."

33. It is an admitted fact that the petitioner was in service of Union of India (B.S.F.) and was dismissed from service on 19.4.2017. The nomination of the petitioner, upon scrutiny was rejected by the Returning Officer by order dated 1.5.2017 on the ground that it was not accompanied by the certificate of the Election Commission that his dismissal from service was not on the ground of disloyalty to State or corruption as required by Section 33 (3) of the Act.

Relevant part from the order of the Returning Officer reads thus :

"In view of all relevant provisions of Representation of Peoples Act, 1951, Hand book of the Returning Officer and judgement in Sundar Lal vs. Sampat Lal, AIR 1963 Raj. 226 it is clear that if a person is dismissed from the government service and five years have not elapsed then such person shall not be deemed to be duly nominated as a candidate unless his nomination paper is accompanied by a certificate issued in the prescribed manner by the Election Commission to the effect that he has not been dismissed for corruption or disloyalty to the State.

In this case, Shri Tej Bahadur has stated that he has been dismissed from the government service on 19th April, 2017. 5 years has not elapsed, but his nomination paper is neither accompanied by certificate issued in the prescribed manner by the Election Commission to the effect that he has not been dismissed for corruption or disloyalty to the State nor he has been able to produce any such certificate by 11 AM of 1st May, 2019 as prescribed in notice. Therefore, nomination paper of Shri Tej Bahadur is liable to be rejected and accordingly Nomination Paper No.-09/HP/2019/RO submitted by him is hereby rejected."

Thus, the issue for consideration is whether the petitioner whose nomination was rejected could claim to be a candidate at the election in question.

34. One of the contention of learned counsel for the petitioner was that once the nomination form was accepted on 30.4.2019, followed by issuance of check list, without pointing out any defect, the nomination could not have been rejected during scrutiny, as there is presumption that the nomination was validly made. In support of his submission, he placed reliance upon **Uttamrao Shivdas Jankar v. Ranjitsinh Vijaysinh Mohite Patil, (2009) 13 SCC 131** and **Ramesh Rout v. Rabindra Nath Rout, 2012(1) SCC 762**. Alternatively, it is contended that the ground for rejection of the nomination is untenable, in as much as the petitioner was never dismissed from service for corruption or disloyalty, consequently neither Section 9 nor Section 33(3) would get attracted.

35. Section 36(2) enjoins the Returning Officer to reject nomination paper suo moto or on objection, interalia on the grounds that there has been a failure to comply with any of the provisions of section 33 of the Act. The power to reject the nomination of any candidate or nomination paper is circumscribed by sub-section (4). The returning officer shall not reject any nomination paper on the ground of any defect which is not of a substantial character. The nomination of the petitioner, as noted above, has been rejected on the ground of non compliance of sub-section (3) of Section 33, which reads thus :-

"(3) Where the candidate is a person who, having held any office referred to in section 9 has been dismissed and a period of five years has not elapsed since the dismissal, such person shall not be deemed to be duly nominated as a candidate unless his nomination paper is accompanied by a certificate issued in the prescribed manner by the Election Commission to the

effect that he has not been dismissed for corruption or disloyalty to the State.

36. Section 9 of the Act speaks of a person who had held office under the Government of India or under the Government of any State and it reads thus :-

"9. Disqualification for dismissal for corruption or disloyalty. -- *(1) A person who having held an office under the Government of India or under the Government of any State has been dismissed for corruption or for disloyalty to the State shall be disqualified for a period of five years from the date of such dismissal.*

(2) For the purposes of sub-section (1), a certificate issued by the Election Commission to the effect that a person having held office under the Government of India or under the Government of a State, has or has not been dismissed for corruption or for disloyalty to the State shall be conclusive proof of the fact:

Provided that no certificate to the effect that a person has been dismissed for corruption or for disloyalty to the State shall be issued unless an opportunity of being heard has been given to the said person."

37. A conjoint reading of the above two provisions would show that the certificate of the Election Commission is essential where (i) the person filing the nomination had held any office referred to in Section 9, i.e., Under Government of India or under Government of any State. (ii) who has been dismissed from service and (iii) a period of five years has not elapsed since his dismissal.

38. Indisputably, and as is admitted in para 4, 16 and 25 of the petition, the petitioner was dismissed while serving under the Government of India and period of five years had also not elapsed since then; thus all the three ingredients get attracted to the case of the petitioner. However, the petitioner claims that his dismissal was not on ground of disloyalty or corruption. He is not covered by Section 9 which prescribe a disqualification from contesting the election, as he was not dismissed on ground of corruption or disloyalty while in government service. Consequently, Section 33(3) would also not get attracted nor was he required in law to file any certificate from the Election Commission. In support of his contention, he has placed reliance upon the judgement of Andhra Pradesh High Court in **M. Narasappa v. M. Krishna Reddy, MANU/AP/0258/ 1984**. In the said case, the election of the returned candidate was challenged on the ground that his nomination was wrongly accepted by the Returning Officer despite the fact that his nomination was not accompanied by the certificate of Election Commission that he was not dismissed from service on ground of corruption or disloyalty. The returned candidate was dismissed within preceding five years of filing of the nomination. The court itself went into the charges levelled against the returned candidate and held that the dismissal was not on ground of corruption. He was not disqualified under Section 9 from contesting the election. Consequently, Section 33(3) will not apply. Here I would like to refer to one more decision taking a diametrically opposite view by the Rajasthan High Court in **Sundar Lal v. Sampat Lal, AIR 1963 Raj. 226** relied upon by learned counsel for the respondent. In that case,

the Court took the view that once certificate of Election Commission is not filed, the Returning Officer was not competent to examine whether dismissal was on ground of corruption or disloyalty to the State and was justified in rejecting the nomination.

39. The crucial ingredient of Section 33(3) as noted above, is holding of office referred to in Section 9 and the fact that period of five years had not elapsed since dismissal of such person. As soon as a person is covered by the ingredients of Section 33, he is required to file certificate from the Election Commission.

40. Although Section 33(3) makes a reference to Section 9 but it does not control the operation of said provision. In as much as, Section 9 is an independent provision stipulating the consequences flowing out of dismissal of a person from service referred to in the said Section. Such a person stands disqualified to contest election for a period of five years from the date of dismissal. Sub-section (2) of Section 9 makes the Election Commission final arbiter in such matters. The certificate of the Election Commission is conclusive proof of the fact that the person was not dismissed from service on ground of corruption or disloyalty to the State. Whether a person is dismissed from service on ground of disloyalty or corruption has to be decided by the Election Commission and not by the Returning Officer. He cannot even examine its correctness, if challenged before him. The reference to Section 9 is for adopting the description of office covered under the said provision and nothing more. If it is accepted that certificate from Election Commission is required to be filed only if a person falls under Section 9, it would render Section 33(3) otiose. A person admitting that he is covered under Section 9 is already disqualified. It is only when the person claims that he was not dismissed on ground of disloyalty or corruption that occasion arises for filing the certificate of the Election Commission.

41. A Constitution Bench of the Supreme Court in **S.M. Banerji v. Sri Krishna Agarwal, AIR 1960 SCC 368,** after considering Section 9(3) and Section 33(3) summarised the legal position thus :-

"The foregoing provisions, so far relevant to the present enquiry, may be summarised thus: If a candidate has been dismissed from Government service and a period of five years has not elapsed since dismissal-, he will have to file along with the nomination paper a certificate issued in the prescribed manner by the Election Commission to the effect that he has not been dismissed for corruption or disloyalty to the State. If it has not been done, the Returning Officer, either suo motu or on objections raised by the opposite party, has to reject the nomination. If the nomination paper does not disclose any such defect and if the Returning Officer has no knowledge of that fact, he has no option but to accept the nomination. The Returning Officer may improperly accept a nomination paper though it discloses the said defect and though an objection is raised to its reception on that ground. Section 100(1)(d)(i) of the Act deals with improper acceptance of any nomination and s. 100(1)(d)(iv) permits an attack on the ground, among others, of non-compliance with the provisions of the Act".

(emphasis supplied)

42. A person covered by Section 33(3) cannot ask the Returning Officer to ascertain that he was not dismissed from service on ground of disloyalty or corruption and accept his nomination, as the Returning Officer is not competent to go into the said issue. He is to be governed by the certificate issued by the Election Commission. The object behind the provision is to minimize points of disputes before the Returning Officer. The law obligates a person covered by Section 33 (3) to file certificate of Election Commission in support of his claim. If he fails to do so, the consequences provided under Section 36(2) will ensue. The Returning Officer would be left with no option but to reject the nomination of such a person. The rejection would not be for the reason that the person is disqualified under Section 9 from contesting the election but for the reason that he has failed to comply with the mandatory procedural requirements of a valid nomination. He has failed to file the certificate of the Election Commission required of him by Section 33 (3) of the Act. Even a Court of law, if approached by such a person, will not embark on any enquiry as to whether he is covered under Section 9 or not. The enquiry will remain confined to ascertainment of the fact as to whether the person is covered by Section 33 or not and if the answer is in affirmative, then action of the Returning Officer has to be upheld. For the foregoing reasons, I am unable to subscribe to the view taken by the Andhra Pradesh High Court in **M. Narasappa**.

43. The power of the Returning Officer regarding acceptance/ rejection of nomination and when acceptance of nomination would be valid, has been dealt with by the Supreme Court in **Durga Shankar Mehta v. Raghuraj Singh, AIR 1954 SC 520** holding thus :-

" If the want of qualification of a candidate does not appear on the face of the nomination paper or of the electoral roll, but is a matter which could be established only by evidence, an enquiry at the stage of scrutiny of the nomination papers is required under the Act only if there is any objection to the nomination. The Returning-Officer is then bound to make such enquiry as he thinks proper on the result of which he can either accept or reject the nomination. But when the candidate appears to be properly qualified on the face of the electoral roll and the nomination paper and no objection is raised to the nomination, the Returning Officer has no other alternative but to accept the nomination. This would be apparent from section 36, subsection (7) of the Act . . .".

44. Sub-section (4) of Section 33 provides that on presentation of a nomination paper, the Returning Officer is enjoined with the duty to satisfy himself1-58 that the names and electoral roll numbers of the candidate and his proposer as entered in the nomination paper are the same as those entered in the electoral rolls. The proviso embodies the principle of overlooking irregularities which are not of substantial nature. Thus a misnomer or inaccurate description or clerical, technical or printing error in regard to the name of the candidate or his proposer shall be overlooked.

45. If follows that if on face of the nomination paper, no defect of substantial nature is evident, the Returning Officer is

bound to receive the nomination form. For instance, in the present case, the petitioner, in the second nomination filed on 29.4.2019 mentioned 'No' while reply to the query contained in Clause (6) of Part III-A of form 2-A (Nomination Paper) as to whether the candidate was dismissed for corruption or disloyalty while holding office under the Government of India or Government of any State? However, when upon scrutiny on 30.4.2019, it transpired that in the other nomination filed by him on 24 April 2019, he mentioned 'Yes' against the same query and disclosed the date of his dismissal as 19.4.2017, he was issued two notices dated 30.4.2019 mentioning about different recitals in the two nominations submitted by him. The notice also specifically records that from the material placed on record by the petitioner himself, it is evident that he was dismissed from service of Government of India within preceding five years. He was therefore, required to submit certificate of the Election Commission to prove that he was not dismissed from service on ground of disloyalty or corruption as required under Section 33(3) of the Act. He was given time up to 11 AM on 1.5.2019, i.e., the following day to furnish such certificate from the Election Commission to enable the Returning Officer to take decision on his nomination papers.

46. Section 36(2) specifically invests the Returning Officer with power to examine the nomination papers and hold enquiry upon objection or on his own motion. In fact, once any defect is discovered by the Returning Officer while examining the nomination papers at the stage of scrutiny, he is under bounden duty to hold a summary enquiry and decide the objection. The only limitation is that in case the objection is from the Returning Officer or any other person, the candidate concerned has to be given time to rebut the objection, before decision is taken. The statutory scheme does not postulate any estoppel against raising of objection to the validity of nomination during scrutiny on the ground that at the time of receipt of nomination paper, no objection was raised. In fact, the very object of fixing a date, time and place for scrutiny, and investing the Returning Officer with power to decide all objections, would stand nullified if the argument of learned counsel for the petitioner is accepted that if nomination papers had been received during the first stage, without any objection, no objection can be raised during scrutiny.

47. I now proceed to consider the judgement of Supreme Court in **Uttamrao Shivdas (Supra)** on which heavy reliance has been placed by learned counsel for the petitioner in contending that there is presumption in law regarding validity of nomination. In the said case, the Returning Officer had overruled the objection against the nomination regarding genuineness of signature of the Proposers. This was done at the stage of scrutiny, after examining the proposers. The High Court, in election petition, only examined the correctness of the decision making process on part of the Returning Officer and not the decision itself. In that context, the Supreme Court held that the High Court while deciding election petition acts as a Court of original jurisdiction and not appellate authority and is therefore competent to examine the correctness of the decision of the Returning Officer. The Supreme Court while so holding, considered para 5 and 6 of Handbook for Returning Officer issued

by the Election Commission. The paragraph on which much emphasis has been laid by counsel for the petitioner reads thus :-

"24. Paragraph 5 provides for objections and summary enquiry, stating:

5. Even if no objection has been raised to a nomination paper, you have to satisfy yourself that the nomination paper is valid in law. If any objection is raised to any nomination paper, you will have to hold a summary inquiry to decide the same and to treat the nomination paper to be either valid or invalid. Record your decision in each case giving brief reasons particularly where an objection has been raised or where you reject the nomination paper. The objector may be supplied with a certified copy of your decision accepting the nomination paper of a candidate after overruling the objections raised by him, if he applies for it. Your decision may be challenged later in an election petition and so your brief statement of reasons should be recorded at this time.

There exists a presumption of validity, as adumbrated in paragraph 6 thereof. It reads, thus:

6. There is a presumption that every nomination paper is valid unless the contrary is prima facie obvious or has been made out. In case of a reasonable doubt as to the validity of a nomination paper, the benefit of such doubt must go to the candidate concerned and the nomination paper should be held to be valid. Remember that when ever a candidate's nomination paper has been improperly rejected and he is prevented thereby from contesting the election, there is alegal presumption that the result of the election has been materially affected by such improper rejection and the election will, therefore, be set aside. There is no such legal presumption necessarily in the converse case where a candidate's nomination has been improperly accepted. It is always safer, therefore, to be comparatively more liberal overlooking minor technical or clerical errors rather than strict in your scrutiny of the nomination papers."

48. These instructions, instead of bringing home the submission urged by learned counsel for the petitioner, on the contrary, lays down exactly the opposite. A duty is cast upon Returning Officer to satisfy himself that nomination is valid in law, even if no objection is raised. It is only in cases where there is reasonable doubt about the validity /invalidity of a nomination paper that the benefit should go to the candidate for reasons mentioned in instruction No.6. These instructions, nor anything laid by the Supreme Court in the said judgement, in any manner, advance the argument of learned counsel for the petitioner.

49. Now coming to the second judgement in **Ramesh Rout (Supra)**, I would first like to briefly allude to the facts of that case. The election of Ramesh Rout as member of Legislative Assembly was under challenge by the respondent Ramendra Pratap Singh on the ground that his nomination was wrongly rejected by the Returning Officer. He filed his nomination as candidate of a recognised party (BJD). He was issued a check list under signature of Returning Officer in which no deficiency nor defect was pointed out. However, on the day of scrutiny, the Returning Officer rejected the nomination on the ground that Form A & Form B duly signed in ink by the authorised officer of the political party

had not been filed, but only the photocopies.

50. The Supreme Court while examining the rival contentions held that the requirement laid down in para 13 of the Election Symbols (Reservation and Allotment) Order, 1968 regarding Form A and B being signed in ink by the officer bearer of the recognised political party is mandatory in nature. Non compliance thereof would tantamount to non compliance of Section 33 and would entail dismissal of the nomination paper :-

"We are unable to accept the submission of Mr. K.K. Venugopal that para 13 of the 1968 Order cannot be read into Rule 4. Non-compliance of requirements of para 13 of the 1968 Order, in our view, is a defect of substantial character and the nomination paper of a candidate proposed by a single elector set up by a recognised political party having such defect is liable to be rejected under Section 36(2)(b) as it tantamounts to non-compliance of the provisions of Section 33, namely, the nomination paper having not been completed in the prescribed form."

51. The Supreme Court thereafter proceeded to consider the issue on merits and held that where the check list issued by the Returning Officer certifies that Form A & B were duly filed, it lead to presumption that the documents prescribed in Para 13 had been duly filed. The Supreme Court clarified that the presumption of all requirement having been complied with, is rebuttable one. It was held in the facts of that case that the rival candidate failed to rebut the presumption that original Form A & B were not filed. The relevant observations are as follows :-

"61. As a matter of fact, to obviate unnecessary dispute about presentation of nomination paper by a candidate, the Commission in the handbook has provided for guidelines pertaining to check list. Accordingly, a check list is required to be prepared duly certified by the Returning Officer that all documents have been received. Such check list is signed by the Returning Officer as well as by the candidate. Where a check list certifies that Forms A and B (in the case of candidates set up by a recognised political parties), have been filed, such certificate leads to presumption that the procedural requirement of filing the documents as prescribed in para 13 of the 1968 Order has been complied with. The presumption is of course rebuttable but there must be sufficient evidence by the other side to displace such presumption.

62. In the present case, the check list (Ex.11), Form 3-A (Ext. 42/F) and the list of the nominated candidates checklist (Ext. 44) give rise to presumption in favour of the proposed candidate that he had filed Form-A and Form-B duly signed in ink by the authorised person of BJD with the first set of his nomination paper. The question is whether this presumption has been rebutted by the returned candidate? We do not think so. The oral evidence of the returned candidate (RW-1) and his witness (RW-2) is not of much help insofar as this aspect is concerned. The Returning Officer has not stated firmly and with certainty in his evidence that the proposed candidate had not filed Form-A and Form-B signed in ink by the authorised person of the BJD. Rather he stated that had it come to his notice that the original Form-A and Form-B duly signed in ink were not filed along with the nomination paper by the proposed candidate, he would have made an

endorsement to that effect in the checklist."

52. The check list issued by the Returning Officer without pointing out any deficiency thus raises a rebuttable and not conclusive presumption in favour of the candidate filing the nomination papers. The Returning Officer or the other rival candidates are not precluded from raising objections to the validity of the nomination once the check list had been issued. No doubt, in view of presumption regarding validity of the nomination papers, it would be the burden of the person raising objection to prove the defect by leading cogent evidence. Where there is doubt, the decision should lean in favour of the person filing the nomination in view of para 6 of the Handbook for Returning Officer. The contention that once the check list was duly issued without pointing out any objection, the Returning Officer was precluded at the state of scrutiny from raising any objection even if it goes to the root of the controversy, cannot be accepted. The Returning Officer would be within him power to point out defect during course of scrutiny and reject the nomination if it fails to comply with the mandatory procedure laid down for filing of nomination or if candidate is found to be disqualified.

53. The alternative submission, which forms the anchor sheet of the case of the petitioner was that even if he has not been actually nominated as a candidate, but he would definitely fall in the category of a candidate who claims to have been duly nominated under the second part of the definition of 'candidate'. Therefore, he would still have locus to maintain the election petition. It is contended that a wrong rejection of the nomination itself is an issue which falls for determination in the Election Petition, so it could not be thrown out on the ground that he was not duly nominated.

54. No doubt, the definition of 'candidate' in Section 79(b) also includes a person who 'claims to have been duly nominated'. The said phrase has been subject matter of interpretation by the Supreme Court in number of judgments. A Constitution Bench of Supreme Court in **Charan Lal Sahu v. Dr. APJ Abdul Kalam and others, (2003) 1 SCC 609** had the occasion to consider the phrase in reference to election on the post of President of India. Section 13(a) of the Presidents and Vice-Presidents Election Act, 1952 defines a 'candidate' to mean a person who has been or claims to have been duly nominated as a candidate at an election. Thus, it is similarly worded. Section 14-A of the said Act entitles a candidate or twenty or more electors to question the election by filing election petition before the Supreme Court. In that case also, the locus of the petitioner to challenge the election of president was challenged on the ground that he had not been a candidate nor could be regarded as nominated or duly nominated, as his nomination was rejected by the Returning Officer for not complying with Section 5-B of the said Act, which reads thus: -

"5-B. (1) ... deliver to the Returning Officer at the placed specified in this behalf in the public notice issued under Section 5a nomination paper completed in the prescribed form and subscribed by the candidate as assenting to the nomination, and

(a) in the case of Presidential election, also by at least fifty electors as

proposers and at least fifty electors as seconders;

(b) in the case of Vice-Presidential election, also by at least twenty electors as proposers and at least twenty electors as seconders:

Provided that no nomination paper shall be presented to the Returning Officer on a day which is a public holiday."

55. The Supreme Court quoted with approval three previous decisions on the point, holding that if a person fails to comply with the procedure laid down in Section 5-B, he would not fall within the definition of candidate as he can neither be a candidate, nor can claim to be nominated at such election. It has been held *"that in the matters of claim to candidacy, a person who claims to have been duly nominated is at par with a person who, in fact, was duly nominated. But, the claim to have been duly nominated cannot be made by a person whose nomination paper does not comply with the mandatory requirement of Section 5-B of the Act".*

56. It is worthwhile to quote in extenso from the law report where earlier judgments of the Supreme Court were considered: -

"16. Nomination paper of the petitioner was rejected on the ground that it was not proposed and seconded by the requisite numbers of proposers and seconders. This point was examined exhaustively by this Court in the case of very petitioner now before us against the former President Neelam Sanjeeva Reddy reported in ***Charan Lal Sahu Vs. Neelam Sanjeeva Reddy, 1978 (2) SCC 500*** *and it was held that:*

"12. The result of a careful consideration by us of the provisions mentioned above is that we think that, the procedure or manner for questioning the Presidential election having been laid down, the petitioner must come within the four corners of that procedure in order to have a locus standi to challenge the Presidential election and to be able to maintain this petition. If he neither is nor can claim to be a candidate, on assertions made by him in his petition itself, he would be lacking the right to question the election of Shri Neelam Sanjeeva Reddy as Presidential of India. The effect of the provision of Sections 14(1), 14 (2) and 14 (3) and 14A (1) of the Act, read with Order XXXIX, Rules 2 and 5 of the Rules of this Court, is that the petition before us is barred because the petitioner has not got the required locus standi to maintain it."

17. Again in ***Charan Lal Sahu Vs. Giani Zail Singh, 1984 (1) SCC 390,*** *the point raised by the petitioner on the second limb of Section 13(a) of the Act defining the candidate to mean; "claims to have been duly nominated as a candidate" was rejected. Rejecting the said contention this Court observed:*

"11. The petitioners, however, contend that even if it is held that they were not duly nominated as candidates, their petitions cannot be dismissed on that ground since they "claim to have been duly nominated". It is true that, in the matter of claim to candidacy, a person who claims to have been duly nominated is on par with a person who, in fact, was duly nominated. But, the claim to have been duly nominated cannot be made by a person whose nomination paper does not comply with the mandatory requirements ofSection 5-B(1)(a) of the Act. That is to say, a person whose nomination paper,

admittedly, was not subscribed by the requisite number of electors as proposers and seconders cannot claim that he was duly nominated. Such a claim can only be made by a person who can show that his nomination paper conformed to the provisions ofSection 5-Band yet it was rejected, that is, wrongly rejected by the Returning Officer. To illustrate, if the Returning Officer rejects a nomination paper on the ground that one of the ten subscribers who had proposed the nomination is not an elector, the petitioner can claim to have been duly nominated if he proves that the said proposer was in fact an 'elector'.

12. Thus, the occasion for a person to make a claim that he was duly nominated can arise only if his nomination paper complies with the statutory requirements which govern the filing of nomination papers and not otherwise. The claim that he was 'duly' nominated necessarily implies and involves the claim that his nomination paper conformed to the requirements of the statute. Therefore, a contestant whose nomination paper is not subscribed by at least ten electors as proposers and ten electors as seconders, as required bySection 5-B(1)(a) of the Act, cannot claim to have been duly nominated, any more than a contestant who had not subscribed his assent to his own nomination can. The claim of a contestant that he was duly nominated must arise out of his compliance with the provisions of the Act. It cannot arise out of the violation of the Act. Otherwise, a person who had not filed any nomination paper at all but who had only informed the Returning Officer orally that he desired to contest the election could also contend that he "claims to have been duly nominated as a candidate".

18. The question regarding locus standi was examined for the third time in the election petition filed by the petitioner in ***Charan Lal Sahu Vs. K.R. Narayanan & Ors., 1998 (1) SCC 56****, it was again reiterated that:*

"24. In view of the decisions referred to above, it must be held that neither of the petitioners was a "candidate" as the said expression is defined inSection 2(d) of the Act since neither of them had been duly nominated nor could he claim to have been nominated as a candidate inasmuch as the nomination papers filed by both of them did not comply with the mandatory requirements ofSection 5B (1)(a) of the Act and the nomination paper of Petitioner 2 was filed without complying with the requirements ofSection 5B (2) of the Act. On that view it must be held that neither of the petitioners has the locus standi to maintain the petition."

The Supreme Court concluded by holding thus: -

"19. In view of the authoritative pronouncements of this Court the petitioner cannot be regarded as a person who had been nominated or can claim to have been duly nominated as candidate at the election in question. His nomination papers were thus rightly rejected by the returning officer and the petition on his behalf is, therefore, not maintainable."

(emphasis supplied)

57. In **Mithilesh Kumar Sinha v. Returning Officer for Presidential Election and others, 1993 Supp (4) SCC 386**, the Supreme Court, while interpreting the same rule in relation to presidential election observed that a person cannot claim to have been duly nominated as a candidate at the election unless he had complied with the

mandatory requirements of Section 5-B and Section 5-C. The challenge to the presidential election by Mithilesh Kumar Sinha was not entertained on the ground that he had failed to comply with the mandatory requirements of a valid nomination, consequently, cannot claim to be a candidate at such election. The relevant observations are as follows :-

"30. To be entitled to present an election petition calling in question an election, the petitioner should have been a 'candidate' at such election within the meaning of Section 13(a) for which he should have been "duly nominated as a candidate" and this he cannot claim unless the mandatory requirements of Section 5-B(1)(a) and Section 5-C were complied by him. Where on undisputed facts there was non-compliance of any of these mandatory requirements for a valid nomination, the petitioner was not a 'candidate' within the meaning of Section 13(a) and, therefore, not competent according to Section 14-A to present the petition.

31. It is also settled by the decisions of this Court that in order to have the requisite locus standi as a 'candidate' within the meaning of Section 13(a) for being entitled to present such an election petition in accordance with Section 14-A of the Act the petitioner must be duly nominated as a candidate in accordance with Section 5-B(1)(a) and Section 5-C. Unless it is so the petitioner cannot even claim to have been duly nominated as a candidate at the election as required by Section 13(a). The above conclusion in respect of the nomination paper of the petitioner, Mithilesh Kumar Sinha, from the facts set out by him in the petition, stated by him at the hearing and evident from the documents filed by him makes it clear that the petitioner, Mithilesh Kumar Sinha, has no locus standi to challenge the election of the returned candidate, Dr. Shanker Dayal Sharma as he is not competent to present the election petition in accordance with Section 14-A of the Act read with Order 39 Rule 7 of Supreme Court Rules."

58. Again, in **Devendra Patel vs. Ram Pal Singh & Others, 2013 (10) SCC 80**, the Supreme Court reiterated the law laid down in **Mithlesh Kumar** as under: -

"7. In our opinion, in view of the admitted position that Jaswant Singh's nomination was rejected as he was disqualified, he cannot be considered to be duly nominated as a candidate at the election. Learned counsel for the appellant submits that his contention is founded on the expression "claims to have been duly nominated as a candidate at any election" in Section 79(b)of the 1951 Act. The expression "claims to have been duly nominated as a candidate" would not take within its fold a person whose nomination has been rejected as being disqualified. Such person cannot claim to be duly nominated as a candidate when he is not qualified to contest election. In view of this position, Jaswant Singh is not covered by the expression 'candidate' in either of the two categories within the meaning ofSection 79(b)."

59. This Court, in **Hari Kishan Lal vs. Atal Bihari Bajpai, AIR 2003 Alld 128** ruled that the person filing election petition if not a "duly nominated candidate", will have "no locus standi to file an election petition". In the said case, the nomination of the election petitioner was rejected for not filing proforma

affidavit as per directions of the Election Commission dated 28.8.1997 and despite time being granted to him by the Returning Officer. The court held that requirement of filing affidavit was mandatory and non-filing of the same will result in disqualification of the petitioner. Such a person, being not a duly nominated candidate, cannot maintain election petition. The relevant observations are -

"43. The disqualifications are prescribed underArticle 102of the Constitution of India read withSection 8of the Representation of the People Act, the manner of determination of the disqualification is not provided either byArticle 102of the Constitution of India or bySection 8of the Act and in the absence of any positive requirement for filing of an affidavit, the Returning Officer while exercising powers underSection 36will have to act on the basis of merely a declaration made in the nomination paper. The necessity for issuing the directions by the Election Commission is in order to give effect to the provisions ofArticle 102(e)of the Constitution of India andSection 8of the Act as a person so disqualified cannot be permitted to contest an election. The petitioner whom sufficient time was given for filing the affidavit has chosen not to file the affidavit as required by the Election Com-mission and it was a willful defiance on his part and it cannot be said that he was a duly nominated candidate and has locus standi to file an election petition. The Returning Officer has only observed the direction issued by the Election Commission for which he was legally under an obligation. The contention of Sri R.N. Trivedi, Additional Solicitor General of India that the petitioner is not a duly nominated candidate and has no right to maintain the petition has force.

As the petitioner was not a duly nominated candidate under the provisions of theRepresentation of the People Actand the Constitution of India, he has no locus standi to file the instant Election Petition. It is accordingly rejected at the preliminary stage."

(emphasis supplied)

60. It is no more res integra that a person can claim to be duly nominated only if his nomination paper complies with the statutory requirements, which govern the filing of the election petition. As noted above, the Supreme Court in **Jyoti Basu (supra)** had held long back that no one has fundamental right to file an election petition. It is also not a right conferred under common law. An election petition can be filed only by the person permitted by statute and strictly in consonance with the requirements thereof, else it would call for outright rejection.

61. Learned counsel for the petitioner tried to distinguish these judgments by contending that therein the nomination was rejected because of procedural irregularity in filing of the same. However, in case of the petitioner, the issue as to whether petitioner was dismissed from service on ground of disloyalty or corruption and whether the Returning Officer was justified in rejecting the nomination do not fall in the realm of procedure, but invades his right to file election petition, therefore has to be decided by this court after full fledged trial. The petition cannot be thrown out at the threshold.

62. It is noteworthy that the requirement of filing certificate of the Election Commission is contained in

Section 33, which deals with the procedure relating to presentation of nomination papers and requirements of a valid nomination. Like Section 5-B of the Act, Section 33 also contains a provision for filing of election petition by the candidate or by a specified number of electors. Sub-Section (2), (3), (5) stipulates various other requirements to be complied with while filing the nomination papers. Section 33-A and 34 are also part of the procedure relating to filing of nomination. Section 36(2)(b) enjoins upon the Returning Officer to reject the nomination if it does not comply with Section 33 or 34 of the Act.

63. Section 33, apposite to note, makes use of deeming clause at more than one place -

(i) a candidate shall not be deemed to be qualified to be chosen to fill that seat unless his nomination paper contains a declaration by him specifying the particular caste or tribe of which he is a member and the area in relation to which that caste or tribe is a Scheduled Caste or, as the case may be, a Scheduled Tribe of the State.

(ii) Where the candidate is a person who, having held any office referred to in 2 [section 9] has been dismissed and a period of five years has not elapsed since the dismissal, such person shall not be deemed to be duly nominated as a candidate unless his nomination paper is accompanied by a certificate issued in the prescribed manner by the Election Commission to the effect that he has not been dismissed for corruption or disloyalty to the State.

64. The word 'deemed' embodies a rule of evidence. The object of these provisions is to reduce dispute relating to qualification of the person filing nomination. It presumes existence of certain facts which may possibly be true, but not necessarily always. The manner in which the presumption could be falsified is specified in the statute itself. Thus, in case of a reserved seat, even if a candidate belongs to one of the reserved class, but fails to make declaration, specifying his caste or tribe, he is presumed not qualified to be chosen to fill that post. Likewise, when a candidate was dismissed from Government service within five years of filing of the nomination, he is under obligation to file certificate from the Election Commission that his dismissal was not on ground of disloyalty or corruption, failing which, he will be presumed to be not duly nominated. Concededly, in the instant case, the petitioner was dismissed from service of Government of India on 19.4.2017. He filed his nominations on 24.4.2017 and 29.4.2019. The period of five years had not elapsed by that time. Resultantly, the nomination were not in consonance with the statutory requirements. The petitioner cannot therefore claim to have been duly nominated.

65. Learned counsel for the petitioner has heavily placed reliance upon **Nandiesha Reddy vs Mrs. Kavitha Mahesh, 2011 (7) SCC 721**, while submitting that in the said case, the Supreme Court held an election petition to be maintainable, even if filed by a person whose nomination form was returned. It was urged that the petitioner's case is on a much better footing. In that case, the Returning Officer refused to accept the nomination form on the ground that it was not subscribed by required number of electors. The Returning Office did not

wait for date of scrutiny to arrive, gave no time to meet the objections, nor held the enquiry envisaged by Section 33(2), (5) and (6) of the Act. In the said backdrop, the Supreme Court held as follows: -

"23. From a plain reading of the aforesaid provision it is evident that an election petition calling in question any election can be presented by any candidate at such election. Candidate, in our opinion, would not be only such person whose nomination form has been accepted for scrutiny or whose name appears in the list of validly nominated candidate, that is to say, candidates whose nominations have been found valid. Here, in the present case, the Election Petitioner's plea is that the Returning Officer declined to accept the nomination paper.

24. We are of the opinion that when a nomination paper is presented it is the bounden duty of the Returning Officer to receive the nomination, peruse it, point out the defects, if any, and allow the candidate to rectify the defects and when the defects are not removed then alone the question of rejection of nomination would arise. Any other view, in our opinion, will lead to grave consequences and the Returning Officers may start refusing to accept the nomination at the threshold which may ensure victory to a particular candidate at the election. This is fraught with danger, difficult to fathom."

66. However, the law laid down in the said case would not apply to the facts of the instant case, where the Returning Officer has rejected the nomination during scrutiny after putting the petitioner to notice.

67. This narrows down the controversy to the last submission as to whether the procedure adopted by the Returning Officer in rejecting the nomination was faulty and invalid. It is submitted that the petitioner should have been given at least 24 hours time, or till the end of next working day, to meet the objections.

68. Indisputably, on the date of scrutiny, i.e. 30.4.2019, when it transpired that the petitioner was in service of Government of India and was dismissed within preceeding five years, but certificate from Election Commission that he was not dismissed on ground of corruption or disloyalty, was not filed along with the nomination, he was issued two notices on the same date, granting time upto 11 a.m. the following day to meet the shortcoming. Since the objection was raised by the Returning Officer himself and also by a third person, therefore as provided under proviso to Section 36(5), it was necessary to grant time to the petitioner to rebut it by not later than the next day. In strict consonance with the legislative mandate, time was granted to the petitioner to meet the objection by 11 a.m. on the next date, i.e. 1.5.2019. The contention that he should have been granted at least 24 hours time or till the end of next working day, does not have force. The provision only stipulates that time to rebut shall be allowed, which shall not be later than the next day, following the date fixed for scrutiny. It would not mean that for fulfilling the requirement of the said provision, time till end of next working day has to be granted. The Returning Officer has also to take decision on the same date to which proceedings have been adjourned. For taking decision, he will also need time, as when nomination is rejected, he has to record brief reasons for such rejection. The provision has to be

interpreted to advance the election scheme. Every step has to be taken with full promptitude to ensure completion of the election process in time. The principles of natural justice are applicable to the extent specifically provided. The petitioner cannot claim right to be dealth with more liberally if it is not permissible under the scheme of the statute.

69. In **Rakesh Kumar vs. Sunil Kumar, (1999) 2 SCC 489**, on which heavy reliance was placed by counsel for the petitioner, the Returning Officer refused to adjourn scrutiny to the next day, inspite of candidate making request for time to meet the objections raised against him. The Returning Officer harboured under wrong impression that he was not empowered to adjourn the scrutiny to the next day. In that context, the Supreme Court held as follows: -

"20. Through the proviso, the legislature has provided that in case an objection is raised during the scrutiny, to the validity of a nomination paper of a candidate, the Returning Officer, may, give an opportunity to the concerned candidate to rebut the objection by giving him time not later than the next day. This is in accord with the principles of natural justice also. Since, no other candidate had raised any objection to the claim of the respondent of being the official candidate of BJP, and the objection had been raised by the Returning Officer suo motu, the mandate of the proviso toSection 36(5)of the Act warranted the holding of a summary enquiry, to determine the validity of the nomination paper by the returning officer, while exercising his quasi-judicial function. In the present case, the respondent had sought an opportunity to meet the objection, but even if he had not sought such an opportunity, the returning officer ought to have granted him time to meet the objection in the interest of justice and fair play.

21. The Returning Officer would have been justified in rejecting the nomination paper of the respondent, had the respondent either not sought an opportunity to rebut the objection raised by the Returning Officer or was unable to rebut the objection within the time allowed by the returning officer. Since, the respondent, had by his written application (supra), filed at the time of scrutiny of the nomination papers itself claimed to be the official candidate set up by BJP, which claim was not disputed by any one else during the scrutiny, and had sought time of 24 hours to provide relevant material in support of his submission, it was obligatory on the part of the Returning Officer to allow time to him to rebut the objection, suo motu, raised by the Returning Officer. He could have given him any time to do so within 24 hours but to deny him such an opportunity, in the facts and circumstances of the case, was neither fair nor proper or justified. It was expected of the Returning Officer to adjourn the scrutiny of the nomination paper to enable the respondent to meet the objection. The use of the expression not later than the next day but one following the date fixed for scrutiny under proviso to sub-section (5) of Section 36of the Act un-mistakably shows that the Returning Officer has been vested with the discretion to fix time to enable a candidate to rebut an objection to the validity of his nomination paper and such a discretion has to be fairly and judicially exercised. The refusal to grant an opportunity to the returned candidate and rejecting his nomination paper was clearly an arbitrary exercise of the

discretion vested in the Returning Officer."

70. The Supreme Court nowhere held that time till the end of next working day or 24 hours time should be granted to meet the objection. It only held that the Returning Offficer could have given any time to do so "within 24 hours". I thus find no force in the submission that the procedure adopted by the Returning Officer was in manner faulty or contrary to the statutory scheme.

71. As a result of above discussion, it is clear that the petitioner is neither an elector nor a candidate at the election which he seeks to challenge and would therefore have no locus to file election petition. It is accordingly dismissed, but without any order as to costs.

(2019)12 ILR A968

APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 17.12.2019

BEFORE
THE HON'BLE VED PRAKASH VAISH, J.

FAFO No. 320 of 2016

Suneel Kumar ...Appellant

Versus

Union of India ...Respondent

Counsel for the Appellant:
Sri Manish Kumar Srivastava

Counsel for the Respondent:
Sri Prashant Kumar Srivastava

Civil Law - Railway Claim - Railways Act, 1989 - Railway Claims Tribunal (Procedure) Rules, 1989 - Rule 26 - Substitution of legal representatives - Death of claimant - Claim application does not abate - Law did not expect the claim of dependent/claimant to come to an end with the death of such dependent/claimant - If the legal heirs under Rule 26 can get impleaded and substituted to continue the claim, there can be no justification for the theory that the claim ends or dies with the dependent/claimant

Smt. Saroj Yadav preferred claim application through her husband (appellant) for grant of compensation on the ground of injuries received by her whiles she was trying to get down from the train - During pendency of the said application, applicant (Smt. Saroj Yadav) died & her husband (appellant) moved an application for substitution of her legal representative - Tribunal held original applicant died on account of natural death hence right to sue for compensation on account of personal injury came to an end with the death of the original applicant and the claim stands abated *HC Held* - Appellant - Husband is entitled to be substituted as legal heir of the deceased claimant. (Para 27)

First Appeal from Order allowed. (E-5)

List of cases cited: -

1. 'Shri Rameshwar Manjhi (Deceased) Thru his Son Shri Lakhiram Manjhi Vs Management of Sangramgarh Colliery and others', (1994) 1 SCC 292

2. M. Veerappa Vs Evelyn Sequeira and others (1988) 1 SCC 556

(Delivered by Hon'ble Ved Prakash Vaish,J.)

1. Heard Sri Manish Kumar Srivastava, learned counsel for the appellant and Sri Prashant Kumar Srivastava, learned counsel for the respondent.

2. This is an appeal under Section 23 of the Railways Claims Tribunal Act, 1987 (hereinafter referred to as "the Act, 1987") against the order dated 19th

January, 2016 passed by the Railways Claims Tribunal (hereinafter referred to as "the Tribunal"), Lucknow Bench, Lucknow in Claim Application No.OA/II/U/889/09, whereby the application for substitution of legal representatives was dismissed.

3. The relevant facts necessary for determination of the present appeal are that Smt. Saroj Yadav preferred an application under Section 16 of the Act, 1987 through her husband Sri Suneel Kumar (who is the appellant) for grant of compensation. The case of the claimant was that she along with her daughter Km. Shreya, three years old, was trying to get down from the train, they fell down from the train at Jaipuriya railway crossing near Kanpur Railway Station, both of them sustained injuries; due to said injuries, her daughter-Km. Shreya expired; the applicant, Smt. Saroj Yadav sustained injuries, she had undergone treatment in the hospital at Kanpur. Smt. Saroj Yadav filed an application for grant of compensation on the ground of injuries received by her in the alleged untoward incident bearing Original Application No. OA/II/U/889/09.

4. During pendency of the said application, the applicant (Smt. Saroj Yadav) died on 30.12.2012; the appellant, Suneel Kumar moved an application for substitution of her legal representative.

5. The respondent resisted the application by filing objections on the grounds, *inter alia*, that since Smt. Saroj Yadav preferred the application for compensation on the ground of her personal injury, the right to sue was personal and came to an end with the death of the claimant. It was also stated that the death certificate of Smt. Saroj Yadav shows the date of death as 30.12.2012, but no documentary evidence was filed by the applicant to establish that the death of the deceased occurred due to injuries sustained by her in the alleged incident dated 26.07.2009.

6. The Tribunal framed the following two questions for disposal of the application for substitution of legal representative:

(i) Whether Smt. Saroj Yadav died due to injuries sustained by her in the alleged untoward incident or her death was a natural death?

(ii) In case the death of the claimant was natural, then whether right to sue survives after her death and consequently, the applicant for substitution deserves to be allowed?

7. After considering the submissions made by learned counsel for the parties, vide order dated 19.01.2016, the Tribunal came to the conclusion that the original applicant died on account of natural death. Hence, in view of the maxim *'actio personalis moritur cum persona'* right to sue for compensation on account of personal injury came to an end with the death of the original applicant, Smt. Saroj Yadav and since right to sue come to an end, the claim stands abated. Thus, the request for substitution of the applicant in place of the deceased applicant was rejected and the claim was abated.

8. Aggrieved by the said order dated 19.01.2016, the appellant has preferred the present appeal.

9. Learned counsel for the appellant urged that the maxim *'actio personalis moritur cum persona'* depends upon the

facts and circumstances of each case. According to him, only such claims or reliefs as can be availed by the deceased claimants personally, would abate and not those, which can be quantified in terms of damages.

10. Learned counsel for the appellant also submitted that the present case relates to a contract between the deceased and the applicant, Smt. Saroj Yadav and Railways as she was a *bona fide* passenger of the train who got injured in an untoward incident when she accidentally fell down from the train along with her daughter at Jaipuriya railway crossing near Kanpur Railway Station, and therefore, right to sue survives and the proceedings does not abate. According to learned counsel for the appellant, the Tribunal did not appreciate the law laid down in **'Shri Rameshwar Manjhi (Deceased) Through His Son Shri Lakhiram Manjhi vs. Management of Sangramgarh Colliery and others'**, (1994) 1 SCC 292.

11. On the other hand, learned counsel for the respondent submitted that the Tribunal has rightly dismissed the application for substitution and abated the claim application after applying the judgment in **Rameshwar Manjhi's case (supra)**.

12. I have given my thoughtful considerations to the submissions made by learned counsel for both the parties. I have also carefully gone through the material available on record.

13. Before adverting the facts of the present case, it is necessary to consider the relevant provisions of the Railways Act, 1989.

14. Chapter XIII of the Railways Act, 1989 deals with the liability of Railway Administration for death and injury to passengers due to accident. Section 125 of the Railways Act, 1989 provides for filing an application for compensation. The same reads as under:-

***"125. Application for compensation.**--(1) An application for compensation under section 124 [or section 124A] may be made to the Claims Tribunal--*

(a) by the person who has sustained the injury or suffered any loss, or

(b) by any agent duly authorised by such person in this behalf, or

(c) where such person is a minor, by his guardian, or

(d) where death has resulted from the accident, [or the untoward incident] by any dependant of the deceased or where such a dependant is a minor, by his guardian.

(2) Every application by a dependant for compensation under this section shall be for the benefit of every other dependant."

15. Section 124 of the Railways Act, 1989 provides the accident of liability and compensation on account of untoward incident. The same reads as under:-

***"124. Extent of liability.**--When in the course of working a railway, an accident occurs, being either a collision between trains of which one is a train carrying passengers or the derailment of or other accident to a train or any part of a train carrying passengers, then whether or not there has been any wrongful act, neglect or default on the part of the railway administration such as would*

entitle a passenger who has been injured or has suffered a loss to maintain an action and recover damages in respect thereof, the railway administration shall, notwithstanding anything contained in any other law, be liable to pay compensation to such extent as may be prescribed and to that extent only for loss occasioned by the death of a passenger dying as a result of such accident, and for personal injury and loss, destruction, damage or deterioration of goods owned by the passenger and accompanying him in his compartment or on the train, sustained as a result of such accident.

124A. Compensation on account of untoward incident.*--When in the course of working a railway an untoward incident occurs, then whether or not there has been any wrongful act, neglect or default on the part of the railway administration such as would entitle a passenger who has been injured or the dependant of a passenger who has been killed to maintain an action and recover damages in respect thereof, the railway administration shall, notwithstanding anything contained in any other law, be liable to pay compensation to such extent as may be prescribed and to that extent only for loss occasioned by the death of, or injury to, a passenger as a result of such untoward incident:*

Provided that no compensation shall be payable under this section by the railway administration if the passenger dies or suffers injury due to--

(a) suicide or attempted suicide by him;

(b) self-inflicted injury;

(c) his own criminal act;

(d) any act committed by him in a state of intoxication or insanity;

(e) any natural cause or disease or medical or surgical treatment unless such treatment becomes necessary due to injury caused by the said untoward incident."

16. Section 123 of the Railways Act, 1989 defines the expression 'independent' as under:-

*"**123. Definitions.**--In this Chapter, unless the context otherwise requires,--*

(a) "accident" means an accident of the nature described in section 124;

(b) "dependant" means any of the following relatives of a deceased passenger, namely:--

(i) the wife, husband, son and daughter, and in case the deceased passenger is unmarried or is a minor, his parent;

(ii) the parent, minor brother or unmarried sister, widowed sister, widowed daughter-in-law and a minor child of a pre-deceased son, if dependant wholly or partly on the deceased passenger;

(iii) a minor child of a pre-deceased daughter, if wholly dependant on the deceased passenger;

(iv) the paternal grandparent wholly dependant on the deceased passenger.

(c) "untoward incident" means--

(1) (i) the commission of a terrorist act within the meaning of sub-section (1) of section 3 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (28 of 1987); or

(ii) the making of a violent attack or the commission of robbery or dacoity; or

(iii) the indulging in rioting, shoot-out or arson,

by any person in or on any train carrying passengers, or in a waiting hall, cloak room or reservation or booking office or on any platform or in any other place within the precincts of a railway station; or

(2) the accidental falling of any passenger from a train carrying passengers."

17. The expression 'dependant' is to be understood as defined under Section 123(b) of the Railways Act 1989 "unless the context otherwise requires" as can be seen from Section 123 which starts with the words "In this chapter unless the context otherwise requires". An application under Section 125 (1)(a) can be made by the person who has sustained the injury or suffered any loss. Section 124 deals with injury suffered or loss of property. There is no reason to assume that the legal heirs/representatives of a deceased passengers will not be entitled to claim compensation. If Section 125 (1)(a) is considered in any narrow sense, that would mean that even if a deceased has suffered loss of property, his legal heirs cannot stake a claim under Section 125(1)(a). That would certainly be an unjust and absurd construction. Negligence of the Railways is implicit in Section 124 though proof is dispensed. If two trains collide or one gets derailed or other similar accident take place, negligence is transparently there on the part of the railways and the dispensation of the obligation to proof negligence does not alter the nature of liability. In such a case to say that only the owner of the goods and not his legal heirs/legal representatives will be entitled to claim compensation, would be patently unjust. Hence, the expression "person who has suffered a loss appearing" in clause (a) of Section 125 (1) will certainly have to include the legal heirs/legal representatives of such deceased person who have suffered loss.

18. At this juncture, it is relevant to consider the provisions of Section 306 of the Indian Succession Act, 1925 and Order XXII Rules 1 and 3 of the Code of Civil Procedure (hereinafter referred to as "C.P.C."). Section 306 of the Indian Succession Act, 1925 provides for continuation of the proceedings by or against an individual even after the death, subject to certain conditions. Order XXII Rules 1 and 3 of C.P.C. provides for the consequences of the death of a party to proceedings and the steps to be taken, in that context. Section 306 of the Indian Succession Act, 1925 reads as under:-

"306. Demands and rights of action of or against deceased survive to and against executor or administrator.--*All demands whatsoever and all rights to prosecute or defend any action or special proceeding existing in favour of or against a person at the time of his decease, survive to and against his executors or administrators; except causes of action for defamation, assault, as defined in the Indian Penal Code, 1860 (45 of 1860) or other personal injuries not causing the death of the party; and except also cases where, after the death of the party, the relief sought could not be enjoyed or granting it would be nugatory."*

19. Order XXII Rules 1 and 3 of C.P.C. read as under:-

"1. No abatement by party's death if right to sue survives.--*The death of a plaintiff or defendant shall not cause*

the suit to abate if the right to sue survives.

3. Procedure in case of death of one of several plaintiff or of sole plaintiff.*--(1) Where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the right to the sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.*

(2) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the Court may award to him the costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff."

20. It is settled law that Section 306 of the Indian Succession Act, 1925 is substantive in nature and Order XXII of C.P.C. is procedural. The object of application for substitution of legal heirs/legal representative is to continue the proceedings.

21. It is pertinent to mention here that in Chapter XIII of the Railways Act, 1989, there is no specific provision as to what will happen when the dependant of a victim of an accident expires during pendency of the claim application. There is no provision of abatement or extinction of the claim of a dependant on his/her death. The rights of a dependent cannot vanish into thin air or disappear merely because death of the dependent takes place, during pendency of the claim application. There is no provision in Chapter XIII of the Railways Act, 1989 that a dependent where the context so requires cannot include the legal heirs of a deceased dependent. The general provisions of law relating to inheritance and succession are not touched by the provisions of Chapter XIII of the Railways Act, 1989.

22. Under the general law, a legal heir claiming under a dependent is entitled to continue the claim as a legal representative. Similarly, a claim which the dependent can be continued by the legal heir/legal representative of a deceased i.e., one claiming under the deceased dependent.

23. The Hon'ble Supreme Court in the case of **'M. Veerappa vs. Evelyn Sequeira and others',** (1988) 1 SCC 556 after considering the provisions of Order XXII Rules 1 and 3 of the C.P.C. and Section 306 of the Indian Succession Act, 1925 and various judgments held as follows:-

"If the entire suit claim was founded on torts, the suit would undoubtedly abate. If the action was founded partly on torts and partly on contract, then, such part of the claim as related to torts would stand abated and the other part would survive. If the suit claim was founded entirely on contract, then, the suit had to proceed to trial in its entirety and be adjudicated upon."

24. In **Rameshwar Manjhi's case (supra)**, the Hon'ble Supreme Court considered various judgments and approved the views expressed in **'Gwalior Rayons Mayoor vs. Labour Court'**, (1978) 2 LLJ 118 (Ker) and **'Management of Bank of Baroda,**

Ahmedabad vs. The Workmen of Bank of Baroda', (1979) 2 LLJ 57 (Guj). In the said case, the issue was, as to whether the claim of an employee, which was pending before the authorities, under the relevant statutes would abate on his death. The Hon'ble Supreme Court held:-

"13. It is thus obvious that the applicability of the maxim 'actio personalis moritur cum persona' depends upon the 'relief claimed' and the facts of each case. By and large the industrial disputes under Section 2-A of the Act relate to the termination of services of the concerned workman. In the event of the death of the workman during pendency of the proceedings, the relief of reinstatement, obviously, cannot be granted. But the final determination of the issues involved in the reference may be relevant for regulating the conditions of service of the other workmen in the industry. Primary object of the Act is to bring industrial peace. The Tribunals and Labour Courts under the Act are the instruments for achieving the same objective. It is, therefore, in conformity with the scheme of the Act that the proceedings in such cases should continue at the instance of the legal heirs/representatives of the deceased workman. Even otherwise there may be a claim for back wages or for monetary relief in any other form. The death of the workman during pendency of the proceedings cannot deprive the heirs or the legal representatives of their right to continue the proceedings and claim the benefits as successors to the deceased workman."

25. It is pertinent to mention here that the Railway Claims Tribunal (Procedure) Rules, 1989 gives a clear indication justifying that the right to claim compensation by a dependent does not get abated or extinguished on the death of the dependent. The Railway Claims Tribunal (Procedure) Rules, 1989 clearly indicates that there can be substitution of a deceased party to the proceedings by his legal representatives. The same reads as under:-

***"26. Substitution of legal representatives.**--(1) In the case of death of a party during the pendency of the proceedings before Tribunal, the legal representatives of the deceased party may apply within ninety days of the date of such death for being brought on record.*

(2) Where no application is received from the legal representaves within the period specified in sub-rule(1), the proceedings shall abate:

Provided that for good and sufficient reasons shown, the Tribunal may allow substitution of the legal representatives of the deceased."

26. From perusal of Rule 26, it is clear that it applies to all claims made by the applicants under Section 125 including dependents who stake the claim under Section 125(1)(d) of the Railways Act, 1989. That being so, Rule 26 is, therefore, a clinching indication that the law did not expect the claim of dependent/claimant to come to an end when the death of such dependent/claimant. If the legal heirs under Rule 26 can get impleaded and substituted to continue the claim, there can be no justification for the theory that the claim ends or dies with the dependent/claimant.

27. In the instant case, the claim application was filed by Smt. Saroj Yadav

(now deceased), during pendency of the said application she died, the appellant moved an application for substitution as her legal representative/legal heir. The Tribunal while considering the application for substitution took into consideration whether Smt. Saroj Yadav (original claimant) died due to injuries sustained by her in the alleged untoward incident or her death was a natural death. In my view, the same was not warranted at that stage. In my considered view, the appellant-Suneel Kumar is entitled to be substituted as legal heir of the deceased claimant.

28. In the result, the appeal is **allowed** and the impugned order dated 19th January, 2016 passed by the Railways Claims Tribunal, Lucknow Bench, Lucknow is set aside and the application for substitution of legal heir of the deceased applicant, Smt. Saroj Yadav is allowed. The Railway Claims Tribunal is directed to decide the claim application expeditiously, in accordance with law.

29. Lower court record along with a copy of this judgment be sent back to the Tribunal forthwith.

(2019)12 ILR A975

APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 18.12.2019

BEFORE
THE HON'BLE VED PRAKASH VAISH, J.

FAFO No. 931 of 2014

Kanthuram ...Appellant
Versus
Jagdev Prasad & Anr. ...Respondents

Counsel for the Appellant:
Vaibhav Srivastava

Counsel for the Respondents:
Subhash Chandra Pandey

Civil Law - Code of Civil Procedure – Section 107 read with Order 41 Rule 24 - Remand - First appellate court has power to remand if the trial court has disposed of a suit on a preliminary issue without recording evidence but where evidence on record is sufficient, the appellate Court may itself determine the case finally.

Held - In the present case, the appellant filed a suit for permanent injunction restraining the respondents/ defendants from interfering in his peaceful possession - respondents filed written statement, issues were framed and both the parties adduced their respective evidence - Not a case where the trial court has disposed of the suit on the preliminary issues without recording evidence and giving its decision on the rest of the issues - The Appellate Court could have decided the appeal on the basis of the material on record. (Para 22 & 23)

First Appeal from Order allowed. (E-5)

List of cases cited: -

1. Santosh Hazari Vs Purushottam Tiwari (Deceased) by LRs (2001) 3 SCC 179

2. Madhukar & Others Vs Sangram & Others (2001) 4 SCC 756

3. B.V. Nagesh and another Vs H.V. Sreenivasa Murthy (2010) 13 SCC 530

4. State Bank of India & Anr Vs Emmsons International Ltd.& Anr (2011) 12 SCC 174

5. P. Purushottam Reddy And Anr Vs Pratap Steels Ltd (2002) 2 SCC 686

(Delivered by Hon'ble Ved Prakash Vaish,J.)

1. Heard Sri Ashish Kumar, learned counsel for the appellant and Sri Subhash

Chandra Pandey, learned counsel for the respondents.

2. The appellant impugns judgment and decree dated 28th August, 2014 passed by learned Additional District Judge, Sitapur, in Civil Appeal No.15 of 2013 (Jagdev Prasad and Anr. v. Kanthuram) by filing appeal under Order 43 Rule 1 (u) of the Code of Civil Procedure, 1908.

3. The brief facts of the case are that the appellant/ plaintiff filed a suit for permanent injunction restraining the respondents/ defendants from interfering in peaceful possession of the appellant and from interfering in the construction work in the suit premises. The case of the appellant/ plaintiff is that his house is situated in mohalla Bahadurpur, pargana Bari, tehsil Sidhauli, district Sitapur, the plaintiff used to tie animals in the Haata; the house of the plaintiff was demolished during rains and he wanted to construct Pakka house; in the village panchayat Sidhauli, house of the plaintiff is recorded as house no.90. Defendant no.2 tried to demolish the same; the plaintiff moved an application dated 25th August, 2008 to Sub-Divisional Magistrate, Sidhauli but the defendants are interfering in his peaceful possession. Hence, the plaintiff filed the suit for permanent injunction.

4. The suit was contested by the defendants/ respondents by filing written statements. The defendants denied the allegations made during the plaint; it is stated that the defendants inherited the said disputed land from their forefathers. The disputed land is the way to exit of defendants and the plaintiff is trying to take forcible possession, defendants have informed about the dispute to the Sub-Divisional Magistrate on 24.10.2008 and 27.10.2008, defendants have got a plan sanctioned to construct the house.

5. On 08th March, 2011, following issues were framed by the Trial Court:

1- क्या वादी विवादित अहाता वर्णित धारा–2 वादपत्र का मालिक काबिज है?

2- क्या वादी वांछित अनुतोष पाने का अधिकारी है?

6. In support of his case, the appellant/ plaintiff examined Smt. Shanti Devi (P.W.1), Kallu (P.W. 2) and Rajju (P.W. 3). The defendants examined Sri Jagdev Prasad (D.W.1), Kamlesh (D.W.2) and Babu Ram (D.W.3).

7. Vide order and decree dated 13th February, 2013, the suit was decreed by the learned Additional Civil Judge, Senior Division, Sitapur.

8. Against the said order of decree dated 13th February, 2013, the respondents/ defendants filed Civil Appeal No.15 of 2013. Vide impugned judgment and decree dated 28th August, 2014, the appeal was allowed and the matter was remanded back to the Trial Court for passing a fresh order.

9. Being aggrieved by the said judgment and decree, the appellant/ plaintiff has filed the present appeal.

10. Learned counsel for the appellant urges that it was not disputed that the disputed property and plot no.90 are the same property, the appellate court failed to appreciate the tax receipts filed by the appellant. He also submits that the documents filed by the appellant/ plaintiff

were also on record and sufficient opportunity was given by the trial court to the respondents to rebut the same but the respondents/ defendants did not rebut the said documents.

11. Learned counsel for the appellant also submits that the impugned judgment and decree is against the provisions of Order XLI Rule 23 and 23-A of the Code of Civil Procedure, 1908. The appellate court could have decided the matter on the basis of pleadings, documents on record and the evidence adduced by both the parties.

12. On the other hand, learned counsel for the respondents/ defendants contends that the appellant had filed some documents at the time of final arguments and no opportunity was given to the respondents to rebut the said documents; in these circumstances, the First Appellate Court rightly remanded the matter for passing a fresh order after affording opportunity to rebut the said documents.

13. I have carefully considered the submissions made by learned counsel for both the parties and I have also gone through the materials available on record.

14. Before adverting the facts of the present case, it is necessary to consider the provisions of Rule 23 and 24 of Order XLI of C.P.C. Rule 23 and 24 of Order XLI of C.P.C. read as under:-

*"**23. Remand of case by Appellate Court.**- Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, which directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand.*

***23-A. Remand in other cases.**- Where the Court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point, and the decree is reversed in appeal and a retrial is considered necessary, the Appellate Court shall have the same powers as it has under Rule 23.*

***24. Where evidence on record sufficient, Appellate Court may determine case finally.**- Where the evidence upon the record is sufficient to enable the Appellate Court to pronounce judgment, the Appellate Court may, after resettling the issues, if necessary, finally determine the suit, notwithstanding that the judgment of the Court from whose decree the appeal is preferred has proceeded wholly upon some ground other than that on which the Appellate Court proceeds."*

15. On perusal of provisions of Rule 23 Order XLI of C.P.C. it is clear that where the Court has disposed of the suit on a preliminary point and the decree is reversed in appeal, the appellate court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded. Rule 23A of Order XLI of C.P.C. provides that where the Courts from whose decree an appeal is preferred has disposed of the case otherwise than on

a preliminary point, and the decree is reversed in appeal and a retrial is considered necessary, the appellate court shall have the same powers as it has under Rule 23. Rule 24 of Order XLI of C.P.C. provides that where the evidence on record is sufficient, appellate court may determine case finally, instead of remanding the same to the lower court.

16. It is settled principle of law that the powers under Section 96 of C.P.C. are wide. The first appeal has to be decided on facts as well as on law. In the first appeal parties have the right to be heard both on questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons. Unfortunately, the appellate court, in the present case has not recorded any finding either on facts or on law. Sitting as the first appellate court it was the duty of the appellate court to deal with all the issues and the evidence led by the parties before recording the finding regarding ownership and possession.

17. The scope and ambit of the first appellate court under Section 96 of C.P.C. have been considered in **'Santosh Hazari vs. Purushottam Tiwari (Deceased) by LRs.'**, (2001) 3 SCC 179, in the said case the Hon'ble Supreme Court held (at pages 188-189) as under:-

"The appellate court has jurisdiction to reverse or affirm the findings of the trial court. First appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. ... while reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it."

18. In **'Madhukar & Others v. Sangram & Others'**, (2001) 4 SCC 756, the Hon'ble Supreme Court reiterated that sitting as a court of first appeal, it is the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings.

19. Further, in the case of **'B.V. Nagesh and another v. H.V. Sreenivasa Murthy'**, (2010) 13 SCC 530, the Hon'ble Supreme Court after taking note of all the earlier judgments laid down following principle with regard to Order XLI of C.P.C. which is as follows:

"3. How the regular first appeal is to be disposed of by the appellate court/High Court has been considered by this Court in various decisions. Order 41 of C.P.C. deals with appeals from original decrees. Among the various rules, Rule 31 mandates that the judgment of the appellate court shall state: (a) the points for determination; (b) the decision thereon; (c) the reasons for the decision; and (d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled.

4. The appellate Court has jurisdiction to reverse or affirm the findings of the trial court. The first appeal

is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must,... therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions putforth, and pressed by the parties for decision of the appellate court. Sitting as a court of first appeal, it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings. The first appeal is a valuable right and the parties have a right to be heard both on questions of law and on facts and the judgment in the first appeal must address itself to all the issues of law and fact and decide it by giving reasons in support of the findings. (Vide ***Santosh Hazari v. Purushottam Tiwari, (2001) 3 SCC 179 at p.188, para 15 and Madhukar v. Sangram, (2001) 4 SCC 756 at p.758,*** *para 5.)*

5. In view of the above salutary principles, on going through the impugned judgment, we feel that the High Court has failed to discharge the obligation placed on it as a first appellate court. In our view, the judgment under appeal is cryptic and none of the relevant aspects have even been noticed. The appeal has been decided in an unsatisfactory manner. Our careful perusal of the judgment in the regular first appeal shows that it falls short of considerations which are expected from the court of first appeal. Accordingly, without going into the merits of the claim of both parties, we set aside the impugned judgment and decree of the High Court and remand the regular first appeal to the High Court for its fresh disposal in accordance with law."

20. In '**State Bank of India & Anr. v. Emmsons International Ltd.& Anr.**' (2011) 12 SCC 174, the Hon'ble Supreme Court reiterated the aforesaid principles.

21. Also, the Hon'ble Supreme Court considered the provisions of Rule 23 of Order XLI of C.P.C. in '**P. Purushottam Reddy And Anr. v Pratap Steels Ltd**', (2002) 2 SCC 686, it was held:-

"11. In the case at hand, the trial court did not dispose of the suit upon a preliminary point. The suit was decided by recording findings on all the issues. By its appellate judgment under appeal herein, the High Court has recorded its finding on some of the issues, not preliminary, and then framed three additional issues leaving them to be tried and decided by the trial court. It is not a case where a retrial is considered necessary. Neither Rule 23 nor Rule 23-A of Order 41 applies. None of the conditions contemplated by Rule 27 exists so as to justify production of additional evidence by either party under that Rule. The validity of remand has to be tested by reference to Rule 25. So far as the objection as to maintainability of the suit for failure of the plaint to satisfy the requirement of Forms 47 and 48 of Appendix A CPC is concerned, the High Court has itself found that there was no specific plea taken in the written statement. The question of framing an issue did not, therefore, arise. However, the plea was raised on behalf of the defendants purely as a question of law which, in their submission, strikes at the very root of the right of the plaintiff to maintain the suit in the form in which it was filed and so the plea was permitted to be urged. So far as the plea as to

readiness and willingness by reference to Clause (c) of Section 16 of the Specific Relief Act, 1963 is concerned, the pleadings are there as they were and the question of improving upon the pleadings does not arise inasmuch as neither any of the parties made a prayer for amendment in the pleadings nor has the High Court allowed such a liberty. It is true that a specific issue was not framed by the trial court. Nevertheless, the parties and the trial court were very much alive to the issue whether Section 16(c) of the Specific Relief Act was complied with or not and the contentions advanced by the parties in this regard were also adjudicated upon. The High Court was to examine whether such finding of the trial court was sustainable or not-in law and on facts. Even otherwise the question could have been gone into by the High Court and a finding could have been recorded on the available material inasmuch as the High Court being the court of first appeal, all the questions of fact and law arising in the case were open before it for consideration and decision."

22. Undisputedly, Section 107 of the C.P.C. empowers the appellate court to remand a case but it also empowers the appellate court to take additional evidence or to require such evidence to be taken. Rule 24 of Order XLI of the C.P.C. provides that where evidence on record is sufficient, the appellate court may determine the case finally. It is settled principle of law that the first appellate court has power to remand the case if the trial court has disposed of a suit on a preliminary issue without recording evidence and giving its decision on the rest of the issues.

23. In the present case, the appellant filed a suit for permanent injunction restraining the respondents/ defendants from interfering in his peaceful possession, the respondents filed written statement, issues were framed and both the parties adduced their respective evidence. It is not a case where the trial court has disposed of the suit on the preliminary issues without recording evidence and giving its decision on the rest of the issues. The Appellate Court could have decided the appeal on the basis of the material on record.

24. In the result, the appeal is **allowed**, the impugned judgment and decree dated 28th August, 2014 passed by learned Additional District Judge, Sitapur in Civil Appeal No.15 of 2013 are set aside and the matter is remanded back to the appellate court to decide the appeal on merits and pass a fresh order after hearing both the parties, in accordance with law. The first appellate court is directed to decide the appeal expeditiously and preferably within a period three months.

25. Both the parties are directed to appear before the learned District Judge, Sitapur on 20th January, 2020 who will hear the appeal himself or assign to some other competent court for deciding the same according to law.

26. Lower court record along with a copy of this judgment be sent to the Appellate Court immediately.

(2019)12 ILR A980

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.10.2019

BEFORE
THE HON'BLE PRADEEP KUMAR SRIVASTAVA, J.

FAFO No. 1013 of 2016

National Insurance Company Ltd., Agra ...Appellant

Versus

Smt. Dropadi Devi & Ors. ...Respondents

Counsel for the Appellant:
Sri Sushil Kumar Mehrotra

Counsel for the Respondents:
Sri Ashutosh Kumar Pandey, Sri Digvijay Singh

A. Civil Law - Motor Vehicles Act (59 of 1988) - Sections 166 & 168 - Multiplier - Deceased more than 50 years - Operative multiplier is 11 for the age group of 51 to 55 years (Para 10)

B. Practice and Procedure - Appellant cannot be permitted to say that the principles laid down in Sarla Verma case and Pranay Sethi case should be applied to the extent it is beneficial to the appellant and not where it is beneficial to the respondents-claimants.

First Appeal from Order disposed Off. (E-5)

List of cases cited: -

1. Sarla Verma Vs Delhi Transport Corporation (2009) 6 SCC 121

2. National Insurance Company Vs Pranay Sethi & others AIR 2017 SC 5157

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

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

2. This appeal has been filed against the impugned judgment and award dated 01.12.2015, passed by Motor Accident Claims Tribunal/Special Judge (D.A.A.), Agra, in MACP No. 441/2014 (Smt. Dropadi Devi and other vs. Yad Ram and others) by which the learned Tribunal has awarded the compensation of Rs. 27,85,495/- with 7% simple interest per annum from the date of filing of the appeal.

3. Aggrieved by the impugned judgment this appeal has been filed on the ground that rash and negligent driving of the driver of the offending Maruti Van was not established and the said Maruti Van was not involved in the accident. The salary of the deceased was not fixed and it was based on the quantity of work, therefore, the learned Tribunal has committed error in taking the salary of the deceased to be on monthly basis. The amount of average of salary should have been taken into consideration. The deceased was nearer to retirement and the multiplier of 7 should have been applied instead of applying the multiplier of 9. The compensation amount is in the higher side, hence, the award is liable to be set aside.

4. Issues were framed by the learned Tribunal and on the basis of evidence on record, the learned Tribunal has concluded that the driver of the offending Maruti Van was rashly and negligently driving the Van and he dashed the motorcycle of the deceased, who died out of injuries sustained by the said accident. It was also found that the claimant PW-1 Smt. Dropadi Devi has supported the allegations of the petition but she was not an eye witness of the accident. PW-3 Ram Babu has been examined as an eye witness and he has proved that the driver of the Maruti Van hit the motorcycle. He was driving the Maruti Van very rashly and negligently and after causing accident, the driver escaped towards Agra. The witness has also stated that in

the accident the total fault was of the driver of the Maruti Van. He has also identified the place where the accident took place. He has further stated that the deceased was driving the motor cycle at a very slow speed. It has also been stated by him that he had told the number of Maruti Van to the police by which the said accident was caused as he saw the the whole incident.

5. The learned Tribunal has also found that there was nothing on record on the basis of which the statement of the witnesses could be disbelieved. The police papers such as first information report, postmortem report, charge sheet and site map prepared by the police have also been filed in the evidence by which the version of the petition was fully corroborated. The learned Tribunal has very adequately dealt with the argument that the first information report was lodged after six days from the date of accident. I do not find any perversity or illegality in the finding of the learned Tribunal.

6. The learned Tribunal has also found that the driver of the Maruti Van was having legal and effective driving license at the time of accident and the Maruti Van was insured with the National Insurance Company. Therefore, the learned Tribunal has rightly held that the responsibility to pay compensation was on the Insurance Company.

7. So far as the quantum of compensation is concerned, PW-2 J.L. Parindra has filed the salary certificate of the deceased, which was also proved by him. On the basis of that salary certificate, the amount of compensation has been determined by the learned Tribunal and I find no illegality in it. The salary certificate shows that after deduction, the take home salary of the deceased was Rs. 28,235/- per month. Learned Tribunal has also found that at the time of accident, the age of the deceased was more than 50 years and, therefore, added 20% against the future income of the deceased.

8. The submission of the learned counsel for the appellant is that in view of the judgment of the Supreme Court in **National Insurance Company vs. Pranay Sethi, AIR 2017 SC 5157**, in the age of 50 to 60 years, only 15% future income is required to be added. 15% of monthly income of Rs. 28.235/- comes to Rs. 4,235/-, whereas, the learned Tribunal has added Rs. 5,647/- against future income. Therefore, the argument of the learned counsel for the appellant is that Rs. 28,235/- + Rs. 4,235/- makes the monthly income Rs. 32,470/-, as such multiplied by 12, the annual income will come to Rs. 3,89,640/-and not Rs. 406584/- as assessed by the learned Tribunal.

9. In view of the above argument, It is therefore, should be seen that by application of **Pranay Sethi (supra)**, and by giving benefit of the judgment to both sides, the awarded amount is in higher side or is just and reasonable. It appears that learned Tribunal has applied the multiplier in the lower side by which the appellant should not be aggrieved as in view of judgment in **Sarla Verma v Delhi Transport Corporation, (2009) 6 SCC 121**, the available multiplier at the age of 51 to 55 years should be 11. The Supreme Court has laid down as below :-

"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 Charlie), 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."

10. The above law has further been affirmed on the point of multiplier in **Pranay Sethi (supra)**. It is clear from the above observation that between the age of 51 to 55, the available multiplier is 11, as the learned Tribunal has determined the age of the deceased to be more than 50 years, hence, the multiplier of 9 has been used. It is again in the lower side as the correct multiplier, in view of **Sarla Verma (supra)**, should have been 11 and there is no force in the argument of the appellant that a multiplier of 7 should have been applied. Thus Rs. 406584 x 9 = Rs. 3659256/-.

11. In view of the above, what is interesting to note that in the annual income as submitted by the learned counsel to the appellant, if a multiplier of 11 will be applied, it will make the amount Rs. 389640/- x 11 = 4286040. The learned Tribunal has assessed the annual income by adding 20% future income to be Rs. 406684/- and if multiplied by 9, it comes to Rs. 3659256/- which is still less than the amount calculated on the basis of adding 15% future income multiplied by 11 which is Rs. 4286040/-. The appellant cannot be permitted to say that the principles laid down in **Sarla Verma (supra)** and **Pranay Sethi (supra)** should be applied to the extent it is beneficial to the appellant and not where it is beneficial to the respondents-claimants. Thus, it clearly establishes that by applying the above referred law, the compensation amount must have increased by more than two lacs rupees. I find that there is no legal base for the grievance raised in this appeal and considered from all point of view, the awarded amount is not required to be disturbed.

12. In **Sarla Verma (supra)**, it has been held by the Supreme Court that a proceeding before the Tribunal is in the nature of inquiry in which a very few thing is required to be established. The Court has observed as under :-

"Basically only three facts need to be established by the claimants for assessing compensation in the case of death: (a) age of the deceased; (b) income of the deceased; and the (c) the number of dependents. The issues to be determined by the Tribunal to arrive at the loss of dependency are (i) additions/deductions to be made for arriving at the income; (ii) the deduction to be made towards the personal living expenses of the deceased; and (iii) the multiplier to be applied with reference of the age of the deceased."

13. The learned Tribunal has deducted 1/4 amount against the personal expenses keeping in view that the surviving members in the family of the deceased were 5, therefore, the amount RS. 3659256/- and 1/4th of it is Rs. 914814/- and after deducting same it comes to Rs. 2744442/-. The learned Tribunal has adequately added the amount

against the conventional head which is Rs. 41,000/-, hence, the total amount comes
to Rs. 2785442/-.

13. In view of above, the total amount of compensation to which the claimants are entitled shall be Rs. 2785442/-. The learned Tribunal has calculated it to be Rs. 2785496/- which is 54 rupees more and that appears to be arithmetical mistake and the same is corrected accordingly to mean Rs. 2785442/-

14. In view of above discussion, the compensation amount is corrected accordingly and the appeal is finally disposed of. Stay if any shall stand vacated.

15. The office is directed to remit the amount of Rs. 25000/- deposited at the time of filing appeal to be adjusted against the awarded amount.

16. Office is directed to communicated the certified copy of this order to the court concerned for information and necessary compliance.

(2019)12 ILR A984

APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 09.12.2019

BEFORE
THE HON'BLE RAJNISH KUMAR, J.

FAFO No. 1115 of 2010

Sunil Kumar ...Appellant
Versus
Mohd. Shadab & Ors. ...Respondents

Counsel for the Appellant:
Shakeel Ahmad Ansari, Rajendra Jaiswal

Counsel for the Respondents:
Alok Kumar Srivastava, B.Q. Siddiqui

A. Civil Law - Motor Vehicles Act (59 of 1988) - Sections 166, 168 & 173 - Pleadings & proof - Degree of proof - in accident claim cases the accident is to be proved on the basis of preponderance of probabilities & it need not be proved beyond reasonable doubt like in a criminal trial - approach of the Tribunal should be to make a holistic analysis of the entire pleadings and evidence, by applying the principles of preponderance of probabilities. (Para 13)

B. Civil Law - Motor Vehicles Act (59 of 1988) - Sections 166, 168 & 173 - Pleadings & proof - Non-examination of pillion rider - Effect - Not fatal when sufficient evidence already on record

Held - Non-examination of the pillion rider not fatal because approach in examining the evidence in accident claim cases is not to find out fault with non-examination of some "best" eyewitness in the case but to analyse the evidence already on record to ascertain whether that is sufficient to answer the matters in issue on the touchstone of preponderance of probability (Para 19)

C. Motor Vehicle Accident - Site Plan - Reliance - Site Plan could not have been relied to discard the accident without its being proved by the concerned police officer who prepared the Site Plan or other corroborative evidence (Para 20)

Tribunal dismissed Motor Accident Claim petition on the ground of certain minor discrepancies in the statements & FIR *Held* - Evidence could not have been discarded on the basis of minor discrepancies and the delay in lodging the FIR and the Site Plan - Accident not denied by the respondents - After investigation charge-sheet filed against the driver of the vehicle - Approach of tribunal should be holistic analysis of the entire pleadings and evidence by applying the

principles of preponderance of probability. (Para 6)

First Appeal from Order partly allowed. (E-5)

List of cases cited: -

1. Bimla Devi & Ors Vs Himanchal Raod Transport Corp & Ors (2009) 13 SCC 530

2. Dulcina Fernandes & Ors Vs Joaquim Xavier Cruz & anr (2013) 10 SCC 646

3. Sunita & Others Vs Raj St Rd Transport Corp & Others Manu/SC/0204/2019

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

1. Heard, Shri Rajendra Jaiswal, learned counsel for the appellant and Shri Alok Kumar Srivastava, learned counsel for the respondent no.1.

2. This first appeal from order has been filed against the judgment and order dated 31.05.2010 passed in Motor Accident Claim Petition No.180 of 2009 (Sunil Kumar Vs. Mohd. Shadab & Another) by Motor Accident Claims Tribunal / Additional District Judge, Court No.6, Unnao by means of which the claim petition filed by the appellant has been dismissed.

3. The brief facts, for disposal of the present appeal, are that on 15.04.2009 the appellant / claimant was going alongwith his brother Shyam Lal for taking medicine to village Nevarna on foot on his left side of road. As he alongwith his father reached at some distance before the Government Ayurvedic Hospital, Nevarna at about 09:30 A.M., the driver of the Scorpio Jeep having Registration No.UP-35-F-7800, driving rashly and negligently, hit the appellant after bringing it on the left side. Consequently, the appellant suffered serious injuries. The right leg of the appellant was broken. The accident was seen by the father of the appellant and Raghuveer S/o Putti Lal R/o village-Nevarna and others and the number of the vehicle was noted down. The appellant was admitted in the District Hospital, Unnao in the injured condition. The appellant remained there for treatment w.e.f. 15.04.2009 to 11.05.2009 and the treatment was going on. The FIR of the accident was lodged by the father of the appellant at Police Station- Achalganj, District- Unnao against the driver. In case the driver of the vehicle would have driven the vehicle cautiously the accident would not have happened. With the aforesaid allegations the claim petition was filed claiming the compensation.

4. The claim petition was contested by the respondent no.1 i.e. the owner of the vehicle denying most of the allegations and also the involvement of his vehicle in the accident. It has been stated in paragraph-24 that at the alleged date and time of accident the accident had not occurred by vehicle No.UP-35-F-7800 because at the time of accident the vehicle was being driven by a competent driver namely Mukesh S/o Santosh Pasi R/o Village- Jamuka, Police Station-Achalganj, District- Unnao with a very slow speed on the left side of the road. Therefore, the question of accident does not arise. The FIR has been lodged with a delay after consultation with the intention to claim the compensation after noting down the number of his vehicle. It has further been stated in the written statement that the vehicle was insured with the respondent no.2 i.e. Reliance General Insurance Company Limited and in case any liability for payment of

compensation is made out the same is to be paid by insurance company. The respondent no.2 i.e Reliance General Insurance Company Limited had also filed its written statement. It has also been stated in written statement that the driver of the vehicle No.UP-35-F-7800 was not negligent. It was further stated in paragraph-11 that the accident was caused by the negligence of the Sunil Kumar as such the answering opposite party is not liable to pay any compensation.

5. On the basis of the pleadings of the parties six issues were framed. On behalf of the appellant-claimant- Sunil Kumar as PW-1 and Shyam Lal Yadav as PW-2 were got examined. On behalf of the respondents no oral evidence was adduced. On behalf of the appellant the original FIR and the copy of the release order of the vehicle in question issued from the Court, the copy of the Registration Certificate, Beema Policy of the vehicle in question, Medical Report of Sunil Kumar, the Site Plan of the spot of the accident, copy of the X-Ray Report of the appellant, report of the doctor for X-Ray, the Medicines taken by the appellant, Cash Memo and Receipts of the medicines taken by the appellant / claimant were filed. On behalf of the respondent-insurance company copy of the Beema Policy was filed. After hearing learned counsel for the parties and material available on record, the learned tribunal has dismissed the claim petition.

6. Submission of learned counsel for the appellant was that the accident had occurred on 15.04.2009 and he was admitted on the same date in the district hospital, Unnao and remained admitted up to 11.05.2009. After examination of the appellant the doctor had recommended for X-Ray of the right leg. In the X-Ray report fracture was found. The appellant and his father who was an eye-witness had adduced their evidence. The father of the appellant had stated that he was going with the appellant at the time of accident and he had seen the number of the vehicle after accident. The FIR was lodged by the father of the appellant and the cause of the delay has been explained by him. But the learned tribunal has not relied on the evidence as adduced by the appellant on the ground of certain minor discrepancies in the statements and the FIR in an illegal manner while the evidence could not have been discarded on the basis of minor discrepancies and the delay in lodging the FIR and the Site Plan. In fact the accident has not been denied by the respondents. It is apparent from the written statement filed by the respondents.

7. On the other hand, learned counsel for the respondent no.1 submitted that the vehicle of the respondent no.1 was not involved in the accident. There were discrepancies in the evidence of the appellant and his father even about the place of the accident. The appellant had stated in his evidence that he was going on his left side and the Nevarna comes after going directly from his village for which there is no need of coming on the road. As per the evidence of the appellant he had got injuries in his right leg, back and shoulders but the said injuries are not mentioned in the medical examination report. The appellant had stated in his evidence that the accident had occurred at some distance prior to the Government Ayurvedik Hospital while the spot of accident has been shown at a far distance of triangle on the north side in the Site Plan. The eye-witness mentioned in the FIR was not produced by the appellant.

The learned tribunal after considering the pleadings and evidence on record has rightly come to the conclusion that the appellant has failed to proof the involvement of the vehicle of the respondent no.1 in the accident. There is no error or illegality in the findings recorded by the learned tribunal.

8. On the basis of above, learned counsel for the respondent no.1 submitted that the appeal has been filed on misconceived grounds which is liable to be dismissed.

9. I have considered the submissions of learned counsel for the parties and perused the records.

10. The claim petition was filed by the appellant claiming compensation on account of the alleged accident on 15.04.2009 from Scorpio Jeep No.UP-35-F-7800 alleging therein that the appellant / claimant was going on 15.04.2009 alongwith his father Shyam Lal for taking medicines to village Nevarna on foot on his left side of road. At about 09:30 A.M., as soon as he reached at the some distance before the Government Ayurvedic Hospital, Nevarna, the Scorpio Jeep No.UP-35-F-7800 came from the backside without giving horn, rashly and negligently and it's driver hit the appellant in which he suffered serious injuries in his right leg which was broken. The accident was seen by his father and Raghuveer S/o Putti Lal R/o Village-Nevarna and others present on the spot and the number of the vehicle was noted down and the appellant was admitted in the District Hospital, Unnao. The respondent no.1 while filing his written statement has not denied the accident on the date, time and place alleged in the claim petition. The only plea for non-involvement of his vehicle in the accident is that the vehicle was being driven by the competent driver namely Mukesh with a very slow speed and on his left side, therefore it is apparent that the accident and the presence of the vehicle of the respondent no.1 on the date, time and place of the alleged accident has not been denied by the respondent no.1. The respondent no.2 has also not denied the accident rather it has stated on the one hand that the driver of the vehicle No.UP-35-F-7800 was not negligent and on the other hand that the accident was caused due to negligence of Sunil Kumar i.e the driver of vehicle in question as such the answering opposite party is not liable to pay any compensation.

11. The appellant was admitted on 15.04.2009 in the Government Hospital, Unnao on the date on which the accident occurred and he was medically examined and the X-Ray of right leg was advised and in the X-Ray fracture was found. The named FIR was lodged on 22.04.209 against the driver of the vehicle and it has also been disclosed in the FIR that on account of the treatment of the appellant being going on he could not lodge the FIR earlier. After investigation the charge-sheet has also been filed against the Mukesh S/o Santosh Pasi R/o Jamuka, Police Station- Achalganj, District-Unnao, a copy of which has been filed before the claims tribunal vide paper no.24 Ga/3.

12. The learned tribunal without considering the aforesaid facts dismissed the claim petition after evaluating the evidence held that since the vehicle in question had not been stopped at the place of accident, therefore evidence of the appellant and his father that they had seen

the number of the vehicle is not believable and there is contradiction in the place of accident in the statement of the witnesses and it has not been stated that how the informant came to know about the registration number and how he came to know about the name and address of the driver and the injuries do not tally with the medical examination report etc. The finding is not based on correct appreciation of record and evidence because the presence of the vehicle in question at the place of alleged accident and it being driven by Mukesh, the driver named in the FIR against whom the charge-sheet has been filed has not been denied by the respondents rather it has been stated in written statement that the driver of the vehicle in question was driving the vehicle with very slow speed and on his left side and as per the statement of the appellant and his father they were also going on the left side of the road. But it has not been considered by the learned tribunal.

13. The learned tribunal has examined the evidence and recorded findings as if the allegations were to be proved beyond reasonable doubt while it is settled proposition of law that in accident claim cases the accident is to be proved on the basis of preponderance of probabilities and it need not be proved beyond reasonable doubt like criminal trial. The approach of tribunal should be holistic analysis of the entire pleadings and evidence by applying the principles of preponderance of probability.

14. The Hon'ble Apex Court in the case of ***Bimla Devi & Others Vs. Himanchal Raod Transport Corporation & Others; (2009) 13 SCC 530*** has held that the claimants were merely to establish their case on the touchstone of preponderance of probability and standard of proof beyond reasonable doubt could not have been applied. The relevant paragraph-15 is extracted below:-

"15. In a situation of this nature, the Tribunal has rightly taken a holistic view of the matter. It was necessary to be borne in mind that strict proof of an accident caused by a particular bus in a particular manner may not be possible to be done by the claimants. The claimants were merely to establish their case on the touchstone of preponderance of probability. The standard of proof beyond reasonable doubt could not have beenapplied. For the said purpose, the High Court should have taken into consideration the respective stories set forth by both the parties."

15. In the present case after lodging of the FIR the investigation was conducted and a charge-sheet has also been filed against the named driver of the vehicle in question which has not been considered by the learned tribunal while deciding the claim petition.

16. The Hon'ble Apex Court in the case of ***Dulcina Fernandes & Others Vs. Joaquim Xavier Cruz & Another; (2013) 10 SCC 646*** has examined the situation where the evidence of eyewitness was discarded by the tribunal and that the respondent in that case was acquitted in the criminal case concerning the accident. However, the Hon'ble Apex Court opined that it can not be overlooked that upon investigation of the case, registered against respondent, prima facie, materials showing negligence were found to put him on trial.

17. The Hon'ble Apex Court considered the aforesaid judgment in the case of ***Sunita & Others Vs. Rajasthan***

State Road Transport Corporation & Others; Manu/SC/0204/2019 and held as under in paragraph-25:-

"25. In Dulcina Fernandes, this Court examined similar situation where the evidence of claimant's eyewitness was discarded by the Tribunal and that the respondent in that case was acquitted in the criminal case concerning the accident. This Court, however, opined that it cannot be overlooked that upon investigation of the case registered against the respondent, prima facie, materials showing negligence were found to put him on trial. The Court restated the settled principle that the evidence of the claimants ought to be examined by the Tribunal on the touchstone of preponderance of probability and certainly the standard of proof beyond reasonable doubt could not have been applied as noted in Bimla Devi. In paras 8 & 9 of the reported decision, the dictum in United India Insurance Co. Ltd. v. Shila Datta10, has been adverted to as under: (Dulcina Fernandes case, SCC p. 650)

*"8. In United India Insurance Co. Ltd. v. Shila Datta while considering the nature of a claim petition under the Motor Vehicles Act, 1988 a threeJudge Bench of this Court has culled out certain propositions of which Propositions (ii), (v) and (vi) would be relevant to the facts of the present case and, therefore, may be extracted hereinbelow: (SCC p. 518, para 10) '10. (ii) The rules of the pleadings do not strictly apply as the claimant is required to make an application in a form prescribed under the Act. In fact, there is no pleading where the proceedings are suo motu initiated by the Tribunal. * * **

(v) Though the Tribunal adjudicates on a claim and determines the compensation, it does not do so as in an adversarial litigation. ...

(vi) The Tribunal is required to follow such summary procedure as it thinks fit. It may choose one or more persons possessing special knowledge of and matters relevant to inquiry, to assist it in holding the enquiry.'

9. The following further observation available in para 10 of the Report would require specific note: (Shila Datta case, SCC p. 519) '10. ... We have referred to the aforesaid provisions to show that an award by the Tribunal cannot be seen as an adversarial adjudication between the litigating parties to a dispute, but a statutory determination of compensation on the occurrence of an accident, after due enquiry, in accordance with the statute.'"

In para 10 of Dulcina Fernandes, the Court opined that nonexamination of witness per se cannot be treated as fatal to the claim set up before the Tribunal. In other words, the approach of the Tribunal should be holistic analysis of the entire pleadings and evidence by applying the principles of preponderance of probability."

It is thus well settled that in motor accident claim cases, once the foundational fact, namely, the actual occurrence of the accident, has been established, then the Tribunal's role would be to calculate the quantum of just compensation if the accident had taken place by reason of negligence of the driver of a motor vehicle and, while doing so, the Tribunal would not be strictly bound by the pleadings of the parties. Notably, while deciding cases arising out of motor vehicle accidents, the standard

of proof to be borne in mind must be of preponderance of probability and not the strict standard of proof beyond all reasonable doubt which is followed in criminal cases."

18. The Hon'ble Apex Court in the aforesaid judgment of ***Sunia and Others (Supra)*** has also considered the effect of the lodging of the FIR and charge-sheet which were not challenged, in paragraph-23, which is extracted below:-

"23. The Tribunal had justly accepted the appellants' contention that the respondents did not challenge the propriety of the said FIR No. 247/2011 (Exh. 1) and chargesheet (Exh. 2) before any authority. The only defence raised by the respondents to this plea was that the said FIR No. 247/2011 was based on wrong facts and was filed in connivance between the appellants/complainants and the police, against which the respondents complained to the incharge of the police station and the District Superintendent of Police but to no avail. Apart from this bald assertion, no evidence was produced by the respondents before the Tribunal to prove this point. The filing of the FIR was followed by the filing of the chargesheet against respondent No.2 for offences under u/Sections 279, 337 and 304A of the IPC and Sections 134/187 of the Act, which, again, reinforces the allegations in the said FIR insofar as the occurrence of the accident was concerned and the role of respondent No.2 in causing such accident. Be that as it 27 may, the High Court has not even made a mention, let alone record a finding, of any impropriety against FIR 247/2011 (Exh. 1) or chargesheet (Exh. 2) or the conclusion reached by the Tribunal in that regard. Yet, the FIR and the Chargesheet has been found to be deficient by the High Court."

19. The Hon'ble Apex Court also held in aforesaid judgment of ***Sunita and Others (Supra)*** that the non-examination of the pillion rider would not be fatal to the case of the appellants because the approach in examining the evidence in accident claim cases is not to find out fault with non-examination of some "best" eyewitness in the case but to analyse the evidence already on record to ascertain whether that is sufficient to answer the matters in issue on the touchstone of preponderance of probability. Thus, non-examination of any age witness can not be fatal. of any The relevant paragraph-31 is extracted below:-

"31. Similarly, the issue of nonexamination of the pillion rider, Rajulal Khateek, would not be fatal to the case of the appellants. The approach in examining the evidence in accident claim cases is not to find fault with non examination of some "best" eye witness in the case but to analyse the evidence already on record to ascertain whether that is sufficient to answer the matters in issue on the touchstone of preponderance of probability. This court, in Dulcina Fernandes (supra), faced a similar situation where the evidence of claimant's eyewitness was discarded by the Tribunal and the respondent was acquitted in the criminal case concerning the accident."

20. So far as the findings recorded by the learned tribunal in regard to the Site Plan is concerned that could not have been relied to discard the accident without its being proved by the concerned police officer who prepared the Site Plan or other corroborative evidence. The

paragraph-33 of ***Sunita and Others (Supra)*** of the Hon'ble Apex Court is relevant in this regard, which is extracted below:-

"33. The site plan (Exh. 3) has been produced in evidence before the Tribunal by witness A.D. 1 (appellant No.1 herein) and the record seems to indicate that the accident occurred in the middle of the road. However, the exact location of the accident, as marked out in the site plan, has not been explained muchless proved through a competent witness by the respondents to substantiate their defence. Besides, the concerned police official who prepared the site plan has also not been examined. While the existence of the site plan may not be in doubt, it is difficult to accept the theory propounded on the basis of the site plan to record a finding against the appellants regarding negligence attributable to deceased Sitaram, moreso in absence of ocular evidence to prove and explain the contents of the site plan."

21. In view of above, this Court is of the view that the learned tribunal though has discussed the evidence in detail to record the finding that the appellant has failed to prove the involvement of the vehicle in question in the alleged accident but has not considered the aforesaid facts, therefore the judgment passed by the learned tribunal is not sustainable and is liable to be set-aside with direction to the concerned tribunal to decide the claim petition afresh after considering the evidence and material available on record in accordance with law.

22. The appeal is, accordingly, **partly allowed**. The judgment and order dated 31.05.2010 passed in Motor Accident Claim Petition No.180 of 2009 (Sunil Kumar Vs. Mohd. Shadab and Another) by Motor Accident Claim Tribunal / Additional District Judge, Court No.6, Unnao is set-aside. The matter is remitted back to the concerned claims tribunal for deciding afresh in accordance with law and the observations made here-in-above expeditiously and preferably within a period of three months from the date of receipt of the certified copy of this order and the record.

23. No orders as to cost.

24. The lower court record shall be remitted back to the concerned tribunal within a period of fifteen days from today.

(2019)12 ILR A991

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.10.2019

BEFORE
THE HON'BLE PRADEEP KUMAR SRIVASTAVA, J.

FAFO No. 1517 of 2011

The Oriental Insurance Company Ltd. ...Appellant

Versus

Raj Narayan & Ors. ...Respondents

Counsel for the Appellant:
Sri S.K. Mehrotra

Counsel for the Respondents:
Sri Dheeraj Kumar Yadav, Sri Ashok Kumar Kesharwani, Sri Ashok Kumar Srivastava, Sri Dheeraj Kumar Yadav, Sri Janardan Prasad Patel, Sri Nripendra Mishra

A. Civil Law - Motor Accident claim - Motor Vehicles Act (59 of 1988) - Sections 166 & 168 - Compensation -

Deduction towards personal & living expenses - Deceased a bachelor - 50% of total income liable to deducted as personal and living expenses (Para 8)

B. Civil Law - Motor Vehicles Act, 1988 - Sections 166 & 168 - Selection of Multiplier - Deceased aged about 18 years - Operative multiplier is 18 for the age group of 15 - 20 (Para 9)

First Appeal from Order disposed off. (E-5)

List of cases cited: -

1. Sarla Verma Vs Delhi Transport Corporation (2009) 6 SCC 121

2. National Insurance Company Vs Pranay Sethi & others AIR 2017 SC 5157

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

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

2. This appeal has been filed by the Oriental Insurance Company Ltd. against the judgment and award dated 31.08.2009 passed by Motor Accident Claims Tribunal/District Judge, Jaunpur, in MACP No. 191 of 2006 (Raj Narayan and another vs. Assistant Regional Manager, UPSRTC Ltd., Mau, Depo and others) by which the learned Tribunal has awarded the compensation of Rs. 3,12,200/- with 6% simple interest per annum.

3. Aggrieved by the aforesaid impugned judgment and awarded, the present appeal has been filed on the ground that the judgment is against the evidence on record, based on erroneous finding on rash and negligent driving, the driver of the offending bus was not having legal and effective driving license at the time of accident and the deceased himself was negligent and the learned tribunal has considered the wrong multiplier and a deduction of 2/3 was not made.

4. During the course of argument, learned counsel appearing on behalf of Insurance Company has submitted that admittedly the deceased was of 18 years old and was bachelor and, therefore, a deduction of 50% should have been made.

5. It is admitted fact that the deceased was 18 years old at the time of accident and as per Rules, 50% of the total income was bound to be deducted against his personal expenses. The other argument is about driving license of the driver of the offending vehicle. The learned Tribunal found that UPSRTC submitted the driving license which was valid on the date of accident.

6. On the contrary, from the side of Insurance Company, the report of surveyor was filed but the same was not proved and, therefore, the learned Tribunal decided that the driver of the offending bus was having valid and effective driving license at the time of accident. As such, I do not find any perversity or illegality in the finding.

7. It appears from the perusal of the impugned judgment that the notional income per day was determined as Rs. 100/- and it was also taken into consideration by the learned Tribunal that the deceased could get such income for 24 days in a month and, therefore, the monthly income of the deceased was determined to be Rs. 2400/- per month, which means the annual income must be Rs. 2,8,800/-. Therefore, the income on the basis of which the amount of

compensation has been assessed is not at all in higher side.

8. Learned Tribunal has deducted 1/3 against the personal expenses. Since, the deceased was bachelor, in view of judgment of the Supreme Court in the case of ***Sarla Verma Vs. Delhi Transport Corporation, (2009) 6 SCC 121***, the deduction should have been made of 50%, therefore, applying the principle of deduction, the annual income for the purpose of determination of compensation will be Rs. 14,400/-.

9. The deceased was aged about 18 years and the learned tribunal has applied the multiplier of 16, whereas, in view of ***Sarla Verma (supra)***, the multiplier of 18 should have been available in his age. The Supreme Court has laid down as below :-

"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 Charlie), 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."

10. The above view has further been affirmed on the point of multiplier by the Supreme Court in the case of **National Insurance Company vs. Pranay Sethi & others, AIR 2017 SC 5157.** Applying the multiplier of 18, the amount of compensation reaches to Rs. 2,59,200/-.

11. In **Sarla Verma (supra)**, it has been held by the Supreme Court that a proceeding before the Tribunal is in the nature of inquiry in which a very few thing is required to be established. The Court has observed as under :-

"Basically only three facts need to be established by the claimants for assessing compensation in the case of death: (a) age of the deceased; (b) income of the deceased; and the (c) the number of dependents. The issues to be determined by the Tribunal to arrive at the loss of dependency are (i) additions/deductions to be made for arriving at the income; (ii) the deduction to be made towards the personal living expenses of the deceased; and (iii) the multiplier to be applied with reference of the age of the deceased."

12. In view of judgment in the case of **Pranay Sethi (supra),** the funeral expenses should be Rs. 15,000/-. Rs. 3000/- has been awarded in the head of loss of love and affection. Adding all the amounts, the total compensation comes to Rs. 2,77,200/-.

13. In view of above, the impugned awarded compensation by the learned Tribunal appears to be in higher side and the same is liable to be reduced to Rs. 2,77,200/- with 6% simple interest per annum from the date of filing of the petition as awarded by the learned Tribunal.

14. With the above modification, the appeal is finally disposed of. Interim order if any shall stand vacated.

15. The amount of Rs. 25000/- deposited at the time of filing of affidavit shall be remitted back to the learned Tribunal to be adjusted against the awarded amount.

16. Office is directed to communicate the certified copy of the order to the learned court below for necessary compliance.

(2019)12 ILR A994

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.11.2019
BEFORE

THE HON'BLE PRADEEP KUMAR SRIVASTAVA, J.

FAFO No. 2166 of 2015

The Oriental Insurance Company Limited ...Appellant
Versus
Smt. Parul Devi & Ors. ...Respondents

Counsel for the Appellant:
Sri Arvind Kumar, Sri A.C. Pandey

Counsel for the Respondents:
Sri Rama Nand Pandey

A. Civil Law - Motor Accident claim - Motor Vehicles Act (59 of 1988) - Section 168 - Composite negligence Vs Contributory negligence – Distinction

'Composite negligence' - where a person is injured without any negligence on his part but as a combined effect of the negligence of two other persons, it is a case of composite negligence. In such a case, each wrongdoer is jointly and severally liable to the injured for payment of the entire damages and the injured person has the choice of proceeding against all or any of them – injured need not establish extent of responsibility of each wrongdoer separately, nor it is necessary for Court to determine extent of liability of each wrongdoer separately.

'Contributory negligence' - where a person suffers injury, partly due to the negligence on the part of another person or persons and partly as a result of his own negligence, then the negligence on the part of the injured which contributed to the accident is referred to as his contributory negligence. In such case the damages recoverable by him in respect of the injuries stands reduced in proportion to his contributory negligence (Para 11)

B. Civil Law - Motor Accident claim - Motor Vehicles Act (59 of 1988) - Composite negligence of drivers of two vehicles - Accident between a tanker and a Scorpio four wheeler- Evidence driver of the tanker vehicle driving rashly & negligently - No evidence that driver of Scorpio driving rashly and negligently - Not making the owner or driver of the Scorpio a party cannot cause prejudice to the appellant (Para 12)

C. Civil Law - Motor Vehicles Act (59 of 1988) - Sections 166 & 168 – Selection of Multiplier - Deceased aged about 42 years - Operative multiplier is 14 for the age group of 41 to 45 years (Para 17)

D. Civil Law - Motor Vehicles Act (59 of 1988) - Sections 166, 168 - Future prospects - Determination - Deceased had permanent job, working as Store Officer - Deceased aged about 42 years - Addition of 30% of actual salary to the income of the deceased (Para 18 & 19)

E. Civil Law - Motor Accident claim - U.P. Motor Vehicle Rules, 1998 - Rule 220-A(2)- Determination of compensation - Deduction for personal and living expense - 1/4th where dependent family members are 4 to 6 - Minor dependent to be counted as half - Half dependent should be considered to be one in view of the beneficial purpose of the law

Held - Number of dependent shown in the petition 5 - UP Amended Motor Vehicle Rules, 2011 provides that two minors will make one unit in determining the number of dependents - considering that three of them were minor, this number will come to three and half -

logically the remainder half dependent should be considered to be one in view of the beneficial purpose of the law which has been enacted as solace in favor of the claimant and the deduction against personal expenses in case of more than 3 dependents, but not 4 dependents, as is the case here where the dependents are three and half, the deduction of 1/4th in place of 1/3rd is justified. (Para 13 & 15)

First Appeal from Order disposed of. (E-5)

List of cases cited: -

1. T.O. Antony Vs Karvarnan AIR 2008 SC (Supp) 1646

2. APSRTC Vs K. Hemalatha AIR 2008 SC 2851

3. Sarla Verma Vs Delhi Transport Corporation Ltd AIR 2009 SC 3104

4. National Insurance Company Vs Pranay Sethi & others AIR 2017 SC 5157

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

1. Heard Sri A.C. Pandey, learned counsel for the appellant and Sri Rama Nand Pandey, learned counsel for the respondents. Perused the record attached with this appeal from both sides.

2. This appeal has been filed by the appellant - The Oriental Insurance Co. Ltd. against the judgment and award dated 14.08.2013 passed by learned Additional District Judge, Court No. 2/MACT, J.P. Nagar in MACP No. 67 of 2007 by which the compensation of Rs.30,75,048.00/- has been awarded with the interest @6% from the date of filing of claim petition to the claimants-respondents.

3. Before the learned Tribunal, a claim petition was filed by the petitioners stating that on 20.7.2007 at about 1.00 PM in the village Allipur, near National Highway, P.S. Gajraula, District J.P. Nagar, an accident took place in which, husband of claimant no. 1 and father of claimant nos. 2 to 5 sustained injuries and died. At the time of accident, the driver of Tanker no. HR 37-B/4183 was being driven by the driver very rashly and negligently which dashed the Scorpio No. UDS 0003/4528 coming from the side of Delhi and the Scorpio overturned and fell over the deceased Om Prakash Mishra by which he sustained serious injuries and while he was being taken for treatment, he died on the way. At the time of accident, the deceased was going on foot to the Jubliant Company Ltd. where he was working and when he reached near the factory, the accident took place. At the time of accident, the deceased was aged about 42 years and was enough healthy and he was working as Store Officer in the said Company and was getting salary of Rs.19,370/- monthly. On that basis, the claim petition has been filed for compensation.

4. The appellant-Insurance Company filed written statement before the Tribunal stating that claimant should establish the accident. At the time of accident none of the drivers of both the vehicles were having valid and effective driving license. The accident took place because of fault of driver of Scorpio and owner of Scorpio and Insurance Company have not been made party. The said offending Tanker was not being driven according to terms of insurance policy and the Insurance Company is not liable to pay any compensation.

5. The opposite party no. 2-M/S. Maple Logistic Pvt. Limited Company

filed written statement denying the allegation of claim petition and stating that accident was not caused by the alleged offending vehicle and the claim petition has been filed on wrong facts. At the time of accident, the driver of Tanker was having valid and effective driving license and the vehicle was ensured with the Insurance Company and if it is established that the accident took place because of rashness and negligence of driver of Tanker, the responsibility to pay compensation is on Insurance Company.

6. The defendant no. 3 has not filed any written statement and against him, the proceeding has taken place ex-parte. The defendant no. 4 Reliance General Insurance Company Ltd. has filed written statement and has stated that claimant has to establish the accident. The driver of Scorpio has not been made party nor he was having valid and effective driving license at the time of accident. The insurance with the Reliance General Insurance Co. Ltd. shall be verified and there is no responsibility to pay compensation on the Insurance Company.

7. The following issues were framed by the learned Tribunal, the English version of the same are as under:

(1)Whether on 20.7.2007 at about 1.00 PM Om Prakash Mishra was going to the Juviliant Company where he was working walking on the road and at that time the Tanker no. S.R.-37B/4183 and Scorpio No. U.P. 5003/4528 dashed to each other and the Scorpio fell upon the deceased Om Prakash Mishra which caused serious injuries to him and while he was in the way for treatment, he died?

(II) Whether the accident took place due to rash and negligent driving of driver of Tanker no. HR 37-B/4182?

(III) Whether the accident was caused due to negligence of both the vehicles?

(IV) Whether Tanker no. HR 37-B/4183 was ensured with the Insurance Company and violated the terms of Insurance Company?

(V) Whether Scorpio no. U.P. 5003/4528 was ensured with the opposite party no. 4?

(VI) Whether the owners of Scorpio violated the terms of Insurance Company?

(VII) Whether both the vehicles were driven by the drivers having valid and effective license at the time of accident?

(VIII) Whether the claimants are entitled to get compensation, if yes, for what amount and against whom?

8. The parties to the claim petition gave evidence in terms of documents such as, copy of FIR, driving license of driver of offending vehicle, copy of insurance policy, registration certificate, copy of permit, salary certificate of deceased, postmortem report, copy of site map, copy of charge sheet, copy of High School Certificate of deceased. P.W. 1- Smt. Parul Devi, P.W. 2-Kapil Joshi and P.W. 3-Ram Chandra Pandey have been examined from the side of claimants. The opposite parties have not given any evidence, oral or documentary.

9. After hearing learned counsel for both sides, the learned Tribunal passed the impugned award aggrieved by which, this appeal has been filed. The appellant has submitted that no accident took place by Tanker and the Scarpio overturned and crushed the deceased. The accident took place in the middle of the road and there was contributory negligence of the other vehicle. The driver of the Tanker was not

summoned even though an application was given. Income was erroneously determined and deduction of 1/4th in place of 1/3rd was wrongly made against personal expense.

10. A cross objection/ application/cross-appeal has been filed by the respondents-claimants that the Insurance Company has wrongly deducted a TDS of Rs. 268970/- and they are entitled for return of that money with interest.

11. The first submission of the learned counsel to the appellant is that it was a case of composite negligence of two vehicles and the learned Tribunal should have determined the percentage of negligence of both and accordingly a direction for apportionment of compensation to that extent should have been made. In **T.O. Antony V. Karvarnan, AIR 2008 SC (Supp) 1646 and APSRTC v K. Hemalatha, AIR 2008 SC 2851**, the Supreme Court has explained the law of composite negligence and its impact on liability of compensation. Where a person is injured without any negligence on his part but as a combined effect of the negligence of two other persons, it is not a case of contributory negligence but is a case of composite negligence. Composite negligence refers to the negligence on the part of two or more persons. Where a person is injured as a result of negligence on the part of two or more wrongdoers, it is said that the person was injured on account of the composite negligence of those wrongdoers. In such a case, each wrongdoer is jointly and severally liable to the injured for payment of the entire damages and the injured person has the choice of proceeding against all or any of them. In such a case, the injured need not establish the extent of responsibility of each wrongdoer separately, nor it is necessary for the Court to determine the extent of liability of each wrongdoer separately. On the other hand where a person suffers injury, partly due to the negligence on the part of another person or persons, and partly as a result of his own negligence, then the negligence on the part of the injured which contributed to the accident is referred to as his contributory negligence. Where the injured is guilty of some negligence, his claim for damages is not defeated merely by reason of the negligence on his part but the damages recoverable by him in respect of the injuries stands reduced in proportion to his contributory negligence.

12. In this case the learned tribunal found on the basis of evidence on record that it was the driver of the Tanker who was driving the Tanker rashly and negligently and dashed the Scarpio which was coming from the opposite direction. There is no evidence on record to take the view that the driver of Scarpio was rash and negligent. No evidence was given to that effect from the side of the appellant before the learned Tribunal. The site-map prepared by IO during investigation also shows that the Scarpio was coming from the correct side and the Tanker dashed it going towards the wrong side. Hence, the submission in this regard appears to be imaginary and hypothetical and has no force. In view of this finding, not making the owner or driver of the Scarpio a party cannot cause prejudice to the appellant.

13. Another argument is with regards to income of the deceased. The learned Tribunal has assessed the monthly income on the basis of the salary

certificate filed and proved by the Officer of Company where he was working as Commercial Officer according to which monthly income was Rs.17496/- and annually Rs. 209952/-. Therefore, the income of the deceased was proved. Thereafter, 1/4th has been deducted against personal expenses. The submission of the learned counsel to the appellant is that a deduction of 1/3rd should have been made as the number of dependent shown in the petition was 5, but, considering that three of them were minor, this number will come to three and half. It has been argued that the UP Amended Motor Vehicle Rules, 2011 provides that two minors will make one unit in determining the number of dependents. Even if it is so, the number of dependents is more than three and as such a deduction of 1/4th is absolutely correct, as a deduction of 1/3rd is provided where the number of dependents is 2 to 3 and in case of 4 to 6 dependents, the deduction is provided as 1/4th.

14. In fact, the UP Rules simply adopts the principle laid down in **Sarla Verma Vs. Delhi Transport Corporation Ltd., AIR 2009 SC 3104** where it has been laid down by the Supreme Court:

"Though in some cases the deduction to be made towards personal and living expenses is calculated on the basis of units indicated in Trilok Chandra, the general practice is to apply standardized deductions. Having considered several subsequent decisions of this Court, we are of the view that where the deceased was married, the deduction towards personal and living expenses of the deceased, should be one-third (1/3rd) where the number of dependent family members is 2 to 3, one-fourth (1/4th) where the number of dependant family members is 4 to 6, and one-fifth (1/5th) where the number of dependant family members exceed six."

15. In view of above, the deduction appears to be appropriate as logically the remainder half dependent should be considered to be one in view of the beneficial purpose of the law which has been enacted as solace in favor of the claimant and the deduction against personal expenses in case of more than 3 dependents, but not 4 dependents, as is the case here where the dependents are three and half, the deduction of 1/4th in place of 1/3rd is justified.

16. The next submission is with regards to application of multiplier. The learned Tribunal has determined the age of the deceased to be 42 years on the basis of his high school certificate and has applied a multiplier of 15 in view of II Schedule. In **Sarla Verma (supra)**, the Supreme Court has laid down as below:

"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 Charlie), 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."

17. The above multiplier system has been further affirmed by the Supreme

Court in **National Insurance Company Vs. Pranay Sethi & others, AIR 2017 SC 5157** and the available multiplier is of 14 in the age of 42 years. It is pertinent to mention that multiplier system has been provided under law law to maintain uniformity in determining quantum of compensation in order to avoid variation. Therefore, multiplier of 15 has been wrongly applied by the learned Tribunal and it should be 14 as held by the Supreme Court.

18. As such, applying the multiplier of 14 in place of 15, the amount comes to 157464 x 14 = Rs. 2204496/-. The learned Tribunal has added a future income at the rate of 30%. The submission of the learned counsel is that in view of the judgment in **Pranay Sethi (supra)**, the future income in the age of 42 years should be 25% of the total income, as the deceased was not a permanent employee and his income was not certain. In this regard, the law has been settled by the Supreme Court in **Pranay Sethi (supra)** in which all the earlier decisions on this point have been discussed and considered and it has been laid down by the Court as below:

"While determining the income, an addition of 50% of actual salary to the income of the deceased towards future prospects, where the deceased had a permanent job and was below the age of 40 years, should be made. The addition should be 30%, if the age of the deceased was between 40 to 50 years. In case the deceased was between the age of 50 to 60 years, the addition should be 15%. Actual salary should be read as actual salary less tax.

(iv) In case the deceased was self-employed or on a fixed salary, an addition of 40% of the established income should be the warrant where the deceased was below the age of 40 years. An addition of 25% where the deceased was between the age of 40 to 50 years and 10% where the deceased was between the age of 50 to 60 years should be regarded as the necessary method of computation. The established income means the income minus the tax component."

19. Clearly, the deceased was not self employed nor he was working on fixed salary and therefore, the addition of salary at the rate of 30% against future prospects is legally justified and there is no illegality when the learned Tribunal has enhanced 30% salary against future prospect and it annually comes to Rs. 47239/-.

20. In conventional head, the learned Tribunal has awarded Rs. 2000/- as funeral expences and Rs. 2500/- for loss of estate. No amount has been awarded for the loss of consortium. It has been laid down in **Pranay Sethi (supra)** as follows:

"Reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs. 15,000/-, Rs. 40,000/- and Rs. 15,000/- respectively."

21. In view of above discussion, the amount of compensation is required to be calculated as follows:

A. Annual Salary at the Rate of Rs. 17496 Monthly - Rs. 209952

B. Deduction of 1/4th Against Personal Expenses - Rs. 52488

Total - Rs. 157464

C. Applying Multiplier of 14 (157464x 14) - Rs. 2204496

D. Future Prospect at the Rate of 30% - Rs. 661348

Total - Rs. 2865844

E. Addition under Conventional Head

1. Loss of Consortium - Rs. 40000

2. Funeral Expences - Rs. 15000

3. Loss of estate - Rs. 15000

Total of Amount under Conventional Head - Rs. 70000

Total Amount of Compensation - Rs. 2935844

22. As calculated above the total amount of compensation should have been Rs. 2935844/-, whereas, the learned Tribunal has awarded an amount of Rs. 3075048/-. Therefore, the awarded amount needs to be modified accordingly.

23. The submission of the learned counsel for the respondents-claimants has been that the Insurance Company has wrongly deducted TDS. In view of the judgment in **Pranay Sethi (supra)**, income tax is required to be deducted. Therefore, if the income tax has been deducted, there appears to be no illegality. If the amount deducted as TDS is wrong or in excess, the same can be returned according to the legal process and by filing return and claiming the excess amount. Accordingly, the objection/application/cross-appeal of the respondents-claimants is disposed of.

24. The amount of compensation is modified to become Rs. 2935844/- in place of Rs. 3075048 which has been awarded by the learned Tribunal by the impugned award. The remaining part of the impugned award shall remain undisturbed. The difference of Rs.139204/- (Rs. 3075048 - 2935844) shall be deducted in half proportion from the share of claimant wife and half of the amount shall be deducted in equal proportion from the share of other four claimants.

25. **With the above modification, this appeal is finally disposed of. Stay order if any shall stand vacated.**

26. The amount of Rs. 25000/- deposited at the time of filing of this appeal be remitted back to the learned Tribunal which shall be adjusted against the awarded amount.

27. The office is directed to send a copy of this judgment to the concerned Tribunal for information and necessary compliance. If the lower court record has been received, the same is directed to be returned to the concerned Tribunal.

(2019)12 ILR A1000

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.10.2019

BEFORE
THE HON'BLE VIRENDRA KUMAR SRIVASTAVA, J.

FAFO No. 2257 of 2010
along with
FAFO No. 2256 of 2010

National Insurance Company Ltd. ...Appellant

Versus

Smt. Reeta Devi & Ors. ...Respondents

Counsel for the Appellant:
Sri Saral Srivastava, Sri Amit Manohar

Counsel for the Respondents:
Sri Anurag Tripathi, Sri Poonam Dubey, Sri Vashistha Tiwari

Civil Law - Motor Accident claim - Motor Vehicles Act (59 of 1988) - Section 149 - Insurance policy / cover note not issued - Insurance Company not liable to pay the compensation - owner of the vehicle merely issuing cheque without mentioning any details of the particular vehicle & cheque encashed by the Insurance Company after the accident - cannot be deemed that insurance policy issued in favour of owner

Accident on 23.2.2001 - Owner sent a back dated cheque on 15.2.2001, without entering details of particular vehicle & sent through post to insurance company without any offer or proposal - Cheque encased by insurance company on 28.3.2001 i.e. after accident - Owner of the vehicle neither filed any policy of Insurance nor any cover note before the Tribunal - *Held* As no valid & effective insurance policy issued by the appellant Insurance Company for insuring any risk of the alleged vehicle, Insurance company not liable to pay compensation - Owner liable to pay compensation to claimants

First Appeal from Order allowed. (E-5)

List of cases cited: -

1. Vikram Greentech India Ltd. & ors Vs New India Assurance Company Ltd (2009) 5 SCC 599

2. Life Insurance Corporation of India Vs Raja Vasireddy Komallavalli Kamba (1984) 2 SCC 719

3. Deokar Export Pvt. Ltd Vs New India Assurance Company Ltd (2008) 14 SCC 598

4. Shamanna and Others Vs The Divisional Manager The oriental Insurance Co. Ltd. And Ors. 2018 ACJ 2163 (SC)

5.National Insurance Company ltd Vs Abhay Singh Pratap Singh Waghela 2008 Law Suits (SC) 1329

6. National Insurance Co. Ltd Vs Swaran Singh and others 2005 (1) JLJ 85

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

1. First Appeal From Order 2257 of 2010 *(National Insurance Company Ltd. vs. Smt. Reeta Devi and others)* against the award and order dated 24.4.2010, passed in M.A.C.P. No. 117/2001 *(Smt. Reeta Devi and others vs. Anthoni John and others)* and First Appeal From Order 2256 of 2010 *(National Insurance Company Ltd. vs. Smt. Lalmati Devi and others)* against the award and order dated 24.4.2010, passed in M.A.C.P. No. 119/2001 *(Smt. Lalmati Devi and others vs. Anthoni John and others)*, have been filed under Section 173 of Motor Vehicle Act (in short "Act'), whereby both the claim petitions, filed by the respondents-claimants (hereinafter referred to as 'claimants'), have been allowed for compensation of Rs. 5,27,900/- each along with 7.5% per annum simple interest.

2. Since both the impugned awards and orders have been arisen out from the accident caused at the same time and place by the Bus bearing registration no. UP 78 N 8663 on 23.2.2001, owned by the same respondent-owner i.e. Anthoni John, both the appeals are being decided together.

3. The brief facts, arising out of both the appeals, are that on 23.2.2001, Prasanjeet Yadav S/o Sabru Yadav,

Mahendra Yadav S/o Chanchal Yadav and their friend Kishan Chauhan @ Heera Nishad S/o Aklu Nishad were coming by their motorcycle Hero Honda from Meereganj to Kinnarpati and when they reached nearby Kinnarpatti village they stopped their motorcycle and as they were talking with each other, bus no. UP 78 N 8663, owned by respondent-Anthoni John, driven by its driver rash and negligently, dashed and crushed them at about 6:30 p.m., whereby, they died on spot and their motorcycle was also damaged.

4. Claim petition no. 117/2001 *(Smt. Reeta Devi vs. Anthoni John and others)* filed for death of Prasanjeet Yadav by claimants, Smt. Reeta Devi and others and claim petition no. 119/2001 *(Smt. Lalmati Devi and others vs. Anthoni John and others)* filed for death of Heera Nishad @ Kishan Chauhan by claimants Smt. Lalmati Devi and others were allowed as above and appellant-Insurance Company was directed to pay the amount of compensation to the claimants of both petitions.

5. Aggrieved by the said awards and orders, both the appeals have been preferred by the Insurance Company.

6. Heard Sri Amit Manohar, learned counsel for the appellant and Sri Anurag Tripathi, learned counsel for the claimants appearing in both the appeals. No one is present on behalf of the owner of the vehicle despite sufficient services of notice.

7. Learned counsel for the appellant has submitted that the alleged Bus bearing registration no. UP 78 N 8663 was never insured by the appellant-Insurance Company at the time of occurrence. Learned counsel further submitted that the respondent-owner of the vehicle has neither filed any policy of Insurance nor any cover note before the Tribunal to prove that the alleged vehicle was insured by Insurance Company at the time of accident. Learned counsel further submitted that after the accident, the owner of the vehicle sent a back dated cheque to Lucknow office of the Insurance Company without any offer or proposal, whereas he was resident of District Kushi Nagar where office of the Insurance Company is already situated. No policy has ever been issued by the Insurance Company covering any risk of the alleged vehicle for the alleged accident. Learned counsel further submitted that neither at the time of issuing cheque nor at the time of accident, any sufficient amount was available in the bank account of owner of the alleged vehicle to honour the said cheque, which shows that no money or premium was paid by the owner to insurance company at or prior to alleged accident and despite that Tribunal made liable to the Insurance Company for the payment of compensation. Impugned awards and orders in both the claim petitions, as challenged under both the appeals, are illegal, improper and unjustified which are liable to be set aside. Learned counsel for the appellant has relied on the law laid down by Hon'ble Supreme Court in **Vikram Greentech India Ltd. And others vs. New India Assurance Company Ltd. (2009) 5 SCC 599, Life Insurance Corporation of India vs. Raja Vasireddy Komallavalli Kamba (1984) 2 SCC 719** and **Deokar Export Pvt. Ltd. vs. New India Assurance Company Ltd., (2008) 14 SCC 598.**

8. Per-contra, learned counsel appearing in both the appeals for claimants submitted that the impugned orders and awards passed by the Tribunal

in both the claim petition are legal and valid, and requires no interference. Learned counsel further submitted that even if it is found that no insurance policy was issued, Insurance Company is liable to pay the compensation awarded to claimants and recover the same from owner of the vehicle. Learned counsel placed reliance on **Shamanna and Others vs. The Divisional Manager The oriental Insurance Co. Ltd. And Ors. 2018 ACJ 2163 (SC), National Insurance Company ltd. vs. Abhay Singh Pratap Singh Waghela 2008 Law Suits (SC) 1329** and **National Insurance Co. Ltd. vs. Swaran Singh and others 2005 (1) JLJ 85.**

9. I have considered the rival submissions made by the learned counsels for the parties and perused the record.

10. In view of the submission made by learned counsels for the parties, the only point of issue involved in both the appeals is whether or not Insurance Company is liable to pay the compensation to the claimants in such cases where no policy insurance or cover note was issued for covering any risk arising out of any accident caused by the alleged vehicle, only on the basis of a cheque, issued without mentioning any details of the particular vehicle by the owner of the vehicle, and encashed by the Insurance Company after the accident.

11. Both the claim petitions were filed by the claimants for compensation under Section 140 and 160 of the Act. Various provisions of the Act put an obligation on the driver as well as on owner of the vehicle to get the vehicle insured from the authorized insurer and not to ply it without valid and effective insurance certificate. Section 145, Section 146, Section 147, Section 149 (1), Section 156 of the Act, Section 64 of VB of Insurance Act, 1938 and Section 2(a), 2(b), 2(e), 2(h) and Section 10 of Indian Contract Act are relevant at this juncture which deals with meaning, necessity, risk coverage, continuance and ingredient of insurance policy. Section 145, 146, 147, 149(1) and 156 of the Act are as follows:-

Section 145. *Definitions. - In this Chapter, - (a) "authorised insurer" means an insurer for the time being carrying on general insurance business in India under the General Insurance Business (Nationalisation) Act, 1972, and any Government insurance fund authorised to do general insurance business under that Act,*

(b) "certificate of insurance" means a certificate issued by an authorised insurer in pursuance of sub-section (3) of section 147 and includes a cover note complying with such requirements as may be prescribed, and where more than one certificate has been issued in connection with a policy, or where a copy of a certificate has been issued, all those certificates or that copy, as the case may be;

(c) "liability", wherever used in relation to the death of or bodily injury to any person, includes liability in respect thereof under section 140;

(d) "policy of insurance" includes "certificate of insurance";

(e)……

(f)……

(g) ……

(Emphasis Supplied)

Section146. *Necessity for insurance against third party risk. -*

(1) No person shall use, except as a passenger, or cause or allow any

other person to use, a motor vehicle in a public place, unless there is in force in relation to the use of the vehicle by that person or that other person, as the case may be, a policy of insurance complying with the requirements of this Chapter

Provided that in the case of a vehicle carrying, or meant to carry, dangerous or hazardous goods, there shall also be a policy of insurance under the Public Liability Insurance Act, 1991.

Explanation. - A person driving a motor vehicle merely as a paid employee, while there is in force in relation to the use of the vehicle no such policy as is required by this sub-section, shall not be deemed to act in contravention of the sub-section unless he knows or has reason to believe that there is no such policy in force.

(2) ……

(3) ..... (Emphasis Supplied)

Section 147. *Requirement of policies and limits of liability.*

(1) In order to comply with the requirements of this Chapter, a policy of insurance must be a policy which -

(a) is issued by a person who is an authorised insurer; and

(b) insurers the person or classes of persons specified in the policy to the extent specified in sub - section (2) -

(i) against any liability which may be incurred by him in respect of the death of or bodily [injury to any person, including owner of the goods or his authorised representative carried in the vehicle] or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place ;
(ii) against the death of or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of the vehicle in a public place;

Provided that ……

(2) Subject to the proviso to sub-section (1), a policy of insurance referred to in sub-section (1), shall cover any liability incurred in respect of any accident, up to the following limits, namely :-

(a) save as provided in clause (b), the amount of liability incurred.

(b) in respect of damage to any property of a third party, a limit of rupees six thousand :

Provided that any policy of insurance issued with any limited liability and in force, immediately before the commencement of this Act, shall continue to be effective for a period of four months after such commencement or till the date of expiry of such policy whichever is earlier.

(3) A policy shall be of no effect for the purposes of this Chapter unless and until there is issued by the insurer in favour of the person by whom the policy is effected a certificate of insurance in the prescribed form and containing the prescribed particulars of any condition subject to which the policy is issued and of any other prescribed matters; and different forms, particulars and matters may be prescribed in different cases.

(4) where a cover note issued by the insurer under the provisions of this Chapter or the rules made thereunder is not followed by a policy of insurance within the prescribed time, the insurer shall, within seven days of the expiry of the period of the validity of the cover note, notify the fact to the registering authority in whose records the vehicle to which the cover note relates has been registered or to such other authority as the State Government may prescribe.

(5) Notwithstanding anything contained in any law for the time being in force, an insurer issuing a policy of insurance under this section shall be liable to indemnify the person or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of that person or those classes of persons.

(Emphasis Supplied)

Section149 (1). *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, judgement or award in respect of any such liability as is requirement 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 of 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 judgement 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 judgements.

Section156. Effect of certificate of insurance. - When an insurer has issued a certificate of insurance in respect of a contract of insurance between the insurer and the insured person, then -

(a) if and so long as the policy described in the certificate has not been issued by the insurer to the insured, the insurer shall, as between himself and any other person except the insured, be deemed to have issued to the insured person a policy of insurance conforming in all respects with the description and particulars stated in such certificate; and

(b) if the insurer has issued to the insured the policy described in the certificate, but the actual terms of the policy are less favourable to persons claiming under or by virtue of the policy against the insurer either directly or through the insured than the particulars of the policy as stated in the certificate, the policy shall, as between the insurer and any other person except the insured, be deemed to be in terms conforming in all respects with the particulars stated in the said certificate.

Section 64VB Insurance Act, 1938 is as under:-

No risk to be assumed unless premium is received in advance.

(1) No insurer shall assume any risk in India in respect of any insurance business on which premium is not ordinarily payable outside India unless and until the premium payable is received by him or is guaranteed to be paid by such person in such manner and within such time as may be prescribed or ***unless and until deposit of such amount as may be prescribed, is made in advance in the prescribed manner.***

(2) For the purposes of this section, in the case of risks for which premium can be ascertained in advance,

the risk may be assumed not earlier than the date on which the premium has been paid in cash or by cheque to the insurer.

Explanation. --Where the premium is tendered by postal money order or cheque sent by post, the risk may be assumed on the date on which the money order is booked or the cheque is posted, as the case may be.

(3) Any refund of premium which may become due to an insured on account of the cancellation of a policy or alteration in its terms and conditions or otherwise shall be paid by the insurer directly to the insured by a crossed or order cheque or by postal money order and a proper receipt shall be obtained by the insurer from the insured, and such refund shall in no case be credited to the account of the agent.

(4) Where an insurance agent collects a premium on a policy of insurance on behalf of an insurer, he shall deposit with, or dispatch by post to, the insurer, the premium so collected in full without deduction of his commission within twenty-four hours of the collection excluding bank and postal holidays.

(5)The Central Government may, by rules, relax the requirements of sub-section (1) in respect of particular categories in insurance policies.

(6) The Authority may, from time to time, specify, by the regulations made by it, the manner of receipt of premium by the insurer. (Emphasis Suipplied)

Section 2(a), 2(b), 2(e), 2(h) and Section 10 of the Indian Contract Act. 1872 are as under:-

2(a) *When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal;*

2(b) *When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise;*

2(e) *Every promise and every set of promises, forming the consideration for each other, is an agreement;*

2(h) *An agreement enforceable by law is a contract.*

Section 10. *All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.*

Nothing herein contained shall affect any law in force in India and not hereby expressly repealed by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents.

12. Thus the aforesaid provision clearly provides that a policy for insurance includes a certificate of insurance which is issued by an authorized insurance company as required by Section 147 of the Act and also includes a cover note complying with such requirement as may be prescribed; no person is authorized to use any vehicle except as a passenger or allow any person to use it at any public place without a policy of insurance as required under the provision of Chapter XII of the Act. Section 147 specifically further provides that the policy of Insurance issued by an authorized insurer must specify the person or class of person and extent of liability

incurred by the insurer in respect of death or bodly injury of any person including the owner of the goods or its authorized representative or damage to any property of third party caused by or arising out of use of the vehicle in public place. Section 149 of the Act specifically provides that the liability of insurer to cover the risk of third party only arises after the certificate of insurance issued under Sub Section 3 of Section 147 of the Act in favour of the insured i.e. owner of the vehicle. Thus, it is clear from the above mentioned provision that there must be a valid and effective insurance certificate / policy issued by an authorized insurer mentioning the particulars of vehicle, details of owner of the vehicle as well as person insured, to the extent of liability and period of its effectiveness and it is the duty of the owner of the vehicle to produce / disclose the particulars of the insurance policy before the Tribunal. In addition to above, it is also clear from the aforesaid provision of Insurance Act that no policy can be issued unless the premium has been paid and the coverage of risk starts only after payment of premium.

13. In view of provisions of Indian Contract Act (supra), it is further clear that without lawful agreement, there will be no contract and mandatory requirement of agreement of contract is that there must be meeting of mind on proposal and offer made by the parties and its acceptance before agreement.

14. In **National Insurance Company ltd. vs. Abhay Singh Pratap Singh Waghela 2008 Law Suits (SC) 1329,** relied by the learned counsel for the claimant, Hon'ble Supreme Court while interpreting the Section 64 of VB of Insurance Act, 1938 held that if the cover note was issued, the cheque issued by the owner for premium was tendered on 23.1.1995 and dishonoured but the amount of premium was accepted in cash on 30.1.1995 thereafter, the Insurance Company cannot deny its liability to pay the compensation to the third party for an accident caused on 23.1.1995.

15. In **Shamanna and Others vs. The Divisional Manager The oriental Insurance Co. Ltd. And Ors. 2018 ACJ 2163 (SC), National Insurance Co. Ltd. vs. Swaran Singh and Others 2005 (1) JLJ 85,** relied by the learned counsel for the claimant, it has been held by Hon'ble Supreme Court that in case of breach of policy, the insurer is bound to pay the compensation to claimant in view of Section 149 of the Act and recover the same from the owner of the vehicle.

16. In view of the peculiar facts and circumstances of this case, while it has been found that no policy has been issued by the appellant Insurance Company for insuring any risk of the alleged vehicle, the law laid down by the Hon'ble Supreme Court in Abhay Singh Pratap Singh Waghela (supra), Shamanna (supra), and in Swarn Singh (supra), relied by the learned counsel of claimants, is not applicable to this case.

17. In **Vikram Greentech India Ltd. And others vs. New India Assurance Company Ltd. (2009) 5 SCC 599,** Hon'ble Supreme Court in para no. 16 to 19 has held as under:-

16. *An insurance contract, is a species of commercial transactions and must be construed like any other contract to its own terms and by itself. In a*

contract of insurance, there is requirement of uberimma fides i.e. good faith on the part of the insured. Except that, in other respects, there is no difference between a contract of insurance and any other contract.

17. *The four essentials of a contract of insurance are, (i) the definition of the risk, (ii) the duration of the risk, (iii) the premium and (iv) the amount of insurance. Since upon issuance of insurance policy, the insurer undertakes to indemnify the loss suffered by the insured on account of risks covered by the insurance policy, its terms have to be strictly construed to determine the extent of liability of the insurer.*

18. *The endeavour of the court must always be to interpret the words in which the contract is expressed by the parties. The court while construing the terms of policy is not expected to venture into extra liberalism that may result in re-writing the contract or substituting the terms which were not intended by the parties. The insured cannot claim anything more than what is covered by the insurance policy. [General Assurance Society Ltd. Vs. Chandumull Jain and another, Oriental Insurance Co. Ltd. Vs. Sony Cheriyan and United India Insurance Co. Ltd. Vs. Harchand Rai Chandan Lal] .*

19. *Document like proposal form is a commercial document and being an integral part of policy, reference to proposal form may not only be appropriate but rather essential. However, the surveyors' report cannot be taken aid of nor can it furnish the basis for construction of a policy. Such outside aid for construction of insurance policy is impermissible.*

18. **Life Insurance Corporation of India vs. Raja Vasireddy Komallavalli Kamba (1984) 2 SCC 719**, Hon'ble Supreme Court in para no. 14 and 15 has held as under:-

When an insurance policy becomes effective is well- settled by the authorities but before we note the said authorities, it may be stated that it is clear that the expression "underwrite" signifies accept liability under'.

The dictionary meaning also indicates that. (See in this connection The Concise oxford Dictionary Sixth Edition p. 1267.) It is true that normally the expression "underwrite" is used in Marine insurance but the expression used in Chapter III of the Financial powers of the Standing order in this case specifically used the expression "underwriting and revivals" of policies in case of Life Insurance Corporation and stated that it was the Divisional Manager who was competent to underwrite policy for Rs 50,000 and above.

The mere receipt and retention of premium until after the death of the applicant or the mere preparation of the policy document is not acceptance. Acceptance must be signified by some act or acts agreed on by the parties or from which the law raises a presumption of acceptance.

See in this connection the statement of law in Corpus Juris Secundum, Vol. XLV page 986 wherein it has been stated as:-

"The mere receipt and retention of premiums until after the death of applicant does not give rise to a contract, although the circumstances may be such that approval could be inferred from retention of the premium. The mere execution of the policy is not an acceptance; an acceptance, to be complete, must be communicated to the

offeror, either directly, or by some definite act, such as placing the contract in the mail. The test is not intention alone. When the application so requires, the acceptance must be evidenced by the signature of one of the company's executive officers."

Though in certain human relationships silence to a proposal might convey acceptance but in the case of insurance proposal silence does not denote consent and no binding contract arises until the person to whom an offer is made says or does something to signify his acceptance. Mere delay in giving an answer cannot be construed as an acceptance, as, prima facie, acceptance must be communicated to the offeror. The general rule is that the contract of insurance will be concluded only when the party to whom an offer has been made accepts it unconditionally and communicates his acceptance to the person making the offer. Whether the final acceptance is that of the assured or insurers, however, depends simply on the way in which negotiations for an insurance have progressed.

(Emphasis Supplied)

19. **Deokar Export Pvt. Ltd. vs. New India Assurance Company Ltd., (2008) 14 SCC 598,** Hon'ble Supreme Court while interpreting the provision of Section 64 of VB Act, 1938 has held in paras 13 and 14 as under:-

13. *A policy of insurance is a contract based on an offer (proposal) and an acceptance. The appellant made a proposal. The respondent accepted the proposal with a modification. Therefore, it was a counter proposal. The appellant had three choices. The first was to refuse to accept the counter-proposal, in which event there would have been no contract. The second was to accept either expressly or impliedly, the counter-proposal of the respondent (that is respondent's acceptance with modification) which would result in a concluded contract in terms of the counter proposal. The third was to make a counter proposal to the counter-proposal of the respondent in which event there would have been no concluded contract unless the respondent agreed to such counter-counter- proposal. But the appellant definitely did not have the fourth choice of propounding a concluded contract with a modification neither proposed nor agreed to by either party. If the appellant did not agree to the policy covering the period 26.8.1988 to 25.8.1989 instead of the period 12.3.1988 to 12.9.1989, the result would never create an insurance contract effective from 30.6.1989 or any other date.*

14. The contention of the learned counsel for the appellant that an equitable view must be taken is untenable. In a contract of insurance, rights and obligations are strictly governed by the policy of insurance. No exception or relaxation can be made on the ground of equity.

(Emphasis Supplied)

20. Thus, in view of the law pronounced by the Hon'ble Supreme Court as above, and aforesaid relevant provision of Indian Contract Act, it is further clear that the contract of insurance is a contract of indemnity. For a valid contract, there must be an agreement enforceable by law and unless there is offer, proposal and acceptance which are essentials of agreement, there cannot be any agreement. In addition to it, there must be a valid and effective insurance policy or a certificate issued in favour of

insured i.e. owner of the vehicle containing the details and particulars required in the said policy, and in absence thereof, the Insurance Company is not liable to pay any compensation or indemnify any person.

21. Coming to the facts of this case, record shows that the respondent-owner of the vehicle appeared before the Tribunal and filed a written statement, wherein he admitted that he is owner of the alleged vehicle UP 78 N 8663; he stated that he had issued cheque no. 738677 dated 15.2.2001 of Rs. 8,500/- and sent it through postal dak in favour of National Insurance Company Ltd. Shah Najaf Road, Lucknow along with registration certificate of the vehicle for insurance and the said cheque was encashed by the Insurance Company. He has further stated that despite several requests, insurance policy / certificate was not issued by the Insurance Company. In his additional written statement, he stated that the aforesaid cheque of Rs. 8,500/- was encashed from his current account no. 0150061087.

22. Insurance Company, in its written statement, specifically denied the issuance or existence of any insurance policy covering the risk of any accident of alleged vehicle, owned by the respondent-owner. OPW-2, Arun Kumar Katiyar, Officer of State Bank of India, Padrauna, District Khushi Nagar, filing the account statement of current account No. 01050061087 of Janta Electricals, has stated that from this account, cheque no. 00738677 dated 22.3.2001 bearing aforesaid account, issued in favour of National Insurance Company Ltd. Lucknow, was encashed on 28.3.2001.

23. The accident was happened on 23.2.2001. It is admitted fact that no insurance policy was issued either prior to the said accident or after the accident by the appellant-Insurance Company covering any risk of the alleged accident. It is not the case of the respondent-owner that on the date of accident, any premium was paid by him or any cover note was issued. He did not produce any proposal, offer or cover note whereby it can be presumed that the alleged cheque was issued by him for the insurance of the alleged Bus No. UP 78 N 8663. Merely by issuing cheque without mentioning the particulars of vehicle or its encashment by the Insurance Company, after one month of the accident it cannot be presumed that the said cheque was issued for the insurance policy of the alleged vehicle.

24. It is also pertinent to note at this juncture that respondent-owner has not assigned any reason or justification as to why he sent cheque to office situated at Lucknow without any requisition or offer of Insurance Company. He is neither resident of Lucknow nor alleged Bus was registered at Lucknow. Learned counsel for the respondent-owner has also not shown any provision of law which provides that merely issuing a cheque will amount to insurance policy.

25. Mere issuing a cheque and sending it by registered post, without any further details which are necessary for insurance policy, cannot be deemed as insurance policy as required by relevant provision of M.V. Act from another point of view because suppose if a person (owner) has more than one vehicle and he sends a cheque by post without mentioning details of any particular vehicle, how it can be presumed that such cheque was issued for premium of that particular vehicle for particular period and

if one or more vehicle caused accident and how tribunal can arrive on conclusion regarding identity of vehicle and period of continuation of coverage of risk.

26. Thus in view of the above discussion, in absence of valid and effective insurance policy, Insurance Company is not liable to pay any compensation and only the respondent-Anthoni John, owner of the alleged vehicle No. UP 78 N 8663, is liable to pay the compensation along with the interest to the claimant-respondents of both the M.A.C.P. No. 117/2001 and 119/2001.

27. Accordingly, both the appeals F.A.F.O. No. 2256 of 2010 *(National Insurance Company Ltd. vs. Smt. Lalmati Devi and others)* and F.A.F.O. No. 2257 of 2010 *(National Insurance Company Ltd. vs. Smt. Reeta Devi and others)* are **allowed.** The judgments and awards dated 24.4.2010 passed by the Tribunal in M.A.C.P. No. 117/2001 *(Smt. Reeta Devi and others vs. Anthoni John and others)* and M.A.C.P. No. 119/2001 *(Smt. Lalmati Devi and others vs. Anthoni John and others)* are modified to the extent as discussed above. Insurance company is exonerated from its liability to pay the compensation. Registry is directed to refund the statutory amount paid by the appellant-Insurance Company, if not remitted to the Tribunal. The respondent-owner of the alleged vehicle is directed to pay the compensation awarded in both the aforesaid petitions along with up to date interest within a period of one month to claimants of both the appeals.

28. Office is directed to send back the lower court record of both the appeals along with the copy of this judgment to the Tribunal for its compliance.

(2019)12 ILR A1011

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.11.2019

BEFORE
THE HON'BLE GOVIND MATHUR, C.J.

FAFO No. 2622 of 2019

M/S Kapila Krishi Udyog Ltd. ...Appellant
Versus
M/S Kamdhenu Cattle Feeds (P) Ltd. ...Respondent

Counsel for the Appellant:
Sri Anurag Khanna, Sri Kartikeya Saran, Sri Devesh Saxena

Counsel for the Respondent:
Sri Abhinava Krishna Srivastava, Sri Saurabh Srivastava

A. Civil Law - Code of Civil Procedure, 1908 - Order 39, Rule 1 & 2 - Temporary Injunction - Power of appellate court - Appellate court should be slow in upsetting order granting or rejecting a temporary injunction - Merely a possibility of the appellate court to arrive at a different conclusion on basis of the same facts and evidence will not justify interference with an order granting or rejecting temporary injunction.

B. Civil Law - Code of Civil Procedure, 1908 - Order 39, Rule 1 & 2 - Specific Relief Act - Section 41(h) - Temporary injunction - to restrain from using the Trade Mark - Temporary Injunction refused - as Plaintiff have equally effective relief by pursing the pending and alive issue under Section 57 of the Trade Marks Act before the Intellectual Property Appellate Tribunal.

Trial court while dismissing temporary injunction application examined facts stated on affidavits, facts pertaining to the other litigation existing between the parties - noticed

that the issue is still alive and pending consideration before Intellectual Property Appellate Tribunal - *Held* - Order is neither perverse nor the trial court failed to exercise or exceeded jurisdiction vested with it. No case made out for interference in appellate jurisdiction.

First Appeal from Order dismissed. (E-5)

(Delivered by Hon'ble Vivek Varma, J. under Chapter VII, Rule 1(3) of the Allahabad High Court Rules, 1952)

1. By the judgment impugned dated 7th August, 2019, learned Additional District Judge, 23, Kanpur Nagar has dismissed an application preferred by the appellant-plaintiff (hereinafter referred as appellant) under Order 39, Rules 1 and 2 of Code of Civil Procedure, 1908.

2. The material facts of the case are that the appellant is a company incorporated under Companies Act and is engaged in the business and manufacturing and sale of cattle feed. The product of the company is having its brand name and trade mark as "Kapila Pashu Ahar".

3. The defendant-respondent (hereinafter referred to as the respondent) is also a company incorporated under the Companies Act and is also engaged in the business of manufacture and sale of cattle feed. The Directors of both the companies are from one family. Sarv Sri Saurabh Shivhare and Samir Shivhare Sons of Late Sri Ramesh Shivhare are Directors of the appellant Company and Sri Surendra Nath Shivhare, real brother of Late Sri Ramesh Shivhare is a Director of respondent Company.

4. The respondent Company was formed prior to the appellant and Sarv Sri Ramesh Shivhare and Surendra Nath Shivhare were its owners and promoters. This company had its brand name and trade mark as "Kapila Pashu Ahar" (Trade Mark No.597524). Unfortunately, Sri Ramesh Shivhare died on 2nd July, 2004. After his death a business sale agreement was executed between the respondent and appellant company, in result business of the respondent as a whole was said to be sold to the appellant.

5. An application was preferred by the appellant on 28th March, 2016 in terms of Section 45 of the Trade Marks Act, 1999 before the Deputy Registrar of the Trade Marks. By an order dated 15th December, 2017, the Deputy Registrar ordered that M/s Kapila Krishi Udyog Limited (appellant) shall remain on a register of trade marks as subsequent proprietor of the Trade Mark No.597524.

6. Being aggrieved by the order dated 15th December, 2017, the respondent-petitioner preferred C.M. No.40954 of 2017 before the High Court of Delhi. A Writ Petition (C) No.10037 of 2017 arising out of the same dispute too was under consideration before the Delhi High Court at that time. The High Court vide its order dated 19th December, 2017 disposed of both the petitions by reserving right of the petitioner to challenge the order dated 15th December, 2017 by availing remedy under Section 57 of the Act of 1999. Validity of the order dated 19th December, 2017 passed by learned single Bench of Delhi High Court was further questioned by the respondent by way of letter patent appeal. The appeal aforesaid came to be disposed of under the order dated 16th April, 2018 that reads as follows:-

"In the present appeal, the grievance is with respect to the adverse

observations contained in the order of the Deputy Registrar of Trademarks [hereafter "the DR"] dated 15.12.2017. In that order, the appellant was asked to seek its remedies under Section 57 of the Trademarks Act, 1999. It is brought to the notice of the Court that the observations in previous order dated 20.10.2017 on the issue of registration which is the subject matter of the application before the Intellectual Property Appellate Board (IPAB) under Section 91 of the Trademarks Act, would come in the way.

In the circumstances, it is hereby directed that neither the observations in the order dated 20.10.2017 nor the observations of the DR in the order dated 15.12.2017 shall be treated as conclusive in any manner nor be deemed to be a reflection on the merits of the appellant's application for rectification. The appeal is accordingly disposed of."

7. After disposal of the letters patent appeal, the appellant preferred a suit before the Court of learned District Judge, Kanpur Nagar to have a decree of permanent injunction in following terms:-

"(A) That the Decree of Permanent Injunction may kindly be passed in favour of the plaintiff and against the defendant suitably restraining the defendants or their trustees, servants, subordinates, representatives, agents and all other person claiming under or/and through them from infringing the use of Plaintiff's said trademarks and labels, any other trademark containing the words kapila pashu aahaar and the plaintiff's Registered Trade Mark aforesaid i.e., "Kapila Pashu Aahar", bearing the Registered Trade Mark No.597524, in any mode or manner.

8. An application as per Order 39, Rules 1 and 2 of the Code of Civil Procedure was also filed by the appellant to have a temporary injunction against the defendant to restrain it from using or interfering or infringing the Trade Mark No.597524. The application aforesaid came to be dismissed by the order impugned dated 7th August, 2019.

9. Learned trial court while dismissing the application examined provisions of the Trade Marks Act, the facts stated by the parties to the proceedings on affidavits and the facts pertaining to the other litigation existing between the parties. The trial court while meeting with the argument advanced on behalf of plaintiff-appellant that in light of the order passed by the single Bench as well as Division Bench of the Delhi High Court, the Trade Mark No.597524 is under absolute ownership of the appellant, noticed that the issue is still alive and is pending consideration before the Intellectual Property Appellate Tribunal. The trial court, on basis of the documents filed by the defendant, also noticed that a suit is also pending before Commercial Court, Kanpur to declare an agreement dated 17th May, 2014 regarding "Kapila Pashu Ahar" void and to prohibit the defendant-respondent to use that as a brand name, which was said to be transferred to the plaintiff-appellant.

10. The trial court in light of the provisions of Section 38 and Section 41 of the Specific Relief Act held that plaintiff-appellant can have equally effective relief by pursing the issue under Section 57 of the Trade Marks Act before the Intellectual Property Appellate Tribunal.

11. While pressing the present appeal, it is submitted that the trial court

failed to appreciate that the trade mark "Kapila Pashu Ahar" was registered in the name of appellant vide order dated 15th December, 2017 and as such the respondent had no right to use the same for its business. Much emphasis is given to the fact that validity of the order dated 15th December, 2017 was affirmed by the Delhi High Court and as such the trial court erred while holding that the appellant may avail relief under Section 41 of the Specific Relief Act.

12. It is further stated that the trial court erred while rejecting the application for injunction on the count of pendency of Suit No.1 of 2016 before the Commercial Court, Kanpur. According to learned counsel for the appellant, the suit aforesaid is founded on a different cause of action and the same has nothing to do with regard to the permanent injunction sought by the appellant in suit proceedings no.4 of 2019.

13. While opposing the appeal and defending the order passed by the trial court learned counsel appearing on behalf of the respondent states that whatever relief claimed by the appellant in Original Suit No.4 of 2019 has also been sought in Original Suit No.01 of 2016. An allegation is also made to the effect that the appellant under valued the suit just to avoid the jurisdiction of Commercial Court, Kanpur Nagar where the Original Suit No.1 of 2016 is pending.

14. It is asserted that an intentional effort is made by the appellant to misrepresent the orders passed by the Delhi High Court in single Bench as well as Division Bench just with a view to avail a temporary injunction by misleading the court.

15. Heard learned counsels, considered the argument advanced and also perused the documents annexed with the memo of appeal.

16. Before coming on merits of the case, it would be appropriate to mention that an appellate court while hearing a miscellaneous appeal questioning correctness of an order passed under Order 39, Rules 1 and 2 of the Code of Civil Procedure, granting or rejecting a temporary injunction, should be slow in upsetting a decision of a trial court. Merely a possibility of the appellate court to arrive at a different conclusion on basis of the same facts and evidence will not justify interference with an order granting or rejecting temporary injunction. However, the trial court while disposing of an application under Order 39, Rules 1 and 2 of the Code of Civil Procedure must apply its judicial mind to the material which is placed on record. Every piece of evidence produced by the either party must be considered in deciding the existence of a prima facie case to justify issuance of a temporary injunction. No such injunction should be issued unless the court is thoroughly satisfied about existence of prima facie case in addition to the factors pertaining to the balance of convenience and irreparable injury that may be caused to either party.

17. Applying the above principle to the instant case, I may state at the outset that the trial court while rejecting the application has considered the affidavits filed by the plaintiff-appellant in support of the application for temporary injunction and also the affidavits filed on behalf of the respondent. The trial court on going through the plaint of Original Suit No.1 of 2016 concluded that the

relief claimed therein is similar to the relief of permanent injunction sought in Original Suit No.4 of 2019. The trial court also examined effect of the proceedings pending before Intellectual Property Appellate Tribunal and held that in light of the relevant provisions of the Specific Relief Act, the appellant may have the same relief in the proceedings aforesaid. So far as the orders passed by Delhi High Court are concerned, I am also satisfied that in light of the orders passed in letters patent appeal, it cannot be said that the issue with regard to trade mark has acquired finality between the parties. The Division Bench of Delhi High Court in quite specific terms held that the respondent herein may avail remedy under Section 57 of the Trade Marks Act, 1999 and the observations made by the Deputy Registrar of Trade Marks under order dated 15th December, 2017 as well as under the order dated 20th October, 2017 shall not be treated as conclusive in any manner and shall also not be deemed to the reflection of the merits of the appellant's application for rectification.

18. In view of whatever stated above, I do not find any just reason to arrive at the conclusion that the trial court failed to appreciate its judicial mind while examining the material available on record or that failed to exercise jurisdiction vested with it while rejecting the application under Order 39, Rules 1 and 2 of the Code of Civil Procedure, 1908. The order is neither perverse nor the trial court failed to exercise or exceeded jurisdiction vested with it. No case hence, is made out for interference in appellate jurisdiction.

19. The appeal hence, is dismissed.

(2019)12 ILR A1015

APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 27.11.2019

BEFORE
THE HON'BLE ANIL KUMAR, J.
THE HON'BLE SAURABH LAVANIA, J.

First Appeal No. 53 of 2018
&
First Appeal No. 55 of 2018

Ram Naik Misra & Anr. ...Appellants
Versus
Km. Gauri & Ors. ...Respondents

Counsel for the Appellants:
Prabhat Kumar

Counsel for the Respondents:
Ramakar Shukla

A. Family & Personal Laws - Guardian and Wards – Custody of minor to Maternal Grandfather - Considerations for Custody of child / minor - Paramount considerations are welfare and wish of minor child - Maternal grandfather taking care of the minor children and providing proper education – Minors stated before court that they want to live with maternal grandfather - Custody/guardianship of minor children given to Maternal grandfather with their father given visitation rights.

Mother of children committed suicide - maternal grandfather filed case for appointing himself as the guardian of minor children - Family Court directed custody/guardianship of minor children to the Maternal Grandfather and not to father - *Held* – Minor children aged about 15 yrs & 13 yrs - mature enough to give their opinion - stated before court that they want to live with maternal grandfather & do not want to live with their father – Record showed Maternal Grandfather is taking care of the minor children and providing proper education - father is the natural guardian of

the minor children & has a preferential right of custody of the minor - but in the matter of the custody of minor - the Court also has to consider the welfare of the child & is also required to consider the wishes of minor children - no illegality in Family court order - however father, being a natural guardian, given the visitation rights, which was not given by the court below (Para 31)

First Appeal partly allowed. (E-5)

List of cases cited: -

1. Tejaswini Gaud & Ors Vs Shekhar Jagdish Prasad Tewari & Ors Cri. Appeal No. 838 of 2019

2. Ruchi Majoo Vs Sanjeev Majoo (2011) 6 SCC 479

3. Lekha Vs P.Anil Kumar (2006) 13 SCC 555

4. Jitender Arora Vs Sukriti Arora reported in (2017) 3 SCC 726

5. Nil Ratan Kundu Vs Abhijit Kundu reported in (2008) 9 SCC 413

6. Nutan Gautam Vs Prakash Guatam (2019) 4 SCC 734

(Delivered by Hon'ble Anil Kumar, J.
& Hon'ble Saurabh Lavania, J.)

1. In compliance of earlier order of this Court, appellant Sri Ram Shanker Misra, respondent Sri Satish Chandra Misra, minor children namely Ms. Gauri and Master Prakhar, are present before this Court.

2. Vide judgment and order dated 11.04.2018, the Principal Judge, Family Court, Sultanpur, decided two cases i.e. Civil Misc. Case No.72 of 2010 (Ram Naik Misra And Another Vs. Km. Gauri And Others) and Civil Misc. Case No.68 of 2009 (Satish Chandra Misra Vs. Ram Shanker Misra).

3. In both the above noted appeals the judgment and order dated 11.04.2018 has been challenged and as such both are being heard and decided by this judgment.

4. Heard, Sri Prabhat Kumar, learned Counsel for the appellant and Sri Ramakar Shukla, learned Counsel for the respondent.

5. Facts in brief of the present case, as per record, are that marriage between appellant no.2/Ram Shanker Misra and Moni Misra was solemnized in the year 2002 and out of the wedlock of appellant no.2 and Moni Misra , two children were born namely Ms. Gauri Misra and Mr. Prakhar Misra. Matrimonial relation between the appellant no.2/Ram Shanker Misra and Moni Misra has become strained and on 02.04.2007 Moni Misra tried to commit suicide and died on 09.04.2007 at K.G.M.C. Lucknow. Thereafter, father of Moni Misra i.e. Sri Satish Chandra Misra took the minor children in his custody. On 10.04.2007 Sri Satish Chandra Misra, lodged an F.I.R. under Sections 304B/498A and 3/4 Dowry Prohibition Act and on 17.5.2007 filed an application under Section 125 Cr.P.C. for maintenance of children. The appellant no.2/Ram Shanker Misra was taken into custody in relation to the FIR lodged by Sri Satish Chandra Misra and on 09.06.2011, the court below has acquitted the appellant Ram Shanker Misra. During the pendency of Criminal trial against the appellant(s), Sri Satish Chandra Misra (नाना), maternal grandfather, filed a Civil Misc. Case No. 68 of 2009 under Guardian and Wards Act for appointing the guardian of minor children. The appellant nos. 1/Sri Ram Naik Misra(दादा) paternal grandfather, and appellant no.2, father of minor(s) Kr.

Gauri and Master Prakhar, also filed a Civil Misc. Case No. 72 of 2010 for appointing the guardian of minor children namely Ms. Gauri Misra and Master Prakhar Misra. Thereafter, Principal Judge Family Court, Sultanpur clubbed both the cases together and decided by its order dated 11.04.2018, whereby allowing the Civil Misc. Case No. 68 of 2009 filed by Sri Satish Chandra Misra and directed that custody of minor children namely Ms. Gauri Misra and Master Prakhar Misra, be given to their maternal grand father (नाना) Sri Satish Chandra Misra and dismissed the Civil Misc. Case No. 72 of 2010 filed by appellants.

6. The judgment and order dated 11.04.2018 passed by Principal Judge, Family Court, Sultanpur is in issue.

7. Sri Prabhat Kumar, learned Counsel for the appellants challenging the judgment and order dated 11.04.2018 submitted that in the present case, father being the natural guardian of the minor children namely Ms. Gauri Misra and Master Prakhar Misra, custody shall be given to him, however, ignoring the said fact, the court below has dismissed the case of appellants. He further submitted that since 2007 both the children are living with their maternal grand father (नाना) Sri Satish Chandra Misra and both the children have been influenced by maternal grand father (नाना) Sri Satish Chandra Misra and this fact has not been considered by the court below and in an arbitrary and illegal manner the court below has passed the order dated 11.04.2018 which is liable to be set aside. In support of his submission he has placed reliance on the judgment of Hon'ble Apex Court in the case of ***Tejaswini Gaud and Others Versus Shekhar Jagdish Prasad Tewari and Others in Criminal Appeal No. 838 of 2019***. The relevant paragraph nos. 34 to 36 are quoted below:-

*"**34.**This Court inSurinder Kaur Sandhu case[Surinder Kaur Sandhuv.Harbax Singh Sandhu, (1984) 3 SCC 698 : 1984 SCC (Cri) 464] was concerned with the custody of a child who was British citizen by birth whose parents had been settled in England after their marriage. The child was removed by the husband from the house and was brought to India. The wife obtained a judicial order from the UK court whereby the husband was directed to hand over the custody of the child to her. The said order was later confirmed by the court of England and thereafter the wife came to India and filed a writ petition in the High Court of Punjab and Haryana praying for custody and production of the child which came to be dismissed against which the wife appealed to this Court. This Court keeping in view the "welfare of the child", "comity of courts" and "jurisdiction of the State which has most intimate contact with the issues arising in the case" held thus: (Surinder Kaur Sandhu case[Surinder Kaur Sandhuv.Harbax Singh Sandhu, (1984) 3 SCC 698 : 1984 SCC (Cri) 464] , SCC pp. 702-03, para 10)*

"10. We may add that the spouses had set up their matrimonial home in England where the wife was working as a clerk and the husband as a bus driver. The boy is a British citizen, having been born in England, and he holds a British passport. It cannot be controverted that, in these circumstances, the English Court had jurisdiction to decide the question of his custody. The modern theory of Conflict of Laws recognises and, in any event, prefers the

jurisdiction of the State which has the most intimate contact with the issues arising in the case. Jurisdiction is not attracted by the operation or creation of fortuitous circumstances such as the circumstance as to where the child, whose custody is in issue, is brought or for the time being lodged. To allow the assumption of jurisdiction by another State in such circumstances will only result in encouraging forum-shopping. Ordinarily, jurisdiction must follow upon functional lines. That is to say, for example, that in matters relating to matrimony and custody, the law of that place must govern which has the closest concern with the well-being of the spouses and the welfare of the offspring of marriage. The spouses in this case had made England their home where this boy was born to them. The father cannot deprive the English Court of its jurisdiction to decide upon his custody by removing him to India, not in the normal movement of the matrimonial home but, by an act which was gravely detrimental to the peace of that home. The fact that the matrimonial home of the spouses was in England, establishes sufficient contacts or ties with that State in order to make it reasonable and just for the courts of that State to assume jurisdiction to enforce obligations which were incurred therein by the spouses. (SeeInternational Shoe Co.v.State of Washington[International Shoe Co.v.State of Washington, 1945 SCC OnLine US SC 158 : 90 L Ed 95 : 326 US 310 (1945)] , which was not a matrimonial case but which is regarded as the fountainhead of the subsequent developments of jurisdictional issues like the one involved in the instant case.) It is our duty and function to protect the wife against the burden of litigating in an inconvenient forum which she and her husband had left voluntarily in order to make their living in England, where they gave birth to this unfortunate boy."

35.*InElizabeth Dinshaw case[Elizabeth Dinshawv.Arvand M. Dinshaw, (1987) 1 SCC 42 : 1987 SCC (Cri) 13] , this Court held that it is the duty of courts in all countries to see that a parent doing wrong by removing children out of the country does not gain any advantage by his or her wrongdoing and was guided by the factors such as the longer time spent by the child in the US in which the child was born and became US citizen and also the fact that the child has not taken roots in India and was still not accustomed and acclimatised to the conditions and environment obtaining in the place of his origin in the United States of America. This Court took note of the fact that the child's presence in India is the result of an illegal act of abduction and the father who is guilty of the said act cannot claim any advantage by stating that he has already put the child in some school in Pune.*

36.*InV. Ravi Chandran (2) case[V. Ravi Chandran (2)v.Union of India, (2010) 1 SCC 174 : (2010) 1 SCC (Civ) 44] , this Court was concerned with the custody of the child removed by a parent from one country to another in contravention of the orders of the court where the parties had set up their matrimonial home. This Court took note of the English decisions, namely,L. (Minors) (Wardship: Jurisdiction), In re[L. (Minors) (Wardship: Jurisdiction), In re, (1974) 1 WLR 250 : (1974) 1 All ER 913 (CA)] andMcKeev.McKee[McKeev.McKee, 1951 AC 352] and also noticed the decision of this Court inElizabeth Dinshaw case[Elizabeth Dinshawv.Arvand M. Dinshaw, (1987) 1*

SCC 42 : 1987 SCC (Cri) 13] andDhanwanti Joshiv.Madhav Unde[Dhanwanti Joshiv.Madhav Unde, (1998) 1 SCC 112] keeping into consideration the fact that the child was left with his mother in India for nearly twelve years, this Court held that it would not exercise its jurisdiction summarily to return the child to the US on the ground that his removal from US in 1984 was contrary to the orders of the US courts. The relevant portion is as under: [V. Ravi Chandran (2) case[V. Ravi Chandran (2)v.Union of India, (2010) 1 SCC 174 : (2010) 1 SCC (Civ) 44] , SCC pp. 195-96, paras 29-30]

"29. While dealing with a case of custody of a child removed by a parent from one country to another in contravention of the orders of the court where the parties had set up their matrimonial home, the court in the country to which the child has been removed must first consider the question whether the court could conduct an elaborate enquiry on the question of custody or by dealing with the matter summarily order a parent to return custody of the child to the country from which the child was removed and all aspects relating to the child's welfare be investigated in a court in his own country. Should the court take a view that an elaborate enquiry is necessary, obviously the court is bound to consider the welfare and happiness of the child as the paramount consideration and go into all relevant aspects of welfare of the child including stability and security, loving and understanding care and guidance and full development of the child's character, personality and talents. While doing so, the order of a foreign court as to his custody may be given due weight; the weight and persuasive effect of a foreign judgment must depend on the circumstances of each case.

30. However, in a case where the court decides to exercise its jurisdiction summarily to return the child to his own country, keeping in view the jurisdiction of the court in the native country which has the closest concern and the most intimate contact with the issues arising in the case, the court may leave the aspects relating to the welfare of the child to be investigated by the court in his own native country as that could be in the best interests of the child. The indication given inMcKeev.McKee[McKeev.McKee, 1951 AC 352] that there may be cases in which it is proper for a court in one jurisdiction to make an order directing that a child be returned to a foreign jurisdiction without investigating the merits of the dispute relating to the care of the child on the ground that such an order is in the best interests of the child has been explained inL. (Minors) (Wardship: Jurisdiction), In re[L. (Minors) (Wardship: Jurisdiction), In re, (1974) 1 WLR 250 : (1974) 1 All ER 913 (CA)] and the said view has been approved by this Court inDhanwanti Joshi[Dhanwanti Joshiv.Madhav Unde, (1998) 1 SCC 112] . Similar view taken by the Court of Appeal inH. (Infants), In re[H. (Infants), In re, (1966) 1 WLR 381 (CA)] has been approved by this Court inElizabeth Dinshaw[Elizabeth Dinshawv.Arvand M. Dinshaw, (1987) 1 SCC 42 : 1987 SCC (Cri) 13] ."

8. Learned Counsel for the appellant has also placed reliance on the judgment reported in ***(2011) 6 SCC 479 (Ruchi Majoo Versus Sanjeev Majoo).*** The relevant paragraph nos. 72 to 77 are quoted below:-

*"**72.**For a boy so young in years, these and other expressions suggesting a deep-rooted dislike for the father could arise only because of a constant hammering of negative feeling in*

him against his father. This approach and attitude on the part of the appellant or her parents can hardly be appreciated. What the appellant ought to appreciate is that feeding the minor with such dislike and despire (sic) for his father does not serve his interest or his growth as a normal child.

73.*It is important that the minor has his father's care and guidance, at this formative and impressionable stage of his life. Nor can the role of the father in his upbringing and grooming to face the realities of life be undermined. It is in that view important for the child's healthy growth that we grant to the father visitation rights; that will enable the two to stay in touch and share moments of joy, learning and happiness with each other. Since the respondent is living in another continent such contact cannot be for obvious reasons as frequent as it may have been if they were in the same city. But the forbidding distance that separates the two would get reduced thanks to the modern technology in telecommunications.*

74.*The appellant has been according to the respondent persistently preventing even telephonic contact between the father and the son. May be the son has been so poisoned against him that he does not evince any interest in the father. Be that as it may telephonic contact shall not be prevented by the appellant for any reason whatsoever and shall be encouraged at all reasonable time. Videoconferencing may also be possible between the two which too shall not only be permitted but encouraged by the appellant.*

75.*Besides, the father shall be free to visit the minor in India at any time of the year and meet him for two hours on a daily basis, unhindered by any impediment from the mother or her parents or anyone else for that matter. The place where the meeting can take place shall be indicated by the trial court after verifying the convenience of both the parties in this regard. The trial court shall pass necessary orders in this regard without delay and without permitting any dilatory tactics in the matter.*

76.*For the vacations in summer, spring and winter the respondent shall be allowed to take the minor with him for night stay for a period of one week initially and for longer periods in later years, subject to the respondent getting the itinerary in this regard approved from the Guardians and Wards Court. The respondent shall also be free to take the minor out of Delhi subject to the same condition. The respondent shall for that purpose be given the temporary custody of the minor in presence of the trial court, on any working day on the application of the respondent. Return of the minor to the appellant shall also be accordingly before the trial court on a date to be fixed by the court for that purpose.*

77.*The above directions are subject to the condition that the respondent does not remove the child from the jurisdiction of this Court pending final disposal of the application for grant of custody by the Guardians and Wards Court, Delhi. We make it clear that within the broad parameters of the directions regarding visitation rights of the respondent, the parties shall be free to seek further directions from the court seized of the guardianship proceedings; to take care of any difficulties that may arise in the actual implementation of this order."*

9. On the basis of above referred judgments, Sri Prabhat Kumar, learned

Counsel for the appellant submitted that father Sri Ram Shanker Misra, is entitled to take custody of his minor children and the judgment and order dated 11.04.2018, under appeal, is liable to be set-aside.

10. In rebuttal, Sri Ramakar Shukla, learned Counsel for the respondent, supporting the judgment and order dated 11.04.2018 passed Principal Judge, Family Court, Sultanpur, submitted that judgment and order, under appeal, is legal has been and passed in accordance with law. He further submitted that mother of the minor children committed suicide in the year 2007 i.e. on 02.04.2007 and died on 09.04.2007. Demand of dowry by the appellants was the cause of committing suicide. Since 2007 both the children are living with Sri Satish Chandra Misra (नाना). On 10.04.2007 Sri Satish Chandra Misra, lodged an F.I.R. under Sections 304B/498A and 3/4 Dowry Prohibition Act against the appellants. Maternal grand father of the children Sri Satish Chandra Misra (नाना) is giving proper care and eduction to the children. Learned Counsel for the respondent further submitted that against the acquittal order of appellants, an appeal bearing Criminal Appeal No. 1351 of 2011, has been filed, which is pending before this Court. Learned Counsel for the respondent also submitted that the father of the children Ram Shanker Misra has remarried and thereafter litigation between him and his second wife is pending under consideration before the competent court. In such circumstances if the custody of the minor children has been given to their father, the future of children would suffer/hamper and therefore, the appeals under consideration are liable to be dismissed.

11. In rebuttal, Sri Prabhat Kumar, learned Counsel for the appellant submitted that remarriage of the appellant cannot be a ground for denying the custody of minor children. In support of his submission he has placed reliance on the judgment reported in ***(2006) 13 SCC 555 (Lekha Versus P.Anil Kumar).*** The relevant paragraph nos. 19 to 23 are quoted below:-

*"**19.**The law permits a person to have the custody of his minor child. The father ought to be the guardian of the person and property of the minor under ordinary circumstances. The fact that the mother has married again after the divorce of her first husband is no ground for depriving the mother of her parental right of custody. In cases like the present one, the mother may have shortcomings but that does not imply that she is not deserving of the solace and custody of her child. If the court forms the impression that the mother is a normal and independent young woman and shows no indication of imbalance of mind in her, then in the end the custody of the minor child should not be refused to her or else we would be really assenting to the proposition that a second marriage involving a mother per se will operate adversely to a claim of a mother for the custody of her minor child. We are fortified in this view by the authority of the Madras High Court inS. Soora Reddiv.S. Chenna Reddi[AIR 1950 Mad 306 : (1950) 1 MLJ 33] where Govinda Menon and Basheer Ahmed Syed, JJ. have clearly laid down that the father ought to be a guardian of the person and property of the minor under ordinary circumstances and the fact that a Hindu father has married a second wife is no*

ground whatever for depriving him of his parental right of custody.

20.*A man in his social capacity may be reckless or eccentric in certain respects and others may even develop a considerable distaste for his company with some justification but all that is a far cry from unfitness to have the natural solace of the company of one's own children or for the duty of bringing them up in proper manner. Needless to say the respondent husband, in this case, seems to be anxious to have the minor child with him as early as possible in order to look after him properly and to provide for his future education. The feelings being what they are between the respondent and the appellant we think it is also natural on the part of the husband to feel that if the minor child continues to live with his former wife, it may be brought up to hate the father or to have a very adverse impression about him. This certainly is not desirable. Needless to say, this Court is not called upon to find that the respondent husband has been entirely blameless in his conduct and few occasions referred to in this case and by the boy at the time of interview, it is not the duty of this Court even to ascertain whether the respondent is a responsible and good citizen and a preferred individual. Many people have shortcomings but that does not imply that they are not deserving of the solace and custody of their children.*

21.*However, in the present case, we have to decide in the interest of the child as to who would be in a better position to look after the child's welfare and interest. The general view that the courts have taken is that the interest and welfare of the child is paramount. While it is no doubt true that under the Hindu law, the father is the natural guardian of a minor after the age of six years, the court while considering the grant of custody of the minor to him has to take into account other factors as well, such as the capacity of the father to look after the child's needs and to arrange for his upbringing. It also has to be seen whether in view of his other commitments, the father is in any position to give personal attention to the child's overall development.*

22.*As indicated hereinbefore, we have spoken to the child who, in our view, is intelligent and appears to be capable of expressing his preference. In fact, he has in no uncertain terms indicated his desire to stay with his mother. His mother's second marriage, instead of proving to be a disadvantage, has proved to be beneficial for the child who seems to be happy and contented in his present situation and we do not think it would be right to unsettle the same.*

23.*The High Court committed a grave error in not ascertaining the wishes of the minor, which has consistently been held by the courts to be of relevance in deciding grant of custody of minor children. We are, therefore, inclined to restore the order passed by the Family Court and to give custody of the minor boy to his mother, but as indicated hereinbefore, we do not want the child to grow up without knowing the love and affection of his natural father who too has a right to help in the child's upbringing. We are of the view that although the custody of the minor child is being given to the mother, the child should also get sufficient exposure to his natural father and accordingly, we permit the respondent to have custody of the child from the appellant during Onam and other important festivals and during the school vacation. We make it clear that the appellant mother shall hand over the*

child to the respondent father during every mid-summer vacation for about a month without adversely affecting the child's education. The appellant should not also prevent the respondent father from coming to see the child during weekends and the appellant should make necessary arrangements for the respondent to meet his child on such occasions. The appellant should not also prevent the child from receiving any gift that may be given by the respondent father to the child."

12. We have considered the submissions of learned Counsel for the parties and perused the records. We find that in the case of Tejaswini Gaud (Supra), the Hon'ble Apex Court has held as under:-

*"**24.**In Sarita Sharma[Sarita Sharmav.Sushil Sharma, (2000) 3 SCC 14 : 2000 SCC (Cri) 568] , the tussle over the custody of two minor children was between their separated mother and father. The Family Court of USA while passing the decree of divorce gave custody rights to the father. When the mother flew to India with the children, the father approached the High Court by filing a habeas corpus petition. The High Court directed the mother to hand over the custody to the father. The Supreme Court in appeal observed that the High Court should instead of allowing the habeas corpus petition should have directed the parties to initiate appropriate proceedings wherein a thorough enquiry into the interest of children could be made.*

***25.**In the recent decision inLahari Sakhamuri[Lahari Sakhamuriv.Sobhan Kodali, (2019) 7 SCC 311 : (2019) 5 Scale 97] , this Court referred to all the judgments regarding the custody of the minor children when the parents are non-residents (NRI). We have referred to the above judgments relating to custody of the child removed from foreign country and brought to India for the sake of completion and to point out that there is a significant difference insofar the children removed from foreign countries and brought into India.*

Welfare of the minor child is the paramount consideration

***26.**The court while deciding the child custody cases is not bound by the mere legal right of the parent or guardian. Though the provisions of the special statutes govern the rights of the parents or guardians, but the welfare of the minor is the supreme consideration in cases concerning custody of the minor child. The paramount consideration for the court ought to be child interest and welfare of the child.*

***27.**After referring to number of judgments and observing that while dealing with child custody cases, the paramount consideration should be the welfare of the child and due weight should be given to child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings, inNil Ratan Kundu[Nil Ratan Kunduv.Abhijit Kundu, (2008) 9 SCC 413] , it was held as under: (SCC pp. 427-28, paras 49-52)*

"49. InGoverdhan Lalv.Gajendra Kumar[Goverdhan Lalv.Gajendra Kumar, 2001 SCC OnLine Raj 177 : AIR 2002 Raj 148] , the High Court observed that it is true that the father is a natural guardian of a minor child and therefore has a preferential right to claim the custody of his son, but in matters concerning the custody of a minor child, the paramount consideration

is the welfare of the minor and not the legal right of a particular party. Section 6 of the 1956 Act cannot supersede the dominant consideration as to what is conducive to the welfare of the minor child. It was also observed that keeping in mind the welfare of the child as the sole consideration, it would be proper to find out the wishes of the child as to with whom he or she wants to live.

50. Again, inM.K. Hari Govindanv.A.R. Rajaram[M.K. Hari Govindanv.A.R. Rajaram, 2003 SCC OnLine Mad 48 : AIR 2003 Mad 315] , the Court held that custody cases cannot be decided on documents, oral evidence or precedents without reference to "human touch". The human touch is the primary one for the welfare of the minor since the other materials may be created either by the parties themselves or on the advice of counsel to suit their convenience.

51. InKamla Deviv.State of H.P.[Kamla Deviv.State of H.P., 1986 SCC OnLine HP 10 : AIR 1987 HP 34] the Court observed: (SCC OnLine HP para 13)

"13. ... the Court while deciding child custody cases in its inherent and general jurisdiction is not bound by the mere legal right of the parent or guardian. Though the provisions of the special statutes which govern the rights of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the Court exercising its parens patriae jurisdiction arising in such cases giving due weight to the circumstances such as a child's ordinary comfort, contentment, intellectual, moral and physical development, his health, education and general maintenance and the favourable surroundings. These cases have to be decided ultimately on the Court's view of the best interests of the child whose welfare requires that he be in custody of one parent or the other.'

52. In our judgment, the law relating to custody of a child is fairly well settled and it is this: in deciding a difficult and complex question as to the custody of a minor, a court of law should keep in mind the relevant statutes and the rights flowing therefrom. But such cases cannot be decidedsolelyby interpreting legal provisions. It is a human problem and is required to be solved with human touch. A court while dealing with custody cases, is neither bound by statutes nor by strict rules of evidence or procedure nor by precedents. In selecting proper guardian of a minor, the paramount consideration should be the welfare and well being of the child. In selecting a guardian, the court is exercisingparens patriaejurisdiction and is expected,naybound, to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. But over and above physical comforts, moral and ethical values cannot be ignored. They are equally, or we may say, even more important, essential and indispensable considerations. If the minor is old enough to form an intelligent preference or judgment, the court must consider such preference as well, though the final decision should rest with the court as to what is conducive to the welfare of the minor."

28.*Reliance was placed uponGaurav Nagpal[Gaurav Nagpalv.Sumedha Nagpal, (2009) 1 SCC 42 : (2009) 1 SCC (Civ) 1] , where the Supreme Court held as under: (SCC pp. 52 & 57, paras 32 & 50-51)*

"32. InMcGrath (Infants), In re[McGrath (Infants), In re, (1893) 1 Ch 143 (CA)] , Lindley, L.J. observed: (Ch p. 148)

"...The dominant matter for the consideration of the court is the welfare of the child. But the welfare of the child is not to be measured by money only nor merely physical comfort. The word "welfare" must be taken in its widest sense. The moral or religious welfare of the child must be considered as well as its physical well being. Nor can the tie of affection be disregarded.'

50. When the court is confronted with conflicting demands made by the parents, each time it has to justify the demands. The court has not only to look at the issue on legalistic basis, in such matters human angles are relevant for deciding those issues. The court then does not give emphasis on what the parties say, it has to exercise a jurisdiction which is aimed at the welfare of the minor. As observed recently inMausami Moitra Ganguli case[Mausami Moitra Ganguliv.Jayant Ganguli, (2008) 7 SCC 673] , the court has to give due weightage to the child's ordinary contentment, health, education, intellectual development and favourable surroundings but over and above physical comforts, the moral and ethical values have also to be noted. They are equal if not more important than the others.

51. The word "welfare" used in Section 13 of the Act has to be construed literally and must be taken in its widest sense. The moral and ethical welfare of the child must also weigh with the court as well as its physical well being. Though the provisions of the special statutes which govern the rights of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the court exercising itsparens patriaejurisdiction arising in such cases.

29.*Contending that however legitimate the claims of the parties are, they are subject to the interest and welfare of the child, inRosy Jacob[Rosy Jacobv.Jacob A. Chakramakkal, (1973) 1 SCC 840] , this Court has observed that: (SCC pp. 847 & 855, paras 7 & 15)*

"7. ... the principle on which the Court should decide the fitness of the guardian mainly depends on two factors: (i) the father's fitness or otherwise to be the guardian, and (ii) the interests of the minors.

15. ... The children are not mere chattels: nor are they mere play-things for their parents. Absolute right of parents over the destinies and the lives of their children has, in the modern changed social conditions, yielded to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society and the guardian court in case of a dispute between the mother and the father, is expected to strike a just and proper balance between the requirements of welfare of the minor children and the rights of their respective parents over them. The approach of the learned Single Judge, in our view, was correct and we agree with him. The Letters Patent Bench on appeal seems to us to have erred [Jacob A. Chakramakkalv.Rosy J. Chakramakkal, 1972 SCC OnLine Mad 90 : (1972) 85 LW 844] in reversing him on grounds which we are unable to appreciate."

30.*The learned counsel for the appellants has placed reliance uponG. Eva Mary Elezabath[G. Eva Mary Elezabathv.Jayaraj, 2005 SCC OnLine Mad 472 : AIR 2005 Mad 452] where the*

custody of the minor child aged one month who had been abandoned by father in church premises immediately on death of his wife was in question. The custody of the child was accordingly handed over to the petitioner thereon who took care of the child for two and half years by the Pastor of the Church. The father snatched the child after two and a half years from the custody of the petitioner. The father of the child who has abandoned the child though a natural guardian therefore was declined the custody."

13. In order to decide the present controversy, we feel it appropriate that the willingness of the children, who are minor, should also be considered and on a query being made by this Court the minor Ms. Gauri Misra, aged about 15 years, stated before us that at present she is studying in Class XI in Gopal Public Senior Secondary School in Science stream and she want to become a Doctor and she has secured 86% marks in High School Examination. We further asked to her that whether she want to live with her father or with her maternal grand father Sri Satish Chandra Misra. In response, she said that she want to live with her maternal grand father Sri Satish Chandra Misra, who has given proper care and education and she does not want to live with her father Ram Shanker Misra. We also put a query to the second minor child Master Prakhar Misra, aged about 13 years, that whether he wants to live with his father or maternal grand father Sri Satish Chandra Misra and in response Master Prakhar Misra, told that he is studying in Class VII in Raghukul Academy English Medium, Lambhua, Sultanpur and he is fond of playing cricket and he wants to live with his maternal grand father Sri Satish Chandra Misra, who has given proper care and education. Both the children also categorically stated before us that the "Nana" is taking all sort of care.

14. The admitted facts of the case are that marriage between appellant Ram Shanker Misra and Moni Misra was solemnized in the year 2002 and out of the wedlock of appellant and Moni Misra , two children were born namely Ms. Gauri Misra and Master Prakhar Misra. Matrimonial relation between the appellant no.2/Ram Shanker Misra and Moni Misra has become strained and on 02.04.2007 Moni Misra tried to commit suicide and died at K.G.M.C. Lucknow on 09.04.2007. Since the date of death of Moni Misra, Km.. Gauri Misra and Master Prakhar Misra are under the custody of their maternal grandfather (नाना) Sri Satish Chandra Misra. On 10.04.2007 Sri Satish Chandra Misra, lodged an F.I.R. under Sections 304B/498A and 3/4 Dowry Prohibition Act. Thereafter, the court below has acquitted the appellant no.2/Ram Shanker Misra and thereafter, Sri Satish Chandra Misra filed a Criminal Appeal against the said acquittal order, which is pending consideration before this Court. It is also not disputed that father of minor children has got remarried and after marriage a litigation between appellant no.2/Ram Shanker Misra and his second wife, is also pending consideration before the court below. The children, who are present before this Court and are mature enough to give their opinion, categorically stated that they do not want to live with their father and "Nana" is taking all sort of care.

15. It is not in dispute that the children, who are presently living with

their maternal grand father (नाना) since the year 2007 are getting good education and are in proper care.

16. In view of the facts of the case, the point for consideration is that "whether the Court below is justified in rejecting the claim of custody of minors of appellants vide judgment under appeal dated 11.04.2018."

17. It would be appropriate if we examine some of the statutes dealing with the situation.

18. The Guardians Act consolidates and amends the law relating to guardians and wards. Section 4 of the said Act defines "minor" as "a person who has not attained the age of majority". "Guardian" means "a person having the care of the person of a minor or of his property, or of both his person and property". "Ward" is defined as "a minor for whose person or property, or both, there is a guardian". Chapter II (Sections 5 to 19 of the Guardians Act) relates to appointment and declaration of guardians. Section 7 thereof deals with "power of the court to make order as to guardianship".

19. Section 8 of the Guardians Act enumerates persons entitled to apply for an order as to guardianship. Section 9 empowers the court having jurisdiction to entertain an application for guardianship. Sections 10 to 16 deal with procedure and powers of court. Section 17 is another material provision and may be reproduced:

"17.Matters to be considered by the court in appointing guardian.--(1) In appointing or declaring the guardian of a minor, the court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.

(2) In considering what will be for the welfare of the minor, the court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.

(3)If the minor is old enough to form an intelligent preference, the court may consider that preference.

(5) The court shall not appoint or declare any person to be a guardian against his will."

20. Section 19 prohibits the court from appointing guardians in certain cases. Chapter III (Sections 20 to 42) prescribes duties, rights and liabilities of guardians.

21. The Hindu Minority and Guardianship Act, 1956 is another equally important statute relating to minority and guardianship among Hindus. Section 4 defines "minor" as "a person who has not completed the age of eighteen years". "Guardian" means "a person having the care of the person of a minor or of his property or of both his person and property", and inter alia includes a natural guardian. Section 2 of the Act declares that the provisions of the Act shall be in addition to, and not in derogation of the 1890 Act.

22. Section 6 enacts as to who can be said to be a natural guardian. It reads thus:

"6.*Natural guardians of a Hindu minor.*--The natural guardians of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are--

(a) in the case of a boy or an unmarried girl -- the father, and after him, the mother:

Provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;

(b) in the case of an illegitimate boy or an illegitimate unmarried girl -- the mother, and after her, the father;

(c) in the case of a married girl -- the husband:

Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this section--

(a) if he has ceased to be a Hindu, or

(b) if he has completely and finally renounced the world by becoming a hermit *(vanaprastha)* or an ascetic *(yati or sanyasi).*

Explanation.--In this section, the expressions "father' and "mother' do not include a stepfather and a stepmother."

23. Section 8 enumerates powers of natural guardian. Section 13 is an extremely important provision and deals with welfare of a minor. The same may be quoted in extenso:

"13.*Welfare of minor to be paramount consideration.--(1)In the appointment or declaration of any person as guardian of a Hindu minor by a court, the welfare of the minor shall be the paramount consideration.*

(2) No person shall be entitled to the guardianship by virtue of the provisions of this Act or of any law relating to guardianship in marriage among Hindus, if the court is of opinion that his or her guardianship will not be for the welfare of the minor."

24. The principles in relation to the custody of a minor child are well settled. In determining the question as to who should be given custody of a minor child, the paramount consideration is the "welfare of the child" and not rights of the parents under a statute for the time being in force.

25. In deciding a difficult and complex question as to the custody of a minor child, a Court of law should keep in mind the relevant statutes and the rights flowing therefrom. But such cases cannot be decided solely by interpreting legal provisions. It is a human problem and is required to be solved with human touch. A Court while dealing with custody cases, is neither bound by statutes nor by strict rules of evidence or procedure nor by precedents. In selecting proper guardian of a minor, the paramount consideration should be the welfare and well being of the child. In selecting a guardian, the Court is exercising *parens patriae* jurisdiction and is expected to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings and the Court should also take the wishes of the minor child into consideration.

26. While considering the provisions of the G & W Act, the Hon'ble Supreme Court in the case of**Jitender Arorav.Sukriti Ararareported in(2017)**

3 SCC 726held at paragraphs 15 and 17 as under:

15. We also had interaction with Vaishali in the chambers earlier. On the date of hearing also, Vaishali was present in the Court and in front of her parents, she unequivocally expressed that she was happy with her father and wanted to continue in his company and did not want to go with her mother, much less to UK. From the interaction, it is clearly discernible that she is a mature girl who is in a position to weigh the pros and cons of two alternatives and to decide as to which course of action is more suited to her. She has developed her personality and formed her opinion after considering all the attendant circumstances. Her intellectualcharacteristicsare adequately developed. She is able to solve problems, think about her future and understands the long-term effects of the decision which she has taken. We also find that she has been brought up in a conducive atmosphere. It, thus, becomes apparent that in the instant case, we are dealing with the custody of a child who is 15 years of age and has achieved sufficient level of maturity.Further, in spite of giving ample chances to the respondent by giving temporary custody of Vaishali to her, the respondent has not been able to win over the confidence of Vaishali. We, therefore, feel that her welfare lies in the continued company of her father which appears to be in her best interest.

17. On the facts of the present case, we are convinced that custody of the child needs to be with the father. She is already 15 years of age and within3years, she would be major and all this custody battle between her parents would come to an end. She would have complete freedom to decide the course of action she would like to adopt in her life. We, thus, allow this appeal and set aside the judgment of the High Court. No costs.

27. The Hon'ble Supreme Court while dealing with the custody of minor child aged about nine years in the case of***Nil Ratan Kunduv.Abhijit Kundureported in(2008) 9 SCC 413***held at paragraphs 52 and 72 as under:

52.*In our judgment, the law relating to custody of a child is fairly well settled and it is this: in deciding a difficult and complex question as to the custody of a minor, a court of law should keep in mind the relevant statutes and the rights flowing therefrom. But such cases cannot be decided solely by interpreting legal provisions. It is a human problem and is required to be solved with human touch. A court while dealing with custody cases, is neither bound by statutes nor by strict rules of evidence or procedure nor by precedents. In selecting proper guardian of a minor, the paramount consideration should be the welfare and well-being of the child. In selecting a guardian, the court is exercising parens patriae jurisdiction and is expected, nay bound, to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development and fa vourable surroundings. But over and above physical comforts, moral and ethical values cannot be ignored. They are equally, or we may say, even more important, essential and indispensable considerations. If the minor is old enough to form an intelligent preference or judgment, the court must consider such preference as well, though the final decision should rest with the court as to what is conducive to the welfare of the minor.*

72.*We have called Antariksh in our chamber. To us, he appeared to be*

quite intelligent. When we asked him whether he wanted to go to his father and to stay with him, he unequivocally refused to go with him or to stay with him. He also stated that he was very happy with his maternal grandparents and would like to continue to stay with them. We are, therefore, of the considered view that it would not be proper on the facts and in the circumstances to give custody of Antariksh to his father, the respondent herein."

28. While considering the provisions of Sections 7 and 17 of the G & W Act, the Hon'ble Supreme Court in the case of*Mausami Moitra Ganguliv.Jayant Gangulir*eported in(2008) 7 SCC 673held at paragraphs 12 and 26 as under:

12.*Before hearing the case, we interviewed Satyajeet in chambers and found that he was quite intelligent and was able to understand the facts and circumstances in which he was placed. He could comprehend matters and visualise his own well-being. He seemed to have no complaint against his father. He explicitly stated before us that he was not inclined to go with his mother and would like to stay with his father and continue his studies at Allahabad where he has quite a few friends.*

26.*Under these circumstances and bearing in mind the paramount consideration of the welfare of the child, we are convinced that the child's interest and welfare will be best served if he continues to be in the custody of the father. In our opinion, for the present it is not desirable to disturb the custody of Master Satyajeet and, therefore, the order of the High Court giving his exclusive custody to the father with visitation rights to the mother deserves to be maintained. We feel that the visitation rights given to the appellant by the High Court, as noted above, also do not require any modification. We, therefore, affirm the order and the aforeextracted directions given by the High Court. It will, however, be open to the parties to move this Court for modification of this order or for seeking any direction regarding the custody and well-being of the child, if there is any change in the circumstances.*

29. Hon'ble Apex Court in the case of ***Nutan Gautam Vs. Prakash Guatam (2009) 4 SCC page 734*** in regard to consideration for appointment of guardian held that the paramount consideration is welfare, interest and desire of the minor children.

30. In the present case, as stated hereinabove, the minors, Km. Gauri Misra, who is 15 years old and Sri Prakhar Misra, who is 13 years old, have categorically stated before us that they want to live with their Maternal Grand father i.e. Sri Satish Chandra Misra-respondent, who is taking care of the minor children and providing proper education, and they specifically stated that they do not want to live with their father i.e. Sri Ram Shanker Misra-appellant no.2.

31. As per settled position of law, father is the natural guardian of the minor children and therefore he has a preferential right of custody of the minor, but in the matter of the custody of minor children Court has to consider the welfare of the child and not the legal right of particular party and the Court should consider the case of custody of minor with humanitarian touch and while deciding the said issue in respect of

custody of minor children, the Court is also required to consider the wishes of minor children.

32. The appellant no.2/father is the natural guardian of the minor children, but as per the facts and circumstances of the present case and as stated herein above and the finding which has been given by the Trial Court while passing the impugned judgment, we are of the considered opinion that the welfare of the child for the custody of guardianship, is to be given preference and from the record it also transpires that the appellants have not pleaded nor disputed that the minor children Km. Gauri Misra and Master Prakhar Misra are not getting proper education and other facilities. It is also proved from the record as well as the statement given by the minor children before us that they are getting proper education and other facilities, which itself reflects from the fact stated before us by Km. Gauri Misra that she has passed her High School Examination with 86% marks and Sri Prakhar Misra also getting good education at Sultanpur.

33. Taking into consideration the settled legal proposition and facts of the case as well as the statement given by the children before this Court, who are mature enough to express their opinion/preference on their wish to stay with "Nana" or "Father", we are of the opinion that the judgment relied upon by the learned counsel for the appellants Sri Prabhat Kumar i.e ***Tejaswini Gaud*** (supra), ***Ruchi Majoo*** (supra) and ***Lekha*** (supra) would not apply in facts of the case.

34. For the foregoing reasons, we do not find any infirmity or illegality in the impugned judgment and order dated 11.04.2018 passed by Principal Judge, Family Court, Sultanpur by which custody/guardianship of the minor children Km. Gauri Misra and Mr. Prakhar Misra has been given to the Maternal Grand father-respondent, Sri Satish Chandra Misra.

35. However, in view of the law laid down by the apex court, the father being a natural guardian should be given the visitation rights, which has not given by the court below, we partly **allow** the appeal providing visitation rights to the father of the minor children-Sri Rama Shanker Misra, and accordingly he has right of visiting his children namely Km. Gauri Misra and Sri Prakhar Misra, on second and fourth Sunday of each month in day hours at a place which is agreed between the parties at Sultanpur and in that regard, the respondent-Sri Satish Chandra Mishra would not prevent the father of the minors in any manner whatsoever it may be.

36. No order as to costs.

(2019)12 ILR A1031

APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 14.11.2019

BEFORE
THE HON'BLE ANIL KUMAR, J.
THE HON'BLE SAURABH LAVANIA, J.

First Appeal No. 64 of 2018

Amit Singh ...Appellant
Versus
Smt. Sandhya Singh ...Respondent

Counsel for the Appellant:
Amol Kumar

Counsel for the Respondent:
Sanjay Kumar Pandey

Civil Law - Hindu Marriage Act, 1955 - Section 10-Judicial Separation-Limitation-legislature/framers of the Act, 1955 have not provided any period or limitation to present the petition under Section 10 of the Act, 1955 for a decree of judicial separation - a petition for getting the decree of judicial separation can be filed even prior to completion of one year of marriage (Para 9 & 22)

First Appeal allowed. (E-5)

List of cases cited: -

1. Indumati v. Krishnamurthy reported in 1998 SCC Online Mad 477: (1999) 1 CTC 210

(Delivered by Hon'ble Saurabh Lavania,J.)

1. Case called out in the revised list. None appeared on behalf of the respondent.

2. Heard learned counsel for the appellant.

3. The instant appeal has been filed challenging the judgment and order dated 16.05.2018, passed by the Principal Judge, Family Court, Lucknow, in Misc. Case No. 19/2018 (Amit Singh v. Smt. Sandhya Singh).

4. Facts, in brief, of the present case are to the effect that the marriage between the appellant and respondent was solemnized on 15.12.2017 at Shiv Mandir, Shivpuri, Ghaziabad as per Hindu Rites and Rituals. Thereafter, the matrimonial relations between the parties become estranged, as such, the respondent left here matrimonial house and started living at her parental house w.e.f. 10.05.2018. In these circumstances, appellant filed a Suit under Section 13 of the Hindu Marriage Act, 1955 (in short 'Act, 1955') registered as Misc. Case No. 18/2018 (Amit Singh v. Smt. Sandhya Singh), which was withdrawn as not pressed. Thereafter, the appellant filed a Suit for judicial separation under Section 10 of the Act, 1955 registered as Misc. Case No. 19/2018 (Amit Singh v. Smt. Sandhya Singh), which was dismissed on 16.05.2018 by the Principal Judge, Family Court, Lucknow with the following observation:-

"पुनः धारा–10 में यह स्पष्ट प्रावधान उपबंधित किया गया है कि धारा–13 में उल्लिखित किन्हीं भी आधार पर धारा–10 का वाद प्रस्तुत किया जा सकता है। हिन्दू विवाह अधिनियम के इन प्रावधानों के समग्र अवलोकन से यह स्पष्ट है कि विवाह होने के एक वर्ष पश्चात् ही न्यायिक पृथक्कीकरण का कोई वाद न्यायालय में प्रस्तुत किया जा सकता है। वादी का प्रतिवादिनी के साथ विवाह दिनांक 15.12.2017 को सम्पन्न हुआ था। अतः वादी का विवाह हुए अभी एक वर्ष व्यतीत नहीं हुआ है। ऐसी स्थिति में प्रस्तुत वाद पंजीकृत होने योग्य नहीं है। तद्नुसार आदेशित किया जाता है। पत्रावली दाखिल दफ्तर हो।"

5. Assailing the order dated 16.05.2018, under appeal, the counsel for the appellant submitted that under Section 10 of the Act, 1955, the legislature has not provided any limitation for presenting a petition for grant of decree of judicial separation whereas for presenting the petition for getting the decree of divorce, the petition can be filed as per the limitation provided under Section 14(1) of the Act, 1955 and the Court below while dismissing the petition for decree of judicial separation filed by the appellant erred in law in considering the limitation provided for presenting the petition for getting the decree of divorce.

6. Learned counsel for the appellant further submitted that the controversy involved in the instant case is covered by the judgment passed by the High Court of Madras in the case of ***Indumati v. Krishnamurthy*** reported in ***1998 SCC OnLine Mad 477 : (1999) 1 CTC 210***, wherein the High Court of Madras after taking into consideration the provisions of the Act, 1955, observed that "from the above legal position, it is clear that even without leave, a petition for divorce could be entertained and no separate Order on an application under Sec. 14 (1) granting leave is required. The proviso to Section 14(1) of the Act itself is an answer to the contentions raised by learned counsel for petitioner."

7. The relevant paras of the judgment passed in the case of ***Indumati (supra)*** on reproduction read as under:-

"12. In a Divisions Bench decision of the Calcutta High Court reported in Rabindra Nath Mukherjee v. Iti Mukherjee @ Chatterjee, 1991 (II) D.M.C. 227: 95 (1991) C.W.N. 1085, this legal position was elaborately considered. Paragraph 6 onwards is relevant for our purpose. Paragraphs 6 to 16 read thus:-

"The expression "entertain", however, as pointed out by the Supreme Court in (2) Laxmiratan Engineering Works, AIR 1968 SC 488 and in (3) Hindustan Commercial Bank, AIR 1970 SC 1384, may not necessarily mean receiving or accepting the plaint or the petition, or the initiation of the proceeding, but may mean "adjudicate upon" or "proceed to consider on merits". Therefore, if the relevant expression in Section 14(1) was "it shall not be competent for any Court to entertain any petition .... unless one year has elapsed since the date of the marriage", I would have held that all that is necessary is the expiry of one year, not necessarily before the presentation of the petition, but before the date on which the Court adjudicates thereon or proceeds to consider on merits. But the express user of "the word "presentation" in the expression "unless on the date of the presentation of the petition one year has elapsed since the date of the marriage" nakedly stands in the way of such a construction and I regret my inability to delete the words "on the date of presentation of the petition" by any amount of judicial activism.

7. But the reasons that are weighing with me for holding these provisions to be directory and thus to require substantial compliance only, and not to be mandatory warranting strict adherence on pain of rejection or dismissal, are as hereunder.

8. The period of three years, as originally enacted by the Legislature, has now been reduced to one year only by the Amendment Act of 1976. That, in my view, clearly indicates that the Legislature itself has been convinced that the period provided for "fair trial" to marriage was unduly long and required circumscription.

9. If the Legislature considered this "fair trial rule" to be of that great importance and of that paramount necessity for the stability of marriage to make it mandatory, it would have inserted similar provisions in the other matrimonial legislations also by way of later amendments. It may be noted that the Legislature has amended rather extensively the Parsi Marriage & Divorce Act, 1936 but without inserting any such analogous provision. If the Legislature really intended the provisions to be that mandatory, it would have a fortiorari

inserted such provisions in the other matrimonial legislations, with Article 14 of the Constitution mandating equal protection of laws and Article 15 interdicting any discrimination on the ground of religion. If Hindu Marriages and Special Marriages warranted protection of "fair trial rule", the Christian or the Parsi marriages cannot be discriminated by denial of such protection.

10. The Proviso to Section 14(1) would also indicate that the provisions requiring intervention of one year between the date of marriage and the date of presentation for petition for divorce are not that mandatory. The proviso provides for leave to the parties by the Court to present petition before the expiry of such period on the ground that the case is of exceptional hardship to the petitioner or of exceptional depravity on the part of the respondent. But the proviso proceeds to provide that at the trial "if appears to the court at the hearing of the petition that the petitioner obtained leave "to present the petition by any misrepresentation or concealment of the nature of the case, the Court may, if it pronounces a decree, do so subject to the condition that the decree shall not have effect until the expiry of one year from the date of marriage...". Now a leave obtained by supperesio veri or suggestio falsi should be treated as vitiated to the extent of being non est and the Proviso, therefore, provides that "the Court may dismiss the petition" but without prejudice to any petition which may be brought after the expiry of one year as aforesaid. But since the Court may also decree the petition only with the rider that the decree shall not be operative before one year from the date of the marriage, the petition, though filed before the prohibited period of one year, and that too on misrepresentation or concealment, stands fully legalised and regularised and the prohibition that the decree shall not be effective until one year from the date of marriage may itself become of no practical effect or utility as in contested divorce cases, a decree is seldom available before that period, notwithstanding the directive in Sec. 21-B(2)of the Act.

11. A premature petition presented with leave wrongfully obtained is no better, if not worse, than one presented without leave, and if such a tainted petition can nevertheless be decreed, then I am yet to know why premature petition, without any such taint, cannot be similarly decreed. Once the Legislature has been found to have permitted decreeing of a premature petition founded on leave obtained dishonestly, the provision in Section 14(1) prohibiting presentation of petition before the prescribed period cannot be held to be that mandatory to warrant rigid compliance and must be held to be directory which require substantial compliance only. For, to hold otherwise would amount to rule that law favours the dishonest maneuverer and discriminate against the honesterrant.

12. There is yet another way of looking into the matter. While I do not suggest that the Legislature, or even the Judiciary, goes or can always afford to go in a common-sense course, we must, whenever possible, interpret laws in a common- sense way and by importing a little hit of common sense whenever necessary. Now, Section 14 (1) does not at all provide for any waiting period for a matrimonial proceeding for judicial separation which can be decreed only on grounds which justify divorce, nor for dissolution of marriage by a decree of

nullity under Sec. 11. Now, while pregnancy of the wife per alium at the time of marriage is a ground for nullifying the marriage under Section 11, pregnancy per alium after the date of marriage is a ground for divorce under Section 13 and, therefore, for judicial separation also under Section 10. Judicial Separation is very often a stepping to a divorce and, more often than not, a decree for judicial separation serves, as the foundation for a decree of divorce under Section 13 (1)(i). From the matrimonial point of view, a post-marital per alium pregnancy is obviously more deprecable than a per-marital one and if the aggrieved husband intending to proceed for divorce on the ground of post-marital per alium pregnancy of the wife is still mandatorily required to give a "fair trial" to the marriage for one year, I do not understand why a husband shall be relieved therefrom when he proceeds to sue the wife for Judicial separation on the same ground or to sue the wife for a declaration of nullity on the ground of per alium pregnancy of the wife at the date of marriage.

13. "Then again, under the provisions of Section 23-A, if one spouse sues the other for, say, restitution of conjugal rights or for Judicial separation, the other spouse may not only oppose the relief sought, but may himself or herself claim for any relief, including divorce, on the ground of the suing spouse's adultery, cruelty or desertion. One can, therefore, easily visualise a case where one spouse has sued the other for restitution or judicial separation within, say, a month from the date of marriage and the other spouse on entering appearance within, say, one month thereafter, makes a claim for divorce in the written statement. As at present advised, I have doubts as to whether the provisions of Section 14(1) would stand in the way of such a counter-claim".

14. At any rate, a petition for Judicial separation is not within the ambit of Section 14 and, as already noted, under Section 13A, the Court, in a divorce proceeding on the ground of cruelty, as is the case before us, may grant Judicial separation. A petition, even though labelled as one for divorce, should not therefore be rejected "on the ground of having been presented before one year from the date of marriage, but the Court should proceed to trial in order to ascertain whether the materials on record would justify a decree for Judicial separation. As the Supreme Court observed in (4) Pratap Singh v. Shri Krishna Gupta, AIR 1956 SC 140, the tendency of the Courts towards technicalities or formalities are to be deprecated for it is the substance that must count and must prevail and take precedence over form. A party's bona fide right to judicial separation cannot be scuttled in limine solely on the ground that the party, on legal advice or otherwise, brought himself within the prohibition of Section 14(1) by labelling his or her petition as one for divorce.

15. The Division Bench decision of this Court in Smritkana v. Dilip Kumar AIR 1982 Cal. 247, cannot, on a careful reading, be construed to have laid down any contrary proposition, but, on a meaningful reading, would go to support the ratio of my view. There also the Division Bench, after holding the petition for divorce to be not maintainable on the ground of having been filed within about 6½ months from the date of marriage, nevertheless proceeded to consider as to whether a decree of judicial separation could be awarded. It is true that, as

already noted, under Section 13A, a decree for judicial separation can be awarded "on a petition for dissolution of marriage by a decree for divorce". If the Division Bench held Section 14 (1) to be that mandatory, then it would have had to hold that the petition, as one for divorce, being beyond the competence of the Court, to entertain, there was no legal and proper "petition for dissolution of marriage by a decree of divorce", on which alone a decree for judicial separation should be awarded under section 13-A.

16. To go back to the decision of the Supreme Court in Pratap Singh v. Shri Krishna Gupta, AIR 1956 SC 140, some rules are so important and fundamental that they go to the root of the matter and must be treated as mandatory and any non-compliance therewith would vitiate everything. Some are not that fundamental and even though mandatory in form substantial compliance therewith would be "good enough. In the absence of the "fair trial' rule in the Indian matrimonial legislation for the Christians, the Parsis, the Muslim women and also in the absence of any such provision even in the Hindu Marriage Act or the Special Marriage Act for matrimonial proceedings for judicial separation and for declaration of nullity, and for the other reasons stated herein before, I have not been able to persuade my self to hold that Sec. 14(1) is that mandatory to warrant rejection or dismissal of the petition presented without rigid and strict compliance thereof, I would rather hold them to be directory to require substantial but not literal, compliance. This aspect was not considered by the Division Bench in Smritkana v. Dilip Kumar, A.I.R. 1982 Cal. 247 but there is nothing contrary either to the view I propose to take." (Italics supplied)

13. The aforesaid decision was followed by another learned Judge of the Calcutta High Court in the decision reported in. Chandrima Guha v. Sumit Guha, 1994 (II) D.M.C 6.

14. From the above legal position, it is clear that even without leave, a petition for divorce could be entertained and no separate Order on an application under Sec. 14 (1) granting leave is required. The proviso to Section 14(1) of the Act itself is an answer to the contentions raised by learned counsel for petitioner.

15. In this case, when this defect was noted, petitioner was cautious enough to file an application itself, and the same is pending before the Family Court. Therefore, there is substantial compliance of Section 14(1) of the Hindu Marriage Act.

16. While deciding the question whether the respondent will be entitled to any relief on the petition for divorce, the question of exceptional hardship and exceptional depravity also will have to be considered, and taking into consideration the same, the Court may also give such direction as it may think necessary. If by the time the Court takes up the case merits, one year time has also expired, I think the Court can take note of the subsequent events also. In a case whether a decree could be granted subject to the condition that it will not take effect until one year after the date of marriage, it is also clear therefrom that a decree on merits also could be passed if the court takes up the matter for consideration on merits after a period of one year from the date of marriage. The question of dismissing the petition for divorce also will not arise.

17. Now I come to the decision of this Court reported in Meganatha Nayagar v. Shrimathi Susheela, AIR 1957 Mad. 423. There, the question that came for consideration was, whether this Court should interfere in an order granting leave under Section 14 of the Hindu Marriage Act. The question now before us was not the matter in issue in that case. Learned Judge (Ramaswami, J.) was considering the scope of evidence that has to be let in while considering an application under Section 14. It was held in that case that the Court has to decide whether the allegations made in the affidavit filed on the application are such that if proved, they would amount to exceptional hardship or depravity. In fact such finding has to be entered on the basis of the affidavit. Learned Judge was also cautious enough to say that at that time the petitioner is not expected to try a petition in advance. Learned Judge further said that he has not merely decide on the basis of the affidavit filed support of the petition whether exceptional hardship or exceptional depravity has been proved. Learned Judge has also enumerated certain guidelines basing on English decisions as to what is exceptional hardship or exceptional depravity."

8. We have heard learned counsel for the appellant and gone through the record.

9. For deciding the issue involved in the present case, which is to the effect that "whether a petition for getting the decree of judicial separation can not be filed prior to completion of one year of marriage?", we feel it appropriate to quote relevant sections of the Act, 1955. The same are as under:-

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

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

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

***9. Restitution of conjugal rights.**--When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other aggrieved party may apply, by petition to the district court, for restitution of conjugal rights and the court, on being satisfied of the truth of the statements made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly.*

***10. Judicial separation.**--[(1) Either party to a marriage, whether solemnized before or after the commencement of this Act, may present a petition praying for a decree for judicial separation on any of the grounds specified in sub-section (1) of Section 13, and in the case of a wife also on any of the grounds specified in sub-section (2) thereof, as grounds on which a petition for divorce might have been presented.]*

(2) Where a decree for judicial separation has been passed, it shall no longer be obligatory for the petitioner to cohabit with the respondent, but the court may, on the application by petition of either party and on being satisfied of the truth of the statements made in such

petition, rescind the decree if it considers it just and reasonable to do so.

***11. Void marriages.**--Any marriage solemnized after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto [against the other party], be so declared by a decree of nullity if it contravenes any one of the conditions specified in clauses (i), (iv) and (v) of Section 5.*

***12. Voidable marriages.**--(1) Any marriage solemnized, whether before or after the commencement of this Act, shall be voidable and may be annulled by a decree of nullity on any of the following grounds, namely:--*

[(a) that the marriage has not been consummated owing to the impotence of the respondent; or]

(b) that the marriage is in contravention of the condition specified in clause (ii) of Section 5; or

(c) that the consent of the petitioner, or where the consent of the guardian in marriage of the petitioner [was required under Section 5 as it stood immediately before the commencement of the Child Marriage Restraint (Amendment) Act, 1978 (2 of 1978)] the consent of such guardian was obtained by force [or by fraud as to the nature of the ceremony or as to any material fact or circumstance concerning the respondent]; or

(d) that the respondent was at the time of the marriage pregnant by some person other than the petitioner.

(2) Notwithstanding anything contained in sub-section (1), no petition for annulling a marriage--

(a) on the ground specified in clause (c) of sub-section (1), shall be entertained if--

(i) the petition presented more than one year after the force had ceased to operate or, as the case may be, the fraud had been discovered; or

(ii) the petitioner has, with his or her full consent, lived with the other party to the marriage as husband or wife after the force had ceased to operate or, as the case may be, the fraud had been discovered;

(b) on the ground specified in clause (d) of sub-section (1) shall be entertained unless the court is satisfied--

(i) that the petitioner was at the time of the marriage ignorant of the facts alleged;

(ii) that proceedings have been instituted in the case of a marriage solemnized before the commencement of this Act within one year of such commencement and in the case of marriages solemnized after such commencement within one year from the date of the marriage; and

(iii) that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of [the said ground].

***13. Divorce.**--(1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party--*

[(i) has, after the solemnization of the marriage, had voluntary sexual intercourse with any person other than his or her spouse; or

(i-a) has, after the solemnization of the marriage, treated the petitioner with cruelty; or

(i-b) has deserted the petitioner for a continuous period of not less than

two years immediately preceding the presentation of the petition; or]

(ii) has ceased to be a Hindu by conversion to another religion; or

[(iii) has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.

Explanation.--In this clause,--

(a) the expression "mental disorder" means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia;

(b) the expression "psychopathic disorder" means a persistent disorder or disability of mind (whether or not including sub-normality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the other party, and whether or not it requires or is susceptible to medical treatment; or]

(iv) [* *]*

(v) has, [* *] been suffering from venereal disease in a communicable form; or*

(vi) has renounced the world by entering any religious order; or

(vii) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of it, had that party been alive; [* *]*

[Explanation.--In this sub-section, the expression "desertion" means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the wilful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expressions shall be construed accordingly].

(viii) [* *]*

(ix) [* *]*

[(1-A) Either party to a marriage, whether solemnized before or after the commencement of this Act, may also present a petition for the dissolution of the marriage by a decree of divorce on the ground--

(i) that there has been no resumption of cohabitation as between the parties to the marriage for a period of [one year] or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties; or

(ii) that there has been no restitution of conjugal rights as between the parties to the marriage for a period of [one year] or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties.]

(2) A wife may also present a petition for the dissolution of her marriage by a decree of divorce on the ground,--

(i) in the case of any marriage solemnized before the commencement of this Act, that the husband had married again before such commencement or that any other wife of the husband married before such commencement was alive at the time of the solemnization of the marriage of the petitioner:

Provided that in either case the other wife is alive at the time of the presentation of the petition; or

(ii) that the husband has, since the solemnization of the marriage, been guilty of rape, sodomy or [bestiality; or]

[(iii) that in a suit under Section 18 of the Hindu Adoptions and

Maintenance Act, 1956 (78 of 1956), or in a proceeding under Section 125 of the Code of Criminal Procedure, 1973 (2 of 1974), [or under the corresponding Section 488 of the Code of Criminal Procedure, 1898 (5 of 1898)], a decree or order, as the case may be, has been passed against the husband awarding maintenance to the wife notwithstanding that she was living apart and that since the passing of such decree or order, cohabitation between the parties has not been resumed for one year or upwards; or

(iv) that her marriage (whether consummated or not) was solemnized before she attained the age of fifteen years and she has repudiated the marriage after attaining that age but before attaining the age of eighteen years.

Explanation.--This clause applies whether the marriage was solemnized before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976).]

***[13-A. Alternate relief in divorce proceedings.**--In any proceeding under this Act, on a petition for dissolution of marriage by a decree of divorce, except in so far as the petition is founded on the grounds mentioned in clauses (ii), (vi) and (vii) of sub-section (1) of Section 13, the court may, if it considers it just so to do having regard to the circumstances of the case, pass instead a decree for judicial separation.]*

***[13-B. Divorce by mutual consent.**--(1) Subject to the provisions of this Act a petition for dissolution of marriage by a decree of divorce may be presented to the district court by both the parties to a marriage together, whether such marriage was solemnized before or after the commencement of the Marriage Laws (Amendment) Act, 1976, on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and that they have mutually agreed that the marriage should be dissolved.*

(2) On the motion of both the parties made not earlier than six months after the date of the presentation of the petition referred to in sub-section (1) and not later than eighteen months after the said date, if the petition is not withdrawn in the meantime, the court shall, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, that a marriage has been solemnized and that the averments in the petition are true, pass a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree.]

***14. No petition for divorce to be presented within one year of marriage.**--*

(1) Notwithstanding anything contained in this Act, it shall not be competent for any court to entertain any petition for dissolution of a marriage by a decree of divorce, [unless at the date of the presentation of the petition one year has elapsed] since the date of the marriage:

Provided that the Court may, upon application made to it in accordance with such rules as may be made by the High Court in that behalf, allow a petition to be presented [before one year has elapsed] since the date of the marriage on the ground that the case is one of exceptional hardship to the petitioner or of exceptional depravity on the part of the respondent, but if it appears to the Court at the hearing of the petition that the petitioner obtained leave to present the petition by any misrepresentation or concealment of the nature of the case, the court may, if it pronounces a decree, do so subject to the condition that the decree

shall not have effect until after the [expiry of one year] from the date of the marriage or may dismiss the petition without prejudice to any petition which may be brought after the [expiration of the said one year] upon the same or substantially the same facts as those alleged in support of the petition so dismissed.

(2) In disposing of any application under this section for leave to present a petition for divorce the [expiration of one year] from the date of the marriage, the Court shall have regard to the interests of any children of the marriage and to the question whether there is a reasonable probability of a reconciliation between the parties before the expiration of the [said one year]."

10. Before dealing with the point involved in the present appeal, it would be appropriate to consider the difference between "Judicial Separation" and "Divorce".

11. In Indian Society, marriage is considered as a sacrament. It is an irrevocable relationship between husband and wife established through rituals and customs.

12. A blissful marital life is a sheer result of unconditional love, faith, belief, passion and determination between couples who ensure to stay together in every phase of life. But things turn out ugly when both the spouses experience lack of interest, mistrust, misunderstandings, differences, etc... amongst one another. Unfortunately, this results in the couple filing for Divorce. But the eyes of law believe in giving an opportunity to couples in the form of Judicial Separation.

13. Before 1955, there was no relief available to either party in case of a failed marriage. They had to continue with the marriage and couldn't break the marriage. After Hindu Marriage Act, 1955 things changed in favour of both parties to the marriage. Now, in case of a failed marriage, the parties do not need to suffer in the marriage and can easily break their matrimonial alliance through Judicial Separation or by a decree of Divorce.

14. Judicial Separation is a provision under the Indian marriage laws, wherein both the husband and the wife get an opportunity to introspect about giving a chance to their marriage, before going on with the divorce proceedings. Under a decree of Judicial Separation, both the parties live separately for a period of time getting adequate space, independence and time to think about continuing their marriage or not. During this phase, both the parties still carry the same legal status of being husband and wife and yet at the same time live separately also.

15. Judicial Separation does not terminate marriage whereas in divorce the parties are no more husband and wife and hence the marriage ends.

16. Judicial Separation is a step prior to a divorce. The purpose of judicial separation is to provide an opportunity to the parties to reconcile their difference.

17. In case of divorce, parties cease to be husband and wife. Divorce puts an end to the marriage and all mutual rights, and obligations stand terminated. The parties are free to marry again.

18. Either party to the marriage, whether solemnized before or after commencement of the Hindu Marriage Act, 1955 can under Section 10 of the Act file a petition for judicial separation. After

a decree is passed in favour of the parties, they are not bound to cohabit with each other. Some matrimonial rights and obligation, however, continue to subsist. They cannot remarry during the period of separation. They are at liberty to live separately from each other. Rights and obligations remain suspended during the period of separation. The grounds for judicial separation are same as for divorce.

19. Needless to say that the Act, 1955 is a "Special Act" relating to marriage among Hindus. Section 4 of the Act, 1955 provides overrding effect to any other law in force immediately before the commencement of this Act shall cease to have effect in so far as it is inconsistent with any of the provisions contained in this Act.

20. It appears from the above quoted provisions of the Act, 1955, that for dissolution of marriage among Hindus, a decree of divorce is necessary on the grounds envisaged under Section 13 of the Act, 1955. For presenting the petition for getting the decree of divorce, limitation is provided under Section 14 of the Act, 1955. As per Section 14 of the Act, 1955, the petition for divorce under Section 13 of the Act, 1955 can be presented only after completion of one year of marriage, however with the leave of the Court, the same can be filed before expiry of one year from the date of marriage. No limitation in the Act, 1955 (Special Act which relates to marriage among Hindus) has been provided for presenting the petition under Section 9, 10, 11 and 12 of the Act, 1955.

21. Needless to say that golden rule of interpretation of an Act/Statute is that the words of a statute must prima facie be given their ordinary meaning. It is yet another rule of construction that when the words of the statute are clear, plain and unambiguous, then the courts are bound to give effect to that meaning, irrespective of the consequences.

22. It is evident from the above quoted provisions of the Act, 1955 that the language and words used therein are clear, plain and unambiguous. We feel that taking into consideration the difference between "Judicial Separation", which is a step prior to divorce and it is for the purpose to provide an opportunity to the parties to think about continuing their marriage, and "Divorce" under Section 13 and 13(B) of the Act, 1955, which terminates the bonding of marriage, the legislature/framers of the Act, 1955 i.e. Parliament has not provided any period or limitation for presenting the petition under Section 10 of the Act, 1955 for a decree of judicial separation.

23. Taking into consideration the aforesaid facts and the reasons as well as the relevant provisions of the Act, 1955 and the observations made by the High Court of Madras in the case of ***Indumati (supra)***, we are of the considered opinion that the order dated 16.05.2018, passed by the Principal Judge, Family Court, Lucknow is unsustainable in the eye of law.

24. For the foregoing reasons, the order dated 16.05.2018, passed by the Principal Judge, Family Court, Lucknow is hereby ***set-aside***. The matter is remanded back to the Principal Judge, Family Court, Lucknow to decide the case of the appellant on merits in accordance with law.

25. The appeal is ***allowed*** with the aforesaid observation.

(2019)12 ILR A1043

APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 19.12.2019

BEFORE
THE HON'BLE ANIL KUMAR, J.
THE HON'BLE SAURABH LAVANIA, J.

First Appeal No. 151 of 2012

Shailendra Kumar Singh ...Appellant
Versus
Smt. Reeta Singh & Anr. ...Respondents

Counsel for the Appellant:
Manish Tripathi, Brij Mohan Sahai, Raj Priya Srivastava, Rajiv Raman Srivastava, Ravi Singh

Counsel for the Respondents:
Sahab Tiwari, Vyomkesh Chandra Shukla

A. Civil Law - Hindu Marriage Act, 1955 - Section 13 - Divorce - Irretrievable breakdown of marriage - it is the duty of the Court while deciding an issue of divorce whether the marriage between the parties has broken down irretrievably or it is dead emotionally & practically and there is no chance of its being retrieved, before compelling the parties to live with each other - long separation tantamount to a mental/physical cruelty. Divorce petition by husband - Ground, husband and wife living separately since 1998/99 and serious allegations levelled against respondent wife of having illicit relationship - Though husband failed to establish his allegation of adultery - however as parties living separately for the last two decades, for all practical purposes, the marriage between the parties is dead. Marriage broken down irretrievably - Decree of divorce granted. (Para 54)

B. Pleadings and proof - Plaintiff can succeed on the strength of his own case and not on the correctness of the defence - contradiction in the statement given by respondent during her cross-examination. Yet, plaintiff cannot get any benefit because plaintiff through his evidence failed to prove the facts stated in his plaint. (Para 34)

First Appeal allowed. (E-5)

List of cases cited: -

1.Naveen Kohli Vs Neelu Kohli AIR 2006 SC 1675; (2006) 4 SCC 558: JT 2006 (3) SC 491: (2006) 3 SCALE 252

2. Samar Ghosh Vs Jaya Ghosh (2007) 4 SCC 511: JT 2007 (5) 569: (2007) 5 SCALE 1: (2007) 4 SCR 428

3. V. Bhagat Vs D. Bhagat (1994) 1 SCC 337 345

4. Saroj Rani Vs Sudarshan Kumar Chadha (1984) 4 SCC 90

5. Romesh Chander Vs Savitri (1995) 2 SCC 7

6. Naveen Kohli Vs Neelu Kohli (2006) 4 SCC 558

7. Rishikesh Sharma Vs Saroj Sharma (2007) 2 SCC 263

8. Geeta Jagdish Mangtani Vs Jagdish Mangtani (2008) 5 SCC 177

9. Satish Sitole Vs Smt. Ganga (2008) 7 SCC 734

10. Mohit Tandon Vs Preeti Tandon 2010 (2) All CJ 1108

11. Sukhendu Das Vs Rita Mukherjee, 2017 (9) SCC 432

12. Smt. Dr. Sarita Vs Dr. Vikas Kanaujia, First Appeal No.31 of 2007, 22.08.2019

13. Girish Chandra Srivastava Vs Reeta Srivastava reported 2019 SCC Online All 3554

14. Ravinder Kaur Vs Manjeet Singh, (2019) 8 SCC 308; 2019 SCC Online SC 1069 313

15. R. Srinivas Kaumar Vs R. Shametha, (2019) 9 SCC 409

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

1. Heard Sri Brij Mohan Sahai and Sri Raj Priya Srivastava, learned counsel for the appellant. None is present on behalf of the respondents.

2. By means of the instant appeal under Section 19 of the Family Courts Act, 1984 (in short "Act, 1984"), the appellant has challenged the judgment and order dated 05.09.2012, passed by the Family Court, Faizabad in Suit No. 105 of 2000 (Shailendra Kumar Singh v. Smt. Reeta Singh), whereby the divorce petition under Section 13 of the Hindu Marriage Act, 1955 (in short "Act, 1955") moved by the appellant was dismissed.

3. Facts, in brief, of the present case as submitted by the learned counsel for the appellant are to the effect that the marriage between appellant-Shailendra Kumar Singh and respondent-Smt. Reeta Singh was solemnized as per the Hindu Rites and Rituals on 18.04.1987. In the year 1993, out of their wedlock, a daughter namely Ankita was born.

4. It is further submitted by the learned counsel for the appellant that in the meantime the appellant got appointment at District- Bahraich, so he had to leave his home situated at Dharupur, Ambedkar Nager leaving there his wife and minor daughter.

5. Learned counsel for the appellant further submitted that when appellant returned to his home, he came to know that his wife has made illicit relationships with Sri Sunil Kumar Shahi @ Pappu and one Sri Ram Shakal Singh. So, in view of the said facts, some hot talks took place between the appellant-Shailendra Kumar Singh and respondent-Smt. Reeta Singh, as a result of which, in the month of September, 1998, the respondent-Smt. Reeta Singh left her matrimonial house and started living at her parental house in District- Azamgarh.

6. Learned counsel for the appellant further submitted that thereafter, the appellant tried his best to pacify the issue, however all the efforts went in vain, as such, having no other alternative option left, the appellant filed a petition on 06.03.2000 in the Court of Principal Judge/ Family Court, Faizabad for divorce under Section 13 (1)(i) of the Act, 1955, which was registered as Regular Suit No. 105 of 2000 (Shailendra Kumar Singh v. Smt. Reeta Singh).

7. Section 13 (1)(i) of the Act, 1955 reads as under:-

"13. Divorce.-(1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband of the wife, be dissolved by a decree of divorce on the ground that the other party-

[(i) has, after the solemnization of marriage, had voluntary sexual intercourse with any person other than his or her spouse; or]"

8. On 04.01.2001, respondent-Smt. Reeta Singh filed her written statement and thereafter, she also filed the additional written statement dated 16.11.2002/10.01.2003 on 10.01.2003. The rebuttal was filed by the appellant on 10.11.2019.

9. Leaned counsel for the appellant further submitted that thereafter, an application for amendment of the plaint was filed by the appellant and the same was allowed and accordingly, the plaint was amended and Sri Ram Shakl Singh was impleaded as respondent No. 2 in the petition filed by the appellant under Section 13 of the Act, 1955 as well as certain amendments were incorporated in the facts of the case. The written statement was also amended by moving the application for amendment dated 03.09.2008.

10. Learned counsel for the appellant further submitted that in order to prove his case, in addition to the documentary evidence, which were letters written by the appellant as well as respondent-Smt. Reeta Singh, on behalf of the appellant, P.W.-1-Shailendra Singh was examined and on behalf of defendant, D.W.-1/Smt. Reeta Singh and DW-2/ Sri Satya Prakash Singh were examined and the evidence of Sri Ram Shakal Singh, who was impleaded as respondent No. 2 was filed in the petition by way of an affidavit.

11. Vide order dated 05.09.2012, the Principal Judge, Family Court, Faizabad dismissed the Regular Suit No. 105 of 2000 (Shailendra Kumar Singh v. Smt. Reeta Singh).

12. Aggrieved by the order dated 05.09.2012, the present appeal has been filed by the appellant-Sri Shailendra Kumar Singh under Section 19 of the Act, 1984.

13. Learned counsel for the appellant has pressed the present appeal on the following grounds:-

(a) that the Court below has wrongly dismissed the petition on the ground that the appellant-Sri Shailendra Kumar Singh failed to prove that the respondent-Smt. Reeta Singh was living in adultery.

(b) that the appellant-Sri Shailendra Kumar Singh and the respondent-Smt. Reeta Singh have got no matrimonial relation since September, 1998 and they are living separately, as such there is no possibility to live together as husband and wife, so on the said ground, the divorce petition should be allowed.

14. Sri. Raj Priya Srivastava, learned counsel for the appellant while pressing the first point submitted that in the present case, it is categorically stated by the appellant way of pleadings that the respondent-Smt. Reeta Singh had an illicit relationship with Sri Sunil Kumar Shahi @ Pappu. In this regard, he placed reliance on paragraph No. 8 of the plaint.

15. In addition to the above facts, learned counsel for the appellant also submitted that the respondent-Smt. Reeta Singh had also got an illicit relationship with her Brother-in-Law (Jija)/husband of her sister. In this regard, he placed reliance on paragraph No. 6 of the petition and on the basis of the averments made in paragraph No. 9 of the petition, it is also submitted by Sri. Raj Priya Srivastava, learned counsel for the appellant that the respondent-Smt. Reeta singh and Sri Ram Shakal Singh were seen by her Bhabhi in compromising position/situation.

16. It is also submitted by learned counsel for the appellant that from the letters which were written by the appellant and the respondent-Smt. Reeta Singh, it is clearly established that respondent-Smt. Reeta singh had illicit

relationships with Sri Sunil Kumar Shahi @ Pappu and with Ram Shakal Singh.

17. In this regard, learned counsel for the appellant placed reliance on the statement given by DW-1/respondent-Smt. Reeta Singh and submitted that in view of the said statement given by respondent-Smt. Reeta Singh in her cross examination, the order which has been passed by the trial Court on the basis of evidence led by the parties, thereby dismissing the petition of the appellant, is contrary to law and, as respondent-Smt. Reeta Singh gave contradictory statement as D.W. 1, as such her evidence cannot be considered as reliable.

18. The relevant portion of the statement given by DW-1/respondent-Smt. Reeta Singh in her cross-examination is quoted below:-

"यह कहना गलत है कि वह गर्भपात नाजायज था। यह कहना गलत है कि मुझे नाजायज गर्भ था जिसे छिपाने के लिए गर्भपात कराया। मैनें शादी के बाद अपने पति को अनेकों पत्र लिखा है। गवाह ने पत्रावली में दाखिल कागज सं0–65/ग पत्र को देखकर कहा यह मेरे द्वारा मेरे पति को लिखा गया है।

यह कहना गलत है कि मेरे व राम शकल के सम्बन्ध से गर्भ हो गया था और राम शकल सिंह ने गर्भपात कराया था। गर्भपात मेरे बहन ने कराया यह बात वही बता सकती है। मैं गर्भपात अस्पताल का नाम नहीं बता सकती। राजे सुलतानपुर में मेरा गर्भपात नहीं हुआ था।"

19. Learned counsel for the appellant while pressing the second point submitted that from the material available on record, it is clearly established that the appellant and respondent-Smt. Reeta Singh are living separately since September 1998, as pleaded by the appellant in his petition and the same is also supported by the statement given by the respondent-Smt. Reeta Singh in her statement that they are living separately since 1999. Learned Counsel for the appellant submitted that there is irretrievable breakdown of marriage between the parties, it is on the ground of serious allegation of adultery and separate living admittedly since the year 1999, as such the trial Court should have granted the decree of divorce on the said ground. In support of his argument, learned counsel for the appellant placed reliance on the judgments of Hon'ble Apex Court in the case of ***Naveen Kohli v. Neelu Kohli*** reported in ***AIR 2006 SC 1675 : (2006) 4 SCC 558 : JT 2006 (3) SC 491 : (2006) 3 SCALE 252*** and ***Samar Ghosh v. Jaya Ghosh*** reported in ***(2007) 4 SCC 511 : JT 2007 (5) 569 : (2007) 5 SCALE 1 : (2007) 4 SCR 428.***

20. Accordingly, it is submitted by the learned Counsel for the appellant that the judgment and decree passed by the trial Court may be set aside and divorce petition may be allowed.

21. We have heard learned counsels for the appellant and perused the record.

22. As per the admitted facts of the present case, the marriage between the appellant and respondent-Smt. Reeta Singh was solemnized on 18.4.1987, as per the Hindu Rights and Rituals. In the year 1993, out of the wedlock of appellant and respondent-Smt. Reeta Singh, one baby girl namely Ankita was born. Thereafter, the matrimonial relations between the appellant and respondent-Smt. Reeta Singh became estranged, as such respondent-Smt. Reeta Singh/wife of the appellant, as admitted by her, started living separately since 1999. Thereafter,

the appellant filed a divorce petition under Section 13(1)(i) of the Act, 1955 on the ground of illicit relationship of respondent-Smt. Reeta Singh with other persons, which was registered as petition No. 105 of 2000 (Shailendra Singh v. Smt. Reeta Singh) before the Principal Judge/Family Court, Faizabad and was dismissed on 5.09.2012.

23. During the pendency of the present appeal, learned counsel for the parties submitted that there is a likelihood that the dispute may be amicably settled between the parties. So in view of the said facts, this Court took steps for settlement of dispute between the parties amicably settled, however, the dispute could not be settled amicably settled between the parties at the behest of respondent-Smt. Reeta Singh.

24. So far as the first argument which has been raised by learned Counsel for the appellant, on the ground of adultery, is concerned, we feel it appropriate to have the meaning of word "Adultery", provided under Section 497 of CPC, which reads as under:-

*"**497. Adultery.**--Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor."*

Clause (i) : Adultery as per Mulla, Hindu Law,21st Edition 2010 P. 906 under chapter IV, Nullity of Marriage And Divorce.

25. By way of amendment in the Act of 1976, Section 13(1)(i) has been introduced in the Act, 1955 and as per the same, a petition of divorce can lie at the instance of the husband or the wife , if the other party has after the solemnization of the marriage committed even a single act of adultery. It must also be noticed that to bring a case under this section it is not necessary now to show that the respondent is living in adultery. The benefit of this liberalized provision can be availed of even in an appeal pending at the commencement of the amending act. It must also been noticed that the expression "adultery' has not been used in the cause and instead the word are "had voluntary sexual intercourse with any other person other than his or her spouse'. Adultery in matrimonial law is one of the principal grounds for relief, and has been defined as consensual sexual intercourse between a married person and another person of the opposite sex during the subsistence of the marriage. An attempt to commit adultery must be distinguished fro adultery, and will not of itself be sufficient ground for relief.

26. Direct proof of adultery is not imperative. It would be unreasonable to expect direct evidence and such evidence if bought before the court, must be suspected and is at to be disbelieved. The accepted rule, therefore, is that circumstantial evidence is all that can normally be expected in proof of the charge. The circumstances must be such as to lead to fair inference, as a necessary conclusion; and unless thiswas so, no protection whatever could be given to marital rights. It is impossible to indicate those circumstances universally, because

they might be infinitely diversified by the situation and character of the parties, by the state of the general manners, and by many other incidental circumstances, apparently slight and delicate in themselves, but which may have important bearing upon the particular case. The only general rule upon the subject is, that the circumstances must be such as would lead the guarded judgment of a reasonable and just man to the conclusion. The facts usually are not of a complicated nature, nut determinable upon common grounds of reason, it is in consequence of this rule that it is not necessary to prove a fact of adultery in time and place. Nor is it absolutely incumbent on the petitioner to prove the identity of the person with whom the alleged act of adultery took place. A spouse is not entitled to a decree on allegations arising out of suspicion created by surrounding circumstances, for such allegations would have to be proved. Mere suspicion is not enough to avail of a remedy under the section. The High Court of Madhya Pradesh distinguishing the judgment of the Supreme Court in V. Bhagat v. D. Bhagat, and Chetandass v. Kamladevi, and the decision of Chanralekha Trivedi has held that when alleged serious allegation about the character of the spouse were not proved and he has also not cooperated in the reconciliation proceedings, no decree of divorce could be passed.

27. The Hon'ble Apex Court in the case of ***V. Bhagat v. D. Bhagat,*** reported in **(1994) 1 SCC 337 345,** after taking into consideration other judgments on the point in issue in para Nos. 13 to 18 held as under:-

*"**13**. Cruelty contemplated by the sub-clause is both physical and mental. We are concerned herein with the latter. It is not possible to define "mental cruelty' exhaustively. As observed by Lord Reid in Gollins v. Gollins [1964 AC 644 : (1963) 2 All ER 966] :*

"No one has ever attempted to give a comprehensive definition of cruelty and I do not intend to try to do so. Much must depend on the knowledge and intention of the respondent, on the nature of his (or her) conduct, and on the character and physical or mental weaknesses of the spouses, and probably no general statement is equally applicable in all cases except the requirement that the party seeking relief must show actual or probable injury to life, limb or health.

It is easy to see that the origin of this requirement is the decision in the well-known case of Russell v. Russell [(1895-99) All ER Rep 1 : (1897) AC 395] ."

To the same effect are the observations of Lord Pearce (at p. 695; All ER p. 992):

"It is impossible to give a comprehensive definition of cruelty, but when reprehensible conduct or departure from the normal standards of conjugal kindness causes injury to health or an apprehension of it, it is, I think, cruelty if a reasonable person, after taking due account of the temperament and all the other particular circumstances would consider that the conduct complained of is such that this spouse should not be called on to endure it.

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I agree with Lord Merriman whose practice in cases of mental cruelty was always to make up his mind first whether there was injury or apprehended injury to health. In the light of that vital fact the court has then to decide whether the sum total of the reprehensible conduct was cruel. That depends on whether the

cumulative conduct was sufficiently weighty to say that from a reasonable person's point of view, after a consideration of any excuse which this respondent might have in the circumstances, the conduct is such that this petitioner ought not to be called on to endure it.

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The particular circumstances of the home, the temperaments and emotions of both the parties and their status and their way of life, their past relationship and almost every circumstance that attends the act or conduct complained of may all be relevant."

The reference to "injury to life, limb or health" in the above passages must be understood in the context of the requirements of the divorce law then obtaining in the United Kingdom.

14. *The change of law brought about by the Hindu Marriage Laws (Amendment) Act, 1976 deserves notice. Prior to the said Amendment Act, cruelty was not a ground for claiming divorce under the Hindu Marriage Act. It was a ground only for claiming judicial separation under Section 10. By the said Amendment Act, cruelty was made a ground for divorce as well -- evidently in recognition of the changing mores of the society. While doing so, it is significant, the words "as to cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party," qualifying the expression "cruelty" in Section 10(1)(b), were omitted by Parliament. It is, therefore, not necessary for the party claiming divorce to prove that the cruel treatment is of such a nature as to cause an apprehension -- a reasonable apprehension -- in his/her mind that it will be harmful or injurious for him/her to live with the other party. Now what does this change mean? Surely, the deletion of the said words could not have been without a purpose. The cruelty of the nature described in Section 10(1)(b) has been explained in this Court's decision in N.G. Dastane v. S. Dastane [(1975) 2 SCC 326 : AIR 1975 SC 1534] . Chandrachud, J. speaking for the Bench, held that where an allegation of cruelty is made, the enquiry has to be –*

"... whether the conduct charged as cruelty is of such a character as to cause in the mind of the petitioner a reasonable apprehension that it will be harmful or injurious for him to live with the respondent".

The learned Judge held further: (SCC pp. 337-38, paras 30-31)

"It is not necessary, as under the English law, that the cruelty must be of such a character as to cause "danger' to life, limb or health or as to give rise to a reasonable apprehension of such a danger. Clearly, danger to life, limb or health or a reasonable apprehension of it is a higher requirement than a reasonable apprehension that it is harmful or injurious for one spouse to live with the other. ... But under Section 10(1)(b), harm or injury to health, reputation, the working-career or the like, would be an important consideration in determining whether the conduct of the respondent amounts to cruelty. Plainly, what we must determine is not whether the petitioner has proved the charge of cruelty having regard to the principles of English law, but whether the petitioner proves that the respondent has treated him with such cruelty as to cause a reasonable apprehension in his mind that it will be harmful or injurious for him to live with the respondent."

This requirement is no longer present in Section 13(1)(i-a).

15. *If so, the question arises what kind of cruel treatment does clause (i-a) contemplate? In particular, what is the kind of mental cruelty that is required to be established? While answering these questions, it must be kept in mind that the cruelty mentioned in clause (i-a) is a ground now for divorce as well as for judicial separation under Section 10. Another circumstance to be kept in mind is that even where the marriage has irretrievably broken down, the Act, even after the 1976 (Amendment) Act, does not permit dissolution of marriage on that ground. This circumstance may have to be kept in mind while ascertaining the type of cruelty contemplated by Section 13(1)(i-a).*

16. *Mental cruelty in Section 13(1)(i-a) can broadly be defined as that conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with the other. In other words, mental cruelty must be of such a nature that the parties cannot reasonably be expected to live together. The situation must be such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with the other party. It is not necessary to prove that the mental cruelty is such as to cause injury to the health of the petitioner. While arriving at such conclusion, regard must be had to the social status, educational level of the parties, the society they move in, the possibility or otherwise of the parties ever living together in case they are already living apart and all other relevant facts and circumstances which it is neither possible nor desirable to set out exhaustively. What is cruelty in one case may not amount to cruelty in another case. It is a matter to be determined in each case having regard to the facts and circumstances of that case. If it is a case of accusations and allegations, regard must also be had to the context in which they were made.*

17. *At this stage, we may refer to a few decisions of this Court rendered under Section 13(1)(i-a). In Shobha Rani v. Madhukar Reddi [(1988) 1 SCC 105 : 1988 SCC (Cri) 60] , Justice K. Jagannatha Shetty, speaking for the Division Bench, held: (SCC pp. 108-09, paras 4 and 5)*

"Section 13(1)(i-a) uses the words "treated the petitioner with cruelty'. The word "cruelty' has not been defined. Indeed it could not have been defined. It has been used in relation to human conduct or human behaviour. It is the conduct in relation to or in respect of matrimonial duties and obligations. It is a course of conduct of one which is adversely affecting the other. The cruelty may be mental or physical, intentional or unintentional. If it is physical the court will have no problem to determine it. It is a question of fact and degree. If it is mental the problem presents difficulty. First, the enquiry must begin as to the nature of the cruel treatment. Second, the impact of such treatment on the mind of the spouse. Whether it caused reasonable apprehension that it would be harmful or injurious to live with the other. Ultimately, it is a matter of inference to be drawn by taking into account the nature of the conduct and its effect on the complaining spouse. There may, however, be cases where the conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or the injurious effect on the other spouse need not be enquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted.

It will be necessary to bear in mind that there has been marked change in the life around us. In matrimonial duties and responsibilities in particular, we find a sea change. They are of varying degrees from house to house or person to person. Therefore, when a spouse makes complaint about the treatment of cruelty by the partner in life or relations, the court should not search for standard in life. A set of facts stigmatised as cruelty in one case may not be so in another case. The cruelty alleged may largely depend upon the type of life the parties are accustomed to or their economic and social conditions. It may also depend upon their culture and human values to which they attach importance. We, the judges and lawyers, therefore, should not import our own notions of life. We may not go in parallel with them. There may be a generation gap between us and the parties. It would be better if we keep aside our customs and manners. It would be also better if we less depend upon precedents. Because as Lord Denning said in Sheldon v. Sheldon [(1966) 2 All ER 257, 259 : (1966) 2 WLR 993] "the categories of cruelty are not closed'. Each case may be different. We deal with the conduct of human beings who are not generally similar. Among the human beings there is no limit to the kind of conduct which may constitute cruelty. New type of cruelty may crop up in any case depending upon the human behaviour, capacity or incapability to tolerate the conduct complained of. Such is the wonderful (sic) realm of cruelty."

It was a case where the wife was a postgraduate in biological sciences while the husband was a doctor. The wife moved the court for divorce on the ground of cruelty. According to her, she had an amount of Rupees two lakhs in fixed deposit in a bank apart from a house property, that her mother-in-law used to make constant demands of money, and that the respondent-husband supported his mother therein. She did not report the same to her parents because she was afraid that if she informed her parents, something may be done to her. The respondent-husband himself admitted in a letter written to the wife that the demand for dowry by his parents was nothing wrong. On the above facts, it was held that the ground of cruelty was established and divorce was granted. The following further observations of Shetty, J. appear to us relevant: (SCC pp. 114-15, para 18)

"Section 13(1)(i-a) of the Hindu Marriage Act provides that the party has after solemnization of the marriage treated the petitioner with cruelty. What do these words mean? What should be the nature of cruelty? Should it be only intentional, wilful or deliberate? Is it necessary to prove the intention in matrimonial offence? We think not. We have earlier said that cruelty may be of any kind and any variety. It may be different in different cases. It is in relation to the conduct of parties to a marriage. That conduct which is complained of as cruelty by one spouse may not be so for the other spouse. There may be instances of cruelty by the unintentional but inexcusable conduct of any party. The cruel treatment may also result by the cultural conflict of the spouse. In such cases, even if the act of cruelty is established, the intention to commit suicide cannot be established. The aggrieved party may not get relief. We do not think that that was the intention with which the Parliament enacted Section 13(1)(i-a) of the Hindu Marriage Act. The context and the set up in which the word "cruelty' has been used in the section,

seems to us, that intention is not a necessary element in cruelty. That word has to be understood in the ordinary sense of the term in matrimonial affairs. If the intention to harm, harass or hurt could be inferred by the nature of the conduct or brutal act complained of, cruelty could be easily established. But the absence of intention should not make any difference in the case, if by ordinary sense in human affairs, the act complained of could otherwise be regarded as cruelty. The relief to the party cannot be denied on the ground that there has been no deliberate or wilful ill-treatment."

18. *In Chanderkala Trivedi v. Dr S.P. Trivedi [(1993) 4 SCC 232 : 1993 SCC (Cri) 1154 : (1993) 3 Scale 541] the husband sued for divorce on the ground of cruelty by wife. The wife filed a written statement wherein she attributed adultery to the husband. In reply thereto the husband put forward another allegation against the wife that she was having undesirable association with young boys. Considering the mutual allegations, R.M. Sahai, J. speaking for Division Bench, observed: (SCC p. 233, para 2)*

"Whether the allegation of the husband that she was in the habit of associating with young boys and the findings recorded by the three courts are correct or not but what is certain is that once such allegations are made by the husband and wife as have been made in this case then it is obvious that the marriage of the two cannot in any circumstance be continued any further. The marriage appears to be practically dead as from cruelty alleged by the husband it has turned out to be at least intimacy of the husband with a lady doctor and unbecoming conduct of a Hindu wife. (also see: ***Chintala Syamala v. Chintala Venkata Satyanarayana Rao, (2008) 10 SCC 711 : (2009) 1 SCC (Cri) 90*** and ***Vijaykumar Ramchandra Bhate v. Neela Vijaykumar Bhate, (2003) 6 SCC 334*** *)."*

28. Now, reverting to the facts of the present case, as per the pleadings of the appellant in this appeal, he has stated that his wife has got illicit relationship with (a) Sri Sunil Kumar Shahi @ Pappu and (b) Ram Shakal Singh/respondent No. 2/Jija of respondent-Smt. Reeta Singh.

29. So far as the assertion made by the appellant in respect to the illicit relationship of respondent-Smt. Reeta Singh with Sri Sunil Kumar Shahi @ Pappu and Ram Shakal Singh/respondent No. 2/Jija of respondent-Smt. Reeta Singh is concerned, as pleaded in the appeal, the foundation laid down in this regard is to the effect that Bhabi of respondent-Smt. Reeta Singh seen her with Sri Sunil Kumar Shahi @ Pappu, as pleaded in paragraph 6. The said fact has to be proved by the appellant, but the appellant has not proved or established the said fact.

30. At this stage, it is relevant to mention here that during the pendency of the litigation Sri Sunil Kumar Shahi @ Pappu died and the appellant did not produce his Bhabhi, who allegedly had seen respondent-Smt. Reeta Singh with Pappu @ Sunil Kumar, as pleaded in the appeal.

31. So far as the matter in respect to illicit relationship with Ram Shakal Singh is concerned, as pleaded in the appeal, the same is based on the letters of respondent-Smt. Reeta Singh. However, a perusal of the said letters which is on record, it is not clearly established that the contents of the

said letter in any way establish that there was illicit relationship of respondent-Smt. Reeta Singh either with Sri Sunil Kumar Shahi @ Pappu or with Ram Shakal Singh rather the appellant was not able to prove the said fact by way of any evidence.

32. Further in the matter in question, Ram Shakal Singh, against whom the appellant allegedly averred to have illicit relationship with respondent-Smt. Reeta Singh, has produced his evidence by way of filing an affidavit on behalf of the defendants, but he was not cross examined by the appellant in order to establish the fact of illicit relationship of his wife with Ram Shakal Singh.

33. In view of the aforesaid reasons, we are of the view that the appellant-Shailendra Singh failed to establish his case in regard to allegation of adultery, on which ground he sought the divorce decree.

34. So far as the argument as made by learned counsel for the appellant that the contradictory statement was given by the respondent-Smt. Reeta Singh, when examined as witness-D.W-1, as stated hereinabove, we would like to say that no doubt there is a contradiction in the statement given by respondent-Smt. Reeta Singh during her cross-examination, but on the said score the appellant cannot get any benefit because the appellant through his evidence failed to prove the facts stated in his plaint. In the instant case, from the material available on record the ground of adultery, which has been taken by the appellant against Sri Sunil Kumar Shahi @ Pappu and respondent No. 2-Ram Shakal Singh has not been proved by him on the basis of evidence which has been led by him either oral or documentary. Needless to say that it is a principle that "plaintiff can succeed on the strength of his own case and not on the correctness of the defence."

35. Now, the second point which is to be considered in the present case is whether the divorce decree can be granted on the ground of irretrievable breakdown of marriage keeping in view the facts that the appellant and the respondent-Smt. Reeta Singh are living separately since 1998/99 and serious allegations have been levelled against respondent-Smt. Reeta Singh.

36. From the material available on record, the position which emerges out is to the effect that, as per the case of the appellant, the respondent-Smt. Reeta Singh left her matrimonial house and started living with her parents since September, 1999.

37. However, in the statement, respondent-Smt. Reeta Singh/D.W.-1 stated as under:-

"मैं सन् 1999 में ससुराल से अखिरी बार मायके गई। तब से मैं मायके में हूं। मायके जाने व सन् 2000 के बीच मैंने कोई प्रार्थना पत्र दहेज के मुकदमे के पहले नहीं दिया। मेरी बहन आशा राजे सुलतानपुर में अध्यापिका है। मैं कहीं नहीं पढ़ाती हूं। यह कहना गलत है कि मेरा राम शकल सिंह से नाजायज सम्बन्ध था जिसकी वजह से नाजायज गर्भ था उसे मैने गिरा दिया। यह भी कहना गलत है कि मैंने अपनी चरित्र हीनता के क्षमा के सम्बन्ध में पति को कई बार पत्र लिखा बल्कि सास से झगड़ा होने की वजह से पति को पत्र लिखा था। "

38. In view of the aforesaid facts, the position which emerges out is to the effect that the appellant and respondent-Smt. Reeta Singh are living separately for

the last 20 years and further between them, various criminal proceedings were taken place. So, now the question which is to be considered is to the effect that *"can a suit of appellant be decreed for divorce on the ground of irretrievable breakdown of marriage due to long separation, as the same tantamounts to a mental/physical cruelty?"*

39. The word 'cruelty' has not been defined in the Hindu Marriage Act. It has been used in Section 13 (1) (i-a) of the act in the context of human conduct or behaviour in relation to or in respect of matrimonial duties or obligations. It is a course of conduct of one which is adversely affecting the other. The cruelty may be mental or physical, intentional or unintentional. If it is physical it is a question of fact and degree. If it is mental, the eqnuiry must begin as to the nature of the cruel treatment and then as to the impact of such treatment on the mind of the spouse. The absence of intention should not make any difference in the case, if by ordinary sense in human affairs, the act complained of could otherwise be regarded as cruelty.

40. Hon'ble the Apex Court in the case of ***Saroj Rani Vs. Sudarshan Kumar Chadha, (1984) 4 SCC 90, 98***, where it was held that court's satisfaction about permanent breakdown of the marriage may serve as an additional justification for granting divorce. Where on facts the marriage has broken down and the parties can no longer live together the court should have no compunction in granting the divorce.

41. In the case of ***V. Bhagat v. D. Bhagat, (1994) 1 SCC 337***, the Apex Court held that mental cruelty means that conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with the other, must be of such a nature that the parties could not reasonably be expected to live together. Regard must be had to the social status, education level of the parties and the society they move.

42. In ***Romesh Chander Vs. Savitri, (1995) 2 SCC 7***, Hon'ble Supreme Court again held that when marriage is dead, emotionally and practically, and there is no chance of its being retrieved, continuance of it would be cruelty within the meaning of Section 13 (1) (i-a) of the Act.

43. In the case of ***Naveen Kohli Vs. Neelu Kohli, (2006) 4 SCC 558***, the Hon'ble Supreme Court observed as hereunder :-

*"**32.** Both the parties have levelled allegations against each other for not maintaining the sanctity of marriage and involvement with another person. According to the respondent, the appellant is separately living with another woman "Shiva Nagi". According to the appellant, the respondent was seen indulging in an indecent manner and was found in a compromising position with one Biswas Rout. According to the findings of the trial court both the parties failed to prove the allegations against each other. The High Court has of course reached the conclusion that the appellant was living with one "Shiva Nagi" for a considerable number of years. The fact of the matter is that both the parties have been living separately for more than 10 years. A number of cases including criminal complaints have been filed by the*

respondent against the appellant and every effort has been made to harass and torture him and even to put the appellant behind the bars by the respondent. The appellant has also filed cases against the respondent.

38. *D. Tolstoy in his celebrated book The Law and Practice of Divorce and Matrimonial Causes, (6th Edn., p. 61) defined cruelty in these words:*

"Cruelty which is a ground for dissolution of marriage may be defined as wilful and unjustifiable conduct of such a character as to cause danger to life, limb or health, bodily or mental, or as to give rise to a reasonable apprehension of such a danger."

"72. Once the parties have separated and the separation has continued for a sufficient length of time and one of them has presented a petition for divorce, it can well be presumed that the marriage has broken down. The court, no doubt, should seriously make an endeavour to reconcile the parties; yet, if it is found that the breakdown is irreparable, then divorce should not be withheld. The consequences of preservation in law of the unworkable marriage which has long ceased to be effective and bound to be a source of greater misery for the parties.

73. A law of divorce based mainly on fault is inadequate to deal with a broken marriage. Under the fault theory, guilt has to be proved; divorce courts are presented with concrete instances of human behaviour as they bring the institution of marriage into disrepute.

74. We have been principally impressed by the consideration that once the marriage has broken down beyond repair, it would be unrealistic for the law not to take notice of that fact, and it would be harmful to society and injurious to the interests of the parties. Where there has been a long period of continuous separation, it may fairly be surmised that the matrimonial bond is beyond repair. The marriage becomes a fiction, though supported by a legal tie. By refusing to sever that tie the law in such cases does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties.

75. Public interest demands not only that the married status should, as far as possible, as long as possible, and whenever possible, be maintained, but where a marriage has been wrecked beyond the hope of salvage, public interest lies in the recognition of that fact.

76. Since there is no acceptable way in which a spouse can be compelled to resume life with the consort, nothing is gained by trying to keep the parties tied forever to a marriage that in fact has ceased to exist.

77. Some jurists have also expressed their apprehension for introduction or irretrievable breakdown of marriage as a ground for grant of the decree of divorce. In their opinion, such an amendment in the Act would put human ingenuity at a premium and throw wide open the doors to litigation, and will create more problems that are sought to be solved.

78. The other majority view, which is shared by most jurists, according to the Law Commission Report, is that human life has a short span and situations causing misery cannot be allowed to continue indefinitely. A halt has to be called at some stage. Law cannot turn a blind eye to such situations, nor can it decline to give adequate response to the necessities arising therefrom.

79. When we carefully evaluate the judgment of the High Court and scrutinise its findings in the background of the facts and circumstances of this case, then it becomes obvious that the approach adopted by the High Court in deciding this matter is far from satisfactory.

80. The High Court ought to have considered the repercussions, consequences, impact and ramifications of all the criminal and other proceedings initiated by the parties against each other in the proper perspective. For illustration, the High Court has mentioned that so far as the publication of the news items is concerned, the status of the husband in a registered company was only that of an employee and if any news item is published, in such a situation, it could not, by any stretch of imagination be taken to have lowered the prestige of the husband. In next para 69 of the judgment that in one of the news items what has been indicated was that in the company, Nikhil Rubber (P) Ltd., the appellant was only a director along with Mrs Neelu Kohli who held 94.5% shares of Rs.100 each in the Company. The news item further indicated that Naveen Kohli was acting against the spirit of the article of association of Nikhil Rubber (P) Ltd., had caused immense loss of business and goodwill. He had stealthily removed produce of the Company, besides diverted orders of foreign buyers to his proprietorship firm M/s Naveen Elastomers. He had opened the bank account with forged signatures of Mrs Neelu Kohli and fabricated the resolution of the board of directors of the Company. Statutory authority under the Companies Act had refused to register documents filed by Mr Naveen Kohli and had issued show-cause notice. All business associates were cautioned to avoid dealing with him alone. Neither the Company nor Mrs Neelu Kohli shall be liable for the acts of Mr Naveen Kohli. Despite the aforementioned finding that the news item was intended to caution business associates to avoid dealing with the appellant then to come to this finding in the next para that it will by no stretch of imagination result in mental cruelty is wholly untenable."

***86.** In view of the fact that the parties have been living separately for more than 10 years and a very large number of aforementioned criminal and civil proceedings have been initiated by the respondent against the appellant and some proceedings have been initiated by the appellant against the respondent, the matrimonial bond between the parties is beyond repair. A marriage between the parties is only in name. The marriage has been wrecked beyond the hope of salvage, public interest and interest of all concerned lies in the recognition of the fact and to declare defunct de jure what is already defunct de facto. To keep the sham is obviously conducive to immorality and potentially more prejudicial to the public interest than a dissolution of the marriage bond."*

44. Hon'ble the Apex Court in the case of ***Samar Ghosh vs. Jaya Ghose, (2007) 4 SCC 511***, held as under :-

*"**101.** No uniform standard can ever be laid down for guidance, yet we deem it appropriate to enumerate some instances of human behaviour which may be relevant in dealing with the cases of "mental cruelty". The instances indicated in the succeeding paragraphs are only illustrative and not exhaustive:*

(i) On consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make possible for the parties to live with each other could come within the broad parameters of mental cruelty.

(ii) On comprehensive appraisal of the entire matrimonial life of the parties, it becomes abundantly clear that situation is such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party.

(iii) Mere coldness or lack of affection cannot amount to cruelty, frequent rudeness of language, petulance of manner, indifference and neglect may reach such a degree that it makes the married life for the other spouse absolutely intolerable.

(iv) Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty.

(v) A sustained course of abusive and humiliating treatment calculated to torture, discommode or render miserable life of the spouse.

(vi) Sustained unjustifiable conduct and behaviour of one spouse actually affecting physical and mental health of the other spouse. The treatment complained of and the resultant danger or apprehension must be very grave, substantial and weighty.

(vii) Sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness causing injury to mental health or deriving sadistic pleasure can also amount to mental cruelty.

(viii) The conduct must be much more than jealousy, selfishness, possessiveness, which causes unhappiness and dissatisfaction and emotional upset may not be a ground for grant of divorce on the ground of mental cruelty.

(ix) Mere trivial irritations, quarrels, normal wear and tear of the married life which happens in day-to-day life would not be adequate for grant of divorce on the ground of mental cruelty.

(x) The married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty. The ill conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behaviour of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty.

(xi) If a husband submits himself for an operation of sterilisation without medical reasons and without the consent or knowledge of his wife and similarly, if the wife undergoes vasectomy or abortion without medical reason or without the consent or knowledge of her husband, such an act of the spouse may lead to mental cruelty.

(xii) Unilateral decision of refusal to have intercourse for considerable period without there being any physical incapacity or valid reason may amount to mental cruelty.

(xiii) Unilateral decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty.

(xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases, does

not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty.

102. *When we take into consideration aforementioned factors along with an important circumstance that the parties are admittedly living separately for more than sixteen-and-a-half years (since 27-8-1990) the irresistible conclusion would be that matrimonial bond has been ruptured beyond repair because of the mental cruelty caused by the respondent."*

45. Hon'ble the Apex Court in the case of ***Rishikesh Sharma vs. Saroj Sharma, (2007) 2 SCC 263***, held as under :-

*"**4.** We heard Mr A.K. Chitale, learned Senior Counsel and Mr S.S. Dahiya, learned counsel for the respondent and perused the judgment passed by both the trial court and also of the High Court. It is not in dispute that the respondent is living separately from the year 1981. Though the finding has been rendered by the High Court that the wife last resided with her husband up to 25-3-1989, the said finding according to the learned counsel for the appellant is not correct. In view of the several litigations between the parties it is not possible for her to prosecute criminal case against the husband and at the same time continue to reside with her husband. In the instant case the marriage is irretrievably broken down with no possibility of the parties living together again. Both the parties have crossed 49 years and living separately and working independently since 1981. There being a history of litigation with the respondent wife repeatedly filing criminal cases against the appellant which could not be substantiated as found by the courts. This apart, only child born in the wedlock in 1975 has already been given in marriage. Under such circumstances the High Court was not justified in refusing to exercise its jurisdiction in favour of the appellant. This apart, the wife also has made certain allegations against her husband, that the husband has already remarried and is living with another lady as stated by her in the written statement. The High Court also has not considered the allegations made by the respondent which have been repeatedly made and repeatedly found baseless by the courts.*

5. *In our opinion it will not be possible for the parties to live together and therefore there is no purpose in compelling both the parties to live together. Therefore, the best course in our opinion is to dissolve the marriage by passing a decree of divorce so that the parties who are litigating since 1981 and have lost valuable part of life can live peacefully for remaining part of their life.*

6. *During the last hearing both the husband and wife were present in the Court. The husband was ready and willing to pay a lump sum amount by way of permanent alimony to the wife. The wife was not willing to accept the lump sum amount but however expressed her willingness to live with her husband. We are of the opinion that her desire to live with her husband at this stage and at this distance of time is not genuine. Therefore, we are not accepting this suggestion made by the wife and reject the same."*

46. Hon'ble the Apex Court in the case of ***Geeta Jagdish Mangtani vs. Jagdish Mangtani, (2008) 5 SCC 177***, held as under :-

*"**4.** The husband has made allegation that after the birth of the son he had gone to the house of the wife at Adipur, Gujarat where he was not allowed to meet her nor was he allowed to see his son. Likewise, the wife has made allegations that her mother-in-law had made dowry-related demands from her. These are mere allegations and counter-allegations on which reliance cannot be placed. Nothing of this kind was stated in the notices or replies thereto. The most important fact which emerges is that from 2-6-1993, the parties have been staying separately and there is total lack of any effort on their part to stay together. Since the wife left the matrimonial home on 2-6-1993 and has, admittedly, not returned to the said home, the absence of any desire on her part to honour the matrimonial obligation is clear. In this connection the observation of the High Court is worth reproducing:*

"... Both the husband and wife have renounced the relationship as husband and wife since June 1993 and from the record of the case also presently the questions which I have asked in the chamber, I am satisfied that both the husband and wife had no intention to live together as husband and wife and decided to break off from the relationship of marriage or withdraw that companionship of husband and wife. Desertion means rejection by the party of all the obligations of marriage and permanent forsaking or abandonment of one spouse by the other without any reasonable cause and without the consent of the other.

14.7. I have considered the entire aspect and there is no useful purpose to have kept the parties as husband and wife particularly from 1993 when both the husband and wife have not stayed together. Though I have made efforts to see that the wife can go to her matrimonial home at Mumbai or the husband can stay at Gandhidham but unfortunately this Court's effort to reunite them as husband and wife failed. This Court has therefore no alternative but to pass the order for divorce to see that both people can be free to have their own houses in this behalf because to keep both the husband and wife together when one stays at Mumbai and another at Gandhidham, without the intention to stay together, would serve no purpose. Therefore, the marriage is completely broken down and no useful purpose would be served by dismissing the second appeal."

47. Hon'ble the Apex Court in the case of ***Satish Sitole vs. Smt. Ganga, (2008) 7 SCC 734***, held as under :-

*"**11.** The prayer made on behalf of the appellant and endorsed by the respondent is neither novel nor new. At the very beginning of this judgment we had referred to the decision of this Court in Romesh Chander [(1995) 2 SCC 7], where it was held that when a marriage is dead emotionally and practically and there is no chance of its being retrieved, the continuance of such a marriage would amount to cruelty. Accordingly, in exercise of powers under Article 142 of the Constitution of India the marriage between the appellant and the respondent was directed to stand dissolved, subject to the condition that the appellant would transfer his house in the name of his wife.*

***13.** Having dispassionately considered the materials before us and the fact that out of 16 years of marriage the appellant and the respondent had been living separately for 14 years, we*

are also convinced that any further attempt at reconciliation will be futile and it would be in the interest of both the parties to sever the matrimonial ties since the marriage has broken down irretrievably."

48. This Court in the case of ***Mohit Tandon vs. Preeti Tandon, 2010 (2) All CJ 1108***, held as under :-

"The essence of marriage is a sharing of common life, a sharing of all the happiness that life has to offer and all the misery that has to be faced in life. The ground of act of cruelty are to be distinguished from ordinary wear and tear of family. Every matrimonial conduct, which may cause annoyance to the other, may not amount to cruelty. Mere trivial irritations, quarrels between spouses, which happen in day-to-day married life, may also not amount to cruelty. Cruelty in matrimonial life may be of unfounded variety, which can be subtle or brutal. It may be words, gestures or by mere silence, violent or non-violent. The ideal couple or a mere ideal one will probably have no occasion to go to Matrimonial Court.

It may be added that cruelty may be inferred from the facts and matrimonial relations of the parties and interaction in their daily life disclosed by the evidence and inference on the said point can only be drawn after all the facts have been taken into consideration. Where there is proof of deliberate course of conduct on the part of one, intended to hurt and humiliate the other spouse, and such a conduct is persisted, cruelty can easily be inferred. Neither actual nor presumed intention to hurt the other spouse, is a necessary element in cruelty.

Taking into consideration the facts in its entirety and the failure of settlement between them either before the lower court and also by us, we are of the view that the marriage has seized to exist in substance and in reality, living apart is a symbol indicating the negation of such sharing. It is indicative of the disruption of the essence of marriage. From the circumstances, we are fully convinced that the marriage between the parties is irretrievably broken down because of incompatibility of temperament. In fact, there has been total disappearance of emotional substratum in the marriage. The matrimonial bond between the parties has been wrecked beyond the hope of salvage and cannot be repaired. The Apex Court in number of cases, namely, Harpit Singh Anand Versus State of West Bengal [2004 (10) SCC 505], Kanchan Devi Vs. Promod Kkumar Mittal [(1996) 8 SCC 90] and Ashok Hurra Vs. Rupa Bipin Zaveri [(1997) 4 SCC 226], in order to do complete justice, granted decree of divorce and directed for closer of all sort of proceedings between the parties.

In the instant case, the record is clear that the parties are living separately and are are not discharging their matrimonial obligations continuously for the last over 15 years and there is no possibility of any reconciliation. Thus, the conclusion is inevitable that the marriage has broken down completely and irretrievably and as such there is no point in compelling them to live together and to make their life more miserable.

In Sandhya Rani v. Kalyan Ram Narayan 1994(suppl) 2 SCC 588 the Apex Court while reiterating the stand that there is no justification for continuing with the marriage which has broken down irretrievably took the view that since the parties are living separately for last more

than three years there is no doubt in taking the stand that the marriage between the parties has broken down irretrievably and, therefore, the Court has no option but to grant decree of divorce.

In the case of Mrs. Chandrakala Memon and another vs. Capt. Vipin Memon and another JT 1993(1) SC 229 the Apex Court held that when the parties were living separately for many years and there appear to be no scope of settlement between them with no chance of their coming together, the decree of divorce was justified. Similar view was expressed by the Supreme Court in the case of Smt. Kanchan Devi v. Pramod Kumar Mittal and another; AIR 1996 SC 192. In the said case, the parties were living separately for more than 12 years and it appeared to the Court that there was no possibility of any reconciliation and as such directed for the dissolution of marriage by a decree of divorce.

It is indeed the obligation of the court and all concerned that the marriage status should, as far as possible, as long as possible and whenever possible, be maintained. But when the marriage is totally dead, in that event, nothing is gained by trying to keep the parties tied forever to a marriage which infact has ceased to exist.

In view of the aforesaid decisions, to end the miseries of the parties and to allow them to henceforth live a happy and peaceful life by brining to an end the litigation appear to be a more sound, reasonable and practical decision. The parties are living separately for about 15 years and there is no possibility of their uniting. Thus, for all practical purposes the marriage is completely dead. IN view of the above and the allegations/counter allegations levelled against each other, the element of cruelty on the part of both of them is also inherent. The Apex Court in the case of Naveen Kohli v. Neelu Kohli ; AIR 2006 SC 1675 suggested that the break down of marriage completely be added as one of the grounds for obtaining divorce. In Satish Sithole vs. Ganga; AIR 2008 SC 3093 the Supreme Court ruled and laid down that the living of parties to a marriage separately for a long time, making acrimonious allegations against each other amounts to cruelty and continuance of such marriage is a further act of cruelty. Therefore, following the principle of 'live and let live' and the precedent laid down by the Apex Court, it is desirable and expedient in the interest of justice to set-aside the impugned orders passed by the Family Court and to allow the appeals."

49. Hon'ble the Apex Court in the case of ***Sukhendu Das vs. Rita Mukherjee, 2017 (9) SCC 432***, held as under :-

*"**7.** The respondent, who did not appear before the trial court after filing of written statement, did not respond to the request made by the High Court for personal appearance. In spite of service of notice, the respondent did not show any interest to appear in this Court also. This conduct of the respondent by itself would indicate that she is not interested in living with the appellant. Refusal to participate in proceeding for divorce and forcing the appellant to stay in a dead marriage would itself constitute mental cruelty (Samar Ghosh v. Jaya Ghosh [Samar Ghosh v. Jaya Ghosh, (2007) 4 SCC 511, p. 547, para 101(xiv)]). The High Court observed that no attempt was made by either of the parties to be posted at the same place. Without entering into the*

disputed facts of the case, we are of the opinion that there is no likelihood of the appellant and the respondent living together and for all practical purposes there is an irretrievable breakdown of the marriage."

8. *This Court, in a series of judgments, has exercised its inherent powers under Article 142 of the Constitution for dissolution of a marriage where the Court finds that the marriage is totally unworkable, emotionally dead, beyond salvage and has broken down irretrievably, even if the facts of the case do not provide a ground in law on which the divorce could be granted (Manish Goel v. Rohini Goel [Manish Goel v. Rohini Goel, (2010) 4 SCC 393, p. 398, para 11 : (2010) 2 SCC (Civ) 162]). Admittedly, the appellant and the respondent have been living separately for more than 17 years and it will not be possible for the parties to live together and there is no purpose in compelling the parties to live together in matrimony (Rishikesh Sharma v. Saroj Sharma [Rishikesh Sharma v. Saroj Sharma, (2007) 2 SCC 263, pp. 264-65, paras 4 and 5]). The daughter of the appellant and the respondent is aged about 24 years and her custody is not in issue before us. In the peculiar facts of this case and in order to do complete justice between the parties, we allow the appeal in exercise of our power under Article 142 of the Constitution."*

50. A Division Bench of this Court in First Appeal No.31 of 2007 "Smt. Dr. Sarita vs. Dr. Vikas Kanaujia" decided on 22.08.2019 held as under :-

"Hon'ble the Apex Court in the case of ***Parveen Mehta Vs. Inderjit Mehta, 2002 (5) SCC 706*** *held as under :*

"18. Quoting with approval the following passage from the judgment in V. Bhagat v. D. Bhagat [(1994) 1 SCC 337] this Court observed therein:

"16. Mental cruelty in Section 13(1)(i-a) can broadly be defined as that conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with the other. In other words, mental cruelty must be of such a nature that the parties cannot reasonably be expected to live together. The situation must be such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with the other party. It is not necessary to prove that the mental cruelty is such as to cause injury to the health of the petitioner. While arriving at such conclusion, regard must be had to the social status, educational level of the parties, the society they move in, the possibility or otherwise of the parties ever living together in case they are already living apart and all other relevant facts and circumstances which it is neither possible nor desirable to set out exhaustively. What is cruelty in one case may not amount to cruelty in another case. It is a matter to be determined in each case having regard to the facts and circumstances of that case. If it is a case of accusations and allegations, regard must also be had to the context in which they were made."

19. Clause (i-a) of sub-section (1) of Section 13 of the Act is comprehensive enough to include cases of physical as also mental cruelty. It was formerly thought that actual physical harm or reasonable apprehension of it was the prime ingredient of this matrimonial offence. That doctrine is now repudiated and the modern view has been

that mental cruelty can cause even more grievous injury and create in the mind of the injured spouse reasonable apprehension that it will be harmful or unsafe to live with the other party. The principle that cruelty may be inferred from the whole facts and matrimonial relations of the parties and interaction in their daily life disclosed by the evidence is of greater cogency in cases falling under the head of mental cruelty. Thus mental cruelty has to be established from the facts (Mulla's Hindu Law, 17th Edn., Vol. II, p. 91).

20. In the case in hand the foundation of the case of "cruelty" as a matrimonial offence is based on the allegations made by the husband that right from day one after marriage the wife was not prepared to cooperate with him in having sexual intercourse on account of which the marriage could not be consummated. When the husband offered to have the wife treated medically, she refused. As the condition of her health deteriorated she became irritating and unreasonable in her behaviour towards the husband. She misbehaved with his friends and relations. She even abused him, scolded him and caught hold of his shirt collar in the presence of elderly persons like Shri S.K. Jain. This Court in the case ofDr N.G. Dastanev.S. Dastane[(1975) 2 SCC 326 : AIR 1975 SC 1534] observed:

"Sex plays an important role in marital life and cannot be separated from other factors which lend to matrimony a sense of fruition and fulfilment."

21. Cruelty for the purpose of Section 13(1)(i-a) is to be taken as a behaviour by one spouse towards the other, which causes reasonable apprehension in the mind of the latter that it is not safe for him or her to continue the matrimonial relationship with the other. Mental cruelty is a state of mind and feeling with one of the spouses due to the behaviour or behavioural pattern by the other. Unlike the case of physical cruelty, mental cruelty is difficult to establish by direct evidence. It is necessarily a matter of inference to be drawn from the facts and circumstances of the case. A feeling of anguish, disappointment and frustration in one spouse caused by the conduct of the other can only be appreciated on assessing the attending facts and circumstances in which the two partners of matrimonial life have been living. The inference has to be drawn from the attending facts and circumstances taken cumulatively. In case of mental cruelty it will not be a correct approach to take an instance of misbehaviour in isolation and then pose the question whether such behaviour is sufficient by itself to cause mental cruelty. The approach should be to take the cumulative effect of the facts and circumstances emerging from the evidence on record and then draw a fair inference whether the petitioner in the divorce petition has been subjected to mental cruelty due to conduct of the other."

.....

''क्रूरता कभी कभी ऐसे कृत्यो स` भी उत्पन्न होती है जिनका कोई प्रत्यक्ष और मूर्ति रूप नही होता है और न ही साक्ष्य से स्थापित किया जा सकता है। ल`किन इनकी अनुभूति अवश्य की जा सकती है ं इस श्रेणी का तथ्य इस अभिकथन मे शामिल है कि विपक्षी ने शादी के तत्काल बाद सुहागरात और उसके बाद प्रार्थी के साथ दाम्पत्य जीवन के आनन्द की अनुभूति और अनुभव से प्रार्थी को वंचित रखा और विपक्षी ने कोई सहभागिता नही की।''

"Cruelty sometimes arises from the acts which are not in tangible and physical state nor can they be established

with evidence. But they can certainly be realised. This statement includes such a category of fact that the opposite party deprived the applicant of marital bliss, and did not ensure participation, on the wedding night immediately after the marriage and also on later occasion."

36. In the opinion of Court, recital contained in paragraph 3 at page 73 is not a finding but a recital regarding explanation offered by Court to the pleading raised by plaintiff-respondent. Even otherwise also when paragraphs 4, 5 and 10 of plaint relied upon by learned Senior Counsel are examined, the same appear to be contradictory to paragraphs 3 and 6 of plaint itself. In other words there is no categorical pleading regarding denial of physical pleasure to plaintiff-appellant after marriage on account of non establishment of conjugal relationship between parties. Even in cross-examination of D.W.1, i.e. Dr. Sarita, we find that no specific question was put to her regarding aforesaid. Reliance placed upon written statement of defendant-appellant is also of no help as averments/allegations made in paragraphs 4, 5 and 10 of plaint were not admitted by defendant-appellant. Furthermore, suit filed by plaintiff-respondent has not been decreed on the ground of denial of physical pleasure. 33 Therefore, once Court below has not taken this as a basis for passing decree of divorce, the impugned judgement and decree cannot be supported on this ground as judgement contains reasons in support of decree.

37. Mr. Ravi Kiran Jain, learned Senior Counsel has alternatively submitted that marriage of parties has broken down irretrievably as parties are living separately since 2.7.2004, therefore, decree of divorce granted by Court below should not be reversed.

38. The argument raised by learned Senior Counsel appears to be attractive at the first flush. However, upon deeper scrutiny, the same is devoid of substance.

39. The issue relating to irretrievable break down of marriage has been considered by a Division Bench of this Court in First Appeal No. 525 of 2006 (Smt. Kavita Sharma Vs. Neeraj Sharma) decided on 7.2.2018, wherein it has been observed in paragraph 28:-

"28. The above findings recorded by Court below could not be shown perverse or contrary to record. Having considered the fact that parties are living separately from decades, we are also of the view that marriage between two is irretrievable and has broken down completely. Irretrievable breakdown of marriage is not a ground for divorce under Act, 1955. But, where marriage is beyond repair on account of bitterness created by the acts of the husband or the wife or of both, Courts have always taken irretrievable breakdown of marriage as a very weighty circumstance amongst others necessitating severance of marital tie. A marriage which is dead for all purposes cannot be revived by the Court's verdict, if the parties are not willing. This is because marriage involves human sentiments and emotions and if they are dried-up there is hardly any chance of their springing back to life on account of artificial reunion created by the Court's decree. On the ground of irretrievable marriage, Courts have allowed decree of divorce and reference may be made to Naveen Kohli v. Neelu Kohli (2006) 4 SCC 558 and Rishikesh Sharma Vs. Saroj Sharma, 2006(12) SCALE 282. It is also

noteworthy that in Naveen Kohli v. Neelu Kohli (supra) Court made recommendation to Union of India that Act, 1955 be amended to incorporate irretrievable breakdown of marriage as a ground for grant of divorce."

40. Similarly this Court in First Appeal No. 792 of 2008 (Ashwani Kumar Kohli Vs. Smt. Anita) decided on 34 17.11.2016 has also considered this question and observed in paragraphs 7, 8, 10, 11, 12 and 13 as under:-

"7. Therefore, point for adjudication in this appeal is "whether a decree of reversal can be passed by granting divorce to the appellant on the ground which was not subject matter of adjudication before the Court below and is being raised for the first time in appeal".

8. Under the provisions of Act, 1955 there is no ground like any "irretrievable breakdown of marriage", justifying divorce. It is a doctrine laid down by judicial precedents, in particular, Supreme Court in exercise of powers under Article 142 of the Constitution has granted decree of divorce on the ground of irretrievable breakdown of marriage.

10. This aspect has been considered by this Court in Ram Babu Babeley Vs. Smt. Sandhya AIR 2006 (All) 12 = 2006 AWC 183 and it has laid down certain inferences from various authorities of Supreme Court, which read as under:-

"(i) The irretrievable break down of marriage is not a ground for divorce by itself. But while scrutinizing the evidence on record to determine whether the grounds on which divorce is sought are made out, this circumstance can be taken into consideration as laid down by Hon'ble Apex Court in the case of Savitri Pandey v. prem Chand Pandey, (2002) 2 SCC 73 and V. Bhagat versus D. Bhagat, AIR 1994 SC 710.

(ii) No divorce can be granted on the ground of irretrievable break down of marriage if the party seeking divorce on this ground is himself or herself at fault for the above break down as laid down in the case of Chetan Dass Versus Kamla Devi, AIR 2001 SC 1709, Savitri Pandey v. prem Chand Pandey, (2002) 2 SCC 73 and Shyam Sunder Kohli v. Sushma Kohli, (2004) 7 SCC 747.

(iii) The decree of divorce on the ground that the marriage had been irretrievably broken down can be granted in those cases where both the parties have levelled such allegations against each other that the marriage appears to be practically dead and the parties can not live together as laid down in Chandra Kala Trivedi versus Dr. SP Trivedi, (1993) 4 SCC 232.

(iv) The decree of divorce on the ground that the marriage had been irretrievably broken down can be granted in those cases also where the conduct or averments of one 35 party have been so much painful for the other party (who is not at fault) that he cannot be expected to live with the offending party as laid down in the cases of V. Bhagat versus D. Bhagat, (supra), Ramesh Chander versus Savitri, (1995) 2 SCC 7, Ashok Hurra versus Rupa Bipin Zaveri, 1997(3) AWC 1843 (SC), 1997(3) A.W.C. 1843(SC) and A. Jayachandra versus Aneel Kaur, (2005) 2 SCC 22.

(v) The power to grant divorce on the ground of irretrievable break down of marriage should be exercised with much care and caution in exceptional circumstances only in the interest of both the parties, as observed by Hon'ble Apex Court at paragraph No. 21 of the

judgment in the case of V. Bhagat and Mrs. D. Bhagat, AIR (supra) and at para 12 in the case of Shyam Sunder Kohli versus Sushma Kohli, (supra)."

11. The above authorities have been followed by this Court in "Pradeep Kumar Vs. Smt. Vijay Lakshmi' in 2015 (4) ALJ 667 wherein one of us (Hon'ble Sudhir Agarwal,J.) was a member of the Bench.

12. In Vishnu Dutt Sharma Vs. Manju Sharma, (2009) 6 SCC 379, it was held that under Section 13 of Act 1955 there is no ground of irretrievable breakdown of marriage for granting decree of divorce. Court said that it cannot add such a ground to Section 13, as that would amount to amendment of Act, which is the function of legislature. It also referred to some judgments of Supreme Court in which dissolution of marriage was allowed on the ground of irretrievable breakdown but held that those judgments do not lay down any precedent. Supreme Court very categorically observed as under:-

"If we grant divorce on the ground of irretrievable breakdown, then we shall by judicial verdict be adding a clause to Section 13 of the Act to the effect that irretrievable breakdown of marriage is also a ground for divorce. In our opinion, this can only be done by the legislature and not by the Court. It is for the Parliament to enact or amend the law and not for the Court. Hence, we do not find force in the submission of learned counsel for the appellant."

13. The above view has been followed in Darshan Gupta Vs. Radhika Gupta (2013) 9 SCC 1. Similar view was expressed in "Gurubux Singh Vs. Harminder Kaur' (2010) 14 SCC 301. This Court also has followed the above view in Shailesh Kumari Vs. Amod Kumar Sachan 2016 (115) ALR 689."

51. The Division Bench of this Court in the case of ***Girish Chandra Srivastava v. Reeta Srivastava*** reported in ***2019 SCC OnLine All 3554*** observed as under:-

*"**17.** Recently a Division Bench of this Court in Smt. Sarita Devi v. Sri. Ashok Kumar Singh reported in 2018 (3) AWC 2328 has considered the question of cruelty in detail in paragraphs 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 27 and 29 which reads as under:--*

"16. In Samar Ghosh v. Jaya Ghosh, (2007) 4 SCC 511 Court considered the concept of cruelty and referring to Oxford Dictionary defines "cruelty' as "the quality of being cruel; disposition of inflicting suffering; delight in or indifference to another's pain; mercilessness; hard-heartedness'.

***18.** In Black's Law Dictionary, 8th Edition, 2004, term "mental cruelty" has been defined as, "a ground for divorce, one spouse's course of conduct (not involving actual violence) that creates such anguish that it endangers the life, physical health, or mental health of the other spouse."*

***19.** The concept of cruelty has been summarized in Halsbury's Laws of England, Vol.13, 4th Edition Para 1269, as under:*

"The general rule in all cases of cruelty is that the entire matrimonial relationship must be considered, and that rule is of special value when the cruelty consists not of violent acts but of injurious reproaches, complaints, accusations or taunts. In cases where no violence is averred, it is undesirable to consider judicial pronouncements with a view to

creating certain categories of acts or conduct as having or lacking the nature or quality which renders them capable or incapable in all circumstances of amounting to cruelty; for it is the effect of the conduct rather than its nature which is of paramount importance in assessing a complaint of cruelty. Whether one spouse has been guilty of cruelty to the other is essentially a question of fact and previously decided cases have little, if any, value. The court should bear in mind the physical and mental condition of the parties as well as their social status, and should consider the impact of the personality and conduct of one spouse on the mind of the other, weighing all incidents and quarrels between the spouses from that point of view; further, the conduct alleged must be examined in the light of the complainant's capacity for endurance and the extent to which that capacity is known to the other spouse. Malevolent intention is not essential to cruelty but it is an important element where it exits."

20. *In 24 American Jurisprudence 2d, the term "mental cruelty" has been defined as under:*

"Mental Cruelty as a course of unprovoked conduct toward one's spouse which causes embarrassment, humiliation, and anguish so as to render the spouse's life miserable and unendurable. The plaintiff must show a course of conduct on the part of the defendant which so endangers the physical or mental health of the plaintiff as to render continued cohabitation unsafe or improper, although the plaintiff need not establish actual instances of physical abuse."

21. *One of the earliest decision considering "mental cruelty" we find is, N.G. Dastane v. S. Dastane, (1975) 2 SCC 326, wherein Court has said:*

"The enquiry therefore has to be whether the conduct charges as cruelty is of such a character as to cause in the mind of the petitioner a reasonable apprehension that it will be harmful or injurious for him to live with the respondent."

22. *In Sirajmohmedkhan Janmohamadkhan v. Haizunnisa Yasinkhan, (1981) 4 SCC 250 Court said that a concept of legal cruelty changes according to the changes and advancement of social concept and standards of living. With the advancement of our social conceptions, this feature has obtained legislative recognition, that a second marriage is a sufficient ground for separate residence and maintenance. Moreover, to establish legal cruelty, it is not necessary that physical violence should be used. Continuous ill-treatment, cessation of marital intercourse, studied neglect, indifference on the part of the husband, and an assertion on the part of the husband that the wife is unchaste are all factors which lead to mental or legal cruelty.*

23. *In Shobha Rani v. Madhukar Reddi, (1988) 1 SCC 105, Court observed that word "cruelty' has not been defined in Act, 1955 but legislature, making it a ground for divorce under Section 13(1)(i)(a) of Act, 1955, has made it clear that conduct of party in treatment of other if amounts to cruelty actual, physical or mental or legal is a just reason for grant of divorce. Cruelty may be mental or physical, intentional or unintentional. If it is physical, it is a question of fact about degree. If it is mental, the enquiry must begin as to the nature of cruel treatment and then as to the impact of such treatment on the mind of the spouse.*

Whether it caused reasonable apprehension that it would be harmful or injurious to live with the other, ultimately, is a matter of inference to be drawn by taking into account the nature of conduct and its effect on the complaining spouse. There may, however, be cases where conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or injurious effect on the other spouse need not be enquired into or considered. In such cases, cruelty will be established if conduct itself is proved or admitted. The absence of intention should not make any difference in the case, if by ordinary sense in human affairs, the act complained of could otherwise be regarded as cruelty.

24. *In V. Bhagat v. D. Bhagat (Mrs.), (1994) 1 SCC 337 considering the concept of "mental cruelty" in the context of Section 13(1)(i)(a) of Act, 1984, Court said that it can be defined as conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with other. In other words, mental cruelty must be of such a nature that the parties cannot reasonably be expected to live together. The situation must be such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party. It is not necessary to prove that mental cruelty is such as to cause injury to the health of other party. While arriving at such conclusion, regard must be had to the social status, educational level of parties, the society they move in, the possibility or otherwise of the parties ever living together in case they are already living apart and all other relevant facts and circumstances which it is neither possible nor desirable to set out exhaustively. What is cruelty in one case may not amount to cruelty in another case. It is thus has to be determined in each case having regard to the facts and circumstances of each case.*

25. *In Chetan Dass v. Kamla Devi, (2001) 4 SCC 250, Court observed that matrimonial matters relates to delicate human and emotional relationship. It demands mutual trust, regard, respect, love and affection with sufficient play for reasonable adjustments with spouse. The relationship has to conform to the social norms as well. There is no scope of applying the concept of "irretrievably broken marriage" as a straitjacket formula for grant of relief of divorce but it has to be considered in the backdrop of facts and circumstances of the case concerned.*

26. *In Savitri Pandey v. Prem Chandra Panadey, (2002) 2 SCC 73, Court held that mental cruelty is the conduct of other spouse which causes mental suffering or fear to matrimonial life of other. Cruelty postulates a treatment of party to marriage with such conduct as to cause a reasonable apprehension in his or her mind that it would be harmful or injurious to live with other party. Cruelty has to be distinguished from ordinary wear and tear of family life.*

27. *In Vinita Saxena v. Pankaj Pandit, (2006) 3 SCC 778 Court held that complaints and reproaches, sometimes of ordinary nature, may not be termed as ''cruelty' but their continuance or persistence over a period of time may do so which would depends on the facts of each case and have to be considered carefully by the Court concerned.*

28. *In Samar Ghosh v. Jaya Ghosh (supra) Court said that though no uniform standard can be laid down but there are some instances which may*

constitute mental cruelty and the same are illustrated as under:

"(i) On consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make possible for the parties to live with each other could come within the broad parameters of mental cruelty.

(ii) On comprehensive appraisal of the entire matrimonial life of the parties, it becomes abundantly clear that situation is such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party.

(iii) Mere coldness or lack of affection cannot amount to cruelty, frequent rudeness of language, petulance of manner, indifference and neglect may reach such a degree that it makes the married life for the other spouse absolutely intolerable.

(iv) Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty.

(v) A sustained course of abusive and humiliating treatment calculated to torture, discommode or render miserable life of the spouse.

(vi) Sustained unjustifiable conduct and behavior of one spouse actually affecting physical and mental health of the other spouse. The treatment complained of and the resultant danger or apprehension must be very grave, substantial and weighty.

(vii) Sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness causing injury to mental health or deriving sadistic pleasure can also amount to mental cruelty.

(viii) The conduct must be much more than jealousy, selfishness, possessiveness, which causes unhappiness and dissatisfaction and emotional upset may not be a ground for grant of divorce on the ground of mental cruelty.

(ix) Mere trivial irritations, quarrels, normal wear and tear of the married life which happens in day to day life would not be adequate for grant of divorce on the ground of mental cruelty.

(x) The married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty. The ill-conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behavior of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty

(xi) If a husband submits himself for an operation of sterilization without medical reasons and without the consent or knowledge of his wife and similarly if the wife undergoes vasectomy or abortion without medical reason or without the consent or knowledge of her husband, such an act of the spouse may lead to mental cruelty.

(xii) Unilateral decision of refusal to have intercourse for considerable period without there being any physical incapacity or valid reason may amount to mental cruelty.

(xiii) Unilateral decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty.

(xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though

supported by a legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty."

29. *The aforesaid Division Bench judgement clearly explains different shades of "cruelty' which by itself are sufficient enough to dissolve the marriage on the ground of cruelty. The aforesaid judgement also prescribes the mode as to how "cruelty' has to be proved and in what decree it has to be proved so as to grant of decree of divorce on the ground of "cruelty'."*

52. In the case of ***Ravinder Kaur v. Manjeet Singh, (2019) 8 SCC 308 : 2019 SCC OnLine SC 1069 313***, the Hon'ble Apex Court observed as under:-

*"**12.** In the above background, keeping in view the nature of allegations made and the evidence tendered in that regard, we find that the consideration made by the trial court with reference to the reliability of the evidence is more appropriate. As already noticed the High Court, while taking note of the nature of allegations made has proceeded on the basis that there is irretrievable breakdown of the marriage. Needless to mention that irretrievable breakdown of marriage by itself is not a ground provided under the statute for seeking dissolution of marriage. To this effect it would be apposite to refer to the decision rendered by this Court to that effect in Vishnu Dutt Sharma v. Manju Sharma [Vishnu Dutt Sharma v. Manju Sharma, (2009) 6 SCC 379 : (2009) 2 SCC (Civ) 897] relied upon by the learned counsel for the appellant. No doubt on taking note of the entire material and evidence available on record, in appropriate cases the courts may have to bring to an end, the marriage so as not to prolong the agony of the parties. However, in the present facts, at this point in time even that situation does not arise in view of the changed scenario on the death of the respondent herein."*

53. Hon'ble the Apex Court in the case of ***R. Srinivas Kaumar vs. R. Shametha, (2019) 9 SCC 409***, held as under :-

*"**5.1.** At the outset, it is required to be noted and does not seem to be in dispute that since last 22 years both the appellant husband and the respondent wife are residing separately. It also appears that all efforts to continue the marriage have failed and there is no possibility of reunion because of the strained relations between the parties. Thus, it appears that marriage between the appellant husband and the respondent wife has irretrievably broken down. In Hitesh Bhatnagar [Hitesh Bhatnagar v. Deepa Bhatnagar, (2011) 5 SCC 234 : (2011) 2 SCC (Civ) 701] , it is noted by this Court that courts can dissolve a marriage as irretrievably broken down only when it is impossible to save the marriage and all efforts are made in that regard and when the Court is convinced beyond any doubt that there is actually no chance of the marriage surviving and it is broken beyond repair.*

5.2. *In Naveen Kohli [Naveen Kohli v. Neelu Kohli, (2006) 4 SCC 558] , a three-Judge Bench of this Court has observed as under: (SCC pp. 579-80 & 582, paras 74, 85 & 86)*

"74. ... once the marriage has broken down beyond repair, it would be

unrealistic for the law not to take notice of that fact, and it would be harmful to society and injurious to the interests of the parties. Where there has been a long period of continuous separation, it may fairly be surmised that the matrimonial bond is beyond repair. The marriage becomes a fiction, though supported by a legal tie. By refusing to sever that tie the law in such cases does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties.

* * *

85. Undoubtedly, it is the obligation of the court and all concerned that the marriage status should, as far as possible, as long as possible and whenever possible, be maintained, but when the marriage is totally dead, in that event, nothing is gained by trying to keep the parties tied forever to a marriage which in fact has ceased to exist. ...

86. In view of the fact that the parties have been living separately for more than 10 years and a very large number of aforementioned criminal and civil proceedings have been initiated by the respondent against the appellant and some proceedings have been initiated by the appellant against the respondent, the matrimonial bond between the parties is beyond repair. A marriage between the parties is only in name. The marriage has been wrecked beyond the hope of salvage, public interest and interest of all concerned lies in the recognition of the fact and to declare defunct de jure what is already defunct de facto."

54. Thus, the legal position which emerges from the analysis of the entire case law on the subject referred to hereinabove is that it is the duty of the Court to consider and examine while deciding an issue of divorce whether the marriage between the parties has broken down irretrievably or it is dead emotionally and practically and there is no chance of its being retrieved before compelling the parties to live with each other.

55. From the facts of the case, it can be gathered that the relations between the parties are sufficiently spoiled and marital knot between them has completely shattered, it is in view of the allegations made by the husband against the wife and vice versa, as per her own admission, is living separately since the year 1999 i.e. wife is living separately for the last two decades. In the facts of the case, in our view, no fruitful purpose would be served in maintaining the matrimonial ties between the parties. For all the practical purposes, the marriage between the parties is dead. In the facts of the case, we are of the view that the marriage between the appellant and respondent-Smt. Reeta Singh has broken down irretrievably, leaving the Court with no option but to grant the decree of divorce.

56. For the foregoing reasons, the appeal is ***allowed.*** The order dated 05.09.2012, passed by the Family Court, Faizabad in Suit No. 105 of 2000 (Shailendra Kumar Singh v. Smt. Reeta Singh), is ***set-aside.*** The decree of divorce is hereby ***granted.*** No order as to costs.

(2019)12 ILR A1071

APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 23.10.2019

BEFORE
THE HON'BLE RAJAN ROY, J.

Second Appeal Defective No. 268 of 2018

Dhiresh Pandey {R.E.R.A.} ...Appellant
Versus
Real Estate Appellate Tribunal U.P. Lucknow & Ors. ...Respondents

Counsel for the Appellant:
Santosh Kumar Shukla

Counsel for the Respondents:

A. Civil Law - Real Estate (Regulation and Development) Act, 2016 Section 44(2) - read with Uttar Pradesh Real Estate (Regulation and Development) Rules 2016, R. 25(2)(a) - Appeal - *"a copy of the direction or order or decision made by the authority'* – Annexing *'Attested copy'* must & not E copy /down loaded copy - on a conjoint reading of S. 44 (2) with R. 25(2) & Form (L) it is clear that while filing an appeal, before Appellate Tribunal, against the order of the Regulatory Authority, it should be accompanied by an *'attested true copy'* of the order, passed by such authority which is the subject matter of the appeal (Para 19)

B. Civil Law - Real Estate (Regulation and Development) Act, 2016 - calculation of the period of limitation - *"is received by the ..... aggrieved person"* - Communication of Order - S. 44 (2) provides for calculation of the period of limitation from the date the order or decision of the Regulatory Authority or Adjudicating Officer is received by the aggrieved person - but no a provision for communication of the order of the Regulatory Authority / Adjudicating Officer - legal position stated by court - As soon as the disposal of the proceedings is communicated through S.M.S. or e-mail, the person aggrieved who proposes to file an appeal should move an application for obtaining an attested true copy of the order and thereafter file an appeal accordingly.

C. Condonation of delay - Delay of 3 days - if the appeal is filed with some delay, the appellant does not have to explain each and every day's delay during the period of limitation - Required to *explain the delay generally, especially from the date of expiry of limitation* - Tribunal erred in not condoning the delay of merely three days in filing the Appeal when the Appellant had shown sufficient cause indicating that the Appeal was within time

D. Word & Meaning - *Attested true copy* vis-à-vis E copy - Meaning - copy of the order uploaded by the Regulatory Authority bearing his digital signatures cannot be said to be an attested copy of that order, as, the attestation is a subsequent act which is normally made by another officer or by some officer, by which he verifies that the copy being provided to the applicant is a true copy of the order originally passed on the file

Second Appeal allowed. (E-5)

List of cases cited: -

1. Officer on Special Duty (Land Acquisition) Vs Shah Manilal Chandulal & ors., (996) 9 SCC 414

2. Benga Behra Vs Briji Kishore Nanda, 2007 (9) SCC 728

3. D.R. Ratnamoorti Vs Ramappa, 2011 (1) SCC 158,

4. Bipromasz Bipron Trading Ltd. Vs Bharat Electronics Ltd. 2012 (6) SCC 384

5. Collector, Land Acquisition, Anantnag & anr Vs Mst. Katiji & ors. 1987 (2) SCC 107

(Delivered by Hon'ble Rajan Roy,J.)

1. This is an appeal under section 58 of the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred as 'Act 2016') challenging the order dated 13.7.2018. This Court vide order dated 27.9.2018 has found the appeal to be within limitation.

2. Sri Shailendra Singh Chauhan, Advocate has put in appearance on behalf of respondent no.2. Sri Inder Preet Singh Chadha, Advocate has put in appearance on behalf of opposite party no.3.

3. This appeal was admitted on the following substantial questions of law vide order dated 26.3.2019:

"1. Whether the Tribunal below has not erred in interpreting section 44(2) of the Real Estate (Regulation and Development) Act 2016 so as to come to the conclusion that while filing an appeal certified copy or attested copy of the impugned order is not required to be filed alongwith the appeal before the Tribunal ?

2. Whether the interpretation given by the tribunal to Section 44(2) of the Act would not render Rule 25 of the Rules and form L appended thereto as redundant and Otiose ?

3. Whether, the Tribunal has not erred in not condoning the delay of merely three days in filing the Appeal when the Appellant had shown sufficient cause indicating that the Appeal was within time."

4. The facts of the case in brief are that an application was filed by the appellant before the Real Estate Regulatory Authority (R.E.R.A.), which was dismissed on 15.1.2018. On 18.1.2018 the appellant received an S.M.S. that the application of the appellant had been disposed off on 15.1.2018. It is said that the said order was uploaded on the website of R.E.R.A. on 18.1.2018. According to the appellant he went to file the appeal against the aforesaid order dated 15.1.2018 passed by R.E.R.A., on 17.3.2018, which was a Saturday, but, as the office of the Appellate Authority was closed on the said date, the counsel returned back. On 19.3.2018 when the appellant's counsel went to file the appeal, he was informed that an attested copy of the order dated 15.1.2018 was required necessarily and the appeal could not be accepted without the said order. In view of this an attested copy of the order dated 15.1.2018 was applied on 19.3.2018 itself and on its receipt the appeal was filed before the Real Estate Appellate Tribunal on 20.3.2018 under section 44 of the Act 2016. As the appeal was delayed by three days as calculated with effect from 18.1.2018, it was accompanied by an application for condonation of delay there being a provision for the same under section 44 itself. In the said affidavit delay was explained as aforesaid and in addition to it it was also stated in paragraph 7 that the appellant had to visit daily regularly in connection with his business and was pursuing the matter from there, as the appeal had to be filed at Lucknow. 17th of March 2018 being a Saturday appeal could not be filed as the office of the Appellate Tribunal was closed. When the appellant's counsel went to file the appeal on 19.3.2018, he was informed that an attested copy of the order was required, which was applied on the same day and was obtained on 20.3.2018 and appeal was filed accordingly on the said date. It was stated that the delay in filing the appeal is *bona fide*, unintentional and beyond the appellant's control and that the appeal be entertained for adjudication on merits, otherwise the applicant-appellant would suffer irreparable injury.

5. R.E.R.A. Appellate Tribunal in its wisdom dismissed the application of the appellant for condoning the delay of three days in filing the appeal.

6. Contention of the learned counsel for the appellant is that such a hypertechnical approach by the Appellate Tribunal is contrary to the grain of precedents of Supreme Court and this Court in a catena of decisions. The approach of the Appellate Tribunal should have been to advance the cause of substantial justice rather than to defeat it on mere delay, especially when the delay was only of three days and it had been appropriately explained. Instead of doing so the Appellate Tribunal undertook a laborious exercise making every effort to justify the dismissal of the application for condonation of delay by passing an order running into eleven pages with a fault finding attitude. Learned counsel submitted that this is not the first case where the Appellate Tribunal, as existing at that time, passed such order.

7. This Court in a number of decisions disapproved similar orders passed by the then Chairman of the Real Estate Appellate Tribunal, Luckow, Sri Atul Kumar Gupta, yet, the officer who was a senior officer of the Higher Judicial Service continued to pass such orders and to justify the same by giving the same reasoning again and again. In this regard he has referred to a decision dated 7.7.2019 rendered in R.E.R.A. Second Appeal No.250 of 2018.

8. His contention is that this Court should by its judgment guide the Appellate Tribunal so that such flaws are not committed in future and the ends of substantial justice are not compromised as also precious time of the Appellate Tribunal, the lawyers involved and this Court, as also the finances involved, are not wasted.

9. Sri Chadha, learned counsel for the opposite party no.3 submitted that he would not say much, but the delay should have been explained by the appellant.

10. On a perusal of the judgment passed by the Appellate Tribunal this Court finds that the Appellate Tribunal has laboured very hard to dismiss the application for condonation of delay of merely three days and has consequently dismissed the appeal itself. The reasons have also been given in great detail. It has been stated in the impugned judgment, firstly, that the appeal is delayed by three days in terms of section 44(2) of the Act 2016. The judgment having been rendered by R.E.R.A. Authority on 15.1.2018 appeal should have been filed by 16th March, 2018 when the limitation of 60 days expired.

11. The Appellate Tribunal disbelieved the contention of the appellant that on 18.1.2018 he had received an S.M.S from R.E.R.A. Authority about disposal of the complaint/application by observing that the S.M.S. was not regarding pronouncement of the order, but it only conveyed that the complaint was disposed of on 18.1.2018. The Appellate Tribunal did not accept the S.M.S. as a message regarding pronouncement of the order dated 15.1.2019, whatever it meant by it.

12. The Tribunal found that the appellant was present before the Regulatory Authority on 15.1.2018 and thus was aware about the impugned order passed on the said date. It also repelled the contention that the attested copy of the order dated 15.1.2018 was received only on 20.3.2018, in the circumstances already noticed hereinabove, on the ground that section 44(2) does not mention the words "certified copy or attested copy" but uses the words "a copy of the direction or order or decision made by the authority or the adjudicating

officer." meaning thereby, the Tribunal was of the view that the order dated 15.1.2018 having been uploaded on 18.01.2018, a downloaded copy of the said order could have been annexed and the appeal could have been disposed off accordingly which would have been in accordance with Rules as there was no requirement of annexing a certified or attested copy of such an order of the Regularity Authority.

13. The Tribunal has further observed that the date of communication of the alleged information about disposal of case or about impugned order or date of uploading of the impugned order has no concern with the commencement of the period of limitation of sixty days as provided under section 44(2) of the Act, meaning thereby, according to him, limitation of sixty days is to be calculated with effect from the date the order is pronounced i.e. 15.01.2018. The Tribunal has further gone on to state that sending of certain e-mail or uploading of order has neither been provided in the provisions of the Act nor under the U.P. Real Estate (Regulation and Development) Rules 2016. It has further observed that the applicant/appellant has not mentioned anything in para of memo of appeal as well as the application for condonation of delay received the official copy of the impugned order which implied that he had received the official copy of the impugned order, without specifying as to when, according to the Tribunal, the appellant/applicant had received the said order. The Tribunal thereafter gone on to observe that the date of receipt of official copy of the order has also not been mentioned which also implied that he had received the official copy of the impugned order on 15.1.2018 itself without the Tribunal mentioning as to the basis of this recital/finding. Thereafter the Tribunal has observed that if the appellant/applicant would have mentioned about non-receipt of official copy of the order, in that eventuality, the appeal of the applicant/appellant would have been premature. He has, thus, concluded that the computation of commencement of the period of sixty days under the Act in the said case shall be from 15.1.2018 i.e. the date on which applicant/appellant received the official copy of the impugned order without mentioning as to on what basis this conclusion has been drawn. No evidence has been mentioned in the judgment of the Tribunal to show that the judgment dated 15.1.2018 was uploaded on the website of the Regulatory Authority on 15.1.2018 itself. Had it been so, even then there would have been some reasonable basis for the recitals contained in the impugned order. Learned counsel for the appellant on the other hand categorically stated that it was uploaded on 18.1.2018 and this is mentioned on the requisite upload itself which can be verified from the official website.

14. The Tribunal has disbelieved the averments made in para 6 of the application for condonation of delay regarding the Tribunal being vacant as also the assertions about regular visits to Delhi from Lucknow on account of professional commitments not being a justifiable ground for not filing the appeal within the limitation of sixty days as prescribed. It has also observed that the attested copy of the order should also have been obtained within the period of sixty days, which was not done, keeping in view the mandatory requirement of enclosing such a copy as per Rule 25(2)(a) of the Rules 2016.

15. The circumstance involving the filing of an application for rectification under section 39 of the Act 2016 before the Regulatory Authority by the appellant was also brushed aside as not being a hurdle in filing appeal within the limitation prescribed. The Tribunal declined to grant benefit of the time spent by the appellant in obtaining the attested copy on the ground that the provisions of Limitation Act 1963 are not applicable with reference to the decision of the Supreme Court of India in the case of *Officer on Special Duty (Land Acquisition) v. Shah Manilal Chandulal & ors., (996) 9 SCC 414.* Thus, the cause shown by the appellant was not found to be satisfactory and the application for condonation of delay of three days was dismissed on the ground that conduct of the appellant was evidence of *prima facie* negligence on his part.

16. Learned Tribunal thereafter referred to various decisions of the Supreme Court in support of conclusions drawn by him and dismissed the application for condonation of delay as also the appeal as a consequence thereof.

17. The appellant claims to be a 'Consumer/Allottee' within the meaning of the Act 2016 and the Rules made thereunder. The Act itself has been enacted to establish the Real Estate Regulatory Authority for regulation and promotion of the Real Estate Sector and to ensure sale of plot, apartment or building, as the case may be, for sale of Real Estate project, in an efficient and transparent manner and to protect the interest of Consumer/Allottees in the Real Estate Sector and to establish adjudicating mechanism for speedy dispute redressal and also to establish an Appellate Tribunal to hear the appeals from decisions, directions of the Real Estate Regulatory Authority and the Adjudicating Officer and for matter connected therewith or incidental thereto as is evident from long title/preamble of the Act 2016.

18. Every authority including the Appellate Tribunal under the Act 2016 should function to advance the object of the Act 2016, and not to frustrate it. Coming to the substantial questions of law on which the appeal has been admitted, as regards the first question, an appeal against the order of the Regulatory Authority lies before the Appellate Tribunal under section 44 of the Act 2016. As per sub-section (2) of section 44 every appeal made under sub-section (1) thereof shall be preferred within a period of 60 days **"from the date on which a copy of the direction or order or decision made by the Authority or the Adjudicating Officer is received by the appropriate government or the competent authority or the aggrieved person"** and it shall be in such form and accompanied by such fee as may be prescribed; provided that the Appellate Tribunal may entertain an appeal after the expiry of sixty days if it is satisfied that there was sufficient cause for not filing it within that period. Sub-section (2) of section 44 thus prescribes a limitation for filing such appeal which is sixty days. This period of limitation is to be calculated from the date on which a copy of the direction or order or decision of the concerned authority/officer is received. The provision further provides that the appeal shall be in such form and accompanied by such fee as may be prescribed.

19. Now as regards the form and the fee prescribed we need to refer to the Uttar Pradesh Real Estate (Regulation and Development) Rules 2016 which have

been made under section 84 of the Act 2016 and have come into effect from 27th October 2016 i.e. the date on which it was notified in the Gazettee. The provision with regard to filing of appeal before the Appellate Tribunal under section 44 is contained in Rule 25. Sub-Rule (2) of Rule 25 provides that every appeal shall be filed in Form (L) alongwith **"an attested true copy of the order against which the appeal is filed"** Form (L) is given at the end of Rules 2016 and according to Serial No. 10 of the Format under the heading "List of enclosures" one of the enclosures mentioned at (i) is **"an attested true copy of the order against which the appeal is filed".** Thus on a conjoint reading of sub-section (2) of section 44 with sub-Rule (2) of Rule 25 and Form (L) what comes out is that the appeal against the order of the Regulatory Authority should be accompanied by an attested true copy of the order passed by such authority which is the subject matter of the appeal, therefore, on a harmonious reading of the aforesaid provisions, especially in view of the words occurring in sub-section (2) of section 44 "it shall be in such format" as may be prescribed. The provisions contained in Rule 25 and Form (L) have to be read into the provisions contained in sub-section (2) of section 44, as part of it, because the Rules are in furtherance of the provisions contained in section 44.

20. In this view of the matter, for the Appellate Tribunal to have observed in the initial part of its discussion on the application for condonation of delay that there is no such requirement of filing an attested or certified copy of the order under challenge in appeal, is based on an absolute misreading and misunderstanding of the provisions of the Act 2016 and the Rules made thereunder. The copy of the order uploaded by the Regulatory Authority bearing his digital signatures cannot be said to be an attested copy of that order, as, the attestation is a subsequent act which is normally made by another officer or by some officer, by which he verifies that the copy being provided to the applicant is a true copy of the order originally passed on the file. Even in the High Court when we pass orders in judicial proceedings, they are uploaded by our Private Secretaries, but if a litigant or any other person downloads a copy of said order which is not attested or certified, then it would at best be an e-copy of said order, whereas there are separate Rules in the High Court for providing attested/certified copies of such orders which are on the original records of the case and the attestation/certification is made by a separate section headed by an Officer Incharge who does the attestation or certification. The word 'Attest' occurring in sub-Rule (2) of the Rule 25 and Form (L), has been defined in Black's Law Dictionary (9th Edition) to mean (1) to bear witness, testify (2) to affirm to be true or genuine, to authenticate by signing as a witness. When this Court peruses the attested copy applied for by the appellant on 19.3.2019 and which was provided to him by the office of the Regulatory Authority, it finds that the order passed by the Authority has been duly attested by the Additional Statistical Officer, U.P. Real Estate Regulatory Authority Lucknow with his signature and date alongwith seal embossed thereon It is such attested copy of an order that has to accompany the appeal to be filed by the appellant under section 44, thus, the finding of the Appellate Tribunal to the contrary is absolutely contrary to the requirement of

law and is perverse. Filing of such an attested copy of the order is the requirement of the Act 2016 read with the Rules. Interestingly in the latter part of the discussion the Appellate Tribunal itself has referred to Rule 25(2)(a) and Form (L) as being a mandatory requirement where it has held that this attested true copy could have been obtained by the appellant within sixty days of limitation prescribed, but was not done, yet, in the earlier part of the discussion a contrary view has been expressed which is not tenable.

21. The word 'Attest' came up for consideration before the Supreme Court in the case of *Benga Behra v. Briji Kishore Nanda, 2007 (9) SCC 728* wherein it was observed - "to attest is to bear witness to a fact". This was in the context of the provisions of the Transfer of Property Act 1882 and the Registration Act 1908. The word 'Attest' also came up for consideration by the Supreme Court in *D.R. Ratnamoorti v. Ramappa, 2011 (1) SCC 158*, wherein it was observed that attestation testifies/certifies the genuineness of the document. Execution is different from attestation, one following the other, attestation after execution.

22. Reference may be made in this regard to the decision of the Supreme Court reported in *2012 (6) SCC 384, Bipromasz Bipron Trading Ltd. V. Bharat Electronics Ltd.,* wherein the distinction between dispatch and delivery was considered in the context of section 3(2) of the Arbitration and Conciliation Act 1996 which provided that communication is deemed to have been received on the day it is so delivered. The Court after considering the said provision and the law with regard to the time of effectiveness of an order observed in the context of the said case that an order passed by an Authority cannot be said to take effect unless the same is communicated to the party affected. The Court finds that in the Act and the Rules there is an anomaly in the sense that sub-section (2) of section 44 provides for calculation of the period of limitation from the date the order or decision of the Regulatory Authority or Adjudicating Officer is received, *inter alia*, by the aggrieved person, but there is no a provision for communication of the order of the Regulatory Authority or the Adjudicating Officer in this regard, though there is such provision in the context of the orders and decisions by the Appellate Tribunal under section 44. This anomaly needs to be removed by making specific provision for communication, only then, sub-section (2) of section 44 would be applied meaningfully and effectively. Till then, the legal position is as already noticed hereinabove, meaning thereby, as soon as the disposal of the proceedings is communicated through S.M.S. or e-mail, as the case may be, the person aggrieved who proposes to file an appeal should move an application for obtaining an attested true copy of the order and thereafter file an appeal accordingly. Question No.1 is answered accordingly.

23. As regards Question No.2, in view of the discussion already made in the context of Question No.1 if the interpretation given by the Tribunal to section 44(2) of the Act 2016 regarding non-requirement of an attested true copy of the order, which is the subject matter of challenge in appeal, accompanying the appeal, then certainly it would be in conflict with Rule 25 and Form (L) referred therein and would render the

latter provisions otios, therefore, the reading and understanding of the provisions of law involved as evinced in the Appellate Tribunal's order is unacceptable and disapproved. Question No.2 is answered, accordingly.

24. As regards Question No.3, this Court is compelled to say that the amount of effort made by the Appellate Tribunal in rejecting the application for condonation of delay of merely three days was quite unnecessary and uncalled for.

25. On a perusal of the affidavit in support of the application for condonation of delay, this Court finds plausible and satisfactory explanation for the same. No prudent person in the facts of the present case could have dismissed the application for condonation of delay of three days. It is well settled that if the appeal is filed with some delay, the appellant does not have to explain each and every day's delay during the period of limitation. He is required to explain the delay generally, especially from the date of expiry of limitation. Reference may be made in this regard to the decision of the Supreme Court in the case of *Collector, Land Acquisition, Anantnag & anr. v. Mst. Katiji & ors. reported in 1987 (2) SCC 107*. A hyper technical approach in a matter involving a delay of barely three days was quite unwarranted. Reference to catena of decisions by the Appellate Tribunal without appreciating the factual matrix of the case and the explanation offered has merely burdened its judgment. The explanation given by the appellant in the affidavit constituted a sufficient cause, but the Tribunal failed to appreciate the same in the correct perspective. It did not adopt a judicious approach in the matter with the result that the ends of substantial justice have been defeated and technicalities have prevailed without any justification. In the affidavit it was stated that on account of engagement with his professional duties the appellant could not prefer the appeal earlier; his counsel went to file the appeal on 17.3.2018 which was within the period of limitation. Even if the S.M.S. sent to the appellant on 18.1.2018 intimating him about the disposal of his application on 15.1.2018 was communicated to him, as according to sub-section (2) of section 44 the limitation of sixty days is to be calculated from the date on which a copy of the direction or order or decision made by the concerned authority **"is received by the ..... aggrieved person"**, therefore, this provision pre-supposes a communication of the order by the Regulatory Authority to the aggrieved person.

26. It appears that though that there is no provision in the Rules, but, there is a practise in the office of the Regulatory Authority of communicating the disposal of the application/complaint to the concerned parties through S.M.S. or e-mail. Now this S.M.S. or e-mail does not contain the attested true copy of the order, but as noticed by the Appellate Tribunal itself it is only a communication about disposal of the application/complaint. Even where e-mails are sent, a copy of the order uploaded on the website bearing the digital signature of the Authority which has passed the order, is sent, which, as already noticed hereinabove, is not an attested copy, as, the attestation has to be subsequent to the act of signing of the said order by the Adjudicating Officer or the Regulatory Officer, as the case may be, while passing the order. It is only on receipt of such communication that an aggrieved person would apply before the

concerned authority for obtaining an attested true copy of the order in respect of which he or she proposes to file an appeal and on receipt of such an order the appeal can be filed.

27. It is true that once the communication had been received by the appellant about the disposal of the application/complaint and he in fact was present as per his own admission on 15.1.2018 when the Regulatory Authority, then he could have applied for the attested true copy of the order within the period of sixty days. In fact he should have as he is presumed to know the requirement of limitation for filing an appeal, but as already stated hereinabove, in the facts of the present case, even if he did not do so and applied for such a copy a day thereafter i.e. on 19.3.2019 which was provided to him on 20th March, 2019, then considering the explanation offered in the affidavit in support of the application for condonation of delay, the cause shown was sufficient, especially considering the delay which was only of three days. The cause of substantial justice should have prevailed. As observed by the Supreme Court the Courts do not put a premium on a decision by default, but on merits, therefore, in the facts of the present case the Appellate Tribunal erred in not condoning the delay in filing the appeal, thereby causing grave prejudice to his rights and materially affecting the same. Question No.3 is answered accordingly.

28. The learned Tribunal also adopted a hyper technical approach in declining to grant the benefit of the time taken by the Regulatory Authority in processing the application of the appellant for grant of attested true copy of the order of the Regulatory Authority by deducting it for the purposes of calculation of limitation on the ground that the provisions of the Act 1963 do not apply. Even if they did not apply, such period should normally be excluded on first principle, as after filing such an application the God is with the concerned Court or Tribunal or Authority and it is not in the hands of the applicant to ensure that the attested copy is provided at the earliest.

29. It would be better if the Rule Making Authority makes a provision for sending an attested true copy of the order passed by the Regulatory Authority/Adjudicating Officer under the provisions of the Act 2016. In view of the terminology used in sub-section (2) of section 44 read with Rule 25(2) and Form L for filing an appeal as in view of the analogy used in sub-section (2) of section 44. There appears to be an implicit application on the said authority/officer to communicate. Orders and the limitation is to b calculated from the receipt of such attested true copy of the order. Although in the facts of this case it has been held that the appellant should have applied attested true copy from the date of communication received through SMS but it would be better if the attested true copy of the order itself is communicated to the concerned parties in the proceedings as then the receipt of the order for the purpose of Sub-Section 2 of Section 44 would not be at the sweet will of the aggrieved person. This anomaly needs to be ironed out by the Rule Making Authority.

30. In view of the above discussion, the impugned judgment of the Appellate Tribunal dated 13.7.2018 passed in Miscellaneous Case No.9 of 2018,

Dhiresh Pandey v. M/s Supertech Ltd., is hereby **quashed.** The appeal under section 58 of the Act 2016 is accordingly **allowed**. The delay in filing the first appeal under section 44 of the Act 2016 is hereby condoned. The Miscellaneous Case No.9 of 2018, Dhiresh Pandey v. M/s Supertech Ltd., is **allowed**. The First Appeal shall now be processed by the Appellate Tribunal accordingly and it shall be decided in accordance with law.

31. The Senior Registrar of this Court shall send a copy of this judgment to the Chairman, Uttar Pradesh Real Estate Appeal Tribunal, Lucknow for necessary action.

(2019)12 ILR A1081

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.11.2019

BEFORE
THE HON'BLE PRADEEP KUMAR SINGH BAGHEL, J.

Recall Application No. 107325 of 2017 in
Second Appeal No. 313 of 2017

Ashok Kumar Sharma ...Appellant
Versus
Smt. Beena Sharma & Ors....Respondents

Counsel for the Appellant:
Sri Raj Kumar Kesari, Sri Raj Kumar

Counsel for the Respondents:
Sri Ashish Kumar Singh

Civil Law - Civil Procedure Code (5 of 1908) - Order 43, Rule 1(u), Rule 23 A - Appeal against order of Remand - Tenability - Second Appeal is not maintainable against the remand order.

Second Appeal dismissed. (E-5)

List of cases cited: -

1. Jegannathan Vs Raju Sigamani and another (2012) 5 SCC 540

2. Narayanan Vs Kumaran and others (2004) 4 SCC 26

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

1. This recall application has been moved by the defendant-respondent no. 1 for recall of the order dated 07th March, 2017, whereby this Court has admitted the second appeal, issued notices to the respondents and granted interim order. The recall application has been filed on the ground that the second appeal is not maintainable against a remand order in view of the provisions of Order XLIII Rule 1 (u) of the Code of Civil Procedure, 19081.

2. The plaintiff-appellant had instituted a civil suit in the Court of the Civil Judge, Senior Division, Hapur, which was registered as O.S. No. 66 of 2008, Ashok Kumar Sharma v. Smt. Rameshwari and others, for permanent injunction restraining the defendants from interfering in his possession over the suit property and to declare the sale-deed dated 10th December, 2007 as void and non est. The defendants contested the matter and the plaintiff's suit was decreed vide judgment and decree dated 09th March, 2016. Aggrieved by the said judgment and decree of the trial Court, the defendant-respondent no. 1 preferred a civil appeal, being Civil Appeal No. 29 of 2016, Smt. Beena Sharma v. Ashok Sharma and others, which was allowed by the lower appellate Court vide its judgment and decree dated 02nd February, 2017 and the judgment and

decree dated 09th March, 2016 of the trial Court was set aside and the matter was remanded back to the trial Court to decide the matter afresh in the light of the observations made by the lower appellate Court.

3. Against the said remand order and decree dated 02nd February, 2017 and 13th February, 2017 respectively passed by the District Judge, Hapur in Civil Appeal No. 29 of 2016, the present second appeal has been filed by the plaintiff-appellant.

4. In the second appeal, vide order dated 07th March, 2017 the appeal has been admitted, notices have been issued to the defendants-respondents and the parties have been directed to maintain status quo. Against this order dated 07th March, 2017 the present recall application has been filed.

5. I have heard learned counsel for the applicant-respondent no. 1 and learned counsel for the appellant.

6. Learned counsel for the applicant-respondent no. 1 has urged that in view of the provisions of Order XLIII Rule 1(u) CPC the second appeal is not maintainable against the remand order. He has placed reliance on a judgment of the Supreme Court in **Jegannathan v. Raju Sigamani and another**2.

7. Learned counsel for the appellant-plaintiff has placed reliance on a judgment of the Supreme Court in the case of **Narayanan v. Kumaran and others**3 in support of his submission that the second appeal is maintainable.

8. I have considered the rival submissions of learned counsel for the parties and perused the material on the record.

9. Concededly, the second appeal has been filed against a remand order. The operative portion of the judgment and order of the lower appellate Court dated 02nd February, 2017 reads as under:

"तदनुसार यह अपील स्वीकार की जाती है। अधीनस्थ न्यायालय का निर्णय व डिक्री दिनांकितः 09.03.2016 निरस्त की जाती है। अधीनस्थ न्यायालय को पत्रावली इस निर्देश के साथ वापिस भेजी जाती है कि वह ऊपर किये गये विवेचनों व संदर्भित विधि व सुस्थापित विधि के मार्गदर्शक सिद्धांतों के संदर्भ में पक्षों को साक्ष्य व सुनवाई का अवसर देकर पुनः मामले में निर्णय व निष्कर्ष यथा शीघ्र 4 माह में देगी।"

10. I have perused the initial report of the Stamp Reporter, which does not raise any objection regarding maintainability of the appeal. A fresh report was called for from the Stamp Reporter, who made the following report on 11th March, 2019:

"In compliance with Hon'ble Court's order dt. 06.3.19, S.R. has to submit that on going through the appellate order, it transpires that the instant appeal has been filed against the remand order. Hence, the second appeal is not maintainable.

Inconvenience caused to the Hon'ble Court is deeply regretted."

11. Order XLIII Rule 1(u) CPC reads as under:

***"1. Appeals from order.**--An appeal shall lie from the following orders under the provisions of Section 104, namely:--*

*** *** ***

(u) an order under Rule 23 [or Rule 23-A] of Order XLI remanding a case, where an appeal would lie from the decree of the Appellate Court;"

12. A perusal of the said provision clearly indicates that an appeal does not lie against the remand order.

13. The same issue fell for consideration before the Supreme Court in the case of **Jegannathan (supra)**, wherein the Supreme Court considering the provisions of Order XLI Rule 23, Order XLI Rule 23-A and Order XLI Rule 25 CPC has held as under:

*"**11.** The High Court relied upon a decision of this Court in Narayanan v. Kumaran4 in holding that civil miscellaneous appeal from the order of remand was not maintainable. The High Court was clearly in error. What has been held by this Court in Narayanan is that an appeal under Order 43 Rule 1 Clause (u) should be heard only on the ground enumerated in Section 100 of the Code. In other words, the constraints of Section 100 continue to be attached to an appeal under Order 43 Rule 1(u). The appeal under Order 43 Rule 1(u) can only be heard on the grounds a second appeal is heard under Section 100.*

***12.** There is a difference between maintainability of an appeal and the scope of hearing of an appeal. The High Court failed to keep in view this distinction and wrongly applied the case of Narayanan in holding that miscellaneous appeal preferred by the appellant was not maintainable."*

14. Learned counsel for the appellant has relied on the judgment of **Narayanan (supra).**

15. Pertinently, the judgment of **Narayanan (supra)** has been distinguished by the Supreme Court in **Jegannathan (supra)** in paragraph-11 & 12 of the judgment, which has been extracted above.

16. In view of the said principle, it is evident that against a remand order the present second appeal is not maintainable. Accordingly, the recall application is allowed. The order dated 07th March, 2017 is recalled.

17. Resultantly, the second appeal is dismissed as not maintainable.

18. No order as to costs.

(2019)12 ILR A1083

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.10.2019

BEFORE
THE HON'BLE SURYA PRAKASH KESARWANI, J.

Writ-A No. 16055 of 2019

Smt. Geeta Devi & Anr. ...Petitioners
Versus
Additional District Judge/Special Judge (Prevention of Corruption Act), Gorakhpur & Ors. ...Respondents

Counsel for the Petitioners:
Sri H.N. Mishra, Sri Abhishek Misra

Counsel for the Respondents:

A. Civil Law - Code of Civil Procedure ,1908 - Order XLI Rule 27 - Production of additional evidence in Appellate court - Application 30 C - filed by the tenant for taking as additional evidence - rejected -

An application under Order XLI Rule 27 C.P.C. must contain necessary averment as to why additional evidence is necessary to decide the real controversy involved in the Appeal or revision - additional evidence cannot be permitted to be adduced so as to fill in the lacunae or to patch up the weak points in the case. (Para 2 & 24)

B. Civil Law - Code of Civil Procedure, 1908 - Order XLI Rule 27 - exception – Appellate court to take additional evidence in exceptional circumstances - **The inadvertence of the party or his inability to understand the legal issues involved or the wrong advice of a pleader or the negligence of a pleader or that the party did not realise the importance of a document, does not constitute a "substantial cause" within the meaning of this rule.** (Para 24)

The general principle is that the Appellate court should not travel outside the record of the lower court and cannot take any evidence in appeal. However , as an exception ,order XLI rule 27 CPC enables the Appellate Court to take additional evidence in exceptional circumstances if the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted or the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause. (Para 24)

Held: **-** It is not the business of the Appellate Court to supplement the evidence adduced by one party or the other in the lower Court. In the absence of satisfactory reasons for non-production of the evidence in the trial court, additional evidence should not be permitted in appeal as a party guilty of remissness in the lower court is not entitled to the indulgence of being allowed to give further evidence. A party who had ample opportunity to produce certain evidence in the lower court but failed to do so or elected not to do so, cannot have it admitted in appeal. (Para 24)

Writ Petition dismissed. (E-7)

List of cases cited: -

1.Jaipur Development Authority Vs. Kailashwati Devi (Smt.) (1997) 7 SCC 297,

2.Union of India Vs. K.V. Lakshman and others (2016) 13 SCC 124,

3.Civil Appeal No.4628 of 2019 Jiten K. Ajmera & Anr. Vs. M/s. Tejas Co-operative Housing Society.

4.Malyalam Plantations Ltd. vs. State of Kerla, (2010) 13 SCC 487, (Para-17)

5.Union Of India vs Ibrahim Uddin, (2010) 8 SCC 148, (Paras-36 to 41)

6.K. Venkataramiah v. A. Seetharama Reddy & Ors., AIR 1963 SC 1526;

7.The Municipal Corporation of Greater Bombay v. Lala Pancham & Ors., AIR 1965 SC 1008;

8.Soonda Ram & Anr. v. Rameshwaralal & Anr., (1975) 3 SCC 698: AIR 1975 SC 479;

9.Syed Abdul Khader v. Rami Reddy & Ors., (1979) 2 SCC 601 : AIR 1979 SC 553,

10.Haji Mohammed Ishaq Wd. S. K. Mohammed & Ors. v. Mohamed Iqbal and Mohamed Ali and Co., AIR 1978 SC 798,

11.State of U.P. v. Manbodhan Lal Srivastava, AIR 1957 SC 912;

12.S. Rajagopal v. C.M. Armugam & Ors., AIR 1969 SC 101

13.Shri Kishore and another vs. Roop Kishore, 2006 (62) ALR 414,

14.Natha Singh v. The Financial Commissioner AIR 1976 SC 1053

15.Shiv Karan and others vs. Special Judge, E.C. Act and another, 2011 (1) JCLR 864 (All) (LB),

16.Satish Kumar Gupta etc. vs. State of Haryana and others, 2017 (2) JCLR 36 (SC).

17.Smt. Ganga Devi and another vs. Bhagwan Das and others, 2014 (106) ALR 295,

18.MATTERS UNDER ARTICLE 227 No. - 4904 of 2017 Prahlad And 7 Others Vs. Chandra Bhan And 6 Others

19.Natha Singh v. The Financial Commissioner AIR 1976 SC 1053

20.Shri Kishore and another vs. Roop Kishore, 2006 (62) ALR 414

(Delivered by Hon'ble Surya Prakash Kesarwani,J.)

1. Heard Sri H.N. Misra, learned Senior Advocate, assisted by Sri Abhishek Misra, learned counsel for the defendant-tenant-petitioner.

2. This writ petition has been filed praying to quash the order dated 30.09.2019 in Rent Revision No.36 of 2016 (Krishna Devi Vs. Rajendra Kumar), passed by Additional District Judge/Special Judge (PC Act), Court No.2, Gorakhpur, whereby the application 30 C under Order XLI Rule 27 C.P.C. filed by the tenant-petitioner for taking as additional evidence paper No.49 C and 50 C, has been rejected.

3. Briefly stated facts of the present case are that the disputed house was purchased by Smt. Premlata Devi, W/o Sri Krishn Mohan by a registered sale deed dated 25.10.1969. She raised new construction after getting the map passed on 25.05.1970 from the Nagar Palika Gorakhpur. A portion of the said house was let out for residential purpose by Smt. Premlata Devi to the original tenant Bansi Lal under a rent agreement dated 31.03.1971. It appears that subsequently, the original tenant made alteration in the tenanted portion and converted it for commercial use and started running a shop. After the death of the original landlady and her husband Krishn Mohan, the house in question was inherited by the plaintiff-respondent Dr. Rajendera Kumar Agarwal, who after determining the tenancy by notice to the tenant, filed SCC Suit No.25 of 2001 (Dr. Rajendra Kumar Agarwal Vs. Bansi Lal). During pedency of the suit the tenant Bansi Lal died and he was succeeded by his six heirs and legal representatives.

4. The SCC suit was filed mainly on two grounds, ***firstly***, default in payment of rent and, ***secondly***, that the tenant without permission in writing of the landlord made construction/structural alteration in the building which diminished its value, utility and disfigured it and started using it for a purpose other than the purpose for which he was admitted to the tenancy of the building. The **suit was decreed** by judgment and decree dated 19.10.2016, passed by the Judge Small Cause Court/Civil Judge (S.D.), Gorakhpur. The Judge Small Cause Court rejected the plea of the plaintiff-landlord regarding default in payment of rent by the tenant but accepted the grounds of structural alteration by the tenant without written permission and use of the tenanted premises for commercial purpose while the tenancy was for residential purpose. Aggrieved with this judgment, the tenant-petitioner filed SCC Revision No.36 of 2016 (Krishna Devi Vs. Rajendra Kumar) in which final arguments had commenced and the revision was argued on

16.09.2019 at length and thereafter, it was fixed for rest of the arguments. Instead of concluding the arguments, the tenant-petitioners filed an application 30 C on 24.09.2019 under Order XLI Rule 27 CP.C. Which is reproduced below:-

"एनेक्चर-3

न्यायालय श्रीमान् अपर जिला जज (भ्रष्टाचार निवारण) कोर्ट नं० 2
गोरखपुर
लघुवाद निगरानी संख्या 36/2016

दरखास्त अन्तर्गत आदेश 41 नियम 27 सी०पी०सी० सपठित धारा 151 सी०पी०सी०

उपरोक्त लघुवाद निगरानी में निवेदन है कि बरवक्त तैम्यारी बहस प्रार्थी के वर्तमान अधिवक्ता द्वारा पिछली तारीख पेशी पर पत्रावली को देखा गया तो पता चला कि प्रार्थी द्वारा फर्द सबूत कागज संख्या 49 ग से जो कागजात कागज संख्या 50/ग अधीनस्थ न्यायालय में दाखिल किये गये हैं। उक्त सभी प्रपत्र फोटो कापी के रूप में है। जिसके कारण प्रार्थी के वर्तमान अधिवक्ता द्वारा प्रार्थी से उसकी असल की मांग की गयी। चूंकी प्रार्थी कायदा कानून से अनभिज्ञ व्यक्ति है और अधीनस्थ न्यायालय में मुकदमें की पैरवी प्रार्थी के बाबा (ग्रेन्ड फादर) वंशी लाल गुप्ता करते थे और सम्पूर्ण कागजात उन्हीं के पास थे बाद वफात वंशीलाल गुप्ता प्रार्थी अधीनस्थ न्यायालय के समक्ष प्रतिस्थापित हुए लेकिन कानूनी राय न मिलने के कारण उपरोक्त किराये को जमा शुदा चालान की असल प्रति अधीनस्थ न्यायालय के समक्ष दाखिल नहीं कर सके। प्रार्थी के वर्तमान अधिवक्ता द्वारा उपरोक्त चालान की असल प्रति मांगने पर प्रार्थी द्वारा घर में रखे कागजातों को तलाशने पर उक्त उपरोक्त चालान के अलावे कुछ अहम सबूत कागजात जो स्वीकृत रूप से मुकदमा लघुवाद के वादी के पिता शंभू प्रसाद अग्रवाल द्वारा जारी किराये को रसीद तथा सेल्स टैक्स विभाग द्वारा निर्गत नोटिस एवं श्रम विभाग द्वारा निर्गत प्रमाण पत्र की असल प्रतिलिपि प्राप्त हुई। जिसे प्रार्थी ने अपने वर्तमान अधिवक्ता को दिखाया तो प्रार्थी के वर्तमान अधिवक्ता ने बताया कि उपरोक्त समस्त संलग्न सबूत कागजात निगरानी हाजा के पूर्ण प्रभावी न्याय निर्णयन हेतु आवश्यक सबूत कागजात है। जिनका दाखिला न्याय हित में आवश्यक है। चूंकि संलग्न सबूत **कागजात कानूनी राय न मिलने एवं प्रार्थीगण के सम्यक तत्परता के बावजूद जानकारी न होने के कारण अधीनस्थ न्यायालय के समक्ष मुकदमा लघुवाद में दाखिल नहीं किये जा सके थे।** ऐसी स्थिति में संलग्न सबूत कागजात को अंगीकृत किया जाना न्यायोचित एवं न्याय संगत है। अन्यथा निगरानीकर्ता की अपूर्णीय क्षति होगी।

अतः प्रार्थना है कि सूची कागजात से संलग्न सबूत कागजातों को साक्ष्य में अंगीकृत किये जाने का आदेश देने की कृपा करें।

प्रार्थी/राहुल"

5. **The aforesaid application 30 C has been rejected by the impugned order dated 30.09.2019**, passed by the Additional District Judge/Special Judge (PC Act), Court No.2, Gorakhpur. **Aggrieved with this order, the tenant-petitioner has filed the present petition under Article 226 of the Constitution of India.**

Submission:-

6. Learned counsel for the petitioner submits that during preparation of the case the counsel advised to file in additional evidence paper No.49 Ga and 50 Ga which was not within the knowledge of the revisionist-petitioner

despite due to diligence and as such it could not be filed before the Trial Court in SCC Suit No.25 of 2001. He submits that court below has committed a manifest error of law to reject the application. In support of his submissions he relied upon judgments of Hon'ble Supreme Court in **Jaipur Development Authority Vs. Kailashwati Devi (Smt.) (1997)7 SCC 297, Union of India Vs. K.V. Lakshman and others (2016) 13 SCC 124, another judgment of Hon'ble Supreme Court dated 6.5.2019 in Civil Appeal No.4628 of 2019 Jiten K. Ajmera & Anr. Vs. M/s. Tejas Co-operative Housing Society.**

Discussion & Findings:

7. I have carefully considered the submissions of learned counsels for the tenant-petitioner.

8. Perusal of the application 30 C under Order XLI Rule 27 filed by the tenant-petitioner shows that it does not contain any averment as to why the additional evidence was necessary to decide the real controversy involved in the appeal. The main controversy involved in the revision is with regard to written permission of the landlord to the tenant for making structural alteration in the building and use of the tenanted premises for purpose other than the purpose for which it was let out.

9. A supplementary affidavit has been filed today by the tenant-petitioner stating that the copies of additional evidence filed before the revisional court is being filed as Annexure SA-1. Perusal of SA-1 shows that it is copies of five tenders of deposit of rent in SCC Suit No.25 of 2001 and photostat copies of two alleged rent receipts dated 05.04.1992 and 17.12.1991 and a photostat copy of some notice of the Sales Tax Department and a photostat copy of some certificate of labour department in the name of M/s. V.K. Enterprises.

10. The suit was contested by the tenant for about 16 years. There is no averment in the application 30 C that why the aforesaid alleged additional evidence is necessary to decide the real controversy involved in the revision. The application 30 C was filed by the tenant-petitioner allegedly on mere advise of the counsel and that too after arguments started. Thus, apart from the fact the application was frivolous and does not comply with the provisions of Order XLI Rule 27 CPC, it also appears that application was filed merely to delay the disposal of the revision.

10. The judgment in the case of **Jaipur Development Authority (supra)** relied by learned counsel for the tenant-petitioner has no application on the facts of the present case inasmuch as facts in that case were that a **suit for permanent injunction** was filed by the plaintiff on the allegation of possession which was decreed ex-party and the defendant in appeal sought to file two documents to show that the possession was taken over from the plaintiff long back. In these circumstances, Hon'ble Supreme Court held that the application under Order XLI Rule 27 CPC was wrongly rejected by the High Court.

11. The judgment in the case of **Union of India Vs. K.V. Lakshman(supra)** relied by learned counsel for the tenant-petitioner also does not support the case of the petitioner

rather law laid down therein is against him. The facts of that case were that the Union of India filed a suit for declaration of ownership of the suit property which was dismissed by the trial court as barred by limitation and also on the ground that the plaintiffs failed to prove their title over the suit land. In first appeal the plaintiffs - Union of India filed an application under Order XLI Rule 27 CPC for taking in additional evidence the documents issued by the State Land Revenue Department in relation to the suit land. That application was rejected and the appeal was dismissed by the High Court. The judgment in the case of **Jiten K. Ajmera (supra)** relied by learned counsel for petitioner is also distinguishable on facts as evident from paragraph 2.4 and paragraph 3.3 of the said judgment. Facts in that case were that the appellant of that case requested for permission to produce two documents which had come into existence after filing of the appeal. The plaintiff - Union of India challenged the judgment of the High Court before the Hon'ble Supreme Court questioning the rejection of application and dismissal of appeal *in limine*. On these facts Hon'ble Supreme Court held as under:-

32) This takes us to the next question in relation to the application filed under Order 41 Rule 27 of the Code. In our considered view, the High Court committed another error when it rejected the application filed by the appellant under Order 41 Rule 27 of the Code. This application, in our opinion, should have been allowed for more than one reason.

*33) **First**, there was no one to oppose the application. In other words, the respondents were neither served with the notice of appeal and nor served with the application and hence they did not oppose the application. **Second**, the appellant averred in the application as to why they could not file the additional evidence earlier in civil suit and why there was delay on their part in filing such evidence at the appellate stage. **Third,** the averments in the application were supported with an affidavit, which remained un-rebutted. **Fourth, the application also contained necessary averment as to why the additional evidence was necessary to decide the real controversy involved in appeal. Fifth,** the additional evidence being in the nature of public documents and pertained to suit land, the same should have been taken on record and lastly, the appellant being the Union of India was entitled to legitimately claim more indulgence in such procedural matters due to their peculiar set up and way of working.*

(emphasis supplied by me)

12. Thus, all the judgment relied by learned counsel for the petitioner are clearly distinguishable on facts of the present case.

13. **As already observed above, the application of the tenant petitioner under Order XLI Rule 27 CPC does not contain necessary averment as to why the additional evidence was necessary to decide the real controversy involved in the revision. In Union of India Vs. K.V. Lakshman (supra)** Hon'ble Supreme Court has observed that **such averment is necessary for allowing the application** under Order XLI Rule 27 CPC. This legal position is also reflected from bare reading of **Order XLI Rule 27 CPC** which is **reproduced below:-**

"27. Production of additional evidence in Appellate Court.- (1) The

parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if--

(a) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause,

The Appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2) Whenever additional evidence is allowed to the produced, by an Appellate Court, the court shall record the reason for its admission."

14. **Perusal of Order XLI Rule 27 C.P.C. shows that it prohibits the parties to an appeal to adduce additional evidence either oral or documentary at the Appellate Court. However, it provides three exceptions in which the Appellate Court may allow such evidence or document to be produced or witness to be examined. These exceptions are provided in clauses (a), (aa) and (b) of Order XLI Rule 27(1) C.P.C.**

15. In the case **Malyalam Plantations Ltd. vs. State of Kerla, (2010) 13 SCC 487**, (Para-17), Hon'ble Supreme Court considered the scope of Order XLI Rule 27 C.P.C. and held as under:-

*"**It is equally well-settled that additional evidence cannot be permitted to be adduced so as to fill in the lacunae or to patch up the weak points in the case.** Adducing additional evidence is in the interest of justice. Evidence relating to subsequent happening or events which are relevant for disposal of the appeal, however, **it is not open to any party, at the stage of appeal, to make fresh allegations and call upon the other side to admit or deny the same. Any such attempt is contrary to the requirements of Order 41 Rule 27 of CPC. Additional evidence cannot be permitted at the Appellate stage in order to enable other party to remove certain lacunae present in that case."***

(Emphasis supplied by me)

16. In the case of **Union Of India vs Ibrahim Uddin, (2010) 8 SCC 148, (Paras-36 to 41),** Hon'ble Supreme Court reiterated the principles of Order XLI Rule 27, C.P.C. laid down by it in its earlier decisions in the case of **K. Venkataramiah v. A. Seetharama Reddy & Ors., AIR 1963 SC 1526; The Municipal Corporation of Greater Bombay v. Lala Pancham & Ors., AIR 1965 SC 1008; Soonda Ram & Anr. v. Rameshwaralal & Anr., (1975) 3 SCC 698: AIR 1975 SC 479; Syed Abdul Khader v. Rami Reddy & Ors., (1979) 2 SCC 601 : AIR 1979 SC 553, Haji Mohammed Ishaq Wd. S. K. Mohammed & Ors. v. Mohamed Iqbal and Mohamed Ali and Co., AIR 1978 SC 798, State of U.P. v. Manbodhan Lal Srivastava, AIR 1957 SC 912; S. Rajagopal v. C.M. Armugam & Ors., AIR 1969 SC 101** and held as under:

"36. ***The general principle is that the Appellate Court should not travel outside the record of the lower court and cannot take any evidence in appeal.*** *However, as an exception, Order XLI Rule 27 CPC enables the Appellate Court to take additional evidence in exceptional circumstances.* ***The Appellate Court may permit additional evidence only and only if the conditions laid down in this rule are found to exist.*** *The parties are not entitled, as of right, to the admission of such evidence. Thus, provision does not apply, when on the basis of evidence on record, the Appellate Court can pronounce a satisfactory judgment. The matter is entirely within the discretion of the court and is to be used sparingly. Such a discretion is only a judicial discretion circumscribed by the limitation specified in the rule itself.*

37. ***The Appellate Court should not, ordinarily allow new evidence to be adduced in order to enable a party to raise a new point in appeal. Similarly, where a party on whom the onus of proving a certain point lies fails to discharge the onus, he is not entitled to a fresh opportunity to produce evidence, as the Court can, in such a case, pronounce judgment against him and does not require any additional evidence to enable it to pronounce judgment.***

38. Under Order XLI , Rule 27 CPC, the appellate Court has the power to allow a document to be produced and a witness to be examined. But the requirement of the said Court must be limited to those cases where it found it necessary to obtain such evidence for enabling it to pronounce judgment. ***This provision does not entitle the appellate Court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in a case.*** *It does not entitle the appellate Court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way. In other words, it is only for removing a lacuna in the evidence that the appellate Court is empowered to admit additional evidence.*

39. It is not the business of the Appellate Court to supplement the evidence adduced by one party or the other in the lower Court. ***Hence, in the absence of satisfactory reasons for the non- production of the evidence in the trial court, additional evidence should not be admitted in appeal as a party guilty of remissness in the lower court is not entitled to the indulgence of being allowed to give further evidence under this rule. So a party who had ample opportunity to produce certain evidence in the lower court but failed to do so or elected not to do so, cannot have it admitted in appeal.***

40. ***The inadvertence of the party or his inability to understand the legal issues involved or the wrong advice of a pleader or the negligence of a pleader or that the party did not realise the importance of a document does not constitute a "substantial cause" within the meaning of this rule.*** *The mere fact that certain evidence is important, is not in itself a sufficient ground for admitting that evidence in appeal.*

41. ***The words "for any other substantial cause" must be read with the word "requires" in the beginning of sentence, so that it is only where, for any other substantial cause, the Appellate Court requires additional evidence, that this rule will apply, e.g., when evidence has been taken by the lower Court so imperfectly that the Appellate Court cannot pass a satisfactory judgment."*** (Emphasis supplied by me)

18. In the case of **Shri Kishore and another vs. Roop Kishore, 2006 (62) ALR 414**, this Court relied upon a judgment of Hon'ble Supreme Court in the case of **Natha Singh v. The Financial Commissioner AIR 1976 SC 1053** and held that it is only in exceptional and extraordinary circumstances that the appellate court may, on its own, direct production of any document or witness only to enable it to pronounce the judgment or for any other substantial cause. No substantial cause has been indicated before this Court. The true test in such a case would be as to whether the appellate court is able to pronounce the judgment on the materials before it, without taking into consideration the additional evidence sought to be adduced. The parties cannot be given opportunity to better the case or adduce additional evidence only to fill up gaps left out in the case before the trial court , or else this would be a never ending process, and the parties would continue to move applications for adducing additional evidence at every stage of the proceedings.

19. In the case of **Shiv Karan and others vs. Special Judge, E.C. Act and another, 2011 (1) JCLR 864 (All) (LB)**, Lucknow Bench of this Court considered rejection of application of a case where the suit was filed in the year 1997 and the appeal against the order of the Trial Court was filed in the year 2009 and, thereafter, an application was filed to receive additional evidence seeking examination of marginal witnesses, this Court upheld the rejection of the application by the Appellate Court on the ground that the application so moved was not justified as giving an opportunity at that stage could mean to allow for filling up lacunae.

20. In the case of **Satish Kumar Gupta etc. vs. State of Haryana and others, 2017 (2) JCLR 36 (SC).**, Hon'ble Supreme Court held that it is clear that neither the Trial Court has refused to receive the evidence nor it could be said that the evidence sought to be adduced was not available despite the exercise of due diligence nor it could be held to be necessary to pronounce the judgment. Additional evidence cannot be permitted to fill-in the lacunae or to patch-up the weak points in the case. There was no ground for remand in these circumstances.

21. In the case of **Smt. Ganga Devi and another vs. Bhagwan Das and others, 2014 (106) ALR 295**, similar principles were reiterated.

22. In **MATTERS UNDER ARTICLE 227 No. - 4904 of 2017 Prahlad And 7 Others Vs. Chandra Bhan And 6 Others decided on 07.09.2017**, this Court held as under:-

"22. In view of the above discussion, I find that the general principle is that the Appellate Court should not travel outside the record of the lower court and generaly cannot take any evidence in appeal. However, as an exception, Order XLI Rule 27 CPC enables the Appellate Court to take additional evidence in exceptional circumstances. The Appellate Court may permit additional evidence only and only if the conditions laid down in this rule are found to exist. The parties are not entitled, as of right, to the admission of such evidence. Thus, provision does not apply, when on the basis of evidence on record, the Appellate Court can pronounce a satisfactory judgment. The matter is entirely within the discretion of the Court

and is to be used sparingly. Such a discretion is only a judicial discretion circumscribed by the limitation specified in the rule itself. The Appellate Court should not, ordinarily allow new evidence to be adduced in order to enable a party to raise a new point in appeal. Similarly, where a party on whom the onus of proving a certain point lies fails to discharge the onus, he is not entitled to a fresh opportunity to produce evidence, as the Court can, in such a case, pronounce judgment against him and does not require any additional evidence to enable it to pronounce judgment. Under Order XLI , Rule 27 CPC, the appellate Court has the power to allow a document to be produced and a witness to be examined. But the requirement of the said Court must be limited to those cases where it found it necessary to obtain such evidence for enabling it to pronounce judgment. This provision does not entitle the appellate Court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in a case. It does not entitle the appellate Court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way. It is not the business of the Appellate Court to supplement the evidence adduced by one party or the other in the lower Court. Hence, in the absence of satisfactory reasons for the non- production of the evidence in the trial court, additional evidence should not be admitted in appeal as a party guilty of remissness in the lower court is not entitled to the indulgence of being allowed to give further evidence under this rule. So a party who had ample opportunity to produce certain evidence in the lower court but failed to do so or elected not to do so, cannot have it admitted in appeal. The inadvertence of the party or his inability to understand the legal issues involved or the wrong advice of a pleader or the negligence of a pleader or that the party did not realise the importance of a document, do not constitute a "substantial cause" within the meaning of this rule. The mere fact that certain evidence is important, is not in itself a sufficient ground for admitting that evidence in appeal."

23. In Satya Narayan Vs. Smt. Mohini Devi And Another in MATTERS UNDER ARTICLE 227 No. - 8925 of 2017, decided on 03.01.2018, this Court has taken similar view.

24. Thus, it is settled law that the Appellate Court should not travel outside the record of the lower court. It is also equally well-settled that additional evidence cannot be permitted to be adduced so as to fill in the lacunae or to patch up the weak points in the case. However, an exception is provided in Order XLI Rule 27 CPC that additional evidence may be produced in the Appellate Court if the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted or the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause. **An application under Order XLI Rule 27 C.P.C. must contain necessary averment as to why additional evidence is necessary to decide the real controversy involved in**

the Appeal or revision. In the case of Union of India Vs. Ibrahimuddin and another 2012(8)SCC 148 (paras 36 to 41) Hon'ble Supreme Court interpreted the phrase "for any other substantial cause" and held that it must be read with the word "requires" in the beginning of sentence, so that **it is only where, for any other substantial cause, the Appellate Court requires additional evidence, that this rule will apply**. It was further held that it is not the business of the Appellate Court to supplement the evidence adduced by one party or the other in the lower Court. **In the absence of satisfactory reasons for non- production of the evidence in the trial court, additional evidence should not be permitted in appeal as a party guilty of remissness in the lower court is not entitled to the indulgence of being allowed to give further evidence.** A party who had ample opportunity to produce certain evidence in the lower court but failed to do so or elected not to do so, cannot have it admitted in appeal. **The inadvertence of the party or his inability to understand the legal issues involved or the wrong advice of a pleader or the negligence of a pleader or that the party did not realise the importance of a document, does not constitute a "substantial cause" within the meaning of this rule**. The mere fact that certain evidence is important, is not in itself a sufficient ground for admitting that evidence in appeal. In **Shri Kishore and another vs. Roop Kishore, 2006 (62) ALR 414** this Court relied upon a judgmnet of Hon'ble Supreme Court in the case of **Natha Singh v. The Financial Commissioner AIR 1976 SC 1053** and held that it is only in exceptional and extraordinary circumstances that the appellate court may, on its own, direct production of any document or witness only to enable it to pronounce the judgment or for any other substantial cause. The parties are not entitled, as of right, to the admission of such evidence. Thus, provision does not apply, when on the basis of evidence on record, the Appellate Court can pronounce a satisfactory judgment. The matter is entirely within the discretion of the Court and is to be used sparingly. Such a discretion is only a judicial discretion circumscribed by the limitation specified in the rule itself. The Appellate Court should not, ordinarily allow new evidence to be adduced in order to enable a party to raise a new point in appeal. Similarly, where a party on whom the onus of proving a certain point lies fails to discharge the onus, he is not entitled to a fresh opportunity to produce evidence, as the Court can, in such a case, pronounce judgment against him and does not require any additional evidence to enable it to pronounce judgment.

24. Applying the principles of law laid down in the above referred judgments of this Court and of Hon'ble Supreme Court on the facts of the present case as discussed above, I do not find any merit in this writ petition. Therefore, the writ petition is **dismissed.**

(2019)12 ILR A1093

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.11.2019

BEFORE
THE HON'BLE ASHWANI KUMAR MISHRA, J.

Writ-A No. 6087 of 2019

Pradeep Kumar Awasthi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Ram Raj Mishra, Sri Anand Mohan Pandey, Sri Vikas Budhwar

Counsel for the Respondents:
C.S.C.

A. Service law-ACP-Petitioner initially appointed as a Superintendent in Central Reserve Engineer Force unit in Border Road organization from 2001 to 2010-later got appointed as Junior Engineer in Minor irrigation Department of State of Uttar Pradesh-period of service rendered to previous employee -not relevant for examining plea of stagnation and granting ACP.

Held - Where the employee takes up a new employment with a different employer, he cannot ask for counting of his services rendered to the previous employer in order to make out a case of stagnation against the subsequent employer. Such a plea can ordinarily be raised with reference to the length of services rendered to the employer concerned only. (Para 15)

Writ Petition dismissed. (E-9)

List of cases cited: -

1. Food Corporation of India and others Vs. Ashish Kumar Ganguli (2009) 7 SCC 734 (distinguished)

2. Purshottam Lal Vs. Union of India (1973) 1 SCC 651 (distinguished)

3. Council of Scientific and Industrial Research Vs. K.G.S. Bhatt (1989) 4 SCC 635

4. State of Tripura Vs. K.K. Rai (2004) 9 SCC 65

5. Hukum Chandra Gupta Vs. ICAR (2012) 12 SCC 666

6. Secretory, Government (NCT Of Delhi) and others Vs. 11 Grade-I DASS Officers Association and others (2014) 13 SCC 296

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

1. Petitioner, Pradeep Kumar Awasthi was initially appointed as a Superintendent (Medical and Electrical) Grade-II in the Central Reserve Engineer Force, a unit in the Border Road Organization (hereinafter referred to as 'organization'), in the year 2001. He continued in the organization from 25.06.2001 to 08.04.2010. While in the employment of the Organization he appears to have applied for appointment to the post of Junior Engineer in the Minor Irrigation Department of the State of Uttar Pradesh, pursuant to an advertisement issued, and was ultimately selected. He joined as Junior Engineer in the Minor Engineering Department on 12.04.2010. Upon an application moved by the petitioner the competent authority in the department of Minor Irrigation has already passed an order on 05.10.2012 granting pay protection as also allowed his services rendered in the Organization to be counted towards qualifying services for pension etc. An application has also been moved by the petitioner for counting of his previous services rendered in the Organization for the purposes of grant of financial up-gradation under the Assured Career Progression scheme (hereinafter referred to as ACP). Some recommendations appear to have been made at the local level in favour of petitioner but no orders have been passed by the competent authority, in that regard, till date. However, the petitioner has come to know of the Government Order issued by the State of Uttar Pradesh on 05.11.2014, which denies benefit of ACP by excluding the services rendered in the earlier Organization. Clause (10) of this Government Order specifically excludes the services rendered in the Central Government or its authorities etc. for the purposes of grant of A.C.P. benefit to the employees of the State Government. Clause (9) and (10) of the Government Order dated 05.11.2014 are relevant for

the controversy raised in this petition and are reproduced hereinafter:-

''9. किसी कार्मिक द्वारा प्रदेश के अन्य राजकीय विभागों में समान ग्रेड वेतन में की गयी नियमित सेवा को वित्तीय स्तरोन्न्यन के लिए गणना में लिया जायेगा, परन्तु ऐसे मामलो में ए0सी0पी0 की व्यवस्था के अन्तर्गत देय किसी लाभ हेतु नये विभाग के पद पर परिवीक्षा अवधि ;च्तवइंजपवद च्मतपवकद्ध सन्तोषजनकरूप से पूर्ण करने के उपरान्त ही विचार किया जायेगा एवं सम्बन्धित लाभ देय तिथि से ही अनुमन्य कराया जायेगा।

10- केन्द्र सरकार/स्थानीय निकाय/स्वशासी संस्था/सार्वजनिक उपक्रम एवं निगम में की गयी पूर्व सेवा को वित्तीय स्तरोन्न्यन के लिए गणना में नहीं लिया जायेगा। ''

2. Petitioner, accordingly, has challenged clause (10) of the Government Order dated 05.11.2014 by filing the present writ petition. It is alleged that Clause (10) of the Government Order dated 05.11.2014 is violative of Article 14 and 16 of the Constitution of India. A further prayer is made in this petition to command the respondents to count petitioner's services rendered in the Organization for the grant of pay upgradation under the ACP scheme. Reliance is placed upon the judgments of Apex Court in Food Corporation of India Vs. Ashis Kumar Gupta (2009) 7 SCC 734 and Purshottam Lal Vs. Union of India (1973) 1 SCC 651.

3. A counter affidavit has been filed by the State disputing petitioner's right to claim financial upgradation under the ACP scheme. A rejoinder affidavit has been filed by the petitioner denying the averments made in the counter affidavit and reiterating the averments made in the writ petition.

4. I have heard Sri Vikas Budhwar, learned counsel for the petitioner and Sri Vishal Singh, learned State Counsel for the respondents and have perused the materials brought on record.

5. The short question that arises for consideration in the facts of the present case is as to whether the State Government is justified in restricting the period of working in the employment of State, on the same scale, as a condition for grant of ACP benefit, and thereby denying services rendered earlier to other bodies like the Central Government/ Local Body/ Autonomous Body/ Government Corporation etc. The other connected issue is with regard to legality of Clause (10) of the Government Order dated 05.11.2014, and whether it offends Article 14 and 16 of the Constitution of India?

6. Facts giving rise to the controversy raised in this petition have already been noticed and, therefore, needs no reiteration. The moot question remains whether petitioner's working in the Organization is liable to be counted for the purposes of grant of financial upgradation under ACP scheme, introduced vide Government Order dated 05.11.2014.

7. Learned counsel for the petitioner submits that the State cannot discriminate between employees/ officers engaged in the State Government vis-a-vis employees of the Central Government, Local bodies, Autonomous body, Public Sector Undertaking and Corporation etc., while extending benefit of financial upgradation under the ACP scheme. Argument is that Clause (10) is violative of Article 14 read with Article 39(A) of the Constitution of India inasmuch as having been appointed in the concerned department of the State

of U.P. i.e. Minor Irrigation Department in the present case, the attributes referable to his earlier employment gets extinct and that all benefits admissible to an employee of the State Government are liable to be extended to him also. Learned counsel for the petitioner places reliance upon observation of Apex Court contained in para 29, 30 and 32 of Food Corporation of India and others Vs. Ashish Kumar Ganguli (2009) 7 SCC 734. The observations, relied upon, are reproduced hereinafter:-

"29. A statutory authority or an administrative authority must exercise its jurisdiction one way or the other so as to enable the employees to take recourse to such remedies as are available to them in law, if they are aggrieved thereby. The question which, however, arises for consideration is as to whether having exercised its jurisdiction in favour of a class of employees, a statutory authority can deny a similar relief to another class of employees. In a case of this nature, in our opinion, the writ court was entitled to declare such a stand taken by the statutory authority as discriminatory on arriving at a finding that both the classes are entitled to the benefit of a statutory rule.

30. It is contended that the deputationists who were the Central Government employees were transferred in terms of Section 12A of the Act. We may notice sub-section (3) thereof, which reads as under :

"12.(3) An officer or other employee transferred by an order made under sub-section (1) shall, on and from the date of transfer, cease to be an employee of the Central Government and become an employee of the Corporation with such designation as the Corporation may determine and shall subject to the provisions of sub-sections (4), (4A), (4B), (4C), (5) and (6) to be governed by the regulations made by the Corporation under this Act as respects remuneration and other conditions of service including pension, leave and provident fund, and shall continue to be an officer or employee of the Corporation unless and until his employment is terminated by the Corporation."

As in terms of the aforementioned provision, the employees so transferred would be deemed to be the employees of the Corporation upon cessation of the relationship of employer and employee between the Central Government and themselves and they would be subject to the provisions of the same regulations. We fail to understand, why the benefit of the said regulations shall be denied to the employees who were deputed to the Corporation from the State Government cadre.

32. Thus, for all intent and purport, the past services of the Central Government employees and the State Government employee whether appointed in the service of the Corporation by way of transfer or by way of absorption would result in cessation of relationship of employer and employee between the Central Government or the State Government as the case may be and the employees concerned. In other words, until their absorption, the respondents were the employees of the State Government and they become the employees of the Corporation only upon their absorptions. Furthermore in the cases of both the Central Government employees as also the State Government employees, common regulation would bind them since their absorption in the service of the Corporation either in terms of sub-section (3) of Section 2A of the

Act or in terms of the order of absorption passed in respect of each of the respondents."

8. Sri Budhwar, learned counsel for the petitioner further submits that grant of financial upgradation under ACP scheme is based upon acceptance of pay commission recommendation of the year 2008. Argument is that once Pay Committee recommendations are accepted, provisions thereof would have to be implemented in its entirety and the services rendered by State Government employee earlier to Central Government etc. cannot be ignored for the purposes. It is also contended that classification introduced vide Government Order dated 05.11.2014, restricting ACP benefits to employees of State Government alone is clearly arbitrary and violates Article 14 of the Constitution of India. It is also urged that classification made on the basis of erstwhile appointing authority, as is sought to be done herein, is clearly impermissible in law. Learned counsel for the petitioner also places reliance upon the observation contained in para 14 of the Apex Court judgment in case of Purshottam Lal Vs. Union of India (1973) 1 SCC 651 which is reproduced hereinafter:-

"14. Mr. Dhebar on behalf of the Government maintains the same position and he says that the Pay Commission's Report did not deal with the case of the petitioners. We are unable to accept this contention. The terms of reference are wide, and if any category of Government servants were excluded material should have been placed before this Court. The Pay Commission has clearly stated that for the purposes of their enquiry they had taken all persons in the civil services of the Central Government or holding civil posts under that Government and paid out of the Consolidated Fund of India, to be Central Government employees. It is not denied by Mr. Dhebar that the petitioners are paid out of the Consolidated Fund of India. "

9. Before proceeding to examine the contention advanced on behalf of the petitioner it would be necessary to examine essential ingredients/ attributes of the Assured Career Progression scheme itself. The Government Order dated 05.11.2014 records that previous Government Orders in respect of grant of ACP benefit are not getting implemented due to various reasons and, therefore, in supersession of previous Government Orders issued from time to time, the new Government Order dated 05.11.2014 is being issued. Clause (3) of this Government Order contemplates grant of three financial upgradation upon completion of regular satisfactory service in the employment of State i.e. 10 years, 16 years and 26 years, respectively. Manner of computation of such term has been specified in various clauses of the Government Order. It is thereafter that Clauses (9) and (10) have been added which have already been extracted above.

10. The justification for existence of the ACP scheme lies in acceptance of settled proposition in service jurisprudence that genuine stagnation in employment due to lack of adequate promotional avenues is detrimental to efficiency of administration and must be avoided. Opportunity of advancement in service career by promotion is considered a normal incidence of service. Efficient administration alone can serve public interest.

11. In the case of Council of Scientific and Industrial Research Vs.

K.G.S. Bhatt (1989) 4 SCC 635 Hon'ble Supreme Court has been pleased to emphasize the importance of ACP scheme to obviate stagnation in service. Para 9 of the report is relevant and is reproduced hereinafter:-

"...It is often said and indeed, adroitly, an organisation public or private does not 'hire a hand' but engages or employs a whole man. The person is recruited by an organisation not just for a job, but for a whole career. Once must, therefore, be given an opportunity to advance. This is the oldest and most important feature of the free enterprise system. The opportunity for advancement is a requirement for progress of any organisation. It is an incentive for personnel development as well. Every management must provide realistic opportunities for promising employees to move upward. The organisation that fails to develop a satisfactory procedure for promotion is bound to pay a severe penalty in terms of administrative costs, misallocation of personnel, low morale, and ineffectual performance, among both non-managerial employees and their supervisors. There cannot be any modern management much less any career planning, manpower development, management development much less any career planning, manpower development, management development, etc. which is not related to a system of promotions."

12. The observation in the case of Council of Scientific Industrial Research (supra) has been consistently followed in subsequent decisions of the Apex Court. See: (State of Tripura Vs. K.K. Rai (2004) 9 SCC 65 and Hukum Chandra Gupta Vs. ICAR (2012) 12 SCC 666).

13. Plea of stagnation in service can ordinarily be set up where an employee in his entire length of service is not even allowed three promotional avenues. The right against stagnation is thus available against the employer who fails to provide reasonable avenues of promotion to its employees. It is available with reference to the length of service in a particular employment/ organization. Financial upgradation as per ACP scheme is intended to compensate for the lack of promotional avenue available with the employer concerned and the benefit under the scheme is personal to the employee concerned.

14. The counting of services for the purposes of awarding financial upgradation under the ACP scheme, therefore, has a direct co-relation with the existence of stagnation in the employment itself. The employment is with reference to a particular employer or else, the very justification for existence of ACP scheme would seize to exist.

15. Where the employee takes up a new employment with a different employer, he can not ask for counting of his services rendered to the previous employer in order to make out a case of stagnation against the subsequent employer. Such a plea can ordinarily be raised with reference to the length of services rendered to the employer concerned only.

16. Clause (9) of the Government Order dated 05.11.2014 also limits the counting of regular service in the same grade of pay, in other Government Departments of the same employer i.e. State, and the benefit of ACP would become payable only after satisfactory completion of probationary period. The requirement, as per it, is that the employer remains the same i.e. State of Uttar Pradesh, and that the employee has continued in the same scale of pay for

long without having requisite avenues of promotion.

17. In a case where the Government Servant has taken up fresh employment with the same employer i.e. the State, but on a higher grade of pay, then the services rendered earlier on the lower scale of pay would not be counted for the grant of benefit under the ACP scheme. This clause, therefore, clearly reveals that avoidance of stagnation for the employee concerned is with reference to his working for long period, in the same scale of pay without any promotional avenue.

18. Similarly, where services are rendered to a different employer i.e. one having distinct juristic personality i.e. Central Government / Local authority / Public Sector Undertaking / Government Corporation etc. the services offered to the previous employer would not be counted for the purposes of alleging stagnation against the new/ subsequent employer i.e. State of U.P.

19. The classification of employer vide Clauses (9) and (10) of the Government Order dated 05.11.2014, for the purposes of implementing ACP scheme in question, therefore, has a direct nexus with the object sought to be achieved and can not be said to be arbitrary or unreasonable inasmuch as it is based on intelligible differentia.

20. So far as judgment of the Apex Court in the case of Food Corporation of India Vs. Ashis Kumar Ganguli (supra) is concerned, this case related to grant of advance increment where distinction was drawn on the basis of source of recruitment. The Apex Court observed that deputationists from the State Government who have been absorbed in the employment of Corporation can not be treated as a class distinct from the employees on transfer from Central Government to the Corporation (Food Corporation of India) once they are governed by the same set of rules. Such classification has been held to violate equality clause enshrined in Article 14 of the Constitution of India.

21. The judgment of the Apex Court in the case of Food Corporation of India (supra) has no applicability on the facts of the present case inasmuch as the distinction based on source of recruitment had no nexus with the object of grant of advance increment. This, however, is not the case here. In the present case, the benefit of financial upgradation under ACP scheme has direct co-relation with the existence of stagnation in a particular employment. Once the employment itself changes the services rendered to the previous employer would not be relevant and cannot be counted to determine stagnation in the subsequent employment or to grant financial upgradation in lieu thereof.

22. In Purshottam Lal (supra) the Apex Court had upheld plea of discrimination raised before it under Article 32 of Constitution of India. The Apex Court found that benefits of revised pay scale was admissible to the writ petitioners w.e.f. July 1, 1959, in accordance with recommendations of Pay Commission. Once the Pay Commission report was accepted the part implementation thereof was not approved. This judgment also has no applicability to the facts of the present case.

23. The grant of benefit under ACP scheme is otherwise a matter of policy and would not require interference by this

Court once the plea of arbitrariness fails. The Hon'ble Supreme Court in Secretory, Government (NCT Of Delhi) and others Vs. Grade-I DASS Officers Association and others (2014) 13 SCC 296 has been pleased to observe that power of judicial review would not be warranted once the policy itself is not found violative of Article 14 and 16 of the Constitution of India.

24. The petitioner had worked with the Organization from 2001 to 2010 whereafter he has been offered fresh appointment in the Department of Minor Irrigation of the State of Uttar Pradesh. The fresh employment offered to petitioner is with a different employer and his services with the subsequent employer would be governed by entirely distinct set of rules from what existed earlier. The period of service rendered hitherto to the previous employer would not be relevant for the purposes of examining plea of stagnation against the subsequent employer, which alone justifies grant of financial upgradation under the ACP scheme in question. Other issues like pay protection and counting of services for grant of pensionary benefits are governed by separate and distinct consideration and set of rules/ executive instructions and have already been allowed to the petitioner by the subsequent employer and, therefore, these aspects requires no further examination.

25. In view of the aforesaid deliberations and discussions, I have no hesitation in rejecting challenge laid to Clause (10) of the Government Order dated 05.11.2014 on the ground of it being arbitrary and violative of Article 14 and 16 of the Constitution of India. Clause (10) of the Government Order is found to be just and valid. Petitioner's plea for counting of his services rendered to the previous employer, for determining stagnation in the employment of the Department of Minor Irrigation, and thereby to grant financial upgradation in lieu thereof, also can not be sustained. Writ petition consequently fails and is dismissed. No order is passed as to costs.

(2019)12 ILR A1100

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.09.2019

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Writ-A No. 10265 of 2005
with
Writ-A No. 27418 of 2005

Durga Prasad & Ors. ...Petitioners
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioners:
Sri Rajendra Rai, Sri S.K. Srivastava, Sri Vijay Gautam, Sri Ram Ji Singh

Counsel for the Respondents:
Sri Govind Saran, Sri Anand Kumar, S.C., Sri Sharad Ranjan Nigam, Sri Vivek Singh, Sri P.K. Pandey

A. Service Law - Reconstruction of different cadres - resulted into additional post of different responsibilities of greater importance in the higher post-different cadre are required to be filled by promotion amongst eligible employees-no illegality in impugned order.

Held - upgradation in the case in hand resulting into increase in posts in superior cadres including that of A.S.I. have been treated to be a promotion, for which eligibility

conditions and burdening of different responsibilities of greater importance in the higher posts are all to be shared by Officials, who are promoted against prescribed posts. (Para 29)

Writ Petition dismissed. (E-9)

List of cases cited: -

1. All India Non-SC/ST Employees Association Railway Versus V. K. Agarwal and others, (2001) 10 SCC 165

2.Union of India versus V. K. Sirothia, 2008 (9) SCC 283

3. R. K. Sabharwal Vs. State of Punjab, 1995 (2) SCC 745

4. Girdhari Lal Kohli vs. Union of India, Writ Petition No.7386-93 of 1984

5. M. L. Rajaram Naik and others vs. The Additional Director, CGHS, Banglore and others

6. India Vs Pushpa Rani and others, 2008 (9) SCC 244

7. D. P. Upadhyay vs. G.M., N.R. Baroda House and Others, -15- 2002 (10) SCC 258.

8. State of Rajasthan Vs Fateh Chand Soni, (1996) 1 SCC 562.

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

1. Heard Sri Rajendra Rai, learned counsel for petitioners and Sri P.K. Pandey, Advocate holding brief of Sri Sharad Ranjan Nigam, learned counsel for respondent.

2. Writ Petition (A) No.10265 of 2005 (hereinafter referred to as "Petition-1") has been filed under Article 226 of the Constitution by nine petitioners namely, Durga Prasad, Prem Chandra Dubey, Chandrajeet Yadav, Krishna Joshi, Sri Ram Dubey, Vijay Shanker Singh, Krishna Mohan Tiwari, Ram Nagina Yadav and Arvind Rai praying for issue of writ of certiorari quashing order dated 14.02.2005 (Annexure 4 to writ petition) in so far as it relates to up-gradation of respondents 5 to 19 to the post of Sub Inspector, Railway Protection Force (hereinafter referred to as "R.P.F.") from the post of Assistant Sub Inspector, R.P.F. Petitioners have also prayed for issue of a writ of mandamus commanding respondents 3 and 4 not to apply rule of reservation for Scheduled Caste and Scheduled Tribe while restructuring the cadre of Group C of R.P.F. Employee (Combatised).

3. All the petitioners are substantively appointed Assistant Sub Inspector (hereinafter referred to as "A.S.I.") in R.P.F. and posted at different places in North Eastern Railway, Gorakhpur (hereinafter referred to as "N.E.R., G.K.P.") when writ petition was filed. Private respondents 5 to 19 are also A.S.I.s in R.P.F. in different areas under control of N.E.R., G.K.P. A seniority list of A.S.I.s under control of N.E.R., G.K.P. was published on 30.01.2004/14.02.2004 in which petitioners are placed at serial numbers 26, 28, 31, 32, 34, 35, 36, 38 and 39 respectively. Railway Board decided to restructure Group 'C' and Group 'D' cadres of R.P.F. and Railway Protection Special Force (hereinafter referred to as "R.P.S.F."), both "Combatised" and "Non-Combatised", and issued a Circular dated 15.09.2004, determining 01.11.2003 as the date of giving effect for restructuring in respect of Artisan and Ancillary categories of RPF/RPSF Non-Combatised, and 01.07.2004 for restructuring in respect of 'combatised' staff of RPF/RPSF. The detail and the manner in which said restructuring is

required to be done, was provided in aforesaid Circular but in para 9 it was said that existing instructions with regard to reservation of Scheduled Caste and Schedulec Tribe wherever applicable shall continue to apply. The restructuring was made on existing strength, but by up-gradation of certain posts. Procedure for existing classification and filling up of vacancies was prescribed in para 3, which reads as under :-

3. The existing classification of the posts covered by these orders as 'selection' and non-selection', as the case may be, remains unchanged. However, for the purpose of implementation of these orders the existing selection procedure will stand modified to the extent that the selection will be based only on scrutiny of service records and confidential reports without holding any written/viva-voce/physical test. In this procedure, the selection Board is supposed to consider the claims of the eligible staff one by one in order of their seniority. It will scrutinise the service records and confidential reports of staff beyond the number equal to the number of posts calculated in terms of para 3.1 below only to the extent the number of staff is found unsuitable for promotion. Further while implementing the restructuring on the basis of above procedure, instructions contained in Board's letter No.E(NG) I-92/CR/# dt. 08.10.93 should be kept in view. Naturally under this procedure the categorization as 'outstanding' will not figure in the panels. This modified selection procedure has been decided upon by the Ministry of Railways as a one time exception by special dispensation, in view of the numbers involved, with the objective of expediting the implementation of these orders. In the case of Artisan staff, the benefit of restructuring under these orders will be extended on passing the requisite Trade Test.

3.1 Normal vacancies existing on the date of effect viz, 01.11.03 (in respect of non-combatised staff) or 01.07.2004 (in respect of combatised staff), except direct recruitment quota, and those arising on that date from this cadre restructuring including chain/resultant vacancies should be filled in the following sequence :

(i) From panels approved on or before 19.03.2004 (in respect of non-combatised staff) or 01.07.2004 (in respect of combatised staff) and current on that date ;

(ii) and the balance in the manner indicated in para 3 above.

3.2 Such selections which have not been finalised by 19.03.2004 (in respect of non-combatised staff) and 01.07.04 (in respect of combatised staff) should be cancelled/abandoned.

3.3 All vacancies arising from the date following the date of effect (viz. 02.11.03 in respect of non-combatised staff and 02.07.04 in respect of compatised staff) will be filled by normal selection procedure.

3.4 All vacancies arising out of the restructuring (including chain vacancies arising out of restructuring) should be filled up by senior employees who should be given benefit of the promotion from the respective date of effect whereas for the normal vacancies existing on the date of effect junior employees should be posted by modified selection procedure but they will get promotion and higher pay from the date of taking over the posts as per normal rules. Thus the special benefit of the promotion from the date of effect (viz. 01.11.03 in respect of non-combatised staff) is

available only for vacancies arising out of restructuring (including chain vacancies arising out of restructuring) and for other vacancies the normal rules of prospective promotion from the date of filling up of vacancy will apply.

3.5 In case where percentages have been reduced in lower grade and no new post becomes available as a result of restructuring, the existing vacancies already available on the respective date of effect should be filled up by the normal selection procedure.

3.6 Employees who retire/resign in between the period from the respective date of effect (viz. 01.11.03 in respect of non-combatised staff and 01.07.2004 in respect of combatised staff) to the date of actual implementation of these orders, will be eligible for the fixation benefits and arrears under these orders from the date of effect.

3.7 It is also clarified that the panels approved till 19.03.2004 and current on above date are to be operated to cover only the already existing vacancies of non-combatised categories (except DR quota) as on 01.11.2003 as per Para 3.1 (i) above and the remaining existing vacancies (except DR quota) and those arising out of restructuring (including chain/resultant vacancies) should be filled up as per para 3.1 (ii) above. In this connection the clarification contained in Board's letter No. III/2004/CRC/3 dt. 03.06.2004 may also be kept in view."

4. As per Annexure-A to the aforesaid Circular, revised percentage of various posts in rank/category of RPF (Combatised) was as under :

Rank/ Category	Pay Scale	Revised %age
Inspector -I Inspector-II	6500 - 10500 +200 SP 6500 - 10500	2.75
Sub Inspector	5500 - 9000	4.50
Asst. Sub Inspector	4000 - 6000	7.75
Head Constable	3200 - 4900	34.00
Constable	3050 - 4590	51.00

5. The question, "whether reservation will apply and no additional posts are created due to restructuring of cadre", came up for consideration before Supreme Court in **All India Non SC/ST Employees Association Railway Versus V. K. Agarwal and others, (2001) 10 SCC 165,** Cont. Petition (Civil) 304 of 1999 in Civil Appeal No.1481 of 1996, and Supreme Court in its order dated 31.01.2001, clarified the position as under :

"ORDER

It appears from all the decisions so far that ***if as a result of re-***

classification or re-adjustment there is no additional posts which are created and it is a case of upgradation, then the principle of reservation will not be applicable*. It is on this basis that* ***this court on 19th November, 1998 had held that reservation for SC & ST is not Applicable in the upgradation of existing posts and civil civil appeal no.1481/1996 and the connected matters were decided against the Union Of India****. The effect of this is that where the total number of posts remained unaltered, though in different scales of pay, as a result of re-grouping and the effect of which may be that some of the employees who were in the scale of pay of Rs.550-700 will go in the higher scales,* ***it would be a case of upgradation of posts and not a case of additional vacancy or post being created to which the reservation principle would apply. It is only if in addition to the total number of existing posts some additional posts are created that in respect of those additional posts the reservation will apply, but with regard to these additional posts the dispute does not arise in the present case****. The present case is restricted to all existing employees who were re-distributed in-to different scales of pay as a result of the said upgradation.*

The Union Of India shall re-work the seniority in the light of the clarification made today and report back within 6 weeks from today.

List after 6 weeks."

(emphasis added)

6. Following aforesaid order, an Office Memorandum was issued by Ministry of Personnel, advising Ministry of Railway to implement directions of Supreme Court contained in **Union of India versus V. K. Sirothia, 2008 (9) SCC 283** and further clarification made in Contempt Petition No.304 of 1999, **All India Non SC/ST Employees Association (Railways) Vs. V. K. Agarwal and others (supra)**. Government of India's Circular dated 25.10.2004 reads as under :

" The undersigned is directed to refer to the Ministry of Railways U.O. Note No. 2004-E(SCT)I/25/1 dated 7th May, 2004 on the subject noted above and to say that the Supreme Court in the matter of ***Union of India versus V.K. Sirothia*** *has held that reservation for SCs and STs will not be applicable when making promotions to the posts upgraded on account of restructuring of cadres. The Hon'ble court in the Contempt Petition No.304 of 1999* ***[All India Non SC/ST Employees Association versus V.K. Agarwal And Others]*** *further clarified that where the total number of posts remained unaltered, though in different scales of pay, as a result of re-grouping, it would be a case of upgradation of posts and not a case of additional vacancy or post being created to which the reservation principle would apply. If the case is restricted to all existing employees who were re-distributed into different scales of pay as a result of upgradation, there cannot be any reservation.*

2. The matter has been examined keeping in view the observations of the Supreme Court. The **Ministry of Railways are advised to implement the directions of the Supreme Court and *not to apply reservation while filling*** *the posts upgraded on account of restructuring, by the existing employees."*

(emphasis added)

7. Ignoring same, however, official respondents have applied reservation on

upgraded cadre and promoted respondents 5 to 19 by impugned order dated 14.02.2005, mentioning their names from serial number 24 to 38 though they are all much junior to the petitioners finding place in seniority list from serial number 40 to 71 and, therefore, impugned list is illegal.

8. Respondents 1 to 4 have filed counter affidavit. It is said that before restructuring 123 posts of Sub Inspectors were sanctioned, out of which 3 posts were ex-cadre. 50 % of vacancies are to be filled in by direct recruitment and 50 % by departmental selection. Thus, 60 posts comes to be filled through different source of recruitment. As a result of restructuring 40 vacancies came together with 60 posts available for departmental selection and total comes to 100 posts. Out of 100 posts reservation for S.C. is 15 % and for S.T. is 7.5 %, but respondents could find only 7 S.C. and 3 S.T. candidates suitable and available against upgraded vacancies of Sub Inspectors and they have been promoted. Rule of reservation has been applied in the light of Circular dated 15.09.2004, clearly providing for reservation. With regard to directions of Supreme Court in V. K. Agarwal (supra), it is clear that aforesaid direction is not consistent with law laid down by Supreme Court in **R. K. Sabharwal Vs. State of Punjab, 1995 (2) SCC 745** followed in **Girdhari Lal Kohli vs. Union of India, Writ Petition No.7386-93 of 1984** decided on 26.07.1995.

9. Petitioners have filed rejoinder affidavit and I may refer to the same at a later stage whenever is required.

10. Counter affidavit has been filed on behalf of respondents 5, 6, 9, 11, 13, 14, 15, 16 and 18. It is said that benefit of reservation has been given based on roster as per Supreme Court Judgment in **R. K. Sabharwal (supra).** Vacancy position of Cadre of Railway Protection Force, N.E. Railway, Gorakhpur as on 01.07.2004 in form of chart is given as under :

Rank	Existing % of sanctioned strength	Revised % of sanctioned strength	**Sanctioned Strength Prior to 1.7.2004**	**Total posts After revised % of cadre under restructuring on 1.7.04**	**Vacancies created under restructuring w.e.f 1.7.0**	**Existing Vacancy Prior to Restructuring**	**Resultant vacancy**

					4		
Inspector-I 6,500-10,500		2.75	67	84	+17	12	–
Sub Inspector Gr.5 500-9000		4.50	123	137	+14	2	29
Asstt. Sub-Inspector 4,000-6,000/-		7.75	180	235	+55	22	16
Hd. Constable 3,200-4,900		34.00	1059	739	-26	320	370
Constable 3,050-4,590/-		51.00	1609	1343	-60	264	574

11. The private respondents have also relied on Full Bench judgment passed by Central Administrative Tribunal, Banglore Bench, Banglore in **M. L. Rajaram Naik and others vs. The Additional Director, CGHS, Banglore and others** holding that appointment to the upgraded post amounts to promotion attracting the principles of reservation for special categories like SCs and Sts.

12. Writ Petition (A) No.27418 of 2005 (hereinafter referred to as "Petition-2") has been filed under Article 226 of the Constitution by three petitioners namely, Sanjay Kumar Singh, Babban Kumar Singh and Rakesh Kumar Singh assailing upgradation of respondents 5, 6 and 7 on the post of Inspector, R.P.F., North Eastern Railway, Gorakhpur on the ground that reservation could not have been applied. Respondent 5's upgradation has been challenged on additional ground that earlier he was posted at East Central Railway, Hajipur and thereafter transferred, therefore, he could not have been considered for restructuring. With respect to respondents 6 and 7, it is also contended that reservation quota is already full and, therefore, reservation cannot be applied.

13. Here also, the stand taken by official respondent in the counter affidavit is similar to that as has been taken in Petition I, therefore, I am not repeating the same.

14. The short issue up for consideration in these matters is "whether upgradation of posts on account of restructuring of cadre, can be treated as promotion so as to attract provisions of reservation relating to Scheduled Caste and Scheduled Tribe and Other Backward Class etc".

15. From facts discussed above it is evident that as a result of restructuring, lower posts of Constable and Head Constable have reduced while there is increase in superior posts like A.S.I., S.I.

and Inspector-I. The existing strength of A.S.I. prior to 01.07.2004 was 180 and as a result of restructuring with effect from 01.07.2004, it has become 235.

16. I find that initially the issue, whether upgradation of posts will amount to promotion or not, was raised before Central Administrative Tribunals at different places wherein answer was given in negative. Union of India brought the matter in appeal and these appeals were decided vide judgment dated 19.11.1998 by Supreme Court in **Union of India vs V. K. Sirothia (supra)**, and the short judgement reads as under :

"CA No.3622 of 1995

1. Heard counsel on both sides.

*2. The finding of the Tribunal that "**the so-called promotion as a result of redistribution of posts is not promotion attracting reservation" on the facts of the case, appears to be based on good reasoning.** On facts, it is seen **that it is a case of upgradation on account of restructuring of the cadres, therefore, the question of reservation will not arise.** We do not find any ground to interfere with the order of the Tribunal.*

3. The civil appeal is dismissed. No costs.

CA No.9149 of 1995

4. In view of the order passed in Civil Appeal no.3622 of 1995, etc., this appeal has to be allowed as in the order under appeal the Tribunal has taken a contrary view. The appeal is, therefore, allowed. No costs."

(emphasis added)

17. After above judgment it appears that grievance of non compliance was made in Contempt Petition No.304 of 1999, **All India Non-SC/ST Employees' Association (Railway) vs. V. K. Agarwal and others (supra),** wherein Supreme Court passed order on 31.01.2001 clarifying the position as under :-

*"1. It appears **from all the decisions so far that if as a result of reclassification or readjustment, there are no additional posts which are created and it is a case of upgradation, then the principle of reservation will not be applicable. It is on this basis that this Court on 19-11-1998 had held that reservation for SC and ST is not applicable in the upgradation of existing posts** and Civil Appeal No.1481 of 1996 and the connected matters were decided against the Union of India. The **effect of this is that where the total number of posts remained unaltered, though in different scales of pay, as a result of regrouping and the effect of which may be that some of the employees who were in the scale of pay of Rs.550-700 will go into the higher scales, it would be a case of upgradation of posts and not a case of additional vacancy or post being created to which the reservation principle would apply**. It is only if in addition to the total number of existing posts some additional posts are created that in respect of those additional posts the reservation will apply, but with regard to those additional posts the dispute does not arise in the present case. The present case is restricted to all existing employees who were redistributed into different scales of pay as a result of the said upgradation.*

2. The Union of India shall rework the seniority in the light of the clarification made today and report back within 6 weeks from today.

3. List after 6 weeks."

(emphasis added)

18. It is on the basis of these two orders of Supreme Court, petitioners have claimed that provisions of reservation could not have been followed and, therefore, promotion of respondents 5 to 19 in Petition-1 and respondents 5 to 7 in Petition-2 on upgraded posts treating the vacancies reserved, are illegal.

19. However, I find that subsequently the same issue has been examined by Supreme Court in detail in **Union of India Vs Pushpa Rani and others, 2008 (9) SCC 244.** Therein cadre restructuring given effect vide Railway Board's letter No.PC-III/2003/CRC/6 dated 09.10.2003 was up for consideration. Central Administrative Tribunal (hereinafter referred to as "Tribunal") at its Bench in Chandigarh and Allahabad decided Original Applications filed before it under Section 19 of Administrative Tribunal Act, 1985 in favour of applicant employees following judgment in **All India Non-SC/ST Employees' Association (Railway) Vs. V. K. Agarwal (supra).** Writ petitions filed before Punjab and Haryana High Court and this Court, respectively, were dismissed. Thereafter matter was taken by Union of India before Supreme Court. It noted that till 1997 policy of reservation was applied on vacancy-wise basis. Later on following judgment of Supreme Court in **R. K. Sabharwal (supra**) wherein it was held that rosters must be operated with reference to the posts and not the vacancies, the policy was changed. Earlier provisions were revised by Railway Board's Circular No.113/97 vide Letter No.95-E (SCT)1/49/5 (1) dated 21.08.1997.

20. Provisions of restructuring which was up for consideration in **Union of India Vs. V. K. Sirothia (supra)** were provided in Railway Board's Circular No.181/85 issued vide Letter No.PCIII/84/UPG/19 dated 25.06.1985. Later on restructuring policy was circulated vide Letter No.PC-III/2003/CRC/6 dated 09.10.2003. Noticing provisions of both Circulars dated 25.06.1985 and 09.10.2003, Supreme Court found that there was substantial differences/dissimilarities in the provisions of two Circulars and those differences were highlighted in para 29 of the judgment which reads as under :

*"29. A **cursory reading of the relevant extracts of Letters dated 25-6-1985 and 9-10-2003 reproduced hereinabove may give** an impression that the policies contained therein are similar but a closer **scrutiny thereof reveals the following stark dissimilarities :***

*(i) In terms of Para 5.1 of Letter dated 25-6-1985, **the existing classification of the posts covered by the restructuring orders i.e. "selection" and "non-selection" was to be retained. However, for the purpose of promoting an individual railway employee there was deemed modification of the selection procedure and the promotion was to be made without holding any written test and/or viva-voce.** As against this, action in terms of para 4 of letter dated 9.10.2003 is required to be taken for making appointment on the basis of selection/non-selection/suitability/Trade Test and in para 5, the requirement of D&A/Vigilance **clearance has been made mandatory for effecting promotion with reference to the cut off date.***

*(ii) While the policy contained in letter dated 25.6.1985 did not specify any minimum period of services as a condition for promotion, para 6 of letter dated 9.10.2003 lays down the **requirement of minimum period of services as a condition for promotion***

and also declares that residency period prescribed for promotion to *various categories should not be relaxed.*

(iii) Para 9 of letter dated 25.6.1985 ***postulated retention of basic functions, duties and responsibilities and addition of other duties*** *and responsibilities, whereas para 7 of letter dated 9.10.2003 mandates that posts being placed in the higher scales of pay should include the duties and responsibilities of greater importance because restructuring is contemplated on functional, operational and administrative considerations.*

(iv) While the policy contained in letter dated 9.10.2003 postulates progressive phasing out of excess number of posts in a particular cadre, no such provision was made in the policy circulated vide letter dated 25.6.1985.

(v) The instructions contained in letter dated 25.6.1985 did not provide for ***direct recruitment against upgraded posts, but para 15 of letter dated 9.10.2003 unequivocally lays down that direct recruitment percentages will not be applicable to the additional posts becoming available as a result of restructuring and the same will apply to normal vacancies after the cut-off date****.*

(vi) Para 18 of letter dated 9.10.2003 shows that the scheme of restructuring is a ***self-financing and expenditure neutral proposition. There was no such provision in the earlier policy.***

(vii) Annexure 1 appended to letter dated 25.6.1985 shows that the percentage of the upgraded posts becoming available as a result of restructuring varied from 20 to 60 in different grades, except in the cadre of Tool Checkers where the percentage varied from 10 to 40. As against this, the percentage of additional posts (as indicated in Annexures A to K appended to letter dated 1.10.2003) becoming available as a result of restructuring of different cadres in Group C and D posts varied from 1 to 10, except in one or two cadres where it was more than 20."

(emphasis added)

21. Thereafter, Court in para 30 of judgment said as under :-

"30. From what we have noted above, it is clear that the policies contained in letters dated 25.6.1985 and 9.10.2003 are substantially dis-similar. The ***exercise of restructuring envisaged in the first policy was in the nature of upgradation of substantial number of posts in different cadres and the upgraded posts were to be filled simply by scrutinizing the service records of the employees without holding any written and/or viva voce test and there was no merit based selection. In contrast, the restructuring exercise envisaged in letter dated 9.10.2003 resulted in creation of additional posts in some cadres with duties and responsibilities of greater importance and which could be filled by promotion from amongst the persons fulfilling the conditions of eligibility and satisfying the criteria of suitability and/or merit****. Para 13 of letter dated 9.10.2003 is, in itself, demonstrative of the difference between simple upgradation of posts in the cadre of Supervisors which are required to be filled without subjecting the incumbents of the posts to normal selection procedure whereas the additional posts becoming available in other cadres are required to be filled by promotion."*

(emphasis added)

22. Court further held that in legal parlance, upgradation of a post involves transfer of a post from lower to higher

grade and placement of incumbent of that post in higher grade. However, in some service rules provisions are/may be made for denial of higher grade to an employee whose service record may contain adverse entries or who may have suffered punishment. If such provisions are made, they are to be followed as held **in D.P. Upadhyay vs. G.M., N.R. Baroda House and Others, 2002 (10) SCC 258.**

23. In **State of Rajasthan Vs Fateh Chand Soni, (1996) 1 SCC 562,** Court held :-

"word ***"promotion" means "advancement or preferment in honour, dignity, rank or grade".*** *"Promotion" thus not only covers advancement to higher position or rank but also implies advancement to a higher grade.* ***In service law the expression "promotion" has been understood in the wider sense and it can be either to a higher pay scale or to higher post."***

(emphasis added)

24. Having said so Court held that once it is recognized that additional posts becoming available as a result of restructuring of different cadres are required to be filled by promotion amongst employees who satisfy the conditions of eligibility and are adjudged suitable, there can be no rational justification to exclude the applicability of policy of reservation while effecting promotions, more so because it has not been shown that the procedure for making appointment by promotion against such additional posts is different that the one prescribed for normal promotion.

25. Thereafter Court referred to Railway Board's Circular dated 09.10.2003 and in paras 35 and 36 said as under :-

"35. A careful reading of the policy contained in letter dated 9.10.2003 shows that with a view to strengthen and rationalize the staffing pattern, the Ministry of Railways had undertaken review of certain cadres. The basis of the ***review was functional, operational and administrative requirement of the Railways****. This exercise was intended to improve the efficiency of administration by providing incentives to the existing employees in the form of better promotional avenues and at the same time requiring the promotees to discharge more onerous duties. The* ***policy envisaged that additional posts becoming available in the higher grades as a sequel to restructuring of some of the cadres should be filled by promotion by considering such of the employees who satisfy the conditions of eligibility including the minimum period of service and who are adjudged suitable by the process of selection. This cannot be equated with upgradation of posts which are required to be filled by placing the existing incumbents in the higher grade without subjecting them to the rigor of selection.***

36. In view of the above discussion, we hold that the Railway Board did not commit any illegality by directing that the existing instructions with regard to the policy of reservation of posts for Scheduled Castes and Scheduled Tribes will apply at the stage of effecting promotion against the additional posts and the Tribunal committed serious illegality by striking down para 14 of letter dated 9.10.2003."

(emphasis added)

26. Thereafter Supreme Court in **Union of India vs. Pushpa Rani and others (supra)** also examined judgments

of various Tribunals up for consideration in appeal including matter decided in **Union of India Vs V. K. Sirothia (supra)** and its follow up and then in para 59 said as under :-

*"59. **An analysis of orders passed by the Tribunals and this Court shows that all cases except that of K. Manickaraj's case involved upgradation of large number of posts which could be filled by placing the existing incumbents in the higher grade without subjecting them to the process of selection**. Different Benches of the Tribunal referred to the policy decision taken by the Railway Board that reservation policy for Scheduled Castes and Scheduled Tribes is not applicable where cadre restructuring results in mass upgradation of posts and held that the administration was required to make appointment/placement against the upgraded posts without reserving posts for Scheduled Castes and Scheduled Tribes. **This Court repeatedly emphasized that the restructuring exercise did not result in creation of new posts/additional posts which could be filled by promotion by following the procedure of selection. Therefore, these decisions are of no help to the cause of the respondents**. At the cost of repetition, we consider it necessary to emphasize **that restructuring exercise envisaged in letter dated 9.10.2003 resulted in creation of additional posts in most of the cadres covered by the policy and the government had taken a conscious decision to fill up such posts by promotion from amongst eligible and suitable employees and the promotees were burdened with duties and responsibilities of greater importance.** Therefore, the Tribunal and High Court were not justified in treating it as a case of upgradation of posts simplicitor. Consequently, the decision of the Tribunal to quash para 14 of letter dated 9.10.2003 and direction given for making appointments de hors the policy of reservation are legally unsustainable."*

(emphasis added)

27. Ultimately, Supreme Court set aside orders of Tribunals and High Courts and upheld reservation as a result of restructuring of posts and promotion made thereunder.

28. I have examined the relevant provisions contained in Railway Board's Circular providing restructuring in the case in hand i.e. dated 15.09.2004 with Railway Board's Circular dated 09.10.2003 and find that the provisions are more or less similar to Railway Board's Circular dated 09.10.2003, which was considered by Supreme Court in **Union of India Vs. Pushpa Rani (supra)**. This is evident from following clauses of Circular dated 15.09.2004 :

*"1.1. This restructuring of cadres will be with reference to the sanctioned cadre strength as on the respective date of effect as indicated above. The staff who will be placed in higher grades **as a result of implementation of these orders will also draw pay in higher grades** from the respective date of effect.*

*2. Staff selected and posted against the additional higher grade posts as a result of restructuring will have their pay **fixed under Rule 1313 (FR-22)(I)(a)(1) R-II from the date of effect with the usual option for pay fixation as per extant rules**. The benefit of fixation of pay from the date of of **effect should also be given on promotion against***

chain/resultant vacancies, if the same would *arise purely due to the restructuring.*

*3. The existing classification of the posts covered by these orders as 'selection' and non-selection', as the case may be****, remains unchanged****. However, for the purpose of implementation of these orders* ***the existing selection procedure will stand modified to the extent that the selection will be based only on scrutiny of service records and confidential reports without holding any written/viva-voce/physical test. In this procedure, the selection Board is supposed to consider the claims of the eligible staff one by one in order of their seniority.*** *It will scrutinise the service records and confidential reports staff beyond the number equal to the number of posts calculated in terms of para 3.1 below only to the extent the number of staff is found unsuitable for promotion. Further while implementing the restructuring on the basis of the above procedure, instructions contained in Board's letter No.E(NG)I-92/CR/3* ***dated 08.10.93*** *should be* ***kept in view.*** *Naturally under this procedure the categorization as 'outstanding' will not figure in the panels. This modified selection procedure has been decided upon by the Ministry of Railways as a* ***one time exception by special dispensation, in view of the numbers involved, with the objective of expending the implementation of these orders.*** *In the case of Artisan staff, the benefit of restructuring under these orders will be extended on passing the requisite 'Trade Test'.*

3.4. All vacancies arising out of the restructuring (including chain vacancies arising out of restructuring) should ***be filled up by senior employees who should be given benefit of the promotion from the respective date of effect whereas for the normal vacancies existing on the date of effect junior employees should be posted by modified selection procedure but they will get promotion*** *and higher pay from the date of taking over of the posts as per normal rules. Thus the special benefit of the promotion from the date of effect (viz.01.11.03 in respect of non-combatised staff and 01.07.2004 in respect of combatised staff) is* ***available only for vacancies arising out of restructuring (including chain vacancies arising out of restructuring) and for other vacancies the normal rules of prospective promotion from the date of filling up of vacancy will apply.***

4. Extant instructions for D & A/Vigilance clearance will be applicable for effecting promotions under these orders with reference to the respective crucial dates (viz.*01.11.2003 in respect of non-combatised staff and 01.07.2004 in respect of combatised staff).*

5. While implementing the restructuring orders, instructions regarding ***minimum period of service for promotion issued from time to time should be followed****. In other words, residency period prescribed for promotions to various categories should not be relaxed.*

6. Since the cadres as detailed in the annexures to this letter are being restructured on functional, operational and administrative considerations, the posts being placed in higher scales of pay as a result of restructuring ***should include the duties and responsibilities of greater importance."***

(emphasis added)

29. The above paragraphs of Circular dated 15.09.2004 I have quoted

are broadly similar to the Circular dated 09.10.2003 and it shows that upgradation in the case in hand resulting into increase in posts in superior cadres including that of A.S.I. have been treated to be a promotion, for which eligibility conditions and burdening of different responsibilities of greater importance in the higher posts are all to be shared by Officials, who are promoted against prescribed posts, hence, above judgment will apply with full force in the case in hand.

30. In that view of the matter, I am of the opinion that issued raised in present writ petitions is covered by decision in **Union of India Vs. Pushpa Rani (supra**) and, therefore, application of provisions of reservation for promotion of respondents 5 to 19 in Petition-1 and respondents 5 to 7 in Petition-2 pursuant to Circular dated 15.09.2004 providing restructuring in Cadre of rank/catogory of RPF (Combatised) which is up for consideration in present writ petitions, is neither illegal nor bad.

31. In the result, both writ petitions fail being devoid of merits and are dismissed accordingly.

32. Interim order, if any, stands vacated.

(2019)12 ILR A1113

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 1.11.2019

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Writ A-No. 21194 of 2002

Saroj Kumar ...Petitioner

Versus

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

Counsel for the Petitioner:
Sri Bhanu Bhushan Jauhari

Counsel for the Respondents:
C.S.C.

A. Service Law - U.P. Recruitment of Dependants of Government Servants (Dying in Harness) Rules, 1974 and U.P. Temporary Government Servants (Termination of Service) Rules, 1975 - Compassionate appointment- made on temporary basis , i.e., on probation under Rules 1974-appointment rejected under Rules,1975 - on the ground-that he had applied after five years-bad-compassionate appointment -a regular appointment - not to be treated as " temporary appointment"-Rules,1975 not applicable-if compassionate appointment not obtained by fraud-termination is arbitrary.

Held- it may be noticed that compassionate appointment of petitioner has not been terminated on the ground that he could not perform satisfactorily on probation but it has been terminated on the ground that he applied for compassionate appointment after five years. Though term of five years under Rules 1974 is not a period of limitation and instead a compassionate appointment could have been allowed even after five years if condition of family member of deceased employee continuing and persisting, penurious, justifying compassionate appointment. (Para 18)

Writ Petition allowed. (E-9)

List of cases cited:

1**.** Ravi Karan Singh vs. State of U.P. and others, 1999(3) UPLBEC 2263

2. Dhirendra Pratap Singh v. District Inspector of Schools and others 1991 (1) UPLBEC 427;

3. Gulab Yadav vs. State of U. P. and others 1991 (2) UPLBEC 995

4. Budhi Sagar Dubey v. District Inspector of Schools and others 1993 ESC 21

5.Sanjai Kumar vs. Dy. Director General (NCE), Directorate and others, 2002(3) UPLBEC 2748.

6. Ram Chandra vs. State of U.P. and others, 2008(2) UPLBEC 1431

7. Jagdish Narain vs. Union of India and others, 2011(3) UPLBEC 2196

8. Sr. General Manager, Ordnance Factory vs. Central Administrative Tribunal and others, 2016(2) ADJ (Distinguished)

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

1. Heard Sri Bhanu Bhushan Jauhari, learned counsel for petitioner and learned Standing Counsel for State of U.P., and perused the record.

2. Principal reliefs claimed in this writ petition reads as under:

"(i) to issue writ order or direction in the nature of certiorari quashing order dated 10.5.2002 (Annexure No. 9).

(ii) to issue writ order or direction in the nature of mandamus directing and commanding the respondents to treat the petitioner in service and to make regular payment of the salary and other allowances of the petitioner with effect from 1.11.2001 till retirement of the petitioner."

3. It is contended by learned counsel for petitioner that petitioner was appointed as Lower Grade Clerk in the office of Executive Engineer Bhawan/Marg Service Khand Lok Nirman Vibhag Bareilly on compassionate basis vide order dated 1.10.1999 passed by Chief Engineer, West Zone, Lok Nirman Vibhag, U.P. Bareilly on probation. Thereafter, show cause notice was issued to petitioner on 2.1.2002 stating that as father of petitioner died on 22.12.1984 and application for appointment on compassionate basis under U.P. Recruitment of Dependants of Government Servants (Dying-in-Harness) Rules, 1974 (hereinafter referred to as "Rules 1974") was submitted after more than 5 years, so he should show cause why his appointment be not terminated.

4. Petitioner submitted reply dated 14.1.2002. Thereafter impugned order dated 10.5.2002 has been passed terminating petitioner under U.P. Temporary Government Servants (Termination of Service) Rules, 1975 (hereinafter referred to as "Rules 1975").

5. It is contended by learned counsel for petitioner that appointment of petitioner was made on compassionate basis on a substantive basis and hence, he could not have been terminated under Rules 1975. Since the said Rules are not attracted in this case.

6. The basic facts when questioned, learned Standing Counsel could not dispute but submitted that an appointment on probation is also temporary appointment. Therefore, petitioner was terminated in purported exercise of power under Rule 3 of Rules 1975.

7. The respective submissions raised a question, whether appointment of petitioner be treated to be substantive or a temporary appointment which could have been terminated under Rules 1975. Thus, the question for consideration as this Court formulated for adjudication in this case is "whether compassionate

appointment under Rules, 1974 could have been made on temporary basis and such appointment could have been terminated in purported exercise of powers under Rules, 1975".

8. I find that on a reference made by a learned Single Judge to a Larger Bench, this issue was considered by a Division Bench consisting of Hon'ble Markandey Katju (as His Lordship then was) and Hon'ble Kamal Kishore, JJ. in **Ravi Karan Singh vs. State of U.P. and others, 1999(3) UPLBEC 2263**. Earlier there were three Single Judge judgments in **Dhirendra Pratap Singh v. District Inspector of Schools and others 1991 (1) UPLBEC 427; Gulab Yadav vs. State of U. P. and others 1991 (2) UPLBEC 995** and **Budhi Sagar Dubey v. District Inspector of Schools and others 1993 ESC 21** wherein it was held that an appointment under Rules, 1974 is a permanent appointment. Subsequently a learned Single Judge disagreed with aforesaid three judgments and referred the matter to Larger Bench. In **Ravi Karan Singh vs. State of U.P. (supra)**, Larger Bench upheld the view taken in above three judgments and held that an appointment under Rules, 1974 has to be treated as permanent appointment since compassionate appointment, if treated to be a temporary appointment, it will nullify the very purpose of Rules applicable for compassionate appointment. Larger Bench (Division Bench) also held that in respect of appointment made on compassionate basis Rules, 1975 will not apply. Para 2 of judgment laying down law by Division Bench in **Ravi Karan Singh vs. State of U.P. (supra)** reads as under:

"2. In our opinion, ***an appointment under the Dying-in-Harness Rules has to be treated as a permanent appointment*** *otherwise if such appointment Is treated to be a temporary appointment, then it will follow that soon after the appointment, the service can be terminated and this will nullify the very purpose of the Dying-in-Harness Rules because such appointment is intended to provide immediate relief to the family on the sudden death of the bread earner. We, therefore, hold that the appointment under Dying-in -Harness Rules is a permanent appointment and not a temporary appointment, and hence the* ***provisions of U. P. Temporary Government Servant (Termination of Services) Rules. 1975 will not apply to such appointments."*** **(emphasis added)**

9. Above judgment was followed by another Division Bench consisting of Hon'ble S.K. Sen, C.J. and Hon'ble Ashok Bhushan, J. (as His Lordship then was) in **Sanjai Kumar vs. Dy. Director General (NCE), Directorate and others, 2002(3) UPLBEC 2748.**

10. Another Division Bench in **Ram Chandra vs. State of U.P. and others, 2008(2) UPLBEC 1431** again had an occasion to consider this aspect and following judgment in **Ravi Karan Singh vs. State of U.P. (supra)**, Court held that appointments made under Rules, 1974 are of permanent nature hence Rules, 1975 will not be applicable. Relevant exposition of law laid down by Division Bench in **Ram Chandra vs. State of U.P. (supra)** is reproduced as under:

"It is settled law that the ***appointments made under the provisions*** *of the U.P. Recruitment of Dependants of Government Servants (Dying-in-Harness)* ***Rules, 1974 are of permanent nature****. Since appointment of the petitioner was of permanent nature, t****he provisions of U.P.***

Temporary Government Servants (Termination of Service) Rules, 1975 were not applicable." (emphasis added)

11. Then came fourth decision in **Jagdish Narain vs. Union of India and others, 2011(3) UPLBEC 2196** which was a matter not governed by Rules, 1974 and Rules, 1975 applicable to State Government employees but it was a case relating to employment under Central Government. The provisions with respect to compassionate appointment were made by Ministry of Personnel, Public Grievances and Pensions (Department of Personnel & Training)'s Office Memorandum No. 14014/6/86-Estt. (D) dated 30.06.1987 . One Late Sarwan Lal, father of Jagdish Narain was appointed on probation for a period of two years with the rider that in case his work and conduct during period of probation is found unsatisfactory his services may be terminated. Subsequently when services of Jagdish Narain was found unsatisfactory he was terminated vide order dated 22.09.1994. This termination was challenged in Central Administrative Tribunal in Original Application No. 844 of 1995 which was dismissed. Thereafter matter came to this Court. Relying on three Division Bench judgments in **Ravi Karan Singh vs. State of U.P. (supra); Sanjai Kumar vs. Dy. Director General (NCE), Directorate (supra)** and **Ram Chandra vs. State of U.P. (supra)**, Division Bench in **Jagdish Narain vs. Union of India (supra)** held that appointment on probation amounts to a temporary appointment which is not permissible when an appointment is made on compassionate basis and, therefore, condition of probation stated in appointment letter was illegal and of no consequence. Petitioner's appointment on compassionate basis was liable to be treated as permanent in nature, hence termination was bad and with aforesaid findings writ petition was allowed and order of Tribunal as well as termination order were set aside.

12. In a subsequent matter which again arose in respect of employment in Central Government, in **Sr. General Manager**, **Ordnance Factory vs. Central Administrative Tribunal and others, 2016(2) ADJ 751** correctness of judgment in **Jagdish Narain vs. Union of India (supra)** was examined by a Full Bench on a reference made by a Division Bench disagreeing with Division Bench judgment in **Jagdish Narain vs. Union of India (supra)**. Three questions referred to be considered by Full Bench are as under:

"1. Where a person is granted compassionate appointment as a member of the family of a deceased employee of the government who has died in harness in relaxation of the normal rules for recruitment, is it not necessary that even a compassionate appointee be placed on probation in the first instance, in the same manner as any other direct recruit, since the provision pertaining to appointment on probation has not been excluded or exempted in the case of a compassionate appointment;

2. Since an ***appointment on compassionate grounds on probation is also a regular appointment*** *and a person appointed as such is not offered a temporary appointment, whether there is any violation of law or principle in appointing a person in this category on probation in the first instance;*

3. In view of the ***clear distinction in service jurisprudence between a regular and a temporary***

appointee, whether the appointment of a person on a compassionate basis on probation is permissible in law."
(emphasis added)

13. Above questions were answered by Full Bench, as under:

"26. We, accordingly, answer the questions which have been referred to the Full Bench in the following terms:

(1) Re Question (1): Where a ***person is appointed on a compassionate basis*** *as a dependent member of the family of an employee of the State who has died in harness,* ***such an appointment can be made on probation****. The object and purpose of appointing a person on probation is to determine the suitability of the person for retention in service.* ***Appointment of a person who is engaged on a compassionate basis on probation is not contrary to law or unlawful.***

(2) Re Question (2): Since ***an appointment on compassionate grounds on probation is also a regular appointment and a person appointed as such is not offered a temporary appointment, such an appointee can be placed on probation in the first instance.***

(3) Re Question (3): The appointment of a person on a ***compassionate basis on probation is permissible in law."*** **(emphasis added)**

14. Reply to Question (2) clearly shows that Full Bench held that appointment on compassionate basis is a regular appointment and is not to be treated as "temporary appointment". In para 18 of judgment Full Bench clearly observed that there is a distinction between appointment on probation and temporary appointment. The relevant observations read s under:

"An appointment on probation does not detract from the nature of the appointment which is to a regular service. Probation is merely an opportunity for the probationer to establish by dint of the work which is rendered during the period of probation, that he or she is suitable for being retained in service. On the part of the employer, probation enables the appointing authority to determine the suitability of the probationer for retention in service. ***There is a well accepted distinction in law and in service jurisprudence between a probationary appointment and a temporary appointment."*** (emphasis added)

15. Full Bench referred to earlier Division Bench judgments in **Ravi Karan Singh vs. State of U.P. (supra); Sanjai Kumar vs. Dy. Director General (NCE), Directorate (supra) and Ram Chandra vs. State of U.P. (supra)** and distinguished aforesaid judgments on the ground that in all these matters, issue, whether a compassionate appointment can be made on probation or not was not involved and these three judgments, therefore, considered a different issue and in fact Division Bench in **Jagdish Narain vs. Union of India (supra)** mistakenly relied on above three judgments omitting the fact that question of appointment on probation was not involved in earlier cases. Full Bench, therefore, overruled Division Bench judgment in **Jagdish Narain vs. Union of India (supra)** and distinguished earlier three judgments in **Ravi Karan Singh vs. State of U.P. (supra); Sanjai Kumar vs. Dy. Director General (NCE), Directorate (supra)** and **Ram Chandra vs. State of U.P. (supra)** observing that neither issue nor principle of law enunciated in above three judgments was applicable to the dispute

which had arisen in **Jagdish Narain vs. Union of India (supra).**

16. In view thereof it is evident that Full Bench judgment in **Sr. General Manager, Ordnance Factory vs. Central Administrative Tribunal (supra)** is not applicable in the case in hand.

17. Instead issue in present writ petition is squarely covered by earlier three Division Bench judgments in **Ravi Karan Singh vs. State of U.P. (supra); Sanjai Kumar vs. Dy. Director General (NCE), Directorate (supra) and Ram Chandra vs. State of U.P. (supra)** which were in respect of employment in State Government and had considered question of compassionate appointment under Rules, 1974 and have clearly held that in case of such appointments, Rules, 1975 are not applicable since compassionate appointment under Rules, 1974 is of permanent nature.

18. Here also respondents have clearly relied on the fact that compassionate appointment of petitioner was made on temporary basis i.e. on probation and has been terminated by taking recourse to Rules, 1975. It may be noticed that compassionate appointment of petitioner has not been terminated on the ground that he could not perform satisfactorily on probation but it has been terminated on the ground that he applied for compassionate appointment after five years. Though term of five years under Rules 1974 is not a period of limitation and instead a compassionate appointment could have been allowed even after five years if condition of family member of deceased employee continuing and persisting, penurious, justifying compassionate appointment. Herein, it is not a case of respondents that after five years family of deceased employee including petitioner were not facing penurious condition and therefore, compassionate appointment is not justified. Moreover, once compassionate appointment was made and there was no fraud, misrepresentation or other fault on the part of such employee, In my view, termination of compassionate appointment in such a case is patently arbitrary, whimsical and erroneous.

19. In the present case, however, since respondents have terminated petitioner treating his appointment only as temporary taking recourse of Rules 1975, this approach of respondents is clearly in the teeth of law laid down in above Division Bench judgments in **Ravi Karan Singh vs. State of U.P. (supra); Sanjai Kumar vs. Dy. Director General (NCE), Directorate (supra)** and **Ram Chandra vs. State of U.P. (supra).**

20. Considering the totality of the facts and circumstances of the case, the writ petition is **allowed**. Impugned order dated 10.5.2002 (Anexure No. 9) is hereby quashed. Petitioner shall be entitled for all consequential benefits.

(2019)12 ILR A1118

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.11.2019

BEFORE
THE HON'BLE MRS. SUNITA AGARWAL, J.

Writ-A No. 69714 of 2015

Sunil Kumar Dubey & Ors. ...Petitioners
Versus

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

Counsel for the Petitioners:
Sri Mukesh Kumar Singh, Sri A. Khare, Sri Ashok Khare

Counsel for the Respondents:
C.S.C., Sri Anup Dhar Dubey, Sri Arvind Prabodh Dubey, Sri Pranesh Dutt Tripathi, Sri Satyendra Kumar Mishra, Sri Sunil Kumar Singh, Sri Vinay Kumar Rai, Sri Yogendra Kumar Srivastava

A. Service Law - U.P. Basic Education (Teachers Service) Rules, 1981- Rule 14, 17, 18, 19, 22 - Seniority - Total 208 candidates were issued appointment letters on the same date - for appointment to the post of Assistant Teacher at junior basic School. They were given 15 days joining time - none of them lost seniority – inter se seniority to be determined from the date of initial appointment in substantive vacancy under Rule 18 (4) read with R.19 and 22 of the Rules, 1981.

Held:- Under the scheme of the Rules, 1981 as noted above, it was not open for the District Basic Education Officer to determine seniority of teachers from the date of their joining instead of date of their initial appointment on a substantive post. (Para 38)

Writ Petition allowed. (E-9)

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

1. Heard Sri Ashok Khare learned Senior Advocate assisted by Sri Mukesh Kumar Singh learned Advocate for the petitioner, Sri Pranesh Dutt Tripathi learned Advocate for the respondent no. 4. Sri Arvind Prabodh Dubey learned Advocate has put in appearance on behalf of the respondent no. 5 and Sri Anup Dhar Dubey and Sri Yogendra Kumar Srivastava learned Advocates appear on behalf of respondent nos. 8 to 11.

2. The present writ petition has been filed by 47 persons working on the post of Assistant Teacher, Senior Basic School/Headmaster, Junior Basic School (both carrying the same pay scale), seeking for quashing of the promotion orders dated 31.7.2015 for granting promotion to the post of Headmaster, Senior Basic School to a total number of 437 persons. Further, prayer is to direct the respondents to redetermine the seniority position of the petitioners herein from the date of their substantive appointment and not from the date of joining on the post of Assistant Teacher, Junior Basic School.

3. The private respondent nos. 5 to 14 are impleaded in representative capacity to represent the promotees, who were granted promotion on the post of Headmaster, Senior Basic School on 31.7.2015.

4. Sri Anup Dhar Dubey and Sri Yogendra Kumar Srivastava learned Advocates appearing on behalf of respondent nos. 8 to 11 and have filed a counter affidavit on their behalf. Respondent no. 5 is represented by Sri Arvind Prabodh Dubey learned Advocate who had filed his Vakalatnama on 15.7.2019.

5. The facts in brief relevant to decide the controversy at hand are that total 208 candidates were issued appointment letters in District Kushinagar on 25.11.1999 for appointment as Assistant Teacher in Junior Basic School after completion of Special B.T.C. Training Course-1999, after getting certificate dated 25.10.1999 as successful candidates. There is no dispute about the date of issuance of the appointment letters

to the petitioners herein, which is 25.11.1999 in case of all the candidates including the petitioners and the respondents herein. It is also admitted that 15 days time was provided to the candidates to join the post of Assistant Teacher in Junior Basic School.

6. The petitioners being teachers working in the schools run by Basic Education Board, their recruitment is governed by the provisions of U.P. Basic Education (Teachers Service) Rules 1981 (hereinafter referred to as "the Rules, 1981"). The appointing authority for all categories of posts under the Rules, 1981 is the Basic Education Officer of the concerned district.

7. In paragraphs '17' and '18' of the writ petition, it is contended that total 208 candidates had joined on different dates after receipt of the appointment letters dated 25.11.1999. The last batch of the candidates had joined on 10.12.1999. The petitioners herein joined the post of Assistant Teachers in Junior Basic School of District Kushinagar between 3.12.1999 and 7.12.1999.

8. It is stated in paragraph '19' of the writ petition that out of total 208 candidates as stated above, only 172 persons including the petitioners herein were in service on the date of filing of the writ petition.

9. It is then contended that all Assistant Teachers, Junior Basic School (including the petitioners herein) who were appointed by the orders dated 25.11.1999 were promoted to the post of Headmaster, Junior Basic School/Assistant Teacher, Senior Basic School. These promotions were made in two bulk.

10. All teachers who belonged to Scheduled Castes and Scheduled Tribes category were granted promotion on 30.6.2004 while the remaining teachers including the candidates belonging to Other Backward Classes were granted promotion on 27.7.2007.

11. Pursuant to the aforesaid promotion orders, all promotees including the petitioners herein had joined forthwith and started working on the promoted post. There was no dispute with regard to interse seniority of the Assistant Teachers in District Kushinagar at that point of time, since all the persons who were appointed on 25.11.1999 to the posts of Assistant Teachers in Junior Basic Schools were promoted on the same day to the post of Headmasters, Junior Basic School/Assistant Teacher, Senior Basic School (both posts carrying the same pay scale) and further for the fact that the said post is 100% promotional. It is contended that there exist total number of 565 Senior Basic Schools in District Kushinagar and consequently the same number of posts of the Headmaster.

12. The dispute arose when promotion exercise to the post of Headmaster in Senior Basic Schools was undertaken in the year 2015 with the circulation of a provisional seniority list of Headmasters, Junior Basic School/Assistant Teachers, Senior Basic School.

13. It is contended that prior to the year 2015, a provisional seniority list dated 15.7.2010 was circulated by the District Basic Education Officer, Kushinagar. But since the said seniority list did not include the names of teachers appointed on 25.11.1999 and was limited

to the appointees uptil the year 1992, there was no question of raising any dispute by the petitioners. No final seniority list was published, thereafter, nor any promotion had been done till the year 2013. Fresh proceeding for promotion was initiated in the year 2013 with the publication of a provisional seniority list which included the names of the petitioners. A copy of the said seniority list is appended as Annexure '9' to the writ petition to assert that the said seniority list referred both the dates of first appointment and joining separately under different columns, but seniority had been fixed from the date of joining of individual candidates. Objections were filed but no final seniority list was published by the District Basic Education Officer. Certain promotions were made to the posts of Headmaster, Senior Basic Schools but since they were limited to the candidates appointed prior to 25.11.1999 as Assistant Teacher, Junior Basic School and no teacher appointed on 25.11.1999 was promoted in the year 2013, there was no question of raising any dispute.

14. It is further contended that the petitioners sought information under Right to Information Act in the year 2013 but the same was not properly replied and copy of district-wise seniority list as demanded by the petitioners was not supplied to them at that point of time.

15. Be that as it may, on 12.6.2015, the District Basic Education Officer, Kushinagar circulated a provisional seniority list of Headmaster, Junior Basic School and Assistant Teacher, Senior Basic School inviting objections against the same. A copy of the list has been appended as Annexure '14' to the writ petition.

16. The names of appointees on the post of Assistant Teacher in Junior Basic School on 25.11.1999 (including the petitioners herein) are found in the said list.

17. A perusal of the said list indicates that the date of joining of individual candidates has been treated to be the date of their substantive appointment while determining their interse seniority.

18. The submission is that the petitioners herein had filed objection dated 17.6.2015 against the erroneous determination of interse seniority but without taking any decision on the said objections, without publication of final seniority list, promotion orders dated 31.7.2015 granting promotion to a total number of 437 persons as Headmaster, Senior Basic School, had been issued. The cause of action for filing the present writ petition arose on account of the said action of the respondents.

19. The submission of learned Senior Counsel for the petitioners is that the determination of seniority of candidates under Rule 22 of the Rules, 1981 has to be made from the date of their appointment in a substantive vacancy. As all candidates who were appointed on the post of Assistant Teachers in Junior Basic School on 25.11.1999 were promoted on the same date to the post of Assistant Teacher in Senior Basic School/Headmaster, Junior Basic School, there cannot be any change in their interse seniority, which has to be determined from the date of their initial appointment in service on substantive post. That means interse seniority of all such appointees has to be determined from the date of their

initial appointment i.e. 25.11.1999. The entire exercise of promotion in question, therefore, is contrary to the Rules, 1981.

20. These submissions are repelled by Sri Pranesh Dutt Tripathi learned Advocate for the respondent no. 4 from the averments made in the counter affidavit filed on behalf of the District Basic Education Officer.

21. Reference has been made to paragraphs '6' to '8' of the counter affidavit to state that seniority of Assistant Teachers in District Kushinagar had been determined on the basis of date of their joining and based on the said seniority list, promotions were granted to the post of Headmaster, Junior Basic School/Assistant Teacher, Senior Basic School in the years 2004 and 2007, when all the petitioners were also promoted. No objection had been raised by the petitioners against the said seniority list prepared on the basis of date of their joining. In the year 2015, the seniority list of Headmaster, Junior Basic School and Assistant Teacher, Senior Basic School was again circulated in all 14 blocks of District Kushinagar and objections were invited.

22. After decision on all objections, final seniority list was published and, thereafter, 626 Assistant Teachers had been called for counselling held between 11.2.2015 and 14.7.2015. The petitioners herein had also participated in the counselling process. They cannot be allowed to turn around to challenge the seniority list or the promotion orders, once they acquiesced with the fact of interse seniority of the Assistant Teachers in District Kushinagar. All teachers from serial no. 1 to 473 from the said seniority list promoted to the post of Headmaster in Senior Basic School are senior to the petitioners and there is no infirmity in consideration of the date of the joining and date of birth of the respective candidates for the purpose of determination of their interse seniority.

23. As the petitioners did not challenge the promotion exercise conducted in the years 2004 and 2007 and participated in the promotion exercise held in the year 2015, the challenge to the seniority list published in the year 2015 cannot be entertained.

24. Having heard learned counsel for the parties and perused the record, before entering into the controversy at hand, it would be appropriate to go through the scheme of the Rules, 1981, which provides for recruitment, promotion, seniority of Assistant Teachers in Basic Schools run by Basic Education Board.

25. The U.P. Basic Education (Teachers) Service Rules, 1981 (Rules 1981) have been framed by the Governor in exercise of powers under sub-section (1) of Section 19 of the Uttar Pradesh Basic Education Act, 1972 (hereinafter referred to as "the Act, 1972").

26. The 'Basic School' as defined in Rule 2(c) of the Rules, 1981 means a school where instructions from class I to VIII are imparted. 'Junior Basic School' as per Rule 2(h) means a Basic School where instructions from Classe I to V are imparted. 'Nursery School' as per Rule 2(j) means a school in which children ordinarily of the age up to six years and taught in classes lower than class I. 'Senior Basic School' means a Basic

School where instructions from Class VI to VIII are imparted. As per Rule 2(o), 'Teacher' means a person employed for imparting instructions in Nursery Schools, Basic Schools, Junior Basic Schools, or Senior Basic Schools.

27. Part II of the Rules, 1981 provides for 'cadre and strength' of the service.

Rule 4 as contained in Part II of the Rules, 1981 reads as under:-

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

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

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

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

Rule 5 in Part III of the Rules, 1981 provides for the 'Source of Recruitment' and reads as under:-

*"**5. Sources of recruitment.** - The mode of recruitment to the various categories of posts mentioned below shall be as follows :*

(a) (i) Mistresses of Nursery Schools	*By direct recruitment as provided in Rules 14 and 15;*
(ii) Assistant Masters and Assistant Mistresses of Junior Basic Schools	
(b) (i) Headmistresses of Nursery Schools	*By promotion as provided in Rule 18;*
(ii) Head Masters and Head Mistresses of Junior Basic Schools	*By promotion as provided in Rule 18;*
(iii) Assistant Masters of Senior Basic Schools	*By promotion as provided in Rule 18;*
(iv) Assistant Mistresses of Senior Basic Schools	*By promotion as provided in Rule 18;*
(v) Head Masters of Senior Basic Schools	*By promotion as provided in Rule 18;*
(vi) Head Mistresses of Senior Basic Schools	*By promotion as provided in Rule 18;*

Provided that if suitable candidates are not available for promotion to the posts mentioned at (iii) and (iv) above, appointment may be made by direct recruitment in the manner laid down in Rule 15."

28. A careful reading of Rules 4 and 5 together shows that there is one cadre of service which is Basic Education Teacher local area-wise. Meaning thereby, in one local area there is only one cadre.

Different categories of posts i.e. Assistant Teacher (Junior Basic School), Assistant Teacher (Senior Basic School), Head Master (Junior Basic School) and Headmaster (Senior Basic School) are kept in one cadre of the local area in which they are appointed. The hierarchy of posts, however, is relevant for the purpose of promotion to the posts of Headmaster, Junior Basic School/Assistant Teacher, Senior Basic School and Headmaster of Senior Basic School as they are 100% promotional posts.

29. The essential qualifications for promotion to the aforesaid posts as per clause (b) of Rule 5 of the Rules, 1981 as provided in sub-rule (3) of Rule 8 of the Rules, 1981.

Relevant Rule 8(3) is reproduced as under:-

*"**8(3)** The minimum experience of candidates for promotion to a post referred to in clause (b) of Rule 5 shall by as shown below against each-*

Post	*Experience*
(i) Head mistresses of Nursery School	*At least five years' teaching experience as permanent Mistress of Nursery School;*
(ii) Head master or Headmistress of Junior Basic Schools and Assistant Master or Assistant Mistress of Senior Basic School	*At least five years' teaching experience as permanent Assistant Mistress or Assistant Master of Junior Basic School;*
(iii) Head master or Headmistress for Senior Basic School or Assistant Master or Assistant Mistress of Senior Basic School, as the case may be: Provided that if sufficient number of suitable or eligible candidates are not available for promotion to the posts mentioned at serial numbers (ii) or (in), the field of eligibility may be extended by the Board by giving relaxation in the period of experience.	*At least three years' experience as permanent Headmaster or Headmistress of Junior Basic School or Assistant Master or Assistant Mistress of Senior Basic School, as the case may be: Provided that if sufficient number of suitable or eligible candidates are not available for promotion to the posts mentioned at serial numbers (ii) or (in), the field of eligibility may be extended by the Board by giving relaxation in the period of experience.*

Rule 18 provides for 'Procedure for Recruitment by Promotion' which reads as under:-

*"**18. Procedure for recruitment by promotion. -** (1) Recruitment by promotion to the posts referred to in clause (b) of Rule 5 shall be made on the basis of seniority subject to rejection of unfit through the Selection Committee constituted under Rule 16.*

(2) The appointing authority shall prepare an eligibility list of candidates in order of seniority and place it before the Selection Committee alongwith their character rolls and such other records pertaining to them as may be considered proper.

(3) The Selection Committee shall consider the cases of the candidates

on the basis of the records referred to in sub-rule (2).

(4) The Selection Committee shall prepare a list of selected candidates in order of seniority as disclosed from the eligibility list referred to in sub-rule (2) and forward the same to the appointing authority."

Rule 19 provides for Appointment after selection, which reads as under:-

*"**19. Appointment.** - (1) The appointing authority shall make appointment to any post referred to in Rule 5 by taking the names of the candidates in the order in which they stand in the list prepared under Rule 17 or 17-A or 18, as the case may be.]*

(2) The appointing authority may make appointments in the temporary and officiating vacancies also from the lists referred to in sub-rule (1).

(3) No appointment shall be made except on the recommendation of the Selection Committee, and, in the case of direct recruitment except on production of residence certificate issued by the Tahsildar.

Rule 22 provides for determination of seniority of teachers which is reproduced as under:-

*"**22. Seniority.** - (1) The seniority of a teacher in a cadre shall be determined by the date of his appointment in a substantive capacity :*

Provided that, if two or more persons are appointed on the same date their seniority shall be determined in which their names appear in the list referred to in Rule 17 or 17-A or 18, as the case may be.

***Note.** - A candidate selected by direct recruitment may lose his seniority, if he fails to join without valid reasons when a vacancy is offered to him whether the reasons in any particular case are valid or not shall be decided by the appointing authority.]*

(2) The seniority of a teacher who has been transferred from one local area to another in accordance with the provisions of Rule 21 shall be placed at the bottom of the list of teachers of the corresponding class or category pertaining to the local area to which he has been transferred, as on the date of orders for transfer are passed, such a persons shall not be entitled to any compensation.

30. A careful and conjoined reading of the Rules 8(3), 18, 19 and 22 of the Rules, 1981 shows that all such candidates who are eligible for promotion to the post of Headmaster, Junior Basic School and Assistant Teacher, Senior Basic School have to be kept in one eligibility list in order of their seniority by the appointing authority in terms of Rule 18(2) of the Rules, 1981, for consideration of their candidature by the Selection Committee constituted under Rule 16 alongwith their character rolls and other relevant records. Under Rule 18(4), the list of selected candidates is to be prepared by the Selection Committee in the same order of seniority as disclosed from the eligibility list referred to in sub-rule (2) of Rule 18, for forwarding the same to the appointing authority.

31. Rule 19 further states that appointing authority shall make appointment to the post referred to in Rule 5 by taking the names of the

candidates in the same order as they stand in the list prepared under Rule 18.

32. Meaning thereby, the interse seniority of the candidates found eligible and suitable for promotion by the Selection Committee would remain the same on their appointment to the promoted post.

33. The interse seniority of directly recruited candidates at the entry level post i.e. the post of Assistant Teacher, Junior Basic School is determined as per Rule 17 at the time of their direct recruitment.

34. Rule 22 (1) readwith proviso appended to it further states that interse seniority of teachers in a cadre has to be determined according to the same order in which their names appear in the list referred to in Rule 17 or 18.

35. Only exception to the said position is by a 'Note' appended to the proviso to sub-rule (1) of Rule 22 which states that a candidate selected by direct recruitment may lose his seniority, if he fails to join within time given by the appointing authority without any valid reason.

36. Sub-rule (2) of Rule 22 further provides that a teacher would lose his seniority on transfer from one local area to another local area on his request or with his consent.

37. In the instant case, admitted position is that total number of 208 candidates were issued appointment letters on the same date i.e. 25.11.1999 for appointment to the post of Assistant Teacher in Junior Basic School in District Kushinagar, which is the entry level post. They were given 15 days of joining time and had joined within the said period. There is nothing on record which would indicate that any of such candidate had lost his seniority for the fact of non-joining within the joining time granted by the appointing authority. The 'Note' appended to the proviso to sub-rule (1) of Rule 22, therefore, is not attracted. None of them would lose their seniority and their interse seniority has to be determined from the date of their initial appointment i.e. 25.11.1999 as per rule 14 readwith rule 17 of the Rules, 1981. On promotion to the post of Assistant Teacher in Senior Basic School/Headmaster, Junior Basic School, their interse seniority would remain unchanged for the admitted fact that all of them were promoted on the same date. Their seniority has to be determined as per Rule 18(4) readwith Rules 19 and 22 taking into consideration the date of their initial appointment in substantive vacancy on the post of Assistant Teacher in Junior Basic School, which is 25.11.1999 for all such appointees.

38. Under the scheme of the Rules, 1981 as noted above, it was not open for the District Basic Education Officer to determine seniority of teachers from the date of their joining instead of date of their initial appointment on a substantive post. The said flaw in determination of seniority is evident from the averments made by the District Basic Education Officer, Kushinagar in his counter affidavit. His defence only is that the petitioners cannot be allowed to agitate the dispute pertaining to their interse seniority as promotions were made in the years 2004 and 2007 and they participated in the exercise, result of which is under challenge. The said argument is wholly unsustainable.

39. The obvious reason is that there was no occasion for the petitioners to raise any dispute as all teachers appointed on 25.11.1999 were promoted to the post of Headmaster in Junior Basic School and Assistant Teacher in Senior Basic School.

40. This fact is also admitted to the District Basic Education Officer, Kushinagar and private respondents in their counter affidavits.

41. In fact, the dispute with respect to the interse seniority petitioners and private respondents arose in the year 2015 when provisional seniority list was published on 12.6.2015 determining seniority of the Assistant Teachers from the date of their joining instead of the date of their initial appointment. The petitioners raised objections and filed the instant writ petition, immediately after receipt of the information of the promotion order. There is no latches on the part of the petitioners in challenging the wrong determination of their seniority vis-a-vis promotees. The entire exercise of promotion to the post in question on the basis of the said seniority list is, therefore, illegal.

42. In the facts and circumstances of the present case, it cannot be said that interse seniority of the teachers in the Basic Schools of District Kushinagar was settled and cannot be reopened.

43. For the above discussions, the promotion orders dated 31.7.2015 are liable to be set aside.

44. The District Basic Education Officer, Kushinagar is hereby directed to prepare a fresh seniority list by determining interse seniority of the candidates appointed on 25.11.1999 from the date of their initial appointment as per the Rules, 1981. After re-determination of the seniority of all such persons, their candidature for promotion to the post of Headmaster in Senior Basic School, District Kushinagar shall be considered afresh. The orders of promotion shall, accordingly, be issued and implemented immediately after determination of their seniority.

45. It is further directed that in case, in the fresh exercise, the petitioners are found eligible for promotion and are selected as per their seniority against the vacancies of Headmaster, Senior Basic School filled by promotion on 31.7.2015, they shall be given notional promotion w.e.f. that date till actual promotion orders are issued.

46. It is further made clear that in case of reshuffling of the list of promotees and reversion of the respondents, no recovery shall be made from them.

47. The entire exercise shall be completed within a period of two months from the date of submission of certified copy of this order.

48. In view of the above observations and directions, the writ petition is **allowed.**

(2019)12 ILR A1127

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.10.2019
BEFORE
THE HON'BLE SIDDHARTHA VARMA, J.

Writ-C No. 543 of 2017

M/s. Kritika Auto Product Ltd.
...Petitioner
Versus
U.P. State Micro and Small Enterprises Facilitation Council, U.P. Kanpur & Anr.
...Respondents

Counsel for the Petitioner:
Sri Pramod Kumar Singh Paliwal

Counsel for the Respondents:
C.S.C. Sri Kandarp Srivastava, Sri Kaustubh Srivastava, Sri Ranjit Saxena

A. Civil Law - Arbitration and Conciliation Act, 1996 – Section 36 – Micro Small and Medium Enterprises Development Act, 2006 – Section 18 (2) and (3) – Maintainability of execution case u/s 36 of Act, 1996 to execute an award under Act, 2006 – Enforcement of an award through its execution can be filed anywhere in the country where such decree can be executed and there is no requirement for obtaining a transfer of the decree from the Court, which would have jurisdiction over the arbitral proceedings. (Para 8 & 9)

Writ Petition dismissed. (E-1)

List of cases cited: -

1. Sundaram Finance Limited vs. Abdul Samad and Ors AIR 2018 SC 965

List of cases cited: -

1. Computer Sciences Corporation India Pvt. Ltd. v. Harishchandra Lodwaland Anr. AIR 2006 MP 34

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

1. Learned counsel for the parties have filed their written arguments.

2. A dispute arose between the petitioner and the respondent no. 2 regarding payment for some goods supplied by the respondent no. 2 to the petitioner. From the record of the case it appears that the respondent no. 1 that is the U.P. State Micro and Small Enterprises Facilitation Council, U.P. Kanpur entertained the dispute between the petitioner and the respondent no. 2 and ultimately an award was drawn on 11.5.2015 which was signed on 21.6.2015 and as per the award the respondent no. 2, (the petitioner before the U.P. State Micro and Small Enterprises Facilitation Facilitation Council) was entitled to get an amount of Rs. 19,86,951/- alongwith interest. The amount payable to the respondent no. 2 on the date of the award was Rs. 36,04,777/-. It was further provided that interest would be leviable till the entire payment was made. When this amount, it appears, was not being paid by the petitioner, the respondent no. 2 filed an application for executing the award before the District Judge, Faridabad. This application was filed under Section 36 of the Arbitration and Conciliation Act, 1996. The petitioner who was the Judgement Debtor had appeared before the executing court and the execution proceedings had started. This writ petition, thereafter, during the continuation of the execution proceedings, was filed saying that as only the provisions of Sections 65 to 81 of the Arbitration and Conciliation Act 1996 had been made applicable by Section 18 (2) of the Micro Small and Medium Enterprises Development Act, 2006, the provisions of Section 36 were not applicable and the Execution Case was not maintainable. Since the learned counsel for the petitioner readout Section 18 (2) of the Micro Small and Medium Enterprises Development Act, the same is being reproduced here as under:-

"**18. Reference to Micro and Small Enterprises Facilitation Council:-(2)** On receipt of a reference under sub-section (1), the Council shall

either itself conduct conciliation in the matter or seek the assistance of any institution or centre providing alternate dispute resolution services by making a reference to such an institution or centre, for conducting conciliation and the provisions of sections 65 to 81 of the Arbitration and Conciliation Act, 1996, shall apply to such a dispute as if the conciliation was initiated under Part III of that Act "

3. Further learned counsel for the petitioner stated that even if the Arbitration and Conciliation Act 1996 was applicable then as per Section 42 of that Act the Court which had jurisdiction over the Arbitration proceedings alone would have the jurisdiction to deal with the execution etc. of the award.

4. Learned counsel for the petitioner still further argued that under no circumstances would the award which was in the shape of a decree be executed by the Court at Faridabad. In this regard, learned counsel for the petitioner relied upon **AIR 2006 MP 34 (Computer Sciences Corporation India Pvt. Ltd. v. Harishchandra Lodwal and Anr.)** and stated that it would have been proper had the execution been filed at Kanpur and thereafter it would have been transferred to some other Court. But, he stated, it could not have been filed at Faridabad.

5. Learned counsel for the respondents, in reply, however, submitted that though Section 18 (2) of the Micro Small and Medium Enterprises Development Act, 2006, had applied Sections 65 to 81 for the purposes of conciliation, arbitration had to take place as per the Section 18 (3) of the Micro Small and Medium Enterprises, Development Act. The council under the Act could either itself settle the dispute by arbitration or could refer a given dispute to any institution or centre for arbitration. For arbitration the provisions of the Arbitration and Conciliation Act 1996 had to apply as if the Arbitration was in pursuance of an arbitration agreement referred to under Section 7(1) of the Arbitration and Conciliation Act 1996.

6. Since learned counsel for the respondents referred to Section 18(3) of the Micro Small and Medium Enterprises Development Act 2006, the same is being reproduced here as under:-

"18. Reference to Micro and Small Enterprises Facilitation Council:- (3) Where the conciliation initiated under sub-section (2) is not successful and stands terminated without any settlement between the parties, the Council shall either itself take up the dispute for arbitration or refer it to any institution or centre providing alternate dispute resolution services for such arbitration and the provisions of the Arbitration and Conciliation Act, 1996, shall then apply to the disputes as if the arbitration was in pursuance of an arbitration agreement referred to in sub-section (1) of Section 7 of that Act."

7. Learned counsel for the respondent no. 2 submitted that under Section 35 there was a finality attached to the arbitration award if it had not been challenged and then its enforcement was possible under Section 36 of the Arbitration and Conciliation Act. Since the learned counsel for the respondent no. 2 referred to Section 35 and 36 of the Arbitration and Conciliation Act, the same are being reproduced here as under:-

"**35. Finality of arbitral awards:-** Subject to this Part an arbitral award shall be final and binding on the parties and persons claiming under them respectively.

36. Enforcement.-(1) Where the time for making an application to set aside the arbitral award under Section 34 has expired, then, subject to the provisions of sub-section (2), such award shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908 (5 of 1908), in the same manner as if it were a decree of the court.

(2) Where an application to set aside the arbitral award has been filed in the Court under section 34, the filing of such an application shall not by itself render that award unenforceable, unless the Court grants an order of stay of the operation of the said arbitral award in accordance with the provisions of sub-section (3), on a separate application made for that purpose.

(3) Upon filing of an application under sub-section (2) for stay of the operation of the arbitral award, the Court may, subject to such conditions as it may deem fit, grant stay of the operation of such award for reasons to be recorded in writing:

Provided that the Court shall, while considering the application for grant of stay in the case of an arbitral award for payment of money, have due regard to the provisions for grant of stay of a money decree under the provisions of the Code of Civil Procedure, 1908 (5 of 1908)."

8. Learned counsel for the respondents further submitted that since an award was not a decree but was only being executed like a decree by a fiction of law created by the Arbitration and and Conciliation Act, the arbitral award could be executed anywhere in the country where such a decree/award could be executed and, therefore, there was no requirement to first file the execution application for executing the award in the Court which had jurisdiction and then get it transferred. In fact, learned counsel for the respondent no.2 submitted that the judgement cited by the learned counsel for the petitioner stood overruled by the judgement reported in **AIR 2018 SC 965 (Sundaram Finance Limited vs. Abdul Samad and Ors)**. Since the learned counsel for the respondent no. 2 referred to paragraphs 22, 23 and 24 of the judgement, the same are being reproduced here as under:-

"22. We are, thus, unhesitatingly of the view that the enforcement of an award through its execution can be filed anywhere in the country where such decree can be executed and there is no requirement for obtaining a transfer of the decree from the Court, which would have jurisdiction over the arbitral proceedings.

23. The effect of the aforesaid is that the view taken by the Madhya Pradesh High Court and the Himachal Pradesh High Court is held to be not good in law while the views of Delhi High Court, Kerala High Court, Madras High Court, Rajasthan High Court, Allahabad High Court, Punjab & Haryana High Court and Karnataka High Court reflect the correct legal position, for the reasons we have recorded aforesaid.

24. The appeal is accordingly allowed and the impugned order dated 20.3.2014 is set aside restoring the execution application filed by the appellant before the Morena courts. The parties are left to bear their own costs. "

9.Having heard the learned counsel for the parties, I am of the view that the award could have been put into execution by the Court where the execution was filed. This is also the view which has been taken by the judgement reported in **AIR 2018 SC 965**.

10.The writ petition, therefore, lacks merit and is, accordingly, dismissed.

(2019)12 ILR A1131

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.11.2019

BEFORE
THE HON'BLE PRADEEP KUMAR SINGH BAGHEL, J.
THE HON'BLE ROHIT RANJAN AGARWAL, J.

Writ-C No. 9402 of 2019

The Indian Hume Pipe Co. Ltd.
...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Anurag Khanna, Sri Shubham Agrawal, Sri Raghav Dev Garg

Counsel for the Respondents:
C.S.C., Sri Anant Kishore, Sri Manish Kumar Nigam, Sri Pranjal Mehrotra, Sri S.K. Chaturvedi, Sri Shashi Nandan

A. Judicial review – Scope – Interference in contract matter and E-tender process – Judicial review in tender matters is limited and review can only be made on point of arbitrariness, illegality and excess exercise of power – The Court should not venture into the realm of terms of contract and it is the author of the tender document who is the best person to understand and appreciate its requirement and interpret the same – It should refrain from exercise of judicial review in matters relating to terms and conditions of the tender document – Only in case where breach of rules of natural justice has been committed or decision has been reached which no reasonable Tribunal would have reached or there is an abuse of power, that the Court can interfere. (Para 25, 50 & 56)

Writ Petition dismissed. (E-1)

List of cases cited: -

1. Nabha Power Ltd. (NPL) v. Punjab State Power Corporation Ltd. (PSPCL) and another, (2018) 11 SCC 508

2. Judgment dated 09.04.2019 of Supreme Court passed in Civil Appeal No. 3588 of 2019; Caretel Infotech Ltd. v. Hindustan Petroleum Corporation Limited and others)

3. AFCONS Infrastructure Ltd. vs. Nagpur Metro Rail Corporation Ltd. and another, (2016) 16 SCC 818

4. Haffkine Bio-Pharmaceutical Corporation Ltd. vs. Nirlac Chemicals and others, (2018) 12 SCC 790

5. Maa Binda Express Carrier and another vs. North-East Frontier Railways and others (2014) 3 SCC 760

6. Union of India vs. Sankalchand Himatlal Sheth and another (1977) 4 SCC 193

7. Ramana Dayaram Shetty v. The International Airport Authority, AIR 1979 (SC)1628

8. Poddar Steel Corporation vs. Ganesh Engineering Works and others (1991) 2 SCC 273

9. G.J. Fernandez vs. State of Karnataka and others (1990) 2 SCC 488

10. Tata Cellular v. Union of India (1994) 6 SCC 651

11. Indian Railway Catering and Tourism Corporation Ltd. and another v. Doshion Veolia

Water Solutions Pvt. Ltd. and others, (2010) 13 SCC 364

(Delivered by Hon'ble Rohit Ranjan Agarwal, J.)

1. Heard Sri Anurag Khanna, learned Senior Advocate assisted by Sri Shubham Agarwal and Sri Radhav Dev Garg, learned counsel for the petitioner, Sri Shashi Nandan, learned Senior Advocate assisted by Sri Manish Kumar Nigam, learned counsel for respondent nos. 6 and 7 and Sri Pranjal Mehrotra, learned counsel for respondent nos. 2 to 5.

2. Present petition has been filed by the petitioner for the following reliefs:

"a. Issue a writ, order or direction in the nature of certiorari quashing the entire proceedings of opening of financial bids in pursuance of the E-tender Notice dated 09.01.2019.

aa. Issue a writ, order or direction in the nature of certiorari quashing the impugned letter dated 09.03.2019 issued by the Respondent no. 4 herein.

b. Issue writ, order or direction in the nature of mandamus calling for the records of the technical bids submitted and further reject the technical bid submitted by the Joint Venture comprising of Respondent no. 6 and 7.

c. Issue writ, order or direction in the nature of mandamus calling for the records of financial bids submitted and further declare the Petitioner as the successful bidder.

d. Issue writ, order or direction in the nature of mandamus restraining the Respondent no. 2 from issuing letter of intent in favour of the Joint Venture (JV) comprising of the Respondent no. 6 and 7."

3. Petitioner is a company incorporated under the provisions of the Companies Act, having its registered office at Mumbai. According to petitioner, it is engaged in the business of manufacture of Prestressed Concrete Pipes, Hume Steel Pipes, Penstock Pipes, R.C.C. Hume Pipes, Prestressed Concrete Sleepers, Bar Wrapped Steel Cylinder Pipes and Prestressed Concrete Cylinder Pipes.

4. It was on 09.01.2019 that an e-tender notice was issued by the office of Superintended Engineer Vth Circle, U.P. Jal Nigam, Jhansi inviting bids on "Turnkey" basis for survey, design, construction, testing, commissioning, trial and run and handing over of work proposed in Jhansi Water Supply Reorganization Scheme (Phase-II) under AMRUT programme. As per the notice technical part of e-bids was to be opened on 07.02.2019, which was postponed to 04.03.2019, as 04.03.2019 was a holiday, the technical bid was revised to be opened on 05.03.2019.

5. According to petitioner, it submitted its bid on 01.03.2019. e-tender notice was accompanied by e-tender document, having all the conditions of eligibility in order to participate in the tender proceedings.

6. Technical bid was opened and the same was uploaded on the website on 05.03.2019 by respondent no. 2, and three technical bids including that of petitioner, as well as of Joint Venture (JV),

comprising of respondent nos. 6 and 7 and one more bid was uploaded.

7. It is further stated that petitioner found certain discrepancies in the joint bid of respondent nos. 6 and 7, as such he wrote a letter on 08.03.2019, as well as sent, an e-mail on 09.03.2019 to respondent no.2. The objection of petitioner to the technical bid of respondent nos. 6 and 7 was that documents appended were not in conformity with the conditions prescribed in e-tender document. It is also stated that petitioner received an e-mail from respondent no. 2 on morning of 09.03.2019 that tender of petitioner has been accepted during technical evaluation and financial bid will be opened on 09.03.2019 at 5 p.m.

8. In the evening of 09.03.2019, financial bids of all the three bidders were opened and the Joint Venture, comprising of respondent nos. 6 and 7 was found to be the lowest being 5.55% less than the estimated value, while petitioner's bid was second lowest at 1.92% less than the estimated value, while financial bid of the third bidder that is respondent no. 8 was 9.45% more than the estimated value.

9. Sri Anurag Khanna, learned Senior counsel appearing for the petitioner submitted that entire proceedings and exercise undertaken by respondent no. 2 and its officers are ex-facie illegal and are in clear violation of terms and conditions provided in the e-tender document. Bid awarded in favour of respondent nos. 6 and 7 is being challenged on the following three grounds:-

9.1. Firstly on the basis of work experience of the Joint Venture which does not confirm with the criteria provided in e-tender document, according to him, criteria for pre-qualification with respect to work experience was provided in Clause 11 of the e-tender document. In technical bid submitted by JV of respondent no. 6 and 7, two certificates of work experience for the work done in Ghana and Angola was disclosed and the said work certificate for work done in a foreign country would not tantamount to work experience as per e-tender document.

9.1.1. He laid emphasis on Clause 2.13 of e-tender document which provides for effect of work experience in a foreign country, which is reproduced hereinunder:-

"2.13 The experience in foreign countries of a subsidiary or parent company will also be considered for qualification in case the company is not registered in India. The experience has to be certified by the respective Embasssy office."

9.1.2. According to Sri Khanna, work experience of a Company in a foreign country will be considered only if the same is not registered in India, while both respondent nos. 6 and 7 are Companies which are registered in India, hence work experience in Ghana and Angola as claimed by them cannot be counted as work experience. Further, the experience has to be certified by respective Embassy and from perusal of certificates so enclosed by respondents, it is clear that they are not certified by respective Embassies of Ghana and Angola, thus, the said work certificate cannot be considered and the condition as stipulated in the document has not been fulfilled. He further pointed out that work experience certificate submitted by respondent nos. 6 and 7 relating to certificate issued by Government of

Karnataka, reflects that only 80.05% of total work was done and not the entire work, while eligibility criteria as per Clause 11 mandates that certificate of completed work was to be enclosed.

9.2. The second ground of attack is in regard to the solvency certificate provided by JV of respondent no. 6 and 7 which is not in conformity with the requirement of e-tender document. Emphasis has been laid on the list of documents in the e-tender document which a proposed bidder has to submit online on the e-tender website. Serial No. 27 requires a bidder to submit a solvency certificate issued by District Magistrate/ Nationalized Bank. According to petitioner respondent no. 6 submitted two solvency certificates, one issued by HSBC Bank, dated 21.02.2019, and other issued by Yes Bank on 25.02.2019, thus, total solvency of the two being 190 crores (Rs. 100 crores + 90 crores). While solvency certificate of Rs.75 crores issued by Punjab National Bank on 02.02.2019 was submitted by respondent no. 7. Stress has been laid on the fact that as Clause 27 provided for solvency certificate either issued by District Magistrate or by a nationalized bank, but in present case respondent no. 6 has submitted solvency certificate issued by HSBC Bank which is not a nationalized bank, nor any solvency certificate has been issued by District Magistrate. Thus, solvency certificate so submitted by respondents cannot be considered while reviewing the technical bids. It was also pressed that bidder was required to have a solvency of Rs.189 crores and respondent no. 7 had submitted a solvency certificate issued by Punjab National Bank to the tune of Rs.75 crores only which was not in accordance with the amount prescribed in e-tender notice.

9.3. The third ground of attack is that, working bid capacity of respondent no. 7 is less than the estimated cost of work supposed to be done by it. It has been contended that in the JV, respondent no. 6 was the lead partner as per their Joint Venture agreement dated 27.02.2019 and responsibility of work has been divided between them as per agreement, and scope of work of respondent no. 7 is limited to extent of supply, execution and maintenance during defect liability period of PCCP pipes.

10. Sri Khanna invited the attention of the Court to eligibility criteria in the e-tender document which requires the bidder to have working bid capacity equal to or more than the estimated cost of work put to tender. According to him, on calculating the estimated cost of work, earmarked for respondent no. 7, in pursuance of the JV agreement, from bill of quantity issued by respondent no. 2, is about Rs.165 crores, while respondent no. 7 has shown its bidding capacity to be Rs.127.31 crores which is less than the estimated cost of work, thus the respondent should not have accepted the technical bid of the JV.

11. Lastly, petitioner has raised an objection that financial bid was opened on a State Government holiday, as Clause 3.28.01 of e-tender documents provides that in case specified date of e-tender opening being declared a holiday for the Department, e-tender shall be opened at the appointed time and place on the next working day. As 09.03.2019 was a second Saturday of the Month, all Government Offices were closed, as such the opening of financial bid on the said date creates suspicion on the conduct of the respondents.

12. A supplementary affidavit was filed by the petitioner bringing on record the objections decided by respondent no. 4, dated 09.03.2019, wherein the objections raised by the petitioner before authorities concerned were decided. Sri Anurag Khanna, learned Senior counsel further, to impress upon his arguments relied upon the judgment of the Apex Court in case of ***AFCONS Infrastructure Ltd. vs. Nagpur Metro Rail Corporation Ltd. and another, (2016) 16 SCC 818.*** Relevant paras 12, 13, 14 and 15 of the judgment are extracted hereasunder.

*"12. In **Dwarkadas Marfatia and Sons v. Port of Bombay, (1989) 3 SCC 293** it was held that the constitutional Courts are concerned with the decision-making process. **Tata Cellular v. Union of India, (1994) 6 SCC 651** went a step further and held that a decision if challenged (the decision having been arrived at through a valid process), the constitutional courts can interfere if the decision is perverse. However, the constitutional courts are expected to exercise restraint in interfering with the administrative decision and ought not to substitute its view for that of the administrative authority. This was confirmed in **Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517** as mentioned in **Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium), (2016) 8 SCC 622.***

13. In other words, a mere disagreement with the decision- making process or the decision of the administrative authority is no reason for a constitutional court to interfere. The threshold of mala fides, intention to favour someone or arbitrariness, irrationality or perversity must be met before the constitutional court interferes with the decision making process or the decision.

*14. We must reiterate the words of caution that this Court has stated right from the time when **Ramana Dayaram Shetty v. International Airport Authority of India, (1979) 3 SCC 489** was decided almost 40 years ago, namely, that the words used in the tender documents cannot be ignored or treated as redundant or superfluous - they must be given meaning and their necessary significance. In this context, the use of the word "metro' in Clause 4.2(a) of Section III of the bid documents and its connotation in ordinary parlance cannot be overlooked.*

15. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional courts but that by itself is not a reason for interfering with the interpretation given."

13. He also relied upon a judgment of the Apex Court in case of ***Haffkine Bio-Pharmaceutical Corporation Ltd. vs. Nirlac Chemicals and others, (2018) 12 SCC 790*** as well as in case of ***Maa Binda Express Carrier and another vs. North-East Frontier Railways and others (2014) 3 SCC 760***. In Paras 8 and 9, the Apex Court held as under:-

"8. The scope of judicial review in matters relating to award of contract

by the State and its instrumentalities is settled by a long line of decisions of this Court. While these decisions clearly recognize that power exercised by the Government and its instrumentalities in regard to allotment of contract is subject to judicial review at the instance of an aggrieved party, submission of a tender in response to a notice inviting such tenders is no more than making an offer which the State or its agencies are under no obligation to accept. The bidders participating in the tender process cannot, therefore, insist that their tenders should be accepted simply because a given tender is the highest or lowest depending upon whether the contract is for sale of public property or for execution of works on behalf of the Government. All that participating bidders are entitled to is a fair, equal and non-discriminatory treatment in the matter of evaluation of their tenders. It is also fairly well-settled that award of a contract is essentially a commercial transaction which must be determined on the basis of consideration that are relevant to such commercial decision. This implies that terms subject to which tenders are invited are not open to the judicial scrutiny unless it is found that the same have been tailor made to benefit any particular tenderer or class of tenderers. So also the authority inviting tenders can enter into negotiations or grant relaxation for bona fide and cogent reasons provided such relaxation is permissible under the terms governing the tender process.

9. Suffice it to say that in the matter of award of contracts the Government and its agencies have to act reasonably and fairly at all points of time. To that extent the tenderer has an enforceable right in the court which is competent to examine whether the aggrieved party has been treated unfairly or discriminated against to the detriment of public interest. (See ***Meerut Development Authority v. Association of Management Studies and Air India Ltd. v. Cochin International Airport Ltd. (2000) 1 SCR 505)****."*

14. Further reliance has been placed in case of ***Union of India vs. Sankalchand Himatlal Sheth and another (1977) 4 SCC 193*** wherein the Court held as under:-

"11. The normal rule of interpretation is that the words used by the legislature are generally a safeguard to its intention. Lord Reid in ***Westminster Bank Ltd. v. Zang, 1966 AC 182*** *observed that "no principle of interpretation of statutes is more firmly settled than the rule that the Court must deduce the intention of Parliament from the words used in the Act." Applying such a rule, this Court observed in* ***S. Narayanaswami v. G. Panneerselyam, AIR 1972 SC 2284*** *that "where the statute's meaning is clear and explicit, words cannot be interpolated." What is true of the interpretation of an ordinary statute is not any the less true in the case of a constitutional provision, and the same rule applies equally to both. But if the words of an instrument are ambiguous in the sense that they can reasonably bear more than one meaning, that is to say, if the words are semantically ambiguous, or if a provision, if read literally, is patently incompatible with the other provisions of that instrument, the court would be justified in construing the words in a manner which will make the particular provision purposeful. That, in essence is the rule of harmonious construction. In* ***M. Pentiah v. Veeramallappa, AIR 1961 SC 1107, 1115*** *this Court observed :*

"Where the language of a statute, in its ordinary meaning and grammatical construction leads to, a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence……"

But, if the provision is clear and explicit, it cannot be reduced to a nullity by reading into it a meaning which it does not carry and, therefore, "Courts are very reluctant to substitute words in a statute or to add words to it, and it has been said that they will only do so where there is a repugnancy to good sense." In the view which I am disposed to take, it is unnecessary to dwell upon Lord Denning's edict in ***Seaford Court Estates Ltd. v. Asher, (1949) 2 All ER 155, 164*** *that when a defect appears in a statute, a Judge cannot simply fold his hands and blame the draftsman, that he must supplement the written word so as to give force and life to the intention of the legislature and that he should ask himself the question how, if the makers of the Act had themselves come across the particular ruck in the texture of it, they would have straightened it out. I may only add, though even that does not apply, that Lord Denning wound up by saying, may be not by way of recanting, that "a Judge must not alter the material of which the Act is woven, but he can and should iron out the creases."*

15. Per contra, Sri Shashi Nandan, learned Senior counsel appearing on behalf of respondent nos. 6 and 7 submitted that petitioner had challenged the bid on technical grounds which were already resolved in pre-bid query and its reply submitted by respondent, Jal Nigam on 09.03.2019. Further, replying to the first argument made by counsel for the petitioner, it was submitted that respondent no. 6 is a registered Company under the Indian Companies Act, who has submitted its work experience of parent Company which is registered in Israel. As given in notice inviting tender (NIT Clause No. 3) which is the basis of all e-tender document, which states that experience in foreign countries of a subsidiary or parent Company will also be considered for qualification. As far as certification from respective Embassy is concerned, it is only necessary when neither parent Company nor subsidiary Company is registered in India.

16. As to the second argument regarding solvency certificate provided by the JV, it was submitted that being a global tender where foreign companies can participate providing solvency certificate from nationalized bank was struck down by the Department. This issue was also raised in pre-bid query of Koya and Company as well as JV, in which written reply was given by the Department, where word "nationalized" was removed and only "bank" was written for issuing solvency certificate. He further submitted that there is no mention about the fact that solvency certificate has to be issued by a Nationalized Bank, and the Master Circular only lays condition regarding solvency amount be equal to 40% or more than that of estimated cost of work. Neither e-tender notice or in Master Circular there is any requirement of solvency certificate from a nationalized bank, as the rationale behind such liberal drafting in the circular, pre bid qualification/ eligibility criteria and NIT was to afford opportunity for global traders to bid for the project.

17. He further submitted that Clause 15 of the e-tender notice provides for earnest money to be submitted in form of

either FDR/ B.G. of a nationalized bank or other bank so provided. The same requirement has been given in Clause 8 of the Master Circular dated 16.11.2018 in regard to the performance guarantee/ security money in form of bank guarantee from any nationalized bank and other banks as provided therein.

18. Answering respondent had submitted bank guarantee for earnest money of Punjab National Bank and ICICI Bank. As e-tender notice as well as Master Circular of the Jal Nigam provides for the earnest money in form of FDR/ B.G. from nationalized bank or the banks provided therein, but for solvency certificate, it would be issued by a Bank.

19. Replying the third argument, Sri Shashi Nandan submitted that contention of the petitioner regarding the fact that working bid capacity of respondent no. 7 being less than the estimated cost of work supposed to be done by it is totally wrong. As per the agreement between JV of respondent nos. 6 and 7, respondent no. 7 was to execute 25% of total work within prestressed cement, concrete pipes and the lead partner that is respondent no. 6 will execute remaining 75% of work. As total cost of project is 472 crores and 25% of the same comes to Rs.118 crore, while the working bid capacity of respondent no. 7 being 127.31 crores, hence the same is much more than the required amount. Thus, the contention of the petitioner that acceptance of technical bid of the answering respondent being irregular is factually wrong.

20. According to him, working bid capacity of both the JV partners taken together has to be considered and it should not be less than estimated cost of work, while nowhere in the tender it required that JV partners have to individually show their working bid capacity to be in excess of the work individually.

21. Replying to the last objection raised by the petitioner as far as the financial bid being opened on State Government holiday, it was contended that the final bid was opened after prior information to all the parties concerned and there being no objection raised by any of the parties to the financial bid being opened.

22. Sri Shashi Nandan, learned Senior Counsel invited the attention of the Court to the judgment of Apex Court rendered in case of ***Ramana Dayaram Shetty v. The International Airport Authority, AIR 1979 (SC) 1628***, wherein the Apex Court while dealing with the grant of contract in Para 23 held as under:-

"23. We may also in this connection refer to the decision of this Court in ***C. K. Achuthan v. State of Kerala, (1959) Supp (1) SCR 787,*** *where Hidayatullah, J., speaking on behalf of The Court made certain observation which was strongly relied upon on behalf of the respondents. The facts of this case were that the petitioner and the 3rd respondent Co-operative Milk Supply Union, Cannanore, submitted tenders for the supply of milk to the Government hospital at Cannanore for the year 1948-49. The Superintendent who scrutinised the tenders accepted that of the petitioner and communicated the reasons for the decision to the Director of Public Health. The resulting contract in favour of the petitioner was, however, subsequently*

cancelled by issuing a notice in terms of clause (2) of the tender, in pursuance of the policy of the Government that in the matter of supply to Government Medical Institutions the Co-operative Milk Supply Union should be given contract on the basis of prices filed by the Revenue Department. The petitioner challenged The decision of the Government in a petition under Article 32 of the Constitution on the ground inter alia that there had been discrimination against him vis-a-vis the 3rd respondent and as such, there was contravention of Article 14 of the Constitution. The Constitution Bench rejected this contention of the petitioner and while doing so, Hidayatullah, J., made the following observation: "There is no discrimination, because it is perfectly open to the Government, even as it is to a private party, to choose a person to their liking, to fulfil contracts which they wish to be performed. When one person is choosen rather than another, the aggrieved party cannot claim the protection of Article 14, because the choice of the person to fulfil a particular contract must be left to the Government." The respondents relied very strongly on this observation in support of their contention that it is open to the 'State' to enter into contract with any one it likes and choosing one person in preference to another for entering into a contract does not involve violation of Article 1a. Though the language in which this observation is couched is rather wide, we do not think that in making this observation, the Court. intended to lay down any absolute proposition permitting the state to act arbitrarily in the matter of entering into contract with third parties. We have no doubt that the Court could not have intended to lay down such a proposition because Hidayatullah J. who delivered the judgment of the Court in this case was also a party to the judgment in ***Rashbihari Panda v. State of Orissa (AIR 1969 SC 1081)*** *which was also a decision of the Constitution Bench, where it was held in so many terms that the State cannot act arbitrarily in selecting persons with whom to enter into contracts. Obviously what the Court meant to say was that merely because one person is chosen in preference to another, it does not follow that there is a violation of Article 14, because the Government must necessarily be entitled to make a choice. But that does not mean that the choice be arbitrary or fanciful. The choice must be dictated by public interest and must not be unreasoned or unprincipled."*

23. Reliance was also placed upon the decision of Supreme Court in case of ***Poddar Steel Corporation vs. Ganesh Engineering Works and others (1991) 2 SCC 273***; Para 6 of the judgment is extracted hereasunder:-

"6. It is true that in submitting its tender accompanied by a cheque of the Union Bank of India and not of the State Bank the clause 6 of the tender notice was not obeyed literally, but the question is as to whether the said non- compliance deprived the Diesel Locomotive Works of the authority to accept the bid. As a matter of general proposition it cannot be held that an authority inviting tenders is bound to give effect to every term mentioned in the notice in meticulous detail, and is not entitled to waive even a technical irregularity of little or no significance. The requirements in a tender notice can be classified into two categories-those which lay down the essential conditions of eligibility and the others which are merely ancillary or

subsidiary with the main object to be achieved by the condition. In the first case the authority issuing the tender may be required to enforce them rigidly. In the other cases it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases. This aspect was examined by this Court in ***C.J. Fernandez v. State of Karnataka, [1990] 2 SCC 488*** *a case dealing with tenders. Although not in an entirely identical situation as the present one, the observations in the judgment support our view. The High Court has, in the impugned decision, relied upon* ***Ramana Dayaram Shetty v. International Airport Authority of India & Ors., [1979] 3 SCC 489*** *but has failed to appreciate that the reported case belonged to the first category where the strict compliance of the condition could be insisted upon. The authority in that case, by not insisting upon the requirement in the tender notice which was an essential condition of eligibility, bestowed a favour on one of the bidders, which amounted to illegal discrimination. The judgment indicates that the court closely examined the nature of the condition which had been relaxed and its impact before answering the question whether it could have validly condoned the shortcoming in the tender in question. This part of the judgment demonstrates the difference between the two categories of the conditions discussed above. However it remains to be seen as to which of the two clauses, the present case belongs."*

24. In case of ***G.J. Fernandez vs. State of Karnataka and others (1990) 2 SCC 488,*** the Apex Court held that changes or relaxation given by the authority/ Department in terms of NIT effecting on all the intending parties should not result in arbitrariness or discrimination. Relevant Para 15 is extracted hereasunder:-

"15. Thirdly, the conditions and stipulations in a tender notice like this have two types of consequences. The first is that the party issuing the tender has the right to punctiliously and rigidly enforce them. Thus, if a party does not strictly comply with the requirements of paras III, V or VI of the NIT, it is open to the KPC to decline to consider the party for the contract and if a party comes to court saying that the KPC should be stopped from doing so, the court will decline relief. The second consequence, indicated by this Court in earlier decisions, is not that the KPC cannot deviate from these guidelines at all in any situation but that any deviation, if made, should not result in arbitrariness or discrimination. It comes in for application where the non-conformity with, or relaxation from, the prescribed standards results in some substantial prejudice or injustice to any of the parties involved or to public interest in general. For example, in this very case, the KPC made some changes in the time frame originally prescribed. These changes affected all intending applicants alike and were not objectionable. In the same way, changes or relaxations in other directions would be unobjectionable unless the benefit of those changes or relaxations were extended to some but denied to others. The fact that a document was belatedly entertained from one of the applicants will cause substantial prejudice to another party who wanted, likewise, an extension of time for filing a similar certificate or document but was declined the benefit. It may perhaps be said to cause prejudice also to a party

which can show that it had refrained from applying for the tender documents only because it thought it would not be able to produce the document by the time stipulated but would have applied had it known that the rule was likely to be relaxed. But neither of these situations is present here. Sri Vaidhyanathan says that in this case one of the applicants was excluded at the preliminary stage. But it is not known on what grounds that application was rejected nor has that party come to court with any such grievance. The quesion, then, is whether the course adopted by the KPC has caused any real prejudice to the appellant and other parties who had already supplied all the documents in time and sought no extension at all? It is true that the relaxation of the time schedule in the case of one party does affect even such a person in the sense that he would otherwise have had one competitor less. But, we are inclined to agree with the respondent's contention that while the rule in Ramana's case (supra) will be readily applied by courts to a case where a person complains that a departure from the qualifications has kept him out of the race, injustice is less apparent where the attempt of the applicant before court is only to gain immunity from competition. Assuming for purposes of argument that there has been a slight deviation from the terms of the NIT, it has not deprived the appellant of its right to be considered for the contract; on the other hand, its tender has received due and full consideration. If, save for the delay in filing one of the relevant documents, MCC is also found to be qualified to tender for the contract, no injustice can be said to have been done to the appellant by the consideration of its tender side by side with that of the MCC and in the KPC going in for a choice of the better on the merits. The appellant had no doubt also urged that the MCC had no experience in this line of work and that the appellant was much better qualified for the contract. The comparative merits of the appellant vis-a-vis MCC are, however, a matter for the KPC (counselled by the TCE) to decide and not for the courts. We were, therefore, rightly not called upon to go into this question."

25. In ***Tata Cellular v. Union of India (1994) 6 SCC 651***, the Apex Court held that judicial review in tender matters is limited and review can only be made on point of arbitrariness, illegality and excess exercise of power. Relevant paras 74, 77 and 94 are extracted hereasunder:-

"74. Judicial review is concerned with reviewing not the merits of the decision in support of which the application for judicial review is made, but the decision-making process itselt.

77. The duty of the court is to confine itself to the question of legality. Its concern should be :

1. Whether a decision-making authority exceeded its powers?

2. Committed an error of law,

3. committed a breach of the rules of natural justice,

4. reached a decision which no reasonable tribunal would have reached or,

5. abused its powers.

Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfillment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon

which an administrative action is subject to control by judicial review can be classified as under:

(i) Illegality : This means the decision- maker must understand correctly the law that regulates his decision-making power and must give effect to it.

(ii) Irrationality, namely, Wednesday unreasonableness.

(iii) Procedural impropriety.

The above are only the broad grounds but it does not rule out addition of further grounds in course of time. As a matter of fact, in R. v. Secretary of State for the Home Department, ex Brind (1991) 1 AC 696, Lord Diplock refers specifically to one development, namely, the possible recognition of the principle of proportionality. In all these cases the test to be adopted is that the court should, "consider whether something has gone wrong of a nature and degree which requires its intervention".

94. The principles deducible from the above are :

(1) The modem trend points to judicial restraint in administrative action.

(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract.

Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

Based on these principles we will examine the facts of this case since they commend to us as the correct principles."

26. In ***Indian Railway Catering and Tourism Corporation Ltd. and another v. Doshion Veolia Water Solutions Pvt. Ltd. and others, (2010) 13 SCC 364***, the Apex Court held as under:-

"42. For this conclusion, we are again supported by the decision in Kanhaiya Lal Agrawal v. Union of India, (2002) 6 SCC 315 in which this Court relying on G.J. Fernandez v. State of Karnataka [(1990) 2 SCC 488] held: (Kanhaiya Lal case, SCC p. 317, para 6)

"6. .....Whether a condition is essential or collateral could be ascertained by reference to the consequence of non-compliance thereto. If non-fulfillment of the requirement results in rejection of the tender, then it would be an essential part of the tender otherwise it is only a collateral term."

Hence, if on the recommendation of the Tender Committee, the accepting authority did not find the deviation from Clause (ii) of the Note by Ion Exchange very material and has accepted the offer of Ion Exchange, the Division Bench of the High Court could not have held that Ion Exchange committed a breach of an essential term by not mentioning the excise duty amount in rupees in its offer."

27. Counsel for the answering respondent also relied upon Para 15 of the judgment of the Apex Court in ***AFCONS*** (supra) and submitted that it is only the person who has authored the tender document, is the best person to understand and appreciate its requirement. Relevant portion is extracted hereasunder:-

"15. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional Courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional Courts but that by itself is not a reason for interfering with the interpretation given."

28. In case of ***Nabha Power Ltd. (NPL) v. Punjab State Power Corporation Ltd. (PSPCL) and another, (2018) 11 SCC 508***, the Supreme Court while discussing the legal principal for interpretation of commercial contracts held as under:-

"72. We may, however, in the end, extend a word of caution. It should certainly not be an endeavour of commercial courts to look to implied terms of contract. In the current day and age, making of contracts is a matter of high technical expertise with legal brains from all sides involved in the process of drafting a contract. It is even preceded by opportunities of seeking clarifications and doubts so that the parties know what they are getting into. Thus, normally a contract should be read as it reads, as per its express terms. The implied terms is a concept, which is necessitated only when the Penta test referred to aforesaid comes into play. There has to be a strict necessity for it. In the present case, we have really only read the contract in the manner it reads. We have not really read into it any "implied term' but from the collection of clauses, come to a conclusion as to what the contract says. The formula for energy charges, to our mind, was quite clear. We have only expounded it in accordance to its natural grammatical contour, keeping in mind the nature of the contract."

29. Following the aforesaid judgment the Apex Court in Civil Appeal No. 3588 of 2019 ***(Caretel Infotech Ltd. v. Hindustan Petroleum Corporation Limited and others)*** decided on 09.04.2019 held that the Court should restrain from giving its interpretation to contracts, especially tender terms, at the behest of a party already competing for the tender, rather than what is propounded by the party framing the tender. His Lordship Sanjay Kishan Kaul, J. while deciding the issue held as under:-

"36. We consider it appropriate to make certain observations in the

context of the nature of dispute which is before us. Normally parties would be governed by their contracts and the tender terms, and really no writ would be maintainable under Article 226 of the Constitution of India. In view of Government and Public Sector Enterprises venturing into economic activities, this Court found it appropriate to build in certain checks and balances of fairness in procedure. It is this approach which has given rise to scrutiny of tenders in writ proceedings under Article 226 of the Constitution of India. It, however, appears that the window has been opened too wide as almost every small or big tender is now sought to be challenged in writ proceedings almost as a matter of routine. This in turn, affects the efficacy of commercial activities of the public sectors, which may be in competition with the private sector. This could hardly have been the objective in mind. An unnecessary, close scrutiny of minute details, contrary to the view of the tendering authority, makes awarding of contracts by Government and Public Sectors a cumbersome exercise, with long drawn out litigation at the threshold. The private sector is competing often in the same field. Promptness and efficiency levels in private contracts, thus, often tend to make the tenders of the public sector a non-competitive exercise. This works to a great disadvantage to the Government and the Public Sector.

37. In ***Afcons Infrastructure Limited v. Nagpur Metro Rail Corporation Limited & Anr., (2016) 16 SCC 818****, this Court has expounded further on this aspect, while observing that the decision making process in accepting or rejecting the bid should not be interfered with. Interference is permissible only if the decision making process is arbitrary or irrational to an extent that no responsible authority, acting reasonably and in accordance with law, could have reached such a decision. It has been cautioned that Constitutional Courts are expected to exercise restraint in interfering with the administrative decision and ought not to substitute their view for that of the administrative authority. Mere disagreement with the decision making process would not suffice.*

42. We have considered it appropriate to, once again, emphasise the aforesaid aspects, especially in the context of endeavours of courts to give their own interpretation to contracts, more specifically tender terms, at the behest of a third party competing for the tender, rather than what is propounded by the party framing the tender. The object cannot be that in every contract, where some parties would lose out, they should get the opportunity to somehow pick holes, to disqualify the successful parties, on grounds on which even the party floating the tender finds no merit."

30. Sri Pranjal Mehrotra, learned counsel appearing for the respondent nos. 2 to 5 submitted that the objections of the petitioner-Company was decided and conveyed to it on 09.03.2019. There was no inconformity in the documents submitted by respondent nos. 6 and 7 with the terms and conditions prescribed in e-tender document. It was further submitted that bids submitted by petitioner was higher than the bid of respondent nos. 6 and 7 by about Rs.17,13,84,103.95 (Rupees Seventeen Crore Thirteen Lac Eighty Four Thousand One Hundred Three and Ninety Five Paisa) and in case the tender was awarded to petitioner, huge loss would have been caused to the public exchequer without any legal justification.

31. It was also stated that e-tender process was totally impartial, systematic and transparent. As Department had found the bid of the JV to be substantially responsive and also their financial bid to be lowest, as such law and equity requires issuance of letter of intent in their favour.

32. Sri Mehrotra replying to the first objection of the petitioner stated that Clause 2.13 of e-tender document is derived from Master Circular of the respondent no. 2 that is U.P. Jal Nigam dated 16.11.2018 and relevant portion being at Note (iii) to Serial No. 1 of the Circular which is reproduced hereinbelow:-

"(iii) the experience in foreign countries of a subsidiary or parent company will also be considered for qualification. In case the company is not registered in India, the experience has to be certified by the respective embassy office."

33. The said Master Circular is on record as CA-1. While the NIT in Clause 3 also provides the same which is extracted hereasunder:-

"3. The experience in foreign countries of a subsidiary or parent company will also be considered for qualification. In case the company is not registered in India, the experience has to be certified by the respective Embassy office."

34. According to counsel, it is only on account of typographical mistake in Clause 2.13 of the e-tender document that petitioner is incorrectly interpreting the said clause. According to him, clause relating to foreign experience in NIT was in consonance with the Master Circular. A perusal of the same reveals that foreign experience of parent Company shall also be considered for qualification, and this requirement has been framed keeping in mind that global tenders are issued, calling upon all major players to participate, so that world class infrastructure may be established in State of U.P.

35. He laid stress on the fact that experience certificate has to be certified by the Embassy office only in cases where Company is not registered in India, but in present case, both respondent nos. 6 and 7 are registered in India.

36. It was also contended that petitioner had raised a pre-bid query regarding foreign experience clause and the Jal Nigam had directed them to refer to NIT, the said fact has not been disclosed by the petitioner nor these documents are there in the writ petition, and they have not approached this Court with clean hands and writ petition suffers from *supprsio veri suggestio falsi*. The said document has been brought on record as Annexure- CA-3 by the Jal Nigam.

37. As far as the second argument regarding solvency certificate, it has been contended that Master Circular dated 16.11.2018 in Clause 5 provides "the solvency amount should be equal to 40% or more of the estimated cost of work". There is no stipulation in the Master Circular preventing the respondents from accepting solvency certificates from banks other than nationalized bank. This fact becomes more relevant when compared with Clause (7) and Clause (8) relating to earnest money and performance guarantee/ security money,

as in Clause 7 Circular provides that earnest money should be in form of bank guarantee from any nationalized bank, Axis Bank, ICICI Bank, IDBI Bank and HDFC Bank. Similarly Clause 8 provides that performance guarantee should be in form of bank guarantee from any nationalized bank, Axis Bank, ICICI Bank, IDBI Bank and HDFC Bank.

38. Had the intention of the respondents been to restrict the banks for solvency certificates, a restriction similar to that as in Clause (7) and (8) would have been included in Clause 5 of the circular. Based on the Circular, NIT also specified amount for which solvency was required but did not specify the issuing authority/ bank.

39. Further, pre-qualification/ eligibility criteria (Clause d) also only provided for solvency amount but does not place any restriction on issuing authority, as rationale behind such liberal drafting in circular, pre-bid qualification/ eligibility criteria and NIT was that global participants were called to bid for the project. Foreign entities cannot provide solvency certificate from District Magistrate or Nationalized Bank, and if the contention and interpretation of the petitioner is accepted then it would exclude them from tendering process.

40. Replying the third argument of the petitioner in regard to the working bid capacity of respondent no. 7, Sri Mehrotra submitted that interpretation of the clause as made by the petitioner cannot be accepted and the working bid capacity of both JV partners are to be taken together and should not be less than estimated cost of work. Further, nowhere the Clause requires that JV partners will have to individually show their working bid capacity to be in excess of work individually undertaken by them. As the working bid capacity of JV of respondent nos. 6 and 7 is 4705.34 crore, which is in excess of work that has to be put to tender.

41. Lastly responding to the 4th objection of the petitioner it was stated that the date of SLTC meeting was proposed on 11.03.2019, therefore, it was required to work on holiday. In fact, the e-tender opening date for 09.03.2019 was declared in advance and same was communicated to all bidders including petitioner.

42. Sri Anurag Khanna, learned Senior Counsel replying to the counter allegations made on behalf of respondents submitted that e-tender document being issued subsequent to NIT would prevail over it and Clause 2.13 of the e-tender document is very clear and logical. He further submitted that Master Circular referred to, does not have binding statutory effect and the conditions enumerated in the e-tender document would prevail over the same. He further submitted that the work experience certificate was not certified from the respective Embassies and cannot be considered as respondent no. 6 was not registered in India and further, the work experience of the JV with the Karnataka Government being not considered by the Jal Nigam is a concession of fact that the JV did not have requisite work experience to qualify for technical bid. He further submitted that the solvency certificate acceptable is provided in the list of documents at Annexure-8 and the same submitted by respondent no. 6 was not issued by the Nationalized Bank or

District Magistrate nor the same was provided by the partner that is respondent no. 7 to a tune of Rs.189 crores. He reiterated the objections made by him in regard to the fact that the technical bid of respondent nos. 6 and 7 should not have been accepted.

43. We have heard learned counsel for the parties at length and perused the material on record.

44. It is not in dispute that the respondent, U.P. Jal Nigam had issued an e-tender on 09.01.2019 for proposed work in Jhansi for supply of water under AMRUT programme. The tender being a global tender, various companies participated and submitted their bid. Petitioner and Joint Venture of respondent nos. 6 and 7 and also respondent no. 8 participated by submitting their bid. Technical bid was opened and uploaded on the website on 05.03.2019, wherein three bids qualified for the financial bid to be opened on 09.03.2019.

45. It is also not in dispute that when the financial bid was opened on 09.03.2019, bid comprising of Joint Venture of respondent nos. 6 and 7 was found to be the lowest, followed by bid of the petitioner, while financial bid of respondent no. 8 was at the third place.

46. Bid made by Joint Venture of respondent nos. 6 and 7 has been challenged by the petitioner on three technical grounds that the work experience certificate given by them was for work done in Ghana and Angola which was done in a foreign country and would not tantamount to work experience as per e-tender document. Secondly, solvency certificate submitted by respondent no. 6 was not from a nationalized bank and working bid capacity of respondent no. 7 was less than estimated cost of work supposed to be done by it.

47. The e-tender notice dated 09.01.2019 which prescribes the terms and conditions for participation in the bid has its very genesis from the Master Circular of the Department that is the U.P. Jal Nigam which is dated 16.11.2018. It has been pointed out that the terms and conditions of the e-tender notice as well as e-tender document goes back to the Master Circular issued by Jal Nigam.

48. The first ground so raised by the petitioner as far as the certificate of work experience of Joint Venture for work done in Ghana and Angola cannot be considered as work experience, is a fallacy, as from the reading of Clause 3 of e-tender notice as well as Master Circular, it is clear that in case of a Company not registered in India then the work done by a subsidiary or a parent company in a foreign country will not be considered, unless certified by the respective Embassy office. But in the present case, the Joint Venture is a Company registered in India, while the parent Company is registered in Israel, as such no certification of work experience done in Ghana and Angola are to be certified by their respective Embassies. Thus, objection made on the basis of Clause 2.13 of e-tender document is of no relevance, as also counsel for the Department stating that, it was due to typographical error which had occurred in the said Clause, would not change the very object of the Clause.

49. As far solvency certificate provided by the Joint Venture is

concerned, it has been argued by both the counsel for the Joint Venture as well as Jal Nigam that it being a global tender inviting global players, it would not be possible to have solvency certificate issued by nationalized bank or District Magistrate. Further, the issue regarding solvency certificate was also settled in pre-bid query of Koya and Company, wherein the Jal Nigam in its written reply had removed the word "nationalized" and only bank was written for issuing solvency certificate. Further, Jal Nigam submitted that in global tender such conditions cannot be laid down as foreign entities cannot provide solvency certificate from District Magistrate or nationalized Bank. It is worth nothing that Clause 15 of e-tender notice in respect of earnest money provides for FDR/ B.G. of a nationalized Bank, Axis Bank, ICICI Bank, IDBI and HDFC Bank. While Clause 5 of the Master Circular only provides that solvency amount should be equal to 40% or more of the estimated cost of work, but does not specify whether it should be from a nationalized bank or bank. Similarly, Clauses 7 and 8 which are in regard to earnest money and performance guarantee/ security money, it has been specifically provided that the same should be in form of bank guarantee from a nationalized bank, Axis Bank, ICICI Bank, IDBI Bank and HDFC Bank. The argument of the petitioner to the extent that Clause 27 of the e-tender document which provides for solvency certificate issued by District Magistrate/ Nationalized Bank cannot be accepted as the Department itself while answering the pre-bid query had clarified that solvency certificate should only be equal to 40% or more of the estimated cost of work but not from any particular bank or Government authority.

50. The Supreme Court in the matter of ***Nabha Power Ltd.*** (supra), ***Caretel Infotech Ltd.*** (supra) and ***AFCONS Infrastructure Ltd.*** (supra) repeatedly held that the Court should not venture into the realm of terms of contract and it is the author of the tender document who is the best person to understand and appreciate its requirement and interpret the same.

51. As in the instant case, Jal Nigam had answered pre-bid query of the respondents and clarified the fact regarding solvency certificate, we refrain ourselves from interpreting the terms of contract.

52. The third objection as far as the working bid capacity of respondent no. 7 is concerned, Jal Nigam has submitted that working bid capacity of both JV partners are to be taken together and it should not be less than estimated cost of work, and it is not that the capacity of work individually undertaken by them has to be considered, while their joint working bid capacity being 4705.34 crores, which is excess of work that has been put to tender, as such the argument has no force.

53. Lastly, the objection was raised in regard to the fact that financial bid was opened on 09.03.2019 which was a holiday, being second Saturday to which the answering Department had submitted that the date was declared in advance and communicated to all bidders including petitioner, as such the same being too technical as no prejudice is caused to either of the parties, the same is not accepted.

54. The petitioner has not alleged any arbitrariness, *mala fide* or excess of

exercise of power by the respondents in the e-tender process. Further, the bid of the Joint Venture comprising of respondent nos. 6 and 7 was found to be the lowest being 5.55% less than the estimated cost of work which saved the Department about Rs. 17 crores, and in case they are ousted from the process and tender is awarded to petitioner, huge loss would be caused to public exchequer without any legal justification.

55. Argument raised by counsel for petitioner to the extent that the e-tender document came later in time to the e-tender notice, as such it would prevail cannot be accepted, as the very genesis of e-tender notice (NIT), and e-tender document is the Master Circular of U.P. Jal Nigam which guides and provides for all the work and contract to be undertaken by the Department. It is on the basis of this Circular that terms and conditions were laid down in the e-tender notice and further in the e-tender document. Once the author of the document itself has come out with clarification to the effect that what will be the work experience and the requirement of solvency certificate, there is no justification to interfere in the tender process on the ground of technicalities.

56. It is well-settled that the Courts should refrain from exercise of judicial review in matters relating to terms and conditions of the tender document, and only in case where breach of rules of natural justice has been committed, or decision has been reached which no reasonable Tribunal would have reached or there is an abuse of power, that the Court can interfere.

57. In the present case, we find that none of grounds raised by the petitioner for invoking extra ordinary jurisdiction under Article 226 of the Constitution arise and the bid of the Joint Venture being the lowest and there being no deviation in the tender process, we decline to interfere in the tender process of respondent no. 2.

58. The writ petition is **dismissed**. However, no order as to cost.

(2019)12 ILR A1149

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.11.2019

BEFORE
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Writ-C No. 14272 of 2012
with Writ-C cases No. - 14156 of 2012, 14274 of 2012,14276 of 2012, 14278 of 2012, 14280 of 2012, 14281 of 2012, 14282 of 2012, 14284 of 2012, 14285 of 2012 & 14286 of 2012

Bareilly Nagar Nigam ...Petitioner
Versus
Smt. Sudama & Ors. ...Respondents

Counsel for the Petitioner:
Sri Anil Tiwari, Sri Satyam Singh, Sri Hemant Kumar

Counsel for the Respondents:
C.S.C.

A. Civil Law - Payment of Gratuity Act, 1972 – Applicability – Re-agitation of the matter – Applicability of the P.G. Act to municipal corporation is no longer *res integra* in view of judgment in Mujib Ullah Khan's case – Earlier order, being inter parties and the same having not been put to challenge, attained finality – Held, the petitioner cannot be allowed to re-agitate the same ground again. (Para 13 & 17)

Writ Petition dismissed. (E-1)

List of cases cited: -

1. Nagar Ayukt, Nagar Nigam, Kanpur Vs Mujib Ullah Khan & Ors. with Nagar Nigam, Gorakhpur Vs Ram Shanker Yadav & Anr. (2019) 6 SCC 103

2. Nagar Nigam, Gorakhpur through Nagar Ayukt Vs Suresh Pandey & Ors. 2019 (10) ADJ 418

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

1. Heard Sri Hemant Kumar, learned counsel for the petitioner and Sri Mata Prasad, learned Standing Counsel appearing for the State-respondents.

2. These petitions have been filed seeking to challenge a common order dated 04.02.2012 passed by the Controlling Authority under the Payment of Gratuity Act, 19721/Deputy Labour Commissioner, U.P., Bareilly in Case Nos.138/P.G.A./2004, 139/P.G.A./2004, 140/P.G.A./2004, 141/P.G.A./2004, 143/P.G.A./2004, 147/P.G.A./2004, 148/P.G.A./2004, 149/P.G.A./2004, 151/P.G.A./2004, 159/P.G.A./2004 and 160/P.G.A./2004. The necessary particulars in this regard are as follows:-

Serial Numbers	Writ Petitions	Parties	Particulars of the cases before the Controlling Authority
1	Writ-C No.14272 of 2012	Bareilly Nagar Nigam Vs. Smt. Sudama & Ors.	Case No.139/P.G.A./2004/04.02.2012
2	Writ-C No.14156 of 2012	Bareilly Nagar Nigam through its Municipal Commissioner Vs. Fatima Begum & Ors.	Case No.140/P.G.A./2004/04.02.2012
3	Writ-C No.14274 of 2012	Bareilly Nagar Nigam Vs. Munni Devi & Ors.	Case No.147/P.G.A./2004/04.02.2012
4	Writ-C No.14276 of 2012	Bareilly Nagar Nigam Vs. Masih Charan & Anr.	Case No.151/P.G.A./2004/04.02.2012
5	Writ - C No.14278 of 2012	Bareilly Nagar Nigam Vs. Sushila & Ors.	Case No.149/P.G.A./2004/04.02.2012
6	Writ-C No.14280 of 2012	Bareilly Nagar Nigam Vs. Kamla & Anr.	Case No.143/P.G.A./2004/04.02.2012
7	Writ-C No.14281 of 2012	Bareilly Nagar Nigam Vs. Chanda & Anr.	Case No.138/P.G.A./2004/04.02.2012

8	Writ-C No.14282 of 2012	Bareilly Nagar Nigam Vs. Naresh Chand Saxena & Anr.	Case No.141/P.G.A./2004/04.02.2012
9	Writ-C No.14284 of 2012	Bareilly Nagar Nigam Vs. Duli & Ors.	Case No.148/P.G.A./2004/04.02.2012
10	Writ-C No.14285 of 2012	Bareilly Nagar Nigam Vs. Ramvati & Ors.	Case No.151/P.G.A./2004/04.02.2012
11	Writ-C No.14286 of 2012	Bareilly Nagar Nigam Vs. Raman Lal & Anr.	Case No.159/P.G.A./2004/04.02.2012

3. The writ petitions being based on similar set of facts, with the consent of parties, are being taken up and decided together.

4. Writ-C No.14272 of 2012, has been treated to be the leading petition, wherein the order dated 04.02.2012 passed by the Controlling Authority in Case No.139/P.G.A./2004 (decided alongwith the connected matters), is under challenge.

5. The records of the case indicate that upon an application filed by the respondent-workmen, Case No.139/P.G.A./2004 was registered before the Controlling Authority under the Payment of Gratuity Act, 1972/Deputy Labour Commissioner, U.P., Bareilly. In terms of the aforementioned application it was stated that only a part of the total gratuity amount due to them had been paid by the employer and accordingly claims were raised for payment of the balance amount. The aforementioned application came to be decided by the Controlling Authority by means of the order dated 17.03.2005 directing payment of the balance amount of gratuity.

6. Upon similar applications being filed by the workmen who are parties in the connected writ petitions, different orders bearing date 17.03.2005 were passed by the Controlling Authority allowing the claims for payment of difference of gratuity.

7. The aforementioned orders dated 17.03.2005 passed by the Controlling Authority came to be challenged by the petitioner, Bareilly Nagar Nigam, by filing writ petitions on the ground that the P.G. Act, 1972 was not applicable to the Bareilly Nagar Nigam. The particulars of these writ petitions are as follows:-

Serial Numbers	Writ Petitions	Parties
1	WRIT-C No.41977 of 2005	Bareilly Nagar Nigam through Municipal Commissioner Vs. Fatima Begum & Ors.
2	WRIT-C No.41988 of 2005	Bareilly Nagar Nigam through Municipal

		Commissioner Vs. Kamla & Ors.
3	WRIT-C No.41932 of 2005	Bareilly Nagar Nigam through Municipal Commissioner Vs. Masih Charan & Anr.
4	WRIT-C No.41991 of 2005	Bareilly Nagar Nigam through Municipal Commissioner Vs. Sushila & Ors.
5	WRIT-C No.41929 of 2005	Bareilly Nagar Nigam through Municipal Commissioner Vs. Ramvati & Ors.
6	WRIT-C No.41982 of 2005	Bareilly Nagar Nigam through Municipal Commissioner Vs. Smt. Sudama & Ors.
7	WRIT-C No.41984 of 2005	Bareilly Nagar Nigam through Municipal Commissioner Vs. Duli & Anr.
8	WRIT-C No.41989 of 2005	Bareilly Nagar Nigam through Municipal Commissioner Vs. Munni Devi & Ors.
9	WRIT-C No.41936 of 2005	Bareilly Nagar Nigam through Municipal Commissioner Vs. Raman Lal & Anr.
10	WRIT-C No.41972 of 2005	Bareilly Nagar Nigam through Municipal Commissioner Vs. Chanda & Others
11	WRIT-C No.41952 of 2005	Bareilly Nagar Nigam through Municipal Commissioner Vs. Naresh Chandra Saxena & Anr.
12	WRIT-C No.60132 of 2005	Bareilly Nagar Nigam through Municipal Commissioner Vs. Munshi Lal & Anr.

8. The aforementioned writ petitions were decided together as a bunch by means of a common judgment and order dated 04.04.2011. The judgment dated 04.04.2011 is being reproduced below:-

"1. In this entire bunch of writ petitions, the order passed by Prescribed Authority under Payment of Gratuity Act, 1972 (hereinafter referred to as "1972 Act") has been assailed on the ground that the said Act has no application to Bareilly Nagar Nigam.

2. However, it is not demonstrated or shown to this Court as to how 1972 Act is not applicable to Bareilly Nagar Nigam. Application of 1972 Act is provided in Section 1(3) of the Act itself and read with definition clause, in my view, the Prescribed Authority has not erred in passing the impugned order applying the aforesaid Act to petitioner.

3. Learned counsel for the petitioner, however, submitted that it was pleaded before the Prescribed Authority that the workman having already availed benefit of gratuity under the rules framed by Municipal Corporation and the same having been paid, cannot claim benefit under 1972 Act, inasmuch as, payment of

gratuity can be claimed either under 1972 Act or under the terms of statutory rules framed by Municipal Corporation and not both.

4. This question has been considered by the Apex Court in Beed District Central Coop. Bank Ltd. Vs. State of Maharashtra & Ors. (2006) 8 SCC 514 and referring to Section 4(5) of 1972 Act, the Apex Court has held that provisions of the Act envisage for one scheme. It can not be segregated. Sub-section (5) of Section 4 of 1972 Act does not contemplate that the workman would be at liberty to opt for better terms of the contract, while keeping the option open in respect of a part of the statute. While reserving his right to opt for the beneficent provisions of the statute or the agreement, he has to opt for either of them and not the best of the terms of the statute as well as those of the contract. He cannot have both. The Apex Court in para 16 categorically held that the workman cannot opt for both the terms. Such a construction would defeat the purpose for which sub-section (5) of Section 4 has been enacted.

5. To the same effect is the decision of Delhi High Court in Municipal Corporation of Delhi Vs. Smt. V.T. Naresh & Anr. In Civil Misc. Writ Petition No.128/83 decided on 14th August, 1985.

6. In taking the above view I am also fortified by a judgement of this Court in Nagar Ayukt, Nagar Nigam, Kanpur Vs. Mujib Ulla Khan & Ors. 2008(117) FLR 277.

7. Learned counsel for the workmen-respondents submitted that they have been directed to be paid only the difference and not more than that which fact could not be shown to be incorrect by learned counsel for the petitioner.

8. Since only difference has been directed to be paid to respondents-workmen so as to give the benefit of only one scheme and not both, I do not find any reason to interfere with impugned orders. However, only by way of clarification, I provide that the claim of workmen having been made under 1972 Act shall be confined to the benefit admissible thereunder and if payment of gratuity has been made under the rules framed by the Municipal Corporation, such amount would be taken into consideration while satisfying demand of workmen under impugned orders.

9. In the circumstances, I find no reason to interfere with the impugned order.

10. Writ petitions lacks merit. Dismissed."

9. An application seeking clarification of the judgment dated 04.04.2011 was filed, which was rejected vide order dated 22.11.2011.

10. Pursuant to the aforementioned judgment dated 04.04.2011 a common order dated 04.02.2012 has been passed by the Controlling Authority in all the connected matters pertaining to the workmen who are parties in the present writ petition and the connected petitions. The Controlling Authority in terms of the order dated 04.02.2012 has directed the petitioner to make necessary deposit in terms of the earlier order dated 17.03.2005 whereunder the claims of the workmen for payment of difference of the amount of gratuity had been allowed.

11. The order dated 04.02.2012 which is a common order in the bunch of matters decided together, has been sought to be assailed on the ground that as per

terms of sub-section (5) of Section 4 of the P.G. Act, 1972 the workmen could not opt for the benefit of the terms of the statute as well as those of the contract and benefit of only one scheme could be taken.

12. Learned Standing Counsel appearing for the State-respondents has supported the order passed by the Controlling Authority by submitting that in terms of the order passed by the Controlling Authority only difference of the gratuity amount has been directed to be paid and as such it could not be said that the claims have been raised seeking benefit of the terms of the statute as well as those of the contract.

13. The issue with regard to the applicability of the P.G. Act, 1972 to municipal corporations, governed in terms of the provisions contained under the U.P. Municipal Corporation Act, 1959 is no longer *res integra* in view of the pronouncement made in the judgment in the case of Nagar Ayukt, Nagar Nigam, Kanpur Vs. Mujib Ullah Khan & Ors. with Nagar Nigam, Gorakhpur Vs. Ram Shanker Yadav & Anr.2 wherein taking into view of the provisions of the P.G. Act, 1972 and the notification dated 08.01.1982 issued under Section 1(3)(c), the P.G. Act, 1972 was held to be applicable. The relevant observations made in the aforesaid judgment are being extracted below:-

"3. The appellant, the Municipal Corporation, Kanpur is governed by the Uttar Pradesh Municipal Corporation Act, 1959, whereas, the Respondent is an employee of the appellant. The employees in both cases claimed gratuity by invoking the jurisdiction of the Controlling Authorities under the Act. The argument of the Appellant before the learned Single Judge was that the gratuity is payable in accordance with the Retirement Benefits and General Provident Fund Regulations, 1962 framed Under Section 548 of the 1959 Act as amended on 11.01.1988. Such Regulations contemplate payment of gratuity at the rate of 15 days' salary per month for 16.5 months. It was found by the High Court that it is the Act which is applicable, whereby, gratuity calculated at the rate of 15 days' salary for every completed year without any ceiling of months or part thereof.

4. The argument raised by the appellant before the High Court is, that the gratuity is payable in terms of Rule 4(1) of the 1962 Regulations published Under Section 548 (1) of the 1959 Act as amended on 11.01.1988. Therefore, the employees of the Municipalities are entitled to gratuity only in terms of such Regulations and not under the Act.

5. The High Court relied upon a judgment reported as Municipal Corporation of Delhi v. Dharam Prakash Sharma AIR 1999 SC 293 to hold that only employees of Central Government or the State Government are exempt from the applicability of the Act, therefore, the employees of the Appellants would be governed by the Act and are entitled to gratuity in terms of the scale mentioned therein. It was held that the Act is not applicable only to the Central Government or State Governments in terms of definition of an "employee" under Section 2 (e) of the Act. Therefore, the employees of the Municipalities are entitled to the gratuity in terms of the provisions of the Act.

6. The appellant relies upon Section 3 of the U.P. Dookan Aur Vanijya Adhishthan Adhiniyam, 1962 which is to

the effect that such Act will have no application to the office of Government or Local Bodies. Therefore, on the strength of such statutory provision, it was argued that the Act would not be applicable in respect of the Municipalities. The appellant is not a factory, mine, oilfield, plantation, port and railway company and that there is no notification as stipulated under Clause (c) of Section 1(3) of the Act. Therefore, the employees of the Municipalities are entitled to the gratuity in terms of the Regulations framed in exercise of powers of Section 548 of the 1959 Act and not under the Act.

7. On the other hand, the learned Counsel for the Respondent pointed out that the Central Government has published a notification in terms of Section 1(3)(c) of the Act on 08.01.1982 to extend the applicability of the Act to the Municipalities. Thus, the Act is applicable to the Municipalities…"

x x x x x

10. In terms of the above said Section 1(3)(c) of the Act, the Central Government has published a notification on 08.01.1982 and specified local bodies in which ten or more persons are employed, or were employed, on any day of the preceding twelve months as a class of establishment to which this Act shall apply.…

11. We find that the notification dated 08.01.1982 was not referred to before the High Court. Such notification makes it abundantly clear that the Act is applicable to the local bodies i.e. the Municipalities. Section 14 of the Act has given an overriding effect over any other inconsistent provision in any other enactment. The said provision reads as under:

"14. Act to override other enactments, etc. The provisions of this Act or any Rule made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or in any instrument or contract having effect by virtue of any enactment other than this Act."

12. In view of Section 14 of the Act, the provision in the State Act contemplating payment of gratuity will be inapplicable in respect of the employees of the local bodies.

13. Section 2(e) of the Act alone was referred to in the judgment reported as Municipal Corporation of Delhi. The said judgment is in the context of CCS (Pension) Rules, 1972 which specifically provides for payment of Pension and Gratuity. The Act is applicable to the Municipalities, therefore, it is wholly inconsequential even if there is no reference to the notification dated 08.01.1982.

14. The entire argument of the appellant is that the State Act confers restrictive benefit of gratuity than what is conferred under the Central Act. Such argument is not tenable in view of Section 14 of the Act and that liberal payment of gratuity is in fact in the interest of the employees. Thus, the gratuity would be payable under the Act. Such is the view taken by the Controlling Authority."

14. The notification dated 08.01.1982, referred to above, had been issued in terms of Section 1(3)(c) of the P.G. Act, 1972 whereunder the Central Government specified local bodies in which ten or more persons are employed or were employed, on any day preceding twelve months, as a class of the establishment to which the Act shall apply. The notification dated 08.01.1982 reads as under:-

"New Delhi, the 8th January, 1982
NOTIFICATION

S.O. No. 239....-In exercise of the powers conferred by Clause (c) of Sub-section (3) of Section 1 of the Payment of Gratuity Act, 1972 (39 of 1972), the Central Government hereby specified 'local bodies' in which ten or more persons are employed, or were employed, on any day preceding twelve months, as a class of establishments to which the said Act shall apply with effect from the date of publication of this notification in the Official Gazette.

Sd/.

(R.K.A. Subrahmanya)

Additional Secretary
(F. No. S-70020/16/77-FPG)"

15. The judgment in the case of **Nagar Ayukt Nagar Nigam, Kanpur Vs. Mujib Ullah Khan & Anr.** has been followed in a recent judgment of this Court in **Nagar Nigam, Gorakhpur through Nagar Ayukt Vs. Suresh Pandey & two Ors.3** wherein the relevant statutory provisions and the case law on the subject has been considered in detail.

16. The contention of the learned counsel for the petitioner with regard to the point that the workmen concerned could not opt for better terms of gratuity as per the terms of the statute as well as those of the contract, was specifically considered by this Court in the earlier round of litigation which was decided by the judgment dated 04.04.2011 in Writ-C No.41977 of 2005 (and connected matters) and the said argument was repelled by stating that in terms of the orders passed by the Controlling Authority since only difference in the amount of gratuity had been directed to be paid to the respondent-workmen so as to give benefit of only one scheme and not both, there was no reason to interfere with the orders impugned. The judgment also clarified that the claim of the workmen having been made under the P.G. Act, 1972 shall be confined to the benefit admissible therein and if payment of gratuity has been made under the rules framed by the municipal corporation, such amount would be taken into consideration.

17. The judgment dated 04.04.2011 being inter partes and the same having not been put to challenge, the said judgment has attained finality and the petitioner cannot be allowed to re-agitate the same grounds again.

18. The order dated 04.02.2012 which is sought to be challenged in the present bunch of petitions having been passed in pursuance of the observations made in the judgment dated 04.04.2011 passed in Writ-C No.41977 of 2005 (and connected matters), the same cannot be faulted with.

19. Counsel appearing for the petitioner has not been able to dispute the legal proposition with regard to the applicability of the provisions of the P.G. Act, 1972 to municipal corporations, including the petitioner-Nagar Nigam.

20. No other ground was raised by the counsel for the petitioner.

21. The writ petitions lack merit and are accordingly **dismissed.**

(2019)12 ILR A1157

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.08.2019

BEFORE
THE HON'BLE PRADEEP KUMAR SINGH BAGHEL, J.
THE HON'BLE PIYUSH AGRAWAL, J.

Writ-C No. 25692 of 2019

Lachhu Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Sudhir Dixit, Sri Deepti, Sri Utkarsh Dixit

Counsel for the Respondents:
C.S.C., Sri Anjali Upadhya

A. Civil Law - Land Acquisition Act, 1894 – Entitlement of 64.7% additional compensation as well as of allotment of developed *abadi* plot to the extent of 10% of acquired land – Judgement in Gajraj has made it clear that the land holders who have not filed writ petition, their case shall be considered by the Authority, which shall take a decision as to whether the benefit of additional compensation and the allotment of abadi plot be also given to those land holders who have not come to the Court. (Para 14)

Writ Petition disposed. (E-1)

List of cases cited: -

1. Gajraj and others v. State of U.P. and others (2011) 11 ADJ 1 (FB)

2. Savitri Devi v. State of Uttar Pradesh and others (2015) 7 SCC 21

3. Khatoon and others v. State of U.P. and others; Civil Appeal No. 2127 of 2018 (arising out of SLP (C) No. 35758 of 2016) : 2018(2) RCR (Civil) 164.

4. Civil Misc. Writ Petition Nos. 26718 of 2018; Atar Singh and others v. State of U.P.

5. Civil Misc. Writ Petition Nos. 16647 of 2018; Suresh Singh and others v. State of U.P. and others

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

1. The petitioner has preferred this writ petition for issuance of a direction to the respondents to allot the developed abadi to the extent of 10% of the acquired land. The relief claimed in the writ petition reads as under:

"i) Issue a writ, order or direction in the nature of mandamus commanding the Respondents to allot the developed Abadi Plot to the extent of 10% of the acquired land, subject to maximum of 2500 square meter in pursuance of the land of the petitioner acquired by the Authority bearing Khata No. 278 Khasra No. 152 measuring 2.6070 hectare situated at Village Pali, Pargana & Tehsil Dadri, District Gautam Budh Nagar."

2. It is stated that Greater Noida Industrial Development Authority (for short, "the Authority") acquired petitioner's *bhumidhari* land being Khata No. 278 Khasra No. 152 situated at Village Pali, Pargana & Tehsil Dadri, District Gautam Budh Nagar.

3. A large number of writ petitions were filed by the farmers. A batch of petitions was decided by a common judgement in the case of **Gajraj and others v. State of U.P. and others1.** The

petitioner claims that he has also filed Civil Misc. Writ Petition No. 46933 of 2011 (Raghubar & others v. State of U.P. & others) which was clubbed with the lead petition2. This Court in Gajraj (supra) has passed the following directions:

"482. ...

3. All other writ petitions except as mentioned above at (1) and (2) are disposed of with following directions:

(a) The petitioners shall be entitled for payment of additional compensation to the extent of same ratio (i.e. 64.70%) as paid for village Patwari in addition to the compensation received by them under 1997 Rules/award which payment shall be ensured by the Authority at an early date. It may be open for Authority to take a decision as to what proportion of additional compensation be asked to be paid by allottees. Those petitioners who have not yet been paid compensation may be paid the compensation as well as additional compensation as ordered above. The payment of additional compensation shall be without any prejudice to rights of land owners under Section 18 of the Act, if any.

(b) All the petitioners shall be entitled for allotment of developed Abadi plot to the extent of 10% of their acquired land subject to maximum of 2500 square meters. We however, leave it open to the Authority in cases where allotment of abadi plot to the extent of 6% or 8% have already been made either to make allotment of the balance of the area or may compensate the land owners by payment of the amount equivalent to balance area as per average rate of allotment made of developed residential plots.

4.The Authority may also take a decision as to whether benefit of additional compensation and allotment of abadi plot to the extent of 10% be also given to;

(a) those land holders whose earlier writ petition challenging the notifications have been dismissed upholding the notifications; and

(b) those land holders who have not come to the Court, relating to the notifications which are subject matter of challenge in writ petitions mentioned at direction No.3."

4. The said judgement was affirmed by the Supreme Court in the case of **Savitri Devi v. State of Uttar Pradesh and others.3** Relevant part of the judgement of the Supreme Court reads as under:

"48. To sum up, the following benefits are accorded to the land owners:

48.1. Increasing the compensation by 64.7%;

48.2. Directing allotment of developed abadi land to the extent of 10% of the land acquired of each of the land owners;

48.3. Compensation which is increased at the rate of 64.7% is payable immediately without taking away the rights of the land owners to claim higher compensation under the machinery provided in the Land Acquisition Act wherein the matter would be examined on the basis of the evidence produced to arrive at just and fair market value.

49. This, according to us, provides substantial justice to the appellants.

Conclusion

50. Keeping in view all these peculiar circumstances, we are of the

opinion that these are not the cases where this Court should interfere under Article 136 of the Constitution. However, we make it clear that directions of the High Court are given in the aforesaid unique and peculiar/specific background and, therefore, it would not form precedent for future cases.

51. ...

52. The Full Bench judgment of the High Court is, accordingly, affirmed and all these appeals are disposed of in terms of the said judgment of the Full Bench."

5. In the present case the petitioner claims that he has filed writ petition, therefore, he is entitled for 64.7% additional compensation and is also entitled for allotment of developed *abadi* plot to the extent of 10% of acquired land. The petitioner claims that his 2.6070 hectares land was acquired thus he is entitled for 2607 sq.mtrs. but in view of maximum limit of 2500 sq.mtrs he is entitled for the same.

6. The petitioner has made several representations but no decision has been taken as yet.

7. We have heard learned counsel for the petitioner, learned Standing Counsel and Sri Ramendra Pratap Singh, learned counsel for respondent nos. 2 & 3.

8. Sri Singh has placed reliance on the judgment in the case of **Khatoon and others v. State of U.P. and others4,** and a Division Bench judgement in Civil Misc. Writ Petition Nos. 26718 of 20185 and 16647 of 20186.

9. We have considered the submissions of learned counsel for the parties and perused the record.

10. The petitioner's plot no. 278 area 2.6070 hectare was said to be acquired. The petitioner has not enclosed the notification issued under Sections 4 & 6 of the Land Acquisition Act, 1894. In paragraph-6 of the writ petition the petitioner has claimed that he has filed Civil Misc. Writ Petition no. 46933 of 2011. A copy of the judgement of the said order is on the record as annexure-2 to the writ petition. The said writ petition has been filed by Raghubar and others which was disposed of on 21.10.2011 in terms of the judgement **in Gajraj (supra).**

11. The grievance of the petitioner is that in compliance of the judgment in **Gajraj (supra)** similarly placed persons have been paid 64.70% developed plot up to 10% of the total acquired land for residential purposes but the petitioner has been denied the allotment of developed abadi plot to the extent of 10% of his acquired land.

12. We find that the petitioner has made representations dated 26.9.2017 and 19.6.2019 to the authority concerned which is on the record.

13. Sri Ramendra Pratap Singh, learned counsel for the respondents has placed heavy reliance on the judgement of the Supreme in **Khatoon (supra).** In paragraph-15 of the said judgement it is recorded that the appellants in those cases have not filed any writ petition and for the first time on 15.2.2016 they approached the High Court under Article 226 of the Constitution. Paragraph-15 of the said judgement reads as under:

"15. The appellants herein, whose lands were also acquired in these acquisition proceedings, then woke up out

of slumber and filed the writ petitions for the first time on 15.02.2016 in the High Court of Judicature at Allahabad out of which these appeals arise."

14. It is pertinent to mention that the Full Bench in its operative portion of the judgement in **Gajraj (supra)** has made it clear that the land holders who have not filed writ petition, their case shall be considered by the Authority which shall take a decision as to whether the benefit of additional compensation and the allotment of abadi plot be also given to those land holders who have not come to the Court relating to the notification which are subject matter of challenge in **Gajraj (supra)** and companion petitions and all those land holders whose earlier writ petitions challenging the notifications have been dismissed.

15. It was urged by learned counsel for the petitioner that in compliance of the said directions the Authority has taken a resolution to extend the benefit to those persons also who have not filed writ petition and has sought approval of the State Government, however, the State Government vide its order dated 21.9.2016 addressed to the Chief Executive Officer, Greater Noida, Gautam Budh Nagar has rejected the said proposal. The said Government Order reads as under:

''संख्या – 1214/77–3–56एe@16

प्रेषक,
अनिल कुमार,
अनु सचिव,
उत्तर प्रदेश शासन।

सेवा में,
मुख्य कार्यपालक अधिकारी।
ग्रेटर नोएडा, गौतबमुद्धनगर।

औद्योगिक विकास अनुभाग – 3 लखनऊः दिनांक 21 सितम्बर, 2016

विषय :– मा0 उच्चतम न्यायालय/मा0 उच्च न्यायालय के विभिन्न आदेशों से अनाच्छादित अर्जित भूमि के उन कृषकों को भी जिन्हें प्राधिकरण बोर्ड के विभिन्न निर्णयों से 64.70 प्रतिशत की दर से अतिरिक्त प्रतिकर/अतिरिक्तता का भुगतान किया गया है, को प्राधिकरण द्वारा पूर्व निर्धारित अर्हता/नीति के अनुसार पात्र कृषकों को 10 प्रतिशत (अधिकतम 2500 वर्ग मीटर) की सीमा तक विकसित भूखण्डो के आवंटन के सम्बन्ध में।

महोदय,

कृपया उपर्युक्त विषयक अपने पत्र संख्या – 106/भूलेख/भू0 प0/2016, दिनाक 20.04.2016 का सन्दर्भ ग्रहण करने का कष्ट करें, जिसमें प्राधिकरण की 104 वीं बोर्ड बैठक में लिये गये निर्णय के अनुक्रम में मा0 उच्चतम न्यायालय/मा0 उच्च न्यायालय के विभिन्न आदेशों से अनाच्छादित अर्जित भूमि के उन कृषकों को भी जिन्हें प्राधिकरण बोर्ड के विभिन्न निर्णयों से 64.70 प्रतिशत की दर से अतिरिक्त प्रतिकर/ अतिरिक्तता का भुगतान किया गया है, को प्राधिकरण द्वारा पूर्व निर्धारित अर्हता/नीति के अनुसार पात्र कृषकों को 10 प्रतिशत (अधिकतम 2500 वर्ग मीटर) की सीमा तक विकसित भूखण्डों को आंवटित किये जाने के सम्बन्ध में शासन की अनुमति दिये जाने का अनुरोध किया गया है।

2. इस सम्बन्ध में मुझे यह कहने का निर्देश हुआ है कि सन्दर्भित पत्र द्वारा उपलब्ध कराया गया प्रस्ताव सम्यक विचारोपरान्त स्वीकार योग्य नही पाया गया। कृपया तद्नुसार अवगत होने का कष्ट करें।

भवदीय
ह0 अप0
(अनिल कुमार)
अनु सचिव।''

16. In the present case the said issue need not to be decided since the petitioner's case is that he had filed writ petition and it was tagged and decided along with the case of Gajraj and others.

17. In the present case the petitioner has averred that he has filed a writ petition and a copy of the order of **Raghubar (supra)** is also on the record hence the judgement of **Khatoon (supra)** is not applicable in the facts of the present case as the petitioner had filed writ petition which was tagged with the case of **Gajraj and others** as also it was disposed of in the same terms.

18. In any view of the matter, we are of the opinion that the grievance of the petitioner be considered at the first instance by the authority concerned by passing a reasoned order. Accordingly, the writ petition is disposed of with a direction upon the second respondent to consider the cause of the petitioner and pass appropriate order. The authority concerned shall make an endeavour to address the grievance of the petitioner expeditiously, preferably within three months from the date of communication of this order.

19. Needless to say that we have not expressed our opinion on the merits of the case, the authority concerned shall pass the order independently and in accordance with law.

20. No order as to costs.

(2019)12 ILR A1161

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.09.2019

BEFORE
THE HON'BLE PRADEEP KUMAR SINGH BAGHEL, J.
THE HON'BLE ROHIT RANJAN AGARWAL, J.

Writ-C No. 26861 of 2017

Raju ...Petitioner

Versus

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

Counsel for the Petitioner:
Sri Raj Karan Yadav

Counsel for the Respondents:
C.S.C., Sri Ravi Prakash Pandey, Sri Vivek Verma, Sri M.C. Chaturvedi

A. Civil Law - Urban Land (Ceiling and Regulation) Act, 1976 – Section 10 (5) and (6) – Urban Land (Ceiling and Regulation) Repeal Act, 1999 – Section 3(2)(a) – Abatement of proceeding – No possession memo – Physical possession of the land was never taken from the petitioner. He is still in cultivatory and physical possession – State authorities have not taken possession from the petitioner in terms of sub-section (5) or sub-section (6) of Section 10 of the Act, 1976 – Held the proceeding initiated under the Act, 1976 stands abated in terms of sub-section 2(a) of Section 3 of the Repeal Act. (Para 22, 34 & 37)

Writ Petition allowed. (E-1)

List of cases cited: -

1. St. of U.P. Vs Hari Ram (2013) 4 SCC 280,

2. Gajanan Kamlya Vs Addl. Collector & Comp. Auth.& Ors. JT 2014 (3) SC 211

3. St. of U.P & Anr. Vs Nek Singh 2010 Law Suit (All) 3581

4. Ram Singh Vs St. of U.P. & Ors. 2013 (7) ADJ 662 (DB)

5. St. of U.P. Thru Secy Avas Avam Shahri Niyojan Vs Ruknuddin & Ors. Writ-C No. 54830 of 2011, decided on 03.10.2018: Law Suit (All) 3470

6. Lalji Vs St. of U.P. & Anr. 2018(5) ADJ 566

List of cases cited: -

1. Yasin and others v. State of U.P. and others 2014(4) ADJ 305(DB)

2. Ram Chandra Pandey v. State of U.P. and others 2010 (82) ALR 136

3. State of Assam v. Bhaskar Jyoti Sharma and Others 2015 (5) SCC 321

4. Shiv Ram Singh Vs. State of U.P. & Others 2015 (5) AWC 4918

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

1. The petitioner has laid challenge in the present writ petition the proceedings initiated under the provisions of the Urban Land (Ceiling and Regulation) Act, 1976 (for short Act No. 33 of 1976)1 on the ground that the said proceedings stood abated in terms of the Urban Land (Ceiling and Regulation) Repeal Act, 1999 (for short Act 15 of 1999)2 and for quashing of the order dated 02.05.2017 passed by the District Magistrate,Varanasi.

2. Brief factual matrix may be noted. The petitioner claims that he is owner of the araji nos. 31/1 area 11 decimal, 86/1 area 26 decimal, 86/4 area 20 decimal, 32/2 area ¾ decimal. He claims to have half share out of total araji. The said land was within the municipal limit of the Varanasi and the land was recorded as agricultural land but being the land within the municipal limit the provisions of the Act, 1976 were made applicable. The petitioner submitted ceiling return/statement under sub-section (1) of Section 6 of the Act No.33 of 1976 Act, which was registered as case no.915/7035/76-77 (State Vs. Lallan) and case no.916/7035/76-77 (State v. Bachau), Village Ranipur, District Varansari. It is stated that without serving the notice under Section 8(3) of the Act,1976 illegal order was passed on 27.10.1978 under Section 8(4) of the Act, 1976 and out of 3218.54 square meter land 218.54 square meter land was declared surplus. Thereafter a notice is said to be issued under sub-section (5) of Section 10 of the Act, 1976, it bears the date 15.02.1982. The petitioner has averred in paragraph 7 of the writ petition which has been repeated in other paragraphs also that the said notice dated 15.02.1982 was never served upon the petitioner and as such the land holders neither surrendered the land to the State nor the respondents have ever taken actual possession from the petitioner.

3. It is stated that the petitioner is still in physical and cultivatory possession of the land in question and since the order under sub-section (4) of Section 8 of the Act, 1976 was never served upon the land holder, therefore, he could not file any appeal under Section 33 of the Act, 1976.

4. The petitioner has further averred that no proceeding under sub-section (5) or sub-section (6) of Section 10 of the Act,1976 has been initiated, therefore, after repeal Act came into force respondents have no right to take possession from the petitioner.

5. It is worthwhile to mention that in the meantime the Act, 1976 was repealed by the Urban Land (Ceiling and Regulation) Repeal Act, 1999 (Act 15 of 1999). The said Act was adopted by the State of U.P. whereunder subject to the certain conditions mentioned in the provisions of the Act the pending proceedings shall be lapsed. That one of the relief sought in the writ petition is that to declare that the proceedings initiated under the Act, 1976 is abated in terms of the Repeal Act.

6. The petitioner had earlier approached this Court by way of **Writ Petition No.6757 of 2017, Raju v. State of U.P. & 2 Others**. The said writ petition was disposed of on 13.02.2017 with a direction upon the respondent no.2 to consider the fact relating to the actual physical possession of the plot in question and such an enquiry be undertaken at first instance by the District Magistrate. In pursuance of the order of this Court dated 13.02.2017 the petitioner had submitted detailed representation on 23.02.2017, wherein he has asserted that he is still in physical possession and no forceful possession has been taken under sub-section 6 of Section 10 of Act, 1976. It has also been averred that the petitioner never surrendered voluntarily his land after the alleged notice under sub-section (5) of Section 10 of the Act, 1976 was issued to him. The District Magistrate has rejected the representation of the petitioner by a cryptic order only on the ground that the petitioner's land has been declared surplus vide order date 27.10.1978 under sub-section (4) of Section 8 of the Act, 1976 and 218.54 square meter has been declared surplus. Declaration under sub-section (1) and sub-section (3) of Section 10 of Act, 1976 was made in official gazette and after that the information in terms of sub-section (5) of Section 10 of Act, 1976 was issued on 15.02.1982 and the compensation amount Rs.1092.70 was determined on 21.08.1998 and the possession to the Varanasi Development Authority has been handed over before the Repeal Act came into force and accordingly the representation of the petitioner has been rejected. The order dated 02.05.2017 passed by the District Magistrate is also under challenge in the instant writ proceedings.

7. A counter affidavit has been filed by the State. The stand taken in the counter affidavit is that Lallan and Bachau, sons of Mitlu (father of the petitioners) had filed detailed documents under sub-section (1) Section 6 of Act, 1976 and a notice dated 21.10.1978 was issued under sub-section (3) of Section 8 of the Act, 1976 against which no objection was filed. Thereafter the competent authority on 27.10.1978 has passed an order under sub-section (4) of Section 8 of the Act, 1976 and declared 218.54 square meter as surplus vacant land. It is further averred that the necessary publication in terms of sub-section (1) and sub-section (3) of Section 10 of the Act, 1976 was issued and after issuance of the Government Order dated 26.12.1978 and 22.03.1980 a notice under sub-section (5) of Section 10 of the Act, 1976 was issued to the petitioner for delivering the possession of the land and that was done prior to the Repeal Act came into force.

8. A short counter affidavit was filed on behalf of the Varanasi Development Authority wherein it is clearly mentioned that the petitioner's land has not been transferred to the Varanasi Development Authority. The said counter affidavit was sworn by the Tehsildar, Varanasi Development Authority wherein it has been averred that the Competent Officer has not transferred any surplus land of plot nos. 3/6, 18/1, 18/9 and 18/11 at Mauja Lakhanpur, Pargana Dehat, Tehsil Amanat, District Varanasi to the Varansari Development Authority. It is averred that neither the disputed land has been transferred to the Varansari Development Authority nor the same is in its possession at present.

(emphasis supplied)

9. In the rejoinder affidavit the petitioner has denied the allegation made in the counter affidavit filed on behalf of the State that the notice under sub-section (5) of Section 10 of the Act, 1976 has never been served upon the petitioner and no proceeding under-section (6) of Section 10 has been held. It is also stated that the State in its counter affidavit has not given the date of peaceful possession or actual physical possession taken by the State. It is also averred that the possession of the land in dispute has not been taken by the State nor the petitioner has voluntarily handed over the possession of his land which was declared surplus land to the State.

10. We have heard Sri Raj Karan Yadav, the learned counsel for the petitioner, Sri M.C.Chaturvedi, learned Senior Advocate assisted by Sri R.P. Pandey, learned counsel for the Varanasi Development Authority and the learned Standing Counsel and perused the materials on record.

11. The learned counsel for the petitioner has submitted that the petitioner has never handed over the possession of the disputed land under sub-section (5) of Section 10 of Act, 1976 to the State and no forceful possession has been taken from the petitioner under sub-section (6) of Section 10 of the Act,1976.

12. It has been vehemently urged that the petitioner is still in physical and cultivatory possession of the land and he has never handed over the possession to the authority. He further submits that in view of the fact that the petitioner is still in possession of the land and no forceful possession has not been taken over by the State, the proceedings under under the Act, 1976 stood abated in terms of sub-section 2(a) of Section 3 of the Repeal Act. Lastly, he has urged that the Varanasi Development Authority in its counter affidavit has clearly admitted that the land in question has never been transferred to it. Thus, a false statement has been made by the State in its counter affidavit that the possession was handed over to the Varanasi Development Authority. He further submitted that the State in its counter affidavit has not disclosed the date when the possession was taken.

13. The learned counsel for the petitioner has placed reliance on the judgment of the Supreme Court in the case of **State of U.P. v. Hari Ram3, Lalji v. State of U.P. and another4, Yasin and others v. State of U.P. and others5,** and **Ram Chandra Pandey v. State of U.P. and others6,**

14. Learned Standing Counsel submitted that after the notification made under sub-section (1) of Section 10 and sub-section (3) of Section 10 of the Act, 1976 the surplus land declared by the competent authority stood vested with the State and in the revenue records also the name of the State was recorded. He has placed reliance on a judgment of the Supreme Court in the case of **State of Assam v. Bhaskar Jyoti Sharma and Others7, and Shiv Ram Singh Vs. State of U.P. & Others8,.**

15. We have summoned the original record in the matter and the learned Standing Counsel has stated that in this batch of writ petitions there is no original possession memo in the original record. He also failed to point out in the original record which indicates that after taking

possession from the petitioner it was handed over to the Varanasi Development Authority.

16. From the record it is also evident that no proceedings under sub-section (6) of Section 10 of the Act, 1976 has been taken.

17. Before adverting to the submissions raised by the learned counsel for the parties it would be apposite to refer relevant provisions of the Act, 1976.

18. Section 2(o) of the Act, 1976 defines "urban land" and Section 2(q) defines "vacant land". Section 6 of the Act, 1976 provides that owner of the land shall submit a statement giving detail of the vacant land. Section 8(1) enjoins that the competent authority shall get a survey of the land conducted and on the basis of the said survey a draft statement under sub-section (3) of Section 8 of the Act, 1976 was required to be served upon the land owner calling for objection to the said statement within thirty days and the order is passed under sub-section (4) of Section 8 of the Act, 1976 and later a notification is issued under sub-section (1) of Section 10 for publication in the Gazette giving particulars of the vacant land. Thereafter another notice is published stating that the land shall be deemed to have been vested on the Government free from all encumbrances. Thereafter a notice under sub-section (5) of Section 10 of the Act, 1976 is issued calling upon the land owner to hand over possession of the land declared surplus. If the land owner fails to handover the possession voluntarily in response to the aforementioned notice, sub-section (6) of Section 10 of the Act, 1976 confers a power upon the competent authority to take forceful possession. For the sake of convenience, Sections 2(o), 2(q) and sub-sections (5) and (6) of Section 10 of the Act, 1976 are reproduced hereunder:

*"**2(o)** "urban land" means,--*

(i) any land situated within the limits of an urban agglomeration and referred to as such in the master plan; or

(ii) in a case where there is no master plan, or where the master plan does not refer to any land as urban land, any land within the limits of an urban agglomeration and situated in any area included within the local limits of a municipality (by whatever name called), a notified area committee, a town area committee, a city and town committee, a small town committee, a cantonment board or a panchayat, but does not include any such land which is mainly used for the purpose of agriculture.

Explanation.--For the purpose of this clause and clause (q),--

(A) "agriculture" includes horticulture, but does not include--

(I) raising of grass,

(ii) dairy farming,

(iii) poultry farming,

(iv) breeding of live-stock, and

(v) such cultivation, or the growing of such plant, as may be prescribed;

(B) land shall not be deemed to be used mainly for the purpose of agriculture, if such land is not entered in the revenue or land records before the appointed day as for the purpose of agriculture:

Provided that where on any land which is entered in the revenue or land records before the appointed day as for the purpose of agriculture, there is a building which is not in the nature of a farm-house, then, so much of the extent of

such land as is occupied by the building shall not be deemed to be used mainly for the purpose of agriculture:

Provided further that if any question arises whether any building is in the nature of a farm-house, such question shall be referred to the State Government and the decision of the State Government thereon shall be final;

(C) Notwithstanding anything contained in clause

(B) of this Explanation, land shall not be deemed to be mainly used for the purpose of agriculture if the land has been specified in the master plan for a purpose other than agriculture;"

*"**2(q)** "vacant land" means land, not being land mainly used for the purpose of agriculture, in an urban agglomeration, but does not include--*

(i) land on which construction of a building is not permissible under the building regulations in force in the area in which such land is situated;

(ii) in an area where there are building regulations, the land occupied by any building which has been constructed before, or is being constructed on, the appointed day with the approval of the appropriate authority and the land appurtenant to such building; and

(iii) in an area where there are no building regulations, the land occupied by any building which has been constructed before, or is being constructed on, the appointed day and the land appurtenant to such building:

Provided that where any person ordinarily keeps his cattle, other than for the purpose of dairy farming or for the purpose of breeding of live-stock, on any land situated in a village within an urban agglomeration (described as a village in the revenue records), then, so much extent of the land as has been ordinarily used for the keeping of such cattle immediately before the appointed day shall not be deemed to be vacant land for the purposes of this clause."

*"**10(5)** Where any vacant land is vested in the State Government under sub-section (3), the competent authority may, by notice in writing, order any person who may be in possession of it to surrender or deliver possession thereof to the State Government or to any person duly authorised by the State Government in this behalf within thirty days of the service of the notice."*

*"**10(6)** If any person refuses or fails to comply with an order made under sub-section (5), the competent authority may take possession of the vacant land or cause it to be given to the concerned State Government or to any person duly authorised by such State Government in this behalf and may for that purpose use such force as may be necessary.*

Explanation.--In this section, in sub-section (1) of section 11 and in sections 14 and 23, "State Government", in relation to--

(a) any vacant land owned by the Central Government, means the Central Government;

(b) any vacant land owned by any State Government and situated in the Union territory or within the local limits of a cantonment declared as such under section 3 of the Cantonments Act, 1924 (2 of 1924), means that State Government."

19. In the year 1999 the Parliament enacted the Urban Land (Ceiling and Regulation) Repeal Act, 1999 (for short Act 15 of 1999). The said Act was adopted by the State of U.P. also by a notification dated 18.03.1999. It is apposite to reproduce Sections 3 and 4 of the Repeal Act.

*"**3. Saving.**-- (1) The repeal of the principal Act shall not affect--*

(a) the vesting of any vacant land under sub-section 10, possession of which has been taken over by the State Government or any person duly authorized by the State Government in this behalf or by the competent authority;

(b) the validity of any order granting exemption under sub-section (1) of Section 20 or any action taken thereunder, notwithstanding any judgment of any court to the contrary;

(c) any payment made to the State Government as a condition for granting exemption under sub-section (1) of Section 20.

(2) Where--

(a) any land is deemed to have vested in the State Government under sub-section (3) of Section 10 of the principal Act but possession of which has not been taken over by the State Government or any person duly authorized by the State Government in this behalf or by the competent authority; and

(b) any amount has been paid by the State Government with respect to such land then, such land shall not be restored unless the amount paid, if any, has been refunded to the State Government.

***4. Abatement of legal proceedings.**-- All proceedings relating to any order made or purported to be made under the principal Act pending immediately before the commencement of this Act, before any court, tribunal or other authority shall abate:*

Provided that this section shall not apply to the proceedings relating to sections 11,12,13 and 14 of the principal Act in so far as such proceedings are relatable to the land, possession of which has been taken over by the State Government or any person duly authorised by the State Government in this behalf or by the competent authority."

20. It is significant to mention that in exercise of the powers under Section 35 of the Act, 1976 the State Government issued the Directions, 1983 known as The Uttar Pradesh Urban Land Ceiling (Taking of Possession, Payment of Amount and Allied Matters) Directions, 1983 (Directions issued by the State Government under Section 35 of the Act, 1976). The direction no.3 is relevant for our purpose which is extracted below:

***"3. Procedure for taking possession of vacant land in excess of ceiling limit.**--(1) The competent authority will maintain a register in Form No.ULC -1 for each case regarding which notification under sub-section (3) of Section 10 of the Act is published in the gazette."*

***4.** (1) * * **

(2) An order in Form No. ULC-II will be sent to each land holder as prescribed under sub-section (5) of Section 109 of the Act and the date of issue and service of the order will be entered in Column 8 of Form No. ULC-I.

(3) On possession of the excess vacant land being taken in accordance with the provisions of sub-section (5) or sub-section (6) of Section 10 of the Act, entries will be made in a register in Form ULC-III and also in Column 9 of the Form No. ULC-1. The competent authority shall in token of verification of the entries, put his signatures in Column 11 of Form No. ULC-1 and Column 10 of Form No. ULC-III.

Form No. ULC-1

Register of notice under Sections 10(3) and 10(5)

(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)
Sl. No.	Sl. No. of register of receipt Sl. No. of register of taking possession	Case Number	Date of Notification under Section 10(3)	Land to be acquired village Mohali	Date of taking over possession	Remarks	Signature of competent authority			

Form No. ULC-II
Notice order under Section 10(5)
[See clause (2) of Direction (3)]
In the court of competent authority

U.L.C. .....…
No..... Date .....…
Sri/Smt..... T/o .....…

In exercise of the powers vested under Section 10(5) of the Urban Land (Ceiling and Regulation) Act, 1976 (Act No.33 of 1976), you are hereby informed that vide Notification No..... dated ..... under Section 10(1) published in Uttar Pradesh Gazette dated ..... following land has vested absolutely in the State free from all encumbrances as a consequence Notification under Section 10(3) published in Uttar Pradesh Gazette dated ..... Notification No..... dated .... With effect from ..... you are hereby ordered to surrender or deliver the possession of the land to the Collector of the District Authorised in this behalf under Notification No.324/II-27- U.C.77 dated February 9, 1977, published in the gazette, dated March 12, 1977, within thirty days from the date of receipt of this order otherwise action under sub-section (6) of Section 10 of the Act will follow.

Description of vacant land

Location	*Khasra No. identification*	*Area*	*Remarks*
1	*2*	*3*	*4*

Competent Authority

.....

.....

No. .....

Dated.....

Copy forwarded to the Collector ..... with the request that action for immediate taking over of the possession of the above detailed surplus land and its proper maintenance may, kindly be taken an intimation be given to the undersigned along with the copy of certificate to verify.

Competent Authority

.....

....."

21. In addition, the State Government has issued a Government Order on 29.09.2015 pursuant to the judgment of the Supreme Court in the case of **Hari Ram (supra)** and to avoid the unnecessary litigation the State Government has issued detailed directions in respect of the possession and abatement of the proceedings. The said Government Order reads as under:

"संख्या – 2228/आठ–6–15–124 यwlh@13

प्रेषक,

पनधारी यादव

सचिव,

उत्तर प्रदेश शासन।

सेवा में,

जिलाधिकारी,

गोरखपुर, वाराणसी, इलाहाबाद, लखनऊ, कानपुर

आगरा, मेरठ, मुरादाबाद, अलीगढ, बरेली, सहारनपुर।

आवास एवं शहरी नियोजन अनुभाग–6

लखनऊः दिनांक 29 सितम्बर 2015

विषय– नगर भूमि (अधिकतम सीमा एवं विनियमन) निरसन अधिनियम, 1999 ततक्रम में निर्गत शासनादेश तथा मा0 उच्चतम न्यायालय के निर्णय दिनांक 11.03.2013 के सम्बन्ध में।

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महोदय,

उपयुर्क्त विषय पर मुझे यह कहने का निर्देश हुआ है कि भारत सरकार के अधिनियम संख्या–15/1999 दिनांक 18.03.1999 द्वारा नगर भूमि (अधिकतम सीमा एवं विनियमन) अधिनियम 1976 को निरसित करते हुए नगर भूमि (अधिकतम सीमा एवं विनियमन) निरसन अधिनियम 1999 प्राख्यापित किया गया जिसके क्रम में शासनादेश संख्या– 502/9– न0 भू0–99–21यू0सी0/99, दिनांक 31.03.1999 द्वारा उक्त निरसन अधिनियम को उत्तर प्रदेश राज्य में अंगीकृत किया गया। निरसन अधिनियम 1999 की धारा–3 में यह प्राविधान है कि मूल अधिनियम का निरसन निम्नलिखित को प्रभावित नहीं करेगा–

(1) (क) धारा–10 की उपधारा– (3) के अधीन ऐसी रिक्त भूमि का निहित होना, जिसका कब्जा राज्य सरकार या राज्य सरकार द्वारा इस निमित्त सम्यक रूप से अधिकशतक किसी व्यक्ति या सक्षम प्राधिकारी ने ले लिया है।

(ख) धारा– 20 की उपधारा– (1) के अधीन छूट देने संबंधी किसी आदेश या उसके अधीन की गयी किसी कार्यवाही की किसी न्यायालय के किसी निर्णय में उसके विरूद्ध किसी बात के होते हुए भी विधिमान्यताः

(ग) धारा– 20 की उपधारा– (1) के अधीन प्रदान की गयी छूट की शर्त के रूप मे राज्य सरकार को किया गया कोई संदायः

(2) जहां–

(क) मूल अधिनियम की धारा–10 की उपधारा (3) के अधीन किसी भूमि को राज्य सरकार में निहित होना मानी गयी है किन्तु जिसका कब्जा राज्य सरकार या राज्य सरकार द्वारा इस निमित्त सम्यक रूप से प्राधिकृत किसी व्यक्ति या सक्षम प्राधिकारी द्वारा नही लिया गया : और

(ग) ऐसी किसी भूमि के बाबत जिसके लिए राज्य सरकार द्वारा किसी रकम का संदाय कर दिया गया है तब तक प्रत्यावर्तित नही की जाय और जब तक कि राज्य सरकार को संदाय की गयी रकम का यदि कोई हो, प्रतिदाय नही कर दिया जाता।

उक्त के क्रम में शासनादेश संख्या–777/9न0भू0–135 यू0सी0/99 दिनांक

09.02.2000, शासनादेश संख्या–1623/9–न0भू0–2000 दिनांक 09.08.2000 एवं शासनादेश संख्या– 190/9–आ–6–2001 दिनांक 24.01.2001 निर्गत किये गये जिसमे मुख्य रूप से यह व्यवस्था की गई कि मूल अधिनियम धारा –8 (4) के अन्तर्गत जो भूमि रिक्त घोषित की गई थी और धारा–10 (3) के अन्तर्गत राज्य में निहित हो चुकी थी एवं धारा–10 (5) की कार्यवाही का आदेश हो चुका था परन्तु इस भूमि पर राज्य सरकार का कब्जा प्राप्त नही हो सका था, ऐसी भूमि के सम्बन्ध मे मूल भूधारक को अदा की गई धनराशि भूधारक द्वारा वापस करने पर भूमि मूल भूधारक को प्रत्यावर्तित की जा सकती है किन्तु अदा की गई धनराशि भू– धारक द्वारा वापस न करने की दशा में भूमि पर कब्जा किये जाने के सम्बन्ध मे विधि अनुसार अग्रिम कार्यवाही अमल मे लायी जाय। यह भी व्यवस्था की गई कि जिस भूमि के सम्बन्ध में धारा–10 (5) की कार्यवाही के उपरान्त धारा–10 (6) की कार्यवाही पूर्व हो चुकी है और भूमि पर राज्य सरकार द्वारा कब्जा लिया जा चुका है वह सरप्लस भूमि अन्तिम रूप से राज्य सरकार में निहित मानी जायेगी।

3. नगर भूमि सीमारोपण– गोरखपुर, वाराणसी, इलाहाबाद, लखनऊ, कानपुर, आगरा, मेरठ, मुरादाबाद, अलीगढ, बरेली, सहारनपुर में लम्बित अर्बन सीलिंग प्रकरणों का समुचित रूप से निस्तारण ने होने की स्थिति मे भू–धारकों/वादियों द्वारा मा0 उच्च न्यायालय में अधिक संख्या में रिट याचिकायें योजित की जा रही है। नगर बस्ती कार्यालयों द्वारा रिट याचिकाओं में विभागीय पक्ष समयान्तर्गत साक्ष्यों सहित प्रबलता से प्रस्तुत न किये जाने के कारण मा0 न्यायालय द्वारा पारित आदेशों के क्रम में शासन को असमंजसपूर्ण स्थिति का सामना करना पड़ रहा है।

4. अर्बन सीलिंग के अन्य प्रकरण में राज्य सरकार द्वारा मा0 उच्चचम न्यायालय नई दिल्ली में विशेष अनुमति याचिका संख्या–12960/2008 उत्तर प्रदेश राज्य बनाम हरीराम योजित की गयी। कालान्तर मे अन्य जनपदों के अर्बन सीलिंग से संबधित प्रकरणों मे योजित विशेष अनुमति याचिकायें उक्त विशेष अनुमति याचिका से क्लब की गयी। उक्त विशेष अनुमति याचिका संख्या–12960/2008 तथा उससे क्लब अन्य विशेष अनुमति याचिकाओं में पारित मा0 उच्चतम न्यायालय के निर्णय दिनांक 11.03.2013 मे अर्बन सीलिंग से संबधित प्रकरणों मे मार्गदर्शक सिद्धान्त प्रतिपादित किये गये हैं। निर्णय दिनांक 11.03.2013 का महत्वपूर्ण एवं क्रियात्मक अंश निम्नवत हैः–

प्रस्तर–39

The mere vesting of the land under sub-section (3) of Section 10 would not confer any right on the State Government to have de facto possession of the vacant land unless there has been a voluntary surrender of vacant land before 18.3.1999. State has to establish that there has been a voluntary surrender of vacant land or surrender and delivery of peaceful possession under sub-section (5) of Section 10 or forceful dispossession under sub-section (6) of Section 10. On failure to establish any of those situations, the land owner or holder can claim the benefit of Section 3 of the Repeal Act. The State Government in this appeal could not establish any of those situations and hence the High Court is right in holding that the respondent is entitled to get the benefit of Section 3 of the Repeal Act.

प्रस्तर–40

We, therefore, find no infirmity in the judgment of the High Court and the appeal is, accordingly dismissed so also the other appeals. No documents have been produced by the State to show that the respondents had been dispossessed before coming into force of the Repeal Act and hence, the respondents are entitled to get the benefit of Section 3 of the Repeal Act. However, there will be no order as to cost.

5- नगर भूमि (अधिकतम सीमा एवं विनियमन) निरसन अधिनियम, 1999 में विहित प्राविधान तथा तत्क्रम में निर्गत शासनादेश दिनांक 09.02.2000, शासनादेश दिनांक 09.08.2000 एवं शासनादेश दिनांक 24.01.2001 स्वतः स्पष्ट है। विशेष अनुमति याचिका संख्या–12960/2008 उत्तर प्रदेश राज्य बनाम हरीराम तथा उससे क्लब

अन्य विशेष अनुमति याचिकाओं में पारित मा0 उच्चतम न्यायालय के निर्णय दिनांक 11.03.2013 में उल्लिखित सिद्धान्त/आदेश भी स्वतः स्पष्ट हैं।

6- कृपया नगर भूमि (अधिकतम सीमा एवं विनियमन) निरसन अधिनियम, 1999 तथा उक्त शासनादेश दिनांक 09.02.2000, शासनादेश दिनांक 09.08.2000 एवं शासनादेश दिनांक 24.01.2001 में विहित व्यवस्था, विशेष अनुमति याचिका संख्या–12960/2008 उत्तर प्रदेश राज्य बनाम हरीराम में पारित मा0 उच्चतम न्यायालय के निर्णय दिनांक 11.03.2013 में उल्लिखित सिद्धान्तों/आदेशों के आलोक में लम्बित प्रकरणों मे स्महंस पदहतमकपमदजे देखते हुए आवश्यक कार्यवाही की जाय।

भवदीय
ह0 अपठनीय
(पनधारी यादव)
सचिव

संख्या एवं दिनांक तदैव।

प्रतिलिपि निम्नलिखित को सूचनार्थ एवं आवश्यक कार्यवाही हेतु प्रेषित।

1. निदेशक नगर भूमि सीमारोपण, उ0प्र0 जवाहर भवन– लखनऊ

2. सक्षम प्राधिकारी नगर भूमि सीमारोपण गोरखपुर, वाराणसी, इलाहाबाद, लखनऊ, कानपुर, आगरा, मेरठ, मुरादाबाद, अलीगढ, बरेली, सहारनपुर।

3. मुख्य स्थायी अधिवक्ता मा0 उच्च न्यायालय, इलाहाबाद

4. गार्ड फाईल।

आज्ञा से
(कल्लू प्रसाद द्विवेदी)
उप सचिव।"

22. Now, the question before us is whether in present set of facts the proceedings shall abate in view of sub-section (2) of Section 3 of the Act, 1999. The issue regarding the abatement of the Urban Land Ceiling Proceeding in terms of sub-section (2) of Section 3 of the Repeal Act fell for consideration before the Supreme Court in some of the cases and in a large number of the cases in this Court. The law laid down in the unbroken line of the judgments are that if at the time of the enforcement of the Repeal Act the possession has not been taken by the State in terms of sub-section (5) or sub-section (6) of Section 10 of the Act, 1976 then the proceedings under Section 1976 shall be abated.

23. In the case of **Hari Ram (supra)** the Supreme Court has elaborately considered the scope of sub-section (5) and sub-section (6) of Section 10 of the Act, 1976 and the directions framed by the State Government under Section 35 of the Act, 1976 and the directions framed by the State Government under U.P. Urban Land Ceiling (Taking of Possession, Payment of Amount and Allied Matters) Direction 1983. The relevant part of the judgment of the Supreme Court reads thus:

*"**30.** Vacant land, it may be noted, is not actually acquired but deemed to have been acquired, in that deeming things to be what they are not. Acquisition, therefore, does not take possession unless there is an indication to the contrary. It is trite law that in construing a deeming provision, it is necessary to bear in mind the legislative purpose. The purpose of the Act is to impose ceiling on vacant land, for the acquisition of land in excess of the ceiling limit thereby to regulate construction on such lands, to prevent concentration of urban lands in hands of few persons, so as to bring about equitable distribution. For achieving that object, various procedures have to be followed for acquisition and vesting. When we look at those words in the above setting and the provisions to follow such as sub-sections (5) and (6) of Section 10, the words "acquired" and "vested" have different*

meaning and content. Under Section 10(3), what is vested is de jure possession not de facto, for more reasons than one because we are testing the expression on a statutory hypothesis and such an hypothesis can be carried only to the extent necessary to achieve the legislative intent.

Voluntary surrender

31. *The "vesting" in sub-section (3) of Section 10, in our view, means vesting of title absolutely and not possession though nothing stands in the way of a person voluntarily surrendering or delivering possession. The Court in Maharaj Singh v. State of U.P.13, while interpreting Section 117(1) of the U.P. Zamindari Abolition and Land Reforms Act, 1950 held that "vesting" is a word of slippery import and has many meaning and the context controls the text and the purpose and scheme project the particular semantic shade or nuance of meaning. The Court in Rajendra Kumar v. Kalyan14 held as follows: (SCC p. 114, para 28)*

"28. ...We do find some contentious substance in the contextual facts, since vesting shall have to be a "vesting" certain. 'To "vest", generally means to give a property in.' (Per Brett, L.J. Coverdale v. Charlton15 : Stroud's Judicial Dictionary, 5th Edn. Vol. VI.) Vesting in favour of the unborn person and in the contextual facts on the basis of a subsequent adoption after about 50 years without any authorization cannot however but be termed to be a contingent event. To 'vest', cannot be termed to be an executor devise. Be it noted however, that 'vested' does not necessarily and always mean 'vest in possession' but includes 'vest in interest' as well."

32. *We are of the view that so far as the present case is concerned, the word "vesting" takes in every interest in the property including de jure possession and, not de facto but it is always open to a person to voluntarily surrender and deliver possession, under Section 10(3) of the Act.*

33. *Before we examine sub-section (5) and sub-section (6) of Section 10, let us examine the meaning of sub-section (4) of Section 10 of the Act, which says that during the period commencing on the date of publication under sub-section (1), ending with the day specified in the declaration made under sub-section (3), no person shall transfer by way of sale, mortgage, gift or otherwise, any excess vacant land, specified in the notification and any such transfer made in contravention of the Act shall be deemed to be null and void. Further, it also says that no person shall alter or cause to be altered the use of such excess vacant land. Therefore, from the date of publication of the notification under sub-section (1) and ending with the date specified in the declaration made in sub-section (3), there is no question of disturbing the possession of a person, the possession, therefore, continues to be with the holder of the land.*

Peaceful dispossession

34. *Sub-section (5) of Section 10, for the first time, speaks of "possession" which says where any land is vested in the State Government under sub-section (3) of Section 10, the competent authority may, by notice in writing, order any person, who may be in possession of it to surrender or transfer possession to the State Government or to any other person, duly authorized by the State Government.*

35. *If de facto possession has already passed on to the State Government by the two deeming*

provisions under sub-section (3) to Section 10, there is no necessity of using the expression "where any land is vested" under sub-section (5) to Section 10. Surrendering or transfer of possession under sub-section (3) to Section 10 can be voluntary so that the person may get the compensation as provided under Section 11 of the Act early. Once there is no voluntary surrender or delivery of possession, necessarily the State Government has to issue notice in writing under sub-section (5) to Section 10 to surrender or deliver possession. Sub-section (5) of Section 10 visualizes a situation of surrendering and delivering possession, peacefully while sub-section (6) of Section 10 contemplates a situation of forceful dispossession."

24. The case of **Hari Ram (supra)** was followed by the Supreme Court in the case of **Gajanan Kamlya v. Addl. Collector & Comp. Auth.& Ors.**9. The relevant part of the judgment is extracted below:

"13. We have, therefore, clearly indicated that it was always open to the authorities to take forcible possession and, in fact, in the notice issued under Section 10(5) of the ULC Act, it was stated that if the possession had not been surrendered, possession would be taken by application of necessary force. For taking forcible possession, certain procedures had to be followed. Respondents have no case that such procedures were followed and forcible possession was taken. Further, there is nothing to show that the Respondents had taken peaceful possession, nor there is anything to show that the Appellants had given voluntary possession. Facts would clearly indicate that only de jure possession had been taken by the Respondents and not de facto possession before coming into force of the repeal of the Act. Since there is nothing to show that de facto possession had been taken from the Appellants prior to the execution of the possession receipt in favour of MRDA, it cannot hold on to the lands in question, which are legally owned and possessed by the Appellants. Consequently, we are inclined to allow this appeal and quash the notice dated 17.2.2005 and subsequent action taken therein in view of the repeal of the ULC Act. The above reasoning would apply in respect of other appeals as well and all proceedings initiated against the Appellants, therefore, would stand quashed."

25. In **Special Leave Petition (C) No.17799 of 2015**, which was also taken up with Special Leave Petition (C) No. 38922 of 2013, State of U.P. and another v. Vinod Kumar Tripathi and others, vide order dated 19th January, 2016 the Supreme Court has held as under:

"As could be seen from the original record, possession of the land in question is taken neither by the competent authority or his authorised representative by following the procedure as laid down under Section 10(5) and Section 10(6) of the Urban Land (Ceiling & Regulation) Act, 1976 (now repealed), therefore, the impugned order cannot be interfered. Hence, the special leave petition is liable to be dismissed and is hereby dismissed accordingly."

26. This Court in **State of Uttar Pradesh and another v. Nek Singh**10, has considered extensively the procedure which has to be followed for taking

possession from the land holder. The relevant paragraph of the judgment reads as under:

"9. Otherwise also, the statutory benefit of the Repealing Act is also available to the landholder-respondent in the fact-situation of the matter, as the taking of the "possession" in the present case was neither de jure nor de facto. The term "possession" as per sections 3 and 4 of the Repealing Act and section 10(6) of the U.L.C.R Act means and implies the lawful "possession" after "due compliance of the statutory provisions". In State of U.P v. Boon Udhyog (P) Ltd. . 1999 4 AWC 3324 para 16, a Division Bench of this Court has held that where possession has been taken, its legality is to be decided on merits. Similarly, another Division Bench of this Court in State of U.P v. Hari Ram . 2005 60 ALR 535., has held that "in case possession is purported to be taken under section 10(6) of the Act, still Court is required to examine whether "taking of such possession' is valid or invalidated on any of the considerations in law. If Court finds that one or more grounds exist which show that the process of possession, though claimed under section 10(5) or 10(6) of the Act is unlawful or vitiated in law, then such possession will have no reorganization in law and it will have to be ignored and treated as of no legal consequence". On examination of the facts on record, it is crystal clear that the possession allegedly taken on 23.1.1986 was unlawful for plurality of reasons which are--Firstly, the possession allegedly taken on 23.1.1986 was pursuant to the CA's order dated 19.12.1985 under section 10(5) which was addressed to deceased Dhan Singh and, therefore, it was nullity and non est factum having no legal consequence and the possession taken on the basis was also void. Secondly, as per the Government Order dated 9.2.1977 issued by the State Government (filed with Supplementary Counter Affidavit and taken on record), the Collector was alone authorised under section 10(6) of the U.L.C.R Act to take possession on behalf of the State Government, but in the instant case, the possession was taken by the Tehsil officials and not by the Collector or the Additional Collector or by the Competent Authority himself. The Collector could not have delegated his authority to anyone else as a delegate could not have further delegated in view of the maxim--Delegatus non potest delegare. As such, the taking of possession by the Tehsil Officials was per se illegal being not as per the authorisation dated 9.2.1977 and, therefore, had no consequences. Thirdly, the possession was taken on 23.1.1986, while the alleged affixation of the order dated 19.12.1985 under section 10(5) of the U.L.C.R Act was made on 9.1.1986 by the process-server and, as such, the possession was taken on 23.1.1986 only after the expiry of 14 days instead of the statutory period of 30 days as enjoined in section 10(5) of the U.L.C.R Act. Fourthly, the possession certificate (Annexure-7 to the WP) did not mention the factum of "taking' possession, and it merely stated the factum of the transfer of possession to the State Government. Needless to say that unless the possession was first "taken', the same could not have been "transferred' to the State Government. The plain reading of the possession certificate does not show taking of possession from the occupants and, therefore, it cannot be termed as a possession certificate under section 10(6). Fifthly, the stand of the State Government

before the Appellate Authority was that the State Government has "taken over only symbolic possession over the plots in question and the same cannot be treated physical possession". If it be so, then also, it would not be deemed to be "possession" within the meaning of section 10(6) of the U.L.C.R Act which meant actual and physical possession and not symbolic one."

27. The similar view has also been expressed by this Court in **Ram Singh v. State of U.P. and others**11. The relevant part of the judgment is extracted below:

*"**36.** It is a matter of common notice and also matter of record that large number of cases which earlier came before this court and were decided and even at present also on getting the record it is clear that proceedings are either without any notice on the land holders or after the notice to the dead person or after the notice but not the proper service stating the name of the witnesses and their details and in most of the cases proceedings did not progress after the notice under Section 10(5) of the Urban Land (Ceiling and Regulation) Act 1976 and if there is notice under Section 10(6) of the Act it again do not contain proper service with the name/identity of the witnesses. For taking Dakhal document demonstrates the authority signing the paper is not competent. The emphasis on the word 'actual physical possession' has some special meaning and thus that rules out the paper possession and it is for this reason it has been said that mere entry will not reflect taking of actual physical possession.*

28. In the case of **State of U.P. Thru Secy Avas Avam Shahri Niyojan v. Ruknuddin and others**12, the Court has observed as under :

*"We having gone through the records and we find that the possession memo which was prepared on 22/23.03.1998, no where indicates as to how possession was taken and what is the name of witness in whose presence such possession was taken. There is no name indicated in the writ petition filed by the State or even in the rejoinder affidavit. The name of the Lekhpal in whose presence the alleged possession is said to have been taken has not been mentioned and the printed proforma of the possession memo is blank to that effect. The question as to how the factum of taking actual physical possession has been established by the State was discussed by a Division Bench in the case of **Mohd. Islam & 3 Others Vs. State of U.P.** in Writ Petition No. 15864 of 2015 decided on 4th December, 2017. The said decision was quoted with approval by a Division Bench in the case of **Rati Ram Vs. State of U.P. & Others 2018 (4) ALJ 338** paragraph no. 8 as follows:-*

"8. The 'Dakhalnama' a certified copy whereof has been produced before us does not even bear the signatures of any attesting witness. We find this to be a lapse and patent illegality the benefit whereof has to be given to the land holder in view of the Division Bench judgment in the case of Mohd. Islam and 3 others v. State of U.P. and 2 others, Writ Petition No. 15864 of 2015 decided on 4th December, 2017. It was also a case of District-Saharanpur. We extract paragraph Nos. 44 to 47 of the said judgment which are as under:

"44. Since, in the present case, neither factum of taking actual physical possession by Competent Authority under Ceiling Act has been fortified by placing

any document nor factum of possession of Development Authority at any point of time has been shown, therefore, argument advanced by learned Standing Counsel on the basis of State of Assam (supra) will not help.

45. Viewed from the above exposition of law we find in the present case that no such exercise of issuing notice under Section 10(6) of the Act, 1976 and thereafter execution of memo on the spot had taken place which is mandatory for ceiling authorities as admittedly the original tenure-holder and then his successors had never voluntarily surrendered the possession of land. In the absence of voluntary surrender of possession of surplus land, the authorities were required to proceed with forcible possession. The document of possession memo would not by itself evidence the actual taking of possession unless it is witnessed by two independent persons acknowledging the act of forcible possession. As discussed above in the earlier part of this judgment we are not able to accept the alleged possession memo worth calling a document as such in the absence of certain requisites, nor does it bear the details of witnesses who signed the document. It bears mainly signatures of Chackbandi Lekhpal, a person taking possession and then the document has been directed to be kept on file. This is no way of taking forcible possession nor, a document worth calling possession memo. A mere issuance of notification under Section 10(3) and notice under Section 10(5) regarding delivery of possession does not amount to actual delivery of possession of land more especially in the face of the fact that the tenureholder had in fact not voluntarily made surrender of possession of surplus land and no proceeding under Section 10(6) had taken place.

46. Since, we have held that possession memo dated 20.06.1993 is not a possession memo and is a void document for want of necessary compliance under Section 10(6) of the Act, 1976, the petitioners are entitled to the benefit under Section 4 of the Repeal Act, 1999 that came into force w.e.f. 20.03.1999.

47. We may also place on record that respondents claim that possession of land in question was handed over to Saharanpur Development Authority pursuant to Government Order dated 29.12.1984 but here also we find that no material has been placed on record to show that any such actual physical possession was handed over to Saharanpur Development Authority and the said authority is in de facto possession of land in dispute. Except bare averment made in the counter-affidavit respondent have not chosen to place anything on record to support the stand that de facto possession over land in dispute is that of Saharanpur Development Authority. Therefore even this stand has no legs to stand and is rejected."

29. Applying the aforesaid principle in the present case, we find that there is no possession memo on the record. In the counter affidavit also copy of the possession memo has not been enclosed. The date when the possession has been taken either under sub-section (5) or sub-section (6) of Section 10 of the Act, 1976 has not been mentioned in any of the affidavit filed by the State or the Varanasi Development Authority. Thus, it is evident that the averments made by the petitioner in the writ petition that he is still in possession acceptance.

30. In addition, to the above the Varanasi Development Authority in its short counter affidavit has categorically

stated that the State has not handed over the surplus land to it. Paragraph nos. 4 and 5 of the counter affidavit filed by the Varanasi Development Authority are extracted below:

"4. That it is pertinent to state here that a perusal of relevant record reveals that the Competent Officer, Urban Land Ceiling, Varanasi has not transferred any surplus land of plot nos. 3/6, 18/1, 18/9, 18/11 at Mauja Lakhanpur, Pargana Dehat, Tehsil Amanat, District Varanasi to the Varanasi Development Authority, Varanasi till date.

5. That it is therefore reiterated that the aforesaid land in dispute has neither been transferred to the Varanasi Development Authority nor the same is in its possession at present."

31. From the above quoted paragraphs of the counter affidavit filed by the Varanasi Development Authroity it is clearly established that the possession of the plots in question has not been handed over to the Varanasi Development Authority. The statement made in the counter affidavit filed by the State authorities in this regard is incorrect. From the pleadings of the State and the submissions of the learned Standing Counsel it appears to us that the State authorities and the competent authorities are under impression that after the notification under Section 10(3) of the Act,1976 the land in question stands vested in the State, hence, the Repeal Act will have no application.

32. We do not agree with the submission of the learned Standing Counsel that the land is vested in the State irrespective of the physical possession taken by the respondents or not. If the proposition is accepted then the sub-section 2(a) of Section 3 of the Repeal Act shall be redundant which clearly provides that if the land is deemed to have been vested in the State under sub-section (3) of Section 10 of the principal Act but possession of which has not been taken over by the State Government, such land shall not be restored unless the amount paid if any, has been refunded to the State Government.

33. In the counter affidavit filed by the respondents there is no averment that the compensation has been paid to the petitioner.

34. The averments made by the petitioner that it has not surrendered the land to the respondents and they have not taken possession from him has not been effectively denied in the counter affidavit. It has also been stated that the petitioner is in actual possession and no proceeding under sub-section (5) and sub-section (6) of Section 10 of the Act, 1976 has been initiated. Along with the counter affidavit only three documents have been brought on record, notice under sub-section (4) of Section 8 of the Act, 1976, notice under sub-section (5) of Section 10 of the Act, 1976 and the letter sent by the competent authority to the Vice-Chairman of the Varanasi Development Authority dated 6/12.05.1998. This communication simply mentions that the possession was handed over to the Varanasi Development Authority but no possession memo has been enclosed. Moreover, when there is no document to support that the possession was taken from the petitioner by the State authorities in accordance with law then simply on the basis of a communication sent by the competent

authority to the Vice-Chairman, Varanasi Development Authority to transfer the possession is not a compliance in terms of of sub-section (5) and sub-section (6) of Section 10 of the Act,1976. As discussed above, in the counter affidavit there is no averment that the petitioner was given compensation. Moreover, the communication of the competent authority to the Vice-Chairman, Varanasi Development Authority is not correct as the Varanasi Development Authority in its counter affidavit, as discussed above, has clearly stated that the surplus land has not been transferred to it.

35. As regards the judgment in the case of **State of Assam (supra)** it was admitted by the land holder therein that the actual physical possession of the land in question was taken over by the State on 07.12.1991. The judgment of the **State of Assam (supra)** was considered by a Division Bench of this Court in the case of **Lalji v. State of U.P. & 2 Others**13,. The Court has held as under:

[29]. *Faced with a situation where respondents could not place even an iota of evidence showing actual physical possession of disputed land by respondent, learned Standing Counsel sought to rely upon Supreme Court judgment in State of Assam Vs. Bhasker Jyoti Sharma & Ors. 2015 (5) SCC 321 and contended that irrespective of any defect in notice under Sections 10(5) or 10(6) of Act, 1976, if possession has been taken in any manner, Repeal Act 1999 will have no application.*

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[37]. *We may also mention at this stage that except bare averment that disputed land was transferred to ADA by competent Authority, no material has been placed on record about transfer of possession to ADA and infact nothing has been placed on record even to show that de facto possession of land in dispute before or after Repeal Act, 1999 is with ADA. ADA has also not placed on record anything to show that land in dispute is in its actual physical possession and in absence thereof, we had no occasion to require petitioner to prove, how de facto possession of land in dispute came in the hands of ADA. With regard to possession of land in dispute, except bare averments, nothing has been placed on record. It appears that respondents were under impression that once notification under Section 10(3) has been issued, land in dispute vested in 'State' and thereafter, irrespective of fact whether actual physical possession is taken by respondents or not, land owner would cease to have any right and Repeal Act, 1999 will have no application though this assumption on the part of respondents, as we have already discussed, stood negated by Court in State Vs. Hari Ram."*

36. In the case of **Shiv Ram Singh (supra)** the petitioner has challenged the proceedings under the Act, 1976 after lapse of considerable long time. In the said case notice under sub-section (1) of Section 10 of the Act, 1976 was issued in 1985 and a notification under sub-section (3) of Section 10 of the Act, 1976 was issued on 02.06.1986. The State had taken possession on 25.06.1993 prior to the enforcement of the Repeal Act and the name of the State was recorded in the revenue records. In that case the petitioner for the first time challenged the proceedings in the year 2002 and when the matter was remitted to the District Magistrate to decide the issue of the

actual possession on 10.05.2007, the District Magistrate after considering the evidence adduced by the petitioner and the State by its order dated 10.05.2007 found that the possession from the petitioner was taken on 25.06.1993 pursuant to the notice dated 25.02.1987, i.e., prior to the enforcement of the Repeal Act. Moreover, the order of the District Magistrate dated 10.05.2007 was challenged by the petitioner after lapse of two years in July, 2009 and in the meantime Jal Nigam at the surplus land had constructed Sewage Treatment Plant (STP) at the cost of Rs. 73.00 crores. In context of the said fact the Court had dismissed the writ petition of the petitioner therein.

37. In view of the above, we find that the physical possession of the land was never taken from the petitioner. He is still in cultivatory and physical possession. On the basis of the materials on record we are satisfied that the State authorities have not taken possession from the petitioner in terms of sub-section 5 or sub-section (6) of Section 10 of the Act, 1976 and he is still in possession. Hence, in our view, the proceedings initiated under the Act,1976 stands abated in terms of sub-section 2(a) of Section 3 of the Repeal Act. The order of the District Magistrate dated 02.05.2017 is set aside and the proceedings under Act, 1976 is abated. The writ petition is, accordingly, allowed.

(2019)12 ILR A1179

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.10.2019

BEFORE
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Writ-C No. 27086 of 2019

Prathama U.P. Gramin Bank ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Dharmendra Vaish

Counsel for the Respondents:
A.S.G.I., Ms. Jyotsna Srivastava, Sri Sandeep Kumar

A. Civil Law - Payment of Gratuity Act, 1972 – Section 7(7) – Appeal – Pre-deposit condition – Mandatory nature – Right to appeal has been qualified with the requirement of pre-deposit as a condition precedent and the said condition having been introduced is mandatory – Appellate Authority has no discretion to waive the condition of pre-deposit – Appeal cannot be held to be competent in the absence of fulfilment of the condition of pre-deposit. (Para 34 & 37)

Held **-**The Appellate Authority having been given no discretion to waive the condition of predeposit there is no scope for admitting the appeal unless at the time of preferring the appeal the appellant produces a certificate of the Controlling Authority to the effect that the amount in question has been deposited with the authority or deposits such amount with the Appellate Authority.

B. Appeal – Right of - Nature – is a statutory right and it is open to the legislature, which confers the remedy of an appeal, to provide for conditions subject to which the right to appeal may be exercised – Right to appeal inheres in no one and such right being the creature of a statute, the same can be qualified or be made subject to fulfilment of conditions prescribed therefor. (Para 11 & 35)

C. Interpretation of Statute – Rules regarding construction of a proviso – Object of Proviso – P.G. Act, 1972 – second proviso to Section 7(7) – As a

general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment and ordinarily a proviso is not interpreted as stating a general rule – Natural and appropriate effect of a proviso to a statute, or to a section thereof, is to restrain or qualify the provisions immediately preceding it – second proviso has been introduced with a view to make pre-deposit of the gratuity amount determined by the Controlling Authority as a prerequisite for preferring an appeal and a duty has been cast on the Appellate Authority not to admit an appeal unless it is accompanied either by a certificate or by a deposit, as the case may be. (Para 24, 32 & 36)

Writ Petition dismissed. (E-1)

List of cases cited: -

1. The Anant Mills Company Ltd. Vs St. of Gujarat & Ors. (1975) 2 SCC 175

2. Vijay Prakash D. Mehta & Anr. Vs Collector of Customs (Preventive), Bombay (1988) 4 SCC 402

3. Gujarat Agro Industries Company Ltd. Vs Municipal Corporation of the City of Ahmedabad & Ors. (1999) 4 SCC 468

4. M/s Elora Construction Company Vs The Municipal Corporation of Greater Bombay & Ors. AIR 1980 Bom. 162

5. Government of Andhra Pradesh & Ors. Vs P. Luxmi Devi (Smt.) (2008) 4 SCC 720

6. Manik Lal Majumdar & Ors. Vs Gauranga Chandra Dey & Ors. (2004) 12 SCC 448

7. National Textile Corporation Ltd. & Ors. Vs Deputy Labour Commissioner Appellate Authority (P.G. Act) & Ors.2014 LLR 71

8. The Management, Tamil Nadu State Transport Corporation (Madurai) Ltd. Vs The Controller under the Payment of Gratuity Act, Assistant Commissioner of Labour & Ors. 2018 LLR 66

9. Hindustan Fertilizer Corporation Ltd. Vs Union of India & Ors. 2017 LLR 1058

10. Ishverlal Thakorelal Almaula Vs Motibhai Nagjibhai AIR 1966 SC 459

11. Shah Bhojraj Kuverji Oil Mills & Ginning Factory Vs Subbash Chandra Yograj Sinha AIR 1961 SC 1596

12 S. Sundaram Pillai & Ors. Vs V.R. Pattabiraman & Ors. (1985) 1 SCC 591

13. State of Rajasthan Vs Leela Jain AIR 1965 SC 1296

14. S.T.O. Vs Hanuman Prasad AIR 1967 SC 565

15. C.T. Vs Jhaver Ramkishan Shrikishan AIR 1968 SC 59

16 Delhi Metro Rail Corporation Ltd. Vs Tarun Pal Singh & Ors. (2018) 14 SCC 161

17. Haryana State Cooperative Land Development Bank Ltd. Vs Haryana State Cooperative Land Development Banks Employees Union & Anr. (2004) 1 SCC 574

18. Madras and Southern Mahratta Railway Company Ltd. Vs Bezwada Municipality AIR 1944 PC 71

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

1. Heard Sri Dharmendra Vaish, learned counsel for the petitioner, Ms. Jyotsana Srivastava, learned counsel appearing for respondent nos.1, 2 and 3 and Sri Sandeep Kumar, learned counsel for respondent no.4.

2. The present petition has been filed seeking a direction to the Appellate Authority constituted under the Payment

of Gratuity Act, 19721 to accept the bank guarantee furnished by the petitioner-bank in lieu of the deposit to be made as a pre-condition for filing of an appeal under Section 7(7) of the P.G. Act, 1972.

3. Briefly stated the facts of the case are that upon an application filed by the fourth respondent under sub-rule (1) of Rule 10 of the Payment of Gratuity (Central) Rules, 19722 alleging that he had not been paid due amount of gratuity by the Prathama Bank, Head Office, Ram Ganga Vihar, M.D.A, Moradabad (petitioner herein) an order dated 12.03.2019 was passed by the Controlling Authority under the P.G. Act, 1972/Assistant Labour Commissioner (Central), Bareilly allowing the application and issuing a direction to the Prathama Bank to pay the balance amount of gratuity together with interest to the fourth respondent.

4. It is submitted that against the aforesaid order passed by the Controlling Authority an appeal under Section 7(7) of the P.G. Act, 1972 was preferred before the second respondent with a request for accepting bank guarantee in lieu of deposit as required under sub-section (7) of Section 7. It is further submitted that the fourth respondent vide its communication dated 02.08.2019 has informed the petitioner-bank that in terms of Section 7(7) of the P.G. Act, 1972 bank guarantee cannot be permitted as there is no provision for the same and the petitioner has been advised to deposit the amount in the shape of demand draft within the specified period so that the appeal could be entertained.

5. Contention of the learned counsel for the petitioner is that the petitioner is a rural bank and is facing financial crisis and in view of the same the condition of deposit of the amount would further aggravate its financial hardship and as such permission ought to have been granted for furnishing of bank guarantee in lieu of the requirement to make the pre-deposit.

6. The issue which thus arises in the present petition is as to whether the condition of pre-deposit under sub-section (7) of Section 7 of the P.G. Act, 1972 is mandatory, and as to whether bank guarantee can be directed to be furnished in lieu of such pre-deposit.

7. In order to appreciate the contention which is sought to be raised by the petitioner the provision of filing of an appeal under sub-section (7) of Section 7 of the P.G. Act, 1972 may be referred to. For ease of reference Section 7 of the P.G. Act, 1972 is being extracted below:-

"**7. Determination of the amount of Gratuity.**--(1) A person who is eligible for payment of gratuity under this Act or any person authorised, in writing, to act on his behalf shall send a written application to the employer, within such time and in such form, as may be prescribed, for payment of such gratuity.

(2) As soon as gratuity becomes payable, the employer shall, whether an application referred to in sub-section (1) has been made or not, determine the amount of gratuity and give notice in writing to the person to whom the gratuity is payable and also to the controlling authority specifying the amount of gratuity so determined.

(3) The employer shall arrange to pay the amount of gratuity within thirty days from the date it becomes payable to

the person to whom the gratuity is payable.

(3-A) If the amount of gratuity payable under sub-section (3) is not paid by the employer within the period specified in sub-section (3) the employer shall pay, from the date on which the gratuity becomes payable to the date on which it is paid, simple interest at such rate, not exceeding the rate notified by the Central Government from time to time for repayment of long-term deposits, as that Government may, by notification specify :

Provided that no such interest shall be payable if the delay in the payment is due to the fault of the employee and the employer has obtained permission in writing from the controlling authority for the delayed payment on this ground.

(4)(a) If there is any dispute as to the amount of gratuity payable to an employee under this Act or as to the admissibility of any claim of, or in relation to, an employee for payment of gratuity, or as to the person entitled to receive the gratuity, the employer shall deposit with the controlling authority such amount as he admits to be payable by him as gratuity.

Explanation.-- x x x x x

(b) Where there is a dispute with regard to any matter or matters specified in clause (a), the employer or employee or any other person raising the dispute may make an application to the controlling authority for deciding the dispute.

(c) The controlling authority shall, after due inquiry and after giving the parties to the dispute a reasonable opportunity of being heard, determine the matter or matters in dispute and if, as a result of such inquiry any amount is found to be payable to the employee, the controlling authority shall direct the employer to pay such amount or, as the case may be, such amount as reduced by the amount already deposited by the employer.

(d) The controlling authority shall pay the amount deposited, including the excess amount, if any, deposited by the employer, to the person entitled thereto.

(e) As soon as may be after a deposit is made under clause (a) the controlling authority shall pay the amount of the deposit--

(i) to the applicant where he is the employee; or

(ii) where the applicant is the employee, to the nominee or, as the case may be, the guardian of such nominee or heir of the employee if the controlling authority is satisfied that there is no dispute as to the right of the applicant to receive the amount of gratuity.

(5) For the purpose of conducting an inquiry under sub-section (4), the controlling authority shall have the same powers as are vested in a Court, while trying a suit, under the Code of Civil Procedure, 1908 (5 of 1908), in respect of the following matters namely--

(a) enforcing the attendance of any person or examining him on oath;

(b) requiring the discovery and production of documents;

(c) receiving evidence on affidavits;

(d) issuing commissions for the examination of witnesses.

(6) Any inquiry under this section shall be a judicial proceeding within the meaning of Sections 193 and 228, and for the purpose of Section 196, of the Indian Penal Code, 1860 (45 of 1860).

(7) Any person aggrieved by an order under sub-section (4), may, within

sixty days from the date of the receipt of the order, prefer an appeal to the appropriate Government or such other authority as may be specified by the appropriate Government in this behalf :

Provided that the appropriate Government or the appellate authority, as the case may be, may if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal within the said period of sixty days, extend the said period by a further period of sixty days.

Provided further that no appeal by an employer shall be admitted unless at the time of preferring the appeal, the appellant either produces a certificate of the controlling authority to the effect that the appellant has deposited with him an amount equal to the amount of gratuity required to be deposited under sub-section (4), or deposits with the appellate authority such amount.

(8) The appropriate Government or the appellate authority, as the case may be, may, after giving the parties to the appeal a reasonable opportunity of being heard, confirm, modify or reverse the decision of the controlling authority."

8. A plain reading of the aforementioned statutory provision indicates that a right of appeal has been provided for against an order under sub-section (4) of Section 7 which is to be preferred within sixty days from the date of the receipt of the order. In terms of the first proviso the Appellate Authority is empowered to extend the aforesaid period by a further period of sixty days upon being satisfied that the appellant was prevented by sufficient cause from preferring the appeal within the prescribed time period.

9. The second proviso to sub-section (7) of Section 7 which has been inserted by Act 25 of 19843 stipulates that no appeal by an employer shall be admitted unless at the time of preferring the appeal, the appellant either produces a certificate of the Controlling Authority to the effect that the appellant has deposited with him an amount equal to the amount of gratuity required to be deposited under sub-section (4), or deposits with the Appellate Authority such amount.

10. The provision with regard to pre-deposit of an amount equal to the amount of gratuity as a condition precedent for the appeal being admitted has been introduced by insertion of the second proviso by Act 25 of 1984 and the same having been provided for in mandatory terms it would follow that the right to appeal under sub-section (7) of Section 7 becomes a vested right only when the pre-condition of deposit is complied with. The Appellate Authority is not to admit the appeal unless at the time of preferring the appeal, the appellant either produces a certificate of the Controlling Authority to the effect that the appellant has deposited with the authority an amount equal to the amount of gratuity required to be deposited under sub-section (4) or deposits such amount with the Appellate Authority.

11. The right of appeal, it is well settled, is a statutory right and it is open to the legislature which confers the remedy of an appeal to provide for conditions subject to which the right to appeal may be exercised. The power to regulate the exercise of the right of appeal by providing for a pre-deposit as a condition precedent to the entertainment of an appeal seeking to challenge the

imposition of the amount came up for consideration in the case of **The Anant Mills Company Ltd. Vs. State of Gujarat & Ors.**4 and it was held that the right of appeal being a creature of a statute it was upon the legislature to impose an accompanying liability upon a party upon whom a legal right is conferred or to prescribe conditions for the exercise of the right. The relevant observations in the judgment are as follows:-

"40. After hearing the learned Counsel for the parties, we are unable to subscribe to the view taken by the High Court. Section 406(2)(e) as amended states that no appeal against a rateable value or tax fixed or charged under the Act shall be entertained by the Judge in the case of an appeal against a tax or in the case of an appeal made against a rateable value after a bill for any property tax assessed upon such value has been presented to the appellant, 'unless the amount claimed from the appellant has been deposited by him with the Commissioner. According to the proviso to the above clause, where in any particular case the Judge is of opinion that the deposit of the amount by the appellant will cause undue hardship to him, the Judge may in his discretion dispense with such deposit or part thereof, either unconditionally or subject to such conditions as he may deem fit. The object of the above provision apparently is to ensure the deposit of the amount claimed from an appellant in case he seeks to file an appeal against a tax or against a rateable value after a bill for any property tax assessed upon such value has been presented to him. Power at the same time is given to the appellate Judge to relieve the appellant from the rigour of the above provision in case the Judge is of the opinion that it would cause undue hardship to the appellant. The requirement about the deposit of the amount claimed as a condition precedent to the entertainment of an appeal which seeks to challenge the imposition or the quantum of that tax, in our opinion, has not the effect of nullifying the right of appeal, especially when we keep in view the fact that discretion is vested in the appellate Judge to dispense with the compliance of the above requirement. All that the statutory provision seeks to do is to regulate the exercise of the right of appeal. The object of the above provision is to keep in balance the right of appeal, which is conferred upon a person who is aggrieved with the demand of tax made from him, and the right of the Corporation to speedy recovery of the tax. The impugned provision accordingly confers a right of appeal and at the same time prevents the delay in the payment of the tax. We find ourselves unable to accede to the argument that the impugned provision has the effect of creating a discrimination as is offensive to the principle of equality enshrined in Article 14 of the Constitution. It is significant that the right of appeal is conferred upon all persons who are aggrieved against the determination of tax or rateable value. The bar created by Section 406(2)(e) to the entertainment of the appeal by a person who has not deposited the amount of tax due from him and who is not able to show to the appellate Judge that the deposit of the amount would cause him undue hardship arises out of his own omission and default. The above provision, in our opinion, has not the effect of making invidious distinction or creating two classes with the object of meting out differential treatment to them;

it only spells out the consequences flowing from the omission and default of a person who despite the fact that the deposit of the amount found due from him would cause him no hardship, declines of his own volition to deposit that amount. The right of appeal is the creature of a statute. Without a statutory provision creating such a right the person aggrieved is not entitled to file an appeal. We fail to understand as to why the Legislature while granting the right of appeal cannot impose conditions for the exercise of such right. In the absence of any special reasons there appears to be no legal or constitutional impediment to the imposition of such conditions. It is permissible, for example, to prescribe a condition in criminal cases that unless a convicted person is released on bail, he must surrender to custody before his appeal against the sentence of imprisonment would be entertained. Likewise, it is permissible to enact a law that no appeal shall lie against an order relating to an assessment of tax unless the tax had been paid. Such a provision was on the statute book in Section 30 of the Indian Income-tax Act, 1922. The proviso to that section provided that ". . . no appeal shall lie against an order under sub-section (1) of Section 46 unless the tax had been paid". Such conditions merely regulate the exercise of the right of appeal so that the same is not abused by a recalcitrant party and there is no difficulty in the enforcement of the order appealed against in case the appeal is ultimately dismissed. It is open to the Legislature to impose an accompanying liability upon a party upon whom legal right is conferred or to prescribe conditions for the exercise of the right. Any requirement for the discharge of that liability or the fulfilment of that condition in case the party concerned seeks to avail of the said right is a valid piece of legislation, and we can discern no contravention of Article 14 in it. A disability or disadvantage arising out of a party's own default or omission cannot be taken to be tantamount to the creation of two classes offensive to Article 14 of the Constitution, especially when that disability or disadvantage operates upon all persons who make the default or omission."

12. The right to appeal being subject to the obligatory condition of making a pre-deposit again came up for consideration in the context of Section 129-E of the Customs Act, 1962 in the case of **Vijay Prakash D. Mehta & Anr. Vs. Collector of Customs (Preventive), Bombay**5, and it was held that the right to appeal is neither an absolute right nor an ingredient of natural justice and the said right being a statutory right it can be circumscribed by the conditions in the grant. The relevant observations made in the judgment are as follows:-

"5. The aforesaid section provides a conditional right of appeal in respect of an appeal against the duty demanded or penalty levied. Although the section does not expressly provide for rejection of the appeal for non-deposit of duty or penalty, yet it makes it obligatory on the appellant to deposit the duty or penalty, pending the appeal, failing which the Appellate Tribunal is fully competent to reject the appeal. See, in this connection, the observations of this Court in respect of Section 129 prior to substitution of Chapter XV by the Finance Act, 1980 in Navinchandra Chhotelal v. Central Board of Excise & Customs (1971) 1 SCC 289. The proviso, however,

gives power to the Appellate Authority to dispense with such deposit unconditionally or subject to such conditions in cases of undue hardships. It is a matter of judicial discretion of the Appellate Authority.

9. Right to appeal is neither an absolute right nor an ingredient of natural justice the principles of which must be followed in all judicial and quasi-judicial adjudications. The right to appeal is a statutory right and it can be circumscribed by the conditions in the grant."

13. A similar view was reiterated in the case of **Gujarat Agro Industries Company Ltd. Vs. Municipal Corporation of the City of Ahmedabad & Ors.**6 wherein the constitutionality of the pre-condition of deposit under Section 406(2)(e) of the Bombay Municipal Corporation Act, 1949 was upheld and it was stated that the right to appeal being a statutory right and not an inherent right it is for the legislature to decide to make the right subject to any condition or not. The observations made in the judgment in this regard are as follows:-

"8. By the amending Act 1 of 1979 discretion of the court in granting interim relief has now been limited to the extent of 25% of the tax required to be deposited. It is, therefore, contended that the earlier decision of this Court in Anant Mills case (1975) 2 SCC 175 may not have full application. We, however, do not think that such a contention can be raised in view of the law laid down by this Court in Anant Mills case (1975) 2 SCC 175. This Court said that right of appeal is the creature of a statute and it is for the legislature to decide whether the right of appeal should be unconditionally given to an aggrieved party or it should be conditionally given. Right of appeal which is a statutory right can be conditional or qualified. It cannot be said that such a law would be violative of Article 14 of the Constitution. If the statute does not create any right of appeal, no appeal can be filed. There is a clear distinction between a suit and an appeal. While every person has an inherent right to bring a suit of a civil nature unless the suit is barred by statute, however, in regard to an appeal, the position is quite opposite. The right to appeal inheres in no one and, therefore, for maintainability of an appeal there must be authority of law. When such a law authorises filing of appeal, it can impose conditions as well (see Ganga Bai v. Vijay Kumar (1974) 2 SCC 393)."

14. The provision restricting the right of appeal by requiring deposit of the amount concerned in appeal again came up in the case of **M/s Elora Construction Company Vs. The Municipal Corporation of Greater Bombay & Ors.**7, and it was stated that the right of appeal being a creation of statute could be taken away by the statute expressly or by necessary intendment and the provision restricting the right of appeal by requiring deposit of the amount concerned was held constitutionally valid.

15. Again, in the case of **Government of Andhra Pradesh & Ors. Vs. P. Luxmi Devi (Smt.)**8 the requirement of pre-deposit under Section 47-A proviso of the Stamp Act, 1899 was held to be constitutionally valid and not violative of Articles 14 and 19 or any other provision of the Constitution of India9.

16. The question as to whether the Appellate Authority has the discretion to say that an appeal could be preferred

without satisfying the pre-condition of deposit where the statutory requirement has been specifically stated in a compulsive language came up for consideration in the case of **Manik Lal Majumdar & Ors. Vs. Gauranga Chandra Dey & Ors.**10, and it was held that the condition of pre-deposit being a statutory requirement no discretion was left to the Appellate Authority to hold that an appeal could be preferred without satisfying the said requirement.

17. The provision with regard to the requirement to deposit the amount of gratuity under the second proviso to Section 7(7) of the P.G. Act, 1972 came up for consideration in the case of **National Textile Corporation Ltd. & Ors. Vs. Deputy Labour Commissioner Appellate Authority (P.G. Act) & Ors.**11 and it was held that as per terms of the second proviso, the deposit of the amount of gratuity was required and as the same had not been complied the appeal had rightly been dismissed. The observations made in the judgment are as follows:-

"3. ...the petitioners were required to deposit the amount of gratuity as provided under section 7(7) of the Act of 1972 and as they have not complied the statutory provisions as contained under the Act of 1972, their appeal has rightly been dismissed. This Court is of the considered opinion that the appeal preferred by the petitioners has rightly been dismissed due to non-compliance of the aforesaid statutory provisions."

18. In **The Management, Tamil Nadu State Transport Corporation (Madurai) Ltd. Vs. The Controller under the Payment of Gratuity Act, Assistant Commissioner of Labour & Ors.**12 it was held that the object of the legislation was very clear and the second proviso to sub-section (7) of Section 7 of the Act, 1972 had been introduced with the object of making pre-deposit of the gratuity amount determined by the Controlling Authority as a pre-requisite for preferring an appeal and failure to deposit the amount would mean that the appeal itself is incompetent. The relevant extracts in the judgment are as follows:-

"3. Once the Controlling Authority quantifies the amount of gratuity and directs the employer to pay the same, it should be required to be deposited before preferring appeal in terms of the provisions of the Payment of Gratuity Act. The intention and object of the legislation is very clear and the second proviso to sub section 7 of Section 7 of the Act, has been introduced with the object of making pre-deposit of the gratuity amount determined by the Controlling Authority as a pre-requisite for preferring appeal. Further, Clause (a) of sub-section 4 of Section 7 deals with voluntary deposit by the employer at the threshold where the employer has come forward with such deposit.

4. The Division Bench of this Court in Onward Trading Company, Madras and Deputy Commissioner of Labour, Madras and another reported in 1989 (2) LLN 672, held that the statutory precondition must be obeyed and also held that failure to deposit the amount would mean that the appeal itself is incompetent. As the petitioner Management has not deposited the amount, the relief sought for by the petitioner has got to be rejected…"

19. A similar position was reiterated in **Hindustan Fertilizer Corporation**

Ltd. Vs. Union of India & Ors.13 wherein it was held that the word "shall" used in the second proviso to Section 7(7) is to be read as mandatory and it curtails the right of an appellant not depositing the requisite amount to have his appeal heard or even admitted. Further, it was held that the relevant provision suggests that a duty has been cast on the Appellate Authority not to admit such an appeal unless it is accompanied either by a certificate or by a deposit as the case may be. The observations made in the judgment are as follows:-

"6. For the purpose of filing of an appeal, there is certain requirement to be complied with. The second proviso to Section 7(7) of the said Act, inter alia, says that no appeal under Section 4 of the Act shall be admitted unless at the time of preferring the appeal, the appellant either produces a certificate of the Controlling Authority to the effect that the appellant has deposited with him an amount equal to the amount of gratuity required to be deposited under Section 4 or deposits with the appellate authority such amount. While rejecting the petitioner's appeal, the respondent No. 2 had specifically held that the employer had neither obtained a certificate from the Controlling Authority nor deposited the awarded amount with the appellate authority. Therefore, the appeal was rejected.

9. ...I find no infirmity in the order in rejecting the appeal. The second proviso to Section 7(7) of the Act which was incorporated by way of an amendment specifically says that no appeal shall be admitted unless the requirements as mentioned in the subsequent part of the proviso is complied with. The use of the word 'shall' is to be read as mandatory and there is no scope of reading it as directory. It curtails the right of an appellant not depositing the requisite amount to have his appeal heard or even admitted. A more close look at the relevant provisions of law suggests that a duty has been cast on the appellate authority not to admit such an appeal unless it is accompanied either by a certificate or by a deposit, as the case may be. The appellate authority merely followed the provisions of law which it was bound to."

20. The provisions with regard to making of a pre-deposit as a condition precedent for filing of an appeal having been inserted under sub-section (7) of Section 7 of the P.G. Act, 1972 by way of a proviso, it would be apposite to refer to the manner in which a proviso is to be construed.

21. In **Craies on Statute of Law**14, referring to the rules regarding construction of a proviso, it has been observed as follows:-

"9.1. The effect of an excepting or qualifying proviso, according to the ordinary rules of construction, is to except out of the preceding portion of the enactment, or to qualify something enacted therein, which but for the proviso would be within it; and such a proviso cannot be construed as enlarging the scope of an enactment when it can be fairly and properly construed without attributing to it that effect."

22. Again, as has been pointed out by Craies in the treatise on Statute Law;

"The effect of an excepting or qualifying proviso, according to the ordinary rules of construction, is to except

out the preceding portion of the enactment, or to qualify something enacted therein, which but for the proviso would be within it."

23. In **Ishverlal Thakorelal Almaula Vs. Motibhai Nagjibhai**15, the intendment of the proviso has been discussed thus:-

"8. The proper function of a proviso is to except or qualify something enacted in the substantive clause, which but for the proviso would be within that clause. It may ordinarily be presumed in construing a proviso that it was intended that the enacting part of the section would have included the subject-matter of the proviso. But the question is one of interpretation of the proviso and there is no rule that the proviso must always be restricted to the ambit of the main enactment. Occasionally in a statute, a proviso is unrelated to the subject-matter of the preceding section, or contains matters extraneous to that section, and it may have then to be interpreted as a substantive provision, dealing independently with the matter specified therein, and not as qualifying the main or the preceding section."

24. In **Shah Bhojraj Kuverji Oil Mills & Ginning Factory Vs. Subbash Chandra Yograj Sinha**16, the object of the proviso and how it is to be interpreted has been stated in the following manner:-

"9. The law with regard to provisos is well settled and well understood. As a general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment, and ordinarily, a proviso is not interpreted as stating a general rule…"

25. Again, in **S. Sundaram Pillai & Ors. Vs. V.R. Pattabiraman & Ors.**17, various decisions with regard to the manner of construction of a proviso have been discussed and it has been stated as follows:-

"29. Odgers in Construction of Deeds and Statutes (5th Edn.) while referring to the scope of a proviso mentioned the following ingredients:

'p. 317. Provisos--These are clauses of exception or qualification in an Act, excepting something out of, or qualifying something in, the enactment which, but for the proviso, would be within it.

p. 318. Though framed as a proviso, such a clause may exceptionally have the effect of a substantive enactment.'

30. Sarathi in Interpretation of Statutes at pp. 294-95 has collected the following principles in regard to a proviso:

(a) When one finds a proviso to a section the natural presumption is that, but for the proviso, the enacting part of the section would have included the subject-matter of the proviso.

(b) A proviso must be construed with reference to the preceding parts of the clause to which it is appended.

(c) Where the proviso is directly repugnant to a section, the proviso shall stand and be held a repeal of the section as the proviso speaks the latter intention of the makers.

(d) Where the section is doubtful, a proviso may be used as a guide to its interpretation: but when it is clear, a proviso cannot imply the existence of words of which there is no trace in the section.

(e) The proviso is subordinate to the main section.

(f) A proviso does not enlarge an enactment except for compelling reasons.

(g) Sometimes an unnecessary proviso is inserted by way of abundant caution.

(h) A construction placed upon a proviso which brings it into general harmony with the terms of section should prevail.

(i) When a proviso is repugnant to the enacting part, the proviso will not prevail over the absolute terms of a later Act directed to be read as supplemental to the earlier one.

(j) A proviso may sometimes contain a substantive provision."

26. In the case of **State of Rajasthan Vs. Leela Jain**18, the following observation with regard to construction of a proviso has been made:-

"14. ...So far as a general principle of construction of a proviso is concerned, it has been broadly stated that the function of a proviso is to limit the main part of the section and carve out something which but for the proviso would have been within the operative part."

27. In **S.T.O. Vs. Hanuman Prasad**19, it was held as follows:-

"5. ... It is well recognised that a proviso is added to a principal clause primarily with the object of taking out of the scope of that principal clause what is included in it and what the legislature desires should be excluded."

28. In **C.C.T. Vs. Jhaver Ramkishan Shrikishan**20 following observations were made:-

"8. ...Generally speaking, it is true that the proviso is an exception to the main part of the section; but it is recognised that in exceptional cases a proviso may be a substantive provision itself."

29. The different purposes served by a proviso have been summarised in the case of **Delhi Metro Rail Corporation Ltd. Vs. Tarun Pal Singh & Ors**.21 in the following manner:-

"43. ...To sum up, a proviso may serve four different purposes:

(1) qualifying or excepting certain provisions from the main enactment;

(2) it may entirely change the very concept of the intendment of the enactment by insisting on certain mandatory conditions to be fulfilled in order to make the enactment workable;

(3) it may be so embedded in the Act itself as to become an integral part of the enactment and thus acquire the tenor and colour of the substantive enactment itself; and

(4) it may be used merely to act as an optional addenda to the enactment with the sole object of explaining the real intendment of the statutory provision."

30. In **Haryana State Cooperative Land Development Bank Ltd. Vs. Haryana State Cooperative Land Development Banks Employees Union & Anr.**22, the function of proviso has been considered and it has been observed as follows:-

"9. The normal function of a proviso is to except something out of the enactment or to qualify something enacted therein which but for the proviso

would be within the purview of the enactment. As was stated in Mullins v. Treasurer of Surrey (1880) LR 5 QBD 170 at p. 173 (DC) (referred to in Shah Bhojraj Kuverji Oil Mills & Ginning Factory v. Subbash Chandra Yograj Sinha (AIR 1961 SC 1596) and Calcutta Tramways Co. Ltd. v. Corpn. of Calcutta (AIR 1965 SC 1728), when one finds a proviso to a section the natural presumption is that, but for the proviso, the enacting part of the section would have included the subject-matter of the proviso. The proper function of a proviso is to except and to deal with a case which would otherwise fall within the general language of the main enactment and its effect is confined to that case. It is a qualification of the preceding enactment which is expressed in terms too general to be quite accurate. As a general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment and ordinarily, a proviso is not interpreted as stating a general rule.

x x x x x

"If in a deed an earlier clause is followed by a later clause which destroys altogether the obligation created by the earlier clause, the later clause is to be rejected as repugnant, and the earlier clause prevails. ...But if the later clause does not destroy but only qualifies the earlier, then the two are to be read together and effect is to be given to the intention of the parties as disclosed by the deed as a whole' (per Lord Wrenbury in Forbes v. Git (1921 SCC OnLine PC 102 : (1922) 1 AC 256).

A statutory proviso 'is something engrafted on a preceding enactment' (R. v. Taunton St. James (1829) 9 B&C 831 : 109 ER 309, ER p. 311).

"The ordinary and proper function of a proviso coming after a general enactment is to limit that general enactment in certain instances' (per Lord Esher in Barker, In re, ex p Constable (1890) LR 25 QBD 285 (CA)."

31. The function of a proviso to carve out an exception or to qualify something enacted therein which would otherwise be within the purview of the enactment was emphasised in **Madras and Southern Mahratta Railway Company Ltd. Vs. Bezwada Municipality**23 wherein it was stated by **Lord Macmillan** as follows:-

"The proper function of a proviso is to except and deal with a case which would otherwise fall within the general language of the main enactment, and its effect is confined to that case."

32. In "**The Construction and Interpretation of Law" by Henry Campbell Black**24, while considering the manner of construction of provisos it has been stated that the natural and appropriate effect of a proviso to a statute, or to a section thereof, is to restrain or qualify the provisions immediately preceding it.

33. The second proviso to sub-section (7) of Section having been introduced by way of an amendment in terms of Act 25 of 1984 and in terms thereof the requirement of pre-deposit of an amount equal to the amount of gratuity as a condition precedent for an appeal being admitted having been provided for in a language which mandatory in form clearly indicates that the intention of the legislature was to qualify the right to appeal under sub-section (7) of Section 7

by providing for pre-deposit of the amount as a condition precedent.

34. It may, therefore, be inferred that in terms of the second proviso introduced by the Act 25 of 1984 the right to appeal granted under sub-section (7) of Section 7 of the P.G. Act, 1972, has been qualified with the requirement of pre-deposit as a condition precedent, and the said condition having been introduced in a language which is compulsive in form the appeal cannot be held to be competent in the absence of fulfilment of the condition of pre-deposit.

35. It may also be seen that the right to appeal inheres in no one and such right being the creature of a statute, the same can be qualified or be made subject to fulfilment of conditions prescribed therefor.

36. The object of the legislation is very clear and the second proviso to sub-section (7) of Section 7 of the P.G. Act, 1972 has been introduced with a view to make pre-deposit of the gratuity amount determined by the Controlling Authority as a pre-requisite for preferring an appeal and a duty has been cast on the Appellate Authority not to admit an appeal unless it is accompanied either by a certificate or by a deposit, as the case may be.

37. The Appellate Authority having been given no discretion to waive the condition of pre-deposit there is no scope for admitting the appeal unless at the time of preferring the appeal the appellant produces a certificate of the Controlling Authority to the effect that the amount in question has been deposited with the authority or deposits such amount with the Appellate Authority.

38. In view of the foregoing discussion, the stand of the Appellate Authority declining to grant permission for furnishing a bank guarantee in lieu of the requirement of pre-deposit under sub-section (7) of Section 7 of the P.G. Act, 1972 stating that there is no provision for the same, cannot be faulted with.

39. The writ petition is devoid of merits and is accordingly dismissed.

(2019)12 ILR A1192

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.11.2019

BEFORE
THE HON'BLE YASHWANT VARMA, J.

Writ-C No. 27730 of 2003

Vipin Kumar Agarwal ...Petitioner
Versus
Collector, Meerut & Ors. ...Respondents

Counsel for the Petitioner:
Sri Pramod Kumar Jain

Counsel for the Respondents:
C.S.C.

A. Civil Law - Indian Stamp Act 1899 – Article 23 – Explanation – Definition of Conveyance – Explanation inserted at the end of Article 23 – It is evident that it seeks to introduce a substantive provision in the law bringing a certain genre of agreements to sell within the ambit of the expression conveyance – It, in essence, introduces and creates new obligations and liabilities which were otherwise not contemplated by Article 23. (Para 8 & 11)

Held – On a more fundamental plane, the Court finds that the Explanation itself while

bringing agreements to sell within the ambit of Article 23, uses the expression- *"shall be deemed to be a conveyance…..".* It is thus manifest that agreements to sell are brought within the scope of Article 23 by virtue of a legal fiction that is introduced.

B. Interpretation of statute – Construction of Explanation clause – One can never ignore that interpretation of statutes is fundamentally concerned with substance and not mere form – Merely because what is introduced is titled as an explanation, that in itself would not necessarily commend itself to be an exposition of the existing law – In case the explanation introduces a substantive law or makes provision for matters which cannot be viewed as being implicit and contemplated in the provision as it stood, the explanation cannot be recognised or held to be declaratory – In case it is found that the Explanation creates obligations or liabilities whose attributes were non-existent in the original provision, it cannot be interpreted to be an elucidation of that provision.

Writ Petition allowed. (E-1)

List of cases cited: -

1. Keshavji Ravji & Co. v. CIT, (1990) 2 SCC 231

2. Union of India Vs. Martin Lottery Agency Ltd. (2009)12 SCC 209

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

1. Heard learned counsel for the petitioner and the learned Standing Counsel.

2. The instant writ petition assails the orders passed by the respondents in proceedings initiated against the petitioner under Section 47-A of the **Indian Stamp Act 1899**1. The issue itself arises consequent to the execution of an agreement to sell on 31 May 1993 in favour of the petitioner. The aforesaid agreement to sell was followed by a sale deed being executed on 31 January 1994. The respondents, however, drew proceedings under Section 47-A of the Act holding the petitioner liable to pay additional stamp duty on the original agreement to sell which had been executed. Article 23 as appearing in Schedule 1-B prescribes the stamp duty payable on conveyances. It appears that the respondents proceeded in the matter on the basis of of Article 23 as it stood in its amended form after the promulgation of U.P. Act No. 22 of 1998 and more particularly the Explanation which came to be introduced pursuant thereto. Article 23, as it existed on the date of execution of the agreement to sell, namely 31 May 1993, carried no Explanation. This position is not disputed by the respondents.

3. By virtue of U.P. Act No. 22 of 1998 an Explanation came to be appended to Article 23 which reads thus:-

"For the purposes of this Article, in the case of an agreement to sell an immovable property, where possession is delivered before the execution or at the time of execution, or is agreed to be delivered without executing the conveyance, the agreement shall be deemed to be a conveyance and stamp duty thereon shall be payable accordingly:

Provided that the provisions of Section 47-A shall *mutatis mutandis* apply to such agreement:

Provided further that when conveyance in pursuance of such agreement is executed, the stamp duty

paid on the agreement shall be adjusted towards the total duty payable on the conveyance."

4. According to the respondents since the agreement to sell also evidenced possession having been delivered, it was liable to be deemed to be a conveyance and stamp duty liable to be paid accordingly. Prior to the insertion of the said Explanation, Article 23 read thus:-

"23. CONVEYANCE as defined by Section 2(10) not being a TRANSFER charged or exempted under No. 62."

5. The petitioner contends that the agreement to sell would be exigible to duty in accordance with the provisions made in Article 23 as it stood on the date of execution of that instrument. According to the petitioner since Article 23 at that time only covered **"Conveyance"** as defined in Section 2(10) of the Act, an agreement to sell, with or without possession, could not have been taxed as a conveyance. According to the petitioner Section 2(10) of the Act brought within its ambit only actual conveyances and sales by which movable or immovable property may have been transferred. They would contend that an agreement to sell was neither contemplated nor covered in the definition of "conveyance" as embodied in Section 2(10). A more serious challenge is raised to the impugned orders on the ground that although the Explanation came to be added for the first time by virtue of U.P. Act No. 22 of 1998, the instrument in question has been taxed as if that amendment applied retrospectively. It was in that backdrop that it was submitted that the Explanation clearly introduced a new liability in respect of an agreement to sell and that consequently it could not be interpreted as having retroactive operation.

6. The Court at the outset notes that the petitioners appear to be correct in their submission that the amended Article 23 could have had no application since it came to be introduced after the execution of the instrument in question. It must be borne in mind that while the agreement to sell came to be executed on 31 May 1993, U.P. Act No. 22 of 1998 came to be promulgated on 1 September 1998 and therefore evidently after the execution of the instrument forming subject matter of the proceeding. Since an instrument becomes exigible to duty under the Act the moment it is executed, it necessarily must be taxed in accordance with the provisions made in Schedule 1-B as existing at that time. An amendment to Schedule 1-B which is introduced much after the execution of the instrument cannot be held to apply.

7. The Court additionally finds that while an agreement to sell with possession was brought within the ambit of a conveyance by virtue of the Explanation which came to be added to Article 23, that would still require the Court to answer the question whether that Explanation could be construed as being declaratory, having been added *ex abundanti cautela* or did it introduce a new liability which was otherwise not contemplated in the provision.

8. An Explanation when added to a statutory provision is generally understood as being aimed at ironing out the creases or expounding and clarifying the true intent of the statute. However,

one can never ignore that interpretation of statutes is fundamentally concerned with substance and not mere form. Merely because what is introduced is titled as an explanation, that in itself would not necessarily commend itself to be an exposition of the existing law. At least such a conclusion cannot be held to be inevitable or one which brooks no exception. In case the explanation introduces a substantive law or makes provision for matters which cannot be viewed as being implicit and contemplated in the provision as it stood, the explanation cannot be recognised or held to be declaratory. In case it is found that the Explanation creates obligations or liabilities whose attributes were non existent in the original provision, it cannot be interpreted to be an elucidation of that provision.

9. In **Keshavji Ravji & Co. v. CIT,2 the Supreme Court pertinently held**:-

37. Sri Ramachandran urged that the introduction, in the year 1984, of Explanation I to Section 40(b) was not to effect or bring about any change in the law, but was intended to be a mere legislative exposition of what the law has always been. An 'Explanation', generally speaking, is intended to explain the meaning of certain phrases and expressions contained in a statutory provision. There is no general theory as to the effect and intendment of an Explanation except that the purposes and intendment of the 'Explanation' are determined by own words. An Explanation, depending on its language, might supply or take away something from the contents of a provision. It is also true that an Explanation may-this is what Sri Ramachandran suggests in this case-be introduced by way of abundant--caution in order to clear any mental cobwebs surrounding the meaning of a statutory provision spun by interpretative errors and to place what the legislature considers to be the true meaning beyond controversy or doubt. Hypothetically, that such can be the possible purpose of an 'Explanation' cannot be doubted. But the question is whether in the present case, Explanation I inserted into Section 40(b) in the year 1984 has had that effect.

38. The notes on clauses appended to the Taxation Laws (Amendment) Bill, 1984, say that Clause 10 which seeks to amend Section 40 will take effect from 1st April, 1985 and will, accordingly, apply in relation to the assessment year 1985-86 and subsequent years. The express prospective operation and effectuation of the 'Explanation' might, perhaps, be a factor necessarily detracting from any evincement of the intent on the part of the legislature that the Explanation was intended more as a legislative exposition or clarification of the existing law than as a change in the law as it then obtained.....…"

10. Dealing with the characteristics of a declaration or clarificatory legislation, the Supreme Court in **Union of India Vs. Martin Lottery Agency Ltd.**3 held as under:-

43. The question as to whether a Subordinate Legislation or a Parliamentary Statute would be held to be clarificatory or declaratory or not would indisputably depend upon the nature thereof as also the object it seeks to achieve. What we intend to say is that if two views are not possible, resort to clarification and/or declaration may not be permissible.

44. This aspect of the matter has been considered by this Court in Virtual Soft Systems Ltd. v. CIT [(2007) 9 SCC 665], holding :

"50. It may be noted that the amendment made to Section 271 by the Finance Act, 2002 only stated that the amended provision would come into force with effect from 1.4.2003. The statute nowhere stated that the said amendment was either clarificatory or declaratory. On the contrary, the statue stated that the said amendment would come into effect on 1.4.2003 and therefore, would apply to only to future periods and not to any period prior to 1.4.2003 or to any assessment year prior to assessment year 2004-2005. It is the well settled legal position that an amendment can be considered to be declaratory and clarificatory only if the statue itself expressly and unequivocally states that it is a declaratory and clarificatory provision. If there is no such clear statement in the statute itself, the amendment will not be considered to be merely declaratory or clarificatory.

51. Even if the statute does contain a statement to the effect that the amendment is declaratory or clarificatory, that is not the end of the matter. The Court will not regard itself as being bound by the said statement made in the statute but will proceed to analyse the nature of the amendment and then conclude whether it is in reality a clarificatory or declaratory provision or whether it is an amendment which is intended to change the law and which applies to future periods."

48. The Gujarat High Court in CIT v. S.G. Pgnatal [(1980) 124 ITR 391 (Guj)] held that words "earned in India" occurring in clause (ii) must be interpreted as "arising or accruing in India" and not "from service rendered in India". Opining that the High Court proceeded on an incorrect hypothesis, it was held : *(Sedco case[Sunrise Associates v. Govt. of NCT of Delhi,* (2006) 5 SCC 603] [(2008) 5 SCC 176], SCC p. 723, para 9)

"9. The High Court did not refer to the 1999 Explanation in upholding the inclusion of

salary for the field break periods in the assessable income of the employees of the appellant. However the respondents have urged the point before us.

10. In our view the 1999 Explanation could not apply to assessment years for the simple reason that it had not come into effect then. Prior to introducing the 1999 Explanation, the decision in CIT v. S.G. Pgnatale (supra) was followed in 1989 by a Division Bench of the Gauhati High Court in Commissioner of Income Tax v. Goslino Mario reported in [(2002) 10 SCC 165]. It found that the 1983 Explanation had been given effect from 1.4.1979 whereas the year in question in that case was 1976-77 and said : (ITR p.318)

". . . it is settled law that assessment has to be made with reference to the law which is in existence at the relevant time. The mere fact that the assessments in question has (sic) somehow remained pending on April 1, 1979, cannot be cogent reason to make the Explanation applicable to the cases of the present assessees. This fortuitous circumstance cannot take away the vested rights of the assessees at hand"."

49. Reverting to the decision of a Kerala High Court in CIT v. S.R. Patton [(1992) 193 ITR 49 (Ker)] wherein Gujarat High Court's judgment was followed, this Court noticed that

explanation was not held to be a declaratory one but thereby the scope of Section 9(1)(ii) of the Act was widened. The law in the aforementioned premise was laid down as under : (Sedco case [2005) 12 SCC 717], SCC pp. 724-25, paras 17-19)

"17. As was affirmed by this Court in Goslino Mario (supra), a cardinal principle of the tax law is that the law to be applied is that which is in force in the relevant assessment year unless otherwise provided expressly or by necessary implication. [See also: Reliance Jute and Industries. v. CIT [(1980) 1 SCC 139]. An Explanation to a statutory provision may fulfil the purpose of clearing up an ambiguity in the main provision or an Explanation can add to and widen the scope of the main section (See: Sonia Bhatia v. State of U.P. [(1981) 2 SCC 585 at 598]. If it is in its nature clarificatory then the Explanation must be read into the main provision with effect from the time that the main provision came into force (See: Shyam Sunder v. Ram Kumar [(2001) 8 SCC 24 (para 44)]; Brij Mohan Laxman Das v. CIT[(1997) 1 SCC 352 at 354], CIT v. Podar Cement [(1997) 5 SCC 482 at 506]. But if it changes the law it is not presumed to be retrospective irrespective of the fact that the phrase used are 'it is declared' or 'for the removal of doubts'.

18. There was and is no ambiguity in the main provision of Section 9(1)(ii). It includes salaries in the total income of an assessee if the assessee has earned it in India. The word "earned" had been judicially defined in S.G. Pgnatale (supra) by the High Court of Gujarat, in our view, correctly, to mean as income "arising or accruing in India". The amendment to the section by way of an Explanation in 1983 effected a change in the scope of that judicial definition so as to include with effect from 1979, "income payable for service rendered in India".

19. When the Explanation seeks to give an artificial meaning 'earned in India' and bring about a change effectively in the existing law and in addition is stated to come into force with effect from a future date, there is no principle of interpretation which would justify reading the Explanation as operating retrospectively."

11. As this Court views the Explanation inserted at the end of Article 23, it is evident that it seeks to introduce a substantive provision in the law bringing a certain genre of agreements to sell within the ambit of the expression conveyance. It, in essence, introduces and creates new obligations and liabilities which were otherwise not contemplated by Article 23. Regards must also be had to the fact that the Act while defining the word conveyance did not include agreements to sell nor can the language employed in Section 2 (10) be understood as envisioning an agreement to sell.

12. On a more fundamental plane, the Court finds that the Explanation itself while bringing agreements to sell within the ambit of Article 23, uses the expression- *"shall be deemed to be a conveyance....."*. It is thus manifest that agreements to sell are brought within the scope of Article 23 by virtue of a legal fiction that is introduced. This additionally convinces the Court that the Explanation is neither clarificatory nor declaratory and in any case cannot be viewed as being a mere exposition of the statutory position that existed. For these reasons also, the Court finds itself unable to sustain the impugned orders.

13. The writ petition is consequently **allowed**. The impugned orders dated 30 April 2001, passed by the respondent No. 3 and 31 March 2003, passed by the respondent No. 2 are hereby quashed. All moneys deposited or recovered from the petitioner pursuant to the impugned order shall consequently be refunded forthwith.

(2019)12 ILR A1198

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.11.2019

BEFORE
THE HON'BLE ANJANI KUMAR MISHRA, J.

Writ-C No. 27953 of 2018
connected with Writ-C cases 27278 of 2019 & 31241 of 2019

Baba Sukkhu Maa Prabhudevi Inter College & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Bhola Nath Yadav, Sri Abhishek Kumar Yadav

Counsel for the Respondents:
C.S.C., Sri Manoj Kumar Yadav, Sri Ravindra Nath Yadav

A. Civil Law - U.P. Revenue Code, 2006 – Section 67 – Gao Sabha Property – Eviction – Resolution of the Gaon Sabha – Gaon Sabha cannot gift any land to anyone. It can, at best, grant a lease of agricultural land – Such lease is to be in accordance with the provisions contained in Section 198 of the U.P. Zamindari Abolition and Land Reforms Act, after following the order of preference prescribed for grant of such lease – Moreover, such resolution requires approval of the Sub Divisional Officer – In absence of approval the resolution, for all practical purposes, it is a piece of waste paper. (Para 21)

B. Civil Law - U.P. Revenue Code, 2006 – Section 101 – Proviso to Section 101(2) – Exchange of the Gao Sabha land with *bhumidhari* land – Requirement of reference by the Sub Divisional Officer to State Govt. – No reference – Application of exchange has been rejected, against which revision is pending – Held, pendency of revision against an order rejecting application for exchange is no ground for interference because no rights can accrue in favour of any person over land which is land of public utility. (Para 26 & 27)

C. Civil Law - U.P. Revenue Rules, 2016 – Rule 102 – Exchange of land of public utility – Effect of absence of necessary rules – Since the Rules do not provide the manner in which the State Government is required to deal with an application for exchange referred to it by the Sub Divisional Officer, the power conferred by the proviso to Section 101(2) cannot be exercised – Direction issued to State Govt. to desist from exercising the power conferred by the proviso to Section 101(2) till such time the U.P. Revenue Code Rules, 2016 are suitably modified/amended, prescribing the conditions and procedure for exercise of power conferred by proviso to Section 101(2). (Para 28, 37 & 39)

Writ Petition dismissed. (E-1)

List of cases cited: -

1. Writ Petition No.26070 of 2019 Amar Nath Singh Vs St. of U.P. & others decided on 20.08.2019

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

1. Heard learned counsel for the parties.

2. Writ petition No.27953 of 2018 arises out of proceedings under Section 67 of the U.P. Revenue Code, 2006 and seeks a writ of certiorari for quashing the order

dated 06.07.2018 passed by the Tehsildar ordering eviction of the petitioner and the order dated 04.07.2018 passed by the Collector, Jaunpur affirming the order of the Tehsildar.

3. The case of the petitioner is that on 16.08.1996, a resolution was passed by the Gaon Sabha/ Land Management Committee that plot no.233 area 3.95 and plot no. 232 area 0.40 of village Golhapur, Pargana Anguli, Tehsil Shahganj, District Jaunpur be allotted to the petitioner for establishing a School.

4. Plot no.233 in the resolution is stated to be recorded as pasture land while the plot no.232 is stated to be reserved for plantation of trees but Educational work is being carried out over it.

5. It is stated that on the basis of the aforesaid resolution, on a time barred objection under Section 9, the Consolidation Officer reserved the plots in the name of the petitioner institution. It is stated that thereafter, the School was constructed thereon and as on date about 600 students are being imparted education.

6. An application for recall of the order was passed by the Consolidation Officer filed by the intervener in this writ petition, represented by Shri R.N. Yadav, was allowed and the order passed by the Consolidation Officer was recalled.

7. Against this order, the petitioner filed a recall application, which was rejected.

8. Thereafter, the petitioner filed two revisions; one against the order allowing the restoration application of the intervener and the other against the order rejecting his application for recall of the said order. Both these revisions are stated to be pending .

9. It appears that on 17.01.2018, a notice under Section 67 of the U.P. Revenue Code, 2006 in RC Form 20 was issued to the petitioner.

10. In these proceedings, the Tehsildar vide order dated 16.04.2018, ordered eviction of the petitioners. The consequential appeal has been dismissed, vide order dated 04.07.2018, which orders are impugned in this writ petition.

11. The contention of counsel for the petitioner is that the land had been allotted/ gifted to the institution by the resolution of the Gaon Sabha and consequent thereto an order was passed in favour of the petitioner by the Consolidation Officer.

12. In pursuance of the aforementioned, the School has been established and is running. The order recalling the order passed by the Consolidation Officer, is impugned in a revision, which is pending consideration and therefore, the matter of allotment is yet to attain finality.

13. It is next contended that a large amount of money has been spent in establishing the institution. Therefore, the impugned orders, if allowed to stand shall occasion failure of justice.

14. It is lastly contended that the petitioner has filed an application under Section 101 of the U.P. Revenue Code, 2006 for exchange of the land over which, the petitioner institution is situated with bhumidhari land of the petitioner no.2.

This application as also pending consideration.

15. In view of the submissions, a prayer for allowing the writ petition has been made.

16. Shri R.N. Yadav, counsel appearing for the intervener has submitted that the petitioner has encroached upon land of public utility, namely, pasture land as also the land, which was reserved for plantation of trees. The Gaon Sabha has no jurisdiction or power to pass a resolution for allotting land to a private institution or of gifting it to a private institution. Any allotment on the resolution of the Gaon Sabha, requires the approval of the Sub Divisional Officer, which has never been granted. Therefore, there is no gift or lease of the land in issue in favour of the petitioner.

17. It is next contended that although the case of the petitioner is that an application for exchange is pending consideration, however, no exchange is possible because only a bhumidhar can exchange his land. The petitioner no.2 is possessed of only 0.102 hectare of land, which, in any case, is recorded in the name of her husband.

18. It is also stated that the resolution of the Gaon Sabha in any case were absolutely illegal because, the petitioner no.2 as also her husband Sher Bahadur Yadav were at various point of time, Pradhan of the village. The resolution is wholly collusive and fraudulent at the instance of the erstwhile and present Pradhans.

19. Counsel for the petitioner has placed reliance upon the decision of the Division Bench of this Court in Committee of Management, Durga Narain College and Adity Kumari School and others Vs. State of U.P. and others, 2018(140) RD 510 in support of his case.

20. I have considered the submission made by counsel for the parties and perused the record.

21. In so far as the resolution of the Gaon Sabha dated 16.08.1996 is concerned, the same cannot confer any right upon the petitioner institution. This is so because the Gaon Sabha cannot gift any land to anyone. The Goan Sabha, at best can grant a lease of agricultural land. However, such lease is to be in accordance with the provisions contained in Section 198 of the U.P.Zamindari Abolition and Land Reforms Act, after following the order of preference prescribed for grant of such lease. A resolution for an allotment of the Land Management Committee necessarily requires approval of the Sub Divisional Officer. Admittedly, in the case at hand, despite a resolution having been passed in favour of the petitioners, there is no approval of the Sub Divisional Officer. The resolution therefore, for all practical purposes, is waste paper.

22. For the same reason, the order of the Consolidation Officer in favour of the petitioner dated 23.10.1996, relying upon the aforesaid resolution, is patently illegal and wholly without jurisdiction. Therefore, this order has rightly been set aside on a restoration application filed by the intervener.

23. Although, the petitioner has challenged the order allowing the recall application by means of a revision, which

is stated to be pending, yet this Court, in the facts and circumstances of this case is not inclined to interfere in the orders impugned on this ground, alone. The revision in my considered opinion, necessarily has to fail for the reasons already given herein-above.

24. The very fact that the proceedings under Section 67 of the U.P. Revenue Code, 2006 were initiated against the petitioner shows that the land, despite the order passed by the Consolidation Officer on 23.10.1996, continues to be recorded in the name of the Gaon Sabha. The petitioners therefore, are wholly unauthorized occupants.

25. This situation is further compounded by the fact that the land over which, the institution is running is public utility land, governed by the provisions of Section 132 of the U.P. Zamindari Abolition and Land Reforms Act and/ or the parallel provisions contained in Section 77 of the U.P. Revenue Code, 2006.

26. In so far as the application for exchange under Section 101 of the U.P. Revenue Code, 2006 filed by the petitioner is concerned, the same has been dismissed vide order dated 23.05.2018 passed by the Sub Divisional Officer. Although, it is stated that a revision against this order is pending consideration before the Commissioner, Varanasi Division, Varanasi, this Court does not consider it appropriate to interfere with the impugned orders on the plea aforesaid because no rights can accrue in favour of any person over land which is land of public utility as is the situation in the case at hand. The embargo in this regard under the U.P. Zamindari Abolition and Land Reforms Act was absolutely categorical. However, this embargo has been watered down to an extent by the proviso to Section 101(2) of the U.P. Revenue Code, 2006.

27. In view of the proviso, the State Government can permit exchange also of land of public utility, but on the matter being referred to it by the Sub Divisional Officer. No reference has been made by the Sub Divisional Officer. The Sub Divisional Officer has, in fact, rejected the application for exchange. Therefore, the proviso aforementioned does not come into play in the case at hand.

28. Even otherwise, this Court has in earlier decision in Writ Petition No.26070 of 2019 Amar Nath Singh Vs. State of U.P. & others decided on 20.08.2019 held that the proviso stipulates that the State Government may permit exchange of land of public utility on conditions and in the manner prescribed. However, the rules framed thereunder are absolutely silent with regard to the manner in which, the power is to be exercised by the State Government. The power provided to the State Government by the proviso aforesaid can be exercised only after relevant provisions have been incorporated in the rules and or the existing rules are suitably amended/ modified.

29. In view of the foregoing discussion, the impugned orders call for no interference. The writ petition is without merit and the petitioners claim found to be based on fraud.

30. For the same reason, no benefit can be granted to the petitioners decision of the Apex Court in *Jagpal Singh &*

others Vs. State of Punjab & others, 2011(11) SC 396.

31. The writ petition No.27953 of 2018 is accordingly liable to be dismissed.

32. The connected writ petition no.27278 of 2019 has been filed for implementation of the orders impugned in Writ Petition No.27953 of 2018 above has been held liable to be dismissed. The respondents are therefore, liable to be directed to execute the orders, which stand affirmed upon dismissal of the writ petition No.27953 of 2018, expeditiously.

33. Writ Petition No. 31241 of 2019 arises out of an application for exchange filed by the respondent no. 5 who is petitioner no. 2 in Writ Petition No. 27953 of 2018.

34. This petition has been filed seeking the following relief:-

"(I) Issue a writ order or direction in the nature of mandamus commanding and directing the respondents/authorities specially respondent no. 1 not to undertake any proceedings to exchange the pasture land to the extent of area 0.821 Hectare from the Land Gata No. 326 total area 1.598 Hectare with the private owner of a school i.e. Baba Sukkhu Maa Prabu Devi Inter College Golagaur, Jaunpur in pursuance of recommendations dated 28.8.2018 and 8.3.2019 passed by one R.B. Singh, Joint Secretary U.P. Shashan as eviction order dated 16.4.2018 has been passed and the same has been affirmed by appellate order dated 4.7.2018 and exchange proceedings has been rejected vide order dated 23.05.2018."

35. This is so because an application for exchange filed by the respondent no. 5 was rejected by the Sub Divisional Officer and against that a revision is stated to be pending. The respondent no. 5 is the present Pradhan of the village. The order dated 23.05.2018 rejecting the application for exchange has been challenged before the Commissioner, Varanasi Division, Varanasi.

36. The contention of counsel for the petitioner is that wrongly and illegally, the State Government at the behest of the respondents is trying to interfere in the proceedings. The Joint Secretary, State of U.P. has written a letter dated 03.03.2019 addressed to the Commissioner and Secretary Board of Revenue calling for a report with regard to proceedings under Section 101 for exchange. It is sought to be contended that this report has been called for to enable the Government to exercise the powers conferred by sub-rule 4 of Rule 102. Proviso to Section 101 empowers the State Government to permit exchange of land, which is land of public utility having been entrusted to the Gram Panchayat or a local authority under Section 59 of the U.P. Revenue Code, 2006 or is reserved for planned use or is land wherein bhumidhari rights cannot accrue, on the conditions and in the manner prescribed. Prescription necessarily has to be under the Rules. The relevant rule in this regard is Rule 102 of the U.P. Revenue Code Rules, 2016.

37. The said provision as also the corresponding Rules 102 has been considered in the judgement dated 20.08.2019 passed in Writ C No. 26070 of 2019 (Amar Nath Singh Vs. State of U.P. and 6 others). It has been held therein that the procedure for dealing with a reference made to the State Government by the Sub

Divisional Officer in proceedings under Section 101 of the U.P. Revenue Code, 2006 has not been provided under the Rules. It has been observed as follows:-

"Moreover, since the rules namely the U.P. Revenue Code Rules 2016 do not provide the manner in which the State Government is required to deal with an application for exchange referred to it by the Sub Divisional Officer, the power conferred by the proviso to Section 101(2) cannot be exercised."

38. Further in the operative portion of the judgement, the following direction has been issued:-

"Learned Standing Counsel is directed to ensure that a copy of this order is forwarded to the competent authorities in the State Government, advising them to desist from exercising the power conferred by the proviso to Section 101 (2) of the U.P. Revenue Code, 2006 till such time the U.P. Revenue Code Rules, 2016 are suitably modified/amended, prescribing the conditions and procedure for exercise of the said power."

39. Under the circumstances, Writ Petition No. 31241 of 2019 is disposed of in the terms of the directions issued in Writ C No. 26070 of 2019, wherein the State Government has been directed to desist from exercising the power conferred by the proviso to Section 101(2) of the U.P. Revenue Code, 2006, till such time, the U.P. Revenue Code Rules, 2016 are suitably modified/amended, prescribing the conditions and procedure for exercise of power conferred by proviso to Section 101(2).

40. Writ Petition No.27953 of 2018 is dismissed while Writ Petition no.27278 of 2019, stands disposed of directing the respondents to execute the orders which stand affirmed due to dismissal of Writ Petition No.27953 of 2018 within four weeks of a certified copy of this order being filed before them.

(2019)12 ILR A1203

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.09.2019

BEFORE
THE HON'BLE SIDDHARTHA VARMA, J.

Writ-C No. 28035 of 2019

Sompal ...Petitioner

Versus

Sub-Divisional Magistrate Tehsi Rampur Maniharan, District Saharanpur ...Respondents

Counsel for the Petitioner:
Sri Suresh Chandra Pandey

Counsel for the Respondents:
C.S.C., Sri Rajesh Yadav, Sri Ram Babu Tiwari

A. Civil Law - Essential Commodities Act, 1955 - Fair price shop - Cancellation of licence by Sub-Divisional Officer – the charges which the petitioner had to reply to should have been very clear and should have been enumerated seriatim - when a delinquent fair price shop dealer is given a statement of charge then the charges should be very clear - after the enquiry what punishment would follow also should be clearly given out in the show cause notice. (Para 4)

A definite enquiry ought to have been undergone whereby a place, date and time ought to have been fixed for the enquiry - If the petitioner had failed to appear - the enquiry officer should have questioned the complainants - looked into the evidence -

should have come to a definite conclusion as to whether the petitioner was guilty of the charges. (Para 4)

Held: - It was improper for the Enquiry Officer to have simply stated that since the delinquent had not submitted his reply it had to be presumed that he had accepted his guilt. (Para 4)

Writ Petition allowed. (E-7)

List of cases cited: -

1. Aajad Kumar vs. State of U.P. and 2 Others, 2018(126) ALR 721

2. Puran Singh vs. State of U.P. and others, (2010 (3) ADJ 659 (FB)

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

1. The petitioner's fair price shop was suspended on 12.05.2011. Thereafter, the suspension order was recalled on 10.06.2011. Again when the petitioner's fair price shop was suspended on 24.06.2011 and cancelled, thereafter, on 04.07.2011, the petitioner filed a writ petition being a writ petition No. 35438 of 2011. Initially an interim order was granted on 07.07.2011, which was subsequently vacated on 29.01.2014 and the petitioner was relegated for availing the remedy of Appeal. When the petitioner's Appeal was dismissed, he filed a writ petition being writ petition No. 62538 of 2014. This writ petition was allowed on 27.02.2019 and the Court after quashing the orders dated 04.07.2011 and 24.09.2014 restored the petitioner's shop. Thereafter, it appears in pursuance of the High Court's order on 30.03.2019 the petitioner was given back his shop. On 15.06.2019, a show cause notice was again issued to the petitioner stating that on 13.06.2019 a team which had been constituted as per the order dated 27.02.2019 had held a meeting in which the Gram Pradhan, the complainant Shri Pal himself had met along with other villagers and in the open meeting as many as 96 complaints were found and were brought on record. The petitioner, thereafter, was required to give his explanation to the show cause notice dated 15.06.2019. When, however, on 18.07.2019 the Sub-Divisional Officer, Rampur Maniharan, District- Saharanpur cancelled the licence of the petitioner, the instant writ petition was filed. The petitioner in effect made the following three submissions:-

i) Show cause notice if is perused shows that 96 complaints were made against the petitioner. What exactly were the complaints was not enumerated in the show cause notice given to the petitioner. Learned counsel for the petitioner states that as per the Govt. Order dated 29.07.2004 when the show cause notice was issued the punishment also which would have followed the enquiry should have been given out. Since this show cause notice was extremely vague and it only enumerated the complaints without any details the show cause notice was not a show cause notice in the eyes of law.

ii) Learned counsel for the petitioner submits that if the order dated 18.07.2019 is perused it becomes clear that when the petitioner was the given show cause notice a reply was expected from him. Various opportunities were given to the petitioner on 17.06.2019, 01.07.2019 and on 05.07.2019 and when the petitioner did not submit any reply it was presumed that he had accepted the charges and the licence was cancelled. Learned counsel relying upon a judgement reported in 2018(126) ALR

721 : (Aajad Kumar vs. State of U.P. and 2 Others), submitted that if the Enquiry Officer desired to punish the petitioner, he should have conducted a full fledged enquiry on his own. He should have called the complainants and should have got the complaints enquired into. Only after being satisfied that the complaints were correct he should have passed the order of punishment. Learned counsel for the petitioner submits that simply because the petitioner had not filed his reply it could not be concluded that he was guilty.

iii) Learned counsel for the petitioner further submits that though in the order it has been stated that no reply was filed, he had infact made an effort on 06.07.2019 to submit the reply. This he states in the Supplementary Affidavit, which he has filed today.

2. Learned Standing Counsel, however, in reply submits that when the petitioner was not submitting any reply then there was no other option left with the respondent/State to conclude that the petitioner had accepted his guilty. Learned Standing counsel further submits that a show cause notice did not require an enumeration of charges. The petitioner when was informed of his mistakes, he should have gleaned out the charges from the statement of facts which were supplied to him. There was no requirement to give a definite statement of charge.

3. Learned counsel appearing for the subsequent allotee, the Caveator adopted the arguments of the learned Standing counsel.

4. Having heard the learned counsel for the petitioner, learned Standing Counsel and the Counsel for the Caveator this Court is of the definite view, that the charges which the petitioner had to reply to should have been very clear and should have been enumerated seriatim. This is also what has been held in a judgement and order of this Court dated 19.09.2019 (Manoj Kumar Yadav vs. State of U.P. and 4 others). Even if the Govt. Order dated 29.07.2004 is perused along with the Full Bench decision of ***Puran Singh vs. State of U.P. and others reported in (2010 (3) ADJ 659 (FB)***, it becomes clear that when a delinquent fair price shop dealer is given a statement of charge then the charges should be very clear. Also, after the enquiry what punishment would follow also should be clearly given out in the show cause notice. Further the Court is of the view that as per the Govt. Order dated 29.07.2004 and 16.10.2014 and as per the law as has been laid down in ***2018(126) ALR 721 : (Aajad Kumar vs. State of U.P. and 2 Others)*** a definite enquiry ought to have been undergone whereby a place, date and time ought to have been fixed for the enquiry. If the petitioner had failed to appear then the enquiry officer should have questioned the complainants, looked into the evidence and, thereafter, should have come to a definite conclusion as to whether the petitioner was guilty of the charges. It was improper for the Enquiry Officer to have simply stated that since the delinquent had not submitted his reply it had to be presumed that he had accepted his guilt.

5. With these observations, the order dated 18.07.2019 is quashed and the writ petition is **allowed.**

(2019)12 ILR A1205
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.11.2019

BEFORE
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Writ-C No. 29840 of 2019

Shri 1008 Parshvanath Digamber Jain Mandir Samiti, District-Ghaziabad & Anr. ...Petitioners

Versus

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

Counsel for the Petitioners:
Sri Lakshmi Kant Trigunait, Sri Dev Kant Trigunait

Counsel for the Respondents:
C.S.C.

A. Civil Law - Society Registration Act, 1860 – Section 3 (1) and (2) – Registration of the society – Claim by rival group – Sub section (2) of Section 3 begins with a *non obstante* clause – Provision contained under subsection (1) of Section 3 would stand qualified by insertion of the proviso – Right to get certification of the registration of the Society under subsection (1) of Section 3 is not absolute and the same is subject to the powers of the Registrar to issue public notice or notices to other persons inviting objections against the proposed registration and considering all objections, which may be received by him before registration of society – Registrar is to refuse to register a society in a case where after giving an opportunity of showing cause he records his satisfaction regarding existence of the conditions specified under subsection (2). (Para 12, 17 & 38)

B. Interpretation of statute – Construction of Proviso – As a general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment, and ordinarily, a proviso is not interpreted as stating a general rule. (Para 21)

Held **-** The insertion of the proviso to subsection (1) of Section 3 clearly indicates that the intention of the legislature was to qualify the right conferred in terms of subsection (1) for grant of a certificate of registration upon submission of memorandum of association and certified copy along with other necessary particulars and requisite fee by conferring upon the Registrar a discretion to issue public notice or issue notices to such persons as he thinks fit inviting objections, if any, against the proposed registration and to consider all such objections.

C. Interpretation of statute – Internal aid of construction – Nature and object of *non obstante* clause – Beginning with expression 'Notwithstanding' – A *non obstante* clause, as used in subsection (2) of Section (3), has been construed as a legislative device to modify the ambit of the provision or law mentioned in the *non obstante* clause or to override it in specified circumstances – It is generally appended to a section with a view to give the enacting part of the section, in case of conflict, an overriding effect over the provision in the same or other Act mentioned in the *non obstante* clause. (Para 32 & 36)

Writ Petition dismissed. (E-1)

List of cases cited: -

1. Pamulapati Buchi Naidu College Committee, Nidubrolu and others Vs. Government of Andhra Pradesh and others AIR 1958 A.P. 773

2. Ishverlal Thakorelal Almaula Vs. Motibhai Nagjibhai AIR 1966 SC 459

3. Shah Bhojraj Kuverji Oil Mills & Ginning Factory Vs. Subbash Chandra Yograj Sinha AIR 1961 SC 1596

4. S. Sundaram Pillai & Ors. Vs. V.R. Pattabiraman & Ors. (1985) 1 SCC 591

5. State of Rajasthan Vs. Leela Jain AIR 1965 SC 1296

6. S.T.O. Vs. Hanuman Prasad AIR 1967 SC 565

7. C.C.T. Vs. Jhaver Ramkishan Shrikishan AIR 1968 SC 59

8. Delhi Metro Rail Corporation Ltd. Vs. Tarun Pal Singh & Ors. (2018) 14 SCC 161

9. Haryana State Cooperative Land Development Bank Ltd. Vs. Haryana State Cooperative Land Development Banks Employees Union & Anr. (2004) 1 SCC 57412

10. Madras and Southern Mahratta Railway Company Ltd. Vs. Bezwada Municipality AIR 1944 PC 71

11. Union of India and another Vs. G.M.Kokil and others 1984 Supp. SCC 196

12. Chandavarkar Sita Ratna Rao Vs. Ashalata S. Guram (1986) 4 SCC 447

13. State of Bihar and others Vs. Bihar Rajya M.S.E.S.K.K. Mahasangh and others (2005) 9 SCC 129

14. Muzaffar Hussain and others Vs. Assistant Registrar, Firms, Societies and Chits, U.P., Meerut Region Meerut and others 1987 ALJ 728

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

1. Heard Sri Lakshmi Kant Trigunait, learned counsel for the petitioners and Sri Mata Prasad, learned Standing Counsel appearing for the State respondents.

2. The present petition seeks to challenge the order dated 11.07.2019 passed by the Deputy Registrar, Firms Societies and Chits Meerut Region, Meerut in terms of which, the application filed by the petitioners for registering it as a society under the provisions of the Societies Registration Act, 18601 has been rejected. Further, prayer has been made for issuance of direction to the respondents for consideration of the claim of the petitioners pertaining to registration of the Society.

3. The facts of the case as reflected from the pleadings of the writ petition indicate that an application bearing application No.10001114 dated 07.05.2018 was submitted before the respondent No.4 seeking registration of the petitioner No.1 as a society under the Act, 1860. It has also been stated that the other procedural formalities such as submission of the copy of the memorandum of association and the list of the managing body of the society had been completed and requisite fee was also deposited. It is stated that a public notice was issued by the respondent No.4 inviting objections with regard to the application filed by the petitioners for registration of the Society and thereafter the order dated 11.07.2019 has been passed rejecting the claim of the petitioners for grant of registration under the Act 1860 for the reason that there existed a dispute with regard to the management of the Society.

4. Aggrieved by the aforesaid order, the present writ petition has been filed.

5. The contention of the learned counsel for the petitioners is that the application for registering the Society having been duly submitted after completion of all the necessary procedural requirements including the submission of memorandum of association, the list of members of the managing Committee and also deposition of the requisite fee, the respondent No.4 could not have refused to register the society. It is submitted that there existed no dispute pertaining to the Society and that the dispute which was sought to be raised by one person, namely, Harish Kumar Jain has nothing to do with the affairs of the Society. It is also sought to be contended that the petitioners having filed the application seeking registration on 07.05.2018 which is prior in time to the application dated

19.09.2018 submitted by the rival contenders the claim of the petitioners for registration of the society ought to have been considered.

6. Per contra, learned Standing Counsel appearing for the State-respondents has supported the order passed by the Deputy Registrar by submitting that as there existed a dispute with regard to the Society in question the Deputy Registrar has rightly rejected the application filed by the petitioners for grant of registration of the Society under the Act, 1860 .

7. In order to appreciate the rival contentions, the relevant provisions with regard to registration of a society under the Act, 1860 may be referred to. For ease of reference Sections 2 and 3 of the Act, 1860 are being extracted below:

"2. Memorandum of association:- The memorandum of association shall contain the following things (that is to say)--

the name of the society;

the object of the society;

the names, addresses and occupations of the governors, council, directors, committee, or other governing body to whom, by the rules of the society, the management of its affairs is entrusted.

A copy of the rules and regulations of the society, certified to be a correct copy by not less than three of the members of the governing body, shall be filed with the memorandum of association.

3. Registration and fees:- (1) Upon such memorandum and certified copy being filed along with particulars of the address of the Society's office which shall be its registered address, by the Secretary of the Society on behalf of the persons subscribing to the memorandum, the Registrar shall certify under his hand that the society is registered under this Act. There shall be paid to the Registrar for every such registration a fee of [one thousand rupees] [or such smaller fee as the State Government may notify in respect of any class of societies]:

[Provided that the State Government may, by notification in the official Gazette, increase from time to time the fee payable under this sub-section:

Provided further that the Registrar may, in his discretion, issue public notice or issue notices to such persons as he thinks fit inviting objections, if any, against the proposed registration and consider all objections that may be received by him before registering the society]

(2) Notwithstanding anything in sub-section (1) the Registrar shall refuse to register a society, if after giving it an opportunity of showing cause against such refusal, he is satisfied that-

(a) the name of the society is identical with that of any other society previously registered under this Act;

(b) the name of society sought to be registered uses any of the words, namely, 'Union', 'State', 'Land Mortgage', 'Land Development', ' Co-operative', 'Gandhi', 'Reserve Bank' or any words expressing or implying the sanction, approval or patronage of the Central or any State Government or any word which suggests or is calculated to suggest any connection with any local authority or any corporation or body constituted by or under any law for the time being in force, or is such as is otherwise likely to deceive

the public or the members of any other society previously registered under this Act;

(c) any one or more of the objects of the society sought to be registered is not an object mentioned in Sections 1 and 20; or

(d) its objects are contrary to any other law for the time being in force;

[Provided that the State Government may in exceptional circumstances, for reasons to be recorded permit any society to use the word' Union' or the word 'Gandhi' in its name, and thereupon, the use of that word in the name of the society shall not be a ground for refusal to register or to renew the certificate of registration of such society]"

8. A plain reading of the aforementioned statutory provisions as contained under Section 3 substituted in terms of U.P. Act No.52 of 1975, and also the provisions contained under Section 2 indicate that upon the memorandum of association containing the name of the Society and its objects being filed by the Secretary along with particulars of the address of the Society's office which shall be its registered address, by the Secretary of the Society on behalf of the persons subscribing to the memorandum, the Registrar shall certify under his hand that the society is registered under the Act and there shall be paid to the Registrar for every such registration a fee as the State Government may notify in respect of any class of societies.

9. The second proviso to sub-section (1) of Section 3 of the Act 1860 gives the Registrar a discretion to issue public notice or issue notices to such persons as he thinks fit inviting objections, if any, against the proposed registration and consider all objections that may be received by him before registering the Society.

10. Sub-section (2) of Section 3 mandates that the Registrar shall refuse to register a society, if after giving it an opportunity of showing cause against such refusal, he is satisfied that:

(a) the name of the society is identical with that of any other society previously registered under this Act;

(b) the name of society sought to be registered uses any of the words, namely, 'Union', 'State', 'Land Mortgage', 'Land Development', 'Co-operative', 'Gandhi', 'Reserve Bank' or any words expressing or implying the sanction, approval or patronage of the Central or any State Government or any word which suggests or is calculated to suggest any connection with any local authority or any corporation or body constituted by or under any law for the time being in force, or is such as is otherwise likely to deceive the public or the members of any other society previously registered under this Act;

(c) any one or more of the objects of the society sought to be registered is not an object mentioned in Sections 1 and 20; or

(d) its objects are contrary to any other law for the time being in force.

11. It is thus seen that the provision under sub-section (1) of Section 3 which enjoins that the Registrar shall certify under his hand that the society is registered under the Act upon the memorandum of association and certified copy being filed along with other necessary particulars and requisite fee is qualified by the second proviso in terms of which the Registrar may in his

discretion issue public notice or issue notices to such persons as he thinks fit inviting objections, if any, against the proposed registration and consider all objections that may be received by him before registering the society.

12. Further, sub section (2) of Section 3 begins with a non-obstante clause and is stated in a compulsive language which mandates that the Registrar shall refuse to register the society if after giving it an opportunity of showing cause against such refusal he is satisfied regarding existence of the contingencies provided thereunder.

13. The Societies Registration Act 1860, which is an act for the registration of the literary, scientific and charitable societies, was enacted for improving the legal condition of societies established for the promotion of literature, science, or the fine arts or for the diffusion of useful knowledge, or for charitable purposes. The Act lays down the procedure for registration of the societies for various purposes stated in the Act.

14. The effect of registration of a society under the Act, 1860 is to grant it the status of a legal entity apart from the members constituting it. The legal effect of registration of society under the Act 1860 came up for consideration in the case of **Pamulapati Buchi Naidu College Committee, Nidubrolu and others Vs. Government of Andhra Pradesh and others**2 wherein it was stated as follows.

"11. Now, what is the legal effect of the registration of a Society? The Societies Registration Act was enacted for the registration of literary and scientific societies and the object of the Act, as stated in the preamble, is to make provision for improving the legal condition of societies established for the promotion, of literature, science, or the fine arts or for the diffusion of useful knowledge, the diffusion of political education, or for charitable purposes.

Under the provisions of the Act any seven or more persons associated for any literary, scientific, or charitable purpose, or for any such purpose as is described in S. 20 may, by subscribing their names to a memorandum of association and filing the same with the Registrar of Joint Stock Companies, form themselves into a society. The memorandum of association is to contain the name of the society, the objects of the society, the names, addresses and occupations of the governors, council, directors, committee, or other governing body to whom, by the rules of the society, the management of its affairs is entrusted.

The property, movable and immovable, belonging to a society may be vested in trustees, and if not so vested, is deemed to be vested for the time being in the governing body of such society, and in all proceedings, civil and criminal, may be described as the property of the governing body of such society by their proper title. Under S. 16 of the Act, the governing body of the society shall be the governors, council, directors, committee, trustees, or other body to whom by the rules and regulations of the society the management of its affairs is entrusted.

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19. The basic assumption made by the learned counsel for the petitioner that the registration of society can be equated to the granting of a Royal Charter, does not rest on a solid foundation. A society registered under the

Societies Registration Act is an association of individuals which comes into existence with certain aims and objects.

If it is not registered as a society under the Act it would have the character of an association which cannot sue or be sued except in the name of all the members of the association. The registration of the Society confers on it certain advantages. The members as well as the Governing Body the Society are not always the same. Even though the members of the Society or the Governing Body fluctuate from time to time, the identity of the society is sought to be made continuous by reason of the provisions of the Societies Registration Act.

The Society continues to exist and to function as such until its dissolution under the provisions of the Act. The properties of the society continue to be vested in the trustees or in the Governing Body irrespective of the fact that the members of the society for the time being are not the same as they were before; nor will be the same thereafter.

By reason of the provisions of the Societies Registration Act, once the society is registered the Registrar, by the filing of the memorandum and certified copy of the rules and regulations and the Registrar has certified that the society is registered under the Act, it enjoys the status of a legal entity apart from the members constituting the same and is capable of suing or being sued. But the fact to be noted is that what differentiates a society registered under the Act of 1860 a company incorporated under the Companies Act is that in the latter case the share-holders of company hold the properties of the company as their own whereas in the case of a society registered under the Act of 1860, the members of the society or the members of the governing body do not have any proprietary or beneficial interest; in the property the society holds.

Having regard to the fact that the members of the general body or the members of the governing body of the society do not have any proprietary or beneficial interest in the property of the society, it follows that upon its dissolution, they cannot claim any interest in the property of the dissolved society. The Societies Registration Act, therefore, does not create in the members of the registered society any interest other than that of bare trustees. What all the members are entitled to, is the right of management of the properties of the society subject to certain conditions…"

15. It would be relevant to take note of fact that Section 3 of the Act, 1860 which relates to registration of societies stood amended and substituted in the State of U.P. in terms of the Societies Registration (Uttar Pradesh Amendment) Act, 1975 (U.P. Act No. 52 of 1975).

16. As has been noticed in the earlier part of the judgment, the provision under sub-section (1) of Section 3 which enjoins the Registrar to certify under his hand that the society is registered under the Act upon the memorandum of association and certified copy being filed along with other necessary particulars and requisite fee is qualified by the second proviso in terms of which the Registrar may in his discretion issue public notice or issue notices to such persons as he thinks fit inviting objections, if any, against the proposed registration and consider all objections that may be

received by him before registering the society.

17. In order to appreciate the extent to which the provision contained under sub-section (1) of Section 3 would stand qualified by insertion of the proviso in terms of the amendment made by U.P. Act No. 52 of 1975, it would be apposite to refer to the manner in which a proviso is to be construed.

18. In **Craies on Statute of Law**3, referring to the rules regarding construction of a proviso, it has been observed as follows:-

"9.1. The effect of an excepting or qualifying proviso, according to the ordinary rules of construction, is to except out of the preceding portion of the enactment, or to qualify something enacted therein, which but for the proviso would be within it; and such a proviso cannot be construed as enlarging the scope of an enactment when it can be fairly and properly construed without attributing to it that effect."

19. Again, as has been pointed out by Craies in the treatise on Statute Law;

"The effect of an excepting or qualifying proviso, according to the ordinary rules of construction, is to except out the preceding portion of the enactment, or to qualify something enacted therein, which but for the proviso would be within it."

20. In **Ishverlal Thakorelal Almaula Vs. Motibhai Nagjibhai**4, the intendment of the proviso has been discussed thus:-

"8. The proper function of a proviso is to except or qualify something enacted in the substantive clause, which but for the proviso would be within that clause. It may ordinarily be presumed in construing a proviso that it was intended that the enacting part of the section would have included the subject-matter of the proviso. But the question is one of interpretation of the proviso and there is no rule that the proviso must always be restricted to the ambit of the main enactment. Occasionally in a statute, a proviso is unrelated to the subject-matter of the preceding section, or contains matters extraneous to that section, and it may have then to be interpreted as a substantive provision, dealing independently with the matter specified therein, and not as qualifying the main or the preceding section."

21. In **Shah Bhojraj Kuverji Oil Mills & Ginning Factory Vs. Subbash Chandra Yograj Sinha**5, the object of the proviso and how it is to be interpreted has been stated in the following manner:-

"9. The law with regard to provisos is well settled and well understood. As a general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment, and ordinarily, a proviso is not interpreted as stating a general rule…"

22. Again, in **S. Sundaram Pillai & Ors. Vs. V.R. Pattabiraman & Ors.**6, various decisions with regard to the manner of construction of a proviso have been discussed and it has been stated as follows:-

"29. Odgers in Construction of Deeds and Statutes (5th Edn.) while referring to the scope of a proviso mentioned the following ingredients:

'p. 317. Provisos--These are clauses of exception or qualification in an Act, excepting something out of, or qualifying something in, the enactment which, but for the proviso, would be within it.

p. 318. Though framed as a proviso, such a clause may exceptionally have the effect of a substantive enactment.'

30. Sarathi in Interpretation of Statutes at pp. 294-95 has collected the following principles in regard to a proviso:

(a) When one finds a proviso to a section the natural presumption is that, but for the proviso, the enacting part of the section would have included the subject-matter of the proviso.

(b) A proviso must be construed with reference to the preceding parts of the clause to which it is appended.

(c) Where the proviso is directly repugnant to a section, the proviso shall stand and be held a repeal of the section as the proviso speaks the latter intention of the makers.

(d) Where the section is doubtful, a proviso may be used as a guide to its interpretation: but when it is clear, a proviso cannot imply the existence of words of which there is no trace in the section.

(e) The proviso is subordinate to the main section.

(f) A proviso does not enlarge an enactment except for compelling reasons.

(g) Sometimes an unnecessary proviso is inserted by way of abundant caution.

(h) A construction placed upon a proviso which brings it into general harmony with the terms of section should prevail.

(i) When a proviso is repugnant to the enacting part, the proviso will not prevail over the absolute terms of a later Act directed to be read as supplemental to the earlier one.

(j) A proviso may sometimes contain a substantive provision."

23. In the case of **State of Rajasthan Vs. Leela Jain**7, the following observation with regard to construction of a proviso has been made:-

"14. ...So far as a general principle of construction of a proviso is concerned, it has been broadly stated that the function of a proviso is to limit the main part of the section and carve out something which but for the proviso would have been within the operative part."

24. In **S.T.O. Vs. Hanuman Prasad**8, it was held as follows:-

"5. ... It is well recognised that a proviso is added to a principal clause primarily with the object of taking out of the scope of that principal clause what is included in it and what the legislature desires should be excluded."

25. In C.C.T. Vs. **Jhaver Ramkishan Shrikishan**9 following observations were made:-

"8. ...Generally speaking, it is true that the proviso is an exception to the main part of the section; but it is recognised that in exceptional cases a proviso may be a substantive provision itself."

26. The different purposes served by a proviso have been summarised in the

case of **Delhi Metro Rail Corporation Ltd. Vs. Tarun Pal Singh & Ors.**10 in the following manner:-

"43. ...To sum up, a proviso may serve four different purposes:

(1) qualifying or excepting certain provisions from the main enactment;

(2) it may entirely change the very concept of the intendment of the enactment by insisting on certain mandatory conditions to be fulfilled in order to make the enactment workable;

(3) it may be so embedded in the Act itself as to become an integral part of the enactment and thus acquire the tenor and colour of the substantive enactment itself; and

(4) it may be used merely to act as an optional addenda to the enactment with the sole object of explaining the real intendment of the statutory provision."

27. In **Haryana State Cooperative Land Development Bank Ltd. Vs. Haryana State Cooperative Land Development Banks Employees Union & Anr.**11, the function of proviso has been considered and it has been observed as follows:-

"9. The normal function of a proviso is to except something out of the enactment or to qualify something enacted therein which but for the proviso would be within the purview of the enactment. As was stated in Mullins v. Treasurer of Surrey (1880) LR 5 QBD 170 at p. 173 (DC) (referred to in Shah Bhojraj Kuverji Oil Mills & Ginning Factory v. Subbash Chandra Yograj Sinha (AIR 1961 SC 1596) and Calcutta Tramways Co. Ltd. v. Corpn. of Calcutta (AIR 1965 SC 1728), when one finds a proviso to a section the natural presumption is that, but for the proviso, the enacting part of the section would have included the subject-matter of the proviso. The proper function of a proviso is to except and to deal with a case which would otherwise fall within the general language of the main enactment and its effect is confined to that case. It is a qualification of the preceding enactment which is expressed in terms too general to be quite accurate. As a general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment and ordinarily, a proviso is not interpreted as stating a general rule.

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"If in a deed an earlier clause is followed by a later clause which destroys altogether the obligation created by the earlier clause, the later clause is to be rejected as repugnant, and the earlier clause prevails. ...But if the later clause does not destroy but only qualifies the earlier, then the two are to be read together and effect is to be given to the intention of the parties as disclosed by the deed as a whole' (per Lord Wrenbury in Forbes v. Git (1921 SCC OnLine PC 102 : (1922) 1 AC 256).

A statutory proviso 'is something engrafted on a preceding enactment' (R. v. Taunton St. James (1829) 9 B&C 831 : 109 ER 309, ER p. 311).

"The ordinary and proper function of a proviso coming after a general enactment is to limit that general enactment in certain instances' (per Lord Esher in Barker, In re, ex p Constable (1890) LR 25 QBD 285 (CA)."

28. The function of a proviso to carve out an exception or to qualify

something enacted therein which would otherwise be within the purview of the enactment was emphasised in **Madras and Southern Mahratta Railway Company Ltd. Vs. Bezwada Municipality**12 wherein it was stated by **Lord Macmillan** as follows:-

"The proper function of a proviso is to except and deal with a case which would otherwise fall within the general language of the main enactment, and its effect is confined to that case."

29. In **"The Construction and Interpretation of Law"** by **Henry Campbell Black**13, while considering the manner of construction of provisos it has been stated that the natural and appropriate effect of a proviso to a statute, or to a section thereof, is to restrain or qualify the provisions immediately preceding it.

30. The insertion of the proviso to sub-section (1) of Section 3 clearly indicates that the intention of the legislature was to qualify the right conferred in terms of sub-section (1) for grant of a certificate of registration upon submission of memorandum of association and certified copy along with other necessary particulars and requisite fee by conferring upon the Registrar a discretion to issue public notice or issue notices to such persons as he thinks fit inviting objections, if any, against the proposed registration and to consider all such objections.

31. Further, sub section (2) of Section 3 which begins with a non-obstante clause and has been stated in a compulsive language mandates that the Registrar shall refuse to register the society if after giving it an opportunity of showing cause against such refusal he is satisfied regarding existence of the contingencies provided thereunder.

32. A non-obstante clause, as used in sub-section (2) of Section (3), has been construed as a legislative device to modify the ambit of the provision or law mentioned in the non-obstante clause or to override it in specified circumstances.

33. The meaning of the term 'non obstante clause' has been explained in **Advanced Law Lexicon** by **P Ramanatha Aiyar**14 as follows.

"**Non obstante clause.** A clause in a statute which overrides all provisions of the statute. It is usually worded : '

'Notwithstanding anything in…'

Need not always have effect of cutting down clear terms of enactment. Enacting part when clear can Control non-obstante clause.

A clause used in public and private instruments intended to preclude, in advance, any interpretation contrary to certain declared objects or purposes.

Notwithstanding; an overriding clause."

34. The nature and object of a non-obstante clause as an internal aid of construction was considered in **Union of India and another Vs. G.M.Kokil and others**15 and it was held to be a legislative device employed to give overriding effect to some provisions over some contrary provisions that may be found either in the same enactment or some other enactment to avoid the operation and effect of all contrary provisions. The observations made in the judgment are as follows :-

"11....It is well-known that a non obstante clause is a legislative device which is usually employed to give overriding effect to certain provisions over some contrary provisions that may be found either in the same enactment or some other enactment, that is to say, to avoid the operation and effect of all contrary provisions.…"

35. The import and effect of a non-obstante clause again came up for consideration in **Chandavarkar Sita Ratna Rao Vs. Ashalata S. Guram**16 and it was stated that often a non-obstante clause is appended to a section in the beginning with a view to give the enacting part of the section in case of conflict an overriding effect. The observations in the judgment are as follows :-

"67.A clause beginning with the expression "notwithstanding anything contained in this Act or in some particular provision in the Act or in some particular Act or in any law for the time being in force, or in any contract" is more often than not appended to a section in the beginning with a view to give the enacting part of the section in case of conflict an overriding effect over the provision of the Act or the contract mentioned in the non obstante clause. It is equivalent to saying that in spite of the provision of the Act or any other Act mentioned in the non obstante clause or any contract or document mentioned the enactment following it will have its full operation or that the provisions embraced in the non obstante clause would not be an impediment for an operation of the enactment. See in this connection the observations of this Court in*South India Corpn. (P)Ltd.v.Secretary, Board of Revenue, Trivandrum*[AIR 1964 SC 207, 215 : (1964) 4 SCR 280]"

36. In the case of **State of Bihar and others Vs. Bihar Rajya M.S.E.S.K.K. Mahasangh and others**17 while considering the meaning, object and effect of a non-obstante clause, it was stated as follows :-

"45.A*non obstante*clause is generally appended to a section with a view to give the enacting part of the section, in case of conflict, an overriding effect over the provision in the same or other Act mentioned in the*non obstante*clause. It is equivalent to saying that in spite of the provisions of the Act mentioned in the*non obstante*clause, the provision following it will have its full operation or the provisions embraced in the*non obstante*clause will not be an impediment for the operation of the enactment or the provision in which the*non-obstante* clause occurs. (See*Principles of Statutory Interpretation*, 9th Edn., by Justice G.P. Singh -- Chapter V, Synopsis IV at pp. 318 and 319.)

47.Normally the use of a phrase by the legislature in a statutory provision like "notwithstanding anything to the contrary contained in this Act" is equivalent to saying that the Act shall be no impediment to the measure (see*Law Lexicon* words "notwithstanding anything in this Act to the contrary"). Use of such expression is another way of saying that the provision in which the*non obstante*clause occurs usually would prevail over other provisions in the Act. Thus,*non obstante*clauses are not always to be regarded as repealing clauses nor as clauses which expressly or completely supersede any other provision of the law, but merely as clauses which remove all

obstructions which might arise out of the provisions of any other law in the way of the operation of the principal enacting provision to which the*non obstante*clause is attached. (See*Bipathummav.Mariam Bibi*[(1966) 1 Mys LJ 162] , Mys LJ at p. 165.)"

37. The scheme of the Act with regard to registration of a society as amended in terms of U.P. Act No. 52 of 1975 came up for consideration in the case of **Muzaffar Hussain and others Vs. Assistant Registrar, Firms, Societies and Chits, U.P., Meerut Region Meerut and others**18, and it was held that under the scheme of the Act the Registrar is not to act as an automaton and in terms of sub-section (2) which begins with a non-obstante clause the Registrar is to refuse registration upon his satisfaction as to the existence of any one or more of the grounds specified. The relevant observations made in the judgment are as follows.

"11. Under the scheme of the Act (as amended), the Registrar is not to act as an automaton. The satisfaction is objective on consideration of relevant material. Sub-Section (2) of S. 3 begins with the non obstante clause, that is, "notwithstanding anything in sub-section (I)". Sub-section (I) provides that upon memorandum of association and copy of rules and regulations being filed, the Registrar shall certify that the society is registered. Even if this could be classed as a ministerial act, it has definitely assumed a different character with the introduction of sub-s. (2) which places the Registrar under mandate to refuse registration upon his satisfaction as to the existence of any one or more of the grounds specified. The satisfaction is not subjective. This presupposes application of mind despite there being no formal opposition as such to the application for registration…"

38. It is, therefore, seen that the right to get certification of the registration of the Society under sub-section (1) of Section 3 is not absolute and the same is subject to the powers of the Registrar to issue public notice or notices to other persons inviting objections against the proposed registration and considering all objections, which may be received by him before registration of society. Further, the Registrar is to refuse to register a society in a case where after giving an opportunity of showing cause he records his satisfaction regarding existence of the conditions specified under sub-section (2).

39. In the instant case, after filing of the application dated 07.05.2018 by the petitioners seeking registration of the Society in the name of *" Sri 1008 Parshvanath Digamber Jain Mandir Samiti, Sri 1008 Parshvanath Digamber Jain Mandir, Balram Nagar, Tehsil Loni, District Ghaziabad* another application dated 19.09.2018 was submitted by one Sri Harish Kumar Jain claiming registration of a Society in the name of *"Sri 1008 Parshvanath Digamber Jain Mandir Charitable Society B-60 Balram Nagar, Tehsil Loni, District Ghaziabad"*. The applications submitted by the petitioners as well as the other group were both accompanied by copies of memorandum of association and other requisite papers along with the necessary fee.

40. The applications having been filed by two sets of parties seeking registration of societies in similar names the Registrar in his discretion issued a

letter dated 31.12.2018 to the Sub-Divisional Magistrate, Loni, District Ghaziabad to get a spot inquiry conducted, so that the exact situation may be verified and it may be seen as to whether there existed any dispute with regard to the management of the Society. The status of the entries in the revenue records was also directed to be verified.

41. In response to the aforesaid request sent by the Deputy Registrar the Sub-Divisional Magistrate, Loni vide his letter dated 10.07.2019 forwarded an inquiry report stating therein that the matter was inquired into by the Tehsildar Loni and a report dated 05.07.2019 had been submitted wherein it has been stated that the property in question was not a public property and that there existed a dispute with regard to the management of the society in the name of *"Sri 1008 Parshvanath Digamber Jain Mandir"* and there also existed a dispute with regard to the title and ownership between two rival parties in respect of the property in question. It was disclosed that a civil suit being Original Suit No. 946 of 2018 (Sri 1008 Parshvanath Digamber Jain Mandir vs. Pravin Kumar Jain and others) was pending before the court of Civil Judge (Senior Division) Ghaziabad.

42. It is on the basis of aforesaid report submitted by the Sub-Divisional Magistrate, Loni that the Deputy Registrar has drawn an inference that there existed a dispute with regard to the ownership and title pertaining to the movable and immovable properties of the society in question and also a dispute with regard to the management of the society and that a civil suit was pending between the two rival factions both of whom applied for grant of registration under the Act, 1860.

43. In view of the aforesaid facts and circumstances of the case the conclusion drawn by the Deputy Registrar with regard to the existence of a dispute in respect of the ownership of the properties of the Society and also with regard to its management and that it would not be appropriate to grant certificate of registration to either of the two sets of claimants and thereafter rejecting the applications filed by both the contesting parties leaving it open to them to submit applications afresh upon disposal of the pending suit between the parties cannot be faulted with.

44. No other ground was raised.

45. Learned counsel for the petitioners has not been able to point out any material error or irregularity in the order dated 11.07.2019 passed by the Deputy Registrar, Firms Societies and Chits Meerut Region, Meerut i.e. respondent No.4, which may warrant interference in exercise of powers in writ jurisdiction under Article 226 of the Constitution of India.

46. The writ petition lacks merit and is accordingly dismissed.

(2019)12 ILR A1218

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.11.2019

BEFORE
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Writ-C No. 31147 of 2019

Shamli Distillery & Chemical Works Shamli ...Petitioner

Versus

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

Counsel for the Petitioner:
Sri Diptiman Singh

Counsel for the Respondents:
C.S.C., Ms. Bushra Maryam

A. Labour Law – Termination of service of workman – Domestic enquiry – Opportunity of hearing to the employer – Adjudication process to be adopted by Labour Court – Principle laid down – It is obligatory upon the Labour Court to first decide the preliminary issue as to the legality of the domestic enquiry and in case it proceeds to hold the domestic enquiry to be not fair and proper it would be open to the employer to ask for such opportunity to lead evidence to prove the charge of misconduct and once such prayer is made either orally or by application or in the pleading, the same is to be granted to enable the employer to prove the misconduct. (Para 18)

Held **-**In view of the specific pleading having been made by the petitioner-employer the Labour Court before proceeding to hold the termination to be illegal and invalid ought to have granted an opportunity to the petitioner-employer to lead evidence and prove its case and the Labour Court could not have straightaway proceeded to hold the termination to be illegal and invalid.

Writ Petition allowed. (E-1)

List of cases cited: -

1. Management of Ritz Theatre (P) Ltd. Delhi Vs. Workmen AIR 1963 SC 295

2. Workmen of the Motipur Sugar Factory Private Ltd. Vs. The Motipur Sugar Factory Private Ltd. AIR 1965 SC 1803

3. Delhi Cloth & General Mills Co. Vs. Ludh Budh Singh (1972) 1 SCC 595

4. State Bank of India Vs. R.K.Jain and others (1972) 4 SCC 304

5. The Workmen of M/S Firestone Tyre and Rubber Co. of India (P) Ltd. Vs. The Management and others (1973) 1 SCC 813

6. The Cooper Engineering Limited Vs. Shri P.P.Mundhe (1975) 2 SCC 661

7. Shankar Chakravarti Vs. Britannia Biscuit Co. Ltd. and another (1979) 3 SCC 371

8. Kurukshetra University Vs. Prithvi Singh (2018) 4 SCC 483

9. Indian Iron & Steel Co. Ltd. Vs. Workmen AIR 1958 SC 130

10 M.L.Singla Vs. Punjab National Bank and Another (2018) 18 SCC 21

11. Bharat Sugar Mills Ltd. Vs. Jai Singh (1962) 3 SCR 684

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

1. Supplementary counter affidavit filed by Ms. Bushra Maryam on behalf of the respondent no. 3 is taken on record.

2. Sri Diptiman Singh, learned counsel for the petitioner has stated that he does not propose to file any response to the aforesaid supplementary counter affidavit.

3. With the consent of the parties the writ petition is taken up for final disposal as per the Rules of the Court.

4. Heard learned counsel for the parties.

5. The present petition seeks to challenge the award dated 27.03.2019, published on 25.06.2019, passed by the Labour Court, U.P. Saharanpur in Adjudication Case No.69 of 2008, whereby the Labour Court while

answering the reference with regard to the legality/validity of the termination of the services of the respondent no.3-workman w.e.f. 14.03.2008 has held the termination to be illegal/invalid and directed his reinstatement with full back wages and consequential benefits.

6. The sole contention raised on behalf of the petitioner is that the services of the respondent-workman had been terminated pursuant to a domestic enquiry and the Labour Court having framed an issue with regard to the fairness of the domestic enquiry and having held the same to be not fair and proper it ought to have granted opportunity to the petitioner-employer to lead evidence and prove the case before the Labour Court. It is submitted that upon coming to the conclusion that the domestic enquiry was not fair and proper, the Labour Court could not have straightaway proceeded to hold the termination to be illegal/invalid without grant of opportunity to the petitioner-employer to prove the case before the Labour Court.

7. Counsel for the respondent no. 3-workman submits that though a plea was raised in the written statement filed by the employer that in the event the domestic enquiry is held to be not fair and proper it may be permitted to lead evidence and prove the case before the Labour Court, but the order-sheet does not indicate that the said plea was pressed by the employer at any stage of the proceedings.

8. In order to appreciate the controversy involved it would be relevant to advert to the legal position with regard to the scope of the powers exercisable by a Labour Court while deciding a dispute relating to the legality and correctness of a termination order passed against the workman pursuant to a domestic enquiry and the rights of the employer to lead evidence and defend the order of termination before the Labour Court.

9. The right of the Management to defend its action solely on the basis of a domestic enquiry by demonstrating it to be fair and proper, or taking the other course of relying firstly on the validity of domestic enquiry and alternatively and without prejudice to the plea that the enquiry is fair and proper also seeking to adduce evidence before the Tribunal to justify its action was upheld in the case of **Management of Ritz Theatre (P) Ltd. Delhi Vs. Workmen**1. The observations made in the judgment in this regard are as follows :-

"12...In enquiries of this kind, the first question which the Tribunal has to consider is whether a proper enquiry has been held or not. Logically, it is only where the Tribunal is satisfied that a proper enquiry has not been held or that the enquiry having been held properly the findings recorded at such an enquiry are perverse, that the Tribunal derives jurisdiction to deal with the merits of the dispute. It is quite conceivable, and in fact it happens in many cases, that the employer may rely on the enquiry in the first instance and alternatively and without prejudice to his plea that the enquiry is proper and binding, may seek to lead additional evidence. It would, we think, be unfair to hold that merely by adopting such a course, the employer gives up his plea that the enquiry was proper and that the Tribunal should not go into the merits of the dispute for itself. If the view taken by the Tribunal was held to be correct, it would lead to this

anomaly that the employer would be precluded from justifying the dismissal of his employee by leading additional evidence unless he takes the risk of inviting the Tribunal to deal with the merits for itself, because as soon as he asks for permission to lead additional evidence, it would follow that he gives up his stand based on the holding of the domestic enquiry. Otherwise, it may have to be held that in all such cases no evidence should be led on the merits unless the issue about the enquiry is tried as a preliminary issue. If the finding on that preliminary issue is in favour of the employer, then, no additional evidence need be cited by the employer; if the finding on the said issue is against him, permission will have to be given to the employer to cite additional evidence. Instead of following such an elaborate and somewhat cumbersome procedure, if the employer seeks to lead evidence in addition to the evidence adduced at the departmental enquiry and the employees are also given an opportunity to lead additional evidence, it would be open to the Tribunal first to consider the preliminary issue and then to proceed to deal with the merits in case the preliminary issue is decided against the employer. That, in our opinion, is the true and correct legal position in this matter."

10. The question as to whether in a case where no enquiry as required under the applicable Standing Orders had been held could the Management justify the order of dismissal before the Industrial Tribunal was subject matter of consideration in the case of **Workmen of the Motipur Sugar Factory Private Ltd. Vs. The Motipur Sugar Factory Private Ltd.**2. The observations made in the judgment in this regard are as follows :-

"12. If it is held that in cases where the employer dismisses his employee without holding an enquiry, the dismissal must be set aside by the Industrial Tribunal only on that ground, it would inevitably mean that the employer will immediately proceed to hold the enquiry and pass an order dismissing the employee once again. In that case, another industrial dispute would arise and the employer would be entitled to rely upon the enquiry which he had held in the meantime. This course would mean delay and on the second occasion it will entitle the employer to claim the benefit of the domestic enquiry. On the other hand, if in such cases the employer is given an opportunity to justify the impugned dismissal on the merits, the employee has the advantage of having the merits of his case being considered by the tribunal for itself and that clearly would be to the benefit of the employee. That is why this Court has consistently held that if the domestic enquiry is irregular, invalid or improper, the tribunal may give an opportunity to the employer to prove his case and in doing so, the tribunal tries the merits itself. This view is consistent with the approach which industrial adjudication generally adopts with a view to do justice between the parties without relying too much on technical considerations and with the object of avoiding delay in the disposal of industrial disputes…"

11. The nature of the jurisdiction exercised by an Industrial Tribunal while examining the validity and propriety of a domestic enquiry held by the Management came up for consideration in the case of **Delhi Cloth & General Mills Co. Vs. Ludh Budh Singh**3, wherein it was held that in a case where the

termination order has been passed pursuant to a domestic enquiry it is open to the Management to request the Tribunal to try the validity of the domestic enquiry as a preliminary issue and also ask for an opportunity to adduce evidence before the Tribunal, if the finding on the preliminary enquiry is against the Management. The principles culled out in the judgment are as follows :-

"61. From the above decisions the following principles broadly emerge –

(1) If no domestic enquiry had been held by the management, or if the management makes it clear that it does not rely upon any domestic enquiry that may have been held by it, it is entitled to straightway adduce evidence before the Tribunal justifying its action. The Tribunal is bound to consider that evidence so adduced before it, on merits, and give a decision thereon. In such a case, it is not necessary for the Tribunal to consider the validity of the domestic enquiry as the employer himself does not rely on it.

(2) If a domestic enquiry had been held, it is open to the management to rely upon the domestic enquiry held by it, in the first instance, and alternatively and without prejudice to its plea that the enquiry is proper and binding, simultaneously adduce additional evidence before the Tribunal justifying its action. In such a case no inference can be drawn, without anything more that the management has given up the enquiry conducted by it.

(3) When the management relies on the enquiry conducted by it, and also simultaneously adduces evidence before the Tribunal, without prejudice to its plea that the enquiry proceedings are proper, it is the duty of the Tribunal, in the first instance, to consider whether the enquiry proceedings conducted by the management, are valid and proper. If the Tribunal is satisfied that the enquiry proceedings have been held properly and are valid, the question of considering the evidence adduced before it on merits, no longer survives. It is only when the Tribunal holds that the enquiry proceedings have not been properly held, that it derives jurisdiction to deal with the merits of the dispute and in such a case it has to consider the evidence adduced before it by the management and decide the matter on the basis of such evidence.

(4) When a domestic enquiry has been held by the management and the management relies on the same, it is open to the latter to request the Tribunal to try the validity of the domestic enquiry as a preliminary issue and also ask for an opportunity to adduce evidence before the Tribunal, if the finding on the preliminary issue is against the management. However elaborate and cumbersome the procedure may be, under such circumstances, it is open to the Tribunal to deal, in the first instance, as a preliminary issue the validity of the domestic enquiry. If its finding on the preliminary issue is in favour of the management, then no additional evidence need be cited by the management. But, if the finding on the preliminary issue is against the management, the Tribunal will have to give the employer an opportunity to cite additional evidence and also give a similar opportunity to the employee to lead evidence contra, as the request to adduce evidence had been made by the management to the Tribunal during the course of the proceedings and before the trial has come to an end. When the preliminary issue is decided against the

management and the latter leads evidence before the Tribunal, the position, under such circumstances, will be, that the management is deprived of the benefit of having the finding of the domestic Tribunal being accepted as prima facie proof of the alleged misconduct. On the other hand, the management will have to prove, by adducing proper evidence, that the workman is guilty of misconduct and that the action taken by it is proper. It will not be just and fair either to the management or to the workman that the Tribunal should refuse to take evidence and thereby ask the management to make a further application, after holding a proper enquiry, and deprive the workman of the benefit of the Tribunal itself being satisfied, on evidence adduced before it, that he was or was not guilty of the alleged misconduct.

(5) The management has got a right to attempt to sustain its order by adducing independent evidence before the Tribunal. But the management should avail itself of the said opportunity by making a suitable request to the Tribunal before the proceedings are closed. If no such opportunity has been availed of, or asked for by the management, before the proceedings are closed, the employer can make no grievance that the Tribunal did not provide such an opportunity. The Tribunal will have before it only the enquiry proceedings and it has to decide whether the proceedings have been held properly and the findings recorded therein are also proper."

12. A similar view was taken in the case of **State Bank of India Vs. R.K.Jain and others**4, while considering the question as to whether the Management can produce evidence to prove the grounds for justification of discharge of the workman before the Tribunal and if so at what stage of proceedings. The observations made in the judgment in this regard are as follows :-

"35.It should be remembered that when an order of punishment by way of dismissal or termination of service is effected by the management, the issue that is referred is whether the management was justified in discharging and terminating the service of the workman concerned and whether the workman is entitled to any relief. In the present case, the actual issue that was referred for adjudication to the Industrial Tribunal has already been quoted in the earlier part of the judgment. There may be cases where an enquiry has been held preceding the order of termination or there may have been no enquiry at all. But the dispute that will be referred is not whether the domestic enquiry has been conducted properly or not by the management, but the larger question whether the order of termination, dismissal or the order imposing punishment on the workman concerned is justified. Under those circumstances it is the right of the workman to plead all infirmities in the domestic enquiry, if one has been held and also to attack the order on all grounds available to him in law and on facts. Similarly, the management has also a right to defend the action taken by it on the ground that a proper domestic enquiry has been held by it on the basis of which the order impugned has been passed. It is also open to the management to justify on facts that the order passed by it was proper. But the point to be noted is that the enquiry that is conducted by the Tribunal is a composite enquiry regarding the order which is under challenge. If the

management defends its action solely on the basis that the domestic enquiry held by it is proper and valid and if the Tribunal hold0 against the management on that point, the management will fail. On the other hand, if the management relies not only on the validity of the domestic enquiry, but also adduces evidence before the Tribunal justifying its action, it is open to the Tribunal to accept the evidence adduced by the management and hold in its favour even if its finding is against the management regarding the validity of the domestic enquiry. It is essentially a matter for the management to decide about the stand that it proposes to take before the Tribunal. It may be emphasised, that it is the right of the management to sustain its order by adducing also independent evidence before the Tribunal. It is a right given to the management and it is for the management to avail itself of the said opportunity."

13. The jurisdiction of an Industrial Tribunal while adjudicating disputes relating to dismissal or discharge was exhaustively considered in the case of **The Workmen of M/S Firestone Tyre and Rubber Co. of India (P) Ltd. Vs. The Management and others**5, and certain broad principles were laid down. The observations made in the judgment in this regard are being extracted below :-

"31.We have exhaustively referred to the various decisions of this Court, as they give a clear picture of the principles governing the jurisdiction of the Tribunals when adjudicating disputes relating to dismissal or discharge.

32.From those decisions, the following principles broadly emerge:

(1) The right to take disciplinary action and to decide upon the quantum of punishment are mainly managerial functions, but if a dispute is referred to a Tribunal, the latter has power to see if action of the employer is justified.

(2) Before imposing the punishment, an employer is expected to conduct a proper enquiry in accordance with the provisions of the Standing Orders, if applicable, and principles of natural justice. The enquiry should not be an empty formality.

(3) When a proper enquiry has been held by an employer, and the finding of misconduct is a plausible conclusion flowing from the evidence, adduced at the said enquiry, the Tribunal has no jurisdiction to sit in judgment over the decision of the employer as an appellate body. The interference with the decision of the employer will be justified only when the findings arrived at in the enquiry are perverse or the management is guilty of victimisation, unfair labour practice or mala fide.

(4) Even if no enquiry has been held by an employer or if the enquiry held by him is found to be defective, the Tribunal in order to satisfy itself about the legality and validity of the order, had to give an opportunity to the employer and employee to adduce evidence before it. It is open to the employer to adduce evidence for the first time justifying his action, and it is open to the employee to adduce evidence contra.

(5) The effect of an employer not holding an enquiry is that the Tribunal would not have to consider only whether there was a prima facie case. On the other hand, the issue about the merits of the impugned order of dismissal or discharge is at large before the Tribunal and the latter, on the evidence adduced before it,

has to decide for itself whether the misconduct alleged is proved. In such cases, the point about the exercise of managerial functions does not arise at all. A case of defective enquiry stands on the same footing as no enquiry.

(6) The Tribunal gets jurisdiction to consider the evidence placed before it for the first time in justification of the action taken only, if no enquiry has been held or after the enquiry conducted by an employer is found to be defective.

(7) It has never been recognised that the Tribunal should straightaway, without anything more, direct reinstatement of a dismissed or discharged employee, once it is found that no domestic enquiry has been held or the said enquiry is found to be defective.

(8) An employer, who wants to avail himself of the opportunity of adducing evidence for the first time before the Tribunal to justify his action, should ask for it at the appropriate stage. If such an opportunity is asked for, the Tribunal has no power to refuse. The giving of an opportunity to an employer to adduce evidence for the first time before the Tribunal is in the interest of both the management and the employee and to enable the Tribunal itself to be satisfied about the alleged misconduct.

(9) Once the misconduct is proved either in the enquiry conducted by an employer or by the evidence placed before a Tribunal for the first time, punishment imposed cannot be interfered with by the Tribunal except in cases where the punishment is so harsh as to suggest victimisation.

(10) In a particular case, after setting aside the order of dismissal, whether a workman should be reinstated or paid compensation is, as held by this Court in *The Management of Panitole Tea Estatev.Workmen*,(1971) 1 SCC 742 within the judicial decision of a Labour Court or Tribunal."

14. The consequences which would follow in a case where the domestic enquiry was found to be defective for violation of principles of natural justice and as to whether in such a case a duty would be cast on the Labour Court to give an opportunity to the employer to adduce evidence afresh and whether the failure to do so would vitiate the award was taken up for consideration in the case of **The Cooper Engineering Limited Vs. Shri P.P.Mundhe**6. The observations made in the judgment are as follows :-

"22.We are, therefore, clearly of opinion that when a case of dismissal or discharge of an employee is referred for industrial adjudication the Labour Court should first decide as a preliminary issue whether the domestic enquiry has violated the principles of natural justice. When there is no domestic enquiry or defective enquiry is admitted by the employer, there will be no difficulty. But when the matter is in controversy between the parties that question must be decided as a preliminary issue. On that decision being pronounced it will be for the management to decide whether it will adduce any evidence before the labour court. If it chooses not to adduce any evidence, it will not be thereafter permissible in any proceeding to raise the issue. We should also make it clear that there will be no justification for any party to stall the final adjudication of the dispute by the Labour Court by questioning its decision with regard to the preliminary issue when the matter, if worthy, can be agitated even after the final award. It will be also legitimate for

the High Court to refuse to intervene at this stage. We are making these observations in our anxiety that there is no undue delay in industrial adjudication."

15. The question as to whether the Labour Court is duty bound to afford an opportunity to the employer to lead evidence and to prove the charge against the workman on merits in a case where the domestic enquiry is held to be illegal and improper fell for consideration in the case of **Shankar Chakravarti Vs. Britannia Biscuit Co. Ltd. and another**7, and while answering the aforesaid question it was held that it is for the employer to ask for such opportunity to lead evidence to prove the charge of misconduct and once such prayer is made in any form i.e. orally or by application or in the pleading the same cannot be denied to the employer. The observations made in the judgment in this regard are being extracted below ;-

"35...It is both the right and obligation of the employer, if it so chooses, to adduce additional evidence to substantiate the charges of misconduct. It is for the employer to avail of such opportunity by a specific pleading or by specific request.…"

16. The question with regard to the necessity of framing a preliminary issue to decide validity of domestic enquiry again came up for consideration in the case of **Kurukshetra University Vs. Prithvi Singh**8, and after referring to the earlier judgments in the case of **Indian Iron & Steel Co. Ltd. Vs. Workmen**9, and **Shankar Chakravarti Vs. Britannia Biscuit Co. Ltd.**7 it was observed that in the facts of the case the Labour Court committed an error in not framing a preliminary issue for deciding the legality of the domestic enquiry and having found fault in the domestic enquiry committed another error when it did not allow the employer to lead independent evidence to prove the misconduct/charge on merits and straightway proceeded to hold that it was a case of illegal retrenchment. The observations made in the aforementioned judgment in this regard are as follows :-

"12.The question as to what are the powers of the Labour Court and how it should proceed to decide the legality and correctness of the termination order of a workman under the Labour Laws in reference proceedings and what are the rights of the employer while defending the termination order in the Labour Court remains no more res integra and is settled by series of decisions of this Court beginning from *Indian Iron & Steel Co. Ltd.v.Workmen* till *Shankar Chakravartiv.Britannia Biscuit Co. Ltd.[Shankar Chakravartiv.Britannia Biscuit Co. Ltd.*, (1979) 3 SCC 371 and also thereafter in several decisions as mentioned below.

13.In between this period, this Court in several leading cases examined the aforesaid questions. However, in *Shankar case*, (1979) 3 SCC 371, this Court took note of entire case law laid down by this Court in all previous cases and reiterated the legal position in detail.

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20.We are constrained to observe that first, the Labour Court committed an error in not framing a "preliminary issue" for deciding the legality of domestic enquiry and second, having found fault in the domestic enquiry committed another error when it did not allow the appellant to lead independent evidence to prove the

misconduct/charge on merits and straightaway proceeded to hold that it was a case of illegal retrenchment and hence the respondent's termination is bad in law."

17. The aforementioned proposition of law has been reiterated in the case of **M.L.Singla Vs. Punjab National Bank and another**10, and it has been stated that it is obligatory for the Labour Court to decide the validity/legality of the domestic enquiry and in case it is held that the domestic enquiry was illegal because it had been conducted in violation of the principles of natural justice the employer ought to be granted opportunity to lead evidence and prove the case before the Labour Court. The observations in the aforesaid judgment made in this regard after examining the earlier decisions in the case of **Bharat Sugar Mills Ltd. Vs. Jai Singh11, Management of Ritz Theatre (P) Ltd. Delhi Vs. Workmen1, Workmen of the Motipur Sugar Factory Private Ltd. Vs. The Motipur Sugar Factory Private Ltd.2, SBI Vs. R.K.Jain4, Delhi Cloth and General Mills Co. Vs. Ludh Budh Singh3, Workmen of M/S Firestone Tyre & Rubber Co. of India (P) Ltd. Vs. Management and others5, Cooper Engineering Limited Vs. P.P.Mundhe6** and **Shankar Chakravarti Vs. Britannia Biscuit Co. Ltd.**7 are as follows :-

"13.It is necessary to examine the legality and correctness of the award of the Labour Court in the first instance and then the impugned order.

14.When we examine the award in the light of detailed facts set out above, we find that the Labour Court committed more than one jurisdictional error in answering the reference.

15.The first error was that it failed to decide the validity and legality of the domestic enquiry. Since the dismissal order was based on the domestic enquiry, it was obligatory upon the Labour Court to first decide the question as a preliminary issue as to whether the domestic enquiry was legal and proper.

16.Depending upon the answer to this question, the Labour Court should have proceeded further to decide the next question.

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20.If the Labour Court had come to a conclusion that the domestic enquiry is illegal because it was conducted in violation of the principles of natural justice thereby causing prejudice to the rights of the employee, Respondent 1 Bank was under legal obligation to prove the misconduct (charges) alleged against the appellant (employee) before the Labour Court provided he had sought such opportunity to prove the charges on merits.

21.The Labour Court was then under legal obligation to give such opportunity and then decide the question as to whether Respondent 1 Bank was able to prove the charges against the appellant on merits or not.

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25.Assuming that the Labour Court had the jurisdiction to direct the parties in the first instance itself to adduce evidence on merits in support of the charges yet, in our opinion, it was obligatory upon the Labour Court to first frame the preliminary issue on the question of legality and validity of the domestic enquiry and confine its discussion only for examining the legality and propriety of the enquiry proceedings.

26.Depending upon the finding on the preliminary issue on the legality of

the enquiry proceedings, the Labour Court should have proceeded to decide the next questions. The Labour Court while deciding the preliminary issue could only rely upon the evidence, which was relevant for deciding the issue of legality of enquiry proceedings but not beyond it.

27.In other words, the Labour Court failed to see that it would have assumed the jurisdiction to examine the charges on the merits only after the domestic enquiry had been held illegal and secondly, the employer had sought permission to adduce evidence on merits to prove the charges and on permission being granted, he had led the evidence.

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35.The law on this subject was examined by this Court in several decisions beginning from *Bharat Sugar Mills Ltd.v.Jai Singh*, (1962) 3 SCR 684;*Ritz Theatre (P) Ltd.v.Workmen*(1963) 3 SCR 461;*Workmenv.Motipur Sugar Factory (P) Ltd.*,(1965) 3 SCR 588;*SBIv.R.K. Jain* (1972) 4 SCC 304;*Delhi Cloth and General Mills Co.v.Ludh Budh Singh*,(1972) 1 SCC 595; *Workmenv.Firestone Tyre & Rubber Co. of India (P) Ltd.*, (1973) 1 SCC 813 and *Cooper Engg. Ltd.v.P.P. Mundhe*,(1975) 2 SCC 661.

36.All the aforementioned decisions were examined in detail by a Bench of three Judges of this Court in *Shankar Chakravarti v.Britannia Biscuit Co. Ltd.*,(1979) 3 SCC 371.

37.Though in *Shankar Chakravarti case*,(1979) 3 SCC 371, the question was when the domestic enquiry is held illegal and improper by the Labour Court, whether the Labour Court is duty bound to afford an opportunity to the employer to lead evidence to prove the charge against the workman on merits before the Labour Court.

38.This Court while answering the aforesaid question in*Shankar Chakravarti case*,(1979) 3 SCC 371 held that it is for the employer to ask for such opportunity to lead evidence to prove the charge of misconduct and once such prayer is made in any form i.e. orally or by application or in the pleading, the same cannot be denied to the employer. It has to be granted to enable him to prove the misconduct. This Court further held that no duty is cast upon the Court to offer such opportunity to the employer suo motu, if he does not ask for it. In other words, he has to ask for from the Court by any of the three modes mentioned above."

18. From the forgoing discussion it follows that it is obligatory upon the Labour Court to first decide the preliminary issue as to the legality of the domestic enquiry and in case it proceeds to hold the domestic enquiry to be not fair and proper it would be open to the employer to ask for such opportunity to lead evidence to prove the charge of misconduct and once such prayer is made either orally or by application or in the pleading, the same is to be granted to enable the employer to prove the misconduct. It has been consistently held that the Management would have a right to defend its action solely on the basis of the domestic enquiry by demonstrating it to be fair and proper, or taking the other course of relying firstly on the validity of the domestic enquiry and alternatively and without prejudice to the plea that the enquiry is fair and proper also seeking to adduce evidence before the Tribunal to justify its action.

19. In the instant case, the records of the present case indicate that in the

written statement filed by the petitioner-employer before the Labour Court it was specifically pleaded that in case the Labour Court finds any defect in the enquiry, the management be allowed to prove the case before the Labour Court and to lead the evidence for the said purpose.

20. In view of the specific pleading having been made by the petitioner-employer the Labour Court before proceeding to hold the termination to be illegal and invalid ought to have granted an opportunity to the petitioner-employer to lead evidence and prove its case and the Labour Court could not have straightaway proceeded to hold the termination to be illegal and invalid.

21. Learned counsel appearing for the respondent no. 3 has not been able to dispute the aforementioned legal position and has fairly submitted that in order to expedite the proceedings the matter be remanded to the Labour Court to proceed afresh after giving due opportunity to the petitioner-employer to lead evidence and prove the charge.

22. In the light of the foregoing discussion the award of the Labour Court is held to be legally unsustainable and is accordingly set aside and the matter is remanded to the Labour Court with an observation that the Labour Court would afford an opportunity, as sought by the employer in its written statement, to lead evidence to prove the misconduct, and thereafter proceed to decide the issue with regard to the legality/validity of the termination of the services of the respondent no. 3-workman, in terms of the reference made before it.

23. Counsel for the parties have jointly submitted that they would appear before the Labour Court and would not seek any unnecessary adjournment.

24. Having regard to the fact that the dispute had been referred for adjudication more than a decade ago it is expected that the Labour Court would proceed with the matter and endeavour to conclude the proceedings expeditiously, preferably within a period of six months from the date of receipt of a certified copy of the order of this Court.

25. The writ petition is allowed to the extent indicated hereinabove.

(2019)12 ILR A1229

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.10.2019

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE VIRENDRA KUMAR SRIVASTAVA, J.

Writ-C No. 33360 of 2018
With
Writ-C No. 35154 of 2018

Lov Mandeshwari Saran Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Harihar Prasad Srivastava

Counsel for the Respondents:
C.S.C., Sri M.D. Singh 'Shekhar', Sri Devi Prasad Mishra, Sri Ajit Kumar Singh(Addl. A.G.), Sri Nimai Das & Sri Sudhanshu Srivastava(Addl. C.S.C.), Sri Amit Verma

A. Nazul property – Nature and meaning – Nazul is an Arabic word. It refers to a land annexed to Crown. During British Regime, immoveable property of

individuals, Zamindars, Nawabs and Rajas when confiscated for one or the other reason, it was termed as 'Nazul property' – It was neither acquired nor purchased after making payment – In Legal Glossary 1992 meaning of the term 'Nazul' has been given as 'Rajbhoomi' – It is only such land which is owned and vested in the State on account of its capacity of Sovereign, and application of right of bona vacantia. (Para 42, 43 and 44)

B. Constitution of India – Article 296 – Principle of escheat/ bona vacantia/ Doctrine of lapse – Empowering the king to take property – Recognized under common law of England – These principle would have been applicable prior to enforcement of Constitution of India – Article 296 has retained power of State to get ownership of such land, in respect whereof principle of 'escheat', 'lapse' or 'bona vacantia' applied – This power continued to apply after enactment of Constitution with the only modification that if such land is situate within the territory of State Government, it will vest in State and in other cases, it will vest in Union of India. (Para 46 and 49)

Held – Thus the land in question which is admittedly 'Nazul', belonged to the category as discussed above i.e. it came to be vested and owned by State in its capacity of Sovereign and right of bona vacantia. When acquisition is made under the provisions of a Statute, purpose of acquisition is already known and State pay its price but when land is owned by State, which is Nazul, objective of use of such land is not predetermined but it can be utilized by State for larger public welfare and its benefit, as necessitated from time to time. In other words 'Nazul' land forms the assets owned by State in trust for the people in general who are entitled for its user in the most fair and beneficial manner for their benefit. State cannot be allowed to distribute such largesse by pick and choose manner or to some selected groups etc.

Thus, land in question remained with State Government being its owner. Lease right transferred to Maharani Janki Kunwar ceased to continue with Lessee after her death that too issueless, and in any case after expiry of term of lease on 31.12.1960.

C. Nazul land – Right of State for resumption and re-entry – Public purpose – State has unrestricted power of re-entry to its own property and, that too, for public purpose and the above authorities are applicable to these petitions – Lease has already expired, which has not been granted to anyone else. Petitioners have no claim for conversion into freehold. Held, right of State to get its own land is not obstructed in any manner. (Para 74 and 75)

D. Civil Law - Transfer of property Act, 1882 – Section 106 – Tenant at sufferance – After expiry of lease, status of lessee, status of lessee becomes that of 'Tenant at sufferance' – 'Tenant at sufference' is one who comes into possession of land by lawful title, but who holds it by wrong after termination of term or expiry of lease by efflux of time – It does not create relationship of landlord and tenant – Therefore, even a quit notice is not necessary to be given and Section 106 TP Act, 1882 is not at all attracted. (Para 81 and 82)

Writ Petition dismissed (E-1)

List of Cases cited:-

1. Dyke v. Walford 5 Moore PC 434= 496-13 ER 557 (580)

2. Pierce Leslie and Co. Ltd. Vs. Miss Violet Ouchterlony Wapsnare, AIR 1969 SC 843

3. Collector of Masulipatam v. C. Vencata Narainapah 8 MIA 500, 525

4. Ranee Sonet Kowar v. Mirza Himmut Bahadoor (2) LR 3 IA 92, 101

5. Bombay Dyeing and Manufacturing Co. Ltd. v. State of Bombay [1958] SCR 1122, 1146

6. Superintendent and, Legal Remembrancer v. Corporation of Calcutta [1967] 2 SCR 170, 204

7. Cook v. Sprigg (1899) AC 572

8. Raja Rajinder Chand v. Mst. Sukhi, AIR 1957 SC 286

9. Nayak Vajesingji Joravarsingji v. Secretary of State for India in Council AIR 1924 PC 216

10. Dalmia Dadri Cement Co. Ltd. v. CIT [1958] 34 ITR 514 (SC) : AIR 1958 SC 816

11. Promod Chandra Deb v. State of Orissa AIR 1962 SC 1288

12. Amarsarjit Singh v. State of Punjab AIR 1962 SC 1305

13. Thakur Amar Singhji v. State of Rajasthan AIR 1955 SC 504

14. State of Rajasthan vs. Sajjanlal Panjawat AIR 1975 SC 706

15. Promod Chandra Deb vs. State of Orissa AIR 1962 SC 1288

16. Biswambhar Singh vs. State of Orissa 1964 (1) SCJ 364

17. Secretary of State Vs. Narain Khanna AIR 1942 Privy Council 35

18. Md. Wajeeh Mirza vs. Secretary of State for India in Council, AIR 1921 Oudh 31

19. Sharda Devi Vs. State of Bihar and another, 2003 (3) SCC 128

20. Collector of Bombay Vs. Nusserwanji Rattanji Mistri (1996) 10 SCC 150

21. State of U.P. and another Vs. Lalji Tandon (dead) through Legal Representatives (2004) 1 SCC 1

22. Azim Ahmad Kazmi and others vs. State of U.P. and Another (2012) 7 SCC 278

23. Judgment dated 02.04.2013 of Allahabad High Court passed in Writ Petition No.62588 of 2010, M/s Madhu Colonizers Pvt. Ltd. vs. State of U.P. & Ors.

24. R.V. Bhupal Prasad vs. State of A.P. (1995) 5 SCC 698

25. Sevoke Properties Ltd. vs. West Bengal State Electricity Distribution Company Ltd. AIR 2019 SC 2664

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

1. Both these writ petitions relate to Nazul Plot No.112, Strachey Road, Allahabad.

2. Writ Petition No.33360 of 2018 *(hereinafter referred to as "Writ-1")* was heard on 29.5.2019 and judgment was reserved while Writ Petition No.35154 of 2018 *(hereinafter referred to as "Writ-2")* was heard on 30.5.2019 and judgment was reserved. Counsel for parties stated that both the matters relate to same plot, involve common question of facts and law, therefore, we are deciding both these writ petitions by this common judgment.

3. Sri Harihar Prasad Srivastava, Advocate, appeared for petitioner in Writ-1 and Sri Pallav Saxena, Advocate, assisted by Sri Vikram D. Chauhan, Advocate, appeared for petitioners in Writ-2. Sri Ajit Kumar Singh, Additional Advocate General assisted by Sri Nimai Das and Sudhanshu Srivastava, Additional Chief Standing Counsels have appeared for State of U.P. and its Authorities; Sri M.D.Singh Shekhar, Senior Advocate, assisted by Sri Amit Verma appeared for Allahabad Development Authority *(hereinafter referred to as "ADA").*

W.P.-1

4. In Writ-1, sole petitioner Lov Mandeshwari Saran Singh son of Late Badreshwari Saran Singh has prayed for issue of a writ of certiorari quashing notice dated 18.8.2018 issued by District Magistrate, Allahabad (respondent-3), intimating petitioner and one Jai Prakash

Ojha, Manager, "The Prayag Upniveshan Avam Nirman Sahakari Samiti *(hereinafter referred to as "PUANS Samiti")* that lease of land in dispute, expired on 31.12.1960, has not been renewed thereafter; State Government has granted approval for resumption/re-entry on land in dispute; therefore petitioner and another should vacate disputed land within 15 days and hand over possession, failing which forcible possession shall be taken. Petitioner has also prayed for a writ of mandamus restraining respondents 1, 3, 4 and 5 from taking possession of land in dispute and also to place order dated 16.08.2018 passed by respondent-1 pertaining to proposal sent by respondent-2 to State Government, before this Court.

5. Brief facts pleaded by petitioner in Writ -1 are that Plot No.112, Civil Station, Allahabad is a Nazul Land having total area of 11,414 Sq.Meters. By way of an Indenture of Lease, dated 01.01.1894 it was let out to 'Agra Savings Bank Ltd.' in Liquidation, situate at Allahabad, on yearly rent of Rs.120/- for a period of seventeen years for maintaining and preserving building standing for dwelling purpose. The period of lease expired on 31.12.1910. The area of land mentioned in the Indenture of lease was 6 acres. Another lease deed was executed on 05.12.1924 whereby aforesaid plot 112, situate at Thornhill Road, area 2.821 acres, was let out to one Enite Edward Morean for a period of 50 years w.e.f. 01.01.1911. Some of the relevant terms of lease deed dated 05.12.1924 are as under :

(i) AND ALSO will not ***without the previous consent in writing of the said Collector*** *erect or set up or suffer to be* ***erected or set up on any part of the said premises*** *hereby demised any messuage or building other than and except the messuage and buildings already erected and delineated upon the map hereto annexed.*

(ii) AND THAT ***if in breach of the said preceding*** *covenant any messuage or building is erected or set up or suffered to be erected or* ***set up without such permission as aforesaid it shall be lawful for the Collector or for any person or persons duly deputed by him to cause such messuage or building to be pulled down after the expiration of fourteen days of his giving or causing to be given notice to the said lessee his Executors,*** *Administrators and Assigns to remove the same which notice may be given either verbally or in writing upon the said premises.*

(iii) AND ***will not without the previous consent in writing of the said Collector make any alteration in the plan or elevation*** *of the said buildings and out buildings or* ***carry or permit to be carried on the said premises any trade or business*** *whatsoever or* ***use the same or permit the same to be used for any purpose other than that of a dwelling house.***

(iv) AND ALSO will not without the previous consent in writing of the said Collector grow any crops/ or keep any horses, cattle or other animals for hire or profit or allow the same to be done in or upon the said demised premises but shall use the name for the purposes of a garden or pleasure grounds attached to the said dwelling house

(v) AND ALSO upon the breach of any of the aforesaid covenant the said lessee his Executors, Administrators or Assigns shall and will on demand pay or cause to be paid to the Secretary of State the sum of Rs. 500 by way of liquidated damages and not penalty and that ***on a***

second breach of the same it shall be lawful for the said Secretary of State his Successors or Assigns into and upon the same demised premises or any part thereof in the name of the whole to re-enter and the same to have again repossess and enjoy as in their former *estate anything herein contain to the contrary notwithstanding*

(vi) AND ALSO that the said lessee his Executors, Administrators and Assigns ***will not without the permission in writing of the said Collector*** *or of some person authorized by him in that behalf* ***construct thatch or cover or cause or permit to be constructed thatched or covered with grass reeds or other inflammable materials any building*** *which shall or may be erected or constructed upon the said piece or parcel of land or ground, unless such thatch or roof or inflammable material shall be protected by a covering of tiles.*

(vii) And that if in breach of the said lastly preceding convent any building which shall or may be erected or constructed upon the said piece or parcel of land or ground be thatched or covered with grass reeds or other inflammable materials without such permission as aforesaid and without being protected by a covering of tiles, ***it shall be lawful for the said Collector or for any person duly deputed by him to cause such building, shed, roof, covering or other inflammable material to be pulled down*** *after the expiration of twelve hours from the time of his giving or causing to be given notice to the said lessee his Executors, Administrators or Assigns to remove the same, which notice may be given either verbally or in writing upon the said premises*

(viii) AND ALSO ***shall and will at the end, expiration or other sooner determination of the said term peaceably and quietly leave surrender and yield up to the said Secretary*** *of State his Successors or Assigns the* ***said piece or parcel of land or ground together will all such of the said erection or building and all fixtures and things which at any time and during the said term shall be affixed or set up within or upon the said*** *demised premises as the said Secretary of State, his Successors and Assigns* ***shall desire to take over at a valuation according to the option hereinafter reserved to them*** *subject however to the conditions hereinafter contained.*

(ix) PROVIDED ALWAYS and it is hereby understood and agreed that ***in case the said Secretary of State shall not at the expiration of the said term desire to take over the said buildings, erections or fixtures or things which shall have at any time during the said term granted under the lease dated 1st day of January, 1894 or during the said term hereby granted affixed to or set up within or*** *upon the said premises* ***it shall be lawful for the said lessee his Executors, Administrators or Assigns to remove and take away the same as and for his and their absolute property,*** *but in case the said Collector shall at the expiration of the said term hereby granted* ***give notice to the said lessee*** *his Executors, Administrators or Assigns* ***of his intention to take over the buildings, erections, fixtures or things*** *which shall have been at any time during the said term granted under the lease dated 1st day of January, 1894 or during the said term hereby granted set up within or upon the said premises or any part thereof,* ***it shall be lawful for the said Secretary of State, his Successors and Assigns to take over the said buildings, erections, fixtures and things*** *or any part thereof with the land,*

*and i**n that case the said Secretary** of State, his Successors and Assigns **shall pay unto the said lessee** his Executors, Administrators or Assigns the value of such buildings, erections, fixtures or other things or of such part thereof as they shall so take over as aforesaid, **such value to be ascertained in case the parties themselves cannot agree, by the arbitration of two arbitrators,** the one to be named by the Secretary of State, his Successors and Assigns and the other by the said lessee his Executors, Administrators, or Assigns, and in case they shall differ by an umpire to be appointed by the said two arbitrators, or in case either of the parties hereto shall neglect to appoint an arbitrator for more than one fortnight after notice has been served upon them or him by the other party to appoint such arbitrator, then by the sole arbitration of the arbitrator appointed by such other of the parties hereto which arbitration shall be final.*

*(x) PROVIDED ALWAYS and it is hereby declared and agreed that **no compensation or payment shall be claimable by the said lessee** his Executors, Administrators or Assigns for any buildings, erections or fixtures erected, affixed or placed by him them or any of them in or upon the said premises or any part thereof, **in case these presents shall be determined by re-entry for forfeiture in which case the building, erections and fixtures shall rest absolutely in the said Secretary of State,** his Successors and Assigns as his own property **without any compensation** or payment in respect thereof.*

*(xi) PROVIDED FURTHER and it is hereby agreed that the said lessee his Executors, Administrators or Assigns **shall not assign or underlet or otherwise part with the possession of the said premises or any part thereof without the permission of the said Secretary of State his Successors or Assigns** (which permission may be signified by the said Collector or by such other person as the Government of the North-Western Provinces or the said Secretary of State may appoint in that behalf) for that express purpose had and obtained*

*(xii) PROVIDED ALWAYS that if the said lessee his Executors, Administrators or Assigns **shall assign or transfer these presents, or the lease or term hereby granted or created, or the unexpired portion of the said term,** or shall underlet the said premises or any part thereof with such permission as aforesaid unto any other person or persons of whom the said Collector shall approve, and if such person or persons shall engage and bind themselves to observe all the conditions, agreements and provisions of these presents in respect of such portion of the said term or of the said premises as shall have been so assigned or underlet to him as aforesaid and shall procure such assignments or sublease to be registered in such manner as shall be appointed by the said Secretary of State for the purpose of registering leases and other instruments of or relating to lands situate within the local limits of Allahabad (and for the registry of which assignments or subleases a fee of not more than Rs. 16 shall be paid by the person or persons tendering such assignments or sublease for registry) then and **not otherwise the liability of the said lessee his Heirs, Executors and Administrators for the purpose or subsequent observance and performance of the covenants on the lessee's part** herein contained, so far **as relates to the portion of the said term or of the said premises so assigned or***

underlet as aforesaid, but not further or otherwise, shall cease and determine, but without prejudice however to the right of auction of the said Secretary of State his Successors or Assigns in respect or on account of *any previous breach of any covenant or covenants herein contained,*

(xiii) PROVIDED ALWAYS and it is hereby desired that ***if the said yearly rents*** *hereby reserved or any part thereof shall at any time be in arrears and* ***unpaid for the space of 21 days next after any of the said days whereon*** *the same shall have become due* ***whether the same shall have been lawfully demanded or not*** *or* ***if there shall be any breach or non-observance by the lessee of any of the covenants hereinbefore contained on his part to be observed and performed then*** *and i****n any such case it shall be lawful for the Secretary of State notwithstanding the waiver of any previous cause or right of the re-entry to enter into and upon the said demised premises and the buildings and out buildings erected as aforesaid or any part thereof in the name of the whole and thereupon the same shall remain to the use of and be vested in the Secretary of State*** *and* ***this demise shall absolutely determine but which entry if made shall not prejudice*** *the right of the said Secretary of State his Successors or Assigns to damages for the previous breach of any covenant on the part of the said lessee his Executors, Administrators or Assigns herein contained.*

(xiv) AND the said Secretary of State doth hereby for himself his Successors and Assigns covenant with the said lessee his Executors, Administrators or Assigns that be the said lessee his Executors, Administrators or Assigns paying the rent hereinbefore reserved at the times and in manner hereinbefore appointed, and observing and performing all and singular the covenants, conditions and agreements herein contained and on his and their parts to be observed and performed according to the true intent and meaning of these presents, shall and may peaceably and quietly hold, use, occupy, possess and enjoy the said piece and parcel of land and ground and premises ***hereby demised during the said term of fifty years*** *hereby granted without any let, suit, denial, eviction or disturbance of or by the said Secretary of State, his Successors or Assigns or of or by any person or persons claiming or to claim through or under them."* (Emphasis added)

6. The lease rights of above Nazul Plot was transferred by Sri Morean in favour of Maharani Janki Kunwar through Management of Court of Wards, Bettiah Estate, Bihar in 1925. Maharani Janki Kunwar was daughter of Rai Bahadur Sidh Narain Singh, Talukedar of Anapur Estate, Allahabad. She was married to Maharaja Harendra Kishore Singh of Bettiah Raj in Bihar. Maharaja Harendra Kishore Singh died issuless and intestate in 1893. His first widow Maharani Sheo Ratan Kunwar succeeded Bettiah Estate. Maharani Sheo Ratan Kunwar died issuless in 1896. Thereafter Estate was succeeded by second widow Maharani Janki Kunwar. In 1897, Court of Wards, Bihar, holding Maharani Janki Kunwar incompetent to manage Estate, appointed Manager to look after management of property of Bettiah Raj Estate. The properties in State of U.P. were being managed by Court of Wards, Uttar Pradesh through Collector, Gorakhpur. In 1959, Court of Ward Act was repealed in State of U.P. and Board of Revenue was authorized to manage and administer affairs related with Court of Wards.

7. Transfer of disputed land by Sri E.E.Morean to Maharani Janki Kunwar was approved by Collector, Allahabad and she was recorded as lease-holder of aforesaid Nazul Plot in Nazul Property Register. On the disputed land there was a bungalow constructed for residence of Maharani Janki Kunwar, who was residing therein till her death i.e. 27.11.1954. The term of lease expired on 31.12.1960.

8. Maharani Janki Kunwar was also lease-holder of another contiguous Nazul plot no.114, Civil Station, Allahabad and had one property i.e. 474, Mutthiganj, Allahabad. After death of Maharani Kunwar on 27.11.1954, a number of persons claimed property of 'Bettiah Estate' and filed petitions before Court of Wards, Bihar to get property released in their favour. State of Bihar also claimed aforesaid property through Escheat. Father of petitioner, Badreshwari Saran Singh, was minor in 1954. He was grandson and nearest blood relation of Maharani Janki Kunwar. Therefore, he also filed petition on 07.01.1955 claiming property of Maharani Janki Kunwar. The claim of parties over property of Bettiah Estate of Maharani Janki Kunwar was considered by Sri M.S.Rao, Additinoal Member, Board of Revenue and vide resolution dated 18.01.1955 he held that Court would retain charge of properties until dispute is determined by a competent Civil Court.

9. Petitioner claimed that he, being the great grand son and blood relation of Maharani Janki Kunwar, was entitled to get lease deed executed in his favour in respect of disputed Nazul land.

10. In the year 1960, when period of lease was going to expire, Manager of Court of Wards of Bettiah Estate requested Collector, Allahabad for renewal of lease and pursuant thereto a demand note was raised to deposit Rs.21,889/- as premium and Rs.202.11 towards yearly rent. Manager, Court of Wards deposited aforesaid amount by way of cheque to Nagar Mahapalika, Allahabad. It was encashed by Nagar Mahapalika, Allahabad on 31.03.1963. Administrator, Nagar Mahapalika, Allahabad vide letter dated 18.03.1967 sent proposal to Collector, Allahabad requesting execution of fresh lease of land in dispute. Collector forwarded the said proposal vide letter dated 07.04.1967 to Commissioner, Allahabad but it remained pending. Then, Collector, Allahabad, on 25.10.1993 again sent a detailed letter to State Government seeking advice in the matter relating to land in dispute. The said letter is on record as Annexure 5 to writ petition.

11. Petitioner filed an application in 2009 along with Treasury Challan dated 07.12.2009 to Collector, Allahabad requesting to convert disputed Nazul land into freehold in favour of petitioner. Thereafter petitioner filed Writ Petition No.3970 of 2010, seeking a mandamus commanding State of U.P. and others to convert Nazul plot No.112, Civil Station, Allahabad into freehold and accept petitioner's Treasury Challan dated 07.12.2009. He also prayed for quashing of nomination/consent letter dated 25.02.1999 issued by Manager, Court of Wards, Bettiah Estate in favour of M/s PUAENS Samiti (respondent-7 in that case) and application submitted by said Samiti for freehold of land in dispute. The writ petition was decided vide judgment dated 18.2.2010. This Court categorically held that petitioner has no right to make any application for free hold. The relevant

observations in the judgment read as under :

*"We are satisfied that the **petitioner has no right to make any application for free hold."*** (Emphasis added)

12. With regard to entitlement of M/s PUAEN Samiti for freehold right of disputed Nazul land, this Court did not adjudicate the same but observed that if said application is considered by District Magistrate, he shall also look into the question "whether there was any right of nomination in favour of M/s PUAENS Samiti", and "whether any nomination or any exercise of freehold could be made in respect of land in dispute". Subject to above observations, writ petition was dismissed.

13. Petitioner then filed Review Petition No.103754 of 2010, which was also rejected vide order dated 11.10.2012. It is said that the order rejecting review application has been passed without any logical reason. It is further said that in the backdrop of aforesaid judgment, respondents 1, 3 and 4 have not executed any lease deed in favour of petitioner.

14. Again petitioner made a representation dated 26.09.2015 and then filed Writ Petition No.59253 of 2017, which is pending. Relying on Supreme Court judgment in **State of Bihar and others vs. Sri Radha Krishna Singh and others, AIR 1983 SC 684**, it is said that plea of escheat was not accepted by Supreme Court; property belonged to Maharani Janki Kunwar and under custody of Courts of Wards; petitioner being legal heir of Maharani Janki Kunwar is entitled to have claim over said property.

15. Further it is said that State of U.P. has filed Original Suit No.561 of 2001 in the Court of Civil Judge (Senior Division), seeking following reliefs:

*"1. That through a declaration in favour of the plaintiff and against the defendant, it be declared that the **plaintiff is owner of the properties of Betia Rajya detailed in Schedule 'A' & 'B' which earlier belonged to Late Maharaja Harinder Kishore Singh as it** has devolved on it for want of any heir of Late Maharaja and his two widows.*

*2. That through decree of injunction in favour of the plaintiff against the Defendants, the defendants be restrained **from disputing the plaintiff's title on the properties in suit** and also from ejecting the plaintiff's forcibly over the suit properties.*

3. That the cost of the suit be awarded to the plaintiff against the defendants.

4. That such other or further relief be awarded to the plaintiff against the defendants to which the plaintiff is found entitled." (Emphasis added)

16. Petitioner has pleaded that land in dispute, therefore, is in the custody of Board of Revenue. Claim of State of U.P. on the ownership of land in dispute is subjudice before Court of Civil Judge (Senior Division), Gorakhpur; hence, notice issued by respondent 3 for re-entry on land in dispute is illegal; it is also in violation of principles of natural justice as no opportunity of hearing has been given before issuing the aforesaid notice; Respondents have usurped authority of Board of Revenue, which has custody of property in dispute after repeal of Court of Wards Act, 1959 *(hereinafter referred to as "Act, 1959")* and notice is also in

violation of judgment and direction given by Supreme Court in **State of Bihar and others vs. Sri Radha Krishna Singh and others (supra).**

17. On behalf of respondents 3 and 4, a counter affidavit has been filed stating that disputed land having total area of 11433 Sq. meters was demised through an Indenture of Lease dated 05.12.1924 for a period of 50 years commencing from 01.01.2011 in favour of E.E.Morean by Secretary of State for India; the lease in question is governed by the provisions of Government Grants Act, 1895 *(hereinafter referred to as "GG Act, 1895")*; Lease expired on 31.12.1960; it has not been renewed thereafter; Lease deed contained provision of re-entry and in pursuance thereof State has exercised its right of resumption/re-entry; though GG Act, 1895 has been repealed by Repealing and Amending (Second) Act, 2017 *(hereinafter referred to as "Repeal Act, 2017")* notified on 05.01.2018 but by virtue of Section 4, right, title, obligation or liability already acquired, accrued or incurred have been saved; the disputed land has been sought to be resumed for the purpose of constructing a 'Multi Purpose Building' and for functioning of Industrial Tribunal/Labour Court, which is to be developed by Allahabad Development Authority renamed as Prayagraj Development Authority (Now titled and described as "PDA"); Petitioner's claim for freehold right has already been rejected by this Court vide judgment dated 18.02.2010 and the said judgment has attained finality, petitioner, therefore, had no right in respect of land in dispute; property in dispute of Bettiya Estate relates to property owned by Maharaja Harendra Kishore Singh and his widows but property in question was never property of Maharaja Harendra Kishore Singh or his widows; Nazul is owned by State, hence question of title over land in dispute of Maharaja Harendra Kishore Singh does not arise; Petitioner has no right to claim execution of lease deed in his favour; respondents have rightly proceeded to resume land in dispute for public purposes and writ petition is liable to be dismissed.

18. Writ-2 has been filed by three petitioners namely Kunwar Udai Singh, Kunwar Vijay Singh and Kunwar Ajay Singh, all three sons of late Rajkumari Bina Singh alias Purnima Kunwar wife of Late Kunwar Narayan Singh. It has impleaded State of U.P. through Principal Secretary, Awas Avam Sahari Niyojan; District Magistate, Allahabad and Allahabad Development Authority (Now 'PDA') as respondents 1, 2 and 3, respectively. They have prayed for issue of a writ of certiorari for quashing notice dated 18.08.2018, which is impugned in Writ-1 also. They have further sought a declaration that property in dispute i.e. Nazul Plot No.112, Civil Station (Thornhill Road) also known as 7, Stretchy Road, Civil Lines, Allahabad, belongs to petitioners and not amenable to proceedings emanating from notice dated 18.8.2018 or any other action of respondents to re-enter and acquire the same under any law or administrative action.

19. The case set up by petitioners is that they are sons of late Kunwar Narayan Singh (Father) and (late) Rajkmari Bina Singh alias Purnima Kunwar (Mother). Sri Kunwar Narayan Singh died on 11.02.1975 and Rajkumari Bina Singh alias Purnima Kunwar died on 13.11.2012. Maharaha Harendra Kishore

Singh succeeded to throne of Bettiah Raj and died intestate on 26.03.1893. He left a testamentary instrument i.e. 'Will', dated 13.09.1892, in favour of Yuvraj Ramni Singh. Will dated 13.09.1892 was approved by King of England vide memorandum dated 25.05.1938. After death of Maharaja Harendra Kishore Singh, Yuvraj Ramni Singh succeeded to the throne of Bettiah Raj. A letter was issued by Governor of Fort William, Bengal on 14.04.1937 addressed to Yuvraj Ramni Singh that order for his enthronement upon Rajgaddi of Bettiah Raj would be passed very soon and he shall be informed accordingly and till then he must have patience. Later on, Sri Rai Sahib J.O.N Shukla, Assistant Political Officer, Dehradun, U.P. sent a letter dated 07.10.1938 to Yuvraj Ramni Singh, remitting him a sum of Rs.1,55,000/- towards Annual State Grant for the year 1936-1937. Yuvraj Ramni Singh filed Original Suit No.428 of 1938 in the Court of Civil Judge, Allahabad, which was decreed vide judgment dated 19.03.1947 declaring him Successor of Late Maharaja Harendra Kishore Singh and absolute owner of Bettiah Raj. He was also declared successor of all rights, privileges, honours, title and moveable and immoveable properties of Maharaja Harendra Kishore Singh of Bettiah Raj. Appeal No.357 of 1947 filed by one Bhagwati Prasad Singh, who was defendant-11 in the said suit was dismissed by District Judge, Allahabad vide judgment and decree dated 30.07.1949. Some suits were filed in the State of Bihar and ultimately all these cases came to be decided by Supreme Court in **State of Bihar & Ors. Vs. Radha Krishna Singh and others (Supra)** wherein findings recorded by Court in para 265 read as under:

"(1) That the plaintiff has no doubt proved that he was a direct descendant of Gajraj Singh but that is of no assistance to him so long as it is not shown that the missing links the relationship of Gajraj Singh with Ramruch singh, and Ramruch Singh with Bansidhar Singh, and that Bansidhar Singh was one of the sons and that Bansidhar Singh was one of the sons of Hirday Narain Singh have been established.

(2) That the plaintiff has miserably failed to prove that Gajraj Singh was in any way connected with Bansidhar Singh, or that Ramruch Singh was the son of Bansidhar Singh and brother of Debi Singh.

(3) That Ex. J was admissible in evidence though of no assistance to the plaintiffs.

(4) That the documents, transactions, judgments, robkars, plaints, written statements, etc. produced by the plaintiffs are either inadmissible or irrelevant.

(5) That the oral evidence on the point of genealogy is utterly unreliable and unworthy of credence.

(6) That neither the documentary or the oral evidence adduced by the plaintiffs is sufficient to prove their case and hence the ***plaintiffs have failed to discharge the initial onus which lay on them to prove their case.***

(7) That the majority judgment is wrong in law and on facts and has arrived at factually wrong and legally incorrect conclusions and, therefore, cannot be upheld.

(8) That we entirely agree with the judgment of M.M.Prasad, J. so far as the plaintiffs' case is concerned.

(9) The ***plaintiffs have not proved that they are the next and the***

nearest reversioners of the late Maharaja *(Harendra Kishore Singh)" (Emphasis added)*

20. With respect to claim of 'escheat' put forward by States of Bihar and U.P., in **State of Bihar and others vs. Sri Radha Krishna Singh and others (supra)**, Court said that for the properties under management of Court of Wards of State of Bihar and Uttar Pradesh, status quo will be maintained until any of the State is able to prove its plea of 'Escheat' in a properly constituted action.

21. Petitioners' mother being daughter of Yuvraj Ramni Singh, who died on 14.12.1950, was the only surviving legal representative but she was not aware of her rights and entitlement over assets of Bettiah Raj including disputed Nazul land. She filed an application dated 01.10.2003 before Board of Revenue claiming release and handing over possession of entire moveable and immoveable properties to her from management and possession of Court of Wards relating to Bettiah Raj. Board of Revenue did not take any action and in the meantime petitioner's mother died. Thereupon, petitioners' came to this Court in Writ Petition No.52820 of 2014 complaining that no decision has been taken on their application dated 01.10.2003. It was disposed of vide judgment dated 26.9.2014 directing Chairman, Board of Revenue, to take decision and pass a reasoned order. The order passed by this Court reads as under:

"Heard learned counsel for the petitioners and learned Standing Counsel for the State respondents.

In substance, the petitioners appear to be aggrieved by non-disposal of their application dated 1.10.2003 made before the Chairman Board of Revenue, U.P. at Lucknow.

It is contended that since 2003, the application is pending before the Chairman Board of Revenue but no order has yet been passed thereon.

Having heard learned counsel for the parties, this writ petition is disposed of with the observation that the petitioner's application be decided in accordance with law by passing a reasoned speaking order by the Chairman Board of Revenue expeditiously

It may be clarified that I have neither addressed myself on the maintainability of the petitioner's application nor its merit and the Chairman Board of Revenue is free to pass an independent order in accordance with law."

22. Thereafter, petitioners filed an application under Section 13 of Bengal Court of Wards Act, 1879 claiming release of possession of entire moveable and immoveable properties from management and possession of Court of Wards relating to Bettiah Raj. The said application has been registered as Case No.11 of 2018. Petitioner then received impugned notice dated 18.8.2018. Petitioners submitted reply to District Magistrate/Collector, Allahabad vide letter dated 29.09.2018 stating that disputed land and Nazul Land is part of assets of Bettiah Raj, which has been succeeded by petitioners and therefore notice is wholly illegal.

23. The notice has been challenged on the ground that it amounts to contempt of judgment in **State of Bihar and others vs. Sri Radha Krishna Singh and others (supra)** passed by Supreme Court; property in question cannot be acquired

by State except by due process of law and impugned notice amounts to violation of Article 300-A of Constitution; lease having expired in 1960, notice has been issued after 58 years without following procedure prescribed in law and in any case notice is barred by limitation; it is hit by doctrine of acquiescence and prescription; notice is unreasoned and case of petitioners for release is already pending before Board of Revenue hence it is to impede process of justice and there is an attempt to usurp property at the back of petitioners; it is contrary to statutory provisions and judicial precedence; Respondents have no right of re-entery/ resumption of disputed property; Property has ceased to be governed by provisions of GG Act, 1895; Impugned notice is devoid of legal statutory sanction; status of property in dispute has not been considered and it is otherwise illegal.

24. A counter affidavit has been filed on behalf of respondent-2 i.e. District Magistrate, Allahabad in which pleadings are basically the same as stated in counter affidavit filed in Writ-1. It is additionally stated that succession dispute with respect to Bettiah Estate has nothing to do with property in dispute since it is already owned by State of Uttar Pradesh and not being property of Maharaja Harendra Kishore Singh, aforesaid dispute has nothing to do with the property in question.

25. A rejoinder affidavit has been filed by petitioners, wherein an application filed by Collector, Allahabad has been placed on record stating that Nazul Plot No.112 was property of Maharani Bettiah Raj; in the disputed land, Industrial Tribunal/Labour Court is working but since March, 1967, rent has been collected by Manager, Court of Ward, Bettiah Estate while Collector demanded rent from Tribunal, therefore, till the right of collection of rent is decided, rent should be deposited in Court. On that application filed by Industrial Tribunal, Court permitted deposit of rent in the Court. In State of Uttar Pradesh, right of management of Estate of Bettiah Raj is within the competence of District Administration on behalf of Board of Revenue, therefore, amount of rent, which has been deposited, be released to State and future rent by Industrial Tribunal should be paid to Administrator /Collector, Allahabad. Further, Secretary, Board of Revenue, Bihar (Patna) protested against deposit of rent in State Government Treasury vide letter dated 7.10.1974. Rest averments in rejoinder affidavit basically are reiteration of what has been said in writ petition hence we shall discuss the same in the process of discussion of issues raised in these petitions, wherever required.

26. Learned counsel for petitioner appearing in WP-1 contended that property right of Betttiah Estate has been ascertained by Supreme Court in **State of Bihar and others vs. Sri Radha Krishna Singh and others (supra)**; petitioner Lov Mandeshwari Saran Singh is great grandson of Maharani Janki Kunwar, thereafter after her death on 27.11.1954, he succeeded estate of Maharani Janki Kunwar, which included unexpired lease rights over land in dispute; there was some dispute over succession of estate of Maharani Janki Kunwar, therefore, estate of Maharani Janki Kunwar went into the hands of Court of Ward, Bihar for management and petitioner is entitled to transfer of leased land by Court of Ward, Bihar; when he submitted his application, Court of Ward held possession of land in dispute on behalf of legal heirs of

Maharani Janki Kunwar; when it made application for renewal of lease, it was on behalf of such legal heirs; it is in furtherance thereof that petitioner applied for freehold in 2009 but this Court did not consider the matter properly and writ petition was dismissed holding that petitioner has no right for freehold of disputed land; claim of State Government with regard to ownership of land in dispute is subjudice in the Court of Civil Judge (Senior Division), Gorakhpur in Original Suit No.561 of 2001 hence, notice issued to petitioner for re-entry/resumption of land is patently illegal; respondents have no right to resume land since dispute of ownership is still pending; impugned notice is also in violation of principles of natural justice and contrary to what has been said by Supreme Court in **State of Bihar and others vs. Sri Radha Krishna Singh and others (supra)**.

27. Petitioners of WP-2 claim themselves to be owner of land in dispute hence it is contended that State is not entitled to re-enter or resume the same. Here also reliance has been placed on Supreme Court judgment in **State of Bihar and others vs. Sri Radha Krishna Singh and others (supra)**. It is contended that notice in question amounts to contempt of judgment of Supreme court aforesaid; further notice in question amounts to acquisition of land by State without due process of law and notice is in violation of Article 300-A of Constitution; resumption is sought to be made after 58 years of expiry of lease without following procedure prescribed in law; it is barred by limitation, hit by doctrine of 'prescription' and 'acquiescence'; notice is unreasoned and dispute relating to release of land is pending before Board of Revenue, hence impugned notice would impede process of justice thereat; property in question ceased to be governed by provisions of GG Act, 1895 and moreso since it has been repealed therefore, State cannot take recourse of provisions of said Act.

28. Certain facts, which emerge from above pleadings we find it appropriate to place in a chronological manner hereinbelow for proper appreciation of dispute:

Date	**Events**
01.01.1894	Nazul Plot No.112, Civil Station, Allahabad, area 11,414 Sq.Meters was leased to to M/s Agra Savings Bank Ltd. (in liquidation at that time) for a period of 17 years for dwelling purposes.
31.12.1910	Period of above lease expired.
01.01.1911	Renewal of lease of Nazul Plot 112 (earlier Civil Station now called Thornhill Road) area 2.821 acres in favour of Enite Edward Morean vide lease deed dated 05.12.1924 for a period of 50 years.
1925	Enite Edward Morean transferred lease rights of Nazul Plot No.112 in favour of Maharani Janki Kunwar thrugh Management Court of Ward, Bettiah Estate, Bihar.
27.11.1954	Maharani Janki Kunwar died.

31.12.1960 Lease expired.

… Court of Ward, Bihar deposited premium and yearly rent of one year requesting renewal of lease by cheque to Nagar Mahapalika,Allahabad.

31.03.1963 Nagar Mahapalika, Allahabad encashed cheque.

18.03.1967 Administrator, Nagar Mahapalika, Allahabad sent proposal to Collector, Allahabad for execution of fresh lease.

07.04.1967 Collector sent proposal to Commissioner, Allahabad.

25.10.1993 Collector, Allahabad sent letter to State Government seeking its guidance over land in dispute.

25.02.1999 Manager of Court of Ward, Bettiah Estate gave consent letter/nomination in favour of M/s PUAENS Samiti to get land in dispute freehold.

2009 Petitioner of WP-1 filed application and deposited requisite amount to Collector, Allahabad for conversion of Nazul into freehold in his favour.

WP-3970 of 2010 Writ Petition filed by petitioner WP-1 seeking mandamus commanding Collector to accept Treasury Challan of petitioner WP-1 and convert Nazul Plot 112, Civil Station, Allahabad into freehold.

18.02.2010 Writ Petition No. 3970 of 2010 was dismissed holding that petitioner of WP-1 has no right to make any application for freehold.

11.10.2012 Review Application filed by petitioner of WP-1 was rejected.

26.09.2015 Petitioner of WP-1 again made a representation requesting for freehold.

WP-59253 of 2017 Writ petition filed by petitioner WP-1 and the same is pending.

29. There is another set of facts relating to ownership of Bettiah Estate, Bihar and we find it appropriate to place the same in chronological manner hereat.

Date
Events

… Maharani Janki Kunwar (daughter of Rai Bahadur Sidh Narain Singh, Talukdar of Anapur Estate) married to Maharaja Harendra Kishore Singh of Bettiah Raj, Bihar.

1893 Maharaj Harendra Kishore Singh died issueless.

1896 The first widow of Maharaj Harendra Kishore Singh i.e. Maharani Sheo Ratan Kunwar, who succeeded Bettiah Estate after death of Maharaj Harendra Kishore Singh, also died issueless.

1897 Court of Ward, Bihar held Maharani Janki Kunwar incompetent to manage Estate i.e. Bettiah Estate of Maharaj Harendra Kishore Singh, thus appointed Manager.

27.11.1954 Maharani Janki Kunwar died.

1959 Court of Ward Act repealed and thereupon Board of Revenue was authorized to manage and administer affairs related to Court of Ward.

30. There is third set of facts borne out from WP-2 and the same is also stated in a chronological manner as under:-

Date	Events
…	Maharaja Harendra Kishore Singh succeeded to throne of Bettiah Raj, Bihar.
13.09.1892	Maharaja Harendra Kishore Singh executed a Testamentary Instrument i.e. will in favour of Yuvraj Ramni Singh.
26.03.1893	Maharaja Harendra Kishore Singh died, hence, in terms of will Yuvraj Ramni Singh succeeded Bettiah Raj Estate.
14.04.1937	Governor of Ford William sent a letter to Yuvraj Ramni Singh informing that throne of Bettiah Raj Estate would soon be assigned to him and till then he must have patience.
25.05.1938	King of England approved will dated13.09.1892.
07.10.1938	Yuvraj Ramni Singh got Rs. 1,55,000/- towards annual estate grant for the year 1936-37 from Assistant Political Officer, Dehradun.
Original Suit No. 428 of 1938	Yuvraj Ramni Singh filed suit in the Court of Civil Judge, Allahabad, for declaration as successor of late Maharaja Harendra Kishore Singh and absolute owner of Bettiah Raj.
19.03.1947	Aforesaid suit was decreed.
Appeal No.357 of 1947	One Bhagwati Prasad Singh, defendant -11 in aforesaid suit filed appeal.
30.07.1949	Appeal filed by Bhagwati Prasad Singh was dismissed.
14.12.1950	Yurraj Ramni Singh died. His daughter i.e.

mother of petitioners of W.P. 2 succeeded to the entire estate.

11.02.1975 Kunwar Narayan Singh, petitioners' father died.

2001 Original Suit No.561 of 2001 has been filed by State of U.P. in the Court of Civil Judge (Senior Division), Gorakhpur, seeking declaration that plaintiff is owner of property of Bettiah Raj, detailed in Schedule 'A' & 'B'.

23.11.2012 Raj Kumari Bina Singh alias Purnima Kunwar, petitioners' mother died.

31. Above facts make it clear that petitioners are trying to create confusion in property of Bettiah Estate/Bettiah Raj and Nazul Plot No.112, Civil Station, Allahabad, with which we are concerned. It is admitted by parties that plot no.112, which is disputed land in both these writ petitions, is 'Nazul land' and owned by State Government. It is also not in dispute that State Government has never transferred its ownership rights to erstwhile Ruler of Bettiah Raj and Bettiah Estate or anyone else. No material in this regard has been placed on record and it is also not the case of petitioners at all.

32. Here we are not concerned with title/ownership of Estate of Bettiah Raj as to whom the said ownership devolved after death of Maharaj Harendra Kishore Singh when he died in 1893 or thereafter. Before us, succession of ownership rights over estate of Bettiah Raj is not a subject matter of adjudication. Both the petitioners have heavily relied on Supreme Court judgment in **State of Bihar and others vs. Sri Radha Krishna Singh and others (supra)** to contend that notice in question amounts to contempt of aforesaid judgment of Supreme Court but neither anything has been explained to us during course of argument nor anything has been shown as to how notice, which has been questioned in both writ petitions amounts to contempt of aforesaid judgment. We have also gone through entire judgment rendered by Constitution Bench (four Judges Bench) of Supreme Court dealing with set of appeals arising from Special Bench judgment of Patna High Court. From the aforesaid judgment, we find that Raja Hirday Narain Singh was admittedly owner of properties of Bettiah Estate. Maharaja Harendra Kishore Singh was a direct descendant of Raja Hirday Narain Singh. After the death of Maharaja Harendra Kishore Singh on 26.03.1893, claiming his impartible estate, a number of claims were set up by several persons. Property of Bettiah Estate comprised of huge moveable and immovable properties, such as land, houses, jewellery, etc. One suit i.e. T.S. No.3 of 1955 was filed at Varanasi by one Ram Bux Singh. Aforesaid suit, however, was withdrawn on 09.04.1956. Another suit was filed on 16.08.1955 in the Court of Sub-Judge, Patna and it was registered as T.S. No.44 of 1955. Plaintiff in that case was Suresh Nandan Singh. Third suit i.e. T.S. No.25 of 1958 was filed in the Court of Sub-Judge, Patna on 11.04.1958 by Raja Jugal Kishore Singh. Forth suit i.e. T.S. No.5 of 1961 was filed initially on 12.03.1959 in the Court of Sub-Judge, Chhapra, which was later transferred to the Court of Sub-Judge, Patna and re-numbered as T.S. 5 of 1961. Here

Principal Plaintiff was Radha Krishna Singh son of Bhagwati Prasad Singh. Matter reached Supreme Court as a result of decree passed in favour of Radha Krishna Singh by High Court while other two suits were dismissed.

33. Main contest before Supreme Court was between Radha Krishna Singh, State of Bihar and State of Uttar Pradesh, who claimed that Estate of Bettiah State vested in respective State Governments by 'escheat' after death of two widows of Maharana Harendra Kishore Singh who died issuless.

34. The entire history of Bettiah Raj has been given in the judgment of Supreme Court and, in our view, it is not necessary to go into that detail for the reason that in the present case we are not concerned with title/ownership/succession dispute of Estate of Bettiah Raj. Suffice it to mention that after death of second widow of Maharaja Harendra Kishore Singh i.e. Maharani Janki Kunwar, management of Bettiah Estate went into hands of Court of Ward, Bihar and property in State of Uttar Pradesh came to be administered by Court of Ward, U.P. Succession and ownership dispute has to be settled in the light of respective litigation. Even in the suit filed by State of U.P. i.e. Original Suit No.561 of 2001, as we have noticed above, plaintiff i.e. State of U.P. has claimed ownership of property of Bettiah Raj which earlier belonged to late Maharaja Harendra Kishore Singh, on the ground that it devolved upon State of U.P. for want of any heir of Late Maharaja Harendra Kishore Singh and his two widows.

35. We are concerned here with Nazul Plot 112, which admittedly is owned and vested in State of U.P. and its title and ownership has never been transferred to anybody else at any point of time. Neither any such argument was advanced before us, nor there is any pleading, nor any material to support it.

36. Petitioners assume that transfer of lease rights of Nazul land is same thing as if title has been transferred. This assumption is wholly fallacious and lacks any legal sanctity.

37. In the present case, disputed Nazul land was let out through 50 years' Indenture of Lease executed by Secretary of State of India in Council, in favour of Enite Edward Morean w.e.f. 01.01.1911. In 1925, lease rights of Nazul Plot was transferred by Enite Edward Morean to Maharani Janki Kunwar through Management of Court of Ward, Bettiah Estate, Bihar. Maharani Janki Kunwar died on 27.11.1954 issuless. Term of lease also expired on 31.12.1960. Petitioners of both the writ petitions claiming rights in property of Maharani Janki Kunwar have undergone various litigation but Nazul plot was not property of Maharani Janki Kunwar at all. Therefore, question of any interest acquired by petitioners in Nazul land does not arise at all.

38. The very basic assumption on the part of petitioners in this regard is patently fallacious, illegal and erroneous in law.

39. At this stage, it would be appropriate for this Court to examine and made it clear as to what is 'Nazul'.

40. Every land owned by State Government is not termed as 'Nazul' and

therefore it has become necessary to understand, what is 'Nazul'.

41. State Government may own land by having acquired and vested in various ways, which includes vesting of land in the capacity of a Sovereign body and having right of bona vacantia. Property may also be acquired and owned by State by way of acquisition under the Statute relating to acquisition of land or by purchase through negotiation or gift by an individual or in similar other manners. All such land, which is owned and vested in the State Government results in making State, owner of such land, but in legal parlance, the term "Nazul" is not applicable to all such land.

42. It is only such land which is owned and vested in the State on account of its capacity of Sovereign, and application of right of bona vacantia, which is covered by the term 'Nazul', as the term is known for the last more than one and half century.

43. In Legal Glossary 1992, fifth edition, published by Legal Department of Government of India, at page 589, meaning of the term 'Nazul' has been given as 'Rajbhoomi, i.e., Government land'.

44. Nazul is an Arabic word. It refers to a land annexed to Crown. During British Regime, immoveable property of individuals, Zamindars, Nawabs and Rajas when confiscated for one or the other reason, it was termed as 'Nazul property'. The reason being that neither it was acquired nor purchased after making payment. In old record, when such land was referred in Urdu, this kind of land was shown as 'Jaidad Munzabta'.

45. For dealing with such property, under the authority of Lt. Governor of North Western Provinces, two orders were issued in October, 1846 and October, 1848. Therein, after the words "Nazul property", its english meaning was given as 'Escheats to the Government'. Sadar Board of Revenue on May 20, 1845 issued a circular order in reference to "Nazul land" and in para 2 thereof it mentioned, "The Government is the proprietor of those land and no valid title to them can be derived but from the Government". Nazul land was also termed as "Confiscated Estate". Under Circular dated July 13, 1859, issued by Government of North Western Provinces, every Commissioner was obliged to keep a final confiscation statement of each District and lay it before Government for orders.

46. Right of King to take property by 'escheat' or as 'bona vacantia' was recognized by common law of England. Escheat of property was Lord's right of re-entry on real property held by a tenant, dying intestate, without lawful heirs. It was an incident of Feudal Tenure and based on the want of a tenant to perform Feudal services. On the tenant dying intestate without leaving any lawful heirs, his estate came to an end and Lord, by his own right and not by way of succession or inheritance from the tenant, re-entered real property as owner. In most cases, land escheated to Crown as the 'Lord Paramount', in view of gradual elimination of Intermediate or Mesne lords since 1290 AD. Crown takes as 'bona vacantia' goods in which no one else can claim property. In **Dyke v. Walford 5 Moore PC 434= 496-13 ER 557 (580)** it was said 'it is the right of the Crown to bona vacantia to property which has no

other Owner'. Right of the Crown to take as "bona vacantia" extends to personal property of every kind. The escheat of real property of an intestate dying without heirs was abolished in 1925 and Crown thereafter could not take such property as bona vacantia. The principle of acquisition of property by escheat, i.e., right of Government to take on property by 'escheat' or 'bona vacantia' for want of a rightful owner was enforced in Indian territory during the period of East India Company by virtue of Statute 16 and 17 Victoria, C. 95, section 27.

47. We may recollect, having gone through history, that prior to 1857, several Estates were taken over by British Company i.e. East India Company by way of annexation. Doctrine of lapse applied in Jhansi was another kind of above mentioned two principles.

48. The above provisions had continued by virtue of section 54 of Government of India Act, 1858, section 20(3)(iii) of Government of India Act, 1915 and section 174 of Government of India Act, 1935. After enactment of Constitution of independent India, Article 296 now continues above provision and says :

'Subject as hereinafter provided, ***any property in the territory of India which****, if this Constitution had not come into operation,* ***would have accrued to His Majesty or, as the case may be, to the Ruler of an Indian State by escheat or lapse, or as bona vacantia for want of a rightful owner, shall if it is property situate in a State, vest in such State****, and shall, in* ***any other case, vest in the Union.****'* (Emphasis added)

49. Article 296, therefore, has retained power of State to get ownership of such land, in respect whereof principle of 'escheat', 'lapse' or 'bona vacantia' would have been applicable prior to enforcement of Constitution of India. The above power continued to apply after enactment of Constitution with the only modification that if such land is situate within the territory of State Government, it will vest in State and in other cases, it will vest in Union of India. Vesting of land and giving ownership to State Government or Union of India under Article 296 is clearly in respect of a land, which will come to it by way of 'escheat', 'lapse' or 'bona vacantia' and not by way of acquisition of land under some Statute or purchase etc.

50. In **Pierce Leslie and Co. Ltd. Vs. Miss Violet Ouchterlony Wapsnare, AIR 1969 SC 843** Court has considered the above principles in the context of 'Sovereign India' as stands under Constitution after independence, and, has observed :

"....in this country the Government takes by escheat immoveable as well as moveable property for want of an heir or successor. *In this country escheat is not based on artificial rules of common law and is not an incident of feudal tenure.* ***It is an incident of sovereignty and rests on the principle of ultimate ownership by the State of all property within its jurisdiction".*** (Emphasis added)

51. Court also placed reliance on **Collector of Masulipatam v. C. Vencata Narainapah 8 MIA 500, 525; Ranee Sonet Kowar v. Mirza Himmut Bahadoor (2) LR 3 IA 92, 101, Bombay Dyeing and Manufacturing Co. Ltd. v. State of Bombay [1958] SCR 1122,**

1146, Superintendent and, Legal Remembrancer v. Corporation of Calcutta [1967] 2 SCR 170, 204.

52. Judicial Committee in **Cook v. Sprigg (1899) AC 572** while discussing, 'what is an act of State', observed :

"The taking possession by Her Majesty, whether ***by cession or by any other means by which sovereignty can be acquired,*** *was an act of State."*
(Emphasis added)

53. This decision has been followed in **Raja Rajinder Chand v. Mst. Sukhi, AIR 1957 SC 286.**

54. In **Nayak Vajesingji Joravarsingji v. Secretary of State for India in Council AIR 1924 PC 216**, Lord Dunedin said :

"When ***a territory is acquired by a sovereign State for the first time, that is an act of State.*** *It matters not how the acquisition has been brought about. It may be* ***by conquest, it may be by cession following on treaty, it may be by occupation of territory hitherto unoccupied by a recognised ruler. In all cases the result is the same.*** *Any inhabitant of the territory can make good in the municipal courts established by the new sovereign only such rights as that sovereign has, through his officers, recognised. Such* ***rights as he had under the rule of predecessors avail him nothing.****"* (Emphasis added)

55. In **Dalmia Dadri Cement Co. Ltd. v. CIT [1958] 34 ITR 514 (SC) : AIR 1958 SC 816**, Court said (page 523 of 34 ITR) :

"The ***expression 'act of State'*** *is, it is scarcely necessary to say, not limited to hostile action between rulers resulting in the occupation of territories. It* ***includes all acquisitions of territory by a sovereign State for the first time, whether it be by conquest or cession.****"*
(Emphasis added)

56. In **Promod Chandra Deb v. State of Orissa AIR 1962 SC 1288**, Court said, 'Act of State' is the taking over of sovereign powers by a State in respect of territory which was not till then a part of its territory, either by conquest, treaty or cession, or otherwise.

57. To the same effect was the view taken by a Constitution Bench in **Amarsarjit Singh v. State of Punjab AIR 1962 SC 1305**, where in para 12, Court said:

"It is settled law that ***conquest is not the only mode by which one State can acquire sovereignty*** *over the territories belonging to another State, and that the* ***same result can be achieved in any other mode which has the effect of establishing its sovereignty.****"*
(Emphasis added)

58. In **Thakur Amar Singhji v. State of Rajasthan AIR 1955 SC 504**, in para 40, Court said :

"The **status of a person must be either that of a sovereign or a subject.** *There is no tedium quid. The law does not recognise an intermediate status of a person being partly a sovereign and partly a subject and when once it is admitted that the Bhomicharas had acknowledged the sovereignty of Jodhpur their status can only be that of a subject.* ***A subject might occupy an exalted position and enjoy special privileges, but***

he is none the less a subject..."
(Emphasis added)

59. In **State of Rajasthan vs. Sajjanlal Panjawat AIR 1975 SC 706** it was held that Rulers of the erstwhile Indian States exercised sovereign powers, legislative, executive and judicial. Their firmans were laws which could not have been challenged prior to the Constitution. Court relied on earlier decisions in **Director of Endowments, Govt. of Hyderabad vs. Akram Ali, AIR 1956 SC 60, and Sarwarlal vs. State of Hyderabad, AIR 1960 SC 862.**

60. In **Promod Chandra Deb vs. State of Orissa AIR 1962 SC 1288** "act of the State" was explained in the following words :

*'an "act of State" may be the taking over of sovereign powers either **by conquest or by treaty or by cession or otherwise**. It may have happened on a particular date by a public declaration or proclamation, or it may have been the result of a historical process spread over many years, and sovereign powers including the right to legislate in that territory and to administer it may be acquired without the territory itself merging in the new State.'*

61. This decision has been followed later in **Biswambhar Singh vs. State of Orissa 1964 (1) SCJ 364**, wherein Court said:

*"16. Thus, a **territory acquired by a sovereign State is an Act of State but the land comprising territory does not become the land owned by State.** The **land owned by State may come to it in various ways, like confiscation, purchase, escheat or bona vacantia, gift, etc.** In such a case the ownership vests in State, like any other individual and **State is free to deal with the same in a manner like any other owner may do so.***

*17. Thus **'Nazul' is a land vested in State for any reason whatsoever that is cession or escheat or bona vacantia, for want of rightful owner or for any other reasons and once land belong to State,** it will be difficult to assume that State would acquire its own land. It is per se impermissible to acquire such land by forcible acquisition under Act, 1894, since there is no question of any transfer of ownership from one person to another but here State already own it, hence there is no question of any acquisition."*
(Emphasis added)

62. Thus the land in question which is admittedly 'Nazul', belonged to the category as discussed above i.e. it came to be vested and owned by State in its capacity of Sovereign and right of bona vacantia. When acquisition is made under the provisions of a Statute, purpose of acquisition is already known and State pay its price but when land is owned by State, which is Nazul, objective of use of such land is not predetermined but it can be utilized by State for larger public welfare and its benefit, as necessitated from time to time. In other words 'Nazul' land forms the assets owned by State in trust for the people in general who are entitled for its user in the most fair and beneficial manner for their benefit. State cannot be allowed to distribute such largesse by pick and choose manner or to some selected groups etc.

63. Thus, land in question remained with State Government being its owner.

Lease right transferred to Maharani Janki Kunwar ceased to continue with Lessee after her death that too issueless, and in any case after expiry of term of lease on 31.12.1960.

64. The next submission that State cannot acquire land without acquisition proceeding is also misconceived, inasmuch as, there could not have been any occasion of acquisition of land vested in State, since State cannot acquire land already owned by it or vested in it. Law in this regard is well settled.

65. In **Secretary of State Vs. Narain Khanna AIR 1942 Privy Council 35**, it was held:

"where Government acquires any property consisting of land and buildings, and where land was the subject matter of Government grant, subject to power of resumption by Government at any time on giving one month's notice, then ***compensation was payable only in respect of such buildings as may have been authorized to be erected and not in respect of land.****"* (Emphasis added)

66. A Division Bench of Judicial Commissioner in **Md. Wajeeh Mirza vs. Secretary of State for India in Council, AIR 1921 Oudh 31**, said as under:

"when Government itself claims to be owner of the land, there can be no question of its acquisition and the provisions of the Land Acquisition Act cannot be applicable. This opinion expressed by Judicial Commissioner has been approved in ***Sharda Devi vs. State of Bihar and another (supra)****. Court reiterate in* ***Sharda Devi vs. State of Bihar and another (supra)*** *that land or an interest in land pre-owned by State cannot be subject-matter of acquisition by State.* ***If the land in question is Government land, there is no question of initiating proceedings of acquisition at all. Government would not acquire the land, which already vests in it.****"*

(Emphasis added)

67. In **Sharda Devi Vs. State of Bihar and another, 2003 (3) SCC 128**, Court has said as under:

"the State does not acquire its own land for it is futile to exercise the power of eminent domain for acquiring rights in the land, which had already vests in the State. It would be absurdity to comprehend the provisions of Land Acquisition Act being applicable to such land wherein ownership or the entirety of rights already vests in State. In other words, ***land owned by State on which there are no private rights or encumbrances is beyond the preview of provisions of Land Acquisition Act.****"*

(Emphasis added)

68. In **Collector of Bombay Vs. Nusserwanji Rattanji Mistri (1996) 10 SCC 150**, it was held:

"under the provision of Land Acquisition Act, Government acquires the sum total of all private interests subsisting in them. ***If Government has itself an interest in land, it has only to acquire other interest outstanding thereof so that it might be in a position to pass it on absolutely for public user.****"*

(Emphasis added)

69. In **State of U.P. and another Vs. Lalji Tandon (dead) through Legal Representatives (2004) 1 SCC 1** referring to the decision in **Sharda Devi**

vs. State of Bihar (supra), court said as under:

"the notification and declaration under Sections 4 and 6 of the Land Acquisition Act for acquisition of the land i.e. the site below the bungalow are meaningless. It would have been different if the State would have proposed the acquisition of lease hold rights and/or the superstructure standing thereon, as the case may. But that has not been done."

70. Further Claim of petitioner in WP-1 about conversion of lease into freehold under Government policy is thoroughly misconceived, inasmuch as, neither petitioners are Lessees nor otherwise entitled to claim freehold under any of the relevant Government Orders.

71. We could have gone in further detail on this aspect but this issue has already been considered by this Court while dismissing earlier petition of petitioner of WP-1 i.e. Writ Petition No.3970 of 2010 vide judgment dated 18.02.2010 observing that petitioner has no right to make any application for freehold and that is why we express our full agreement therewith and reiterate the same. The same reasoning applies to petitioners of WP-2 also.

72. In the circumstances, petitioners have no claim whatsoever over land in dispute and hence, they have no occasion to challenge impugned notice also for want of any right, interest etc. in the property in dispute.

73. Further, petitioners of WP-2 have claimed their right through alleged succession to Bettiah Raj by Yuvraj Ramni Singh pursuant to testamentary instrument i.e. Will dated 13.09.1892. Original Suit No. 428 of 1938 filed by Yuvraj Ramni Singh was decreed by Civil Judge, Allahabad, holding him successor of Late Maharaja Harendra Kishore Singh and absolute owner of Bettiah Raj. Since land in dispute was not part of Estate of Bettiah Raj and it was never owned by Maharaja Harendra Kishore Singh, therefore, aforesaid suit and decree passed by Civil Court in favour of Yuvraj Ramni Singh will have no concern or effect with respect to land in dispute. Their claim is also wholly devoid of any merit.

74. Now coming to right of State for resumption and re-entry, petitioners are only stranger so far as disputed land is concerned. Lease right has already expired on 31.12.1960. Lease has not been granted to anyone else. Petitioners have no claim for conversion into freehold. Hence right of State to get its own land is not obstructed in any manner.

75. Moreover, rights of State to resume its Nazul land is settled in **Azim Ahmad Kazmi and others vs. State of U.P. and Another (2012) 7 SCC 278** as also by a Division Bench of this Court in **Writ Petition No. 62588 of 2010 (M/s Madhu Colonizers Pvt. Ltd. vs. State of U.P. and others)** decided on 2.4.2013 that State has unrestricted power of re-entry to its own property and, that too, for public purpose and the above authorities are applicable to these petitions.

76. Both the writ petitions therefore are wholly misconceived. Petitioners have no claim over property in dispute, therefore other issues raised by petitioner with regard to Repeal Act, 2017 etc. are not relevant and only academic. However,

even in respect of effect of Repeal Act, 207, we do not find any merit in the submission advanced on behalf of petitioners.

77. It is contended that Section 4 of Repeal Act, 2017 only protects right, title, obligation or liability already acquired, accrued or incurred by State of U.P. under GG Act, 1895 to resume Nazul land according to resumption clause of lease-deed prior to repeal of GG Act, 1895 and nothing more than that. Since no right, title, obligation or liability was acquired or incurred or accrued to State Government by resorting to resumption under resumption clause before repeal of GG Act, 1895, resumption sought with reference to GG Act, 1895 after its repeal is wholly illegal.

78. Meaning of words 'accrue', 'acquired' and 'incurred' have been given in various paragraphs of writ petitions but we find that basic aspect has been ignored and missed by petitioners Terms of lease as soon as lease was executed caused in creating rights, obligations, duties and interest of both the parties i.e. Lessor and Lessee in accordance with terms and conditions of lease. Relevant clause says that it shall be lawful for the Secretary of State notwithstanding waiver of any previous cause or right of re-entry to enter into and upon said demised premises whereupon the same shall remain to the use of and vested in Secretary of State and said demise shall absolutely determine out. The Lessee, who agreed with said terms incurred duty to allow such re-entry to State whenever Government do exercises its right of re-entry and here lies the right of State to re-enter the land, which was required by State. By virtue of execution of lease deed and accepting the same, Lessee incurred liability not to obstruct the said right of State i.e. Lessor.

79. Petitioners, in our view, have misconstrued the provisions of Section 4 vis-a-vis terms of lease and therefore, entire argument in this respect is devoid of merit hence rejected.

80. The other issues have been raised with respect to resumption being barred by limitation, doctrine of 'prescription', 'acquiescence' and non speaking notice as also violative of Article 300-A of Constitution. However, counsel for petitioners has not placed anything to show as to how above argument are substantiated. It could not be disputed that petitioners are not claiming any right founded on adverse possession and therefore, doctrine of 'prescription' has no application. No limitation could be shown in the case in hand, which is applicable. The property belongs to State, therefore, question that Article 300-A of Constitution is violated also does not arise.

81. Record shows that petitioners are not in possession over the land is dispute and an Industrial Tribunal is running over it. Moreover, even possession of lessee after determination of lease or expiry of period of lease becomes that of "Tenant at sufferance", therefore, even a quit notice is not necessary to be given and Section 106 of TP Act, 1882 is not at all attracted. Relying on earlier decision in **R.V. Bhupal Prasad vs. State of A.P. (1995) 5 SCC 698** in a recent decision in **Sevoke Properties Ltd. vs. West Bengal State Electricity Distribution Company Ltd. AIR 2019 SC 2664**, Court held that once it is admitted by lessee that term of lease has

expired, lease stood determined by efflux of time and in such case, a quit notice under Section 106 is not required to be given. Court has said as under :

"Once the lease stood determined by efflux of time, there was no necessity for a notice of termination Under Section 106."

(Emphasis added)

82. In the above authority, Court held that after expiry of period of lease, status of Lessee becomes that of 'Tenant at sufferance'. 'Tenant at sufference' is one who comes into possession of land by lawful title, but who holds it by wrong after termination of term or expiry of lease by efflux of time. The tenant at sufferance is one who wrongfully continues in possession after extinction of a lawful title. There is little difference between him and a trespasser. Quoting from Mulla's Transfer of Property Act (7th Edn.) at page 633, Court observed that tenancy at sufferance is merely a fiction to avoid continuance in possession operating as a trespass. It has been described as the least and lowest interest which can subsist in reality. It, therefore, cannot be created by contract and arises only by implication of law when a person who has been in possession under a lawful title continues in possession after that title has been determined, without consent of person entitled. A "tenancy at sufferance" does not create relationship of landlord and tenant. Court further quoted from page 769 of Mulla's transfer of Property Act (7th Edition), that act of holding over after expiration of term does not necessarily create a tenancy of any kind. If lessee remains in possession after determination of term, the common law Rule is that he is a tenant at sufferance.

83. One more interesting fact we may notice at this stage. Petitioners of WP-2 are staking their claim over land in dispute on the basis of alleged Will executed by Maharaja Harendra Kishore Singh on 13.09.1892 and he died on 26.03.1893. On that date, land in dispute was neither part of Bettiah Raj estate nor even lease was executed in favour of either Maharaja Harendra Kishore Singh or Maharani Janki Kunwar. As per record, lease of land in dispute was executed on 01.01.1894 in favour of M/s Agra Savings Bank Ltd. for a period of 17 years, which expired on 31.12.1910. Thereafter, renewed lease deed was executed on 05.12.1924 with effect from 01.01.1911 in favour of Enite Edward Morean. In 1925, only lease rights were transferred by Enite Edward Morean in favour of Maharani Janki Kunwar. Thus, question of aforesaid lease land becaming part of Bettiah Estate, which could have been subject matter of Will dated 13.09.1892 executed by Maharaja Harendra Kishore Singh, would not arise and the very foundation and basis of petitioners of WP-2 falls on the ground and renders their entire claim wholly fallacious and misconceived. This reason alone is sufficient to reject their claim.

84. The **last question** up for consideration is "whether re-entry/resumption of land by Lessor i.e. State Government is valid?"

85. So far as validity of resumption of land in 'public purpose', it could not be disputed that land has been sought to be required by State for 'public purpose'. Allahabad City has been selected for development as a Smart City and respondents have pleaded that demand of lot of land has been made by various

Government departments since various Offices, Workshops, Parks, Parking places etc. have to be constructed. The land in dispute has been found suitable for erection of building for 'Industrial Tribunal cum Labour Court' and construction of 'Multipurpose Building' by A.D.A. and development whereof is public purpose. In fact, on this aspect, no substantial argument has been made and in our view, resumption of land by State is for 'public purpose'.

86. In view of above discussion, we do not find any merit in both the petitions. The writ petitions are accordingly dismissed.

87. No costs.

(2019)12 ILR A1255

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.11.2019

BEFORE
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Writ-C No. 35512 of 2019

Aryavart Bank ...Petitioner
Versus
Appellate Auth. Payment of Gratuity Act, 1972 & Dy. Chief Labour Commissioner (Central) Kanpur & Ors. ...Respondents

Counsel for the Petitioner:
Sri Amrish Sahai

Counsel for the Respondents:
C.S.C., Sri Girish Kumar Srivastava, Sri Chandra Bhan Gupta

A. Civil Law - Payment of Gratuity Act, 1972 – Section 7(7) – Ist Proviso – Limitation for filing Appeal – Extension of time – It is only the case where the appeal has been filed beyond the prescribed time period of 60 days from the date of receipt of the order passed under subsection (4), the first proviso to sub section (7) would be required to be invoked by filing an application for condonation of delay – Appellate Authority would thereafter be required to exercise its discretion in the matter and in case it records its satisfaction that the appellant was prevented by sufficient cause from preferring the appeal within the prescribed period of 60 days, the said period may be extended by a further period of 60 days. (Para 12)

Held – In this view of the matter, the order dated 05/06.08.2019 having been passed by the Appellate Authority without consideration of the facts relevant for deciding the issue of limitation the same cannot be legally sustained and is thus set aside.

Writ Petition allowed. (E-1)

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

1. Heard Sri Amrish Sahai, learned counsel for the petitioner, Sri Girish Kumar Srivastava, learned counsel for the first and second respondents and Sri Chandra Bhan Gupta, learned counsel appearing for the third respondent.

2. Counsel for the petitioner has confined his prayer to the prayer clause no.1 in terms of which a challenge has been raised to the order dated 05/06.08.2019 passed by the Appellate Authority under the Payment of Gratuity Act, 1972/Deputy Chief Labour Commissioner (Central), Kanpur in File No.K-36(89)2019/C.1., whereby the appeal under Section 7(7) of the Payment of Gratuity Act, 19721 has been rejected as being barred by limitation.

3. Contention of the counsel for the petitioner is that as per the terms of

Section 7(7) of the P.G. Act, 1972 the limitation prescribed for filing an appeal is 60 days from the date of receipt of the order under challenge, which is extendable by a further period of 60 days upon sufficient cause being shown.

4. It is submitted that in the instant case the application filed by the third respondent for a direction for payment of gratuity amount, registered as Case No.JHS-36(23)/2018, was allowed by the Controlling Authority under the P.G. Act, 1972/Assistant Labour Commissioner (Central), Jhansi by means of an order dated 18.03.2019, and the said order was received by the petitioner on 09.04.2019.

5. It is further submitted that the order dated 18.03.2019 was modified in terms of a corrigendum bearing the same date i.e. 18.03.2019 and this corrigendum was received by the petitioner on 16.04.2019. Accordingly, learned counsel for the petitioner submits that the appeal under Section 7(7) of the P.G. Act, 1972 which had been preferred before the Appellate Authority on 13.06.2019 was within the period of limitation of 60 days as provided for.

6. It is contended that the appeal having been filed within the prescribed period of limitation there was no occasion for filing of an application seeking condonation of delay and in this view of matter the order passed by the Appellate Authority dismissing the appeal as being barred by limitation for the reason of non-filing of the application for condonation of delay, cannot be sustained.

7. Sri Chandra Bhan Gupta, learned counsel for the third respondent raises a dispute with regard to the date of receipt of the corrigendum order dated 18.03.2019 and submits that there is no material on record to demonstrate that the appeal was filed within a period of 60 days from the date of receipt of the corrigendum order.

8. Be that as it may, the order passed in appeal does not show any consideration of the facts relevant for deciding the issue with regard to limitation so as to sustain the conclusion drawn by the Appellate Authority.

9. In this regard it would be apposite to refer to the provisions contained under sub-section (7) of Section 7 of the P.G. Act, 1972 with regard to filing of an appeal against an order passed under sub-section (4) of Section 7. For ease of reference sub-section (7) of Section 7 of the P.G. Act, 1972 is being extracted below:-

"7. Determination of the amount of Gratuity.-- x x x x x

(7) Any person aggrieved by an order under sub-section (4), may, within sixty days from the date of the receipt of the order, prefer an appeal to the appropriate Government or such other authority as may be specified by the appropriate Government in this behalf :

Provided that the appropriate Government or the appellate authority, as the case may be, may if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal within the said period of sixty days, extend the said period by a further period of sixty days.

Provided further that no appeal by an employer shall be admitted unless at the time of preferring the appeal, the appellant either produces a certificate of

the controlling authority to the effect that the appellant has deposited with him an amount equal to the amount of gratuity required to be deposited under sub-section (4), or deposits with the appellate authority such amount."

10. A plain reading of the aforementioned provision indicates that any person aggrieved by an order under sub-section (4) of Section 7, may, within 60 days from the date of receipt of the order, prefer an appeal to the appropriate Government or such other Authority as may be specified by the appropriate Government in this behalf. In terms of the first proviso the appropriate Government or the Appellate Authority, as the case may be, may if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal within the said period of 60 days, extend the said period by a further period of 60 days.

11. It is thus seen that as per terms of sub-section (7) of Section 7 of the P.G. Act, 1972 the prescribed limitation for filing an appeal against an order order under sub-section (4), is 60 days from the date of receipt of the order, and in a case where the appeal is preferred within the aforesaid prescribed time period the same would be held to be within limitation and there would be no requirement for seeking extension of the time period.

12. It is only the case where the appeal has been filed beyond the prescribed time period of 60 days from the date of receipt of the order passed under sub-section (4), that the first proviso to sub-section (7) would be required to be invoked by filing an application for condonation of delay, and the Appellate Authority would thereafter be required to exercise its discretion in the matter and in case it records its satisfaction that the appellant was prevented by sufficient cause from preferring the appeal within the prescribed period of 60 days, the said period may be extended by a further period of 60 days.

13. In this view of the matter, the order dated 05/06.08.2019 having been passed by the Appellate Authority without consideration of the facts relevant for deciding the issue of limitation the same cannot be legally sustained and is thus set aside.

14. The matter is remitted back to the Appellate Authority for a fresh decision in the light of the observations made above.

15. It would be open to parties to appear before the Appellate Authority and make their submissions on the point of limitation. The appeal, if found by the Appellate Authority to be within prescribed period of limitation, as provided under sub-section (7) of Section 7 of the P.G. Act, 1972 may be heard and decided on its merits thereafter.

16. It is made clear that this Court has not expressed itself on the rival contentions sought to be raised by the parties, either on the point of limitation or on merits.

17. The writ petition is **allowed** to the extent indicated above.

(2019)12 ILR A1257

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.10.2019

BEFORE
THE HON'BLE YASHWANT VARMA, J.

Writ-C No. 36416 of 1995

The State of U.P. & Anr. ...Petitioners
Versus
The A.D.J. Sonbhadra & Ors.
...Respondents

Counsel for the Petitioners:
Sri Prabodh Gaur, C.S.C., Sri Sanjai Goswami

Counsel for the Respondents:
S.C., Sri H.M. Srivastava, Sri O.P. Singh, Sri S.K. Rao

A. Constitution of India – Article 48A – Forest Conservation Act, 1980 – Section 2 – Environment protection – Forest conservation – Statutory interdict enshrined in Section 2 represents a momentous measure of 'we the people' to preserve and protect forests and the environment. This singular provision finally gave effect to the constitutional obligation placed upon the State by virtue of Article 48A of the Constitution – Decision of Apex Court in T.N. Godavarman Thirumulpad's case that the Act, 1980 is enacted with a view to check further deforestation which ultimately results in ecological imbalance may not be ignored. (Para 17 & 18)

B. Review – Maintainability – Absence of statutory provision – Formulation of adjudication process by Apex Court – Special procedure was formulated and evolved by the Supreme Court and put in place by virtue of its decisions of Banwasi Sewa Ashram's case. It was this unique and distinctive process of adjudication as evolved therein that was mandated to be adhered to by the adjudicating authorities while processing claims laid under the 1927 Act. It was this exceptional process of adjudication in terms of which all decisions taken by the FSO were liable to be placed before the Additional District Judge for scrutiny, appraisal and confirmation. The orders passed in Banwasi Sewa Ashram thus constituted the source and foundation for the authority which was to be exercised by the FSO's and Additional District Judges. (Para 20 & 21)

C. Civil Law - Indian Forest Act, 1927 – Section 4 & 5 – Notification dated 04.07.1970 issued u/s 4 of Act, 1927 – On the date when the notification came to be promulgated, the prohibition and bar as engrafted in Section 5 of the 1927 Act came to operate, which clearly mandates that no rights shall be acquired in or over the land comprised in such notification except by succession or under a grant of contract in writing made in that behalf by the Government – Consequently after 04.07.1970 no rights could have been acquired on land which came to be included in the notification u/s 4. (Para 28)

Held – While the private respondent asserts to have been in possession of the land prior to its vesting under the provisions of 1950 Act, no material or evidence was either alluded to or brought to the attention of the Court. That material also does not appear to have been placed for the consideration of either the FSO or the Additional District Judge. This, the Court notes, since no such material or evidence was ever noticed by either the Forest Settlement Officer or the Additional District Judge in the orders which were framed. It has also come on the record that the initial order made by the FSO on 30 August 1986 was ultimately recalled by that authority on 25 February 1992. The respondent never assailed that order in any proceedings.

Reverting to the individual facts, the Court notes that the Additional District Judge on both occasions has clearly failed to bear in mind that the initial order passed by the FSO 30 August 1986 had itself been recalled by that authority subsequently. That subsequent order of 25 February 1992 has neither been alluded to nor considered. The respondent did not lead any other evidence that may have established that he had been in cultivatory

possession from prior to 4 July 1970 when the notification under Section 4 came to be issued or from before 15/16 May 1950 being the order of the State Government transferring Dudhi Forest to the Forest Department. The Additional District Judge rests his decision solely on the spot inspection report which formed the basis of the original order which was ultimately recalled. The Additional District Judge also does not rest his decision on any other independent or cogent evidence which may have established that the factual position as found by the FSO was incorrect. Viewed in that backdrop, it is manifest that the prayer for review was clearly liable to be granted.

D. Civil Law - U.P. Zamindari Abolition and Land Reform Act, 1950 – Section 131-A – Scope – Overriding Effect – In its barest form, Section 131A seeks to protect the possession of persons on land which may vest in a Gaon Sabha by virtue of Section 117 of that Act – However, provision of Section 131A is neither stated to have overriding effect over the other parts of the 1950 Act nor it is worded to be in supersession of other statutes that may operate on the subject of forests. As is manifest, that provision is not worded so as to apply notwithstanding a prohibition or restraint contained in any other enactment which touches the field of forests and rights that may accrue on land on which forests may exist. (Para 23)

E. Meaning of word 'Forest' – Expression forest to be understood not just as defined in dictionaries but also to any land which answered the description of forest as generally understood as also land recorded as forest irrespective of ownership. The rights consequently claimed by virtue of Section 131A cannot be recognised as flowing unhindered by the restrictions imposed in that decision. (Para 26)

F. Interpretation of statute – Harmonious construction – Section 131A of Act, 1950 as is evident does not override or eclipse the prohibition put in place by Section 5 of Act, 1927 – In order to accord a harmonious construction upon Section 131A of the 1950 Act bearing in mind Section 5 of the 1927 Act, it must be interpreted to extend at best to land held in cultivatory possession from prior to the issuance of the notification under Section 4 – Assertion of a right under Section 131A and a recognition thereof in law would also have to be tested on the anvil of Section 2 of the 1980 and the orders of the Supreme Court referred to above – The extent of protection which can be recognised cannot be viewed in the abstract and in any case cannot be adjudged without bearing in mind the provisions made in the 1927 and the 1980 Acts. (Para 27)

Writ Petition allowed. (E-1)

List of cases cited: -

1. Banwasi Sewa Ashram Vs. State of U.P. And Others (1986) 4 SCC 453

2. T.N. Godavarman Thirumulpad Vs. Union of India (1997) 2 SCC 267

3. Judgment of Supreme Court dated 13.11.2000 passed in Centre for Environmental Law Vs. Union of India W.P. (Civil) No. 337 of 1995

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

1. Heard Sri Sanjai Goswami, the learned Additional Chief Standing Counsel and Sri Rajesh Srivastava, learned Standing Counsel for the State and Sri O.P. Singh, learned Senior Advocate who has appeared for the respondents.

2. This petition challenges the orders dated 30 January 1993 and 24 May 1994 passed by the Additional District Judge. The challenge itself arises in the backdrop of proceedings taken in District Sonbhadra pursuant to the procedure as evolved and laid in place by the Supreme Court in **Banwasi Sewa Ashram Vs.**

State of U.P. And Others1. The challenge arises in the context of the proposal of the State to constitute a reserved forest in accordance with the provisions made in the **Indian Forest Act, 1927**2. On the record the Court finds an order dated 15/16 May 1950, issued by the Deputy Secretary in the Government of Uttar Pradesh and addressed to the Secretary, Board of Revenue conveying to him the sanction of the Governor to the transfer of the "Dudhi Forest" from the control and administration of the Revenue Department to the Department of Forest. The document stands testimony to the fact that the Dudhi Forest was under the control and administration of the State Government from prior to the date of this communication. On 4 July 1970, the State proceeded to issue a notification under Section 4 of the 1927 Act embodying its intent to constitute a reserved forest in the district. The land over which the respondent claims interest admittedly forms part of this notification. It appears that asserting that he had been in continuance possession of this land and was also cultivating the same, he approached the Forest Settlement Officer for a declaration in respect of his status and title which was granted on 30 August 1986. In terms of this order, the Forest Settlement Officer is stated to have recognized the respondent to be a bhumidhar in possession over the land in question.

3. It is pertinent to note that in the meanwhile the Supreme Court received a letter on or about 1983 which was treated as a petition under Article 32 of the Constitution. The grievance which was raised in that letter was in respect of the rights of tribals and traditional forest dwellers who were deprived of their status and rights of possession and cultivation over lands which had come to be included in notifications issued under Section 4 of the 1927 Act by the State Government. The Supreme Court was apprised that tribals and other individuals in possession of the land had been deprived of their right without the statutory procedure of due enquiry and settlement of claims having been undertaken. Entertaining that challenge the Supreme Court on 22 August 1983 passed the following interim order:

"The writ petition is adjourned to October 4, 1983 in order to enable the parties to work out a formula under which claims to Adivasis or tribals in Dudhi and Robertsganj Tehsils, to be in possession of land and to regularisation of such possession may be investigated by a high powered committee with a view to reaching a final decision in regard to such claims. Meanwhile, no further encroachments shall be made on forest land nor will any of the Adivasis or tribals be permitted under colour of this order or any previous order to cut any trees and if any such attempt is made, it will be open to the State authorities to prevent such cutting of trees and to take proper action in that behalf but not so as to take away possession of the land from the Adivasis or tribals."

4. The case before the Supreme Court proceeded further and ultimately after taking into consideration the reports of the Commissioners submitted to it and the peculiar facts of the case as appearing before it, it framed detailed directions for the consideration and disposal of claims that were to be raised. Those directions as embodied in its detailed decision of 20 November 1986 rendered on that petition read thus:

"(1) So far as the lands which have already been declared as reserved forest

under Section 20 of the Act, the same would not form part of the writ petition and any direction made by this Court earlier, now or in future in this case would not relate to the same. In regard to the lands declared as reserved forest, it is, however, open to the claimants to establish their rights, if any, in any other appropriate proceeding. We express no opinion about the maintainability of such claim.

(2) In regard to the lands notified under section 4 of the Act, even where no claim has been filed within the time specified in the notification as required under section 6(c)of the Act, such claims shall be allowed to be filed and dealt with in the manner detailed below:

I. Within six weeks from December 1, 1986, demarcating pillars shall be raised by the Forest Officers of the State Government identifying the lands covered by the notification under Section 4 of the Act. The fact that a notification has been made under Section 4 of the Act and demarcating pillars have been raised in the locality to clearly identify the property subjected to the notification shall be widely publicised by beat of drums in all the villages and surrounding areas concerned. Copies of notices printed in Hindi in abundant number will be circulated through the Gram Sabhas giving reasonable specifications of the lands which are covered by the notification. Sufficient number of inquiry booths would be set up within the notified area so as to enable the people of the area likely to be affected by the notification to get the information as to whether their lands are affected by the notification, so as to enable them to decide whether any claim need be filed. The Gram Sabhas shall give wide publicity to the matter at their level. Demarcation, as indicated above, shall be completed by January 15,1987. Within three months therefrom, claims as contemplated under section 6(c) shall be received as provided by the statute.

II. Adequate number of record officers shall be appointed by December 31, 1986. There shall also be five experienced Additional District Judges, one each to be located at Dudhi, Muirpur, Kirbil of Dudhi Tehsil and Robertsganj and Tilbudwa of Robersganj Tehsil. Each of these Additional District Judges who will be spared by the High Court of Allahabad, would have his establishment at one of the places indicated and the State shall provide the requisite number of assistants and other employees for their efficient functioning. The learned Chief Justice of the Allahabad High Court is requested to make the services of five experienced Additional District Judges available for the purpose by December 15, 1986 so that these officers may be posted at their respective stations by January 1, 1987. Each of those Additional District Judges would be entitled to 30 per cent of the salary as allowance during the period of their work. Each Additional District Judge would work at such of the five notified places that would be fixed up by the District Judge of Mirzapur before December 20, 1986. These Additional District Judges would exercise the powers of the Appellate Authority as provided under section 17 of the Act.

III. After the Forest Settlement Officer has done the needful under the provisions of the Act, the findings with the requisite papers shall be placed before the Additional District Judge of the area even though no appeal is filed and the same shall be scrutinized as if an appeal has been taken against the order of the

authority and the order of the Additional District Judge passed therein shall be taken to be the order contemplated under the Act.

3. When the Appellate Authority finds that the claim is admissible, the State Government shall (and it is agreed before us) honour the said decision and proceed to implement the same. *Status quo* in regard to possession in respect of lands covered by the notification under Section 4 shall continue as at present until the determination by the appellate authority and no notification under Section 20 of the Act shall be made in regard to these lands until such appellate decision has been made."

5. It becomes pertinent to note that the Supreme Court at the very outset clarified that the directions as framed would have no application to land which had already come to be included in a final notification issued under Section 20 of the 1927 Act. The directions consequently stood confined to land notified under Section 4 and in respect of which settlement proceedings had not concluded. The detailed directions framed inter alia provided for survey and settlement operations being undertaken by the FSO's in accordance with the statutory obligations placed under the 1927 Act, the appointment of adequate number of survey officials, the publication of notices in the area of the proposal of the Government to create a reserved forest and the establishment of special courts manned by Additional District Judges to facilitate the process of adjudication of claims. The Supreme Court, in a significant departure from the adjudicatory procedure otherwise provided for under the 1927 Act, provided that all orders that may come to be passed or made by the FSO's would be mandatorily placed for the consideration and scrutiny of the Additional District Judges concerned and treated as *suo moto* appeals. It was further provided that the decision taken by the Additional District Judges on these *suo moto* appeals shall be taken to be the final orders as contemplated under the 1927 Act. The special procedure was evolved principally to protect the interests of the large number of tribals and traditional forest dwellers who otherwise were handicapped in seeking legal redress for protection of their rights by virtue of their social status.

6. It would also be relevant to advert to another order passed on 8 February 1989 in **Banwasi Sewa Ashram**, where the Supreme Court held that land which had been included in a notification issued under Section 4 of the 1927 Act, would also be subject to the rigours of Section 2 of the **Forest Conservation Act, 19803** which had in the meantime been promulgated. The Court takes note of this order since it would be of some significance while evaluating the correctness of the submissions which were advanced.

7. Reverting back to the issue of settlement of claims in accordance with the procedure evolved by the Supreme Court, it appears that on the detailed directions being brought to the attention of the respondents, the order of 30 August 1986 conferring the status of bhumidhar on the private respondents was recalled by the FSO on 25 February 1992. In the meanwhile and pursuant to the process of settlement that was initiated in accordance with the procedure prescribed in **Banwasi Sewa Ashram**, the claim of the respondent fell for consideration before

the FSO. The FSO in his order of 26 March 1992 noted that the respondent rested his claim solely on the order of the Forest Settlement Officer, which had already been annulled on 25 February 1992. It noted that the nature of the land was such that it was suitable to be included and made part of the proposed reserved forest and consequently upheld the inclusion of the land in the notification issued under Section 4. In accordance with the procedure laid down in **Banwasi Sewa Ashram**, that order was then placed before the Additional District Judge for scrutiny by way of a *suo moto* appeal. The Additional District Judge on 30 January 1993 proceeded to reverse the decision of the FSO and held that since the earlier spot inspection had found the petitioner to be in possession of the land and having partly cultivated it, the plot in question was liable to be excluded from the proposed reserved forest.

8. In the meanwhile, the Supreme Court while in seisin of proceedings in **Banwasi Sewa Ashram** took note of various complaints that were made with respect to the manner in which settlement proceedings had moved forward. It took note of the complaints made both by landholders as well as the Forest Department of apparent and patent errors having been committed by the FSO's in the disposal of claims. Bearing those complaints in mind, on 10 May 1991 it passed the following order:

"... It appears that there have been taken some instances where decisions have been taken but they required to be reviewed. Both the parties, counsel for the parties agrees, that review can be filed within 30 days from today and if so filed the plea of limitation shall not avail...."

9. The complaints with respect to settlement proceedings were yet again noticed by it in its order dated 16 February 1993, when it proceeded to frame the following additional directions:

"4. The reports of the Commissioners (January 1, 1993) and of Justice Loomba reveal that there have been some errors whereby rights of non-occupants have been recorded without on-the-spot inspection, hearings and to the prejudice of the actual occupants on the spot. The Commissioners and Justice Loomba have identified 17 forest villages in this respect which are as under:

1. Chattarpur 2. Goetha
3. Jaampani 4. Dhuma
5. Sukhra 6. Supachuan
7. Naudiha 8. Madhuvan
9. Karhiya (Dudhi) 10. Nagwa
11. Gulaljharia 12. Kudri
13. Ghaghri 14. Kirbil
15. Sagobaandh 16. Jarha
17. Bailhathhi

Agreeing with the Reports of the Commissioners, Justice Loomba and the contentions of Mr. Rajiv Dhawan, learned counsel for the petitioner, we direct that special review be undertaken in the above 17 villages only in respect of those cases where there are complaints from the individuals and the errors are patent on the record. The Forest Department shall also be at liberty to ask for special review in the cases pertaining to the above villages where according to

the Department records have not been correctly prepared."

10. On **4 October 1993**, the Supreme Court was apprised by the Department of Forest that various orders passed by the Forest Settlement Officer and the Additional District Judges merited review and reconsideration. Dealing with that prayer it entered the following observations in its order of 4 October 1993: -

".....He seeks directions from this court for the review of those cases. The forest department may bring those cases to the notice of the Additional District Judge, who shall consider those cases in accordance with law…."

11. These three orders are also of significant import since the 1927 Act otherwise did not confer any right of a substantive review on the adjudicatory authorities constituted under that enactment. The State in purported exercise of the liberty granted by these orders preferred a petition for review before the Additional District Judge. That review petition has been dismissed on 24 May 1994. It is in the above backdrop that the instant writ petition came to be preferred challenging the orders passed by the Additional District Judge originally as well as on the review petition preferred thereafter.

12. Appearing in support of the petition, Sri Goswami, the learned Additional Chief Standing Counsel has submitted that the review was liable to be granted since on both occasions the Additional District Judge had failed to either allude to or consider the fact that the order made in favour of the respondent by the FSO on 30 August 1986 no longer survived having been recalled on 25 February 1992. It was submitted that the spot inspection report which was referred to in those proceedings was the same on which the order of 30 August 1986 rested. It was contended that in any case no rights could be recognized as having accrued in favour of the respondent post the issuance of the notification under Section 4 on 4 July 1970. According to Sri Goswami, the rights which had been claimed by the respondent on the basis of possession could not have been accorded recognition in law in view of the provisions made in Section 5 of the 1927 Act. Section 5 as amended in its application to the State of U.P. vide Act No. 23 of 1965 reads thus: -

"5. Bar of accrual of forest rights.-- After the issue of notification under section 4 no right shall be acquired in or over the land comprised in such notification, except by succession or under a grant or a contract in writing made or entered into by or on behalf of the Government or some person in whom such right was vested when the notification was issued; and no fresh clearings for cultivation or for any other purpose shall be made in such land, nor any tree therein felled, girdled, lopped, tapped, or burnt, or its bark or leaves stripped off, or the same otherwise damaged, nor any forest-produce removed therefrom, except in accordance with such rules as may be made by the State Government in this behalf."

13. It is pertinent to note that while Section 5 in the principal enactment stops at restraining individuals from clearing land included in a Section 4 notification for cultivation or any other purpose, the

U.P. Amendment travels further and injuncts persons from cutting or felling trees or removing forest produce from such land. According to Sri Goswami there was an abject failure on the part of the respondent to establish any right or title over the land existing from prior to the issuance of the notification under Section 4. Sri Goswami drew the attention of the Court to the fact that the nature of the land as was found to exist on the spot was duly taken into consideration by the FSO in his order of 26 March 1992 and that the Additional District Judge clearly erred in overturning that verdict and failing to grant the prayer for review as made.

14. Refuting those submissions, Sri O.P. Singh, learned Senior Counsel who has appeared for the private respondent addressed the following submissions. According to Sri Singh, the Court must bear in mind that no provision of the 1927 Act grants a power of substantive review on the Appellate Authority. The power to undertake a substantive review, it was contended, must be statutorily conferred and cannot be available to be exercised in the absence of a specific provision in that respect being made in the statute. Sri Singh referring to the order of 4 October 1993 submitted that the direction of the Supreme Court was not liable to be viewed as conferring on the Additional District Judge the authority to undertake a substantive review. He submits that after noticing the contentions addressed it was only observed in that order that it would be open to the Forest Department to approach the Additional District Judges by way of an appropriate application that may be considered and disposed of *"in accordance with law"*. According to Sri Singh, the tenor of the directions and observations entered in that order establishes that the question of the maintainability of the review petition was not decided and it was left open to the Additional District Judges to consider any application that the Forest Department chose to make in accordance with law. In view thereof it was submitted that the Additional District Judge could not have entertained the review petition. According to Sri Singh once the Additional District Judge had proceeded to allow the claim of the respondent on 30 January 1993 the same attained finality and therefore could not have been reviewed.

15. Sri Singh has further placed reliance upon the provisions made in Section 131-A of the **U.P. Zamindari Abolition and Land Reforms Act 1950**4 to submit that notwithstanding the orders passed by the authority in proceedings undertaken under the 1927 Act, the law itself accords protection to persons like the respondent in cultivatory possession of land and the extension of bhumidhari rights albeit on a non transferable basis. That provision is in the following terms: -

"131-A. Bhumidhari rights in Gaon Sabha or State Government land in certain circumstances.--Subject to the provisions of Section 132 and Section 133-A, every person in cultivatory possession of any land, vested in a Gaon Sabha under Section 117 or belonging to the State Government, in the portion of District Mirzapur South of Kaimur Range, other than the land notified under Section 20 of the Indian forest Act, 1927, before the 30th day of June, 1978, shall be deemed to have become a Bhumidhar with non-transferable rights of such land.

Provided that where the land in cultivatory possession of a person, together with any other land held by him

in Uttar Pradesh exceeds the ceiling area determined under the Uttar Pradesh Imposition of Ceiling on Land Holdings Act, 1960, the rights of a Bhumidhar with non-transferable rights shall accrue in favour of such person in respect of so much area of the first-mentioned land, as together with such other land held by him, does not exceed the ceiling area applicable to him and the said area shall be demarcated in the prescribed manner in accordance with the principles laid down in the aforesaid Act."

16. Sri Singh placing reliance upon the provisions made in Section 131-A has submitted that in light of the statutory protection accorded and extended, no cause arises for this Court to interfere with the order ultimately passed by the Additional District Judge in the *suo moto* appeal. It was lastly urged that a reserved forest could not be viewed as land falling within the ambit of Section 132 of the 1950 Act since it essentially remains land per se till it is actually declared as reserved forest under Section 20 of the 1927 Act. This submission was addressed in light of the benefits extended by Section 131A being made subject to the provisions of Section 132 of the 1950 Act. Section 132 of the 1950 Act reads thus: -

"132. Land in which [bhumidhari] rights shall not accrue.- Notwithstanding anything contained in Section 131, but without prejudice to the provisions of Section 19, [bhumidhari] rights shall not accrue in--

(a) pasture lands or lands covered by water and used for the purpose of growing singhara or other produce or land in the bed of a river and used for casual or occasional cultivation;

(b) such tracts of shifting or unstable cultivation as the State Government may specify by notification in the Gazette; and

[*(c)* lands declared by the State Government by notification in the Official Gazette, to be intended or set apart for taungya plantation or grove lands of a [Gaon Sabha] or a local authority or land acquired or held for a public purpose and in particular and without prejudice to the generality of this clause--

(i) lands set apart for military encamping grounds;

(ii) lands included within railway or canal boundaries;

(iii) lands situate within the limits of any cantonment;

(iv) lands included in sullage farms or trenching grounds belonging as such to a local authority;

(v) lands acquired by a town improvement trust in accordance with a scheme sanctioned under Section 42 of the U.P. Town Improvement Act, 1919 (U.P. Act VII of 1919), or by a municipality for a purpose mentioned in clause (a) or clause (c) of Section 8 of the U.P. Municipalities Act, 1916 (U.P. Act VII of 1916); and

(vi) lands set apart for public purposes under the U.P. Consolidation of Holdings Act, 1953 (U.P. Act V of 1954).]"

17. Before proceeding to deal with the rival submissions noted above, it would be apposite to notice certain noteworthy statutory and judicial interventions with regard to the subject of forests that intervened. The proceedings in Banwasi Sewa Ashram progressed during a period when the 1980 Act had already come to be promulgated. The statutory interdict enshrined in Section 2

of that enactment represents a momentous measure of *"we the people"* to preserve and protect forests and the environment. This singular provision finally gave effect to the constitutional obligation placed upon the State by virtue of Article 48A of the Constitution. Section 2, seemingly unpretentious and yet pregnant with purpose and intent, stipulates as follows: -

"2. Restriction on the de-reservation of forests or use of forest land for non-forest purpose.-- Notwithstanding anything contained in any other law for the time being in force in a State, no State Government or other authority shall make, except with the prior approval of the Central Government, any order directing,--

(i) that any reserved forest (within the meaning of the expression "reserved forest" in any law for the time being in force in that State) or any portion thereof, shall cease to be reserved;

(ii) that any forest-land or any portion thereof may be used for any non-forest purpose;

[*(iii)* that any forest-land or any portion thereof may be assigned by way of lease or otherwise to any private person or to any authority, corporation, agency or any other organisation not owned, managed or controlled by Government;

(iv) that any forest-land or any portion thereof may be cleared of trees which have grown naturally in that land or portion, for the purpose of using it for reafforestation.]"

18. From a historical perspective, the development of the jurisprudence on the subject of environment protection would be incomplete if one were to ignore the epoch making decision handed down by the Supreme Court on 12 December 1996 in **T.N. Godavarman Thirumulpad Vs. Union of India**5 when it held: -

"4. The Forest Conservation Act, 1980 was enacted with a view to check further deforestation which ultimately results in ecological imbalance; and therefore, the provisions made therein for the conservation of forests and for matters connected therewith, must apply to all forests irrespective of the nature of ownership or classification thereof. The word "forest" must be understood according to its dictionary meaning. This description covers all statutorily recognised forests, whether designated as reserved, protected or otherwise for the purpose of Section 2(i) of the Forest Conservation Act. The term "forest land", occurring in Section 2, will not only include "forest" as understood in the dictionary sense, but also any area recorded as forest in the Government record irrespective of the ownership. This is how it has to be understood for the purpose of Section 2 of the Act. The provisions enacted in the Forest Conservation Act, 1980 for the conservation of forests and the matters connected therewith must apply clearly to all forests so understood irrespective of the ownership or classification thereof. This aspect has been made abundantly clear in the decisions of this Court in Ambica Quarry Works v. State of Gujarat [(1987) 1 SCC 213] , Rural Litigation and Entitlement Kendra v. State of U.P. [1989 Supp (1) SCC 504] and recently in the order dated 29-11-1996 (Supreme Court Monitoring Committee v. Mussoorie Dehradun Development Authority [WP (C) No 749 of 1995 decided on 29-11-1996]). The earlier decision of this Court in State of Bihar v. Banshi Ram Modi

[(1985) 3 SCC 643] has, therefore, to be understood in the light of these subsequent decisions. We consider it necessary to reiterate this settled position emerging from the decisions of this Court to dispel the doubt, if any, in the perception of any State Government or authority.....…"

19. Again on 13 November 2000, the Supreme Court in **Centre for Environmental Law Vs. Union of India**6 passed the following order: -

"Four weeks for filing of affidavits by the States that have not already done so. List after 5 weeks. Pending further orders, no dereservation of forests/Sanctuaries/National Parks shall be affected."

In one sense the decisions and orders referred to above followed the trend which was set in the 8 February 1989 order of the Supreme Court in **Banwasi Sewa Ashram** which had held that land covered under a notification issued under Section 4 of the 1927 Act would also be covered by the prohibition imposed by Section 2 of the 1980 Act. It was these orders and the prevailing statutory regime that governed the field when the settlement proceedings forming subject matter of the instant writ petition were progressing before the FSO and the Additional District Judges. Having sketched the backdrop in which the impugned proceedings ensued before the authorities, the Court now proceeds to rule on the submissions addressed by respective parties.

20. Dealing firstly with the question of maintainability of the review petition, the Court notes that the provisions engrafted in the 1927 Act do not make a specific provision of substantive review being exercised by the authorities constituted thereunder. However, the Court also bears in mind that the 1927 Act also does not envisage a *suo moto* appeal being preferred or entertained by the Additional District Judge either. The facts which were obtaining in the region in which the reserved forest was proposed to be created, the manner in which the rights of tribal and traditional forest dwellers were overlooked and trodden over constrained the Supreme Court to modify the statutory procedure put in place by the 1927 Act. It was the special procedure formulated and evolved by the Supreme Court and put in place by virtue of its decisions and orders rendered from time to time in **Banwasi Sewa Ashram** that governed the field. It was this unique and distinctive process of adjudication as evolved therein that was mandated to be adhered to by the adjudicating authorities while processing claims laid under the 1927 Act. It was this exceptional process of adjudication in terms of which all decisions taken by the FSO were liable to be placed before the Additional District Judge for scrutiny, appraisal and confirmation. The orders passed in **Banwasi Sewa Ashram** thus constituted the source and foundation for the authority which was to be exercised by the FSO's and Additional District Judges. The consequential question to be posed would, therefore, be whether those orders empowered the Additional District Judges to exercise powers of review.

21. The Court finds that indubitably the orders of 10 May 1991 and 16 February 1993 made in **Banwasi Sewa Ashram**, the Supreme Court in unambiguous terms provided for

individuals as well as the Department of Forest to prefer review petitions in those cases where mistakes and errors apparent on the face of the record were alleged to exist. The Supreme Court took note of the Reports of the Commissioners and Justice Loomba submitted on 1 January 1993, which had found that the settlement orders made in 17 forest villages suffered from manifest errors. These orders conferred a right on both the landholder as well as the Department of Forest to petition the Additional District Judge by way of review applications. The Supreme Court clearly permitted the Forest Department to move the Additional District Judges by way of *"special review"*. It is also pertinent to note that while the orders of 10 May 1991 and 16 February 1993 granted this right to both individuals as well as the Department of Forest, the last order which is adverted to, namely, of 04 October 1993 only dealt with the grievance of the Department of Forest where it alleged that a review was mandated in numerous cases. It was these orders that conferred the right on individuals and the Forest Department to petition the Additional District Judges by way of a special review. The exercise of settlement and adjudication was an ongoing process being monitored and overseen by the Supreme Court and the directions issued from time to time aimed at ensuring purity of the adjudicatory process. These orders conferred a substantive right on parties to seek review of the orders passed by the Additional District Judges. The right so conferred was entitled to be exercised notwithstanding the absence of a statutory provision made in that regard in the 1927 Act. The orders alluded to above constituted the fountainhead and the source of the right of special review that was exercised by the petitioners here. In light of the aforesaid, the Court comes to conclude that the review applications were maintainable and were rightly entertained notwithstanding the fact that no statutory provision in that respect existed in the 1927 Act.

22. That then takes the Court to deal with the submission addressed in the backdrop of Section 131-A of the 1950 Act. Section 131-A was initially promulgated by way of Ordinance No. 7 of 1987. It was ultimately introduced in the statute by virtue of U.P. Act 14 of 1987. Section 131A principally extends protection to those persons who were found to be in cultivatory possession of land in the portion of District Mirzapur South of the Kaimur Range prior to 30 June 1978 and confers on such individuals the status of a bhumidhar with non transferable rights on such land. Whether this provision would be sufficient to safeguard the asserted interest of the private respondent is the issue that consequently falls for determination. While dealing with this question it would be apposite to bear in mind the fact that by the time that this measure was introduced, the 1980 Act already stood in place. The rights which are claimed by the respondents in terms of its provisions would merit examination and evaluation from a dual perspective- firstly, on the basis of the language of the section itself and other attendant provisions of the 1950 Act and secondly, in the backdrop of the statutory regime governing forests which otherwise exists.

23. On a plain reading of Section 131A, it is evident that the provision is neither stated to have overriding effect over the other parts of the 1950 Act nor is

it worded to be in supersession of other statutes that may operate on the subject of forests. As is manifest, that provision is not worded so as to apply notwithstanding a prohibition or restraint contained in any other enactment which touches the field of forests and rights that may accrue on land on which forests may exist. In its barest form, Section 131A seeks to protect the possession of persons on land which may vest in a Gaon Sabha by virtue of Section 117 of that Act. Section 117 provides that the State Government may by a general or special order vest in a Gaon Sabha or other local authority land that had come to vest with it upon promulgation of the 1950 Act. It becomes relevant to recall that Section 4 of the 1950 Act envisaged the vesting of all estates situate in the State with the Government upon abolition of zamindari. Section 117 while enumerating the categories of vested land that may be transferred not just speaks of forests but also of land cultivable or otherwise, trees, fisheries, ponds, tanks, water channels, pathways and abadi sites. Consequently when Section 131A refers to land vesting in a Gaon Sabha under Section 117, it cannot be understood as being with regard to possession of persons upon forests alone. Possession of a person may be found to exist even on land cultivable or otherwise or on any other category of estates vesting in the State.

24. The second internal control on the benefit conferred by that provision is manifest from its opening lines itself which makes its provisions subject to Sections 132 and 133A of the 1950 Act. Section 132 of the 1950 Act essentially declares that bhumidhari rights shall not accrue upon the categories of land enumerated therein. This statutory interdict also applies to land declared or held by the Government for a public purpose in terms of Section 132 (c). It would be pertinent to recollect that the land forming subject matter of the instant writ petition formed part of the *"Dudhi Forest"* which was transferred by the State Government from the Department of Revenue to the Forest Department on 15/16 May 1950, a fact noted in the introductory part of this judgment. It is therefore apparent that a forest under the ownership and control of the State of U.P. existed in 1950 itself. Clearly, therefore, in 1950 the State of U.P. held land which constituted a forest. That the creation and preservation of forests is a constitutional obligation and would clearly constitute a public purpose cannot possibly be disputed. Significantly, clause (c) of Section 132 while expanding upon the categories which would constitute land held for a public purpose employs the phrase *"..in particular and without prejudice to the generality of this clause..."*. It is thus evident that clause (c), while specifying categories of lands held for a public purpose, is not exhaustive but merely illustrative. On a foundational plane, therefore, the Court finds it difficult to accept the proposition that possessory rights claimed on forests were entitled to be perfected by virtue of Section 131A. The problem, however arises on account of that provision specifically referring to land in respect of which a notification under Section 20 of the 1927 may not have been issued and thus evincing an intent to extend the coverage of Section 131A even to forests.

25. The Court finds that there is no explicit or straightforward expression of intent to extend the benefits of that provision to land covered under Section 4

of the 1927 Act. Assuming that was the legislative intent, it was open for the Legislature to have said so plainly. It is apposite to note that the provision was introduced in 1987 by which time the 1980 Act was already in force and Section 2 thereof applied. It also becomes apposite to note that U.P. Act 14 of 1987 was not reserved for the assent of the President. More importantly, Parliament by virtue of Act No. 69 of 1988 introduced clause (iii) in Section 2 of the 1980 Act restraining State Governments from assigning forest land to persons by way of lease or otherwise. Of equal import is the order dated 8 February 1989 passed in **Banwasi Sewa Ashram** which clarified that land covered in a notification under Section 4 of the 1927 Act would also be subject to the rigours imposed by Section 2 of the 1980 Act. If Section 131A were to be conferred the interpretation as suggested by the respondents it would clearly breach the provisions of Section 2 of the 1980 Act.

26. The Court also bears in mind the decision rendered by the Supreme Court in **Godavarman** which explained the expression forest to be understood not just as defined in dictionaries but also to any land which answered the description of forest as generally understood as also land recorded as forest irrespective of ownership. The rights consequently claimed by virtue of Section 131A cannot be recognised as flowing unhindered by the restrictions imposed in that decision.

27. Viewed from the angle of the provisions engrafted in the 1927 Act, the Court notes that once the notification under Section 4 of the 1927 Act came to be issued on 4 July 1970, the statutory restraint comprised in Section 5 of that Act also applied. Section 5, it becomes important to recall, prohibits the acquisition of rights in or over land comprised in a Section 4 notification except by way of succession, grant, or contract in writing made by the Government. Section 131A as is evident does not override or eclipse the prohibition put in place by Section 5 of the 1927 Act. In order, therefore, to accord a harmonious construction upon Section 131A of the 1950 Act bearing in mind Section 5 of the 1927 Act, it must be interpreted to extend at best to land held in cultivatory possession from prior to the issuance of the notification under Section 4. The assertion of a right under Section 131A and a recognition thereof in law would also have to be tested on the anvil of Section 2 of the 1980 and the orders of the Supreme Court referred to above. The extent of protection which can be recognised cannot be viewed in the abstract and in any case cannot be adjudged without bearing in mind the provisions made in the 1927 and the 1980 Acts.

28. Undisputedly the State proceeded to issue the notification under Section 4 on 04 July 1970. From the moment that notification came to be promulgated the prohibition and bar as engrafted in Section 5 of the 1927 Act came to operate. That provision clearly mandates that no rights shall be acquired in or over the land comprised in such notification except by succession or under a grant of contract in writing made in that behalf by the Government. Consequently the position which emerges is that post 04 July 1970 no rights could have been acquired on land which came to be included in the notification under Section 4. It becomes pertinent to note that while

the private respondent asserts to have been in possession of the land prior to its vesting under the provisions of 1950 Act, no material or evidence was either alluded to or brought to the attention of the Court. That material also does not appear to have been placed for the consideration of either the FSO or the Additional District Judge. This, the Court notes, since no such material or evidence was ever noticed by either the Forest Settlement Officer or the Additional District Judge in the orders which were framed. It has also come on the record that the initial order made by the FSO on 30 August 1986 was ultimately recalled by that authority on 25 February 1992. The respondent never assailed that order in any proceedings.

29. Reverting to the individual facts, the Court notes that the Additional District Judge on both occasions has clearly failed to bear in mind that the initial order passed by the FSO 30 August 1986 had itself been recalled by that authority subsequently. That subsequent order of 25 February 1992 has neither been alluded to nor considered. The respondent did not lead any other evidence that may have established that he had been in cultivatory possession from prior to 4 July 1970 when the notification under Section 4 came to be issued or from before 15/16 May 1950 being the order of the State Government transferring Dudhi Forest to the Forest Department. The Additional District Judge rests his decision solely on the spot inspection report which formed the basis of the original order which was ultimately recalled. The Additional District Judge also does not rest his decision on any other independent or cogent evidence which may have established that the factual position as found by the FSO was incorrect. Viewed in that backdrop, it is manifest that the prayer for review was clearly liable to be granted.

30. Accordingly and for the reasons noted, this writ petition shall stand **allowed**. The impugned orders dated 30 January 1993 and 24 May 1994 passed by the Additional District Judge, shall stand quashed and set aside. The order of the FSO dated 26 March 1992 shall stand affirmed and restored.

(2019)12 ILR A1272

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.11.2019

BEFORE
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Writ-C No. 50174 of 2016

State of U.P. ...Petitioner
Versus
Presiding Officer, Labour Court, U.P. Jhansi & Anr. ...Respondents

Counsel for the Petitioner:
Sri S.M. Iqbal Hasan, Sri Some Narain Mishra, Sri Mata Prasad

Counsel for the Respondents:
Sri Syed Mushfiq Ali

A. Civil Law - U.P. Industrial Dispute Act, 1947 – Section 4(k) and 10(1) – Reference – Undue delay – Though no limitation has been prescribed for making of a reference; however, delay in raising an industrial dispute would definitely be an important circumstance which must keep in view at the time of exercise of discretion by the Labour Court irrespective of whether or not such objection has been raised by the other side – Limitation period for making

reference is coextensive with the existence of dispute, meaning thereby that the dispute should be alive on the day when the decision was taken to make a reference or to refuse to make reference. (Para 30 & 31)

Held –31. In respect of an alleged termination said to have been made on 01.10.1991 the reference was made on 29.03.2014 i.e. after a lapse of more than two decades there would be little reason to believe that there existed a live dispute when the reference was made and for this reason also the award passed by the Labour Court more particularly the directions issued for reinstating the respondent workman in service with effect from the date of termination and further holding him entitled to 25% of the back wages and also full back wages from the date of the award cannot be sustained.

B. Evidence Law - Evidence Act, 1972 – Section 101 – Burden of proof – Labour law – Law with regard to burden of proving the *factum* of 240 days of working in a calender year so as to claim benefit of being in continuous service as defined under Section 2(g) and consequently to claim of protection of Section 6N of the U.P. Industrial Disputes Act, 1947 is well settled – The burden of proof is thus the legal obligation on a party to prove the allegation made by him, and is often associated with the maxim '*Semper necessitas probandi incumbit ei qui agit*' which means the burden of proof is on the claimant – Burden of proving the said fact lies upon the workman. (Para 13 & 25)

C. Rule of Evidence – Distinction between 'burden of proof' and 'onus of proof' – The burden of proof lies upon the person who has to prove a fact and it never shifts; however, the shifting of onus of proof is a continuous process in the evaluation of evidence.

Writ Petition allowed. (E-1)

List of cases cited: -

1. Range Forest Officer Vs S.T. Hadimani (2002) 3 SCC 25

2. Rajasthan State Ganganagar S. Mills Ltd. Vs State of Rajasthan & Anr. (2004) 8 SCC 161

3. Municipal Corporation Faridabad Vs Siri Niwas 3 (2004) 8 SCC 195

4. M.P. Electricity Board Vs Hariram (2004) 8 SCC 246

5. Manager, Reserve Bank of India, Bangalore Vs S. Mani & Ors. (2005) 5 SCC 100

6. Surendranagar District Panchayat Vs. Dahyabhai Amarsinh(2005) 8 SCC 750

7. R.M. Yellatti Vs. Assistant Executive Engineer (2006) 1 SCC 106

8. Ranip Nagar Palika Vs. Babuji Gabhaji Thakore & Ors. (2007) 13 SCC 343

9. SubDivisional Engineer, Irrigation Project, Yavatmal Vs. Sarang Marotrao Gurnule 2009 (120) FLR 114 (Bom.H.C.)

10. Haridwar Vs. Smt. Kulwant 2013 (6) ADJ 485

11. Rangammal Vs. Kuppuswami & Anr. (2011) 12 SCC 220

12. A. Raghavamma and another Vs. A. Chenchamma & Anr. AIR 1964 SC 136

13. M/s Triveni Engineering Industry Ltd. Vs. State of U.P. & Ors. WRIT C No.60572 of 2011

14. State of U.P. & Anr. Vs. Chhunna Lal & Anr. 2019 (8) ADJ 782

15. Sapan Kumar Pandit Vs. U.P. State Electricity Board & Ors. (2001) 6 SCC 222

16. Shalimar Works Ltd. Vs. WorkmenAIR 1959 SC 1217

17. Western India Match Co. Ltd. Vs. Workers' Union(1970) 1 SCC 225

18. Nedungadi Bank Ltd. Vs. K.P. Madhavankutty (2000) 2 SCC 455

19. Prabhakar Vs. Joint Director, Sericulture Department & Anr. (2015) 15 SCC 1

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

1. Heard Sri Mata Prasad, learned Standing Counsel for the petitioner and Sri Syed Mushfiq Ali, learned counsel appearing for the respondent-workman.

2. The instant writ petition has been filed seeking to assail the award dated 21.12.2015 passed by the Labour Court, U.P., Jhansi in Adjudication Case No.62 of 2014.

3. Records of the case show that upon an industrial dispute being raised by the second respondent-workman a reference was made under Section 4K of the U.P. Industrial Disputes Act, 1947 which was registered as Adjudication Case No.62 of 2014 before the Labour Court, U.P., Jhansi, and the question which was referred for adjudication is as follows:-

"क्या सेवायोजक द्वारा अपने श्रमिक श्री कामता प्रसाद पुत्र श्री भगवान दास कारपेन्टर की सेवाएं दिनांक 01.10.1991 से समाप्त किया जाना उचित तथा /अथवा वैधानिक है ? यदि नहीं तो संबंधित श्रमिक क्या हितलाभ /उपशम पाने का अधिकारी है तथा अन्य किस विवरण सहित ?"

4. The reference, aforementioned, which was with regard to the legality/validity of the termination of the respondent-workman with effect from 01.10.1991 was answered by the Labour Court in terms of an award dated 21.12.2015 by recording a conclusion that the termination of services of the workman was not legal and valid and issuing a direction to reinstate him in service with effect from the date of termination i.e. 01.10.1991 and further holding him entitled to 25% of the back wages and also full wages from the date of publication of the award.

5. The records of the case indicate that as per the case set up by the respondent-workman in the written statement filed before the Labour Court it had been claimed that he had been paid wages as a daily wager for the period October, 1990 to 30.09.1991 and thereafter his services were terminated w.e.f. 01.10.1991, and in the aforesaid manner he had completed more than 240 days of work. It was further stated that the termination of his services had been made without any notice and following the due procedure.

6. The petitioner also filed a written statement before the Labour Court wherein it was stated that the workman had worked for a period of 30 days in the month of June, 1991 and the payment in respect of the said period of working had been made immediately. It was further submitted that the workman had never been appointed against any post and as such there was no question of termination of his services. It was also stated that he had not completed 240 days of continuous service during any calender year.

7. The award passed by the Labour Court does not refer to any documentary or oral evidence of the workman to support his claim. Only a reference has been made to an application filed by the

workman for summoning of the records by the employer and in view of the non-production of the said documents by the employer the Labour Court has drawn an adverse inference and proceeded *ex parte* to allow the claim of the workman.

8. Learned Standing Counsel appearing for the petitioner has contended that the engagement of the respondent-workman having been categorically denied by the petitioner in its written statement the burden of proof with regard to the working of the respondent-workman in the petitioner-establishment for a period of 240 days in a calender year so as to establish his continuous working and claim the benefit of Section 6N of the U.P. Industrial Disputes Act, 1947 was upon the workman, and in the instant case, the workman had failed to discharge the said burden. It is also submitted that the alleged termination having been said to have been made on 01.10.1991 the reference made on 29.03.2014 was highly belated and was therefore bad in law. It is accordingly submitted that the conclusion drawn by the Labour Court with regard to the termination of the services of the workman being illegal and invalid with a further direction for reinstatement of the workman, payment of 25% back wages and also full wages from the date of publication of the award is legally unsustainable and is liable to be set aside.

9. Learned counsel appearing for the respondent-workman has supported the award of the Labour Court by asserting that the workman having pleaded in his written statement that he had been paid wages as a daily wager from the month of October, 1990 to 30.09.1991 it was evident that he worked continuously for a period of 240 days and the relevant records having not been produced by the employer the Labour Court has rightly drawn the adverse inference with regard to the same.

10. Heard learned counsel for the parties and perused the records.

11. From perusal of the records of the case, it appears that only on the basis of an assertion made in the written statement that he had paid wages as a daily wager from the month of October, 1990 to 30.09.1991 the workman has sought to contend that he had worked continuously for more than 240 days and that he was entitled to a notice before his services could be terminated. No material evidence, documentary or oral, appears to have been led by the workman in support of his claim and the award of the Labour Court also does not refer to any such evidence.

12. The only indication in the award in this regard and what seems to have weighed with the Labour Court is the fact that an application had been filed by the workman for summoning of the records and pursuant thereto the records in question had not been produced by the employer. The Labour Court, accordingly, drew an adverse inference and thereafter proceeded *ex parte* to allow the claim set up by the workman.

13. The law with regard to burden of proving the *factum* of 240 days of working in a calender year so as to claim benefit of being in continuous service as defined under Section 2(g) and consequently to claim of protection of Section 6N of the U.P. Industrial Disputes Act, 1947 is well settled and it has been consistently held that the burden of

proving the said fact lies upon the workman.

14. In the case of **Range Forest Officer Vs. S.T. Hadimani**1, where a claim had been made by the workman regarding working for more than 240 days, it was held that the onus to prove the said fact was on the workman. The relevant observations made in the judgment are as follows:-

"2. In the instant case, dispute was referred to the Labour Court that the respondent had worked for 240 days and his service had been terminated without paying him any retrenchment compensation. The appellant herein did not accept this and contended that the respondent had not worked for 240 days. The Tribunal vide its award dated 10-8-1998 came to the conclusion that the service had been terminated without giving retrenchment compensation. In arriving at the conclusion that the respondent had worked for 240 days, the Tribunal stated that the burden was on the management to show that there was justification in termination of the service and that the affidavit of the workman was sufficient to prove that he had worked for 240 days in a year.

3. For the view we are taking, it is not necessary to go into the question as to whether the appellant is an "industry" or not, though reliance is placed on the decision of this Court in State of Gujarat v. Pratamsingh Narsinh Parmar [(2001) 9 SCC 713 : 2002 SCC (L&S) 269 : JT (2001) 3 SC 326]. In our opinion the Tribunal was not right in placing the onus on the management without first determining on the basis of cogent evidence that the respondent had worked for more than 240 days in the year preceding his termination. It was the case of the claimant that he had so worked but this claim was denied by the appellant. It was then for the claimant to lead evidence to show that he had in fact worked for 240 days in the year preceding his termination. Filing of an affidavit is only his own statement in his favour and that cannot be regarded as sufficient evidence for any court or tribunal to come to the conclusion that a workman had, in fact, worked for 240 days in a year. No proof of receipt of salary or wages for 240 days or order or record of appointment or engagement for this period was produced by the workman. On this ground alone, the award is liable to be set aside. However, Mr. Hegde appearing for the Department states that the State is really interested in getting the law settled and the respondent will be given an employment on compassionate grounds on the same terms as he was allegedly engaged prior to his termination, within two months from today."

15. The aforementioned legal position was reiterated in the case of **Rajasthan State Ganganagar S. Mills Ltd. Vs. State of Rajasthan & Anr.**2, wherein it was held as follows:-

"6. It was the case of the workman that he had worked for more than 240 days in the year concerned. This claim was denied by the appellant. It was for the claimant to lead evidence to show that he had in fact worked up to 240 days in the year preceding his termination. He has filed an affidavit. It is only his own statement which is in his favour and that cannot be regarded as sufficient evidence for any court or tribunal to come to the conclusion that in fact the claimant had worked for 240 days in a year. These

aspects were highlighted in Range Forest Officer v. S.T. Hadimani [(2002) 3 SCC 25 : 2002 SCC (L&S) 367]. No proof of receipt of salary or wages for 240 days or order or record in that regard was produced. Mere non-production of the muster roll for a particular period was not sufficient for the Labour Court to hold that the workman had worked for 240 days as claimed. Even if that period is taken into account with the period as stated in the affidavit filed by the employer, the requirement prima facie does not appear to be fulfilled. The following period of engagement which was accepted was 6 days in July 1991, 15-1/2 days in November 1991, 15-1/2 days in January 1992, 24 days in February 1992, 20-1/2 days in March 1992, 25 days in April 1992, 25 days in May 1992, 7-1/2 days in June 1992 and 5-1/2 days in July 1992. The Labour Court demanded production of muster roll for the period of 17-6-1991 to 12-11-1991. It included this period for which the muster roll was not produced and came to the conclusion that the workman had worked for more than 240 days without indicating as to the period to which period these 240 days were referable."

16. Again in the case of **Municipal Corporation Faridabad Vs. Siri Niwas**3, it was held, in the context of Section 25F of the Act, 1947 (containing provisions similar as under Section 6N of the Act, 1947), that the burden was on the workman to prove that he had worked for more than 240 days in the preceding one year prior to his retrenchment and the workman having not adduced any evidence with regard to the same the claim raised by him could not be allowed only on the basis of adverse inference drawn against the employer for not producing the muster rolls. The relevant observations made in the judgment are as follows:-

"13. The provisions of the Indian Evidence Act, 1872 per se are not applicable in an industrial adjudication. The general principles of it are, however applicable. It is also imperative for the Industrial Tribunal to see that the principles of natural justice are complied with. The burden of proof was on the respondent herein to show that he had worked for 240 days in preceding twelve months prior to his alleged retrenchment. In terms of Section 25-F of the Industrial Disputes Act, 1947, an order retrenching a workman would not be effective unless the conditions precedent therefore are satisfied. Section 25-F postulates the following conditions to be fulfilled by employer for effecting a valid retrenchment:

(i) one month's notice in writing indicating the reasons for retrenchment or wages in lieu thereof;

(ii) payment of compensation equivalent to fifteen days, average pay for every completed year of continuous service or any part thereof in excess of six months.

14. For the said purpose it is necessary to notice the definition of "continuous service" as contained in Section 25-B of the Act. In terms of sub-section (2) of Section 25-B that if a workman during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for 240 days within a period of one year, he will be deemed to be in continuous service. By reason of the said provision, thus, a legal fiction is created. The retrenchment of the respondent took

place on 17-5-1995. For the purpose of calculating as to whether he had worked for a period of 240 days within one year or not, it was, therefore, necessary for the Tribunal to arrive at a finding of fact that during the period between 5-8-1994 to 16-5-1995 he had worked for a period of more than 240 days. As noticed hereinbefore, the burden of proof was on the workman. From the award it does not appear that the workman adduced any evidence whatsoever in support of his contention that he complied with the requirements of Section 25-B of the Industrial Disputes Act. Apart from examining himself in support of his contention he did not produce or call for any document from the office of the appellant herein including the muster rolls. It is improbable that a person working in a local authority would not be in possession of any documentary evidence to support his claim before the Tribunal. Apart from muster rolls he could have shown the terms and conditions of his offer of appointment and the remuneration received by him for working during the aforementioned period. He did not even examine any other witness in support of his case.

15. A Court of Law even in a case where provisions of the Indian Evidence Act apply, may presume or may not presume that if a party despite possession of the best evidence had not produced the same, it would have gone against his contentions. The matter, however, would be different where despite direction by a court the evidence is withheld. Presumption as to adverse inference for non-production of evidence is always optional and one of the factors which is required to be taken into consideration in the background of facts involved in the lis. The presumption, thus, is not obligatory because notwithstanding the intentional non-production, other circumstances may exist upon which such intentional non-production may be found to be justifiable on some reasonable grounds. In the instant case, the Industrial Tribunal did not draw any adverse inference against the appellant. It was within its jurisdiction to do so particularly having regard to the nature of the evidence adduced by the respondent.

16. No reason has been assigned by the High Court as to why the exercise of discretional jurisdiction of the Tribunal was bad in law. In a case of this nature, it is trite, the High Court exercising the power of judicial review, would not interfere with the discretion of a Tribunal unless the same is found to be illegal or irrational.

x x x x x

19. Furthermore a party in order to get benefit of the provisions contained in Section 114 Ill. (g) of the Indian Evidence Act must place some evidence in support of his case. Here the Respondent failed to do so.

x x x x x

21. ...The High Court, therefore, proceeded to pass the impugned judgment only on the basis of the materials relied on by the parties before the Tribunal. The High Court, in our opinion, committed a manifest error in setting aside the award of the Tribunal only on the basis of adverse inference drawn against the appellant for not producing the muster rolls."

17. The aforementioned position of law was restated in the case of **M.P. Electricity Board Vs. Hariram**4, in the following terms:-

"11. The above burden having not been discharged and the Labour Court

having held so, in our opinion, the Industrial Court and the High Court erred in basing an order of reinstatement solely on an adverse inference drawn erroneously. At this stage it may be useful to refer to a judgment of this Court in the case of Municipal Corpn., Faridabad v. Siri Niwas [(2004) 8 SCC 195 : JT (2004) 7 SC 248] wherein this Court disagreed with the High Court's view of drawing an adverse inference in regard to the non-production of certain relevant documents…"

18. The question of onus of proof regarding the *factum* of working was again considered in the case of **Manager, Reserve Bank of India, Bangalore Vs. S. Mani & Ors.**5 and it was held that initial burden of proof is always on the workman to prove his working and that the onus of proof does not shift to the employer nor is the burden of proof on the workman discharged merely because the employer fails to prove a defence. The relevant observations made in the judgment are as follows:-

"28. The initial burden of proof was on the workmen to show that they had completed 240 days of service. The Tribunal did not consider the question from that angle. It held that the burden of proof was upon the appellant on the premise that they have failed to prove their plea of abandonment of service…"

x x x x x

"35. Only because the appellant failed to prove its plea of abandonment of service by the respondents, the same in law cannot be taken to be a circumstance that the respondents have proved their case."

19. The question of onus of proof and the evidence to be led again came up in the case of **Surendranagar District Panchayat Vs. Dahyabhai Amarsinh**6, and it was held that the burden to prove his working lies on the workman and it is for him to adduce evidence to prove the said *factum* and in a case if the evidence with regard to the same has not been led by the workman it would be held that he has failed to discharge the burden. It was only in a case where sufficient evidence was led by the workman that the Court could have drawn adverse inference against the other party. The relevant observations made in the judgment are as follows:-

"18. In the light of the aforesaid, it was necessary for the workman to produce the relevant material to prove that he had actually worked with the employer for not less than 240 days during the period of twelve calendar months preceding the date of termination. What we find is that apart from the oral evidence the workman has not produced any evidence to prove the fact that he has worked for 240 days. No proof of receipt of salary or wages or any record or order in that regard was produced; no co-worker was examined; muster roll produced by the employer has not been contradicted. It is improbable that the workman who claimed to have worked with the appellant for such a long period would not possess any documentary evidence to prove nature of his engagement and the period of work he had undertaken with his employer. Therefore, we are of the opinion that the workman has failed to discharge his burden that he was in employment for 240 days during the preceding 12 months of the date of termination of his service. The courts below have wrongly drawn an adverse inference for non-production of the record

of the workman for ten years. The scope of enquiry before the Labour Court was confined to only 12 months preceding the date of termination to decide the question of continuation of service for the purpose of Section 25-F of the Industrial Disputes Act. The workman has never contended that he was regularly employed in the Panchayat for one year to claim the uninterrupted period of service as required under Section 25-B(1) of the Act. In the facts and situation and in the light of the law on the subject, we find that the respondent workman is not entitled to the protection or compliance with Section 25-F of the Act before his service was terminated by the employer. As regards non-compliance with Sections 25-G and 25-H suffice it to say that witness Vinod Misra examined by the appellant has stated that no seniority list was maintained by the department of daily wagers. In the absence of regular employment of the workmen, the appellant was not expected to maintain seniority list of the employees engaged on daily wages and in the absence of any proof by the respondent regarding existence of the seniority list and his so-called seniority, no relief could be given to him for non-compliance with provisions of the Act. The courts could have drawn adverse inference against the appellant only when seniority list was proved to be in existence and then not produced before the court. In order to entitle the court to draw inference unfavourable to the party, the court must be satisfied that evidence is in existence and could have been proved".

20. The question of burden of proof yet again came up for consideration in the case of **R.M. Yellatti Vs. Assistant Executive Engineer**7, wherein it was reiterated that burden of proof lies on the workman and it is for him to adduce cogent evidence, both oral and documentary, and mere non-production of muster rolls *per se* will not be a ground to draw an adverse inference against the employer. The relevant observations made in the judgment are as follows:-

"12. Now coming to the question of burden of proof as to the completion of 240 days of continuous work in a year, the law is well settled. In Manager, Reserve Bank of India v. S. Mani [(2005) 5 SCC 100 : 2005 SCC (L&S) 609] the workmen raised a contention of rendering continuous service between April 1980 to December 1982 in their pleadings and in their representations. They merely contended in their affidavits that they had worked for 240 days. The Tribunal based its decision on the management not producing the attendance register. In view of the affidavits filed by the workmen, the Tribunal held that the burden on the workmen to prove 240 days' service stood discharged. In that matter, a three-Judge Bench of this Court held that pleadings did not constitute a substitute for proof and that the affidavits contained self-serving statements; that no workman took an oath to state that he had worked for 240 days; that no document in support of the said plea was ever produced and, therefore, this Court took the view that the workmen had failed to discharge the burden on them of proving that they had worked for 240 days. According to the said judgment, only by reason of non-response to the complaints filed by the workmen, it cannot be said that the workmen had proved that they had worked for 240 days. In that case, the workmen had not called upon the

management to produce the relevant documents. The Court observed that the initial burden of establishing the factum of continuous work for 240 days in a year was on the workmen. In the circumstances, this Court set aside the award of the Industrial Tribunal ordering reinstatement.

13. In Municipal Corpn., Faridabad v. Siri Niwas [(2004) 8 SCC 195 : 2004 SCC (L&S) 1062] the employee had worked from 5-8-1994 to 31-12-1994 as a tubewell operator. He alleged that he had further worked from 1-1-1995 to 16-5-1995. His services were terminated on 17-5-1995 whereupon an industrial dispute was raised. The case of the employee before the Tribunal was that he had completed working for 240 days in a year; the purported order of retrenchment was illegal as the conditions precedent to Section 25-F of the Industrial Disputes Act were not complied with. On the other hand, the management contended that the employee had worked for 136 days during the preceding 12 months on daily wages. Upon considering all the material placed on record by the parties to the dispute, the Tribunal came to the conclusion that the total number of working days put in by the employee were 184 days and thus he, having not completed 240 days of working in a year, was not entitled to any relief. The Tribunal noticed that neither the management nor the workman cared to produce the muster roll w.e.f. August 1994; that the employee did not summon muster roll although the management had failed to produce them. Aggrieved by the decision of the Tribunal, the employee filed a writ petition before the High Court which took the view that since the management did not produce the relevant documents before the Industrial Tribunal, an adverse inference should be drawn against it as it was in possession of best evidence and thus, it was not necessary for the employee to call upon the management to do so. The High Court observed that the burden of proof may not be on the management but in case of non-production of documents, an adverse inference could be drawn against the management. Only on that basis, the writ petition was allowed holding that the employee had worked for 240 days. Overruling the decision of the High Court, this Court found on facts of that case that the employee had not adduced any evidence before the court in support of his contention of having complied with the requirement of Section 25-B of the Industrial Disputes Act; that apart from examining himself in support of his contention, the employee did not produce or call for any document from the office of the management including the muster roll (MR) and that apart from muster rolls, the employee did not produce the offer of appointment or evidence concerning remuneration received by him for working during the aforementioned period…

14. In Range Forest Officer [(2002) 3 SCC 25 : 2002 SCC (L&S) 367] the dispute was referred to the Labour Court as to whether the workman had completed 240 days of service. Vide award dated 10-8-1988, the Tribunal held that the services were wrongly terminated without giving retrenchment compensation. In arriving at this conclusion, the Tribunal stated that in view of the affidavit of the workman saying that he had worked for 240 days, the burden was on the management to show justification in termination of the service. It is in this light that the Division Bench of this Court took the view that the

Tribunal was not right in placing the burden on the management without first determining on the basis of cogent evidence that the workman had worked for 240 days in the year preceding his termination. This Court held that it was for the claimant to lead evidence to show that he had worked for 240 days in the year preceding his termination; that filing of an affidavit is only his own statement in his own favour which cannot be recorded as sufficient evidence for any court or tribunal to come to the conclusion that a workman had worked for 240 days in a year. This Court found that there was no proof of receipt of salary or wages for 240 days; that the letter of appointment was not produced; that the letter of termination was not produced on record and, therefore, the award was set aside.

15. In Rajasthan State Ganganagar S. Mills Ltd. [(2004) 8 SCC 161 : 2004 SCC (L&S) 1055] the workman had alleged that he had worked for more than 240 days in the year concerned, which claim was denied by the management. The workman had merely filed an affidavit in support of his case. Therefore, the Division Bench of this Court took the view that it was for the claimant to lead evidence to show that he had worked for 240 days in the year preceding his termination. This Court observed that filing of an affidavit was not enough because the affidavit contained self-serving statement of the workman which cannot be regarded as sufficient evidence for any court or tribunal to come to the conclusion that the claimant had worked for 240 days in a year. Further, this Court found that there was no proof of receipt of salary or wages for 240 days and, therefore, mere non-production of the muster roll for a particular period was not sufficient for the Labour Court to hold that the workman had worked for 240 days as claimed. On the facts of that case, the Court found that even if the period for which the workman had alleged to have worked was taken into account, as mentioned in his affidavit, still the said workman did not fulfil the requirement of completion of 240 days of service and, therefore, this Court set aside the award of the Labour Court.

16. In M.P. Electricity Board [(2004) 8 SCC 246 : 2004 SCC (L&S) 1092] the workmen were engaged by the Board on daily wages for digging pits to erect electric poles. It was the case of the Board that on completion of the project, the employment was terminated and whenever a similar occasion arose for digging pits, the workmen were re-employed on daily wages and, therefore, their employment was not permanent in nature nor had the workmen completed 240 days of continuous work in a given year. The project jobs came to an end in 1991 and the workmen were never re-employed by the Board. Being aggrieved by the said non-employment, the workmen filed applications under the M.P. Industrial Relations Act seeking permanent employment, primarily on the ground that they have completed 240 days in a year and their discontinuation of service amounted to retrenchment without following the legal requirements. The Board denied the allegations made in the application before the Labour Court. An application was moved before the Labour Court by the workmen seeking direction to the Board to produce the muster roll for the period concerned. However, no other material was produced by the workmen to establish the fact that they had worked for 240 days continuously in a given year.

Some of the workmen were also examined before the Labour Court. However, no document was produced in the form of letter of appointment, receipt indicating payment of salary, etc. After examining the entry in the muster rolls, the Labour Court came to the conclusion that the workmen had not worked for 240 days continuously in a given year, hence, they could not claim permanency nor could they term their non-employment as retrenchment. Aggrieved by the award of the Labour Court, the workmen preferred an appeal before the Industrial Court at Bhopal which took the view that since the Board has failed to produce the entire muster roll for the year ending 1990, an adverse inference was required to be drawn against the Board and solely based on the said inference, the Industrial Court accepted the case of the workmen that they had worked for 240 days continuously in a given year. Accordingly, the Industrial Court granted reinstatement to the workmen with 50% back wages. Drawing of such an adverse inference was challenged before this Court by the M.P. Electricity Board. In the light of the aforestated facts, this Court opined that the Industrial Court or the High Court could not have drawn an adverse inference for non-production of the muster rolls for the years 1990 to 1992, particularly in the absence of a specific plea by the claimants that they had worked during the period for which muster rolls were not produced. This Court observed that the initial burden of establishing the factum of their continuous work for 240 days in a year was on the workmen and since that burden was not discharged, the Industrial Court and the High Court had erred in ordering reinstatement solely on an adverse inference drawn erroneously.

17. Analysing the above decisions of this Court, it is clear that the provisions of the Evidence Act in terms do not apply to the proceedings under Section 10 of the Industrial Disputes Act. However, applying general principles and on reading the aforestated judgments, we find that this Court has repeatedly taken the view that the burden of proof is on the claimant to show that he had worked for 240 days in a given year. This burden is discharged only upon the workman stepping in the witness box. This burden is discharged upon the workman adducing cogent evidence, both oral and documentary. In cases of termination of services of daily-waged earners, there will be no letter of appointment or termination. There will also be no receipt or proof of payment. Thus in most cases, the workman (the claimant) can only call upon the employer to produce before the court the nominal muster roll for the given period, the letter of appointment or termination, if any, the wage register, the attendance register, etc. Drawing of adverse inference ultimately would depend thereafter on the facts of each case. The above decisions however make it clear that mere affidavits or self-serving statements made by the claimant workman will not suffice in the matter of discharge of the burden placed by law on the workman to prove that he had worked for 240 days in a given year. The above judgments further lay down that mere non-production of muster rolls per se without any plea of suppression by the claimant workman will not be the ground for the Tribunal to draw an adverse inference against the management. Lastly, the above judgments lay down the basic principle, namely, that the High Court under Article 226 of the Constitution will not interfere with the concurrent findings

of fact recorded by the Labour Court unless they are perverse. This exercise will depend upon the facts of each case."

21. After referring to earlier judgments on the issue of onus of proof, a similar view was taken in the case of **Ranip Nagar Palika Vs. Babuji Gabhaji Thakore & Ors.**8. The relevant observations made in the judgment are as follows:-

"8. ...the burden of proof lies on the workman to show that he had worked continuously for 240 days for the preceding one year and it is for the workman to adduce evidence apart from examining himself to prove the factum of being in employment of the employer."

22. In the context of burden of proof requiring 240 days continuous service and drawing of an adverse inference, reference may also be had to the judgment in the case of **Sub-Divisional Engineer, Irrigation Project, Yavatmal Vs. Sarang Marotrao Gurnule**9.

"21. The next question is how the workman is expected to discharge this burden? Does it follow from the observations in the judgments quoted above (underlined for the sake of convenience) that a workman is expected to tender a particular quantum of evidence, or to examine a particular number of witnesses in support of his plea? The Evidence Act, which does not apply to matter under the Industrial Disputes Act, too does not lay down that any particular number of witnesses must be examined to prove a particular fact. A fact is held as proved when a Judge upon considering the matter before him either believes it to exist or considers its existence so probable that a man of ordinary prudence would believe that it exists. Just as it would be futile to expect an employer to prove a non-existent fact, namely that a workman had not worked for 240 days, it would be futile to expect a workman to produce non-existent evidence. The best evidence rule would mandate that if the workman has in his possession any documentary evidence which would support his word on oath, he must produce such evidence, and, if he is not doing so, it would result in discrediting his word. The observations of the Apex Court that in addition to his own word, the workman must put in something more has to be read with this caveat. The difficulties and dangers in examining another workman in support of his own claim may be imagined. Ordinarily out of fear of reprisal a workmen who is already in employment is unlikely to step into the witness box to support the case of a colleague who has been thrown out. Workman's examining another workman who has been similarly thrown out would not cut ice with the Court because the Court may feel that two lies do not make one truth. Therefore, ultimately in the matter of appreciation of evidence, it is for the Judge who sees the parties in person and receives their evidence to decide whether he would believe them or not. Whether burden on workman is discharged by him or not would have to be decided by applying law declared in following few sentences from para 17 in judgment of three-Judge Bench in R.M. Yellati v. The Asstt. Executive Engineer (supra), which we wish to again reproduce, for, there would be no clearer pronouncement on the subject at pp. 448 & 449 of 2006 (1) LLJ 442.

"17. This burden is discharged only upon the workman stepping in the

witness box. This burden is discharged upon the workman adducing cogent evidence, both oral and documentary. In cases of termination of services of daily-waged earners, there will be no letter of appointment or termination. There will also be no receipt or proof of payment. Thus in most cases, the workman (the claimant) can only call upon the employer to produce before the Court the nominal muster roll for the given period, the letter of appointment or termination, if any, the wage register, the attendance register, etc. Drawing of adverse inference ultimately would depend thereafter on the facts of each case. The above decisions however make it clear that mere affidavits or self-serving statements made by the claimant workman will not suffice in the matter of discharge of the burden placed by law on the workman to prove that he had worked for 240 days in a given year. The above judgments further lay down that mere non-production of muster rolls per se without any plea of suppression by the claimant workman will not be the ground for the Tribunal to draw an adverse inference against the management. Lastly, the above judgments lay down the basic principle, namely, that the High Court under Article 226 of the Constitution will not interfere with the concurrent findings of fact recorded by the Labour Court unless they are perverse. This exercise will depend upon the facts of each case."

A careful re-reading of this passage would show that the Court does not hint at necessity of examining anyone in addition to the workman, while at the same time saying that affidavit alone would not be sufficient. What is expected of workman is to tender cogent evidence, by stepping in the witness box (and thereby allowing the truth of his version to be tested by cross-examination)."

23. The legal position with regard to the burden of proof and onus is well settled and it has been consistently held that the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it. In this regard reference may be had to the judgment in the case of **Haridwar Vs. Smt. Kulwant**10, wherein it was held as follows:-

"12. In my view, learned counsel for the appellant is misconstruing the concept of term "burden of proof" and "onus" by identifying the two as synonymous. The onus probandi i.e. "Burden of proof" lies upon a person who is bound to prove the fact and it never shifts.

13. Section 101 of Indian Evidence Act, 1872 (hereinafter referred to as "Act, 1872") talks of burden of proof, and says:

"**Burden of proof.**--Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."

14. The burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for a negative is usually incapable of proof. The provision is based on the rule, *ie incumbit probatio qui dicit, non qui negat.* In Constantine Line v. I S Corpn, (1941) 2 All ER 165, Lord Maugham said;

"It is an ancient rule founded on consideration on good sense and should

not be departed from without strong reasons."

15. A person who asserts a particular fact has to prove the same. Until such burden is discharged, the other party is not required to be called upon to prove his case. Whoever desires a Court to give judgment, dependent on the existence of facts which he asserts, must prove that those facts exist. The distinction between "burden of proof" and "onus" is that the former lies upon the person and never shifts but the "onus" shifts. Shifting of onus is a continuous process in the evaluation of evidence. For example, in a suit for possession, based on title once the plaintiff is able to create a high degree of probability so as to shift the onus on the defendant, it is then for the defendant to discharge his onus and in absence of such discharge by defendant, burden of proof lying on the plaintiff shall be held to have been discharged so as to amount to proof of plaintiff's title.

16. The above distinction between "burden of proof" and "onus" of proof has been explained in A.Raghavamma v. A. Chenchamma, AIR 1964 SC 136, followed in R.V.E. Venkatachala Gounder v. Arulmigu Viswesaraswami & V.P. Temple and another, (2003) 8 SCC 752.

17. Section 102 of Act, 1872 says that burden of proof in a suit would lie on a person who would fail if no evidence at all were given on either side. Here it is not degree of proof but the onus to lead evidence i.e. obligation to begin to prove a fact. The burden of proof as such has not been defined in the Act but looking to the substance and the context and spirit, it can be said that burden to establish case, loosely, can be said to be burden of proof.

18. For applying above provision in the case in hand, there can be no manner of doubt in holding that burden of proof lies upon the plaintiff. In the case in hand, to prove that sale deed in question suffers an infirmity, justifying its cancellation, as pleaded in the plaint and to prove those facts, burden lies upon plaintiff. But then it has to be understood that there is a distinction between "burden of proof" as a matter of law and pleading and as a matter of adducing evidence. In the first sense, the burden is always constant but burden in the sense of adducing evidence shifts from time to time, having regard to evidence adduced or the presumption of fact or law raised in favour of one or the other. On this aspect, more light emanates when we go through Sections 103 and 104 of Act, 1872, which read as under:

"S. 103. Burden of proof as to particular fact.--The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

S. 104. Burden of proving fact to be proved to make evidence admissible.--The burden of proving any fact necessary to be provided in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence."

24. In the case of **Rangammal Vs. Kuppuswami & Anr.**11, referring to Section 101 of the Evidence Act, it was held that the burden of proving a fact always lies upon the person who asserts the fact and until such burden is discharged, the other party is not required to be called upon to prove his case. The

relevant observations made in the judgment are as follows:-

"21. Section 101 of the Evidence Act, 1872 defines "burden of proof" which clearly lays down that:

"101. Burden of proof.-- Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."

Thus, the Evidence Act has clearly laid down that the burden of proving a fact always lies upon the person who asserts it. Until such burden is discharged, the other party is not required to be called upon to prove his case. The court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such conclusion, he cannot proceed on the basis of weakness of the other party."

25. The burden of proof is thus the legal obligation on a party to prove the allegation made by him, and is often associated with the maxim *"Semper necessitas probandi incumbit ei qui agit"* which means the burden of proof is on the claimant.

26. The essential distinction between "burden of proof" and "onus of proof" is legally well settled. The burden of proof lies upon the person who has to prove a fact and it never shifts; however the shifting of onus of proof is a continuous process in the evaluation of evidence. In this regard reference may be had to the judgment in the case of **A. Raghavamma and another Vs. A. Chenchamma & Anr.**12 wherein it was held as follows:-

"12. ...There is an essential distinction between burden of proof and onus of proof : burden of proof lies upon the person who has to prove a fact and it never shifts, but the onus of proof shifts. The burden of proof in the present case undoubtedly lies upon the plaintiff to establish the factum of adoption and that of partition. The said circumstances do not alter the incidence of the burden of proof. Such considerations, having regard to the circumstances of a particular case, may shift the onus of proof. Such a shifting of onus is a continuous process in the evaluation of evidence…"

27. The aforementioned position has been discussed in a recent judgment of this Court in **M/s Triveni Engineering Industry Ltd. Vs. State of U.P. & Ors.**13 and also **State of U.P. & Anr. Vs. Chhunna Lal & Anr.**14

28. In the instant case the aforementioned burden of proof having not been discharged by the respondent-workman the finding recorded by the Labour Court with regard to the workman having been completed 240 days in a calender year so as to claim entitlement of the protection under Section 6N of the Act, 1947 is not supported from the records and the same being contrary to the material evidence which is available on record the finding cannot be legally sustained. The respondent-workman having not been able to prove the *factum* of his continuous service he was not entitled to benefit of the protection of Section 6N of the U.P. Industrial Disputes Act, 1947 and to the reliefs which have been granted by the Labour Court.

29. Presumption as to adverse inference for non-production of evidence is not obligatory and the burden of proof having not been discharged by the workman the Labour Court could not have proceeded to issue directions for reinstatement, back wages and other consequential benefits solely on the basis of adverse inference.

30. As regards the contention raised by the counsel for the petitioner that the alleged termination having been said to have been made on 01.10.1991 the reference made on 29.03.2014 was highly belated, this Court may take notice of the fact that though no limitation has been prescribed for making of a reference; however, delay in raising an industrial dispute would definitely be an important circumstance which must keep in view at the time of exercise of discretion by the Labour Court irrespective of whether or not such objection has been raised by the other side.

31. The limitation period for making a reference was subject matter of consideration in the case of **Sapan Kumar Pandit Vs. U.P. State Electricity Board & Ors.**15, wherein it was held that the limitation period for making reference is co-extensive with the existence of dispute, meaning thereby that the dispute should be alive on the day when the decision was taken to make a reference or to refuse to make reference. The observations made in the judgment are as follows:-

"8. The above section is almost in tune with Section 10 of the Industrial Disputes Act, 1947, and the difference between these two provisions does not relate to the points at issue in this case. Though no time-limit is fixed for making the reference for a dispute for adjudication, could any State Government revive a dispute which had submerged in stupor by long lapse of time and rekindle by making a reference of it to adjudication? The words "at any time' as used in the section are prima facie indicator to a period without boundary. But such an interpretation making the power unending would be pedantic. There is inherent evidence in this sub-section itself to indicate that the time has some circumscription. The words "where the Government is of opinion that any industrial dispute exists or is apprehended' have to be read in conjunction with the words "at any time'. They are, in a way, complementary to each other. The Government's power to refer an industrial dispute for adjudication has thus one limitation of time and that is, it can be done only so long as the dispute exists. In other words, the period envisaged by the enduring expression "at any time' terminates with the eclipse of the industrial dispute. It, therefore, means that if the dispute existed on the day when the reference was made by the Government, it is idle (sic ideal) to ascertain the number of years which elapsed since the commencement of the dispute to determine whether the delay would have extinguished the power of the Government to make the reference.

9. Hence the real test is, was the industrial dispute in existence on the date of reference for adjudication? If the answer is in the negative then the Government's power to make a reference would have extinguished. On the other hand, if the answer is in positive terms the Government could have exercised the power whatever be the range of the period which elapsed since the inception of the

dispute. That apart, a decision of the Government in this regard cannot be listed (sic) on the possibility of what another party would think, whether any dispute existed or not. The section indicates that if in the opinion of the Government the dispute existed then the Government could make the reference. The only authority which can form such an opinion is the Government. If the Government decides to make the reference, there is a presumption that in the opinion of the Government, there existed such a dispute."

32. In **Shalimar Works Ltd. Vs. Workmen**16 it was pointed out that although there is no limitation prescribed for making a reference of a dispute to the Industrial Tribunal under Section 10(1) of the U.P. Industrial Disputes Act, 1947, the dispute should be referred as soon as possible and in that case the reference having been made after four years of the dispute having arisen it was held that relief of reinstatement should not be given to the discharged workmen in such a belated reference.

33. The issue of lapse of time in making a reference and the effect of the words ' at any time' used under Section 4(k) of the U.P. Industrial Disputes Act, 1947 was considered in the case of **Western India Match Co. Ltd. Vs. Workers' Union**17, and it was held that the discretion conferred upon the Government for making a reference was not unfettered. The observations made in the judgment in this regard are as follows:-

"8. From the words used in Section 4(k) of the Act there can be no doubt that the Legislature has left the question of making or refusing to make a reference for adjudication to the discretion of the Government. But the discretion is neither unfettered nor arbitrary for the section clearly provides that there must exist an industrial dispute as defined by the Act or such a dispute must be apprehended when the Government decides to refer it for adjudication. No reference thus can be made unless at the time when the Government decides to make it an industrial dispute between the employer and his employees either exists or is apprehended. Therefore, the expression "at any time", though seemingly without any limits, is governed by the context in which it appears. Ordinarily, the question of making a reference would arise after conciliation proceedings have been gone through and the conciliation officer has made a failure report. But the Government need not wait until such a procedure has been completed. In an urgent case, it can "at any time", i.e., even when such proceedings have not begun or are still pending, decide to refer the dispute for adjudication. The expression "at any time" thus takes in such cases as where the Government decides to make a reference without waiting for conciliation proceedings to begin or to be completed. As already stated, the expression "at any time" in the context in which it is used postulates that a reference can only be made if an industrial dispute exists or is apprehended. No reference is contemplated by the section when the dispute is not an industrial dispute, or even if it is so, it no longer exists or is not apprehended, for instance, where it is already adjudicated or in respect of which there is an agreement or a settlement between the parties or where the industry in question is no longer in existence.

x x x x x

13. It is true that where a Government reconsiders its previous decision and decides to make the reference, such a decision might cause inconvenience to the employer because the employer in the meantime might have acted on the belief that there would be no proceedings by way of adjudication of the dispute between him and his workmen. Such a consideration would, we should think, be taken into account by the Government whenever, in exercise of its discretion, it decides to reopen its previous decision as also the time which has lapsed between its earlier decision and the date when it decides to reconsider it. These are matters which the Government would have to take into account while deciding whether it should reopen its former decision in the interest of justice and industrial peace but have nothing to do with its jurisdiction Under Section 4(k) of the Act. Whether the intervening period may be short or long would necessarily depend upon the facts and circumstances of each case, and therefore, in construing the expression "at any time" in Section 4(k) it would be impossible to lay down any limits to it."

34. The nature and manner of exercise of powers under Section 10 of the Industrial Disputes Act, 1947 to make a reference was restated in the case of **Nedungadi Bank Ltd. Vs. K.P. Madhavankutty**18, and it was observed that in spite of absence of a statutory limitation period the power to make reference cannot be exercised to revive settled matters or to refer stale disputes and in the facts of the case the reference having been made after seven years the same was held to be bad both on the grounds of delay as well as non-existence of an industrial dispute. The relevant extracts from the judgment are as follows:-

"6. Law does not prescribe any time-limit for the appropriate Government to exercise its powers Under Section 10 of the Act. It is not that this power can be exercised at any point of time and to revive matters which had since been settled. Power is to be exercised reasonably and in a rational manner. There appears to us to be no rational basis on which the Central Government has exercised powers in this case after a lapse of about seven years of the order dismissing the Respondent from service. At the time reference was made no industrial dispute existed or could be even said to have been apprehended. A dispute which is stale could not be the subject-matter of reference Under Section 10 of the Act. As to when a dispute can be said to be stale would depend on the facts and circumstances of each case. When the matter has become final, it appears to us to be rather incongruous that the reference be made Under Section 10 of the Act in the circumstances like the present one. In fact it could be said that there was no dispute pending at the time when the reference In question was made. The only ground advanced by the Respondent was that two other employees who were dismissed from service were reinstated. Under what circumstances they were dismissed and subsequently reinstated is nowhere mentioned. Demand raised by the respondent for raising an industrial dispute was ex facie bad and incompetent.

7. In the present appeal it is not the case of the respondent that the disciplinary proceedings, which resulted in his dismissal, were in any way illegal or there was even any irregularity. He

availed his remedy of appeal under the rules governing his conditions of service. It could not be said that in the circumstances an industrial dispute did arise or was even apprehended after a lapse of about seven years of the dismissal of the respondent. Whenever a workman raises some dispute it does not become an industrial dispute and the appropriate Government cannot in a mechanical fashion make the reference of the alleged dispute terming it as an industrial dispute. The Central Government lacked power to make reference both on the ground of delay in invoking the power Under Section 10 of the Act and there being no industrial dispute existing or even apprehended. The purpose of reference is to keep industrial peace in an establishment. The present reference is destructive to the industrial peace and defeats the very object and purpose of the Act. The Bank was justified in thus moving the High Court seeking an order to quash the reference in question.

8. It was submitted by the respondent that once a reference has been made Under Section 10 of the Act a Labour Court has to decide the same and the High Court in writ jurisdiction cannot interfere in the proceedings of the Labour Court. That is not a correct proposition to state. An administrative order which does not take into consideration statutory requirements or travels outside that is certainly subject to judicial review, limited though it might be. The High Court can exercise its powers under Article 226 of the Constitution to consider the question of the very jurisdiction of the Labour Court. In National Engg. Industries Ltd. v. State of Rajasthan (2000) 1 SCC 371 this Court observed:

24. It will be thus seen that the High Court has jurisdiction to entertain a writ petition when there is an allegation that there is no industrial dispute and none apprehended which could be the subject matter of reference for adjudication to the Industrial Tribunal Under Section 10 of the Act. Here it is a question of jurisdiction of the Industrial Tribunal, which could be examined by the High Court in its writ jurisdiction. It is the existence of the Industrial Tribunal (sic dispute) which would clothe the appropriate Government with power to make the reference and the Industrial Tribunal to adjudicate it. If there is no industrial dispute in existence or apprehended the appropriate Government lacks power to make any reference."

35. The period of limitation for making a reference under Section 10(1) of the Industrial Disputes Act, 1947 and the import of the words 'at any time' used in the said section again came up for consideration in the case of **Prabhakar Vs. Joint Director, Sericulture Department & Anr.**19, and the necessity of determining whether a claim is still alive or it has become stale while making the reference was reiterated and in that case where the services of the workman had been terminated on 01.04.1985 and the reference was made in the year 1999 it was held that the reference after fourteen years of termination without any justifiable explanation for delay was bad in law since it was in respect of a non-existing dispute. The observations made in the judgment in this regard are being extracted below.

"42.3. ...if the dispute is raised after a long period, it has to be seen as to whether such a dispute still exists? Thus, notwithstanding the fact that law of limitation does not apply, it is to be shown by the workman that there is a dispute in praesenti. For this purpose, he

has to demonstrate that even if considerable period has lapsed and there are laches and delays, such delay has not resulted into making the industrial dispute cease to exist. Therefore, if the workman is able to give satisfactory explanation for these laches and delays and demonstrate that the circumstances disclose that issue is still alive, delay would not come in his way because of the reason that law of limitation has no application. On the other hand, if because of such delay dispute no longer remains alive and is to be treated as "dead", then it would be non-existent dispute which cannot be referred.

x x x x x

44. To summarise, although there is no limitation prescribed under the Act for making a reference under Section 10(1) of the ID Act, yet it is for the "appropriate Government" to consider whether it is expedient or not to make the reference. The words "at any time" used in Section 10(1) do not admit of any limitation in making an order of reference and laws of limitation are not applicable to proceedings under the ID Act. However, the policy of industrial adjudication is that very stale claims should not be generally encouraged or allowed inasmuch as unless there is satisfactory explanation for delay as, apart from the obvious risk to industrial peace from the entertainment of claims after long lapse of time, it is necessary also to take into account the unsettling effect which it is likely to have on the employers' financial arrangement and to avoid dislocation of an industry.

45. On the application of the aforesaid principle to the facts of the present case, we are of the view that the High Court correctly decided the issue holding that the reference at such a belated stage i.e. after fourteen years of termination without any justifiable explanation for delay, the appropriate Government had no jurisdiction or power to make reference of a non-existing dispute."

36. The facts of the present case are somewhat similar to the facts as in the case of **Prabhakar Vs. Joint Director, Sericulture Department & Anr.** as in the present case also in respect of an alleged termination said to have been made on 01.10.1991 the reference was made on 29.03.2014 i.e. after a lapse of more than two decades there would be little reason to believe that there existed a live dispute when the reference was made and for this reason also the award passed by the Labour Court more particularly the directions issued for reinstating the respondent-workman in service with effect from the date of termination and further holding him entitled to 25% of the back wages and also full back wages from the date of the award cannot be sustained.

37. In view of the foregoing discussion the award dated 21.12.2015 passed by the Labour Court, U.P., Jhansi in Adjudication Case No.62 of 2014 is held to be legally unsustainable and is accordingly set aside.

38. The writ petition is allowed in the aforementioned terms.

(2019)12 ILR A1292

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.11.2017

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

THE HON'BLE AJIT KUMAR, J.

Writ-C No. 65580 of 2015

Committee of Management Urban Co-Operative Bank Ltd. Basti & Anr.
...Petitioners
Versus
Debt Recovery Tribunal Allahabad & Ors.
...Respondents

Counsel for the Petitioners:
Sri Bhim Sen Pandey

Counsel for the Respondents:
C.S.C.

A. Deciding *question of maintainability* by Registrar of Tribunal - an issue which can be decided only by appropriate forum and not by ministerial staff, more so when no such provision is existing in statute empowering Registrar to take a decision on the *question of maintainability.* (Para 4)

Petition filed by petitioners before Debts Recovery Tribunal - returned by Registrar - on the ground of maintainability - Registrar has gone to the extent of disregarding the judgements , Narendra Kanti Lal Shah Vs. Joint Registrar Cooperative Societies & M. Babu Rao and others Vs. Deputy Registrar of Co-operative Societies and others , observing that judicial explanation does not become binding unless rules are subsequently modified to accommodate need for change - This approach and understanding on the part of Registrar speaks about not only impertinence but lack of judicial knowledge wherein it can ignore verdict of two High Courts on the ground that judgment itself is not binding unless rules are modified. (Para 3 & 5)

Held:- Order passed by Debts Recovery Tribunal set aside - Registrar of Debts Recovery Tribunal directed to register the original application filed by petitioners - it will be open to Tribunal to record deficiencies/ objections whatever it finds, where after final decision on correctness of those deficiencies/ objections will be taken by Tribunal. (Para 6)

Writ Petition allowed. (E-7)

List of cases cited: -

1.Narendra Kanti Lal Shah Vs. Joint Registrar Cooperative Societies, Bombay High Court,

2.M. Babu Rao and others Vs. Deputy Registrar of Co-operative Societies and others.

(Delivered by Hon'ble Sudhir Agarwal, J. & Hon'ble Ajit Kumar, J.)

1. Heard Sri B.S. Pandey, learned counsel for petitioners and learned Standing Counsel for respondents.

2. With the consent of learned counsel for parties we proceed to decide this writ petition at this stage, since only short legal issue in involved in this writ petition.

3. The petition filed by petitioners before Debts Recovery Tribunal has been returned by Registrar on the ground of maintainability vide order dated 29.09.2015, which is challenged in present writ petition.

4. Learned Standing Counsel, despite repeated query, could not show any provision under which question of maintainability can be decided by Registrar of Tribunal. This is an issue which can be decided only by appropriate forum and not by ministerial staff, moreso when no such provision is existing in statute empowering Registrar to take a decision on the question of maintainability.

5. We also find some impertinence on the part of Registrar, Debts Recovery Tribunal, Allahabad inasmuch as petitioners it appears placed reliance on a

Full Bench decision of Bombay High Court in **Narendra Kanti Lal Shah Vs. Joint Registrar Cooperative Societies**, delivered on 12.12.2003 and a judgment of Andra Pradesh High Court in **M. Babu Rao and others Vs. Deputy Registrar of Co-operative Societies and others**, delivered on 05.07.2005 but Registrar has gone to the extent of disregarding aforesaid judgments observing that judicial explanation does not become binding unless rules are subsequently modified to accommodate need for change. This approach and understanding on the part of Registrar speaks about not only impertinence but lack of judicial knowledge wherein it can ignore verdict of two High Courts on the ground that judgment itself is not binding unless rules are modified. It is something like that where a provision is declared ultra vires by a Court but executive may say that since provision so declared has not been removed from statute book by legislature, therefore, he is bound to follow such provision. We, therefore, condemn this attitude and approach on the part of Registrar in disregarding judgments of two High Courts in such manner.

6. In the result, writ petition succeeds and is allowed. Order dated 29.09.2015 is hereby set aside. We further direct that original application filed by petitioners shall be registered by Registrar of Debts Recovery Tribunal concerned. However, it will be open to Tribunal to record deficiencies/ objections whatever it finds, whereafter final decision on correctness of those deficiencies/ objections will be taken by Tribunal.
