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ALLAHABAD SERIES

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101. Hon'ble Mr. Justice Saroj Yadav

(2020)09ILR A1
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.02.2020

BEFORE

THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE PRAKASH PADIA, J.

Criminal Misc. Writ Petition No. 32514 of 2018

Satpal Singh Chhabra ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Swetasha Agarwal

Counsel for the Respondents:
A.G.A.

A. Criminal Law - U.P. Police Regulations, 1861- Chapter XX Rule 231 - Regulation 228 - surveillance of person in History Sheet of Class-A - The surveillance in respect of a person whose history sheet of Class-A has been opened cannot be continued beyond two consecutive years except by a special order or unless he has been found to have been convicted in any cognizable offence and has been in jail or was suspected for any offence or absented himself in suspicious circumstances during said two consecutive years. No such eventuality has happened or occurred in the instant case of the petitioner during the said two consecutive years, therefore history sheet ought to have been closed. (para 12, 14)

Writ Petition Allowed. (E-10)

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

1. Heard learned counsel for the petitioner and Smt. Manju Thakur, learned AGA for the respondents.

2. The petitioner has preferred the present writ petition inter-alia with the prayer to quash the impugned order dated 5.7.2018 passed by the S.S.P., Saharanpur rejecting the petitioner's representation for closure of history-sheet No.30-A opened against the petitioner at Police Station Kutubsher, District Saharanpur since 4.4.2006.

3. The facts in brief as contained in the writ petition are that the petitioner is a reputed man of his town and doing the business and running a daily newspaper in the name of "Dainik Badri Vishal". It is stated in the writ petition that the petitioner was falsely implicated in 9 cases disclosed in the history-sheet. It is further stated that it is apparent that a series of criminal cases relating to disputed properties for which civil suites were also filed before the court of competent jurisdiction at district Saharanpur, were deliberately instituted against the petitioner and are product of malice. From perusal of the history-sheet, which is appended in the writ petition it is clear that on the basis of nine criminal cases relating to the offences against property, history-sheet in question came into existence for the petitioner in the year 2006. The details of the aforesaid nine cases were mentioned in paragraph 9 of the writ petition. From perusal of the same, it is clear that in some of the cases either final report has been submitted or the proceedings were quashed by the competent authority. It is further stated in paragraph 10 of the writ petition that apart from the nine cases as mentioned in the history-sheet eight other cases were also registered against the petitioner with the reference and mention in paragraph 10 of the writ petition. It is further stated in the writ petition that in as many as four cases reference of which has been made by the petitioner in the petition, the petitioner has no connection.

4. It is further argued by learned counsel for the petitioner that after the year 2007, no criminal case whatsoever has been registered against him nor he has been involved in any case pertaining to any civil dispute or land dispute or anything else but no orders were passed by the authorities for closure of the history-sheet in question. In this reasons a comprehensive representation was made by the petitioner before the State Government on 23.8.2016, copy of which is appended as annexure 20 to the writ petition. Since no action was taken on the same, the petitioner earlier preferred a writ petition before this Court being Criminal Misc. Writ Petition No.15785 of 2017 (Satpal Singh Chhabra Vs. State of U.P. and 3 others). The aforesaid writ petition was finally decided by another Coordinate Bench of this Court vide its judgement and order dated 20.4.2018 directing the petitioner to prefer a representation before the concerned S.S.P / S.P. along with a self attested copy of the writ petition within two weeks. The authority concerned was directed to decide the same and pass appropriate orders within two months. The order passed on 20.4.2018 is reproduced hereinbelow :-

"Heard Ms. Swetashwa Agarwal, learned counsel for the petitioner, Sri Ashish Pandey, learned AGA for the State and perused the impugned F.I.R. as well as material brought on record.

The present writ petition has been filed with the prayer to quash the history sheet No. 30-A dated 04.04.2006, command the respondent concerned not to give effect to history sheet No. 30-A dated 04.04.2006 in Police Station Kutubsher, Saharanpur.

Learned counsel for the petitioner submits that he made a representation before the S.S.P., Saharanpur, as it appears from the representation dated 23.08.2016 and copy of the same has been annexed on page No. 134.

We have heard the learned counsel for the petitioner and also learned A.G.A.

It would appear from the record that the police has opened history sheet of the petitioner on the basis of nine cases registered against him mentioned in para no. 6 in which in some of them, the petitioner has been acquitted.

The argument of the learned counsel for the petitioner that the history sheet of Class A can be opened when it has been established on the basis of suspicion or conviction that a suspect is an active and prominent member of a gang of dacoits. It is further argued that mere suspects should not be starred until established that one has become dangerous and confirmed criminal and is unlikely to reform. The next contention is that the case of the petitioner no. 1 is not covered by paragraph 228 of the U.P. Police Regulations.

Per contra, learned A.G.A. drew attention of the Court to the decision in Chaman Lal Vs. State of U.P. 1992 Supp. (2) SCC 84(1) and suggested that the matter should be relegated to authority concerned for deciding whether the history sheet of petitioner should be closed or should be continued.

We are also of the view that the interest of justice would be best served if the matter is relegated to the police authority to take appropriate decision in the matter.

In view of the above, it is directed that in case the petitioner prefers a representation before the concerned S.S.P / S.P. along with a self attested copy of the writ petition within two weeks from today, the authority concerned shall consider it according to law and pass appropriate order within two months.

The petition stands disposed of. "

5. Pursuant to the same a detailed representation was submitted by the petitioner before the respondent no.1. The aforesaid representation was rejected by the respondent no.2 vide its order dated 5.7.2018, copy of which is appended as annexure 1 to the writ petition.

6. It is argued by learned counsel for the petitioner that the history-sheet can only be opened against the person, who is habitual offender or addicted to commit crimes specified under the Police Regulation and in the present case History-sheet was opened against the petitioner although there was no material before the authority for such belief. It is further argued that history-sheet of class-A as in the present case can be opened when it has been established by suspicion or conviction that a suspect is an active and prominent member of a gang of dacoit and mere suspects can not be starred until established that one has become dangerous and confirmed criminal and is unlikely to reform.

7. Learned counsel for the petitioner relied upon Regulation 228 of U.P. Police Regulation. It is further argued that since 2007, there is no criminal case lodged against the petitioner and he was not found involved in any criminal activities under Chapter XX Rule 231 of U.P. Police Regulations, the history-sheet ought to have been closed after two consecutive years but only in order to harass the petitioner the authorities are not closing the history-sheet of the petitioner and are harassing the petitioner in the name of surveillance. It is further argued that the history-sheet of the petitioner is a Class-A and not starred. The relevant provisions regarding maintenance of history-sheet of Class-A is contained in Chapter XX Rule 231 of the U.P. Police Regulations, which is reproduced hereinbelow :-

"(231) The subjects of history sheets of class A will unless they are "starred' remain under surveillance for at least two consecutive year of which they have spent no part in jail. When the subject of a history sheet of class A whose name has not been "starred' who has never been convicted of cognizable offence and has not been in jail or suspected of any offence or absented himself in suspicious circumstances for two consecutive years his surveillance will be discontinued, unless for special reasons to be recorded in the inspection book of the police station the Superintendent decides that it should continue.

When the subject of a history sheet of class A is "starred' he will remain starred for at least consecutive years during which he has not been in jail or been suspected of a cognizable offence or had any suspicious absence recorded against him. At the end of that period, if he is believed to have reformed he will cease to be "starred' but will remain subject to surveillance will be discontinued only if during that period no complaints have been recorded against him.

In closing the history sheets of any "unstarring' ex-convicts and especially ex-convicts dacoits great care should be exercised."

8. In this view of the matter, it is argued that the history-sheet of a Class-A could only be permitted to continue for two conclusive years subject to his not having been in jail for any part of the said two years. The history-sheet beyond two years cannot continue except by a special order

or unless found to have been convicted in any congnizable offence and in jail or suspected for any offence or absented in suspicious circumstances during said two consecutive years. It is argued that the petitioner does not fall into any of the parameters mentioned in paragraph 231 of the Police Regulations as such history-sheet needs to be closed in the interest of justice. It is further argued that though all this grounds were duly taken by the petitioner while filing the representation pursuant to the orders passed by this Court but none of them was taken into consideration by the respondent no.2 while rejecting the same.

9. The writ petition has been contested on behalf of the State by filing counter affidavit.

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

11. It is not disputed that the history sheet of the petitioner was of Class-A and was not "starred'. The relevant provision regarding maintenance of history sheet of Class-A is contained in Chapter XX Rule 231 of the U.P. Police Regulations which is reproduced above.

12. From the above, it is apparent that surveillance in respect of a person whose history sheet of Class-A has been opened, is to be continued for two consecutive years subject to his not having been in jail for any part of said two years. It is also clear from above that history sheet beyond two years cannot continue except by a special order or unless he has been found to have been convicted in any cognizable offence and has been in jail or was suspected for any offence or absented himself in suspicious circumstances during said two consecutive years.

13. In this way, history sheet could be continued for two years beyond 2006 and thereafter since no case was registered against the petitioner in the next two consecutive years and he had never been in jail or convicted of any cognizable offence during two years after 2006, the history sheet could not be continued beyond that period unless Superintendent decided so, for special reasons to be recorded in the inspection book of the police station.

14. The intention of the Regulation 231 is not that history sheet should remain open against anyone for all time to come. Once the person maintains good conduct and he is not convicted in any cognizable offence or has been in jail during that period and also he was not suspected of any offence or absented himself in suspicious circumstances for the said two consecutive years, his surveillance is to be dis-continued except under orders of Superintendent on the basis of reason recorded at police station during inspection. No such eventuality has happened or occurred in the case of the petitioner during the said two consecutive years, therefore, history sheet ought to have been closed. Continuance of history sheet beyond the period as indicated above is wrong and, therefore, petitioner deserves to the relief prayed for.

15. Although all these facts were duly mentioned by the petitioner while making the representation pursuant to the order passed by this Court dated 20.4.2018 but non of them was taken into consideration in legal manner whatsoever by the respondent no.2 while rejecting the same vide its order dated 5.7.2020, which is under challenge in the present writ petition.

16. In view of the same, we are of the opinion that the order dated 5.7.2018

passed by the respondent no.2/S.S.P., Saharanpur, copy of which is appended as annexure 1 to the writ petition is liable to be quashed and the same is hereby quashed.

17. The writ petition is, therefore, allowed.

18. A writ of mandamus is accordingly issued directing the Senior Superintendent of Police, Saharanpur/ respondent no.2 to discontinue history sheet no. 30-A of the petitioner at P.S. Kutubsher, District Saharanpur.

19. No order as to costs.

(2020)09ILR A5
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.09.2020

BEFORE

THE HON'BLE GOVIND MATHUR, C.J.
THE HON'BLE SAUMITRA DAYAL SINGH, J.

Habeas Corpus Writ Petition No. 264 of 2020

Nuzhat Perween ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
In Person, Sri Dileep Kumar, Sri Manish Singh, Sri Manoj Kumar, Sri N.I. Jafri

Counsel for the Respondents:
G.A., Sri Manish Goyal, Sri Patanjali Mishra, Sri Sushil Kumar Mishra

A. Constitution of India–Article 21– Right to Personal Liberty – Under Article 21 of the Constitution of India along with the right to life, the right to personal liberty is a precious fundamental right. This precious fundamental right must always be protected – The strong and valuable fabric of our nation is well designed with support of fundamental rights given in Part-III of the Constitution – These rights are golden thread in the fabric, which is further illuminated by extending protection of life and personal liberty under Article 21 of the Constitution of India – True it is, the right so given under Article 21 is not absolute but no one can be deprived of his or her personal liberty except on such grounds and in accordance with such procedure as are established by law. (Para 29)

B. Civil Law - National Security Act, 1980 – Preventive Detention – Nature – Preventive detention is an exceptional mode to curtail liberty and freedom of a person in exceptionally rare circumstances. (Para 29)

C. Civil Law - National Security Act, 1980 – Section 3(2)-Preventive Detention– Subjective Satisfaction of Authority – Scope of Judicial Review – Interference by the Court – It is not open for the courts to substitute their opinion by interfering with 'subjective satisfaction of the detaining authority' – However, it does not mean that the court cannot look into the material on which detention is based – While assessing 'subjective satisfaction of the detaining authority' the Court examining a petition seeking a writ of habeas corpus has to look into the record to examine whether the subjective satisfaction is acceptable to a reasonable wisdom and that satisfies rationality of normal thinking and analyzing process. (Para 36)

D. Interpretation of Statute – Subjective Satisfaction – Meaning – Expression 'subjective satisfaction' means the satisfaction of a reasonable man that can be arrived at on the basis of some material which satisfies a rational man – It does not refer to whim or caprice of the authority concerned. (Para 36)

E. Civil Law - National Security Act, 1980 – Preventive Detention – KR Das Test for Subjective Satisfaction – No proceedings for detention were initiated for about good two months from the day the detenue addressed the students – It is only after passing of the bail order, the authorities initiated the process of detention under the National Security Act, 1980

– Subjective Satisfaction Test laid down by Supreme Court in Khudi Ram Das's case relied upon – There is a serious lack of objective material on record as may have given rise to a valid subjective satisfaction with the detaining authority to preventively detain the detenue on 13.02.2020 – Held, in absence of any material indicating that the detenue continued to act in a manner prejudicial to public order from 12.12.2019 up to 13.02.2020 or that he committed any such other or further act as may have had that effect, the preventive detention order cannot be sustained. (Para 32, 39, 42, 44 and 48)

Writ petition allowed. (E-1)

Cases relied on :-

1. Khudi Ram Das Vs St. of W.B. & 3 ors.; (1975) 2 SCC 81

2. T.A. Abdul Rahman Vs St. of Kerala & ors.; (1989) 4 SCC 741

3. Rajinder Arora Vs U.O.I .& ors.; (2006) 4 SCC 796

(Delivered by Hon'ble Govind Mathur, C.J. & Hon'ble Saumitra Dayal Singh, J.)

1. Being transmitted by the Supreme Court, this Habeas Corpus petition is before us for adjudication.

2. Smt. Nuzhat Parween, mother of the detenue Dr. Kafeel Khan has preferred this petition assailing validity of the detention order dated 13th February, 2020 passed by the District Magistrate, Aligarh invoking powers under sub-Section (2) of Section 3 of the National Security Act, 1980. Factual matrix of the case is as follows:-

3. After obtaining the degree of Doctor in Medicine (MD), Dr. Kafeel Khan, the detenue entered in service of the State of Uttar Pradesh being appointed as Lecturer at Baba Raghav Das Medical College, Gorakhpur (B.R.D. Medical College, Gorakhpur) in the month of August, 2016.

4. An unfortunate incident occurred at the teaching hospital attached with B.R.D. Medical College, Gorakhpur in the intervening night of 10/11 August, 2017 due to unexpected shortage in supply of liquid oxygen. In a course of disciplinary action, the detenue was placed under suspension on 22nd August, 2019, which was followed by a memorandum of allegations dated 12th September, 2017.

5. For the ill-happenings in the intervening night of 10th/11th August, 2017, a criminal case was also registered against detenue and eight other Doctors working at B.R.D. Medical College, Gorakhpur for the alleged commission of offences under Sections 409, 308, 120B, 420 Indian Penal Code, 1860, Section 15 of Indian Medical Council Act, 1956 and Section 66 of the Information Technology Act, 2000. The case aforesaid was lodged on 23rd August, 2017 at Police Station Hazratganj, Lucknow and the same was transferred for investigation to Police Station Gulhariya, Gorakhpur. The investigating agency arrested the detenue on 2nd September, 2017 but was released on bail in pursuance of an order dated 25th April, 2018 passed by learned single Bench of this Court.

6. As per the averments contained in the petition for writ, the petitioner and his other family members including the detenue were continuously harassed and victimized by the State authorities including the District Administration, Gorakhpur by several means. Details of certain such events and incidents are given in paragraphs 24 to 30 of the petition.

7. In the month of December, 2019, Government of India introduced Citizenship Amendment Bill that came to be passed by both houses of Parliament in their winter session and was also assented to by His Excellency, the President of India on 12th December, 2019. The Act triggered protests across several parts of the country. On 12th December, 2019 itself the detenue and Dr. Yogendra Yadav addressed a gathering of protesting students at Aligarh Muslim University, Aligarh. On 13th December, 2019 at the instance of Sub-Inspector of Police, Sri Danish a criminal case was lodged against the detenue under Section 153-A of the Indian Penal Code at Police Station Civil Lines, Aligarh. The offences under Section 153B, 109, 505(2) Indian Penal Code were added subsequently and, during course of investigation the detenue was arrested on 29th January, 2020. Under an order dated 31st December, 2019 passed by the District Magistrate, Aligarh he was transferred to District Jail, Mathura.

8. An application preferred by the detenue for his release on bail came to be accepted by the Chief Judicial Magistrate, Aligarh vide order dated 10th February, 2020. The order aforesaid reads as under:-

"BAIL ORDER

At the Court of Chief Judicial Magistrate Aligarh

10.02.2020

The accused Dr. Kafeel has submitted a bail application in the order of Case Crime No.-700/2019, Section 153A, 153B, 505(2), 109 IPC, P.S. Civil Line, stating that the applicant/accused is innocent and falsely implicated. There is no criminal history of the accused therefore bail has been sought.

Opposing the bail application, the Ld. Assistant Prosecuting Officer, it has been said that the accused is criminal in nature and the nature of the crime committed by the accused is of a serious nature. Against the above argument of the prosecution the accused contends that the offence has not been committed and he has merely expressed his views of which he has a freedom guaranteed by the Constitution of India. He has been falsely accused and the accused is not in jail but rather on bail.

The accused is detained in the district prison. On the bail application the Ld. Advocate for the accused and the Ld. Assistant Prosecuting Officer were heard and records were observed.

It is evident from the observation of the records that the accused has been held in the district prison for a long time. The offence committed by the accused is considered by the Magistrate Court and punishment by imprisonment of not less than 7 years. As far as the argument of prosecution is concerned that the offence will be repeated by the accused, if the crime is repeated again after the accused is released on bail then the prosecution is free to revoke bail. Therefore, keeping in view the nature of the crime committed by the accused and all the facts and circumstances of the case the reason for granting bail is sufficient. The bail application is acceptable.

ORDER

The bail application is accepted. The accused is released on bail on production of two sureties of Rs.60,000/- and a surety of the same amount with the condition that he will not repeat the crime in future.

Sd/-
CJM

Date:13.02.2020

(Aligarh)"

(translated version of the order as filed along with the writ petition)

9. Suffice to notice that as per release order the accused was to be produced before the Magistrate at 11.00 am on 13th February, 2020 in the event of discrepancy in the particulars given in the release order. Despite the release order dated 10th February, 2020, the accused (present detenue) was neither released nor was produced before the Magistrate, hence the Chief Judicial Magistrate, Aligarh further passed another order dated 13th February, 2020 in following terms:-

"From:

Chief Judicial Magistrate, Aligarh

To:

Superintendent of Jail,

District Jail, Mathura.

Subject:- In relation to the forwarding of release order, through special messenger, of the accused in Case Crime No.700/2019, State vs. Dr. Kafeel, under section 153-A, 153-B, 505(2), 109 IPC.

This is to inform you that this court on 10.02.2020, has allowed the bail application of accused Dr.Kafeel s/o Shakeel Khan, r/o 172 Basantpur, P.S. Rajghat, District Gorakhpur. The release order of above mentioned accused detained in the district prison of Mathura is being sent by a Special Messenger, Shri Parmeet Kumar.

Therefore, after receiving the release order from the Special Messenger, ensure the release of abovementioned accused.

Sd/-
Chief Judicial Magistrate, Aligarh."

(translated version of the order as filed along with the writ petition)

10. As per the petitioner, the order above quoted was presented before the Superintendent of Jail, District Jail, Mathura at about 5.30 pm but was not accepted intentionally and purposefully. The receipt of the order was ultimately shown at 20:20 hours. The order aforesaid was sent to the Superintendent of Jail, District Jail, Mathura by hand through a special messenger Sri Parmeet Kumar. On the same day i.e. 13th February, 2020 the Inspector In-charge, Police Station Civil Line, Aligarh reported to Deputy Inspector General of Police/Senior Superintendent of Police, Aligarh to recommend the District Magistrate, Aligarh for detention of Dr. Kafeel Khan as per provisions of sub-Section (2) of Section 3 of the National Security Act, 1980. The report given by the Inspector In-charge dated 13th February, 2020 reads as under:-

"To,

Sir Deputy Inspector General/Senior Superintendent of Police

District Aligarh

Through:- Proper Channel

Subject - Proposal to detain Dr. Kafeel Khan aged 46 years, S/o Shakeel Khan, R/o 172 Basantpur P.S. Rajghat District Gorakhpur under the provisions of Section 3(2) National Security Act 1980.

Sir,

It is submitted that Dr. Kafeel aged about 46 years S/o Shakeel Khan R/o 172 Basantpur P.S. Rajghat District Gorakhpur has a criminal and communal nature. He has incited disharmony by

provoking the Muslim community against CAA & NRC and against other communities. There is a situation of panic, fear and terror amongst the society due to his acts. The criminal and communal acts committed by him have posed serious danger to the public order.

At present, his criminal activities are described as follows:

Dr. Kafeel addressed about 600 students of AMU on 12.12.2019 at 6:30 pm at Baba Sayeed Gate of the University of the University wherein he provoked the religious sentiments of all the Muslim students of AMU present and there was also an attempt to incite hated, enmity and disharmony against the other community so that there is an adverse impact on the harmony between the communities and disturbance in the public peace. In his speech he said that Mota Bhai teaches that we will either become Hindu or Muslim. We are being made second-class citizens by way of CAA and they will further disturb you by introducing NRC, your father's certificate is not correct. You will be made to run. This is fight for our identity, we will have to fight. In his speech, there was an attempt to provoke hatred in Muslim students for Hindus, Sikhs, Christians, Parsis. He attempted to spread hatred and enmity in the students of AMU for the other communities. In this regard a complaint was admitted on 13.12.2019 at 03.10 am by Sub-Inspector Sh. Danish which was registered in the P.S. Civil Lines vide Case Crime No. 700/19 u/s 153A IPC and thereafter an entry was made on the same day in P.S. Civil Lines, Aligarh vide G.D. No. 3 at 03.10 am.

Upon receiving the complaint by the P.S. and the subsequent handing over of the case to S.I. Sh. Nizamuddin and upon his deliberation, S. 153B, 109 and 505(2) IPC were added on the basis of statements of Deputy Inspector Sh. Danish, witness Co. 2290 Akhilesh Kumar, Co. Clerk 2098 Shami Mohammed, video recording of the speech of Dr. Kafeel and other evidences which proved that the incitement created amongst the Muslim students of AMU by his speech on 12.12.2019 against the other communities by provoking them was an attempt to distort the public order in the district of Aligarh. Due to this on 13.12.2019, around 10,000 students of AMU attempted to march towards the Aligarh City who were stopped by the various efforts with the help of additional police force, PAC, RAF. Had these students were not stopped by due counselling they would have entered the Aligarh District and would have disturbed the peace and public order as well as the communal harmony. On 15.12.2019 around 8:30 pm there was an attempt by the AMU students to break open the Bab-e-Syed gate and to go towards the Aligarh city which was stopped by the Aligarh city police, local police, PAC, RAF and the barricading done for the same. When they were so restricted by the police, the students tried to throw stones towards the police and fired with an intention to kill by which led to a situation of anarchy and chaos as there were rumors and stampede. Due to this governmental property and vehicles were damaged. Many police officials and staff also got injured. After hours of efforts the students were sent back to AMU campus and the public peace and law and order was saved from getting distorted by calling additional police force and RAF who were placed at the sensitive areas of the district. In reference to the said event, Case Crime No.703/19 was registered at the P.S. Civil Line, District Aligarh on 16.12.2019 u/s 147, 148, 149, 153, 188, 189, 332, 336, 307, 504 and 506 IPC against Sarfaraz Ali and 52 others along with 1200-1300 unknown AMU

students and Case Crime No.704/19 was registered u/s 395, 353, 332 and S. 7 CLA Act against Salman Imtiaz and 26 others along with 1200-1300 unknowns. The copy of their images has been attached.

Dr. Kafeel was arrested from the Chattrapati Shivaji International Airport, Mumbai on 30.01.2020 by team of S.T.F., Lucknow. He was presented before the Hon'ble M.M. Court 9, Bandara, Mumbai who accepted the transit remand till 5 pm of 02.02.2020.

Case Crime No.428/17 was registered against Dr. Kafeel in P.S. Gulhira District Gorakhpur u/s 15 of IMC Act, 1956, S. 7/13 of Prevention Corruption Act, 1988, S. 308, 409, 420, 120B of IPC and S. 66 of IT Act. Also, Case Crime No.558/18 has been registered against him at P.S. Cantt, Gorakhpur u/s 419, 420, 467, 468, 471 & 120B IPC.

Apart from these, Case Crime No.241/18 has been registered against Dr. Kafeel at P.S. Kotwali Nagar, District Bahraich u/s 332, 353, 452 IPC and S. 15(3) of IMC Act, 1956.

Public order has been disrupted as a result of the speech delivered to the AMU students by Dr. Kafeel. In view of the fear, terror and anger caused in the people of Aligarh, there are efforts being made to restore the public order with the aid of the present police force. Since that provocation at the Bab-e-Syed gate, there have been continuous protests by the students followed by the protests by women at Shahajmal since 29.01.2020. Public order was completely disrupted in Aligarh for many days. Government schools were asked to be closed.

Due to the said speech by Dr. Kafeel and the disturbance caused to the public order has also been published in the national newspaper Dainik Jagran, Amar Ujala and Hindustan which depicts the fearful situation caused by the incident. The copies of the said newspapers have been attached herewith.

He is currently detained in the Mathura District Jail for Case Crime No.700/19 u/s 153A, 153B, 109, 505(2) of IPC. The bail application presented by Dr. Kafeel has been accepted by the Hon'ble Court. There is a strong apprehension of the public order of District Aligarh being distorted again by Dr. Kafeel by provoking the students once he comes out of bail. If Dr. Kafeel comes out on bail he shall surely incite the students and disturb the peace and communal harmony in the Aligarh District.

Since the fierce and communal speech given by him has had an adverse and unfavorable impact on the public order of the District, therefore it is very important to keep this person detained in jail to maintain the public order.

Thus, it is requested that the District Magistrate, Aligarh may be pleased to pass an order to detain Dr. Kafeel, aged about 46 years S/o Shakeel Khan, R/o 172 Basantpur P.S. Rajghat, District Gorakhpur under S. 3(2) National Security Act, 1980.

Sd/-

Amit Kumar

Inspector Incharge

PS Civil Line

District Aligarh"

(translated version of the order as filed along with the writ petition)

11. Reports of the same nature were also given by the Circle Officer, Aligarh

and Superintendent of Police, Aligarh on 13th February, 2020. The reports so given are verbatim same except some formal distinctions. On 13th February, 2020 itself the Deputy Inspector General of Police/Senior Superintendent of Police, Aligarh made a request to the District Magistrate, Aligarh to pass an order to detain Dr. Kafeel Khan in accordance with National Security Act, 1980. The recitals of the recommendation made by the Deputy Inspector General of Police/Senior Superintendent of Police/Aligarh to the District Magistrate, Aligarh are also largely in the terms and tune to the recommendations made to him by other police officials.

12. The District Magistrate, Aligarh then invoked the powers under sub-Section (2) of Section 3 of the National Security Act, 1980 and passed the order dated 13th February, 2020 that reads as follows:-

"ORDER

For the reason that, as the District Magistrate of Aligah I have come to the conclusion that to prevent the person known as Dr. Kafeel aged 46 years s/o Shakeel Khan r/o 172, Basantpur, PS Rajghat, District Gorakhpur from engaging in activities that are prejudicial to the maintenance of public order this order is necessary.

And therefore, by the power conferred to me by section 3(2) of The National Security Act, 1980 I hereby order that Dr. Kafeel be detained, under simple category in district jail Mathura in the custody of the abovementioned prison's SP u/s 3(2) of the abovementioned act.

Today dated 13/02/2020 with my Signature and Seal this order is passed.

Sd.
Chandra Bhushan Singh
District Magistrate
District Aligarh"

(translated version of the order as filed along with the writ petition)

13. Along with the order of detention the District Magistrate, Aligarh also supplied the grounds of detention, which are as follows:-

"OFFICE OF THE DISTRICT MAGISTRATE, ALIGARH

GROUNDS OF DETENTION

Vide No.149 dated 13/02/2020 Dr. Kafeel aged about 46 years s/o Shakeel Khan R/o 172 Basantpur, PS Rajghat, Distt. Gorakhpur has been detained under Section 3(2) of the NSA 1980. The reasons for your detention u/s 8 of the said Act are provided as follows by the undersigned:

On the date 12/12/2019 around 18:30 hours you addressed the university students around 600 in number at the Bab-E-Sayyed gate of AMU in which in your address you tried to incite the religious sentiments of the AMU Muslim students present in the meeting and to increase hatred, enmity and disharmony towards the other community. There was an adverse effect on the harmony between communities and disturbance in public peace. In your speech it was said that Mota Bhai teaches us that we will become Hindu or Muslim but not human by CAA, we will be made second class citizens after that by implementation of NRC they will trouble you by saying your father's documents are not correct you will be made to run around. This is a fight for existence and we will have to fight. By this address of yours you have tried to create disharmony and enmity towards the Hindu, Sikhs, Christian and

Parsi community in the minds of the Muslim students of the AMU. You have tried to instill a feeling of hatred and enmity in the minds of the Muslim students of AMU towards other community in this reference S.I. Danish filed a complaint 13.12.2019 at 0310 hours in Civil Lines P.S. Aligarh in the said complaint Case Crime No.700/19 section 153A IPC was registered and the registered was entered same date at GD No.3, time 03010 hours in case Civil Lines, Aligarh.

After receiving the information at the P.S the investigation in the above said case was handed over to S.I Shri Nizamudin. During the investigation Section 153B, 109 and 505(2) IPC were added. From the investigation and the statements given by the complainant S.I Shri Danish, witness Constable 2290, Constable Clerk 2098 Shami Mohd. as well as the video recording of the speech and other evidence, this fact has been established that you have on 12.12.19 in AMU made an attempt to disturb the law and order in District Aligarh by inciting the Muslim students of AMU against other communities. Due to this act on 13.12.19 about 10,000 students of AMU attempted to march towards Aligarh city, who were stopped by tireless efforts of the police administration. Had the violent students not been talked to and stopped then this crowd would have disrupted the public order and the communal harmony of the district, by entering Aligarh city. On 15.12.19 at about 8.30 pm students of AMU attempted to go to Aligarh city by breaking open the gate at Bab-E-Sayyed and when an attempt was made to stop them by barricading then the violent students started pelting stones, targeting the police and administration and fired with the intention to kill due to which an atmosphere of anarchy was created and along with rumors panic was created in the city. Government property was damaged by them and due to the aforesaid incident, many police officers and policemen were injured . After hours of efforts, the students of AMU were sent back inside the campus. In relation to this Case crime No. 703 of 2019 U/S 147, 148, 149, 153, 188, 189, 332, 336, 307, 504, 506 IPC was registered at P.S. Civil Lines, District Aligarh against Sarfaraz Ali and 52 named and 1200 to 1300 unknown AMU students. Also, Case Crime No. 704 of 2019 U/S 395, 353, 332 IPC and 7 CLA act against Salman Imtiaz and 26 named and 1200-1300 unknown persons was registered. As a result of your fierce speech given on 12.12.19 and the aforesaid acts consequent there to the public order in district Aligarh was disrupted.

Inspired by your instigating speech against theh constitutional CAA and NRC given to the students of AMU the public order has been disturbed by the continuous violent protests through the students of AMU. Keeping in view the fear, insecurity and anger amongst the people of sensitive district Aligarh, with the aid of the police force present in the district, public order is being attempted to be restored. Since that day at Bab-E-Sayyed gate of AMU continuous protest is being carried out by the instigated students and in this sequence protest by women in Shahaj Mahel is also continuing since 29.01.2020. For days in Aligarh city public under was completely disrupted. Government Schools had to be closed.

The incidents of violent protest due to your instigating speeches which have disturbed the public order in the district have been reported in national daily, Danik Jagaran, Amar Ujala and Hindustan which depicts terrible state of affairs. Due to this feeling of fear and

insecurities have emerged in the people of the sensitive District of Aligarh. Photocopies of the aforesaid newspaper.

Currently you are incarcerated at the District jail Mathura in connection with Case Crime No. 700/19 U/S 153A, 153B, 109, 505(2) IPC. The bail application preferred by you has been allowed by the Ld. Court. Through discrete inquiry by the district police and LIU Aligarh it has been brought to my knowledge that upon being relased on bail there is a strong and complete likelihood of your re-entering district Aligarh and further instigating the students by coming to AMU thereby posing a serious threat to the prevailing public order.

On the basis of the aforesaid grounds, I have come to the conclusion that there is a likelihood of you committing such acts which are prejudicial to the maintenance of public order and in order to prevent you from committing such acts which would be prejudicial to the maintenance of public order it is necessary that you remain under detention.

You hereby informed by the undersigned in pursuance of section 8 of the aforesaid Act that if you seek to challenge such orders under which you are detained you may present the same, through the in charge of the jail where you have detained, to the detaining authority (District Magistrate) and the State government at the earliest. If such application is received after 12 days of this detention order or after the approval of the detention order by the State government, whichever is earlier then the same will not be considered by the Detaining Authority (District Magistrate). If you wish to exercise the right giving such application to the State Government you may present the same through the jail where you are detained addressing the same to the Secretary Home Department U.P. Government, Lucknow.

You are further informed in pursuance of Section 9 & 10 of the aforesaid Act that if you seek to exercise you right of giving an application against the order in pursuance of which you have been detained to the U.P. State Advisory Board, Lucknow then you may present the same through the in charge of the jail where you are detained addressing the same to the U.P. State Advisory Board, Lucknow at the earliest. You are also informed that your case as per Section 10 of the aforesaid Act will be referred to the U.P. State Advisory Board within 3 weeks of the actual date of your detention and if the same is received with a delay then the same will not be considered by the aforesaid Board. You are also informed as per sub-section (1) of section 11 of the aforesaid Act if the U.P. State Advisory Board considered it necessary and if you seek then the aforesaid Board will grant you a hearing. If you desired to be heard in person by the aforesaid board this should be specifically mentioned in your application and the same should be presented through the incharge of the jail where you are detained to the State government.

You are further being informed u/s 14 of the aforesaid Act that you have a right to prefer an application to the Central Government against the order under which you have been detained.

In case you seek to exercise your right of giving an application to the Central Government then you may present the same addressing it to the Secretary, Government of India, Ministry of Home (Internal Security Department, North Block, New Delhi) through the in charge of the jail where you have detained.

Date:- 13-02-2020

Sd/-
Chandrabhushan Singh
District Magistrate
District Aligarh"
(translated version of the order as filed along with the writ petition)

14. As per the counter affidavit filed by the Superintendent of Jail, District Jail, Mathura, the order of detention was served upon Dr. Kafeel Khan on 14th February, 2020 but no date and time of receipt of the detention order is disclosed. The detention order dated 13th February, 2020 came to be approved by the State Government on 24th February, 2020 and a copy of the order of approval was supplied to the detenue on 25th February, 2020. It would also be appropriate to state that as per Superintendent of Jail, District Jail, Mathura the order dated 13th February, 2020 passed by the Chief Judicial Magistrate, Aligarh was received in his office on 13th February, 2020 after locking up the jail, therefore, the accused (present detenue) was not released on that day itself.

15. On receiving the order of detention, the detenue submitted representations in four sets addressed to the District Magistrate, Aligarh, the State Government, the State Advisory Board and the Central Government on 20th February, 2020. The State Government rejected the representation on 4th March, 2020 and a copy of order of rejection was supplied to the detenue on 5th March, 2020. The Central Government rejected the representation on 9th March, 2020. An opportunity of hearing was provided to the detenue by the State Advisory Board on 17th March, 2020. The Board then submitted report to the State Government and on 1st April, 2020 the State confirmed the order of detention.

16. By an order dated 6th May, 2020 the State Government invoking powers under sub-Section (1) of Section 12 of the National Security Act, 1980 extended the term of detention for a period of six months from the date of detention i.e. 13th February, 2020. The State Government vide order dated 4th August, 2020 further extended the term of detention for a period of three months from the date the term of six months expires.

17. Being aggrieved by the order of detention, its confirmation by the appropriate government and further extension under the orders dated 6th May, 2020 and 4th August, 2020, instant petition is preferred to have a writ in the nature of Habeas Corpus.

18. The arguments advanced on behalf of the petitioner are:-

A(i) No material is available on record to arrive at a satisfaction that detention of Dr. Kafeel Khan is necessary to prevent any activity or eventuality referred under sub-Section (2) of Section 3 of the National Security Act, 1980.

(ii) The satisfaction recorded by the appropriate government to detain Dr. Kafeel Khan is absolutely ill-founded and is based on malicious analysis of the facts taken into consideration.

(iii) The order of detention is passed only to frustrate the order passed by the Chief Judicial Magistrate, Aligarh on 10th February, 2020 directing the State Government to release Dr. Kafeel Khan from custody on bail after furnishing requisite sureties and bail bonds.

B. The detention brought into effect under order dated 13th February, 2020 deserves to be declared illegal as the authority making the order of detention did

not communicate the grounds for detention sufficient to afford opportunity of making representation against the order.

C. The detention of Dr. Kafeel Khan deserves to be revoked as the State of Uttar Pradesh as well as the Central Government failed to decide expeditiously the representation submitted by the detenue.

19. Per contra, learned Additional Advocate General, Sri Manish Goyal assisted by Sri Patanjali Mishra, learned Additional Government Advocate while opposing the petition for writ vehemently urged that the District Magistrate, Aligarh only after taking into consideration all the circumstances and the material made available to him arrived at a definite conclusion pertaining to the need of detaining Dr. Kafeel Khan to prevent him from acting prejudicially to public order. It is asserted that the District Magistrate, Aligarh examined all the events taken place on 12th December, 2019 and subsequent thereto, recorded statisfaction that Dr. Kafeel Khan may cause serious injury to the maintenance of public order in the city of Aligarh and, therefore, the detention is highly desirable.

20. According to learned Additional Advocate General, the subjective satisfaction arrived by the District Magistrate, Aligarh after consideration of the material available is not open to be examined and interfered by this Court under Article 226 of the Constitution of India.

21. The arguments advanced by learned counsel appearing on behalf of the petitioner have also been seriously contested by learned Additional Advocate General. It is asserted that the police authorities on 13th February, 2020 brought into his notice about valid apprehension for causing injury to the city of Aligarh by Dr. Kafeel Khan and by taking into consideration the same, the order of detention was passed. The order was served upon the detenue at Mathura as soon as possible. A complete note pertaining to grounds of detention was also served upon the detenue. Along with the note, necessary material was also supplied including a compact disk recording the speech delivered by Dr. Kafeel Khan at Bab-e-Syed gate Aligarh Muslim University, Aligarh. The contents of the speech clearly indicate that the detenue was intending to harm communal harmony, peace and tranquility and for the purpose he prompted student community to be aggressive. As a consequence to the address made by him to a gathering of about 600 students on 12th February, 2020, nearly 10,000 people gathered at Bab-e-Syed gate Aligarh Muslim Unviersity, Aligarh on 13th February, 2020 and caused violence at high level. The violence erupted was controlled by the police after huge efforts. A criminal case in that regard was also lodged in which Chief Judicial Magistrate, Aligarh directed for release of Dr. Kafeel Khan on bail but the District Magistrate, Aligarh without having any intention to flout the bail order, examined effect and impact the arrival of Dr. Kafeel Khan in the city of Aligarh and; anticipating a serious blow to maintenance of public order, a definite opinion was formed to have an order of detention.

22. So far as the delay in deciding representation is concerned, it is submitted that the representation was given by the detenue on 20th February, 2020 and that was examined at different levels and was ultimately decided on 4th March, 2020.

23. Learned Additional Advocate General states that the month of February had 28 days and after 20th, 21st and 22nd were holidays. The District Magistrate considered the representation and rejected the same on 24th March, 2020. The State Government too considered the representation expeditiously and rejected the same on 4th March, 2020. A copy of the rejection order was served upon the detenue on 5th March, 2020 itself.

24. In rejoinder, Sri Dileep Kumar, learned Senior Counsel assisted by Sri Manoj Kumar, Advocate and Sri N.I. Jafri, learned Senior Counsel assisted by Sri Manish Singh, Advocate while reiterating all the arguments made by him pointed out that the note containing grounds for detention does not satisfy the requirements of Article 22 of the Constitution of India and also the provisions of National Security Act, 1980 as the detaining authority did not look into the complete speech made by Dr. Kafeel Khan and also failed to understand its intent. Some portions from here and there are taken out and are mentioned in the order of detention. An intentional effort was made for not providing complete lecture said to be delivered by Dr. Kafeel Khan on 12th December, 2019 at Bab-e-Syed gate Aligarh Muslim University, Aligarh. A compact disk was certainly supplied but no device was made available to play the same. In absence of such performing device, the supply of compact disk is meaningless and that amounts to non-supply of the material.

25. It is further stated that the Chief Judicial Magistrate, Aligarh passed the bail order on 10th February, 2020. In pursuance to the order aforesaid, necessary bail bonds and sureties were furnished on very next day but the accused (present detenue) was not released. A release order then was passed but that too was not accepted intentionally with a view to have an order of detention in the meantime.

26. According to learned counsel, examination of complete facts in seriatum indicates malicious exercise of powers just to curtail liberty and freedom of Dr. Kafeel Khan and the same causes serious injury to the fundamental rights protected under Article 21 and 22 of the Constitution of India.

27. Heard learned counsels, considered the arguments and also perused the record including the original record placed before us by Dr. Anil Kumar Singh, Special Secretary (Home), Government of U.P., Lucknow and Sri Sanjeev Ojha, Deputy Collector, Aligarh.

28. The National Security Act, 1980 that was enacted by Parliament in 31st year of the Republic of India to provide for preventive detention in certain cases and for matters connected therewith.

29. Preventive detention is an exceptional mode to curtail liberty and freedom of a person in exceptionally rare circumstances. Under Article 21 of the Constitution of India along with the right to life, the right to personal liberty is a precious fundamental right. This precious fundamental right must always be protected. Under our constitutional scheme the nation of India is weaved as a democratic republic where social, economic and political justice to every citizen is secured, where liberty of thought, expression, belief, faith are constitutionally protected, where every citizen is at equal status with equal opportunities. The system of governance is to promote fraternity with

assurance to maintain the dignity of every individual as well as unity and integrity of the nation. The strong and valuable fabric of our nation is well designed with support of fundamental rights given in Part-III of the Constitution. These rights are golden thread in the fabric, which is further illuminated by extending protection of life and personal liberty under Article 21 of the Constitution of India. True it is, the right so given under Article 21 is not absolute but no one can be deprived of his or her personal liberty except on such grounds and in accordance with such procedure as are established by law. Any act that causes injury to the valuable rights given in Part-III of the Constitution would be nothing but an effort to weaken the fabric of our nation, a democratic republic. We are examining the entire issue involved in this petition with the conceptual understanding of the fundamental rights as above.

30. Most of the facts placed before us are admitted by the parties. It is a fact admitted that Dr. Kafeel Khan and Dr. Yogendra Yadav addressed a gathering of 600 students at Bab-e-Syed gate of Aligarh Muslim University, Aligarh on 12th December, 2019. They were invited to address the students who were protesting the proposed amendments through the Citizenship Amendment Bill, 2019. The bill was passed by both the houses of the Parliament on 12th December, 2019 and was also assented to by the President of India, on 13th December, 2019. It is also a fact admitted that on 13th December, 2020 a huge crowd of people gathered at Bab-e-Syed gate of Aligarh Muslim University, Aligarh to lodge protest against the amendments introduced in the Citizenship Act.

31. As per the respondents, the crowd gathered caused violence and also damaged public property. An inference has been drawn by the respondents that whatever happened on 13th December, 2019 is an outcome of the provocative speech of Dr. Kafeel Khan. Relevant parts of which are referred in the grounds for detention supplied to the detenue.

32. Pertinent to notice here that no proceedings for detention of Dr. Kafeel Khan were initiated for about good two months from the day he addressed the students. At that time the sole action taken was lodging a criminal case against him pertaining to offences under Section 153A of Indian Penal Code. Some offences were subsequently added to it. In the case aforesaid, accused Dr. Kafeel Khan was arrested on 29th January, 2020 i.e. after a lapse of more than 45 days. In that case an application for getting the accused released on bail came to be accepted by the Chief Judicial Magistrate, Aligarh on 10th February, 2020. No recommendation even then was made for invoking powers under sub-Section (2) of Section 3 of the National Security Act, 1980. It is only after passing of the release order dated 12th February, 2020 three police officials made a request to the Deputy Inspector General/Senior Superintendent of Police, Aligarh to make a request to the District Magistrate, Aligarh for having an order of detention. The order of detention was served upon Dr. Kafeel Khan along with a note of grounds for detention and the supporting material.

33. As per the grounds of detention, on 12th December, 2019 around 18.30 hours Dr. Kafeel Khan addressed the University students around 600 in number at Bab-e-Syed gate of Aligarh Muslim University, Aligarh. In his address, he tried to incite the religious sentiments of the Muslim students present in the meeting and

to increase hatred, enmity and disharmony towards the other community. The speech delivered by Dr. Kafeel Khan had adverse effect on the harmony between communities and that disturbed public peace. In his speech, he stated that "Mota Bhai teaches us that we will become Hindu or Muslim but not human by CAA, we will be made second class citizens after that by implementation of NRC they will trouble you by saying your father's documents are not correct you will be made to run around. This is a fight for existence and will will have to fight".

34. The recitals aforesaid were treated as an effort to create disharmony and enmity towards Hindus, Sikhs, Christians and Parsi in the minds of the Muslim students of Aligarh Muslim University, Aligarh as the detenue tried to instill a feeling of hatred and enmity in minds of the Muslim students of Aligarh Muslim University, Aligarh towards other communities. The above speech, as per the grounds for detention note inspired and instigated students of Aligarh Muslim University to protest against CAA and NRC and that adversely affected public order resulting into a continuous violence. It also developed fear, insecurity and anger amongst the people of sensitive district Aligarh. An apprehension was expressed by the District Magistrate, Aligarh of likelihood of Dr. Kafeel Khan committing such acts.

35. A reading of the grounds of detention certainly creates an impression that a provocative speech was given by the detenue, but a plain reading of that reflects otherwise, hence it would be appropriate to go through that. However, objection of learned Additional Advocate General is the Court must be conscious that the satisfaction of the detaining authority is "subjective in nature" and the Court cannot substitute its opinion over subjective satisfaction of the detaining authority, as such, no interference with an order based on subjective satisfaction of the detaining authority is desirable. He has supported the objections by placing reliance upon following judgments of the Hon'ble Supreme Court:-

1. Ram Bali Rajbhar Vs. The State of West Bengal and others, (1975) 4 SCC 47.

2. Magan Gope Vs. The State of West Bengal, (1975) 1 SCC 415.

3. Asha Keshavrao Bhosale Vs. Union of India and another, (1985) 4 SCC 361.

4. Subramanian Vs. State of Tamil Nadu and another, (2012) 4 SCC 699.

36. We are in absolute agreement with learned Additional Advocate General that it is not open for the courts to substitute their opinion by interfering with "subjective satisfaction of the detaining authority". However, it does not mean that the court cannot look into the material on which detention is based. The expression "subjective satisfaction" means the satisfaction of a reasonable man that can be arrived at on the basis of some material which satisfies a rational man. It does not refer to whim or caprice of the authority concerned. While assessing "subjective satisfaction of the detaining authority" the Court examining a petition seeking a writ of habeas corpus has to look into the record to examine whether the subjective satisfaction is acceptable to a reasonable wisdom and that satisfies rationality of normal thinking and analyzing process. The grounds for detention with supporting

material is also required to be looked into to ascertain whether it is sufficient to enable the detenue to make his representation at earliest, of course, this opportunity must be effective and real. In view of above, we have looked into the speech delivered by the detenue. The closure of examining record as suggested would be nothing but a licence to allow the executives to act at their whims or caprice. This would be against the fundamentals of our constitutional values and provisions.

37. Looking to the seriousness of the issue, we consider it appropriate to quote the entire speech of Dr. Kafeel Khan:-

"Very good Evening.

Let's begin with famous piece of poetry by Allama Iqbal Sahab "Kuch baat hai ki hasti mit-ti nahi humari sadiyon raha hai dushman daur-e-zamaa hamara" (There must be something special that we still exist despite the whole world against us) - (Students clapping)

Before even entering the gate, I received a call from the C.O. City and he said that don't go there or your will be put behind bars. - (Shame -Shame-Shame by students)

I asked him if he received a call from Yogi Ji regarding my arrival. If you all sit down it will be convenient for everyone. - (Students saying sit down everyone)

If you all sit down then we will be able to talk and understand what CAB & NRC are?

How afraid we should be of it ... please sit (students "sit down sit down")

Since our childhood we all are taught that we will neither become Hindus nor Muslims, but humans and our Mota Bhai teaches us that we will become Hindus, Muslims, but not humans.

Why because as they said (pointing at students) "How will a murderer know, whose clothes are stained in blood, how will be hide those stains?

How would they know the meaning of Constitution, since the day RSS came into being in 1928, they don't believe in Indian Constitution. They don't believe in our Constitution. It is repeatedly said that the law brought in by Amit Shah Ji, our Home Minister, is unconstitutional and is not in consonance with India's pluralism, communal harmony, humanity and equality.

We should understand whom are we talking to, We are talking to those who never believed Baba Saheb's Constitution and never ever read it. Since the time they came into existence nearly 90 years ago, their objective has been to divide this Country.

Firstly, you all are very young and I believe you will have to lift the baton and will have to fight. (Students - Inshallah (if God will).

Aligarh has always been dear to me and I think when I was in jail there was a huge protest march for me. After being released from jail, I've been here for 2-3 times and though I won't be able to reciprocate the love I've got from here, however when I got the call last night, I made up my mind that I would definitely come here, no matter how much Yogi Ji try ... (clapping)

Lets firstly talk about what CAB really is. How many people actually know the CAB is? Does everyone know? Why Citizenship Amendment Bill was introduced? There was an attempt in 2015 as well (2016 prompted by crowd). The reason to bring it at the moment is that the NRC implemented by them in Assam has resulted in 19 lakh people being left out. Out of them 90% were those people whom

they wanted to be included in NRC. This backfired for them. Now they weren't able to understand what they should do first, otherwise perhaps they would have been silent after the Kashmir issue for some days. Hence, they brought CAB. According to CAB, barring Muslims, even barring atheists and other groups including Rohingya and many others, whose name I can count, only for 5-6 religions, people were told that those who faced religious persecutions in Pakistan, Bangladesh and Afghanistan will provided citizenship. Muslims shall not be provided the same. We are not affected by it, it's a good thing. Like Amit Shah ji said yesterday that it is about giving citizenship and not taking it from us Muslims, then why are you all protesting. Why are you protesting, you should not be concerned about it.

NRC plus CAB is the lethal term. And one thing is that, they have just build a small wall for now, and later they will build a full structure on it. It is the result of the hatred that they have spread amongst us for 90 years in minds of our youth on the basis of religion.

During the talks with Yogendra ji in car, he said that simply, constitution for us common village people is limited to the SHO. Whatever he says is the constitution for them. The SHO since 2014 knows how to treat them, they are second-class citizens and they should be constantly reminded that it is not their country. Whenever you to to them, they will show you their true nature. This is the reason why we have to protest and oppose. The same has been now approved by the so-called Hon'ble House. When NRC will be introduced, that is the time when we will have problems. Now what is NRC? NRC was made for Assam, and for the same Indian Register was made which has now being amended and in 2019 the completed list is available on the website of the Home Ministry Affairs. The list is complete, all preparations are done. Also, let me tell you that Aadhar Card, Pan Card, Driving License won't be of any relevance. You would require a birth certificate. If you were born in India from 1950 to 1987 then you are a citizen, otherwise not. Next clause says that if any of your parents were born in the period 1987-2004, then you are a citizen. After 2004 till now, if both the parents are born in India, then only you are a citizen. It is nowhere written that if you are a Muslim you shall be removed. Then are we in trouble? Why are we protesting? Because we know what their intentions are. What do we know that people wearing white clothes, how dark they are. We know what their thinking is and what is there in their mind. Only hatred. They will intentionally make us run to get our certificates, our father's certificates, our mother's certificates, our legal records. They will thus create problems for lakhs and crores of people.

But let me assure you all about one thing, that the rumor about sending everyone to detention centres is not possible. Understood? A budget of twenty three thousands crore will be required to send 6 lakh people of Assam to detention centres. 1500 crores were spent on NRC in Assam, say 1600 crores. For the entire India, about 30,000 crores would be required. When we ask for free education, they say that there is no money, increase the fees of JNU. The year in which 70 children died in BRD, 8 lakhs children died in India. I am running a Health for All Campaign, I'm working on that and I have met 13 chief ministers. Even I've met our Health Minister and given him my proposal. The data has been collected by us, a team of 25 non-political health activists, Supreme Court lawyers, CEO's, IITians and we have got the data from UN,

UNICEF, World Bank and WHO. Those data were very tragic. 50% of our population are malnourished. India is the 3rd largest country of AIDS and HIV, 2nd largest of diabetes, 72% population is devoid of health facilities. If they get a heart attack, they will have to travel for 40 kilometers to get a doctor for themselves. As per the research, the ones who are called fake doctors, Bengali doctors are the ones who are actually working, otherwise there isn't anyone. The primary health centres which are the backbone of any health centres in the world is not there, it is shambles. So, we will not talk about that.

I am travelling across India and ask everybody, I repeat it again, they might be getting bored by my speech. But this is the truth. I ask people what do they want? People say that a respectful two-square meal per day, good medical facilities when our children are not well, good colleges and universities for their education for instance AMU, JNU, IIT, AIIMS, a good job after they attain their education. Thus, the only demand that we have for past 70 years is food, clothing, shelter, health, education and employment. And this demand is not just ours but of everyone, of all poor persons. But what they talk about is Shamshaan-Kabristan (Cremation ground-Graveyard), Ali-Bajrang Bali, your Kashmir, Ram Mandir, CAB, NRC. They don't talk about the promise that they made for 2 crores employment per year. They don't talk about giving 15 lakhs Rupees to us as earlier said by them. Economy is doomed, small businessman are ruined. If you go at the ground level, you are not the only one disturbed. By expressing their problems, they hid the problems of economy, employment, roads and housing. So that you don't even ask.

Why is mob lynching done? Mob-lynching is an organized crime. A trained mob comes who are well taught how to attack. Why would a murderer make a video himself? They themselves record the video, upload it on Facebook and inform their senior that the senior sitting in Delhi shall be happy and will save them. This is why mob-lynching is done, to create a fear-psychosis to one community and to create a pseudo-euphoria in other community. The talks about nationalism is actually pseudo-nationalism, on the basis of pseudo-Hinduism only. Our entire opposition gets hid behind soft Hinduism. We only will have to speak and fight.

You must have heard that two months back I got a clean chit. Yogi Government constituted a committee in which it was alleged that Dr. Kafeel is a murderer, is involved in corruption, all children died because of him. The said committee held that Dr. Kafeel was the junior-most doctor and bought cylinders from his own pocket and saved lives of a number of children. Then Yogi ji thought now what can be done, how to trap him now. So, they again suspended me. Now they say that I speak against the government. So now I said "is zulm ke daur me zubaan kholega kaun, agar hum bhi chup rahenge to bolega kaun" (who will speak in this time of atrocities if not me). I would like to tell you that the ones sitting in power are merely faces, the ideology of RSS of spreading hatred has been existed for many years which is being spread in shakhas. We are the ones who are not able to understand this. We will have to understand and I will appeal all my brothers and sisters who believe in prosperous and united India that they should oppose this draconian law. Everybody should come up, not just us Muslims. Everyone should come as to how can citizenship be on the basis of religion. Where was this written in our Indian

Constitution? We are the citizens of the world, these boundaries are created by the politicians for their sake only. You only have to fight.

Aligarh will have to become the leader, the way JNU comes up as the only leader in the entire India for issue of fees or for any issue, For many years I believed that Aligarh is sleeping, but now perhaps after seeking these young faces, I think now is the time to wake up and they have woken up. This is the fight for our identity. We will have to fight. And let me tell you that fight does not mean creating physical violence, we have to fight in a democratic way. We have to fight in their way only and have to tell people that the rumor about detention centers is false. Their thinking is restricted only to Lok Sabha and Rajya Sabha. You don't know how much is India being condemned all over this world for bringing this law.

You should think this way that the servant in your neighbor's house has stolen something, he is manner less, and if he comes to your house you will give him employment. How will your relations be then with your neighbor? How is justified to divide people in the name of religion? However, my brother is also here with me but he has probably gone somewhere right now. My brother was shot where Yogi Adityanath was himself present about 500 meters away. (Crowd- Shame, Shame) After this, when he was taken in the car for emergency surgery to take out the bullet, there was an unnecessary delay of 4 hours. We thought for once that why is God testing his patience. I went to save the children only. There was never a response to it. But I think there must be some will of God. He must be testing me. He must have had a plan and that is the reason I am here with you guys. (Students clapping)

Convey my message that please be united. Please all come together and not be bothered about these small things and quarrels. Do you know yesterday I heard in a debate, someone said that Pakistan's Ahmadiya and Shias should have also been included so that the Muslims here would fight amongst themselves only. Everyone would have been associating them with Shias so that by this reason only they would be covered under CAB. Do you understand? This is how they want to divide. So, please be united and not just in the name of religion. We are humans first. Islam has taught us that our deeds should be right. Our intentions should be right. You choose the path and God will take you to the destination. Inshallah (if God wills).

So, I request you all that you try to reach to your non-Muslim friends, sit and talk to them and tell them we are not the ones who repeat cycle-punctures, fridges, mobiles and who marry 4 times or Jihaadis, Pakistanis. We are also doctors, engineers. Come, sit and eat with us someday for the distances that are created. I would like to tell you that what RSS did was in the name of school, you must be knowing the name of school, I don't have to take its name, through the schools it stated teaching that these bearded people are very bad. It made 4-5 categories namely the ones who repair cycle-punctures, refrigerators, marries four times, lives untidily, support Pakistan, are terrorists. So, when they see that a doctor wearing a tie is saving the lives of children, they feel who is this animal. They don't know. How will you tell them? Get them together and make them understand that we are also humans and no one can be more religious than us. Only our religion teaches about humanity, only our religion teaches about pluralization. (Students clapping)

Thank you so much. There is a lot to talk about. I will just wrap up by saying three things.

First, that there is no need to be afraid of CAB. It has nothing to do with us. But yes, it is a pawn as it is being tried to show you that this country is not yours and you are merely tenants. This is a signal given, a very big signal and its ramification shall be extended to that SHO who is seen as our Constitution.

Secondly, yes, be prepared for NRC. Get your birth certificate made. Get your parents' birth certificated made. And I'm telling you that Aadhar Card, PAN Card, Driving License is not valid at all. What all documents would be required have not yet been informed by them. But 4 documents which are most important, including birth certificate, and ensure that you get your parents' birth certificate made. Theirs would not be available, yours would be. Then, your land records, the ones received from Panchayats, your samasat, voter ID cards. These 4 documents are very important. Keep them ready.

Thirdly and most importantly, this country is ours. This Hindustan is ours, not anyone's property. As much as this land is yours, it is ours too. It is not in your capacity that you can take it away from us. It is not in your capacity that you can intimidate us. It is not in your capacity that you can remove us. We are 25 crores, you can neither scare us by mob-lynching, or by such trivial laws. We will be together, we will be together, we will be united. We will be together like a wall. This is our Hindustan and we will tell you how it will run.

"Darna aata nahi hai hume, jitna bhi dara lo. Har baar ek nai taakat se uthege, chahe jitna bhi daba lo. "(We won't be afraid no matter how much scare us. Every time we will rise, no matter how much you suppress us)

Allah Hafiz (May God be with you)

38. No doubt, some part of the phrases used in the grounds for detention are there in speech, but apparently in different context. The speaker was certainly opposing the policies of the government and while doing so certain illustration are given by him, but that no where reflects the eventualities demanding detention. A complete reading of the speech primafacie does not disclose any effort to promote hatred or violence. It also no where threatens peace and tranquility of the city of Aligarh. The address gives a call for national integrity and unity among the citizens. The speech also deprecates any kind of violence. It appears that the District Magistrate had selective reading and selective mention for few phrases from the speech ignoring its true intent. The entire speech being a subject matter of a criminal case pending against Dr. Kafeel Khan, therefore, it would not be appropriate for us to make much comments on that. Our anxiety is only to assess that as to whether a reasonable man could have arrived at a conclusion as arrived by the District Magistrate, Aligarh? Primafacie, the speech is not such that a reasonable man could have arrived at a conclusion as the inference drawn by the District Magistrate, Aligarh.

39. An important aspect of the matter is that the detenue addressed the gathering on 12th December, 2019. At that time the District Administration, Aligarh did not find the speech of Dr. Kafeel Khan sufficient for preventive detention. Nothing has been said in the order of detention or the grounds for detention that district

administration had any information within the period from 12th December, 2019 to 13th February, 2020 about any effort made by the detenue to cause even a simple scar to the peace or tranquility or the public order of the city of Aligarh. It is only after passing of the bail order by the Chief Judicial Magistrate, Aligarh, the police officials and the District Magistrate, Aligarh initiated the process for detaining Dr. Kafeel Khan under the National Security Act, 1980. At the cost of repetition, it would be appropriate to state that from 12th December, 2019 to 29th January, 2020 the detenue was roaming free and he had ample time to make all the efforts to damage public order in the city of Aligarh, if he was intending to do so.

40. Thus, the detention of the detenue has been made by the executive and it has been defended by the State before this Court on the premise - subjective satisfaction had been reached on the basis of material on record that the detention was necessary to prevent prejudice to maintenance of public order. Thus, the action of the State to curtail the detenue's personal liberty, which in many ways is the mother of the other fundamental rights guaranteed by the Constitution of the country, has been curtailed relying on Section 3(2) of the National Security Act, 1980. Relevant extract of the aforesaid provision is as below:

"(2) The Central Government or the State Government may, if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to the security of the State or from acting in any manner prejudicial to the maintenance of public order or from acting in any manner prejudicial to the maintenance of supplies and services essential to the community it is necessary so to do, make an order directing that such person be detained."

41. In **Khudi Ram Das Vs. State of West Bengal & 3 Ors., reported in 1975 (2) SCC 81,** a three Judge Bench of the Supreme Court while discussing the nature of satisfaction required to be recorded by the executive authorities before preventively detaining a person and while considering the scope of judicial review of such an action observed as under:

"9. But that does not mean that the subjective satisfaction of the detaining authority is wholly immune from judicial reviewability. The courts have by judicial decisions carved out an area, limited though it be, within which the validity of the subjective satisfaction can yet be subjected to judicial scrutiny. The basic postulate on which the courts have proceeded is that the subjective satisfaction being a condition precedent for the exercise of the power conferred on the Executive, the Court can always examine whether the requisite satisfaction is arrived at by the authority : if it is not, the condition precedent to the exercise of the power would not be fulfilled and the exercise of the power would be bad. There are several grounds evolved by judicial decisions for saying that no subjective satisfaction is arrived at by the authority as required under the statute. The simplest case is whether the authority has not applied its mind at all; in such a case the authority could not possibly be satisfied as regards the fact in respect of which it is required to be satisfied. Emperor v. Shibnath Bannerji [AIR 1943 FC 75 : 1944 FCR 1 : 45 Cri LJ 341] is a case in point. Then there may be a case where the power is exercised dishonestly or for an improper purpose :

such a case would also negative the existence of satisfaction on the part of the authority. The existence of "improper purpose", that is, a purpose not contemplated by the statute, has been recognised as an independent ground of control in several decided cases. The satisfaction, moreover, must be a satisfaction of the authority itself, and therefore, if, in exercising the power, the authority has acted under the dictation of another body as the Commissioner of Police did in Commissioner of Police v. Gordhandas Bhanji [AIR 1952 SC 16 : 1952 SCR 135] and the officer of the Ministry of Labour and National Service did in Simms Motor Units Ltd. v. Minister of Labour and National Service [(1946) 2 All ER 201] the exercise of the power would be bad and so also would the exercise of the power be vitiated where the authority has disabled itself from applying its mind to the facts of each individual case by self-created rules of policy or in any other manner. The satisfaction said to have been arrived at by the authority would also be bad where it is based on the application of a wrong test or the misconstruction of a statute. Where this happens, the satisfaction of the authority would not be in respect of the thing in regard to which it is required to be satisfied. Then again the satisfaction must be grounded "on materials which are of rationally probative value". Machindar v. King [AIR 1950 FC 129 : 51 Cri LJ 1480 : 1949 FCR 827]. The grounds on which the satisfaction is based must be such as a rational human being can consider connected with the fact in respect of which the satisfaction is to be reached. They must be relevant to the subject-matter of the inquiry and must not be extraneous to the scope and purpose of the statute. If the authority has taken into account, it may even be with the best of intention, as a relevant factor something which it could not properly take into account in deciding whether or not to exercise the power or the manner or extent to which it should be exercised, the exercise of the power would be bad. Pratap Singh v. State of Punjab [AIR 1964 SC 72 : (1964) 4 SCR 733] . If there are to be found in the statute expressly or by implication matters which the authority ought to have regard to, then, in exercising the power, the authority must have regard to those matters. The authority must call its attention to the matters which it is bound to consider.

10. There is also one other ground on which the subjective satisfaction reached by an authority can successfully be challenged and it is of late becoming increasingly important. The genesis of this ground is to be found in the famous words of Lord Halsbury in Sharp v. Wakefield [1891 AC 173,179] :

"... when it is said that something is to be done within the discretion of the authorities ... that something is to be done according to the rules of reason and justice, not according to private opinion ... according to law and not humour. It is to be, not arbitrary, vague, fanciful, but legal and regular."

So far as this ground is concerned, the courts in the United States have gone much further than the courts in England or in this country. The United States courts are prepared to review administrative findings which are not supported by substantial evidence, that is by "such relevant findings as a reasonable man may accept adequate to support a conclusion". But in England and in India, the courts stop short at merely inquiring whether the grounds on which the authority has reached its subjective satisfaction are such that any reasonable person could

possibly arrive at such satisfaction. "If", to use the words of Lord Greene, M.R., in Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [(1948) 1 KB 223 : (1947) 2 All ER 680] words which have found approval of the House of Lords in Smith v. West Ellor Rural District Council [1956 AC 736 : (1956) 1 All ER 855] and Fawceit Properties Ltd. v. Buckingham County Council [1961 AC 636 : (1960) 3 All ER 503] -- "the authority has come to a conclusion so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere". In such a case, a legitimate inference may fairly be drawn either that the authority "did not honestly form that view or that in forming it, he could not have applied his mind to the relevant facts". Ross v. Papadopollos [(1958) 1 WLR 546 : (1958) 2 All ER 28] . The power of the Court to interfere in such a case is not as an Appellate Authority to override a decision taken by the statutory authority, but as a judicial authority which is concerned, and concerned only, to see whether the statutory authority has contravened the law by acting in excess of the power which the Legislature has confided in it. It is on this ground that the order of preventive detention made by the District Magistrate in Debu Mahto v. State of West Bengal [(1974) 4 SCC 135 : 1974 SCC (Cri) 274] was struck down by this Court. There, in that case, one single solitary act of wagon breaking was relied upon by the District Magistrate for reaching the satisfaction that with a view to preventing the detenu from acting in any manner prejudicial to the maintenance of supplies and services to the community, it was necessary to detain him. This Court pointed out subject to certain reservations that it was difficult to see how "one solitary isolated act of wagon breaking committed by the petitioner could possibly persuade any reasonable person to reach the satisfaction that unless the petitioner was detained he would in all probability indulge in further acts of wagon breaking". This Court did not go into the adequacy or sufficiency of the grounds on which the order of detention was based, but merely examined whether on the grounds given to the detenu, any reasonable authority could possibly come to the conclusion to which the District Magistrate did. It is true that this ground in a sense tends to blur the dividing line between subjective satisfaction and objective determination but the dividing line is very much there howsoever faint or delicate it may be, the courts have never failed to recognise it.

11. This discussion is sufficient to show that there is nothing like unfettered discretion immune from judicial reviewability. The truth is that in a Government under law, there can be no such thing as unreviewable discretion. "Law has reached its finest moments", said Justice Douglas, "when it has freed man from the unlimited discretion of some ruler, some ... official, some bureaucrat.... Absolute discretion is a ruthless master. It is more destructive of freedom than any of man's other inventions". United States v.Wunderlick [(1951) 342 US 98] . And this is much more so in a case where personal liberty is involved. That is why the courts have devised various methods of judicial control so that power in the hands of an individual officer or authority is not misused or abused or exercised arbitrarily or without any justifiable grounds."

42. Thus, while recognizing the grounds on which such a subjective satisfaction could be challenged, the Supreme Court definitely recognized the following grounds of challenge:-

(a) non application of mind;

(b) dishonest and improper exercise of power;

(c) acting under dictation of another authority;

(d) if the authority had disabled itself from applying its mind by self-created rules of policy, etc;

(e) applying a wrong test and misconstruction of statute;

(f) if the satisfaction is not grounded on "materials which are of rationally probative value";

(g) the grounds for satisfaction are such as a rational human-being may not consider connected with the fact in respect of which the satisfaction is reached and must not be extraneous;

(h) the action taken must be within the discretion of the authorities that is according to the rules of reason and justice and not private opinion. Thus, it cannot be arbitrary, vague or fanciful but must be legal and regular.

43. The above test has largely been consistently applied in cases involving validity of preventive detention. Applying the aforesaid test, even if the satisfaction claimed by the executive is taken to exist in the shape of the grounds of detention, it has to be seen whether the same would survive the aforesaid test laid down by the Supreme Court. Undisputedly, the detention order was first issued on 13.02.2020 and not before. Therefore, as for the subjective satisfaction to arise, it is the facts and circumstances that were existing on that day and/or at that point in time that had to be borne in mind before a valid satisfaction could arise that the detention of the detenue was necessary to maintain "public order" at Aligarh.

44. Testing the action taken against the detenue on the above principle, it appears other things apart, there is a serious lack of objective material on record as may have given rise to a valid subjective satisfaction with the detaining authority to preventively detain the detenue on 13.02.2020. The exact nature of the contents of the lecture delivered by the detenue on 12.12.2019 at the Bab-e-Syed Gate of the AMU (as claimed by the state authorities), even if accepted to be correct, it cannot be overlooked that, that material could not be relevant for the purpose of satisfaction being drawn two months thereafter, inasmuch during that period of two months, undisputedly, the detenue neither visited the city of Aligarh nor he made any further or other speech or lecture connected thereto nor there is any material shown to us that the detenue was about to commit any act in furtherance thereto or was going to deliver any other speech or lecture connected thereto as may have prejudiced the public order. Mere apprehension expressed in the grounds of detention, not founded on any material shown to exist on record, if allowed to stand, would fall foul with the test laid down by the Supreme Court in **Khudi Ram Das** (supra), inasmuch as, neither there is any objective material giving rise to the subjective satisfaction nor the subjective satisfaction is found to have been reached in a legal and regular manner but on whim and humour.

45. Then, insofar as the occurrences of the dates 13.12.2019 and 15.12.2019 are concerned, in the first place, they were also more than two months prior to the date of issuance of order of preventive detention. By very nature, the order of preventive detention could have been issued to prevent an occurrence but not punitively or merely by way of a consequence of the occurrences that were two months old. Even otherwise, with respect to those

occurrences, two separate criminal cases being Case Crime Nos.703 of 2019 and 704 of 2019 were admitted to have been lodged against different individuals. During the course of arguments, it has also been submitted that chargesheets have been submitted in those cases against other persons, excluding the present petitioner. In absence of any other material existing on record, it cannot be said, at this stage, that there was any link between the stage when the lecture was delivered by the detenue on 12.12.2019 and the occurrences dated 13.10.2019 and 15.10.2019. That apart, again there is a complete lack of material on record to link those occurrences i.e. the lecture delivered by the detenue on 12.12.2019, and the violent occurrences of 13.12.2019 and 15.12.2019 referred to in the ground of detention and the formation of the satisfaction to preventively detain the detenue on 13.02.2020. In this regard, it may also be noted that on 12th December, 2019 the Citizenship Amendment Bill was assented to by His Excellency, the President of India.

46. Thus, the contention based on the contents of the lecture delivered by the detenue on 12.12.2019 apart, the State authorities have failed to discharge their bounden burden to establish that the lecture delivered by the appellant on 12.12.2019 had such a deleterious effect on the public order in district-Aligarh as had continued to exist up to 13.02.2020 necessitating preventive detention of the detenue, on that later date. In that regard, it may further be borne in mind that delay in passing of detention orders or in recording subjective satisfaction to preventively detain a person may not be a subject matter of a hard and fast rule, yet the record must itself indicate that there existed a continuing casual link between the satisfaction claimed to have been recorded and the offending act. In **Gora Vs State of West Bengal,** reported in **(1975) 2 SCC 14**, it was held:

"There is, therefore, no hard and fast rule that merely because there is a time lag of about six months between the "offending acts" and the date of the order of detention, the causal link must be taken to be broken and the satisfaction claimed to have been arrived at by the District Magistrate must be regarded as sham or unreal. Whether the acts of the detenu forming the basis for arriving at a subjective satisfaction are too remote in point of time to induce any reasonable person to reach such subjective satisfaction must depend on the facts and circumstances of each case. The test of proximity is not a rigid or mechanical test to be blindly applied by merely counting the number of months between the "offending acts" and the order of detention. It is a subsidiary test evolved by the Court for the purpose of determining the main question whether the past activities of the detenu is such that from it a reasonable prognosis can be made as to the future conduct of the detenu and its utility, therefore, lies only insofar as it subserves that purpose and it cannot be allowed to dominate or drown it. The prejudicial act of the detenu may in a given case be of such a character as to suggest that it is a part of an organised operation of a complex of agencies collaborating to clandestinely and secretly carry on such activities and in such a case the detaining authority may reasonably feel satisfied that the prejudicial act of the detenu which has come to light cannot be a solitary or isolated act, but must be part of a course of conduct of such or similar activities clandestinely or secretly carried on by the detenu and it is, therefore, necessary to detain him with a view to preventing him

from indulging in such activities in the future."

47. Later, the conspectus of law on the point was considered in **T.A. Abdul Rahman Vs. State of Kerala & Ors.,** reported in **1989 (4) SCC 741,** wherein it was observed as below:

The conspectus of the above decisions can be summarised thus: The question whether the prejudicial activities of a person necessitating to pass an order of detention is proximate to the time when the order is made or the live-link between the prejudicial activities and the purpose of detention is snapped depends on the facts and circumstances of each case. No hard and fast rule can be precisely formulated that would be applicable under all circumstances and no exhaustive guidelines can be laid down in that behalf. It follows that the test of proximity is not a rigid or mechanical test by merely counting number of months between the offending acts and the order of detention. However, when there is undue and long delay between the prejudicial activities and the passing of detention order, the court has to scrutinise whether the detaining authority has satisfactorily examined such a delay and afforded a tenable and reasonable explanation as to why such a delay has occasioned, when called upon to answer and further the court has to investigate whether the causal connection has been broken in the circumstances of each case."

That exposition of law was restated with approval in Rajinder Arora Vs. Union of India & Ors., reported in 2006 (4) SCC 796.

48. In the instant case, as noted above, that causal link is found to be missing or completely broken. In absence of any material indicating that the detenue continued to act in a manner prejudicial to public order from 12.12.2019 up to 13.02.2020 or that he committed any such other or further act as may have had that effect, the preventive detention order cannot be sustained. In fact, the grounds of detention are silent as to public order at Aligarh being at risk of any prejudice in February, 2020 on account of the offending act attributed to the detenue of the date 12.12.2019. What remains is a mere apprehension expressed by the detaining authority without supporting material on which such apprehension may be founded.

49. We have also tested legality of the detention on count of giving effective opportunity to the detenue to represent at earliest. The grounds for detention along with material were supplied to the detenue in light of clause (5) of Article 22 of the Constitution of India enabling him to submit representation to the competent authorities at earliest. The material so given was a compact disk of the speech delivered by Dr. Kafeel Khan on 12th December, 2019 at Bab-e-Syed gate of Aligarh Muslim University. On asking, it is conveyed to us that no transcript of the speech was supplied to the detenue. The non-supply of transcript would have been of no consequence, if a device would have been supplied to the detenue to play the compact disk. It is the position admitted that no such device was made available to the detenue. A reply to the writ petition has been filed on behalf of respondent no.4, the Superintendent of Jail, District Jail, Mathura wherein too nothing has been stated about supply of such device to the detenue. In absence of such device the supply of compact disk is absolutely non consequential. It virtually amounts non-

supply of the material necessary to submit a representation in accordance with clause (5) of Article 22 of the Constitution of India. Such non-supply of material violates a precious fundamental right of a detenue enshrined under Article 22 of the Constitution. On this count also the detention of Dr. Kafeel Khan deserves to be set aside.

50. The detention of Dr. Kafeel Khan has also been extended twice. It is stated by learned Additional Advocate General that the detenue even while in prison is in contact with the students of Aligarh Muslim University and is instigating to disturb public order of the city. The facts stated is not acceptable being not supported by any material. At the threshold, it would be appropriate to state that the detenue is in State custody where he can't have any electronic device or other mechanical device to have contact anyone. The other eventuality is sending messages through the visitors, but no record of that too is available.

51. One more important aspect of the matter is that the orders of extension were never served upon the detenue. The record shown to us and the pleadings of the petition also refer that only radiograms relating to decision of the State Government for extension of the term of detention were supplied to the detenue. The radiograms mentions that the actual order shall be sent through speed post but in fact nothing except the radiograms were given to the detenue. In light of the discussion above, we are having no hesitation in concluding that neither detention of Dr. Kafeel Khan under National Security Act, 1980 nor extension of the detention are sustainable in the eye of law.

52. As we have arrived at a conclusion that the order of detention is bad, we do not consider it necessary to deal with the argument advanced by learned counsel for the petitioner relating to delay in submission of representation.

53. The writ petition for the reasons given above is allowed. The order of detention dated 13th February, 2020 passed by District Magistrate, Aligarh and confirmed by the State of Uttar Pradesh is set aside. The extension of the period of detention of detenue Dr. Kafeel Khan is also declared illegal. A writ in the nature of habeas corpus is hereby issued to release Dr. Kafeel Khan, the detenue from State custody forthwith.

(2020)09ILR A30
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.09.2020

BEFORE

THE HON'BLE J.J. MUNIR, J.

Habeas Corpus Writ Petition No. 387 of 2020

Sahil(Minor) & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Ashutosh Kumar Pandey

Counsel for the Respondent:
A.G.A.

A. Muslim Personal Law – Minor child – Mother's Right of custody – Mother has an unqualified right in preference to the father till the child attains the age of seven years – The right, however, is lost once she remarries – Right of the mother to the child's custody is not based on the personal law of parties alone, but on a well acknowledged principle arising from human nature that the mother is best oriented to look after the welfare of her infant or young child – The mother has

always been regarded to be best equipped to take care of the needs of a young child, and secure his/ her welfare compared to a father–This right of the mothers is subject only to known exceptions, like her marriage to a stranger or the mother living a demonstrably immoral life. (Para 12 and 17)

B. Law of Guardianship – Muslim Personal Law – Guardianship and Ward Act, 1890 – Application – Personal law of parties is not the final word about entitlement to custody or guardianship in India – The right is regulated by the statute namely Guardians and Wards Act, 1890 – The principle that the provisions of the Guardians and Wards Act would prevail over the personal law of parties in the matter of appointment or declaration of a guardian of the person or the property of a minor, is a principle that has been accepted without cavil by consistent authority. (Para 14)

C. Constitution of India – Article 226 – Writ of Habeas Corpus – Maintainability – Matter relating to custody of minor – Mother asking for her child's custody from a grandfather, who is resisting the mother's right, certainly entitles the mother to say that the grandfather's custody is so unlawful that she is entitled to a writ of habeas corpus – Mother need not be relegated to her ordinary remedy of bringing and pursuing an application, under Section 25 of the Guardians and Wards Act – Held, writ of Habeas Corpus is maintainable. (Para 18, 19 and 21)

D. Writ of Habeas Corpus – Welfare of child – Factors to be kept in mind – Welfare of the minor is certainly more secure in the mother's hand – It is far more secure than in the hands of an aging grandfather, who has married a second time and introduced a step grandmother for the minor in his family – It is well acknowledged that the welfare of the minor is not secured by money alone. It is the product of multifaceted grooming that involves affection, supervision, guidance, education, inculcation of good human values and many other factors of like genre, that go to achieve realization of the human personality – Held, the minor's welfare is far better secured with the mother than in the hands of the grandfather, the rule nisi is made absolute. (Para 24 and 26)

Writ Petition allowed (E-1)

Cases relied on :-

1. Tejaswini Gaud & ors. Vs Shekhar Jagdish Prasad Tewari & ors.; (2019) 7 SCC 42

2. Imambandi & ors. Vs Sheikh Haji Mutsaddi & ors., (1918-19) 23 CWN 50

3. Rafiq Vs Smt. Bashiran & anr., AIR 1963 Raj 239

4. Mt. Siddq-un-Nissa Bibi Vs Nizam-Uddin Khan(1) Sulaiman, AIR 1932 All 215

5. Mohammad Shafi Vs Shamin Banoo, AIR 1979 Bom 156

6. Habeas Corpus Writ Petition No. 82 of 2019; Manuj Sharma Vs St. of U.P. & Others, decided on 12 April, 2019

7. Nithya Anand Raghavan Vs St. of NCT of Delhi & ors., (2017) 8 SCC 454

8. Syed Saleemuddin Vs Dr. Rukhsana & ors., (2001) 5 SCC 247

(Delivered by Hon'ble J.J. Munir, J.)

1. This Habeas Corpus Writ Petition has been effectively filed by the second petitioner, Rehana Bano, asking that the first petitioner, Sahil, her minor son, aged a little less than four years, be ordered to be produced before the Court from the unlawful custody of respondent no.4, Abdul Sohrab, the minor's grandfather and liberated from the said custody, ordering him to be placed in his mother's custody.

2. Heard Sri Ashutosh Kumar Pandey, learned Counsel for the petitioners and Sri Indrajeet Singh, learned A.G.A. appearing on behalf of the State.

3. Respondent no.4, Abdul Sohrab appeared in person, but did not file a counter affidavit. He produced the minor, Sahil in compliance with the *rule nisi* issued by this Court.

4. The case of the second petitioners is that she was married according to Muslim rites on 15.05.2013 to the late Amjad Khan son of Sohrab Khan, respondent no.4. After solemnization of marriage, she cohabited with her husband, discharging her conjugal obligations. It is asserted that on 28.10.2016, the minor detenue, Sahil was born of the wedlock of parties. The second petitioner's deceased husband, Amjad Khan got the name of their newly born son registered with the competent Authority, under the Registration of Births and Deaths Act, 1989 on 28.10.2016. The certificate of birth was issued on 13.12.2016. That certificate is on record as Annexure no.1 to this petition.

5. It is averred by the second petitioner that by ill-fate, she lost her husband, Amjad Khan on 08.02.2017. Once widowed, she faced a barrage of physical and mental harassment, besides torture at the hands of her in-laws, including respondent no.4. It is averred in paragraph no.6 that respondent no.4 would not be content with ill-treating his daughter-in-law, the second petitioner; he would beat up the first petitioner, the second petitioner's minor son. It is the second petitioner's case that on 05.09.2019 at about 7 O' clock in the morning, she was thrown out from her matrimonial home by the fourth respondent, acting in concert with the other in-laws, who beat her up and relieved her of her jewelry and other personal belongings. To add to it, the fourth respondent and other in-laws forcibly snatched away her minor son, Sahil. It is averred that the minor is a young child, less than three years and stands deprived of the second petitioner's maternal love, affection, company and security.

6. It is by now a well reputed and an unexceptionable principle of law that in child custody matters, welfare of the minor is of paramount consideration. But, before the Court could look into those considerations, Sri Indrajeet Singh, learned A.G.A. has raised a preliminary objection that a writ of habeas corpus cannot be invoked to decide virtually custody disputes about minors, between family members. He submits that the fourth respondent is the minor's grandfather, whereas the second petitioner is his mother. If the mother feels that she is entitled to the minor's custody, she ought to go to the Court of competent jurisdiction under the Guardians and Wards Act, 1890. In fact, according to the learned A.G.A., Section 25 of the Guardians and Wards Act is the ideal remedy for a natural guardian to secure custody of a minor from another natural guardian, *vis-a-vis* whom the claiming guardian may feel that he/ she has a better right to the minor's custody. A writ of habeas corpus, according to Sri Indrajeet Singh, is not at all available to resolve custody disputes regarding minors.

7. This question fell for consideration of the Supreme Court in **Tejaswini Gaud and others vs. Shekhar Jagdish Prasad Tewari and others, (2019) 7 SCC 42**. After review of earlier authority of their Lordships of the Supreme Court, it was held:

"19. Habeas corpus proceedings is not to justify or examine the legality of the custody. Habeas corpus proceedings is a medium through which the custody of the child is addressed to the discretion of the Court. Habeas corpus is a prerogative writ which is an extraordinary remedy and the writ is issued where in the circumstances of the particular case, ordinary remedy provided by the law is either not available or is ineffective; otherwise a writ will not be issued. In child custody matters, the power of the High Court in granting the

writ is qualified only in cases where the detention of a minor by a person who is not entitled to his legal custody. In view of the pronouncement on the issue in question by the Supreme Court and the High Courts, in our view, in child custody matters, the writ of habeas corpus is maintainable where it is proved that the detention of a minor child by a parent or others was illegal and without any authority of law.

20. In child custody matters, the ordinary remedy lies only under the Hindu Minority and Guardianship Act or the Guardians and Wards Act as the case may be. In cases arising out of the proceedings under the Guardians and Wards Act, the jurisdiction of the court is determined by whether the minor ordinarily resides within the area on which the court exercises such jurisdiction. There are significant differences between the enquiry under the Guardians and Wards Act and the exercise of powers by a writ court which is summary in nature. What is important is the welfare of the child. In the writ court, rights are determined only on the basis of affidavits. Where the court is of the view that a detailed enquiry is required, the court may decline to exercise the extraordinary jurisdiction and direct the parties to approach the civil court. It is only in exceptional cases, the rights of the parties to the custody of the minor will be determined in exercise of extraordinary jurisdiction on a petition for habeas corpus."

8. It is true that the grandfather is not an utter stranger and, in fact, under the Personal Law of parties, who are Muslims, the grandfather may be regarded as the natural guardian in the absence of the father, who dies without appointing a testamentary guardian or an executor. But under the personal law of parties also, there is a distinction made between the natural guardianship that belongs to the father and the right to custody that vests in the mother until the age of seven years, in case of a minor boy. In case of a minor girl, that right to custody for the mother extends until the girl attains the age of puberty. In this regard, it may be mentioned that under the personal law of parties, there is a clear distinction about the law relating to guardianship of the person of a minor and guardianship of his/ her property. Reference may be made with profit to **Mulla's Principles of Mahomedan Law (Nineteenth Edition) by M. Hidayatullah** and Arshad Hidayatullah. Section 352 of Mulla's Mahomedan Law, which falls under Part B of Chapter XVIII dealing with "Guardians of the Person of a Minor', provides:

"352. Right of mother to custody of infant children. - The mother is entitled to the custody *(hizanat)* of her male child until he has completed the age of seven years and of her female child until she has attained puberty. The right continues though she is divorced by the father of the child, unless she marries a second husband in which case the custody belongs to the father."

9. Again, sections 353, 354 and 355 that have material bearing on the issue are extracted below:

"353. Right to female relations in default of mother.- Failing the mother, the custody of a boy under the age of seven years, and of a girl who has not attained puberty, belongs to the following female relatives in the order given below:-

(1) mother's mother, how highsoever;

(2) father's mother, how highsoever;

(3) full sister;

(4) uterine sister;

(5) consanguine sister;

(6) full sister's daughter;

(7) uterine sister's daughter;

(8) consanguine sister's daughter;

(9) maternal aunt, in like order as sisters; and

(10) paternal aunt, also in like order as sisters.

354. Females when disqualified for custody.- A female, including the mother, who is otherwise entitled to the custody of a child, loses the right of custody -

(1) if she marries a person not related to the child within the prohibited degrees (ss. 260-261), e.g., a stranger, but the right revives on the dissolution of marriage by death or divorce; or

(2) if she goes and resides, during the subsistence of the marriage, at a distance from the father's place of residence; or,

(3) if she is leading an immoral life, as where she is a prostitute; or

(4) if she neglects to take proper care of the child.

355. Right of male paternal relations in default of female relations.- In default of the mother and the female relations mentioned in sec. 353, the custody belongs to the following persons in the order given below:-

(1) the father;

(2) nearest paternal grandfather;

(3) full brother;

(4) consanguine brother;

(5) full brother's son;

(6) consanguine brother's son;

(7) full brother of the father;

(8) consanguine brother of the father;

(9) son of father's full brother;

(10) son of father's consanguine brother;

Provided that no male is entitled to the custody of an unmarried girl, unless he stands within the prohibited degrees of relationship to her (ss. 260-261).

If there be none of these, it is for the Court to appoint a guardian of the person of a minor."

10 It would be noticed that in sharp contrast to the law governing guardianship of the person of a minor, Part C of Chapter XVII of Mulla's Mahomedan Law, enunciates the law quite differently regarding guardianship of the property of a minor. Section 359 provides thus:

"359. Legal guardians of property.- The following persons are entitled in the order mentioned below to be guardians of the property of a minor:-

(1) the father;

(2) the executor appointed by the father's will;

(3) the father's father;

(4) the executor appointed by the will of the father's father."

11. Here, a juxtaposition of Sections 352, 353 and 355 on one hand and Section 359 on the other brings out in sharp relief the distinction between the right to custody or guardianship of the person of a minor and the right to guardianship of his/ her property.

12. The principles of the personal law governing parties show that so far as the right to custody of a male child, who is a minor is concerned, the mother has an unqualified right in preference to the father till the child attains the age of seven years. The right, however, is lost once she remarries. If she does marry, the right to

custody accrues to the father. A different principle applies where the mother is not there. In that case, it goes, according to a graded entitlement of ten different female relatives of the mother and the father in the order indicated under Section 353 *(supra)*. Upon a failure of female relatives, it goes to an ordered list of ten male relatives, indicated under Section 355 *(supra)*.

13. This entitlement of the mother to the custody of a minor male child (as well as female, which is not relevant here) fell for consideration of the Privy Council in **Imambandi and ors. vs. Sheikh Haji Mutsaddi and ors., (1918-19) 23 CWN 50**, where it has been held by their Lordships:

"It is perfectly clear that under the Mahomedan law the mother is entitled only to the custody of the person of her minor child up to a certain age according to the sex of the child. But she is not the natural guardian; the father alone, or, if he be dead, his executor (under the Sunni law) is the legal guardian. The mother has no larger powers to deal with her minor child's property than any outsider or non-relative who happens to have charge for the time being of the infant....."

"As already observed, in the absence of the father, under the Sunni law the guardianship vests in his executor. It the father dies without appointing an execute or (wasi) and his father is alive, the guardians hip of his minor children devolves on their grandfather. Should he also he dead, and have left an executor, it vests in him. In default of these de jure guardians, the duty of appointing a guardian for the protection and preservation of the infants' property devolves on the Judge as the representative of the Sovereign (Baillie's "Digest," ed. 1875, p. 689; Hamilton's Heddya, Vol. IV, p. 555). ....."

14. This then is the position about the entitlement to the custody of a minor male child under the Muslim Law. But, it must be remembered that the personal law of parties is not the final word about entitlement to custody or guardianship in India. The right is regulated by statute. The statute is the Guardians and Wards Act, 1890. The principle that the provisions of the Guardians and Wards Act would prevail over the personal law of parties in the matter of appointment or declaration of a guardian of the person or the property of a minor, is a principle that has been accepted without cavil by consistent authority. The point was considered and the law expounded in **Rafiq vs. Smt. Bashiran and another, AIR 1963 Raj 239. In Rafiq** *(supra)*, Jagat Narayan J. after doing a survey of the provisions of Sections 17 and 19 of the Guardians and Wards Act and relying on a decision of this Court in **Mt. Siddq-un-Nissa Bibi v. Nizam-Uddin Khan(1) Sulaiman, AIR 1932 All 215, held:**

"The learned Senior Civil Judge ignored the provisions of Sec. 19 of the Guardians and Wards Act, which runs as follows:--

"Nothing in this Chapter shall authorise the Court to appoint or declare a guardian of the property of a minor whose property is under the superintendence of a Court of Wards, or to appoint or declare a guardian of the person--

(a) of a minor who is a married female and whose husband is not, in the opinion of the Court, unfit to be guardian of her person, or

(b) of a minor whose father is living and is not, in the opinion of the

Court, unfit to be guardian of the person of the minor, or

(c) of a minor whose property is under the superintendence of a Court of Wards competent to appoint a guardian of the person of the minor."

He did not come to a finding that the father is unfit to be the guardian of the person of the minor.

It may be mentioned here that where the provisions of the personal law are in conflict with the provisions of the Guardians and Wards Act the latter prevail over the former. It is only where the provisions of the personal law are not in conflict with the provisions of the Guardians and Wards Act that the court can take into consideration the personal law applicable to the minor in the appointment of a guardian. The provisions of Sec. 19 of the Guardians and Wards Act prevail over the provisions of Sec. 17 which runs as follows:--

"(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.

(4) The Court shall not appoint or declare any person to be a guardian against his will."

(3) In *Mt. Siddq-un-Nissa Bibi v. Nizam-Uddin Khan, ILR 54 All 128 : (AIR 1932 All 215),* Sulaiman, Acting C.J. observed at page 134 (of ILR All) : (at p. 217 of AIR): --

"The personal law has been abrogated to the extent laid down in the Act. Where, however, the personal law is not in conflict with any provision of the Act, I would not be prepared to hold that it has necessarily been superseded."

and at page 131 (of ILR All) : (at p. 216 of AIR)--

"There can be no doubt that so far as the power to appoint and declare the guardian of a minor under Sec. 17 of the Act is concerned, the personal law of the minor concerned is to be taken into consideration, but that law is not necessarily binding upon the court, which must look to the welfare of the minor consistently with that law. This is so in cases where Sec. 17 applies. In such cases the personal law has to this extent been superseded that it is not absolutely binding on the court and can be ignored if the welfare of the minor requires that some one else, even inconsistently with that law, is the more proper person to be appointed guardian of the minor. Sec. 19 then provides that "Nothing in chapter shall authorise the Court ..... to appoint or declare a guardian of the person (a) of a minor who is a married female and whose bus-band is not, in the opinion of the court, unfit to be guardian of her, person, or (b)..... of a minor whose father is living and is not, in the opinion of the court, unfit to be guardian of the person of the minor, or (c) of a minor whose property is under the superintendence of a Court of Wards competent to appoint a guardian of the person of the minor." The language of the section, as it stands, obviously implies that when any of the three contingencies

mentioned in the sub-clauses exists there is no authority in the court to appoint or declare a guardian of the person of the minor at all; that is to say, the jurisdiction of the court conferred upon it by Sec. 17 to appoint or declare a guardian is ousted where the case is covered by Sec. 19."

(4) There is nothing on record to show that the father of the minor is unfit to be the guardian of her person. As was observed in *B.N. Ganguly v. G.H. Sarkar, AIR 1961 Madh-Pra 173* there is a presumption that the parents will be able to exercise good care in the welfare of their children."

15. The entire law about the right of the mother to the custody of her minor children, a son and a daughter, where the parties were an estranged Muslim couple, was considered by the Bombay High Court in **Mohammad Shafi vs. Shamin Banoo, AIR 1979 Bom 156**. It must be remarked that the facts of the case in **Mohammad Shafi** show that it was truly a custody dispute between the estranged parents of the two minors, where the application by the mother for custody appears to be one made under Section 25 of the Guardians and Wards Act. She had asked for the custody of her minor son, aged four years and a minor daughter, aged two and a half years, at the time of commencement of action. The facts of the case founded on pleadings of parties can best be understood by a reference to their statement in paragraph nos.2 and 3 of the report, that read:

"2. An application for appointment of herself as guardian and for the custody or returning the minors to her custody was filed by Shamim Banu against her husband Mohomed Shafi under sections 7 and 25 of the Guardian and Wards Act. She alleged therein that she was married to Mohomed Shafi and bore three children from respondent Mohomed Shafi, namely Mohomed Raees whose age was given as 4 years, Waheeda Begum, whose age was given as 2½ years and Farooque who was aged 1½ years at the time when this application was presented. She then stated that she was given very cruel treatment by the respondent who wanted to marry another woman and drove her out and at that time snatched Mohomed Raees and Waheeda Begum from her. Farooque was then only a month old and was allowed to be retained with her. She, therefore, filed this application for custody or return of the custody of the minors to herself, namely, Mohomed Raees and Waheeda Begum and for appointment of herself as the guardian under section 7. She also stated in the application that the respondent has married Sajjidabegum after the petitioner was driven away and that the respondent and his newly married wife are living together along with the minors who were, according to her, treated cruelly by the wife, step-mother and the respondent.

3. The respondent filed his written statement to this application and denied that the petitioner was driven away and was treated cruelly. He claimed that he was the natural father of the minor children whose ages were not disputed and was, therefore, entitled to their custody. He contended that the petitioner was divorced by him on 7th November, 1975 and that she was a woman of suspicious character and had connections with others and used to leave the house of the respondent at night in the company of somebody secretly. That she has left him with a view to carry on her affair with her boy friend. In these circumstances and also under the personal law to which the parties belong, namely, Mahomedan Law, he claimed that he was

entitled to the custody of the children and was the proper and legal guardian of the minors. It is his claim that the application is motivated by the proceedings which she has commenced under section 125 of the Code of Criminal Procedure against him. He did not deny that he has married a third time, but denied that either the minors were given cruel treatment by him or his new wife. Lastly, he contended that the minors are being properly looked after and that the petitioner who is staying with her father has no means of income as also her parents which could be sufficient to bring up these minor children. That they would be practically starving whereas the respondent has sufficient earnings of his own. That there are other members in his family who come to him and look after his children by the petitioner."

16. After a searching analysis of the provisions of the Guardians and Wards Act and review of well-known authority on the point, R.D. Tulpule, J. held, summarizing the principle:

"33. In my opinion, as pointed out, the provisions of the personal law applicable to the parties stand superseded to the extent to which a provision is made and which is inconsistent or contrary to that personal law in the Guardians and Wards Act. If the definition in section 4(2) is capable of including the person who is not a natural or legal guardian at the moment, but has the care of the minor, then it seems to me that he can maintain an application under section 25 of the Act. If such an application can be maintained and if the minor was in the custody of such person, as in the present case, a legal guardian cannot say if it is in the interest of the minor and for the welfare of the minor that the custody should be handed over to such guardian as contemplated under section 4 of the Guardians and Wards Act, that such custody should not be granted. It seems to me, therefore, that if it was in the interest of the minor and for its welfare to award the custody to such guardian as defined under section 4(2) to him, its custody should be given. It seems to me that even the personal law applicable to the parties in this case recognises the right to the custody of the mother in spite of the father being a legal and natural guardian during certain period. As I pointed out that could not be upon any other consideration except that the mother is the best person suited to take care of the minor. If that is so, I am inclined to think that she comes within the definition of "guardian' as contemplated under section 4. In that view I do not think particularly in the present circumstances any other conclusion can be reached as regards what is in the interest and welfare of the minors."

17. It is clear from the position of law as it stands that so far as the custody of a minor child is concerned, the mother is entitled to it until the child is of tender age, unless there be a clear disentitlement inferable. This right of the mother to the child's custody is not based on the personal law of parties alone, but on a well acknowledged principle arising from human nature - and if this Court may dare say from the animal nature of man - that the mother is best oriented to look after the welfare of her infant or young child. The mother has always been regarded to be best equipped to take care of the needs of a young child, and secure his/ her welfare compared to a father. This right of the mothers is subject only to known exceptions, like her marriage to a stranger or the mother living a demonstrably immoral life. The mother's right is so well established, that in case of a minor of

tender years, any other relative holding the child in his/ her custody while the mother is around, would be unlawful custody. Of course, the principle would not apply if the mother is disentitled under some reputed exception.

18. Here, it is not the father who holds the child in custody, claimed to be unlawful by the second petitioner. It is the grandfather of the minor. This Court is of opinion that the mother asking for her child's custody from a grandfather, who is resisting the mother's right, certainly entitles the mother to say that the grandfather's custody is so unlawful that she is entitled to a writ of habeas corpus. She need not be relegated to her ordinary remedy of bringing and pursuing an application, under Section 25 of the Guardians and Wards Act.

19. To the end of a reassurance of the principle that a writ of habeas corpus in matters relating to custody of minors may be issued, reference may be made to a recent decision of a Division Bench of this Court in **Manuj Sharma vs. State of Uttar Pradesh & Others, Habeas Corpus Writ Petition No.82 of 2019,** decided on 12th April, 2019. In **Manuj Sharma** *(supra)*, after a searching review of authority on the point, whether a writ of habeas corpus can lie to seek custody of a minor between an estranged couple, particularly, the decisions of the Supreme Court in **Nithya Anand Raghavan v. State of NCT of Delhi and others, (2017) 8 SCC 454 and Syed Saleemuddin v. Dr. Rukhsana and Ors., (2001) 5 SCC 247,** it has been held:

"24. Having considered the aforesaid judgments of the Supreme Court and the principles laid down in the aforestated cases for grant of writ of habeas corpus, it appears that the condition precedent for instituting a petition seeking writ of habeas corpus is the person for whose release, the writ of habeas corpus is sought, must be in detention and he must be under detention by the authorities or by any private individual. It is his detention which gives the cause of action for maintaining the writ of habeas corpus. If the allegations in the writ of habeas corpus read as a whole do not disclose the detention, in other words, if there is no allegation of illegal detention, the writ petition seeking writ of habeas corpus is liable to be rejected summarily. Such writ is available against any person who is suspected of detaining another unlawfully and the habeas corpus Court must issue it, if it is shown that the person on whose behalf it is asked for is unlawfully deprived of his liberty. The writ can be addressed to any person whatever - an official or a private individual - who has another in his custody."

20. It would be noticed from a perusal of the decisions of the Supreme Court in **Nithya Anand Raghavan** *(supra)* and **Syed Saleemuddin** *(supra)* referred to by the Division Bench of this Court in **Manuj Sharma** that the remedy of a habeas corpus to an estranged parent has not been held unavailable, even against the other parent. All that appears to be the requirement is to show that the child with the other parent or with some other member of the family is in detention and that detention is unlawful. It is but logical that in a case where one has to judge the legality of the minor's detention by the other parent or some other relative, the nature of the applying parent's right, vis-a-vis the detaining parent or relative's is decisive. The decision of their Lordships of the Supreme Court in **Tejaswini Gaud** also says that the jurisdiction of the High Court in granting a

habeas corpus is limited by the fact whether the detention of the minor is by a person who is not entitled to his legal custody. It is true that the Supreme Court has held in **Tejaswini Gaud** that habeas corpus can be issued in exceptional cases. It is not that the writ is completely unavailable in matters where a parent claims custody, to which he/ she is lawfully entitled.

21. In this Court's opinion, where there is not much of a debatable right available to the other parent or some other relative, who is detaining the child contrary to the wish of the applying parent, the writ ought to issue. However, if the parent or the other relative detaining the minor has a reasonable right that he/ she can show on affidavits, the parties ought to be left to pursue their remedy under the Guardians and Wards Act. As such, what this Court has concluded hereinabove that this petition is maintainable, proceeds on valid principles.

22. Still, it has to be inquired whether the second petitioner has that kind of an ex facie and impeachable right, vis-a-vis respondent no.4, Abdul Sohrab, the minor's grandfather. This Court had the advantage of speaking to Abdul Sohrab and hearing him in person. He has appeared in person along with his wife and the minor, Sahil. He did not choose to file a counter affidavit and intelligibly placed his case before the Court. He was accompanied by his wife. On the fact being pointed out by the learned Counsel for the petitioners, he conceded that his wife is not the minor's grandmother. She is a woman, whom the fourth respondent has later married. It is, therefore, evident that the minor does not have his grandmother along with his grandfather. Rather, he has a step grandmother. The minor's father is dead. The second petitioner, Rehana Bano is therefore, the only surviving parent of the child. The Court also ascertained the parties station in life and their resources. The Court was informed by the fourth respondent, Abdul Sohrab that he is a teacher by profession and has sufficient means to maintain the minor. He said that the mother, the second petitioner, has no means of her own to maintain the minor. She is dependent upon her parents, with whom she stays after the fourth respondent's son, that is to say, Rehana Bano's husband, Amjad Khan passed away.

23. The second petitioner, Rehana Bano on the other hand stated before the Court in person, which the Court permitted despite presence of learned Counsel representing her, that she is a Postgraduate and undertakes private tuition. She is able to earn reasonably well, besides receiving generous support from her family, with whom she stays after her husband's death.

24. This Court is mindful of the fact that quite apart from what the personal law of parties says about her right to custody until the age of seven years as regards a minor male child, the welfare of the minor is certainly more secure in the mother's hand. It is far more secure than in the hands of an aging grandfather, who has married a second time and introduced a step grandmother for the minor in his family. The welfare of the minor, it is well acknowledged, is not secured by money alone. It is the product of multifaceted grooming that involves affection, supervision, guidance, education, inculcation of good human values and many other factors of like genre, that go to achieve realization of the human personality. In this case, this Court is of clear opinion that the minor's welfare under

the circumstances noticed above is far better secured with the mother than in the hands of the grandfather, respondent no.4.

25. In the result, this Habeas Corpus Writ Petition is **allowed.**

26. The *rule nisi* dated 28.08.2020 is made absolute. The minor, Sahil, who has been produced before this Court in compliance with the *rule nisi*, is ordered to be handed over forthwith to petitioner no.2, Smt. Rehana Bano, who is present in Court. He shall remain in her custody until otherwise ordered by a Court of competent jurisdiction.

27. The fourth respondent, Abdul Sohrab, who is the minor's grandfather, shall have visitation rights to meet the child on the first Sunday of every calendar month between 10:00 a.m. to 12.00 noon at the residence of the second petitioner, Smt. Rehana Bano, situate at Village Budkuda, Tehsil, Jakhania, Police Station Budkuda, District Ghazipur. During these visitations, the minor shall be provided free access to his grandfather by the second petitioner, Smt. Rehana Bano. She shall extend due courtesy to the fourth respondent, Abdul Sohrab.

28. Let this order be communicated to the learned District Judge, Ghazipur, the learned Chief Judicial Magistrate, Ghazipur and the Superintendent of Police, Ghazipur by the office forthwith.

(2020)09ILR A 41
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.09.2020

BEFORE

THE HON'BLE J.J. MUNIR, J.

Habeas Corpus Writ Petition No. 406 of 2020

Smt. Reetu & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Vikrant Singh Parihar, Sri Vipul Kumar Singh

Counsel for the Respondent:
G.A., Sri Ajit Kumar

A. Constitution of India–Article 226 – Writ of Habeas Corpus–Maintainability– Matter relating to custody of minor–A writ of habeas corpus can certainly be issued in matters relating to custody of a child where the child is in custody of a relative or a person, who is not the lawful guardian, though not an utter stranger – A mother pitted against the minor's grandmother and the father's brother can certainly say that the minor is in their unlawful custody, entitling her to maintain a writ petition, asking for a writ of habeas corpus–Held, petition is maintainable. (Para 13 and 15)

B. Law of Guardianship – Guardians and Wards Act, 1890 – Hindu Personal Law – Application – Statute, as a whole, has been interpreted consistently to prevail over the personal law of parties when the question about appointment or declaration of a guardian or the custody of a minor arises. (Para 14)

C. Civil Law - Hindu Marriage Act, 1955 – Section 6 – Guardians and Wards Act, 1890 – Mother is the natural guardian of the minor – In the presence of the minor's natural guardian, the grandmother and the father's brother would not be entitled to the minor's custody. (Para 14 and 16)

D. Writ of Habeas Corpus – Welfare of child – Factors to be kept in mind – The welfare of a minor, which is of paramount consideration under the Guardians and Wards Act, 1890, is best secured in the mother's hands – Apart from the question of the necessary wherewithal to bring up the minor, the Grandmother's advancing age would be a

decisive factors to consider – Held, Habeas Corpus Writ Petition succeeds, the *rule nisi* is made absolute. (Para 14, 20, 23 and 24)

Writ Petition allowed. (E-1)

Cases relied on :-

1. Syed Saleemuddin Vs Dr. Rukhsana & ors., (2001) 5 SCC 247

2. Nithya Anand Raghavan Vs St. of (NCT of Delhi) & anr., (2017) 8 SCC 454

3. Tejaswini Gaud & ors. Vs Shekhar Jagdish Prasad Tewari & ors.; (2019) 7 SCC 42

4. Rafiq Vs Smt. Bashiran & anr., AIR 1963 Raj 239

5. Khaled Kamal Hussein Mohamed Kassem, An Egyptian Citizen Vs St. of Mah. & ors., 2020 SCC OnLine Bom 166

6. Habeas Corpus Writ Petition No. 82 of 2019; Manuj Sharma Vs St. of U.P. & ors., decided on 12 April, 2019

(Delivered by Hon'ble J.J. Munir, J.)

1. Smt. Reetu, the first petitioner says that her minor son, Mohan @ Bholey, the second petitioner has been unlawfully detained by respondent nos.6, 7, 8, 9 and 10. She prays that a writ in the nature of habeas corpus be issued to respondent nos.6, 7, 8, 9 and 10, ordering them to produce the second petitioner before this Court and upon production, the said minor be set at liberty by placing him in her custody.

2. A *rule nisi* was issued on 24.08.2020, ordering the minor, Mohan @ Bholey, to be produced before the Court on 27.08.2020 at 2:00 p.m. On 27.08.2020, the minor was produced in the manner and the time directed. This Court finding the minor to be a very young child, aged about 3 years, thought it appropriate to hear the matter in camera. The case was directed to be put up in Chambers at 4:00 p.m., where family members of the minor alone were allowed along with learned Counsel. During the hearing in Chambers, this Court while reserving judgment, recorded the following orders:

"This matter has been taken up in Chambers today at 4 p.m., in accordance with the earlier order of the day, in presence of Sri Vikrant Singh Parihar, learned Counsel for the petitioners and Sri Ajit Kumar, learned Counsel appearing on behalf of respondent nos.8 and 9, who are the grandmother of the minor and the father's elder brother. respondent nos.6 and 7, who are the sister and the sister's husband of the minor's deceased father, are not required to be heard. Respondent no.10, Chhotey Lal is reported to be dead.

I have spoken to the minor Mohan @ Bholey in Chambers. He is a very young child of three years. I have also spoken to the mother, petitioner no.1, the grandmother of the minor, respondent no.8, in whose custody the minor presently stays and respondent no.9, Deen Dayal.

Learned Counsel for both parties have addressed this Court on merits of their respective cases.

Judgment reserved."

3. Heard Sri Vikrant Singh Parihar, learned Counsel for the petitioners and Sri Ajit Kumar, learned Counsel appearing on behalf of respondent nos.8 and 9.

4. It must be recorded here that respondent nos.8 and 9, the minor's grandmother and his uncle (the father's elder brother), who have appeared to show cause in the matter, have chosen not to file a counter affidavit. The matter was, therefore, heard on the basis of averments made and the material annexed to the

habeas corpus writ petition, ascertaining the stand of parties and also speaking to the minor, Mohan @ Bholey. What the parties, including the minor, have said and what this Court has been able to ascertain from them, would figure a little later in this judgment.

5. The facts giving rise to this petition are these: Smt. Reetu, the first petitioner was married to one Shyam Sundar alias Shyamu according to Hindu rites on 20.02.2015. Shyam Sundar alias Shyamu is no more. He has committed suicide on 14.07.2019. Of the wedlock of parties, two children were born, to wit, Mohan @ Bholey, the detenue and Km. Jhalak. It is made out that the first petitioner's husband was unemployed and in financial distress. He had borrowed some money from respondent no.6, his sister's husband. He could not liquidate the debt that he owed to the sixth respondent. It is claimed that the first petitioner's husband took away all that she had in jewellery. This had led to a bitter dispute between the first petitioner's husband and all the private respondents. Distressed and distraught, the first petitioner's husband along with the first petitioner and their two children left his parents' home and went to stay with his in-laws. It is claimed that anguished and distressed, he consumed some poisonous substance once, but was saved. On a second attempt, he was not that lucky and passed away on 14.07.2019. The first petitioner had gone over to her in-laws' place to participate in the last rites of her husband. Post the thirteenth day rite (तेरहवीं), respondent nos.6, 7, 8 and 9 ousted the first petitioner from her matrimonial home, abusing and battering her in the process.

6. It is averred by the first petitioner that respondent nos.6, 7, 8, 9 and 10 unlawfully detained the second petitioner, her minor son, Mohan @ Bholey. Smt. Reetu says that all her efforts, to regain custody of her minor son, have been in vain. Smt. Reetu says that she is the natural guardian of her minor son, whereas none of the respondents are entitled in law to his custody. It is also averred in the petition that on 08.06.2020, Smt. Reetu made applications to the Superintendent of Police, Etah and the Station House Officer, Police Station Jaitharana, District Etah to liberate her minor from the unlawful custody of respondent nos.6 and 7, and to entrust him to her care. She has annexed copies of those two applications and the photostat copies of registered postal receipts, evidencing dispatch of the two applications, last mentioned to the concerned Authorities. It is in the aforesaid facts and circumstances that the first petitioner has moved this Court.

7. Mr. Ajit Kumar, learned Counsel appearing on behalf of respondent nos.8 and 9 submits that they are no strangers to the minor and cannot be called persons who are holding him in unlawful custody. Respondent no.8 is the minor's grandmother (father's mother), whereas respondent no.9 is his uncle (father's elder brother). He takes objection to the maintainability of this habeas corpus writ petition by urging that a writ of habeas corpus can be issued against one who holds the minor in unlawful custody. A grandmother and a father's brother cannot be placed in that category. It may be that the first petitioner can establish a better right to the minor's custody, but that right can be established in duly constituted proceedings under Section 25 of the Guardians and Wards Act, 1890 (for short, "the Act'). A writ of habeas corpus is out of place and cannot issue.

8. Mr. Parihar, learned Counsel appearing on behalf of the petitioner, on the other hand, argues that respondent nos.8 and 9, notwithstanding their kinship and blood relationship to the minor, are not natural guardians in the mother's presence. The mother is a natural guardian under Section 6(a) of the Hindu Minority and Guardianship Act, 1956 along with the father. In the father's absence, according to the learned Counsel for the first petitioner, the mother alone is the natural guardian, whereas the right to custody asserted by the minor's grandmother and his uncle is unlawful enough to entitle this Court to issue a writ of habeas corpus.

9. This Court has keenly considered the rival submissions of parties, both about the maintainability and the sustainability of the first petitioner's claim. The Court proposes to dispose of the challenge as to maintainability, first in order.

10. This issue fell for consideration of the Supreme Court in **Syed Saleemuddin v. Dr. Rukhsana and Ors., (2001) 5 SCC 247**. It was held by their Lordships thus:

"11. From the principles laid down in the aforementioned cases it is clear that in an application seeking a writ of Habeas Corpus for custody of minor children the principal consideration for the Court is to ascertain whether the custody of the children can be said to be unlawful or illegal and whether the welfare of the children requires that present custody should be changed and the children should be left in care and custody of somebody else. The principle is well settled that in a matter of custody of a child the welfare of the child is of paramount consideration of the Court. Unfortunately, the Judgment of the High Court does not show that the Court has paid any attention to these important and relevant questions. The High Court has not considered whether the custody of the children with their father can, in the facts and circumstances, be said to be unlawful. The Court has also not adverted to the question whether for the welfare of the children they should be taken out of the custody of their father and left in the care of their mother. However, it is not necessary for us to consider this question further in view of the fair concession made by Shri M.N. Rao that the appellant has no objection if the children remain in the custody of the mother with the right of the father to visit them as noted in the judgment of the High Court, till the Family Court disposes of the petition filed by the appellant for custody of his children."

11. Again, the question engaged the attention of the Supreme Court in **Nithya Anand Raghavan vs. State (NCT of Delhi) and another, (2017) 8 SCC 454.** In Nithya Anand Raghavan, it was held:

"44. The present appeal emanates from a petition seeking a writ of habeas corpus for the production and custody of a minor child. This Court in Kanu Sanyal v. District Magistrate, Darjeeling *[Kanu Sanyal v. District Magistrate, Darjeeling, (1973) 2 SCC 674 : 1973 SCC (Cri) 980]* , has held that habeas corpus was essentially a procedural writ dealing with machinery of justice. The object underlying the writ was to secure the release of a person who is illegally deprived of his liberty. The writ of habeas corpus is a command addressed to the person who is alleged to have another in unlawful custody, requiring him to produce the body of such person before the court. On production of the person before the court, the circumstances in which the custody of the person concerned has been

detained can be inquired into by the court and upon due inquiry into the alleged unlawful restraint pass appropriate direction as may be deemed just and proper. The High Court in such proceedings conducts an inquiry for immediate determination of the right of the person's freedom and his release when the detention is found to be unlawful.

45. In a petition for issuance of a writ of habeas corpus in relation to the custody of a minor child, this Court in *Sayed Saleemuddin v. Rukhsana [Sayed Saleemuddin v. Rukhsana, (2001) 5 SCC 247 : 2001 SCC (Cri) 841]* , has held that the principal duty of the court is to ascertain whether the custody of child is unlawful or illegal and whether the welfare of the child requires that his present custody should be changed and the child be handed over to the care and custody of any other person. While doing so, the paramount consideration must be about the welfare of the child. *In Elizabeth [Elizabeth Dinshaw v. Arvand M. Dinshaw, (1987)* 1 SCC 42 : 1987 SCC (Cri) 13] , it is held that in such cases the matter must be decided not by reference to the legal rights of the parties but on the sole and predominant criterion of what would best serve the interests and welfare of the minor. The role of the High Court in examining the cases of custody of a minor is on the touchstone of principle of parens patriae jurisdiction, as the minor is within the jurisdiction of the Court [*see Paul Mohinder Gahun v. State (NCT of Delhi) [Paul Mohinder Gahun v. State (NCT of Delhi),* 2004 SCC OnLine Del 699 : (2004) 113 DLT 823] relied upon by the appellant]. It is not necessary to multiply the authorities on this proposition.

46. The High Court while dealing with the petition for issuance of a writ of habeas corpus concerning a minor child, in a given case, may direct return of the child or decline to change the custody of the child keeping in mind all the attending facts and circumstances including the settled legal position referred to above. Once again, we may hasten to add that the decision of the court, in each case, must depend on the totality of the facts and circumstances of the case brought before it whilst considering the welfare of the child which is of paramount consideration. The order of the foreign court must yield to the welfare of the child. Further, the remedy of writ of habeas corpus cannot be used for mere enforcement of the directions given by the foreign court against a person within its jurisdiction and convert that jurisdiction into that of an executing court. Indubitably, the writ petitioner can take recourse to such other remedy as may be permissible in law for enforcement of the order passed by the foreign court or to resort to any other proceedings as may be permissible in law before the Indian Court for the custody of the child, if so advised.

47. In a habeas corpus petition as aforesaid, the High Court must examine at the threshold whether the minor is in lawful or unlawful custody of another person (private respondent named in the writ petition). For considering that issue, in a case such as the present one, it is enough to note that the private respondent was none other than the natural guardian of the minor being her biological mother. Once that fact is ascertained, it can be presumed that the custody of the minor with his/her mother is lawful. In such a case, only in exceptionable situation, the custody of the minor (girl child) may be ordered to be taken away from her mother for being given to any other person including the husband (father of the child), in exercise of writ jurisdiction. Instead, the other parent can be asked to resort to a substantive

prescribed remedy for getting custody of the child.

12. This question about the maintainability of a petition for a writ of habeas corpus came up for consideration before their Lordships of the Supreme Court in **Tejaswini Gaud and others vs. Shekhar Jagdish Prasad Tewari and others, (2019) 7 SCC 42.** The question has been elaborately examined by their Lordships in **Tejaswini Gaud,** and it has been held:

"19. Habeas corpus proceedings is not to justify or examine the legality of the custody. Habeas corpus proceedings is a medium through which the custody of the child is addressed to the discretion of the Court. Habeas corpus is a prerogative writ which is an extraordinary remedy and the writ is issued where in the circumstances of the particular case, ordinary remedy provided by the law is either not available or is ineffective; otherwise a writ will not be issued. In child custody matters, the power of the High Court in granting the writ is qualified only in cases where the detention of a minor by a person who is not entitled to his legal custody. In view of the pronouncement on the issue in question by the Supreme Court and the High Courts, in our view, in child custody matters, the writ of habeas corpus is maintainable where it is proved that the detention of a minor child by a parent or others was illegal and without any authority of law.

20. In child custody matters, the ordinary remedy lies only under the Hindu Minority and Guardianship Act or the Guardians and Wards Act as the case may be. In cases arising out of the proceedings under the Guardians and Wards Act, the jurisdiction of the court is determined by whether the minor ordinarily resides within the area on which the court exercises such jurisdiction. There are significant differences between the enquiry under the Guardians and Wards Act and the exercise of powers by a writ court which is summary in nature. What is important is the welfare of the child. In the writ court, rights are determined only on the basis of affidavits. Where the court is of the view that a detailed enquiry is required, the court may decline to exercise the extraordinary jurisdiction and direct the parties to approach the civil court. It is only in exceptional cases, the rights of the parties to the custody of the minor will be determined in exercise of extraordinary jurisdiction on a petition for habeas corpus.

21. In the present case, the appellants are the sisters and brother of the mother Zelam who do not have any authority of law to have the custody of the minor child. Whereas as per Section 6 of the Hindu Minority and Guardianship Act, the first respondent father is a natural guardian of the minor child and is having the legal right to claim the custody of the child. The entitlement of father to the custody of child is not disputed and the child being a minor aged 1½ years cannot express its intelligent preferences. Hence, in our considered view, in the facts and circumstances of this case, the father, being the natural guardian, was justified in invoking the extraordinary remedy seeking custody of the child under Article 226 of the Constitution of India."

13. A writ of habeas corpus can certainly be issued in matters relating to custody of a child where the child is in custody of a relative or a person, who is not the lawful guardian, though not an utter stranger. A kinsman or a relative of the child, who holds the child in custody back from the lawful guardian, would entitle the

lawful guardian to seek restoration of custody through a writ of habeas corpus. The question, whether the person who applies for the writ is the lawful guardian or not, is generally to be determined with reference to the personal law, applicable to parties. However so, the Court may also inquire into for the purpose of determining the legality of the custody, from which liberation is sought, vis-a-vis the right of the person asking for the writ, the question of welfare of the minor.

14. Under the provisions of the Act, the welfare of the minor is of paramount consideration. At the same time, Sections 17 and 19 of the Act and the said statute, as a whole, has been interpreted consistently to prevail over the personal law of parties when the question about appointment or declaration of a guardian or the custody of a minor arises. Section 6 of the Hindu Marriage Act, 1955, clearly provides that the mother is a natural guardian of the minor and a wealth of decisions of Courts in our country have been consistent that the welfare of a minor, which is of paramount consideration under the Act, also is best secured in the mother's hands. This issue would be examined a little later.

15. The point presently under consideration does not spare doubt that a mother pitted against the minor's grandmother and the father's brother can certainly say that the minor is in their unlawful custody, entitling her to maintain a writ petition, asking for a writ of habeas corpus. It is, accordingly, held that this petition is maintainable.

16. Now, turning to the entitlement of the first petitioner to succeed in her claim for a writ of habeas corpus, the inquiry by its nature before this Court is very summary. This Court is mindful of the fact that respondent nos.8 and 9 are the grandmother and the father's brother of the minor. They are not utter strangers, but kindred. Even if the mother is the minor's natural guardian, these respondents certainly have an interest in the minor's welfare and well being, together with a right to be in association with him. But, normally, in the presence of the minor's natural guardian, the grandmother and the father's brother would not be entitled to the minor's custody. There could be a case, where these blood relations may demonstrate that conditions do exist or circumstances obtain, that render the mother unfit to hold the minor's custody. These circumstances, in extreme contingencies, are illustrated by a situation, where the mother is leading an immoral life or in a more benign situation is suffering from a serious disease or mental ailment. There could be other circumstances also, where these blood relations could establish that the welfare of the minor would not be best secured in the mother's hand and further that it would be better secured with them. This Court, however, is not the forum to determine that question. The private respondents have all the liberty to establish their right to the minor's custody before a Court of the competent jurisdiction under the Act. So far as this Court is concerned, in the nature of the summary inquiry, there is enough warrant in law to assume that in the presence of the natural guardian, that is the mother, respondent nos.8 and 9, that is to say, the grandmother and the father's brother are not entitled to hold the minor's custody. There is a strong presumption that parents, and particularly, the mother secures the child's welfare, the best. In this connection, reference may be made to the decision of the Rajasthan High Court in **Rafiq vs. Smt. Bashiran and another,**

AIR 1963 RAJ 239. In Rafiq *(supra)*, it was held:

"(4) There is nothing on record to show that the father of the minor is unfit to be the guardian of her person. As was observed in *B.N. Ganguly v. G.H. Sarkar, AIR 1961 Madh-Pra 173* there is a presumption that the parents will be able to exercise good care in the welfare of their children."

17. This question engaged the attention of the Division Bench of the Bombay High Court in **Khaled Kamal Hussein Mohamed Kassem An Egyptian Citizen vs. State of Maharashtra Through Chandan Nagar Police Station and Others, 2020 SCC OnLine Bom 166.** The case arose out of a maze of complicated human relations, where the petitioner asked for the custody of his minor son, held by his deceased wife's mother and sister. The petitioner was an Egyptian citizen, a Muslim, whereas his wife was a indian and a Hindu. They had married under the Special Marriage Act and were blessed with a son, whose custody was in issue. Unfortunately, the wife passed away and the petitioner who was serving outside the country, but frequently visiting his wife and the new born child, asked for the minor's custody. In the exercise of their jurisdiction, to deal with the custody issue by a writ of habeas corpus, their Lordships of the Division Bench entered judgment, that was expressed to be tentative. The determination was held, subject to regular proceeding before a Court of competent jurisdiction under the Act, if resorted to by the parties. The overbearing principle that one cannot miss in the decision is that a definitive preference was expressed, albeit tentative, in favour of the surviving parent and a natural guardian of the child, that is, the father. Speaking for the Bench, S.S. Shinde, J. held:

"85. As it is clear from the observations made by the Hon'ble Supreme Court in Para 18 that, just because the parents are at war with each other, does not mean that the child should be denied the care, affection, love or protection of any one of the two parents. In the present case, it is admitted position that, the Petitioner is the only surviving parent and natural guardian of child Kian. As already observed he has taken care of child Kian in past and there is no room for doubt that, he can look after welfare of child Kian even in future."

18. Now, since welfare of the minor is the most fundamental guiding principle, it is that which has to be the criterion, even in summary decision making. This Court has already referred to the decision of the Supreme Court in **Tejaswini Gaud** in the context of maintainability of a writ petition in child custody matters. Paragraph no.21 of the report quoted *(supra)* indicates a preference in favour of the natural guardian, who was the father in the case under reference, before their Lordships, over the other side, who were the minor's kindred. In **Tejaswini Gaud** *(supra)*, it was held on the issue of welfare of the minor, thus:

"35. The welfare of the child has to be determined owing to the facts and circumstances of each case and the Court cannot take a pedantic approach. In the present case, the first respondent has neither abandoned the child nor has deprived the child of a right to his love and affection. The circumstances were such that due to illness of the parents, the appellants had to take care of the child for some time.

Merely because, the appellants being the relatives took care of the child for some time, they cannot retain the custody of the child. It is not the case of the appellants that the first respondent is unfit to take care of the child except contending that he has no female support to take care of the child. The first respondent is fully recovered from his illness and is now healthy and having the support of his mother and is able to take care of the child.

36. The appellants submit that handing over of the child to the first respondent would adversely affect her and that the custody can be handed over after a few years. The child is only 1½ years old and the child was with the father for about four months after her birth. If no custody is granted to the first respondent, the Court would be depriving both the child and the father of each other's love and affection to which they are entitled. As the child is in tender age i.e. 1½ years, her choice cannot be ascertained at this stage. With the passage of time, she might develop more bonding with the appellants and after some time, she may be reluctant to go to her father in which case, the first respondent might be completely deprived of her child's love and affection. Keeping in view the welfare of the child and the right of the father to have her custody and after consideration of all the facts and circumstances of the case, we find that the High Court was right in holding that the welfare of the child will be best served by handing over the custody of the child to the first respondent.

37. Taking away the child from the custody of the appellants and handing over the custody of the child to the first respondent might cause some problem initially; but, in our view, that will be neutralised with the passage of time. However, till the child is settled down in the atmosphere of the first respondent father's house, Appellants 2 and 3 shall have access to the child initially for a period of three months for the entire day i.e. 8.00 a.m. to 6.00 p.m. at the residence of the first respondent. The first respondent shall ensure the comfort of Appellants 2 and 3 during such time of their stay in his house. After three months, Appellants 2 and 3 shall visit the child at the first respondent's house from 10.00 a.m. to 4.00 p.m. on Saturdays and Sundays. After the child completes four years, Appellants 2 and 3 are permitted to take the child on every Saturday and Sunday from the residence of the father from 11.00 a.m. to 5.00 p.m. and shall hand over the custody of the child back to the first respondent father before 5.00 p.m. For any further modification of the visitation rights, either parties are at liberty to approach the High Court."

19. In a recent decision, a Division Bench of this Court, in **Manuj Sharma vs. State of Uttar Pradesh & Others, Habeas Corpus Writ Petition No.82 of 2019**, decided on 12th April, 2019, preferred the mother in the matter of custody of a two and half years child over the father - both natural guardian - on an abiding principle that in case of children of tender years, the mother is more suitable to hold custody. The plea that the mother is not financially well off was negatived as a disentitling factor. In **Manuj Sharma** *(supra)*, it was held:

"25. In view of the principles of law laid down by various Courts, if facts of the present case are seen, it is apparent that the petitioner has failed to demonstrate that his two minor children are illegally detained by his wife (respondent no.7). The limited contention of the petitioner is about

the welfare of his children, which according to his own assessment, can be better if children would be with him. We are afraid, this self-appreciated statement of the petitioner will not give him any benefit in the present case. The mere fact that the financial condition of the petitioner is superior than that of respondent no.7, does not give him any right for issuance of writ of habeas corpus. If financial position is the only criteria, then in every case, a person who is financially strong would claim custody of child. If a mother is struggling for her rights along with her children, even assuming that she is financially weak, she cannot be deprived of her children just because her husband is a moneyed man. The judgments relied upon by counsel for the petitioner are of no help to him. Even otherwise, in the case in hand, age of the second child of the petitioner and respondent no.7 is just about 2 1/2 years and, we do not wish to separate the small baby from her mother as well as her sister."

20. Now, in the present case, this Court interacted with the mother, the first petitioner here and respondent nos.8 and 9, the minor's grandmother and father's brother, respectively. The Court also spoke to the minor, Mohan @ Bholey. It must be remarked that the minor, Mohan @ Bholey, though a bright child is still very young. He could not intelligibly express his wish or desire in the matter, though this Court did notice that he appeared to be attached to the grandmother, which for a child his age is logical, inasmuch as he has been staying with her for sometime. The mother came forward with an unqualified assertion of her right to hold the minor's custody. She expressed all that a mother would in normal circumstances. She stays with her parents. On the other hand, the minor's grandmother, Smt. Rani, an elderly woman and a widow, stays with her daughter, Smt. Laxmi, respondent no.7 and her son-in-law, Sandeep, respondent no.6. Apart from the question of the necessary wherewithal to bring up the minor, the grandmother's advancing age, would be a decisive factor to consider, in the opinion of this Court. This Court also notices that respondent nos.6 and 7 have not come forward to undertake financial or other responsibility for the minor's upbringing. So far as respondent no.9, Deen Dayal, the minor's father's brother is concerned, he candidly told the Court that he has no objection if the minor is given into the mother's custody.

21. This Court must also note that the grandmother was very frantic about retaining the minor's custody. She told the Court that her son, the minor's father is dead and the minor means a lot to her. She is honest in expressing that sentiment of hers. But, her feelings alone cannot qualify her to be the person with whom the minor's custody can best be entrusted. The mother, after all, is the natural guardian, under Section 6(a) of the Hindu Marriage Act and the sole surviving parent. There is, as earlier noticed, a presumption in favour of the parents taking best care of their children. In case of a mother, the presumption is very strong. Between the yearning grandmother and the mother, who claims custody of her child, certainly the mother is *prima facie* better entitled. At the same time, the grandmother and the father's brother, respondent nos.8 and 9, who are closed kindred of the minor, are entitled to meet him.

22. It is made clear that whatever this Court has said is all tentative. Respondent nos.8 and 9 or any other person, who considers himself/ herself entitled to the

minor's custody, better than the mother, can move and establish that right before a Court of competent jurisdiction under the Act. If an application is brought under Section 25 of the Act or other appropriate proceeding under the said statute, anything said in this judgment, shall not affect the determination to be made by the Court of competent jurisdiction.

23. In the result, this Habeas Corpus Writ Petition succeeds and is **allowed.**

24. The *rule nisi* is made absolute. It is ordered that the minor be set at liberty by respondent nos.6 to 9 and delivered into custody of the mother, Smt. Reetu within a week of the date of this judgment. In case the custody of the minor is not delivered by respondent no.8 or respondent no.9, or any of the respondent nos.6 to 9, the learned Chief Judicial Magistrate, Etah shall cause it to be delivered to the first petitioner, Smt. Reetu by employment of necessary force through the Superintendent of Police, Etah. The Superintendent of Police, Etah is ordered to act in aid of the learned Chief Judicial Magistrate, Etah in the matter. It is further ordered that on the first Sunday of every month between 10:00 a.m. to 2.00 p.m., the first petitioner, Smt. Reetu shall permit respondent nos.8 and 9 to meet the minor, Mohan @ Bholey at her residence. During each such visit, the first petitioner shall extend all due courtesy to respondent nos.8 and 9 and will wholesomely facilitate the meeting.

25. Let this order be communicated forthwith by the Joint Registrar (Compliance) to the learned District Judge, Etah, the learned Chief Judicial Magistrate, Etah and the Superintendent of Police, Etah.

(2020)09ILR A 51
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.08.2020

BEFORE

THE HON'BLE J.J. MUNIR, J.

Habeas Corpus Writ Petition No. 410 of 2020

Smt. Madhubala Mishra & Anr. ...Petitioners
Versus
Shyam Dhar Dubey & Ors. ...Respondents

Counsel for the Petitioners:
Sri Vivek Tiwari, Sri K.S. Tiwari

Counsel for the Respondent:
G.A.

A. Constitution of India -Article 226–Writ of Habeas Corpus–Free will – Old lady living with her one daughter–Judicial Magistrate recorded her statement – No illegal confinement –Held, no good ground to make the rule nisi absolute. (Para 4 and 5)

Writ Petition dismissed. (E-1)

(Delivered by Hon'ble J.J. Munir, J.)

1. In compliance with the rule nisi issued by this Court vide order dated 24.08.2020, the learned Chief Judicial Magistrate, Jaunpur nominated a lady Judicial Officer to go over to the residence of the detenue, Smt. Prabhawati Devi, who stays with her other daughter Manju Devi Dubey and to record her statement. This rule nisi was issued to ascertain whether Smt. Prabhawati is staying with respondent no. 2, Manju Devi Dubey of her free will or she is illegally confined.

2. This modified rule was issued looking to the extraordinary circumstances

prevalent due to Covid-19 pandemic. Normally, this Court, under the prevalent circumstances, would have required Smt. Prabhawati Devi to be produced before the learned Chief Judicial Magistrate or some other Judicial Officer, who would be asked to record her statement acting on this Court's Commission. The Commission here was, however, modified to ask a lady Judicial Officer nominated by the learned Chief Judicial Magistrate to go over to the residence of Smt. Prabhawati Devi, considering her extreme old age which would imperil her life if she were forced to be produce in court.

3. In compliance with the Court's order, the learned Chief Judicial Magistrate, Jaunpur nominated Smt. Sneha, Judicial Magistrate-II, Jaunpur to execute the Commission issued by this Court. The learned Chief Judicial Magistrate has sent a copy of the statement of Smt. Prabhawati Devi through electronic mode recorded by the learned Judicial Magistrate on 26.08.2020 at the former's residence.

4. It must be remarked that the Judicial Officer has gone about the exercise very carefully and has done a remarkable effort. She has gone over to the residence of Smt. Prabhawati, who stays with her other daughter, Manju Devi Dubey and ascertained her identity very carefully. Thereafter she has recorded the fact that Smt. Prabhawati Devi is very old and hard of hearing. The learned Judicial Magistrate has also ascertained whether her mental faculties are good enough to understand what she is being asked. Once satisfied, the learned Judicial Magistrate has proceeded to record Smt. Prabhawati's statements which is in the following words:

"ममुझझे मझेररी उम्र नहहीं ममाललूम हहै। (ममंजलू दझेवरी ककी तरफ इशमारमा कर कहमा) यझे मझेररी बबिबटियमा हहै।

मधमुबिमालमा मझेररी बिझेटिरी हहै, ममुझझे ज्यमादमा ध्यमान नहहीं हहै। महै ममंजलू दझेवरी कझे समाथ कबि सझे रह रहरी हहह ममुझझे ध्यमान नहहीं हहै। महै ममंजलू कझे समाथ अपनरी मजर्जी सझे रह रहरी हहह। मधमु कझे पमास नहहीं जमाउमंगरी, अपनझे कमरझे मम जमाउमंगरी। मधमु कमा बबियमाह ममनझे गगोपमालपमुर मम बकयमा थमा। मधमु कझे पमास बिहहत वरर पहलझे गयरी थरी अबि नहरी जमानमा हहै। ममंजलू मझेररी सझेवमा करतरी हहै। समुनकर तस्दरीक बकयमा। प्रभमावतरी दझेवरी दमारमा बिगोलझे जमानझे पर अक्षरससः अमंबकत बकयमा गयमा

Sneha
26/08/2020
JM-IInd
Jaunpur"

5. The aforesaid statement does not spare a shadow of doubt that the second petitioner, Smt. Prabhawati Devi is staying with her other daughter Smt. Manju Devi Dubey of her free will and without any restraint. She is not confined there, much less illegally confined. There is, therefore, no good ground to make the *rule nisi* absolute. The rule is discharged and this petition is **dismissed.**

6. This Court places on record its appreciation for the excellent work done by Smt. Sneha, Judicial Officer-II, Jaunpur.

7. Let this order be communicated to the learned District Judge, Jaunpur by the Joint Registrar (compliance) within 24 hours.

(2020)09ILR A53
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.07.2020

BEFORE

THE HON'BLE PANKAJ MITHAL, J.
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Special Appeal No. 239 of 2020

Rana Pratap Singh ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Sri J.P. Singh

Counsel for the Respondents:
C.S.C., Sri Bheem Singh, Sri Indal Singh

A. Service Law – Recovery of salary amount – The State cannot be burdened with the payment of salary to two persons staking claim to the same post and the regular incumbent alone is entitled for salary. (Para 4)

Petitioner continued to discharge duties as Officiating Principal even after the regular Principal had joined. Therefore, recovery was held unjustified.

B. Fixation of pension - Petitioner was not legally entitled to continue as Officiating Principal after 20.05.2010 i.e. the date when the regular incumbent had joined the post of Principal, therefore, the prayer for fixation of pension treating the last pay drawn by the petitioner to be that of the Officiating Principal, cannot be accepted. (Para 5)

Special appeal dismissed. (E-4)

Present special appeal challenges judgment and order dated 14.02.2020, passed by the writ court.

(Delivered by Hon'ble Pankaj Mithal, J. & Hon'ble Dr. Yogendra Kumar Srivastava, J.)

1. Heard Sri J.P.Singh, learned counsel for the petitioner-appellant, learned Standing Counsel for the respondent nos. 1 to 4, Sri Bheem Singh, learned counsel for the respondent no. 5 and Sri Indal Singh, learned counsel for respondent no. 6.

2. The judgment and order dated 14.02.2020 passed by the writ court allowing the writ petition in part is under challenge.

3. The petitioner worked as Officiating Principal for a certain time period in an Intermediate College. He challenged the order dated 25.11.2010 passed by the District Inspector of Schools whereby the recovery of salary amount for the period 20th May, 2010 to 30th June, 2010 was ordered against him.

4. The learned Single Judge in allowing the writ petition in part held that in so far as the petitioner continued to discharge duties as Officiating Principal during the period 20th May, 2010 to 30th June, 2010, the recovery is not justified. However, as the respondent no. 6, Dr. Savindra Kumar Singh, had joined as regular Principal of the Institution on 20th May, 2010, the State could not be burdened with the payment of salary to two persons staking claim to the same post and it is the regular Principal who is alone entitled for salary. It was further observed that in view of the above, the Court could not accept the claim of the petitioner-appellant for fixation of pension on the basis of the last pay drawn as Officiating Principal.

5. As regards the submission of the learned counsel for the appellant-petitioner that the pensionary benefits have to be

determined on the basis of the last pay drawn, we are of the view that the petitioner was not legally entitled to continue as Officiating Principal after 20th May, 2010 i.e. the date when the regular incumbent had joined the post of Principal, and as such the prayer for fixation of pension treating the last pay drawn by the petitioner to be that of the Officiating Principal can not be accepted.

6. In this view of the matter, we find no error or irregularity in the judgment under appeal.

7. This special appeal lacks merit and is accordingly dismissed.

(2020)09ILR A54
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.07.2020

BEFORE

THE HON'BLE PANKAJ MITHAL, J.
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Special Appeal No. 262 of 2020

Roop Singh ...Appellant
Versus
Shri Vinay Kumar Jauhari & Ors. ...Respondents

Counsel for the Appellant:
Sri Ashok Kumar Lal, Sri Ravindra Narayan Singh

Counsel for the Respondents:
Sri Uday Pratap Singh, Sri Kshitij Shailendra

A. Contempt of Court – Contempt of Courts Act, 1971: Section 19; **Allahabad High Court Rules, 1952: Chapter VIII, Rule 5** - **Maintainability of appeal – Interlocutory orders which finally decide a question or issue in controversy in the main case or which finally decide a collateral issue or a question which is not the subject matter of the main case, are "judgments" for the purpose of filing appeals under the relevant rules of the High Court. (Para 8, 9)**

In the present case, the order dated 04.03.2020, against which the present appeal has been preferred, is merely of a procedural nature and cannot in any manner be said to touch the merits of the controversy or the dispute between the parties so as to be deemed to have been issued in exercise of powers conferred u/Art. 226 of the Constitution. (Para 11)

B. Words & Phrases – "Judgments" – routine orders which are passed to facilitate the progress of the case till its culmination in the final judgment are not to be held as "judgments" for the purposes of filing intra-court appeals.

Orders which may cause some inconvenience or some prejudice to a party but which do not finally determine the rights and obligations of the parties, would not amount to "judgments". (Para 13)

Special appeal dismissed. (E-4)

Precedent followed:
1. Midnapore Peoples' Coop. Bank Ltd. and others Vs. Chunilal Nanda and others, (2006) 5 SCC 399 (Para 7)

2. Shah Babulal Khimji Vs. Jayaben D. Kania and another, (1981) 4 SCC 8 (Para 8)

3. A.P. Verma and others Vs. U.P. Laboratory Technicians Association and others, 1998 (3) AWC 2264 (Para 9)

Precedent distinguished:

1. Anil Kumar Gupta and another Vs. Pawan Kumar Singh and others, 2015 (8) ADJ 724 (Para 5, 14)

2. Subhash Chandra Tiwari and 2 others Vs. Kishore and 4 others, Special Appeal No. 314 of 2019, decided on 05.03.2019 (Para 5, 14)

3. Vinod Kumar Sharma, District Inspector of Schools, Azamgarh and another Vs. Shiv Mohan Dwivedi, Assistant Teacher, Inter College, Sarai Brindabad, District Azamgarh, 2020 (4) ADJ 48 (Para 3, 14)

Present special appeal challenges order dated 04.03.2020, passed in Contempt Application (Civil) No. 6748 of 2018.

(Delivered by Hon'ble Pankaj Mithal, J. & Hon'ble Dr. Yogendra Kumar Srivastava, J.)

1. Heard Sri Ravindra Narayan Singh alongwith Sri Ashok Kumar Lal, learned counsel for the appellant, Sri Kshitij Shailendra, learned counsel for respondent no.1 and Sri Uday Pratap Singh, learned counsel appearing for respondent nos.2 to 5.

2. The present special appeal has been filed seeking to challenge an order dated 04.03.2020 passed in Contempt Application (Civil) No.6748 of 2018.

3. The respondent no.2 in the contempt application is the appellant before us.

4. A preliminary objection has been raised by the learned counsel appearing for the respondent-applicant with regard to the maintainability of the special appeal. It has been contended that the order under appeal does not decide the rights of the parties and as such the same cannot be held to be a judgment for the purposes of filing of an intra-court appeal.

5. Learned counsel appearing for the appellant has supported the maintainability of the appeal by referring to the merits of the case and trying to contend that the order under appeal was legally unjustifiable. In support of his contention learned counsel for the appellant has sought to place reliance upon the judgments in the case of **Anil Kumar Gupta and another Vs. Pawan Kumar Singh and others1, Subhash Chandra Tiwari and 2 others Vs. Kishore and 4 others2 and Vinod Kumar Sharma, District Inspector of Schools, Azamgarh and another Vs. Shiv Mohan Dwivedi, Assistant Teacher, Inter College, Sarai Brindabad, District Azamgarh3.**

6. In order to appreciate the rival contentions we deem it necessary to set out the order dated 04.03.2020 passed by the learned Single Judge, against which the present appeal has been preferred. The order reads as under:-

"On 10.12.2019, charges were required to be framed. However, when on 10.12.2019 certain submissions were made by the opposite parties explaining their conduct charges were not framed on that date. On 9.1.2020, the respondents were required to take further instructions.

No further instructions have been brought on record.

List this case peremptorily on 1.4.2020. On that date, the respondent no. 2 shall be personally present for the framing of charges."

7. The ambit and scope of maintainability of an appeal under Section 19 of the Contempt of Courts Act, 19714 and also an intra-court appeal under the relevant rules of the High Court, in case of an order passed in contempt proceedings was considered in the case of **Midnapore Peoples' Coop. Bank Ltd. and others Vs. Chunilal Nanda and others5** and it was held that any direction issued or decision made by the High Court, in contempt proceedings, on the merits of a dispute

between the parties, unless the same is incidental to or inextricably connected with the order punishing for contempt, would not be in the exercise of "jurisdiction to punish for contempt" and, therefore, would not be appealable under Section 19 of the Act, 1971. Such an order, passed by the Contempt Court, was held, amenable to a challenge in an intra-court appeal under the relevant rules of the High Court. The position with regard to filing of appeals against orders in contempt proceedings was summarised thus:-

"11. The position emerging from these decisions, in regard to appeals against orders in contempt proceedings may be summarised thus:

I. An appeal under Section 19 is maintainable only against an order or decision of the High Court passed in exercise of its jurisdiction to punish for contempt, that is, an order imposing punishment for contempt.

II. Neither an order declining to initiate proceedings for contempt, nor an order initiating proceedings for contempt nor an order dropping the proceedings for contempt nor an order acquitting or exonerating the contemnor, is appealable under Section 19 of the Contempt of Courts Act. In special circumstances, they may be open to challenge under Article 136 of the Constitution.

III. In a proceeding for contempt, the High Court can decide whether any contempt of court has been committed, and if so, what should be the punishment and matters incidental thereto. In such a proceeding, it is not appropriate to adjudicate or decide any issue relating to the merits of the dispute between the parties.

IV. Any direction issued or decision made by the High Court on the merits of a dispute between the parties, will not be in the exercise of "jurisdiction to punish for contempt" and, therefore, not appealable under Section 19 of the Contempt of Courts Act. The only exception is where such direction or decision is incidental to or inextricably connected with the order punishing for contempt, in which event the appeal under Section 19 of the Act, can also encompass the incidental or inextricably connected directions.

V. If the High Court, for whatsoever reason, decides an issue or makes any direction, relating to the merits of the dispute between the parties, in a contempt proceedings, the aggrieved person is not without remedy. Such an order is open to challenge in an intra-court appeal (if the order was of a learned Single Judge and there is a provision for an intra-court appeal), or by seeking special leave to appeal under Article 136 of the Constitution of India (in other cases)."

8. The question as to whether an intra-court appeal would be available against an interlocutory order containing directions on merits of the dispute was answered by referring to the decision in **Shah Babulal Khimji Vs. Jayaben D. Kania and another6,** and it was held that interlocutory orders which finally decide a question or issue in controversy in the main case or which finally decide a collateral issue or a question which is not the subject matter of the main case, are "judgments" for the purpose of filing appeals under the relevant rules of the High Court.

9. Taking note of the position that in a proceeding initiated under the Act, 1971 the High Court could either punish or discharge the alleged contemner and in doing so, it could pass all such ancillary orders which

are necessary for exercise of such powers but it could not issue any directions or orders regarding the main dispute or controversy between the parties which had led to the filing of writ petition, this Court, in **A.P. Verma and others Vs. U.P. Laboratory Technicians Association and others7**, held that if any order or direction is made by the Court concerning the merit of the controversy or dispute between the parties, or for implementation of any judgment or order, the same would be de hors the provision of the Act, 1971 and would be deemed to have been issued in exercise of powers conferred under Article 226 of the Constitution, and such direction would, therefore, be amenable to an appeal under Chapter VIII, Rule 5 of the Rules of the Court. The observations made in the judgment are as follows:-

"7. ...Thus there can be no doubt that in any proceeding initiated under the Contempt of Courts Act, the High Court can either punish or discharge the alleged contemner and in doing so it can pass all such ancillary orders which are necessary for exercise of such power but it cannot issue any directions or orders regarding the main dispute or controversy between the parties which has led to the filing of writ petition by either of the parties. However, if any order or direction is made by the Court concerning the merit of the controversy or dispute between the parties, or for implementation of any judgment or order, it will be de hors the provision of Contempt of Courts Act and they can only be deemed to have been issued in exercise of power conferred by Article 226 of the Constitution. Such direction would, therefore, be amenable to an appeal under Chapter VIII, Rule 5 of the Rules of the Court as they are not issued in exercise of any power conferred by the Act..."

10. The aforementioned position of law has been restated in a recent judgment of this Court in the case of **Vinod Kumar Sharma** (supra).

11. In the facts of the present case the order dated 04.03.2020, against which the present appeal has been preferred, is merely of a procedural nature and cannot in any manner be said to touch the merits of the controversy or the dispute between the parties so as to be deemed to have been issued in exercise of powers conferred under Article 226 of the Constitution.

12. The law laid down by the Supreme Court in **Shah Babulal Khimji** (supra) is to the effect that orders passed by the Court which are of a routine nature would not be "judgments" even if they cause some inconvenience to the parties.

13. In **Midnapore Peoples' Coop. Bank Ltd.** (supra), the Supreme Court again emphasised that routine orders which are passed to facilitate the progress of the case till its culmination in the final judgment are not to be held as "judgments" for the purposes of filing intra-court appeals. It was also held that orders which may cause some inconvenience or some prejudice to a party but which do not finally determine the rights and obligations of the parties, would not amount to "judgments".

14. The decisions in the case of **Anil Kumar Gupta and another, Subhash Chandra Tiwari and others** and **Vinod Kumar Sharma,** which are sought to be relied upon by the learned counsel for the appellant do not in any manner support the case of the appellant; rather the aforesaid judgments reiterate the settled legal principle that only if the High Court, in

contempt proceedings decides an issue or makes any direction, relating to the merits of the dispute between the parties, the said order would be amenable to an intra-court appeal.

15. In view of the aforementioned facts and circumstances, the preliminary objection raised with regard to maintainability of the special appeal under the provisions of Chapter VIII Rule 5 of the Allahabad High Court Rules, 1952, is sustained.

16. The special appeal is held to be not maintainable and is accordingly dismissed.

(2020)09ILR A58
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.07.2020

BEFORE

THE HON'BLE PANKAJ MITHAL, J.
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Special Appeal Defective No. 356 of 2020

Manish Kumar ...Appellant
Versus
The State of U.P. & Anr. ...Respondents

Counsel for the Appellant:
Sri Rajneesh Tripathi, Sri Ashish Kumar Ojha

Counsel for the Respondents:
C.S.C.

A. Service Law – Recruitment Process– Assessment of fitness–The matters relating to medical evaluation of candidates in a recruitment process involve expert determination and it may not be desirable to supplant the procedure prescribed therefore as laid down under the relevant recruitment rules and taking any other view may have the effect of derailing the recruitment process. (Para 16-18, 22)

In Intra-Court Special Appeal, no interference is usually warranted unless palpable infirmities or perversities are noticed on a plain reading of the impugned judgment and order. (Para 23)

In the instant case, the writ petitioner has been found medically unfit by a duly constituted Medical Board and the said finding w.r.t. his unsuitability on medical grounds has been affirmed by the Appellate Medical Board, and further the opinion of a private medical practitioner which was sought to be relied upon in the writ petition also does not contain any specific opinion that the petitioner was not suffering from the ailment on the basis of which he had been declared unfit by the Medical Board. (Para 19)

Special appeal dismissed. (E-4)

Precedent followed:

1. Vivek Kumar Vs St. of U.P. & ors., 2020 ADJ Online 0073 (Para 22)

2. Md. Arshad Khan Vs St. of U.P. & ors., Special Appeal Defective No. 206 of 2020, decided on 17.03.2020 (Para 22)

Present special appeal challenges judgment and order dated 15.11.2019, passed by the learned Single Judge in Writ – A No. 17576 of 2019.

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

1. The appeal is reported to be beyond time by 211 days. Delay in filing the special appeal has been sufficiently explained.

2. Heard Sri Ashish Kumar Ojha, learned counsel for the appellant and learned Standing Counsel appearing for the State respondents.

3. In the interest of justice, we deem it appropriate to condone the delay in filing the special appeal.

4. The delay condonation application no. 1 of 2020 is allowed.

5. Office is directed to allot a regular number to this appeal.

6. Challenge in the present special appeal is to the judgment and order dated 15.11.2019 passed by the learned Single Judge of this Court in Writ-A No. 17576 of 2019 (Manish Kumar Vs. State of U.P. and another), whereby the writ petition has been dismissed.

7. The writ petitioner is the appellant before us.

8. The matter pertains to the 'Male and Female Constable Recruitment 2018' initiated pursuant to an advertisement issued by the Uttar Pradesh Police Recruitment and Promotion Board.

9. The principal relief sought in the writ petition was for a direction to the respondents to permit the petitioner to re-appear in the re-medical examination and further that a seat may be reserved for him until his grievance is redressed by the respondent authorities.

10. The learned Single Judge, after taking notice of the facts of the case, has dismissed the writ petition in the following terms :-

"Petitioner had applied for appointment to the post of Constable in U.P. Police but he has ultimately been non-suited as he was declared medically unfit. The orders passed by the Medical Board and Appellate Medical Board have not been annexed. The opinion of the Medical Board, however, is sought to be assailed with reference to a certificate issued by the private Doctor.

The consistent opinion of the Medical Board and Appellate Medical Board would ordinarily not be interfered with, unless there is some prima facie material to doubt the veracity of such opinion. The medical report of the private Doctor also shows that petitioner is now fit to resume duty. According to petitioner he was diagnosed with Varicose Veins by the Medical Board, and there is no specific opinion even of the private Doctor that petitioner does not suffer from such physical ailment.

In that view of the matter and in light of the observations made by this Court in State of U.P. and others Vs. Rahul, reported in 2016(3) ADJ 327, this Court is not inclined to interfere in the matter.

Writ petition, accordingly, is dismissed."

11. Learned counsel for the appellant-writ petitioner has tried to assail the judgment under appeal by contending that after being declared medically unfit by the Medical Board and also by the Appellate Medical Board, the petitioner had raised a claim for re-medical examination but the same had not been considered by the authorities.

12. Learned Standing Counsel appearing for the State respondents has supported the judgment of the learned Single Judge by submitting that the petitioner having been declared medically unfit by a duly constituted Medical Board and the said finding having been affirmed

by the Appellate Medical Board, there was no further provision for re-medical examination, and the writ petition had rightly been dismissed.

13. We have heard the counsel for the parties and perused the record.

14. The scope of interference in matters relating to assessment of fitness by a Medical Board constituted under the statutory rules in exercise of powers under writ jurisdiction, in our opinion, would be extremely limited.

15. The Courts have, time and again, emphasised the need for caution when candidates seek to assail the correctness of the findings of a Medical Board constituted under a recruitment process adopted by the State authorities.

16. We may observe that although the powers of the Court under Article 226 are wide enough to issue directions in appropriate cases but such powers are required to be wielded with caution and circumspection. Matters relating to the medical evaluation of candidates in a recruitment process involve expert determination and the Court should exercise caution in supplanting the process adopted by the recruiting agency and substituting it by a Court mandated further medical evaluation.

17. Any such exercise in acceding to requests of candidates who are not found to be medically fit for reassessment on the basis of procedures other than those envisaged by the recruiting agency under the relevant rules would result in the recruitment process being derailed, which would ordinarily be not permissible.

18. In a case where the recruitment process has been carried out as per prescribed statutory rules whereunder a procedure has been prescribed for testing the medical fitness of candidates by a duly constituted Medical Board, the report of the Medical Board is not to be normally interfered with, solely on the basis of a claim sought to be set up by a prospective candidate.

19. In the instant case, the writ petitioner has been found medically unfit by a duly constituted Medical Board and the said finding with regard to his unsuitability on medical grounds has been affirmed by the Appellate Medical Board, and further the opinion of a private medical practitioner which was sought to be relied upon in the writ petition also does not contain any specific opinion that the petitioner was not suffering from the ailment on the basis of which he had been declared unfit by the Medical Board.

20. In the aforementioned circumstances, we are of the view that no further indulgence is required to be granted to the appellant-writ petitioner in this regard. This is, more so, since it is not the case of the petitioner that the decision of the Medical Board was arbitrary, capricious or not in accordance with the procedure under the relevant statutory recruitment rules.

21. No material has been placed on record, or otherwise referred, to suggest that the opinion of the Medical Board or the Appellate Medical Board could in any manner be said to be casual, inchoate, perfunctory or vague. We are therefore of the view that the Medical Board being an expert body, its opinion is entitled to be given due weight, credence and value.

22. A similar view has been taken in recent judgments of this Court in **Vivek Kumar Vs. State of U.P. and others1** and **Md. Arshad Khan Vs. State of U.P. and others2** wherein it was held that matters relating to medical evaluation of candidates in a recruitment process involve expert determination and it may not be desirable to supplant the procedure prescribed therefor as laid down under the relevant recruitment rules and taking any other view may have the effect of derailing the recruitment process.

23. In an Intra-Court Special Appeal, no interference is usually warranted unless palpable infirmities or perversities are noticed on a plain reading of the impugned judgment and order.

24. In the facts and circumstances of the instant case, on a plain reading of the impugned judgment and order, we do not notice any such palpable infirmity or perversity. As such, we are not inclined to interfere with the impugned judgment and order dated 15.11.2019.

25. For reasons stated above, the Special Appeal is liable to be dismissed and stands, accordingly, dismissed.

(2020)09ILR A61
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.08.2020

BEFORE

THE HON'BLE RAMESH SINHA, J.

Writ-A No. 1620 of 2020

Rampal Bhartiya & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Rakesh Pande, Sri Ajay Kumar Gautam

Counsel for the Respondents:
C.S.C., Sri M.N. Singh, Sri Nishith Yadav

A. Service Law – Recruitment/Public Examination - Candidates must be clearly aware of the fact that it is not open to a candidate to decide as to when an application should be submitted and the compliance in time schedule, indicated as mandatory, if not read to be mandatory, the entire process of holding examination would stand dislocated. (Para 13)

The act and conduct of the petitioners as has come on record shows that they were not at all serious in submitting their online application forms by depositing fee by the last date i.e. 10.01.2020 as was required by the advertisement dated 13.12.2019 and the ground, of internet services being disrupted, taken for not submitting the same in time is not at all convincing and reasonable, particularly taking into account the fact that other several similarly situated candidates have submitted their application forms as per the advertisement dated 13.12.2019 on or before 10.01.2020 throughout the State of U.P.

The examination is now scheduled to be held on 16.08.2020 and all the formalities of conducting the same is complete and admit cards etc. have also been issued to the candidates for appearing in the said examination by the UPPSC and at this last juncture, it would not be proper for this Court to interfere in the present writ petition granting any indulgence to the petitioner for allowing them to deposit fee by online mode for appearing in the examination for recruitment of Block Education Officer in the State of U.P. (Para 17, 18)

Writ Petition dismissed. (E-4)

Precedent followed: -
1. Rajendra Patel Vs St. of U.P. & anr., 2016 (1) UPLEBEC 331 (Para 13)

2. Sachin Kumar Vs St. of U.P. & ors., Writ-A No. 987 of 2020, decided on 18.01.2020 (Para 14)

3. Dayaram Yadav Vs St. of U.P. & ors., Writ-A No. 1764 of 2020, decided on 07.02.2020 (Para 14)

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

1. The present writ petition has been nominated by Hon'ble the Chief Justice to this Court vide order dated 14.8.2020.

2. The Court has been convened through video conferencing.

3. Heard Sri Rakesh Pande, Senior Advocate assisted by Sri Ajay Kumar Gautam, learned counsel for the petitioners, Sri Vikas Chandra Tripathi, learned Standing Counsel for respondent no.1 and Sri Nisheeth Yadav, learned counsel for respondent nos.2&3.

4. On 11.2.2020, a co-ordinate Bench of this Court has passed the following order:-

"The petitioners, 23 in number, have filed the instant petition with the grievance that they could not deposit examination fee by internet banking, as required in terms of the advertisement dated 13.12.2019 on account of disruption of internet services in the State. The recruitment is for the post of Block Education Officers. The application was to be submitted in three stages. In the first stage, the candidate has to get himself registered online followed by payment of fee also by online mode and thereafter actual submission of the application form also by online mode. The last date for fee submission was 10.1.2020. All the petitioners have successfully got themselves registered online. The case of the petitioners is that because of disruption of internet services in the State on account of agitation going on in different districts against the Citizenship Amendment Act, they could not deposit the fees. They have, therefore, filed the instant petition with the prayer that their representation praying for extension of time be directed to be considered favourably.

Sri Nisheeth Yadav, learned counsel appearing on behalf of respondents no.2 and 3 points out that U.P. Public Service Commission had received more than five lakhs applications so far. He points out that complaint regarding disruption of internet services has been received from 67 candidates only. He places reliance on a judgment of a Co-ordinate Bench of this Court dated 18.1.2020 in Writ-A No.987 of 2020 (Sachin Kumar Vs. State of U.P. and another), wherein this Court in respect of the same recruitment and somewhat similar grievance dismissed the writ petition. The fact of that case was that the candidate therein had got himself registered online on 10.1.2020 which was the last date. He thereafter tried to deposit the fee but in which he remained unsuccessful. In the said backdrop, the Court held that the candidate himself was responsible for not being able to deposit the fee. He was having sufficient time from 13.12.2019 to 10.1.2020 to deposit the fees. He ought not to have waited for almost a month for initiating the process for submitting his application. The Court also observed that in the meantime, in every likelihood, the Commission must have proceeded with the selection process and directing it to accept the application at this stage would lead to reopening and re-scheduling the entire selection process.

Learned counsel for the petitioner vehemently submitted that the facts of the instant case are clearly distinguishable. In the present case, almost all the petitioners had got themselves registered in December, 2019 itself. The petitioners were preparing

for P.C.S. Entrance Examination which was held on 15.12.2019. After they got free, they tried to deposit the fee by online mode. It is pointed out by referring to various documents filed alongwith the writ petition that repeated attempts to deposit the fee on different dates, much before the last date, had remained unsuccessful. It is further pointed out that the respondent Department, in respect of inviting applications from the teachers for exercising option for inter-district transfer, extended the last date for submitting online applications, having regard to similar request that there had been regular disruption of internet services in different districts in the State on account of the same agitation. The submission is that the disruption of internet services in the State in the month of December, 2019 and January, 2020 is an acknowledged fact. In such circumstances, even if the number of candidates, who could not succeed in uploading their forms, may be small but their grievance could not be overlooked, particularly when the failure of system was not in their hand nor could be anticipated in advance. Their grievance should be addressed to in a sympathetic manner, particularly when nothing much has progressed in respect of the recruitment which is underway. It is submitted that the date of holding the written examination is 22.3.2020 and thus, sufficient time is available. There would be no difficulty if the time for deposit of fee is extended by a few days.

Sri Nisheeth Yadav, learned counsel for respondents no.2 and 3 is directed to file affidavit of Secretary, U.P. Public Service Commission disclosing the present stage of the recruitment process. It shall clearly be disclosed in the affidavit as to what further steps have been taken by the Commission after the last date of submission of application forms and whether any step already taken is such which is irreversible or in case a few days' time is allowed, would it necessarily derail the selection process. The affidavit shall be filed by 20.2.2020.

Put up as fresh on 20.2.2020."

5. Pleadings between the parties have been exchanged. The present matter has been listed today in the additional cause list on the urgency application filed on behalf of the petitioners stating that the examination for the post of Block Education Officer is to be held on 16.8.2020 by Uttar Pradesh Public Service Commission, hence the same was posted for today.

6. The counsel for the petitioners has vehemently argued that all the petitioners have got themselves register for appearing in the said examination in view of the advertisement dated 13.12.2019 and they could not deposit the requisite fee by online mode for appearing in the said examination by 10.1.2020 which was the last date for deposit of fee on account of agitation regarding C.A.A., the internet services have been discontinued overall the State of U.P. with effect from 17.12.2019 till 23.12.2019. He argued that all the three stages being interconnected and applicant could proceed for final submission of application form only after generation of print registration slip and thereafter issuance of payment acknowledgement receipt. Thereafter, only the third stage of proceeding for final submission of application form would be available to a candidate. Normal services could be restored only with effect from 4th January, 2020 although availability of network had become possible intermittently between 23rd December, 2019 to 4th January, 2020. The other petitioners had

also sought to make payments of examination fee but on account of non-availability of network whenever they tried to make payments, the payment acknowledgement receipts showing failed payments could also not be generated. The aforesaid occurrence in totally attributable to defects in the availability of network services for enabling online payments.

7. On the last date i.e. 10th January, 2020, all the petitioners had tried to make one last attempt to submit their forms after paying examination fee but on 10th also the network services were badly affected throughout the state of U.P. or at least in the districts where the petitioners were located and thus, all attempt of the petitioners to deposit the examination fee online were defeated because of deficiency in network services specially as the fee could be submitted only online.

8. In absence of the deposit of the examination fee, the third stage of the submission of final form could not be effected and thus, the petitioners could not submit the entire online form' and it was due to unavoidable circumstances, could not deposit the requisite online fee and fulfil the subsequent stage for filling up the online forms and this court may grant indulgence to the petitioners who are 23 in number for appearing in the said examination which is now scheduled for 16.8.2020.

9. Sri Nisheeth Yadav, learned counsel appearing on behalf of respondent nos.2 & 3 has submitted the queries made by this Court vide its order dated 11.2.2020 are stated in para nos.17 to 19 of the counter affidavit which are reproduced as under:-

"17. That after the closure of the online application forms, the process in respect of holding the examination was initiated and as of today is almost being completed.

18. That the steps already taken by UPPSC in respect of the present selection are as:- (1) allocations of centers in 18 districts (2) the printing of question papers have been completed (3) the printing of OMR sheets have been completed (4) Roll Numbers have been allotted to the candidates, but the Admit Card would be issued just 15 days prior to the date of examination (5) All the materials required for holding examination in different allocated district is under process of distribution, as due precautions are already in motion as the same is highly confidential.

19. That the stages, which have been so completed, are irreversible and the UPPSC is making all due efforts to adhere to the calendar issued in respect of holding of examination as scheduled and any interference at this stage would put UPPSC in a position, wherein the examination could not be conducted on the scheduled dates, which would effect lakhs of students who have already applied against the advertised post."

10. Further he has drawn attention of the Court towards para 9 of the counter affidavit filed on behalf of the said respondents wherein three charts have been given demonstrating the case of each of the petitioners who fall in three categories on the basis of relevant record. It was found that the petitioners who are 23 in number have been segregated in three categories i.e. (I) the petitioners who did not even attempt to apply for the second stage i.e. petitioner no.1 Ram Pal Bhartiya, petitioner no.3 Manoj Kumar, petitioner no.4 Saraswati Kanaujiya, petitioner no.6 Kamini Jaiswal, petitioner no.8

Krishnawati Pal, petitioner no.10 Anjali, petitioner no.14 Mayank Singh, petitioner no.15 Pankaj Yadav, petitioner no.18 Kshamata Dwivedi, petitioner no.19 Ambrish, petitioner no.20 Amit Gupta, petitioner no.21 Rajeev Kumar, petitioner no.22 Ashish Kumar, petitioner no.23 Avinash Kumar Shukla, (II) the petitioners who made an attempt to deposit fee by online mode on the last date i.e. 10.1.2020 are petitioner no.5 Maneesha Devi, petitioner no.9 Saurabh Singh, petitioner no.11 Priti Maurya, petitioner no.12 Shaurya Pandey, petitioner no.13 Mamta Gautam, petitioner no.16 Vivekanand Mishra, (III) the petitioner no.2 Sandhya Devi, petitioner no.7 Manisha Devi and petitioner no.17 Rajni Rani just made one attempt in a month to deposit fee by online mode on 26.12.2019, 29.12.2019 and 3.1.2020 respectively but their attempt failed.

11. He further contended that the Commission has received more than 5 lacs applications and petitioners had enough time to get the online fee deposit for which approximately one month time was allotted to them by the Commission and to say that the internet services were disturbed all over the State as has been argued by learned counsel for the petitioner because of the Citizenship Amendment Act protest etc. is wholly unfounded as there were several other candidates through out the State of U.P. who have completed the third stage and submitted the application form well within the time for appearing in the said examination. The three charts which have been mentioned in para 9 of the counter affidavit itself shows the casual conduct of the petitioners. Out of 23 petitioners, 14 petitioners did not made second attempt after their registration and 6 petitioners only made an attempt to deposit the fee on the last date of submission of online fee as per the advertisement on 10.1.2020 and the three petitioners made attempt to deposit fee on the dates on which there was no interruption in the internet in the State or in any particular district.

12. He vehemently argued that the advertisement in question was published on 13.12.2019 after 15.12.2019, the candidates were having more than 28 days to complete online application form in respect of the advertisement. More than 5,28,313 candidates have applied and completed third stage of form in the same period for which the petitioners contend that there was interruption of internet services and he has also tried to demonstrate the number of applications which were received date wise from 13.12.2019 to 10.1.2020 i.e. last date of submission of fee through documents annexed as Annexure-24 to the counter affidavit.

13. He relied upon a Full Bench decision of this Court in the case of **"Rajendra Patel Vs. State of U.P. and another" reported in 2016 (1) UPLBEC 331** which while considering the similar controversy came to the conclusion that ***"when the Commission holds Public Examination of such large scale, candidates must be clearly aware of the fact that it is not open to a candidate to decide as to when an application should be submitted and the compliance in time schedule, which are indicated as mandatory, if it is not read to be mandatory, the entire process of holding examination would stand dislocated".***

14. Thus it was argued that from the charts which has been referred in para 9 of the counter affidavit, it is apparent that out of 23 petitioners/candidates 14

petitioners/candidates did not even attempt to initiate the process of depositing examination fee i.e. second stage and 6 petitioners/candidates attempted to second stage on or after the cut of date i.e. 10.1.2020 hence the observation made by a co-ordinate Bench of this Court in **Writ-A No.987 of 2020 (Sachin Kumar Vs. State of U.P. and others)** decided on 18.1.2020 would be squarely applicable in respect of the said 6 petitioners of whom detail is being referred in Chart no.2 in the preceding paragraphs. He further pointed out that the observations of this Court in respect of the same selection in the case of **"Dayaram Yadav Vs. State of U.P. and others"** bearing Writ-A No.1764 of 2020 decided on 7.2.2020. The orders passed by the co-ordinate Benches in both the cases, where not challenged by the said candidates before this Court in Special Appeal or any other higher forum till date.

15. He lastly argued that as the examination is scheduled to be held on 16th of August, 2020 and all the process of examination has been completed hence at this stage this Court may not grant any indulgence to the petitioner in the present writ petition as it would disturb the entire examination process which is being conducted by the UPPSC in the entire State of U.P. on such a large scale and it would cause great hardship to the candidates who have submitted their application forms in time for appearing in the said examination.

16. Sri Rakesh Pande, learned Senior Advocate when confronted with the legal proposition of law which has been cited above by Sri Nisheeth Yadav, learned counsel for the respondent nos.3 & 4, he could not dispute the same and only reiterated that the petitioners case may be sympathetically be considered by this Court as the petitioners cannot be put at fault for the prevailing circumstances in the State of U.P. which were beyond their control when they were required to submit their online application forms for the aforesaid recruitment process by 10.1.2020.

17. After having heard learned counsel for the parties and perused the record, it transpires that the application forms were to be submitted in three stages. All the petitioners have got themselves registered by online mode for appearing in the examination for the recruitment of Block Education Officer. 14 petitioners out of 23 petitioners, after getting registration for appearing in the said examination did not made an attempt to fulfill the second stage i.e. of depositing the fee by online mode for appearing in the said examination and 6 petitioners only made an attempt to deposit the fee on last date of submission of online fee as per the advertisement i.e. 10.1.2020 and they failed. Three petitioners only made one attempt each on 26.12.2019, 29.12.2019 and 3.1.2020 respectively to deposit the online fee but they remained unsuccessful. The act and conduct of the petitioners as has come on record shows that they were not at all serious in submitting up their online application forms by depositing fee by the last date i.e. 10.1.2020 as was required by the advertisement dated 13.12.2019 and the ground taken for not submitting the same in time by the counsel for the petitioner is not at all convincing and reasonable, particularly taking into account the fact that similarly other situated several candidates have submitted their application forms as per the advertisement dated 13.12.2019 on or before 10.1.2020 throughout the State of U.P. when the internet services was said to have been disturbed and their application forms in three stages which they have

submitted online mode were accepted by the Uttar Pradesh Public Service Commission for their appearing in the aforesaid examination.

18. The examination is now scheduled to be held on 16.8.2020 and all the formalities of conducting the same is complete and admit cards etc. have also been issued to the candidates for appearing in the said examination by the UPPSC and at this last juncture, in my humble opinion, it would not be proper for this Court to interfere in the present writ petition granting any indulgence to the petitioner for allowing them to deposit the fee by online mode for appearing in the examination for recruitment of Block Education Officer in the State of U.P. which is to be conducted on a large scale and large number of candidates have submitted their online form in three stages timely as per the advertisement issued for the said recruitment process would definitely cause great hardship to the other candidates and dislocate the entire process of holding examination. Moreover, considering the proposition of law as has been settled by this Full Bench decision in the case of **Rajendra Patel (Supra)** and further the order passed by the co-ordinate Benches in the case of **Sachin Kumar (Supra)** and **Daya Ram Yadav (Supra)** which were dismissed on 18.1.2020 and 7.2.2020 respectively of the candidates with respect to the identical controversy which remained unchallenged by the said candidates till date in the Special Appeal before this Court or any other higher forum, therefore, it is also not possible for this Court to consider the case of the petitioners sympathetically as has been prayed by the Counsel for the petitioners.

19. In view of the foregoing discussions, no interference is called for by this Court in exercise of its power under Article 226 of the Constitution of India.

20. The writ petition lacks merit and the same is accordingly dismissed.

21. No order as to costs.

(2020)09ILR A67
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.09.2020

BEFORE
THE HON'BLE MANOJ KUMAR GUPTA, J.

Writ -A No. 5049 of 2020
connected with
Writ -A No. 5181 of 2020 and other cases

Rupesh Kumar ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Avneesh Tripathi, Sri Kranti Kiran Pandey

Counsel for the Respondents:
A.S.G.I.

A. Service Law–Recruitment Process–Review Medical Examination–Recruitment Scheme: Clause 8, 15–Jurisdiction of Allahabad High Court in the present matter–Under the Scheme of recruitment, the conduct of computer based examination, preparation of merit list and force allocation of selected candidates was handled by the Staff Selection Commission (the regional office of which is situated at Allahabad and it exercised jurisdiction over centres located in State of Bihar), while other functions were performed by CAPFS/MHA but Clause 15 of the advertisement which defines court's jurisdiction does not make any distinction based on the stages of recruitment or allocation of different functions to different bodies. **The phrase "any dispute in regard to this recruitment" is wide enough to take within its purview disputes pertaining to all stages of recruitment irrespective of the body entrusted with conducting or holding any particular stage of recruitment.** (Para 8)

B. Recruitment Scheme: Clause 9E – Review Medical Examination – The requirement of filing medical certificate alongwith the memo of appeal should be interpreted keeping in mind the object with which the said provision has been incorporated. It should not be overstretched, lest the very purpose of providing remedy of review medical examination may stand defeated. (Para 14)

Petitioners applied for review medical examination along with fitness certificate of medical practitioners from Government hospitals as per the requirements of Clause 9E. The refusal to entertain appeals in all the cases was on analogous ground that the medical fitness certificate enclosed with the appeal was not by the concerned field specialist. (Para 2, 9)

Clause 9E only contemplates that the medical certificate to be annexed with the appeal should be by the medical officer from Government District Hospital or above. It does not mention that the medical officer issuing the certificate should be a specialist in the field. Such requirement came to be incorporated for the first time in Form No. 3 at the place where the doctor issuing the certificate has to sign, mention his name, and put his seal. (Para 13, 14)

Court observed that the medical practitioner was competent enough to examine the petitioners and certify that they were not suffering from alleged ailment. Under the recruitment scheme, the only evidentiary value of his certificate is in formation of prima facie opinion that there could be an error of judgment on part of the medical officer who examined the candidate in the first instance to warrant acceptance of the appeal for review medical examination of the petitioners. In the review medical examination, the petitioners will be subjected to medical examination by expert doctors. (Para 15)

Therefore, in case the certificates furnished by the petitioners are relied upon at this stage, the respondents would not suffer except that they shall have to hold a review medical examination. On the other hand, if the petitioners really do not suffer from any ailment/shortcoming, as alleged, but their appeal for review medical examination is rejected at the very threshold on the above ground, they would suffer irreparable loss and injury. (Para 15)

Writ Petitions allowed. (E-4)

(Delivered by Hon'ble Manoj Kumar Gupta, J.)

1. This batch of writ petitions raises common questions of facts and law and with consent of learned counsel for the parties, the petitions were heard together and are being decided by this common judgement.

2. The petitioners had appeared in the recruitment for the post of Constables (GD) in CAPFs, NIA, SSF and Rifleman (GD) in Assam Rifles Examination, 2018. Under the recruitment scheme, the candidates were to apply online. It was mandatory to indicate in the online application form Centre from where the candidate desires to take examination. The petitioners accordingly applied online and in their application form, they preferred to appear from Centres located in the State of Bihar. This was apparently for the reason that all the petitioners are domicile of the State of Bihar. The job of holding a computer based examination for shortlisting the candidates was assigned to the Staff Selection Commission. Under Clause 8 of the Recruitment Scheme, the entire State of Bihar and Uttar Pradesh fell under the jurisdiction of the Central Region of the Staff Selection Commission. It is clear from the document filed as Annexure RA-1 to Writ Petition No.5049 of 2020 that the Central Region fell under the jurisdiction of the Regional Office of the Staff Selection Commission, Allahabad (Prayagraj). The petitioners appeared in the computer based examination from different centres located in the State of Bihar. The respondents

shortlisted the candidates for next stage of recruitment based on the scores in the computer based examination. The petitioners were successful in proceeding to the next stage i.e. physical efficiency test/physical standard test. Those candidates who were successful in clearing these stages were shortlisted for detailed medical examination. The petitioners being successful therein were called for detailed medical examination by a medical board. The petitioners duly got themselves medically examined by the medical board. However, all of them were informed by the Chief Medical Officer (SG)/ Commandant that they were found unfit due to various reasons and if they wish to challenge the findings of medical examination, it was open to them to apply for review medical examination in enclosed Form No.2 alongwith demand draft of Rs.25. The application should be accompanied by medical certificate from medical practitioner (specialist medical officer of Government District Hospital and above) as per Form No.3. All the petitioners applied for review medical examination alongwith fitness certificate of medical practitioners from Government hospitals. All the appeals have been rejected on identical ground "medical fitness certificate of concerned field specialist not attached". Aggrieved by the stand taken by the respondents in declining to entertain their appeal for review medical examination, the present batch of petitions has been filed. The petitioners have sought quashing of the communication informing them that their appeal for review medical examination could not be entertained for the above reason and have also prayed for a mandamus commanding the respondents to conduct their review medical examination.

3. Learned counsel for Union of India raised a preliminary objection to the effect that this Court lacks territorial jurisdiction to entertain these petitions. It was urged that no part of cause of action has arisen within the territorial limits of this Court. The petitioners are residents of the State of Bihar; they appeared in the computer based examination from centres located in the State of Bihar; their physical standard test and physical efficiency test were also held at various centres situated in the State of Bihar; their detailed medical examination was held at CRPF Mokama Ghat, Group Centre, CRPF, Mokama Ghat, District Patna, Bihar and consequently, the Patna High Court alone will have jurisdiction in the matter.

4. On the other hand, Shri Avneesh Tripathi, learned counsel for the petitioners submitted that since the petitioners had participated in the recruitment exercise held at various centres in the State of Bihar and consequently, the courts/tribunals having jurisdiction over the place of concerned Regional Office of the Commission i.e. the office of the Staff Selection Commission at Allahabad (Prayagraj) alone will have jurisdiction in the matter as contemplated by Clause 15 of the Recruitment Scheme. Clause 15 is extracted below:-

"15. COURTS JURISDICTION

Any dispute in regard to this recruitment will be subject to courts/tribunals having jurisdiction over the place of concerned Regional/Sub-Regional Office of the Commission where the candidate has appeared for the Computer Based Examination."

5. In rejoinder, learned counsel for the Union of India placed reliance on salient feature number nine of the Recruitment Scheme, which reads as follows:-

"(ix) Court cases/RTI/Public Grievances relating to Notice of

Examination, conduct of Computer Based Examination, preparation of merit list and force allocation of selected candidates will be handled by SCC and those relating to all other issues i.e. Scheme of examination, vacancies, conduct of PET/PST, DME/RME, Document Verification etc. will be handled by coordinating CAPFs/MHA."

6. He submitted that since the Staff Selection Commission was entrusted with the work of conducting computer based examination, preparation of merit list and force allocation of selected candidates, while all other issues were handled by coordinating CAPFs/MHA, therefore, it was the State of Bihar where other stages of recruitment were held, with which the petitioners feel aggrieved, which would determine the jurisdiction in the matter.

7. A plain reading of Clause 15 of the Recruitment Scheme, which defines courts jurisdiction, reveals that any dispute in regard to the recruitment is subject to Courts/Tribunals having jurisdiction over the place of concerned Regional/Sub-regional office of the Commission from where the candidate had appeared for the computer based examination. Indisputably, the petitioners appeared in the computer based examination from different centres located in the State of Bihar. The Regional Office of the Staff Selection Commission situated at Allahabad (Prayagraj) exercised jurisdiction over these centres located in the State of Bihar. In this regard, it is worthwhile to extract the relevant part of Clause 8 of the Recruitment Scheme:-

"8. Centres of Examination:

A candidate must indicate the Centre(s) in the online Application Form in which he/she desires to take the examination. Details about the Examination Centres and Regional Offices under whose jurisdiction these Examination Centres are located are as follows:

S.No.	*Examination Centres & Centre Code*	*SCC Region and States/UTs under the jurisdiction of the Region*	*Address of the Regional Offices/Website*
1.	*Agra (3001), Allahabad (3003), Bareilly (3005), Gorakhpur (3007), Kanpur (3009), Lucknow (3010), Meerut (3011), Varanasi (3013), Bhagalpur (3201), Muzaffarpur (3205), Patna (3206)*	*Central Region (CR)/ Bihar and Uttar Pradesh*	*Regional Director (CR), Staff Selection Commission, 21-23 Lowther Road, Allahabad, Uttar Pradesh-211002. (https://www.ssc-cr.org)*

8. No doubt, under the scheme of recruitment, the conduct of computer based examination, preparation of merit list and force allocation of selected candidates was handled by the Staff Selection Commission, while other functions were performed by CAPFS/ MHA but Clause 15 of the advertisement which defines courts jurisdiction does not make any distinction based on the stages of recruitment or allocation of different functions to different bodies. The phrase "any dispute in regard to this recruitment" is wide enough to take within its purview disputes pertaining to all stages of recruitment irrespective of the body entrusted with conducting or holding any particular stage of recruitment. Resultantly, the submission based on division of functions amongst different

bodies in conducting different stages of recruitment has no force nor the submission based on it relating to ouster of this Court's jurisdiction.

9. Reverting to the merits of the case, the short question which arises for consideration is whether the stand taken by the respondents in refusing to accept the appeal for holding review medical examination is legally sustainable or not. As noted above, the refusal to entertain appeals in all the cases was on analogous ground that the medical fitness certificate enclosed with the appeal was not by the concerned field specialist.

10. It is not in dispute that all the petitioners had alongwith their appeal annexed medical certificates issued in prescribed Form 3 by the doctors of the government hospitals. The certificate specifically states that the issuing authority (Doctor) was aware of the fact that the candidate had been rejected by the Medical Board of the respondent. The certificate also mentions that in the opinion of the issuing authority (Doctor) there was possibility of an error of judgment on part of the Medical Board which examined the candidate in the first instance. The details of the certificates furnished by the petitioner are as follows: -

Writ Petition No.5049 of 2020 Rupesh Kumar Vs. Union of India and others:

The petitioner was declared medically unfit on the ground that he was suffering from hypertension and overweight. The petitioner filed certificate issued by Dr. Syed Naushad Ahmad, MBBS, MS certifying that he examined the petitioner and did not find him suffering from any such disease. He held the post of Deputy Superintendent, Sadar Hospital, Jamui and issued the certificate being the medical officer of the concerned government Hospital.

Writ Petition No.5558 of 2020 Varun Kumar Vs. Union of India and others:

The petitioner was declared suffering from defective distant vision, bow legs, B/L tecticular swelling and hemorrhoids. The petitioner got his eyes tested by Dr. Thanish Kumar of Sadar Hospital, Jamui. He issued a certificate to the effect that his distant vision is 6/6. He also got himself examined by Dr. Rajiv Anand, MS Orthopaedics, Associate Professor, Department of Orthopaedics, Patna Medical College, who certified that the petitioner was not suffering from bowlegs and the error of judgement was due to X-ray values. The petitioner also annexed X-ray report of knee joint B/L.. The Radiologist certified that the study of knee joint reveals that it is normal in density and alignment. He also annexed medical certificate in Form 3 issued by Syed Naushad Ahmad, Deputy Superintendent, Sadar Hospital, Jamui mentioning that the petitioner does not suffer from any of the ailments/defects on account of which he was declared medically unfit. The qualification of Dr. Syed Naushad Ahmad, Deputy Superintendent is MBBS, MS.

Writ Petition No.5181 of 2020 Chandan Kumar Vs. Union of India:

The petitioner was declared medically unfit for the reason that he was suffering from chronic skin infection of the gluteal region. The petitioner got himself examined at Patna Medical College by Dr. Pankaj Kumar Tiwari, Associate Professor in the Department of Skin, Venreal and Leprosy. He did not find him suffering from any such infection. Based on his report, Dr. Syed Naushad, Deputy

Superintendent, Sadar Hospital, Jamui issued medical certificate in Form 3 certifying that the petitioner does not suffer from any such infection.

Writ Petition No.5654 of 2020 Bikas Kumar Sah Vs. Union of India and others:

The petitioner was declared medically unfit on the ground that he was suffering from BN nasal polyp and High BP Tachycardia. The petitioner got himself examined by Dr. Dhirendra Prasad Singh, MBBS, MS, ENT Specialist in Sadar Hospital, Jamui. The petitioner also got himself examined by Dr. Syed Naushad Ahmad, MBBS, MS. He certified that the petitioner does not suffer from High BP Tachycardia and that there was an error of judgement.

11. The provision of review medical examination is contained in Clause 9E of the Recruitment Scheme, which is reproduced below for ready reference:-

"Review Medical Examination (RME): Ordinarily there is no right of appeal against the findings of the Recruiting Medical Officer or Initial Medical Examination. If any Medical Certificate is produced by a candidate as a piece of evidence about the possibility of an error or judgment in the decision of Initial Medical Board/ Recruiting Medical Officer, who had examined him/her in the first instance i.e. DME, an appeal can be accepted. Such Medical Certificate will not be taken into consideration unless it contains a note by the Medical Officer from Government District Hospital or above along with registration no. given by MCI/State Medical Council, to the effect that it has been given in full knowledge of the fact that the candidate has already been rejected and declared unfit for service by CAPF Medical Board, or the recruiting medical officer. If the appeal of a candidate is accepted by CAPF Appellate Authority, his/her Review Medical Examination will be conducted by CAPF RME Board. The decision of the CAPF's Review Medical Boards will be final. No appeal will be entertained against the finding of the second medical i.e. Review Medical Examination."

12. The essential ingredients of Clause 9E can be summarised thus:-

A- Candidate preferring appeal had to produce Medical Certificate as a piece of evidence about the possibility of an error of judgment in the decision of Initial Medical Board/Recruiting Medical Officer, who had examined the candidate in the first instance.

B- Such medical certificate would be taken into consideration only if it contains a note by the medical officer from Government District Hospital or above along with registration number given by MCI/State Medical Council, to the effect that it has been given in full knowledge of the fact that the candidate had already been rejected and declared unfit for service by CAPF Medical Board, or the recruiting medical officer.

C- If the appeal of a candidate is accepted by CAPF Appellate Authority, the candidate's review medical examination will be conducted by CAPF RME Board.

D- The decision of the review medical board would be final.

13. The above provision only contemplates that the medical certificate to be annexed with the appeal should be by the medical officer from Government District Hospital or above. It does not mention that the medical officer issuing the

certificate should be a specialist in the field. However, in the communication sent to the petitioners informing them that they had been declared medically unfit, it was mentioned that in the event they apply for a review medical examination, they were required to submit medical certificate from a medical practitioner who should be specialist medical officer of Government District Hospital and above as per Form No.3. A sample Form 3 which is part of Writ Petition No.5049 of 2020 is reproduced below:-

"FORM No.3 OF CONSTABLE (GD) EXAM-2018

MEDICAL FITNESS CERTIFICATE

Certified that Mrs/Ms. ..... Rupesh Kumar ... S/o Shri Chandra Dev Sah .. Age..22.. years, a candidate of Constable (GD) Exam-2018 in CAPFs whose photo and thumb impression are appended above duly attested by me was examined by me at Hospital .... Sadar Hospital, Jamui.... on date ...4.2.2020.

2. I the undersigned, have the knowledge that Mr./Ms.... Rupesh Kumar..... S/o Sri Chandra Dev Sah... has been declared Medically Unfit by the Medical Officer for Constable (GD) Exam 2018 om CAPFs due to ___HTN over weight____.

3. In my opinion this is an error of judgment due to following reasons :- _____Normal B.P._____ Normal weight.

After due examination, I declare him/her medically fit for the said post.

Dated: 4.2.2020

Sd/- illegible

Signature & Name with seal of Specialist

Medical Officer of concerned field

Registration NO. 233379

(MCI/State Medical Council)

Designation DS.....

Name & Address of Govt. Hospital

(District Hospital and above)

Sadar Hospital Jamui

Sd/ Rupesh Kumar

Signature and name of candidate

(in presence of Medical practitioner)

Sd/- Upadhikshak, Sadar Aspatal, Jamui

4.2.2020

Attested by

Sd/-

Upadhikshak, Sadar Aspatal, Jamui

4.2.2020

Signature & Name with seal of Specialist

Medical Officer of concerned field

Note: (1) The findings of the Medical should be supported by Medical reports/ documents wherever applicable.

2) The Photograph thumb impression and signature of the candidates should be attested by Medical practitioner giving this Medical fitness Certificate. Un-attested forms shall be summarily rejected.

3) CAPFs shall not be responsible for postal delay."

14. As noted, the main provision in the Recruitment Scheme providing for the remedy of review medical examination only speaks of medical certificate from Government District Hospital or above, to

be annexed with the appeal. The medical certificate annexed with the appeal shall be evidence of possibility of an error of judgment in the decision of initial medical board/recruiting medical officer, who had examined the candidate in the first instance. The doctor issuing the certificate is required to certify that it is being issued in full knowledge of the fact that the candidate had already been rejected and declared unfit for service by CAPF medical board, or the recruiting medical officer. He has to owe full responsibility of the facts certified by him. The object unambiguously was to prevent frivolous appeals being filed. If the documents were found in order, the appeal could be accepted. The acceptance of the appeal would not mean that the candidate has been declared or accepted to be medically fit. It would only pave way for constitution of a Review Medical Board by the respondents. The candidates would thereafter be subjected to medical examination once again by the Review Medical Board and only if he is found fit that he would be moving to the next stage of recruitment. The requirement that certificate should be by specialist medical officer of concerned field came to be incorporated for the first time in Form No.3 at the place where the doctor issuing the certificate has to sign, mention his name, and put his seal. In my considered opinion, the requirement of filing medical certificate alongwith the memo of appeal should be interpreted keeping in mind the object with which the said provision has been incorporated. It should not be overstretched, lest the very purpose of providing remedy of review medical examination may stand defeated. So interpreted, I am of the considered view that the Certificates annexed by the petitioners alongwith their appeal were sufficient to entertain the appeals.

15. The submission of learned counsel for the Union of India that Dr. Syed Naushad Ahmad, Deputy Superintendent, Government Hospital, Jamui who certified that two of the petitioners were not suffering from High BP/Hypertension was not competent to issue the same as he is not a cardiologist, has also no force. The qualifications of Dr. Syed Naushad Ahmad are not in dispute. He has done Masters in Surgery and being a general surgeon in a government hospital, he was competent enough to examine the petitioners and certify that they were not suffering from hypertension. Under the recruitment scheme, as noted above, the only evidentiary value of his certificate is in formation of prima facie opinion that there could be an error of judgment on part of the medical officer who examined the candidate in the first instance to warrant acceptance of the appeal for review medical examination of the petitioners. In the review medical examination, the petitioners will be subjected to medical examination by expert doctors. In case the petitioners were really not suffering from the ailments/ shortcomings pointed out during the initial medical examination, they would succeed. On the other hand, if they do suffer from the ailments/shortcomings, they would be discarded. There is no right of further appeal against the decision of the review medical board. In case the certificates furnished by the petitioners are relied upon at this stage, the respondents would not suffer except that they shall have to hold a review medical examination. On the other hand, if the petitioners really do not suffer from any ailment/shortcoming, as alleged, but their appeal for review medical examination is rejected at the very threshold on the above ground, they would suffer irreparable loss and injury. In all events, therefore, the appeals preferred by

the petitioners for a review medical examination should not be dismissed in the manner as has been done by the respondents.

16. In consequence and as a result of above discussion, the writ petitions succeed and are allowed. The respondents are directed to constitute Review Medical Board for re-examination of the petitioners within a period of one week from the date of production of true attested copy of the instant order before them.

17. No order as to costs.

(2020)09ILR A75
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.05.2020

BEFORE
THE HON'BLE SARAL SRIVASTAVA, J.

Writ A No. 6322 of 2018

Dilip Kumar Pandey ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sri Ashok Kumar Pandey

Counsel for the Respondents:
C.S.C.

A. Service Law –The Uttar Pradesh Finance and Accounts Service Rules, 1992: Rule 17 - Promotion - The word used in Rule 17 is "seniority subject to rejection of unfit", which means that seniority alone is not the sole criteria. The suitability of a candidate is also the relevant criteria for consideration for promotion. Thus, if a candidate is not found fit by the Selection Committee, he cannot be promoted solely on the ground of seniority. The pendency of a criminal case against an employee would be a valid and proper circumstance to be taken into account while considering the suitability of a candidate for promotion under Rule 17 of Rules 1992. (Para 14)

As the charge-sheet in the criminal cases has been filed against the petitioner before the meeting of D.P.C., therefore, the recommendation of the selection committee should have been kept in the sealed cover in view of respective office Order (dated 28.05.1997). Hence, the petitioner could not have been recommended by the selection committee nor could he be promoted. Thus, the promotion of the petitioner was illegal. (Para 15, 16)

B. Office Memorandum or government order cannot override a statutory provision, but if the rules are silent on any particular point, the government can fill the gap and supplement the rules and issue instructions not inconsistent with the rules.

The object of adopting a sealed cover procedure is to ensure that a person against whom a decision is taken to proceed departmentally or judicially on a charge constituting misconduct is not left out of consideration for promotion merely because an enquiry is pending against him, therefore to balance the interest of the Establishment, which is that an unworthy person is not promoted, and that of the incumbent, so that upon exoneration in enquiry he is not deprived of the fruits of promotion, the candidature of the incumbent for promotion is considered but recommendation is kept in a sealed cover to be opened and implemented upon exoneration in the inquiry.

Thus, keeping in view the object for adopting sealed cover procedure, the Office Memorandum (dated 28.05.1997) cannot be said to be inconsistent with Rule 17 of the Rules, 1992. (Para 17, 18)

C. Principles of natural justice - It is settled law that where the facts are admitted and only one conclusion is possible, the observance of principles of natural justice is empty formality and observance of it is not necessary since it does not cause any prejudice to the person concerned.

Non-observance of the principles of natural justice in the instant case had not caused any prejudice to the petitioner as he could not have been promoted due to pendency of the criminal case. (Para 20, 21)

Writ petition dismissed. (E-4)

Precedent followed:

1. Dharam Narain Upadhyaya Vs St. of U.P. & ors., 2016 (1) AWC 454 (LB) (Para 16)

2. Raj Karan Yadav Vs High Court of Judicature at Allahabad, 2018 (10) ADJ 61 (DB) (Para 17, 18)

3. S.L. Kapoor Vs Jagmohan & ors., (1980) 4 SCC 379 (Para 20)

Precedent distinguished:

1. Dr. Rajendra Singh Vs St. of Punj. & ors., AIR 2001 SC 1769 (Para 8, 19)

2. Anjani Mishra & ors. Vs St. of U.P. & ors., 2007 (1) UPLBEC 260 (Para 8, 19)

3. State of Punjab Vs K.R. Erry & Sobhag Rai Mehta, AIR 1973 SC 834 (Para 9, 21)

Present petition challenges order dated 02.02.2018, passed by Principal Secretary (Finance), Government of U.P., Lucknow.

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

1. Heard Sri Ashok Kumar Pandey, learned counsel for the petitioner and learned Standing Counsel for the State-respondents.

2. The petitioner by means of the present writ petition has assailed the order dated 2.2.2018 passed by Principal Secretary (Finance), Government of U.P., Lucknow by which promotion accorded to the petitioner by order dated 30.6.2016 has been withdrawn.

3. The case of the petitioner in the writ petition is that he was initially appointed as Treasury/Accounts Officer pursuant to a selection held by Uttar Pradesh Public Service Commission in accounts cadre. The petitioner was promoted in the next higher grade i.e. Rs. 6600/- as Senior Treasury Officer/Senior Accounts Officer in September 2012. The petitioner was subsequently promoted in the grade of Rs. 7600/- as Chief Treasury Officer/Chief Accounts Officer by order dated 30.6.2016. The respondent illegally and arbitrarily by order dated 2.2.2018 withdrew the order dated 30.6.2016 according promotion to the petitioner and directed the recommendation of the selection committee to be kept in seal cover. The order dated 2.2.2018 was passed on account of pendency of criminal cases against the petitioner and also in compliance of the order dated 18.1.2018 passed by the Lucknow Bench of this Court in Writ Petition No. 772 (S/B) of 2018.

4. The petitioner has averred in the writ petition that in Case Crime No. 308, 309 of 2003, the allegation against the petitioner is that two teachers namely Sri Mangla Prasad Singh and Sri Surendra Kumar Singh have been illegally paid salary for which Charge-sheet Nos. 15 of 2005 and 16 of 2005 have been filed in the aforesaid criminal cases. The petitioner has tried to justify his action of disbursement of salary to the aforesaid two teachers on the ground that the role of the Accounts Officer in the disbursement of the salary is very limited, and the salary was paid in compliance of the order of the District Inspector of Schools dated 6.5.2002 as he being a subordinate officer was bound to comply with the said order. In respect of Case Crime No. 307 of 2005, the petitioner has stated that he had joined at District-Ballia in November 2001 whereas the salary to Sri Ravi Shankar Pandey was

released in the year 1999, and before his joining at District-Ballia, there were about three Accounts Officer who had ensured the payment of salary to Sri Ravi Shankar Pandey, therefore, it is a case of false implication.

5. The respondent filed counter affidavit contending inter-alia that the order dated 2.2.2018 has been passed in compliance of order dated 18.1.2018 of the Lucknow Bench in Writ Petition No. 772 (S.B.) of 2018 filed by one Umesh Kumar Upadhyaya claiming parity with the petitioner for promotion on the post of Chief Treasury Officer/Chief Accounts Officer on the ground that Dilip Kumar Pandey (petitioner herein) had been granted promotion despite the pendency of criminal case against him whereas he was denied promotion on account of pendency of criminal case; this court directed the State Government either to grant promotion pay scale to the petitioner(Umesh Kumar Upadhyaya) or withdraw the promotion accorded to Dilip Kumar Pandey (petitioner herein). In compliance of the order of Lucknow Bench of this Court dated 18.1.2018, the case of Umesh Kumar Upadhyaya was considered and it was decided that it was not possible to grant the promotion to Umesh Kumar Upadhyaya till the conclusion of criminal cases against him. Accordingly, the order dated 2.2.2018 was passed withdrawing the promotion accorded to the petitioner.

6. The respondents further placed reliance upon the office Order No. 13/21/89-Ka-1-1997 dated 28.5.1997 which provides the procedure of sealed cover, and according to the paragraph No. 2 (Ga) of the said office Order, if the case of an employee against whom a criminal case is pending has been considered by the selection committee for promotion, the recommendation of the Selection Committee of such candidate shall be kept in sealed cover till the conclusion of the criminal trial. It is further averred that the order impugned is per law and does not call for interference by this Court.

7. The petitioner filed rejoinder affidavit denying the averment of the counter affidavit.

8. Challenging the aforesaid order, learned counsel for the petitioner has made two submissions; Rule 17 of The Uttar Pradesh Finance and Accounts Service Rules, 1992 (hereinafter referred to as 'Rules 1992') does not postulate that a person against whom a criminal case is pending can be denied promotion on the ground of pendency of the criminal case. He submits that Rule 17 provides that the criteria to grant promotion is seniority subject to rejection of unfit. Thus, his submission is that the seniority subject to rejection of unfit is the sole criteria for grant of promotion, and Office Order dated 28.5.1997 cannot override Rule 17 of Rules, 1992 and cannot be invoked to deny the promotion to the petitioner. In support of the above submission, he has placed reliance upon the judgement of Apex Court in the case of **Dr Rajendra Singh Vs. State of Punjab and others, AIR 2001 SC 1769** and judgment of this Court in **Anjani Mishra and others Vs. State of U.P. and others, 2007 (1) UPLBEC 260.**

9. The second submission of counsel for the petitioner is that the impugned order has been passed in violation of principles of natural justice inasmuch as once the petitioner had been accorded promotion, it was incumbent upon the authorities to give due and proper opportunity of hearing to

the petitioner before withdrawing the order of promotion. Thus, the submission is that the impugned order is illegal and not sustainable in law. In support of the contention of violation of principles of natural justice, he has placed reliance upon the judgement of Apex Court in the case of **State of Punjab Vs. K.R. Erry and Sobhag Rai Mehta, AIR 1973 SC 834.**

10. Per contra, learned Standing Counsel contends that the impugned order has been passed in compliance of the order dated 18.1.2018 passed by Lucknow Bench of this Court in Writ Petition No. 772 (S.B.) of 2018 and so as long as the said order stands, the respondents are bound to obey it. He further contends that the Office Memorandum dated 28.5.1997 is not contrary to Rule 17 of the Rules 1992 as it only provides the procedure to keep the recommendation of the Selection Committee in sealed cover in certain contingency. He submits that though the seniority is the prime consideration for promotion, that does not imply that an unfit person can be accorded promotion.

11. He further contends that in the case in hand, it is not in dispute that the chargesheet in criminal cases have been filed against the petitioner before the promotion of petitioner and he could not have been promoted. Therefore, he submits that the observance of principles of natural justice is not required and would be an empty formality.

12. I have heard the rival submissions of learned counsel for the parties and perused the record.

13. To appreciate the first submission of counsel for the petitioner that the office Order dated 28.5.1997 cannot override Rule 17 of Rules 1992, It would be pertinent to extract Rule 17 of Rules 1992 which reads as under:-

"17. Senior Scale Grade-II.- *Selection to the Senior Scale, Grade II shall be made on the recommendation of a Selection Committee, on the basis of seniority subject to rejection of unfit from amongst such substantively appointed officers of the Ordinary Grade who have completed eight years service, as such on the first day of July of the calendar year in which the selection is made. The Selection Committee shall be constituted as under:-*

(i)	the Principal Secretary or the Secretary, as the case may be to the Government in Finance Department.	Chairman
(ii)	Secretary to the Government in Personnel Department or his nominee not below the rank of Joint Secretary.	Member
(iii)	Director Treasuries, Uttar Pradesh	Member

Provided that the Government may, in special circumstances relax the limit of service fixed for selection to the Senior, Grade-II."

14. Rules 17 postulates that the criteria for promotion is seniority subject to rejection of unfit. Reading of Rule 17 of the Rules 1992 does not suggest that the promotion is automatic and seniority alone is the sole criteria. The word used in Rule 17 is "seniority subject to rejection of unfit", which means that seniority alone is not the sole criteria. The suitability of a candidate is also the relevant criteria for consideration for promotion. Thus, if a

candidate is not found fit by the Selection Committee, he cannot be promoted solely on the ground of seniority. The pendency of a criminal case against an employee would be a valid and proper circumstance to be taken into account while considering the suitability of a candidate for promotion under Rule17 of Rules 1992.

15. In the instant case, it is not in dispute that chargesheet has been issued against the petitioner in three criminal cases i.e. Case Nos. 1254 of 2005, 1252 of 2005 and 1253 of 2005 arising out of Case Crime Nos. 307, 308, 309 of 2003. The record reflects that further proceeding in the aforesaid criminal cases has been stayed by this Court in Application under Section 482 Cr.P.C. No. 10770 of 2005 (Annexure No. 10 to the writ petition) but it does not mean that the petitioner has been exonerated from all the charges. The stay of further proceedings in the criminal case does not mean that the charges which have been levelled against the petitioner in criminal cases are false and have been quashed. In the opinion of the court, as the chargesheet in the criminal cases have been filed against the petitioner before the meeting of D.P.C., therefore, the recommendation of the selection committee should have been kept in the sealed cover in view of office Order dated 28.5.1997. Hence, the petitioner could not have been recommended by the selection committee nor could he be promoted. Thus, the promotion of the petitioner was illegal.

16. The Division Bench of this Court in the case of **Dharam Narain Upadhyaya Vs. State of U.P. and others, 2016 (1) AWC 454 (LB),** has upheld the rejection of promotion in a case where the competent authority took a decision and sanctioned the prosecution before the decision of Departmental Promotion Committee. The paragraph Nos. 13 to 15 of the said judgment is extracted hereinbelow:-

"13. Under the terms of office memorandum dated 28 May 1997 the term 'pendency of prosecution' has been clarified with the words that 'the charge-sheet has been submitted in the competent Trial Court'.

14. In the case of Union of India Vs. Kewal Kumar (supra) the Supreme Court considered its judgment rendered in the case of Union of India Vs. K.V. Jankiraman (Supra) and held that in K.V. Jankiraman itself it has been pointed out that the sealed cover procedure is to be followed where a Government Servant is recommended for promotion by the Departmental Promotion Committee but before he is actually promoted, if he is either placed under suspension or disciplinary proceedings are taken against him or decision has been taken to initiate the proceedings or criminal prosecution is launched or sanction for such prosecution has been issued or decision to accord such sanction is taken. The object of following the sealed cover procedure has been indicated by the Supreme Court in the case of Delhi Development Authority Vs. H.C. Khurana (1993) 3 SCC 196 the relevant paragraphs No.13 and 14 are reproduced as under:

"13. It will be seen that in Jankiraman also, emphasis is on the stage when 'a decision has been taken to initiate the disciplinary proceedings' and it was further said that 'to deny the said benefit (of promotion), they must be at the relevant time pending at the stage when charge-memo/charge-sheet has already been issued to the employee'. The word 'issued' used in this context in Jankiraman it is urged by learned counsel for the respondent, means

service on the employee. We are unable to read Jankiraman in 'this manner. The context in which the word 'issued' has been used, merely means that the decision to initiate disciplinary proceedings is taken and translated into action by despatch of the chargesheet leaving no doubt that the decision had been taken. The contrary view would defeat the object by enabling the government servant, if so inclined, to evade service and thereby frustrate the decision and get promotion in spite of that decision. Obviously, the contrary view cannot be taken.

14. 'Issue' of the charge-sheet in the context of a decision taken to initiate the disciplinary proceedings must mean, as it does, the framing of the charge-sheet and taking of the necessary action to despatch the charge-sheet to the employee to inform him of the charges framed against him requiring his explanation; and not also the further fact of service of the charge-sheet on the employee. It is so, because knowledge to the employee of the charges framed against him, on the basis of the decision taken to initiate disciplinary proceedings, does not form a part of the decision making process of the authorities to initiate the disciplinary proceedings, even if framing the charges forms a part of that process in certain situations. The conclusions of the Tribunal quoted at the end of para 16 of the decision in Jankiraman which have been accepted thereafter in para 17 in the manner indicated above, do use the word 'served' in conclusion No.(4), but the fact of 'issue' of the charge-sheet to the employee is emphasised in para 17 of the decision. Conclusion No.(4) of the Tribunal has to be deemed to be accepted in Jankiraman only in this manner."

15. In view of the aforesaid proposition of law laid down by the Hon'ble Supreme court, we are of the view that the pendency of prosecution is not based upon the submission of charge-sheet in the competent Trial Court. Once the competent authority took a decision to initiate a criminal proceeding and sanctioned the prosecution, it is an appropriate stage to withhold the recommendations of the Departmental Promotion Committee from giving effect to. "

17. Now coming to the argument of counsel for the petitioner that the Office Order dated 28.5.1997 cannot override Rule 17 of the Rules 1992 which does not prohibit the promotion on the ground of pendency of criminal proceedings. To appreciate the aforesaid submission, it would be apposite to extract one passage from the Division Bench judgment of this Court in the case of **Raj Karan Yadav Vs. High Court of Judicature at Allahabad, 2018 (10) ADJ 61 (DB)** wherein this Court has delineated the object of adopting sealed cover procedure. Paragraph No. 30 of the said judgment is extracted hereinbelow:-

"30. We have given our anxious consideration to the rival submissions. Before we proceed to address the issue as to whether adoption of sealed cover procedure was justified in the facts of the case, if not, its consequences, it would be useful to first notice as to what purpose adoption of sealed cover procedure serves in matters relating to departmental promotion. <u>The object of adopting a sealed cover procedure is to ensure that a person against whom a decision is taken to proceed departmentally or judicially on a charge constituting misconduct is not left out of consideration for promotion merely because an enquiry is pending against him, therefore to balance the interest of the Establishment, which is that an unworthy</u>

person is not promoted, and that of the incumbent, so that upon exoneration in enquiry he is not deprived of the fruits of promotion from the date his fellow collegues would enjoy, the candidature of the incumbent for promotion is considered but recommendation is kept in a sealed cover to be opened and implemented upon exoneration in the inquiry. "

18. There is no quarrel to the proposition of law that Office Memorandum or government order cannot override a statutory provision, but if the rules are silent on any particular point, the government can fill the gap and supplement the rules and issue instructions not inconsistent with the rules. Thus, keeping in view the object for adopting sealed cover procedure as explained by this Court in the case of **Raj Karan Yadav (supra),** the Office Memorandum dated 28.5.1997 cannot be said to be inconsistent or overrides Rule 17 of the Rules,1992.

19. Counsel for the petitioner could not demonstrate as to how the Office Memorandum dated 28.5.1997 is inconsistent with the aforesaid Rule 17. Accordingly, the court is of the opinion that the judgments of **Dr Rajendra Singh (supra) and Anjani Mishra (supra)** relied upon by counsel for the petitioner are of no help to the petitioner. In view of the aforesaid discussion, this Court does not find any substance in the first submission of counsel for the petitioner.

20. As regards the second submission of the counsel for the petitioner that the opportunity of hearing ought to have been afforded to the petitioner by the respondents before passing the impugned order, it is worth to mention that it is settled law that where the facts are admitted and only one conclusion is possible, the observance of principles of natural justice is empty formality and observance of it is not necessary since it does not cause any prejudice to the person concerned. The Apex Court in the case of **S. L. Kapoor vs Jagmohan & Ors, 1980 (4) SCC 379**. Paragraph No. 17 of the said judgment is extracted hereinbelow:-

"17. Linked with this question is the question whether the failure to observe natural justice does at all matter if the observance of natural justice would have made no difference, the admitted or indisputable facts speaking for themselves. Where on the admitted or indisputable facts only one conclusion is possible and under the law only one penalty is permissible, the Court may not issue its writ to compel the observance of natural justice, not because it approves the non observance of natural justice but because Courts do not issue futile writs. But it will be a pernicious principle to apply in other situations where conclusions are controversial, however, slightly, and penalties are discretionary."

21. In the present case, it is admitted on record that three criminal cases are pending against the petitioner in which chargesheet has been filed. The petitioner could not have been promoted due to pendency of the criminal cases against him and sealed cover procedure should have been adopted by the authorities as provided in Office Order dated 28.5.1997, but the petitioner was illegally promoted. Thus, non-observance of the principle of natural justice in the instant case had not caused any prejudice to the petitioner as he could not have been promoted due to pendency of the criminal case. For the aforesaid reason, the judgment of the Apex Court in the case of **State of Punjab (supra)** is not applicable

in the present case. Accordingly, the court is of the opinion that the second submission of the petitioner is also devoid of merit.

22. Further, it is pertinent to mention that there is nothing on record to indicate that the order of this court dated 18.01.2018 in Writ Petition No. 772 (S.B.) of 2018 has either been vacated or set aside in appeal and as long as the order of this court dated 18.01.2018 stands, the authorities are bound to obey it.

23. Given the reason above, the impugned order cannot be said to be arbitrary or illegal. The writ petition lacks merit and is, accordingly, **dismissed** with no order as to cost.

(2020)09ILR A82
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.04.2020

BEFORE

THE HON'BLE SARAL SRIVASTAVA, J.

Writ A No. 15599 of 2019

Dr. Somu Singh & Ors. ...Petitioners
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioners:
Sri Ashok Khare, Sri Shantanu Khare, Sri Kamlesh Kumar Yadav

Counsel for the Respondents:
A.S.G.I., Sri Krishna Raj Singh Jadaun, Sri Vikram D. Chauhan, Sri Vinay Kumar Singh, Sri V.K. Upadhyay

A.Education/ServiceLaw- Discrimination/arbitrariness- National council of Teacher Education(Recognition Norms & Procedure)Regulations, 2009: Regulation 5; Central Civil Services (Redeployment of Surplus Staff)Rules, 1990: Rule 4; National Council for Teacher Education Act, 1993: Section 17–The University being instrumentality of the state should act as a model employer and should not treat its employees unequally, arbitrarily or to put them in a position which would seriously prejudice and jeopardize the future of its employees. (Para 38)

Advertisement No. 01/2009-10 pursuant to which petitioners have been appointed as Lecturers in B.Ed. Course, shows that the posts were advertised for RGSC (Rajiv Gandhi South Campus). Whereas, facts clearly show that B.Ed. course at RGSC was being run without the approval of the NCTE (National Council for Teacher Education). Under Secretary (Inspection), NCTE vide letter dated 26.04.2017 approved to run B.Ed. course at the faculty of education at the main campus of the University with intake of 280 students, therefore, it could not be justified as to how the posts have been sanctioned for the faculty of education at RGSC to run B.Ed. course, for which no permission was granted by the NCTE. Therefore, Court derived the conclusion that the petitioners were appointed against the posts sanctioned at Faculty of Education at the University, Kamachha Varanasi (main campus of the University). (Para 34)

The action of university is discriminatory and arbitrary in asking the petitioner to report at RGSC. Once the University has allowed the staff of B.P.Ed. (Bachelor of Physical Education) to discharge their duties at main campus after the closure of the B.P.Ed. Course at the South Campus, the petitioners who are similarly placed are entitled to discharge their duties at the Main Campus of the University. (Para 36)

B. It is no doubt true that University has prerogative to take work from the petitioners as and when it is required, but this prerogative is subject to certain limitations and restrictions that it should be exercised in consonance with the principle of right to equality and fairness. (Para 37)

The University has not specified the nature of work which the University would ask the petitioners to discharge at RGSC. The

petitioners have been appointed to impart teaching classes in the faculty of education in the stream in which they are specialized. Therefore, it would not be fair and appropriate on the part of the University to compel the petitioners to discharge any other duty or teach a subject in which they are not specialized. It would seriously prejudice and jeopardize their chances to claim several benefits available to them under the Career Advancement Scheme. (Para 38, 39, 42)

C. Applicability of Rule 4 of Central Civil Services (Redeployment of Surplus Staff) Rules, 1990 - It could not be demonstrated as to how CCS Rules, 1990 are applicable on the teaching faculty of the University. Therefore, the contention of their redeployment in accordance with Rule 4 of Rules, 1990, is misconceived. (Para 25, 43)

Writ petition allowed. (E-4)

Precedent followed:

1. Vice Chancellor L.N. Mithila University Vs Dayanand Jha, (1986) 3 SCC 7 (Para 39)

Present petition challenges ECR No. 108 dated 07.06.2019 (circulated by circular dated 08.07.2019), passed by Executive Council, Banaras Hindu University, Varanasi and communications dated 13.09.2019 and 16.09.2019 issued by Assistant Registrar (Administration-Teaching) and the Professor Incharge, RGSC, Barkaccha, Mirzapur respectively.

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

1. Heard Sri Ashok Khare, learned Senior Counsel assisted by Sri Kamlesh Kumar Yadav, learned counsel for the petitioners and Sri V.K. Upadhyay, learned Senior Counsel assisted by Sri Vikram D. Chauhan, learned counsel for the respondents.

2. The petitioners in the present petition have mainly prayed for the following reliefs:-

"(a). a writ, order or direction in the nature of certiorari quashing the ECR No.108 passed by Executive Council, Banaras Hindu University, Varanasi in its meeting dated 7.6.19, as circulated by circular dated 8.7.19, issued by Section Officer, Executive Council Cell (Annexure No.12).

(b). a writ, order or direction in the nature of certiorari quashing the communications dated 13.9.19 and 16.9.19 issued by the Assistant Registrar (Administration-Teaching) and the Professor Incharge, Rajiv Gandhi South Campus, Barkaccha, Mirzapur respectively (Annexure Nos.13 & 14);

(c). a writ, order or direction of a suitable nature commanding the respondents not to interfere in the functioning of the petitioners at Faculty of Education, Banaras Hindu University, Kamachha, Varanasi, and to pay the petitioners their regular monthly salary on the said post regularly every month."

3. The brief facts of the case are that Banaras Hindu University (hereinafter referred to as 'University') notified an advertisement bearing No.01/2009-10 in the newspaper namely 'Employment News' dated 30th May, 2009 inviting applications for a large number of teaching posts in different departments.

4. The said advertisement included post of of Lecturer in Education (Hindi) bearing Post Code No.3742; one post of Lecturer in Education (Sanskrit) bearing Post Code No.3743; one post of Lecturer in Education (Computer Science) bearing Post Code No.3744; one post of Lecturer in Education (Political Science/History/Geography/Economics) bearing Post Code No.3745; post of Lecturer in Education bearing Post Code

No.3748 for Rajiv Gandhi South Campus, Barkachha, Mirzapur and one post of Lecturer in Education (Mathematics) bearing Post Code No.3746 for Mahila Mahavidyalaya.

5. The petitioner no.1, Dr. Somu Singh being eligible applied under the Physically Handicap category for the post of Lecturer in Education bearing Post Code No.3748. Petitioner no.2, Dr. Ajay Kumar Singh applied for consideration against the post of Lecturer in Education (Political Science/History/Geography/Economics) bearing Post Code No.3745, and petitioner no.3, Dr. Vinod Kumar Singh, applied for being considered for the post of Lecturer in Education (Mathematics) bearing Post Code No.3746.

6. The petitioners were issued interview letters for appearing before the Selection Committee. Each of the petitioners appeared before the Selection Committee on the scheduled date and were recommended for appointment. The recommendation of the Selection Committee was approved by the Executive Council.

7. The petitioner nos.1 and 2 were appointed by appointment letter dated 16.04.2010 while petitioner no.3 was appointed by appointment letter dated 16.04.2010/01.07.2010 issued by Deputy Registrar (Recruitment & Assessment Cell), University. All the petitioners were appointed as Lecturer in Education in Rajiv Gandhi South Campus, Barkachha, Mirzapur (hereinafter referred to as 'RGSC'). As per the appointment letter, petitioners were directed to report for duty in the enclosed proforma to the Dean Faculty of Education, main campus at the University within one month from the date of issue of the letter.

8. The Head and Dean of the Education Department of the University by letter dated 17.04.2010 directed the petitioner nos.1 and 2 to report immediately to the O.S.D./B.Ed. Course Coordinator, RGSC for further instructions. The petitioner no.3 was directed by the Dean, Faculty of Education to report to the O.S.D./B.Ed. Course Coordinator of RGSC for joining. The petitioners pursuant to the direction of Head and Dean of the Education Department reported to the O.S.D./B.Ed. Course Coordinator of RGSC and started discharging their duties at RGSC.

9. It transpires from the record that The National Council for Teacher Education (hereinafter referred to as 'NCTE') on 26.04.2017 sent a communication to the Registrar of the University taking objection against the B.Ed. course being run at RGSC. The aforesaid communication also recorded the fact that by an order dated 30.09.1997 passed by NCTE, the recognition had been accorded for running of B.Ed. course in the Faculty of Education of the University at Kamachha, Varanasi with an annual intake of 180 seats, and for an additional intake of 100 seats in B.Ed. course was granted by subsequent order dated 09.09.2006, therefore, total intake is 280 seats. The said communication also recites that NCTE has not granted recognition for its South Campus situated at RGSC. Thereafter, on 03.08.2018, the Regional Director, Northern Regional Committee, NCTE communicated its objection to the University against running of B.Ed. course at RGSC without prior approval of NCTE.

10. Subsequently, the Northern Regional Committee of NCTE in its 287th meeting held from 18-20.07.2018 vide item no.91 decided for issuing a show cause notice to the University under Section 17 of NCTE Act, 1993.

11. According to the petitioners, the Undergraduate Entrance Test-2018 Information Bulletin did not indicate even a single seat in the Faculty of Education for admission to RGSC and no fresh admissions were made to B.Ed. course at RGSC during the academic session 2018-19 and 2019-20. The students, who had been admitted to B.Ed. first year course during the academic session 2017-18 completed their studies in the second year of B.Ed. course during the academic session 2018-19 and their session came to an end in May, 2019.

12. The Dean, Faculty of Education of the University on 13.05.2019 issued a communication to each of the petitioners asking them to discharge their duties from 21.05.2019 at Faculty of Education, main campus of the University at Kamachha, Varanasi. Pursuant to the aforesaid order, each of the petitioners submitted their joining on 21.05.2019 at Faculty of Education, main campus of the University at Kamachha, Varanasi.

13. It appears that the Executive Council in a meeting held on 07.06.2019 passed a resolution vide item no.2 being ECR 108 that the teachers and employees appointed to teach different courses at RGSC should not be transferred to the Main Campus even if all the courses had to be closed, and the teachers appointed therein should be asked to discharge their duties in other courses being run at RGSC.

14. The Assistant Registrar (Administration) on 13.09.2019 issued a communication to the Dean, Faculty of Education asking him to relieve the teachers of education who were posted at RGSC and are presently working in the Faculty of Education at the main campus of the University for joining back at RGSC. Pursuant thereto, Professor In-charge, RGSC on 16.09.2019 sent a communication to the Dean, Faculty of Education at main campus of the University for relieving the teachers of education for being posted at RGSC.

15. The grievance of the petitioner is that though, the course of B.Ed. has been closed at RGSC in view of objection raised by the NCTE and no students in the B.Ed. course have been admitted since 2018, yet petitioners are being forced to report back at RGSC when there is no work for the petitioners as they are eligible and qualified in their specialty to teach students of education. Their further grievance is that if they are precluded from imparting education in their specialty, they would not be able to fulfill the norms prescribed by UGC for the grant of Career Advancement Scheme. Thus, the action of respondent would seriously prejudice the chance of promotion of petitioners and would jeopardize the carrier of the petitioners.

16. The petitioner has also claimed parity with Dr. Rajesh Prasad Shukla and Professor Shantanu Kumar Swain who were also deputed for discharging their duties at RGSC and were brought to the main faculty of University and have been discharging their duties at the main faculty. In the aforesaid factual backdrop, the petitioners have prayed for the relief extracted above.

17. The respondent-University filed counter affidavit contending inter alia that

petitioners were appointed pursuant to an advertisement notifying the posts for selection and appointment at RGSC. It is further stated that appointment letters of the petitioners clearly specified the place of posting at RGSC. The respondent-University further averred that it is the domain and the prerogative of the employer to take work from the petitioner as and when it is required, and the petitioners have no right to choose the place of working specially when the sanctioned post against which petitioners have been appointed is at RGSC. The respondent-University also pleaded that petitioners are under administrative control of the Professor Incharge, RGSC and salary of the petitioners are also drawn from RGSC. The respondent-University further pleaded that Dr. Rajesh Prasad Shukla and Professor Shantanu Kumar Swain, who applied for the post of Professor pursuant to an Advertisement No.02/2005/06 dated 08.10.2005 notifying the selection and appointment for the post at the main campus, were issued appointment letters in respect of the faculty of education at the main campus of the University at Kamachha, Varanasi, therefore, the petitioners cannot claim parity with them.

18. The petitioners filed rejoinder affidavit stating that they are qualified and have been selected for imparting instructions in B.Ed. course in the faculty of education which course has been stopped at RGSC and is no longer functional. The petitioners are neither equipped nor qualified for teaching any other subject. It is further stated that after stoppage of teaching in B.Ed. course at RGSC where studies were being imparted to 50 students, the entire teaching work for B.Ed. course for complete annual intake of 50 students would continue at the main campus. It is also averred that under the Career Advancement Scheme various norms are prescribed by the UGC which includes award of marks on every assessment year which would be an impossibility in case the petitioners are deprived from imparting teaching in B.Ed. course .

19. The petitioners through rejoinder affidavit have also brought on record the appointment letter of Rajesh Prasad Shukla and Dr. Shantanu Kumar Swain, who applied for selection and appointment for the post of Professor Incharge at RGSC against Advertisement No.02/2005/06 which shows that they were posted at RGSC, but have been brought back to the main faculty Kamachha, Varanasi.

20. Learned Senior Counsel for the petitioners has contended that the action of the respondent-university in posting the petitioners back to RGSC is illegal, arbitrary and discriminatory. He submits that it is evident from the record that NCTE never accorded permission to the University to run B.Ed. course at RGSC, and the said course was run by the University at RGSC without any approval of the NCTE. He submits that the NCTE has accorded approval of total intake of 280 seats for the faculty of education at the main campus of the University. Thus, he submits that though, the petitioners were posted at RGSC, but the faculty of education run at RGSC was part and parcel of the main faculty of education of the main campus of the University at Varanasi, accordingly, the stand of the University that petitioners have been appointed against the sanctioned post of the faculty of education at RGSC is incorrect and against the record.

21. He submits that University has not brought anything on record to indicate that NCTE has approved the intake of 50 seats

for imparting teaching in faculty of education at RGSC rather it is manifest from the record that on objection being raised by the NCTE, the University had to stop classes in faculty of education at RGSC. He submits that the fact that at present no education is being imparted at the faculty of education at RGSC is not disputed b the University. He submits that petitioners are qualified and eligible to teach students in education in their specialized subjects and are not equipped to teach other subjects, therefore, there is no work for the petitioners at RGSC, and for them to continue at RGSC would seriously prejudice their career, as they would be deprived to acquire various eligibility criteria prescribed by the UGC to avail the benefit under Career Advancement Scheme.

22. He further submits that petitioners have stated in paragraph 36 of the writ petition that there exists a shortage of six Assistant Professor for Social Science and three Assistant Professor for Mathematics, therefore, petitioners can be easily adjusted on the aforesaid vacant posts as faculty at RGSC is in fact a part and parcel of faculty of education of main campus of the University. In this regard, he has placed reliance upon memorandum dated 28.06.2017 issued by Registrar of the University which states that 'The permanent teachers appointed at RGSC may be included as members in various bodies like DRC, Board of Examiners, etc. as per existing norms.'

23. He further submits that Dr. Rajesh Prasad Shukla and Professor Shantanu Kumar Swain, who have been posted and discharging their duties at RGSC have been brought back to the main faculty of the University and Dr. Rajesh Prasad Shukla is presently Head and Dean of faculty of education. Thus, the submission is that petitioners are also identically circumstanced, and therefore, are entitled to be treated alike and thus, they should be posted at faculty of education at main campus of the University. He further submits that the University has not brought on record any application wherefrom it can be culled out that University would obtain necessary permission to run B.Ed. course at RGSC. He further submits that Regulation 5 of National Council for Teacher Education (Recognition Norms & Procedure), Regulations, 2009, which prescribes the manner of making application and time limit for permission to run classes in particular subject, provides that duly completed applications in all respect may be submitted to the Regional Committee during the period from the 1st September till 31st of October of the preceding year to the academic session for which recognition has been sought. He submits that no such application has been submitted by the respondents within the prescribed time under Regulation 5(4) of Rules, 2009, therefore, it is evident that University is not going to start faculty of education at RGSC in near future.

24. Per contra, learned Senior Counsel for the respondents has placed advertisement against which petitioners have been appointed to contend that the appointment of petitioners have been made for RGSC, and therefore, they cannot be adjusted or absorbed in the faculty of education at the main campus of the University. He further contends that it is the domain of the employer to take work from his employee as and when it is required and employee have no right to choose the place of working specially when the sanctioned post against which petitioners have been

appointed is at RGSC. He contends that the post of Lecturer in education on which petitioners have been appointed still exists at RGSC, hence, the petitioners cannot make any hue and cry asking them to join at RGSC. He submits that case of Dr. Rajesh Prasad Shukla and Professor Shantanu Kumar Swain with whom petitioners have claimed parity is not identical to that of petitioners inasmuch as Dr. Rajesh Prasad Shukla and Professor Shantanu Kumar Swain have been appointed pursuant to Advertisement No.02/2005/06 notifying the selection and appointment for the post at main campus. Thus, he submits that petitioners do not have any right to be posted at the main faculty of the University.

25. Learned counsel for the respondent-University has placed reliance upon Rule 4 of the Central Civil Services (Redeployment of Surplus Staff) Rules, 1990 (hereinafter referred to as 'Rules, 1990') to contend that petitioners have been redeployed in accordance with the aforesaid rules. It is also contended that B.Ed course at RGSC is temporarily suspended and faculty of B.Ed. at RGSC has not yet closed. He submits that petitioners have been appointed against the sanctioned post at RGSC, and if they are allowed to be accommodated at the main faculty of the University that would amount to allowing backdoor entry of the petitioners in the main campus of the University.

26. I have considered the rival submissions of the parties and perused the record.

27. The issue for determination in the present petition is as to whether the decision of the University asking the petitioners to report back at RGSC is arbitrary and discriminatory.

28. The facts as emerge from the record are that petitioner nos.1 & 2 have been appointed as Lecturer in the Faculty of Education in different streams by appointment letter dated 16.04.2010 and petitioner no.3 was appointed by appointment letter dated 28.06.2010. As per appointment letter, the petitioners were asked to report for duty in the prescribed proforma to the Dean, Faculty of Education, at the main campus of the University, though their appointment was as Lecturer in the faculty of education at RGSC. Pursuant to the appointment letters, petitioners reported for joining to the Head and Dean of the faculty of education at the main campus of the University at Kamachha, Varanasi.

29. The petitioners, thereafter, reported to the O.S.D./B.Ed. Course Coordinator, RGSC in pursuance to the office order dated 17.04.2010 and have been discharging their duties as Lecturer in the faculty of education at RGSC. Further, the letter dated 26th April, 2017 of the Under Secretary (Inspection), NCTE addressed to the Registrar of the University, Kamachha, Varanasi records that recognition for B.Ed. course was granted to the University, Kamachha, Varanasi U.P. vide order No.NRC/NCTE/F-3/UP-25/97/4957 dated 30.09.1997 with an annual intake of 180 seats. The said letter also records that additional annual intake of 100 seats in B.Ed. course was granted vide order No.NRC/NCTE/F-7/5677-5703 dated 09.09.2006, thus, total intake is 280 seats. The said letter also specifically records that NRC, NCTE has not granted recognition for its south campus situated at RGSC. The University does not dispute the correctness

of the aforesaid letter dated 26.04.2017 and the show cause notice dated 03.08.2018 and decision of the NRC, NCTE in the 287th meeting vide Item No.91 resolving to issue show cause notice to the University as to how it had run B.Ed. course at RGSC without approval of the NCTE .

30. The aforesaid correspondence between the University and the NCTE clearly reveals that NCTE has not granted any approval or recognition to the University to run B.Ed. course at RGSC. The University has not made any averment in the counter affidavit explaining as to how it had run B.Ed. course at RGSC without any approval or recognition granted by the NCTE. Thus, it can safely be culled out that intake of 280 seats of students has been approved by the NCTE to run B.Ed. course at the main faculty of University at Kamachha, Varanasi.

31. The petitioners have made specific averment in paragraph 23 of the writ petition that after 2018, no fresh admissions were made during the academic session 2018-19 & 2019-20 at RGSC and no teaching work in the education department is taking place. The University in paragraph 18 of the counter affidavit has not denied the averments made by the petitioners in paragraph 23 of the writ petition. As there was no permission or approval by the NCTE to run B.Ed. course at RGSC, therefore, it implies that there cannot be any post sanctioned for the department of education at RGSC.

32. The petitioners have also stated in paragraph 36 of the writ petition that there exists a shortage of six Assistant Professor for Social Science and three post for Assistant Professor for Mathematics. The said fact has also not been denied by the University in the counter affidavit. Though, the University has taken specific objection in the counter affidavit that appointment of the petitioners have been made against the post at RGSC, but it has not made any averment in the counter affidavit nor filed any document on record to demonstrate that separate posts have been sanctioned for the Faculty of Education at RGSC.

33. Further, the University has tried to defend its action against the allegation of discrimination made by the petitioner by stating that Dr. Rajesh Prasad Shukla and Professor Shantanu Kumar Swain, though posted at RGSC, were appointed against the post at the main campus of the University at Barkachha as is evident from the Advertisement No.02/2005/06 that the posts were advertised for the main campus of the University, Kamachha Varanasi. Accordingly, the case of petitioners are not identical to Dr. Rajesh Prasad Shukla and Professor Shantanu Kumar Swain inasmuch as the post notified for selection against the Advertisement No. 01/2009-10 pursuant to which petitioners were appointed were for the Faculty of Education at RGSC.

34. A perusal of the Advertisement No. 01/2009-10 pursuant to which petitioners have been appointed shows that the posts were advertised for RGSC, but the facts detailed above clearly shows that B.Ed. course at RGSC was being run without the approval of the NCTE. It is also manifest from the various correspondence, referred above, between the University and the NCTE that there was no recognition by the NCTE granting permission to the University to run B.Ed. course at RGSC. The intake of 280 students as it is evident from the letter of Under Secretary (Inspection), NCTE dated 26.04.2017 was

approved to run B.Ed. course at the faculty of education at the main campus of the University, therefore, in such factual backdrop, it is difficult to understand as to how the posts have been sanctioned for the faculty of education at RGSC for which no permission was granted by the NCTE to run B.Ed. course, therefore, the only conclusion which can be derived from the facts in the present case is that the petitioners were appointed against the posts sanctioned at Faculty of Education at the University, Kamachha Varanasi, more so, when the University has not explained in the counter affidavit as to how the posts at RGSC in the faculty of education were sanctioned when there was no permission by the NCTE to run B.Ed. course at RGSC.

35. Accordingly, the Court does not find any merit in the defence of the University that case of petitioners are not identical to that of Dr. Rajesh Prasad Shukla and Professor Shantanu Kumar Swain as it is manifest from the record that the faculty of education at RGSC is part and parcel of the faculty of education at the main campus of the University and the petitioners could be appointed on the sanctioned post in the faculty of education at the main campus of the University.

36. It is also worth to notice that petitioners in paragraph 40 of the writ petition have stated that the course of B.P.Ed. (Bachelor of Physical Education) was also commenced at South Campus, Barkachha, and on being objection taken by the NCTE, the B.P.Ed. course at South Campus, Barkachha was closed and the staff engaged at South Campus in the faculty of B.P.Ed has been allowed to function at main campus of the University, Kamachha Varanasi. The aforesaid paragraph has been replied by the University in paragraph 27 of the counter affidavit wherein University has not denied the averments made by the petitioners in paragraph 40 of the writ petition. In view of the aforesaid fact also, the action of university is discriminatory and arbitrary in asking the petitioner to report at RGSC inasmuch as once the University has allowed the staff of B.P.Ed. to discharge their duties at main campus after the closure of the B.P.Ed. Course at the South Campus, the petitioners who are similarly placed are entitled to discharge their duties at the Main Campus of the University.

37. Now, coming to the submission of learned Senior Counsel for the University that it is the domain of the employer that University should take work from petitioners as and when it is required and petitioners have no right to choose the place of working. It is no doubt true that University has prerogative to take work from the petitioners as and when it is required and petitioners have no right to be posted at the main campus at University, Varanasi, but this prerogative is subject to certain limitations and restrictions that it should be exercised in consonance with the principle of right to equality and fairness.

38. The University being instrumentality of the state should act as a model employer and should not treat its employees unequally, arbitrarily or to put them in a position which would seriously prejudice and jeopardize the future of its employees. In the present case, it is not in dispute that B.Ed. course at RGSC has been stopped. The University did not have any permission from the NCTE to run B.Ed. courses at RGSC. As on today, there is no work in the Faculty of Education at RGSC. The University in the counter affidavit has not specified the nature of work which the

University would ask the petitioners to discharge at RGSC.

39. The petitioners have been appointed to impart teaching classes in the faculty of education in the stream in which they are specialized. Therefore, it would not be fair and appropriate on the part of the University to compel the petitioners to discharge any other duty or teach a subject in which they are not specialized. It would be apt to refer a judgment of the Apex Court in the case of ***Vice Chancellor L.N. Mithila University Vs. Dayanand Jha 1986 (3) SCC 7*** which does not support the contention of the University that it has absolute discretion to take any work from the petitioners which it desires to take from them. Paragraph 8 of the said judgement is extracted hereinbelow:-

"8. The pre-requisite of the power of the Vice-Chancellor under Section 10(14) of the Act to transfer any teacher occupying a post in any department or college maintained by the University to any equivalent post in another department or college maintained by it is that they must, broadly, bear the same characteristics. The mere circumstance that the two posts are carried on the same scale of pay is not enough. That is because in the original text of the Amendment Act the words used in Section 10(14) as well as in the expression 'other equivalent post' as defined in Section 2 (ka, chh) are 'Samakaksh Pad'. Learned counsel for the respondent is therefore right in contending that equivalence of the pay-scale is not the only factor in judging whether the post of Principal and that of Reader are equivalent posts. We arc inclined to agree with him that the real criterion to adopt is whether they could be regarded of equal status and responsibility, The term 'teacher' is defined in Section 2(ka, chh) to include Principal, University Professor, College Professor, Reader, Lecturer etc. Professors of the University like head of the department, College Professors, Readers, Lecturers belong to different grades and discharge different duties and responsibilities. The power of the Vice-Chancellor to transfer any teacher under Section 10(14) is controlled by the use of the word 'Samakaksh' and he can not transfer any teacher from one post to another in a department of the university or a college unless they belong to the same class. In that view, there can be no doubt that the two posts of Principal and Reader cannot be regarded as of equal status and responsibility. The true criterion for equivalence is the status and the nature and responsibility of the duties attached to the two posts. Although the two posts of Principal and Reader are carried on the same scale of pay, the post of Principal undoubtedly has higher duties and responsibilities. Apart from the fact that there are certain privileges and allowances attached to it, the Principal being the head of the college has many statutory rights, such as: (i) He is the ex-officio member of the Senate, (ii) He has the right to be nominated as the member of the Syndicate, (iii) As head of the institution, he has administrative control over the College Professors, Readers, Lecturers and other teaching and non-teaching staff, (iv) The Principal of a constituent college is also the ex-officio member of the Academic Council of the University. And (v) He has the right to act as center Superintendent in the University examinations. It is thus evident that the High Court was right in holding that the post of Reader could not be regarded as an equivalent post as that of Principal in the legal sense. Maybe, when the affairs of a college maintained by the University are mismanaged, the Vice-

Chancellor may, for administrative reasons, transfer a Professor or Reader of any department or college maintained by it to the post of the Principal of such college, but the converse may not be true. While the Professors and Readers by reason of their learning and erudition may enjoy much greater respect in society than the Dean or Principal of a college, it does not follow that the post of Principal must be treated as equivalent to that of a Reader for purposes of Section 10(14) of the Bihar State Universities Act, 1976, as amended."

40. The learned Senior Counsel for the respondent-University has also submitted that discontinuance of the B.Ed. course at RGSC is temporary. In this regard, he has placed an affidavit of Dr. K.P. Upadhyay, Registrar of the University dated 06.07.2015 submitted to NCTE, which has been taken on record, to contend that University has conveyed its willingness to run three units (two units at the main campus & one unit for RGSC) of B.Ed. course. Accordingly, he submits that University is endeavouring to get one unit sanctioned for RGSC to commence B.Ed. course.

41. The said affidavit is of year 2015 and more than four years have passed and no permission to run one unit of B.Ed. course at RGSC has yet been accorded to the petitioners. Further, as per Regulation 5(4) of the Regulation, 2009, the application has to be submitted to the Regional Committee concerned during the period from 1st September till 31st October of the preceding year to the academic session for which recognition has been sought. The University has not brought on record any application submitted by it within the period prescribed in Regulation 5(4) seeking approval of the NCTE to run B.Ed. course at RGSC.

42. The aforesaid contention of learned counsel for the respondent-University does not seems to be correct. It is also important to consider that if petitioners were asked to sit idol or were asked to do work for which they have not been appointed, it would seriously prejudice and jeopardize their chances to claim several benefits available to them under the Career Advancement Scheme inasmuch to avail the benefit under Career Advancement Scheme, petitioners have to fulfill certain norms prescribed by the University Grants Commission which includes awards of marks in every academic session year etc.

43. The contention of the learned Senior Counsel for the University that the petitioners have been redeployed in accordance with Rule 4 of Rules, 1990 is also misconceived inasmuch as the counsel for the respondents could not demonstrate as to how the Rules, 1990 is applicable on the teaching faculty of the University.

44. In view of the aforesaid discussion, this Court finds that action of respondents in asking the petitioners to report back at RGSC where B.Ed. courses have been stopped and there is no work for the petitioners is arbitrary and discriminatory. Consequently, the decision of the Executive Council in ECR No.108 in meeting dated 07.06.2019 as circulated by Circular dated 08.07.2019 (Annexure No. 12) and communications dated 13.09.2019 and 16.09.2019 issued by Assistant Registrar (Administration) (Annexure No. 13 & 14) are quashed. The Respondents are directed not to interfere in the working of the petitioners at the main campus of the University and pay their salary and other benefits admissible to them. Further, it is open to the University to transfer and post

the petitioners at RGSC, if they so desire whenever B.Ed. course after following due procedure and permission from the NCTE commences at RGSC.

45. For the reasons give above, the writ petition is ***allowed*** subject to observations above with no orders as to cost.

(2020)09ILR A93
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.06.2020

BEFORE

THE HON'BLE RAVI NATH TILHARI, J.

Writ A No. 19777 of 2007

Dharmendra Kumar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Satya Prakash Pandey

Counsel for the Respondents:
C.S.C., Sri J.P. Singh, Sri Shailendra Singh

A. Service Law –Police Act, 1861- U.P. Police Regulations - Constitution of India - Article 309 - U.P. Temporary Government Servants (Termination of Services) Rules, 1975-Cancellation of selection on concealment of material fact-The rules framed under proviso to Article 309 of the Constitution of India including the U.P. Temporary Government Servants (Termination of Service) Rules, 1975, are not applicable to the police force as their services are governed by the Police Act, 1861, the Rules and the U.P. Police Regulations, framed under the Police Act, 1861. (Para 16, 17)

Therefore, the impugned order of termination dated 07.04.2007 passed under Rules, 1975 cannot be sustained being without jurisdiction. (Para 18)

B. Suppression of 'material' information presupposes that what is suppressed that 'matters' not every technical or trivial matter. The employer has to act on due consideration of rules/instructions if any in exercise of powers in order to cancel candidature or for terminating the services of employee. Though a person who has suppressed the material information cannot claim unfettered right for appointment or continuity in service but he has a right not to be dealt with arbitrarily and exercise of power has to be in reasonable manner with objectivity having due regard to facts of cases. (Para 23)

It is settled in law that the information given to an employer by a candidate as to conviction, acquittal or arrest or pendency of a criminal case, whether before or after entering into service must be true and there must not be suppression of the required information. In case, there is suppression, or false information is furnished, the employer may consider all relevant facts available as to the antecedents and may take appropriate decision as to the continuance of the employee or in case of selection for his appointment. (Para 25)

In the present case there was suppression of material fact regarding pendency of a criminal case but later on the petitioner was acquitted in Case Crime No. 409 of 2005. Another Case Crime No. 956 of 2006 under Sections 420/467/468 and 471 IPC, which was registered against the petitioner in view of the fact that he had suppressed pendency of Case Crime No. 409 of 2005 in his affidavit for verification, also resulted in petitioner's acquittal. (Para 26)

Another important aspect of the matter, is, that the petitioner was sent on initial training of constable by order dated 30.08.2006 of the Superintendent of Police, Kannauj, after seeking legal opinion in view of pendency of Case Crime No. 409/2005, against the petitioner at that point of time. (Para 26)

Again, the Superintendent of Police, Kannauj on consideration of the legal opinion and the judgment of acquittal dated 23.12.2006 (after the petitioner was acquitted in Case Crime No. 409 of 2005) found the petitioner suitable for

the post of constable and in its discretion took a conscious decision to send the petitioner for intensive training, notwithstanding the fact that the petitioner, in his affidavit for verification did not disclose the pendency of Case Crime No. 409 of 2005 against him. The authority thus determined the suitability and condoned the lapse of the petitioner candidate in not disclosing the correct fact. (Para 26, 28)

Once, the Competent Authority/Superintendent of Police, Kannauj found the petitioner suitable for the post after his acquittal and sent him for intensive training, the impugned order dated 07.04.2007, terminating the services of the petitioner as no longer required, could not be legally passed on the ground of concealment of material fact. (Para 29)

Writ petition allowed. (E-4)

Precedent followed:

1. Anuj Yadav Vs St. of U.P. & 3 ors., Special Appeal Defective No. 1330 of 2013 (DB), decided on 03.01.2014 (Para 9, 17)

2. St. of U.P. Vs Praveen Tyagi recruit constable, Special Appeal Defective No. 341 of 2010, decided on 20.11.2013 (Para 9, 17)

3. Vijay Singh & ors. Vs St. of U.P. & ors., 2004 (4) ESC 2209 (FB) (Para 9, 16)

4. Anuj Yadav Vs St. of U.P., Special Appeal (Defective) No. 1130 of 2013 (Para 17)

5. Praveen Tyagi Vs St. of U.P. & ors., 2010 (1) U.P.L.B.E.C. 478 (Para 17)

6. Avatar Singh Vs U.O.I. & ors., (2016) 8 SCC 471 (Para 11, 23, 24)

Precedent cited:

1. Dipti Prakash Banerjee Vs Satyendra Nath Bose National Centre for Basic Sciences, (1999) 3 SCC 60 (Para 10)

2. Awadesh Kumar Sharma Vs U.O.I., (2000) 1 UPLBEC 763 (DB) (Para 10)

Present writ challenges order dated 07.04.2007, passed by the Superintendent of Police Kannauj.

(Delivered by Hon'ble Ravi Nath Tilhari, J.)

1. Heard Sri Satya Prakash Pandey, learned counsel for the petitioner and the learned Standing Counsel.

2. By means of the present writ petition, the petitioner has prayed for issue of a writ in the nature of certiorari quashing the order dated 7.4.2007 passed by the Superintendent of Police Kannauj (Annexure No.2 to the writ petition), by which the petitioner's services were no longer required, giving him one month's salary and allowances, if any, for the notice period, under the U.P. Temporary Government Servants (Termination of Services) Rules, 1975 (hereinafter referred as the Rules, 1975). The petitioner has further prayed for issue of a writ of mandamus, commanding the respondents to permit him to continue and complete his training of constable and to appoint him as constable in U.P. Police and pay salary and other emoluments, in accordance with law.

3. Facts of the case are that in the recruitment process for the post of constables in U.P. Police, year 2005-06, the petitioner qualified in physical and written test and after interview he was declared successful and was selected on the post of constable in District Kannauj. The selected candidates were required to submit an affidavit in the prescribed proforma for police verification. The petitioner also filed an affidavit dated 10.6.2006 verified by public notary, but in the said affidavit the petitioner stated that there was no criminal case pending against him. On police verification, the Station Officer, Police

Station- Vidhunu submitted report dated 23.6.2006 that a Case Crime No. 409 of 2005 under Sections 324, 504 and 506 I.P.C. was registered against the petitioner, in which charge sheet had also been filed. However, the police report stated that the petitioner was a person of good character and reputation.

4. After the police verification report, the Superintendent of Police, Kannauj/Respondent No.3 vide letter dated 18.7.2006, sought opinion from the District Magistrate, Kannauj for sending the petitioner on training and after the letter of the District Magistrate, Kannauj, dated 23.8.2006 to the effect that, there was no legal impediment in the petitioner's appointment, the petitioner was sent for initial training to Etawah by order dated 30.8.2006.

5. A show cause notice dated 27.11.2006 (Annexure No.1 to the writ petition) was served to the petitioner to show cause as to why his selection be not cancelled, for concealment of the fact of pendency of the criminal case against him.

6. The petitioner filed reply dated 14.12.2006 stating, interalia, that on the date of submitting application for recruitment process i.e. on 3.9.2005, no case was registered against him. The Case Crime No. 409 of 2005 under Sections 324, 504 and 506 IPC was registered against him due to minor family disputes. The petitioner, however, admitted that in the affidavit filed by him due to inadvertant mistake and oversight of the learned advocate, as many affidavits were being prepared of so many candidates, the petitioner's case could not be separated and the pendency of Case Crime No. 409 of 2005 could not be disclosed and his affidavit was also prepared on the same lines as of so many other candidates.

7. At this stage it requires mention that, later on, in case Crime No. 409 of 2005 under Sections 323, 504 and 506 IPC, the petitioner was acquitted by judgment dated 23.12.2006 passed by the Metropolitan Magistrate, Kanpur Nagar and considering the petitioner's acquittal, he was sent to Etawah for intensive training vide letter dated 8.1.2007, by the Superintendent of Police, Kannauj.

8. The Superintendent of Police, Kannauj by the impugned order dated 7.4.2007 terminated the services of the petitioner, under the U.P. Temporary Government Servant (Termination of Service) Rules, 1975, as no longer required on the ground that the petitioner concealed the material fact of pendency of Case Crime No. 409 of 2005 against him. The petitioner's reply to the show cause notice was not found convincing. The petitioner has submitted that he was undergoing intensive training and in the meantime he received the order dated 7.4.2007.

9. Sri Satya Prakash Pandey learned counsel for petitioner has submitted that the order dated 7.4.2007 is without jurisdiction as the Rules 1975, are not applicable to the police constables. Reliance has been placed on the judgment of this Court in the cases of **Anuj Yadav Vs. State of U.P. and three others (Special Appeal Defective No. 1330 of 2013) (DB) decided on 3.1.2014; State of U.P. Vs. Praveen Tyagi recruit constable (Special Appeal Defective No. 341 of 2010 decided on 20.11.2013, and Vijay Singh and others Vs. State of U.P. and others reported in 2004 (4) ESC 2209 (FB).**

10. Learned counsel for the petitioner next contended that the impugned order is stigmatic and punitive. The alleged misconduct is the foundation of the order

and as such a regular enquiry must have been conducted. In any case, he submits that on two petitioner's acquittal in case Crime No. 409 of 2005 the stigma attached in view of pendency of criminal case also stood vanished. He has placed reliance on the judgment in the case of **Dipti Prakash Banerjee Satyendra Nath Bose National Centre for Basic Sciences (1999) 3 SCC 60 and Awadesh Kumar Sharma Vs. Union of India (2000) 1 UPLBEC 763 (DB).**

11. Lastly, placing reliance on the case of **Avatar Singh Vs. Union of India reported in (2016) 8 SCC 431,** the learned counsel for petitioner submitted, that in case of suppression of relevant information or furnishing false information, the competent authority is required to consider various aspects and take appropriate decision to appoint or not to appoint the selected candidate. The impugned order dated 7.4.2007 does not stand the test of the law laid down in the case of Avatar Singh (supra) and deserves to be quashed.

12. Learned Standing Counsel has submitted that the petitioner concealed the material fact of pendency of criminal case against him, which had material bearing on the petitioner's selection and appointment. The antecedents of a candidate are required to be looked into and a person of criminal nature or with criminal background cannot be allowed to enter the services and in particular the services of a disciplined force. He has next submitted that the impugned order is not stigmatic but an order of termination simplicitor and as such any regular inquiry was not required to be conducted in the matter before passing the impugned order.

13. Learned standing counsel has, however, not disputed the fact that the petitioner was acquitted in Case Crime No. 409 of 2005 by the competent court of law, but he has submitted that another Case Crime No. 956 of 2006 under Sections 420, 467, 468 and 471 IPC, was also registered against the petitioner for filing false affidavit for police verification, in the present recruitment process. To this submission, learned counsel for the petitioner submitted that in Case Crime No. 956 of 2006 also the petitioner was acquitted vide judgment dated 8.2.2012 passed by the Chief Judicial Magistrate, Kannauj. (Annexure SA-1 to the supplementary affidavit).

14. I have considered the submissions advanced by the learned counsel for the petitioner and the learned standing counsel and have also perused the material on record.

15. The petitioner, a selected candidate for the post of constable in U.P. Police in the recruitment process year 2005-06, was given a show cause notice dated 27.11.2006 as to why his selection be not cancelled as the petitioner did not disclose pendency of Case Crime No. 409/2005 under Sections 323/504/506 I.P.C. against him in the affidavit for police verification. The order of termination of services as no longer required was passed by the Superintendent of Police, Kannauj, after considering the petitioner's reply, on the ground that the petitioner by playing fraud and concealment of material fact appeared in the recruitment process for the post of constable. The order was passed making specific reference to the U.P. Temporary Government Servants (Termination of Service) Rules, 1975.

16. In the case of **Vijay Singh and another Vs. State of U.P. and others**

reported in 2004 (4) ESC 2209 (F.B.), it has been held that the field , the police service, is already occupied by the provisions of the Police Act, 1861, and as such Rules 1972 as involved in that case, passed under Article 309 of the Constitution of India would not be attracted at all. It is relevant to reproduce paragraph Nos. 17,18,64 and 65 of Vijay Singh case (supra) as under:-

"17. Police Service may, under certain circumstances, be considered as separate and distinguishable from any other State Public Service for the reason that police is subject matter of Entry 2 of List II and State Public Service falls under Entry 51 of List II, therefore, it cannot be held that whatever laws are framed for State Public Service, will automatically become binding for police personnel unless so adopted by the State Government or Rules are framed to that extent. There can be no doubt to the settled legal proposition that any order issued under the provisions of an Act has statutory force. Section 2 of the Act, 1861 empowers the Suite Government to frame Rule or issue Government Order. It reads as under:

"The entire police establishment under a (Provincial Government)..... shall be formally enrolled.....and shall be constituted in such a manner as shall from time to time be ordered by the Provincial Government.

Subject to the provisions of this Act the pay and all other conditions of sendee of members of the subordinate ranks of any police force shall be such as may be determined by the State Government."

64. In the view of the above, we reach the inescapable conclusion that statutory rules cannot be set at naught by issuing executive instructions. But the facts of the instant case do no make the said proposition of law applicable at all. As herein the field is already occupied by the provisions of Act, 1861 which is in operation by virtue of the provisions of Article 313 of the Constitution, thus. Rules, 1972 could not be attracted at all. The Government Orders issued for fixing the maximum age for recruitment on subordinate police posts operate in an entirely different field and are not in conflict with the Rules, 1972. The case stands squarely covered by the Apex Court judgment in Chandra Prakash Tiwari (supra) and, thus, it is not possible for us to take any other view. The main submissions made by Mr. Chaudhary that Pre-Constitutional law stands abrogated altogether by commencement of the Rules, 1972, is devoid of any merit.

Therefore; our answer to question No. 1 is that the field stood occupied on account of the provisions of Section 2 of the Act, 1961. The Legislature while enacting the provisions of Section 2 of Act, 1961 itself delegated the power to the statutory authorities to fix the eligibility including the age etc, The statutory authorities had performed their duties in exercise of the delegated powers from time to time without any deviation therefrom.

65. In such facts and circumstances, there was no occasion for His Excellency, the Governor to frame the Rules under the proviso to Article 309 of the Constitution, also applicable in the case of recruitment of subordinate police officers.".

17. In the cases of **Anuj Yadav Vs. State of U.P. Special Appeal (Defective) No. 1130 of 2013 and Praveen Tyagi Vs. State of U.P. and others 2010 (1) U.P.L.B.E.C. 478** this Court held that the rules framed under proviso to Article 309

of the Constitution of India including the U.P. Temporary Government Servants (Termination of Service) Rules, 1975, are not applicable to the police force as their services are governed by the Police Act, 1861, the Rules and the U.P. Police Regulations, framed under the Police Act, 1861.

18. In view of the above, I find force in the submission of the learned counsel for the petitioner that the impugned order of termination passed by the Superintendent of Police, Kannauj dated 7.4.2007 passed under Rules 1975 cannot be sustained being without jurisdiction.

19. The question if the impugned order is stigmatic or an order of termination simplicitor looses significance, once the order is held to be bad for want of jurisdiction under Rules 1975, which rules are not applicable to the police force.

20. The next submission of the petitioner's counsel is that the competent authority has not considered various aspects of the matter before passing the impugned order on the ground that the petitioner did not disclose pendency of the criminal case against him in his affidavit. He submits that the effect of acquittal and that the petitioner was sent for training, after his acquittal have not been duly taken into consideration, which vitiate the impugned order.

21. The whole idea of verification of character and antecedents is that the person suitable for the post in question is appointed. The information on prescribed proforma is required to ascertain antecedents of the candidate to judge his suitability for appointment or continuance in service. Character, conduct and antecedents do have impact on the nature of employment. The candidate must answer the questions in the affidavit/proforma truthfully and fully. Any misrepresentation or suppression or false statement would demonstrate conduct or character unbefitting for service and in particular security service like police force.

22. There is no dispute that the petitioner in the affidavit, did not disclose the correct fact as regards pendency of criminal case against him. On the date the affidavit was filed the Case Crime No. 409 of 2005 was pending, although, on the date the petitioner applied for the post in the recruitment process, there was no criminal case against him. The petitioner's contention that the Case Crime No. 409/2005 was lodged due to minor family dispute, might be correct, but did not absolve him from disclosing the correct facts.

23. In the case of **Avatar Singh Vs. Union of India and others 2016 (8) SCC 471** the Hon'ble Supreme Court has discussed in detail the object of verification, suppression of material facts in the information furnished, its effect on selection/appointment and the power of the authorities to be exercised and the manner of exercise of such power when the material fact comes to their knowledge. It is relevant to reproduce paragraph Nos. 29, 30, 32, 34, 35 and 36 as under:

29. The verification of antecedents is necessary to find out fitness of incumbent, in the process if a declarant is found to be of good moral character on due verification of antecedents, merely by suppression of involvement in trivial offence which was not pending on date of filling attestation form, whether he may be

deprived of employment? There may be case of involving moral turpitude/serious offence in which employee has been acquitted but due to technical reasons or giving benefit of doubt. There may be situation when person has been convicted of an offence before filling verification form or case is pending and information regarding it has been suppressed, whether employer should wait till outcome of pending criminal case to take a decision or in case when action has been initiated there is already conclusion of criminal case resulting in conviction/acquittal as the case may be. The situation may arise for consideration of various aspects in a case where disclosure has been made truthfully of required information, then also authority is required to consider and verify fitness for appointment. Similarly in case of suppression also, if in the process of verification of information, certain information comes to notice then also employer is required to take a decision considering various aspects before holding incumbent as unfit. If on verification of antecedents a person is found fit at the same time authority has to consider effect of suppression of a fact that he was tried for trivial offence which does not render him unfit, what importance to be attached to such non-disclosure. Can there be single yardstick to deal with all kind of cases?

30. The employer is given 'discretion' to terminate or otherwise to condone the omission. Even otherwise, once employer has the power to take a decision when at the time of filling verification form declarant has already been convicted/acquitted, in such a case, it becomes obvious that all the facts and attending circumstances, including impact of suppression or false information are taken into consideration while adjudging suitability of an incumbent for services in question. In case the employer comes to the conclusion that suppression is immaterial and even if facts would have been disclosed would not have affected adversely fitness of an incumbent, for reasons to be recorded, it has power to condone the lapse. However, while doing so employer has to act prudently on due consideration of nature of post and duties to be rendered. For higher officials/higher posts, standard has to be very high and even slightest false information or suppression may by itself render a person unsuitable for the post. However same standard cannot be applied to each and every post. In concluded criminal cases, it has to be seen what has been suppressed is material fact and would have rendered an incumbent unfit for appointment. An employer would be justified in not appointing or if appointed to terminate services of such incumbent on due consideration of various aspects. Even if disclosure has been made truthfully the employer has the right to consider fitness and while doing so effect of conviction and background facts of case, nature of offence etc. have to be considered. Even if acquittal has been made, employer may consider nature of offence, whether acquittal is honourable or giving benefit of doubt on technical reasons and decline to appoint a person who is unfit or dubious character. In case employer comes to conclusion that conviction or ground of acquittal in criminal case would not affect the fitness for employment incumbent may be appointed or continued in service.

32. No doubt about it that once verification form requires certain information to be furnished, declarant is duty bound to furnish it correctly and any suppression of material facts or submitting false information, may by itself lead to termination of his services or cancellation of candidature in an appropriate case.

However, in a criminal case incumbent has not been acquitted and case is pending trial, employer may well be justified in not appointing such an incumbent or in terminating the services as conviction ultimately may render him unsuitable for job and employer is not supposed to wait till outcome of criminal case. In such a case non disclosure or submitting false information would assume significance and that by itself may be ground for employer to cancel candidature or to terminate services.

34. No doubt about it that verification of character and antecedents is one of the important criteria to assess suitability and it is open to employer to adjudge antecedents of the incumbent, but ultimate action should be based upon objective criteria on due consideration of all relevant aspects.

35. Suppression of 'material' information presupposes that what is suppressed that 'matters' not every technical or trivial matter. The employer has to act on due consideration of rules/instructions if any in exercise of powers in order to cancel candidature or for terminating the services of employee. Though a person who has suppressed the material information cannot claim unfettered right for appointment or continuity in service but he has a right not to be dealt with arbitrarily and exercise of power has to be in reasonable manner with objectivity having due regard to facts of cases.

36. What yardstick is to be applied has to depend upon the nature of post, higher post would involve more rigorous criteria for all services, not only to uniformed service. For lower posts which are not sensitive, nature of duties, impact of suppression on suitability has to be considered by concerned authorities considering post/nature of duties/services and power has to be exercised on due consideration of various aspects.

24. In Avatar Singh case (supra) Hon'ble Supreme Court has summarized conclusions in paragraph 38 which is also being reproduced as under:-

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

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

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

38.(3). The employer shall take into consideration the Government orders/instructions/rules, applicable to the employee, at the time of taking the decision.

38.(4). In case there is suppression or false information of involvement in a criminal case where conviction or acquittal had already been recorded before filling of the application/verification form and such fact later comes to knowledge of employer, any of the following recourse appropriate to the case may be adopted: -

38.4.1 In a case trivial in nature in which conviction had been recorded, such as shouting slogans at young age or for a petty offence which if disclosed would not have rendered an incumbent unfit for

post in question, the employer may, in its discretion, ignore such suppression of fact or false information by condoning the lapse.

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

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

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

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

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

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

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

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

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

25. It is thus settled in law that the information given to an employer by a candidate as to conviction, acquittal or arrest or pendency of a criminal case, whether before or after entering into service must be true and there must not be suppression of the required information. In case, there is suppression, or false information is furnished as regards involvement in a criminal case, where conviction or acquittal has already been recorded or pendency of a criminal case; and such fact, later on comes to the knowledge, the employer may in its discretion, ignore such suppression of fact or false information by condoning the lapse considering the nature of offence, if trivial in nature; or/and suppression is immaterial as even if the facts would have been disclosed, would not have adversely

affected fitness of the incumbent. Where conviction has been recorded in a case which is not trivial in nature the employer may cancel the candidature or terminate the services of the employee. If acquittal has already been recorded in a case involving moral tirpitude or offence of heinous/serious nature, the employer may consider if it is not a case of clean acquittal or benefit of reasonable doubt has been given. The employer may consider all relevant facts available as to the antecedents and may take appropriate decision as to the continuance of the employee or in case of selection for his appointment.

26. In the present case there was suppression of material fact but later on the petitioner was acquitted in Case Crime No. 409 of 2005. Another Case Crime No. 956 of 2006 under Sections 420/467/468 and 471 IPC, which was registered against the petitioner in view of the fact that he had suppressed pendency of Case Crime No. 409 of 2005 in his affidavit for verification, also resulted in petitioner's acquittal. Yet, another important aspect of the matter, is, that the petitioner was sent on initial training of constable by order dated 30.8.2006 of the Superintendent of Police, Kannauj, after seeking legal opinion in view of pendency of Case Crime No. 409/ 2005 under Sections 323/504/506 IPC against the petitioner at that point of time. Again, after the petitioner was acquitted in Case Crime No. 409 of 2005 on the petitioner's representation for sending him for intensive training, in view of his acquittal by order dated 23.12.2006 the Superintendent of Police, Kannauj, on consideration of legal opinion and the judgment of the Court dated 23.12.2006, sent the petitioner for intensive training with request to the Senior Superintendent of Police, Etawah, by letter No. 300/2005/06 dated 8.1.2007 along with his records.

27. The most relevant part of the order dated 8.1.2007 is that the Superintendent of Police, Kannauj after considering the judgment of acquittal dated 23.12.2006 recorded specific finding that the petitioner/recruit constable, Dharmendra Kumar, was suitable for the post of Arakshi/Constable and, as such, it was preferable to send him for intensive training. This letter dated 8.1.2007 is Annexure No.5 to the writ petition which is being reproduced as under:-

''प्रेषक, ''द्वारा
विशेष वाहक/फैक्स/पंजीकृत डाक
पुलिस अधीक्षक
कन्नौज
सेवा में
वरिष्ठ पुलिस अधीक्षक
इटावा
पत्र संख्याः भ–300/2005–06 दिनांक जनवरी 08, 2007

विषय– **रिकूट आरक्षी चे0 नं0 424, धर्मेन्द्र कुमार पुत्र श्री जगन्नाथ निवासी ग्राम बाजपुर थाना विधुनू जनपद–कानपुर नगर को गहन प्रशिक्षण मे भेजे जाने के सम्बन्ध मे।**

संदर्भः– आपका पत्र संख्याःभ–01/2005 दिनांक 07–2006

कृपया अपने उपरोक्त सन्दर्भित पत्र का अवलोकन करने का कष्ट करें, जिसके द्वारा इस जनपद के भर्ती केन्द्र से चयनित रिकूट आरक्षी चेस्ट नं0 424 धर्मेन्द्र कुमार के विरूद्व पंजीयन अभियोग के सम्बन्ध में सूचना एवं चयन निरस्त किये जाने के सम्बन्ध में कृत कार्यवाही से अवगत कराये जाने की अपेक्षा की गयी ळें

उपरोक्त सन्दर्भ में अवगत कराना है कि रिकूट आरक्षी चेष्ट नम्बर 424 धमेन्द्र कुमार के विरूद्व इस जनपद में थाना कोतवाली कन्नौज पर मु0 अ0 सं0 956/06 धारा 420/468/471 भा0द0वि0 पंजीकृत कराया गया था जिसकी

विवेचना उप निरीक्षक ना0 पु0 श्री प्रताप सिंह यादव द्वारा की जा रही है।

उल्लेखनीय है कि रिकूट आरक्षी धर्मेन्द्र कुमार के चयन निरस्त किये जाने के सम्बन्ध में कार्यालय के आदेश संख्या – भः–300/05–06 दिनांक –27–11–2006 के द्वारा चयन निरस्त किये जाने के सम्बन्ध में नोटिस निर्गत किया था, जिसके परिप्रेक्ष्य में रिकूट आरक्षी द्वारा अपने स्पष्टीकरण के साथ माननीय न्यायालय एम0एम0 अष्टम, कानपुर नगर के निर्णय दिनांकित 23–12–2006 की छाया प्रति, जिसमें रिकूट आरक्षी को उसके विरूद्व थाना–विधनू जनपद कानपुर नगर पर पंजीकृत मु0अ0सं0 409/2005 धारा 324/504/506 भा0द0 वि0 के अभियोग के दोषमुक्त किया गया है प्रस्तुत करते हुए उसे गहन प्रशिक्षण हेतु भिजवाये जाने का अनुरोध किया गया है।

इस सम्बन्ध में अधोहस्ताक्षरी द्वारा ज्येष्ठ अभियोजन अधिकारी, कन्नौज से विधिक अभिमत प्राप्त किया गया, (जिसकी प्रति पत्रावली पर उपलब्ध है) के **गहराई से अवलोकन एवं मा0 न्यायालय के निर्णय दिनांकित 23–12–2006 के अवलोकनोपरान्त रिकूट आरक्षी धर्मेन्द्र कुमार को आरक्षी के पद पर योग्य पाते हुए, उसे गहन प्रशिक्षण पर भेजा जाना श्रेयस्कर प्रतीत होता है।**

अतः रिकूट आरक्षी चेस्ट नम्बर–424 धर्मेन्द्र कुमार को उसके सम्बन्धित समस्त मूल अभिलेखों एवं चरित्र पंजिका सहित आपके जनपद को इस अनुरोध के साथ भेजा जा रहा है कि आप कृपया रिकूट आरक्षी की आमद करके उसको वहॉ प्रशिक्षण पर भेजे जाने के सम्बन्ध में अपने स्तर से अग्रिम कार्यवाही करने का कष्ट करें।

संलग्नकः यथोपरि
रिकूट आरक्षी चे0नं0424 धर्मेन्द्र कुमार की
अभिलेखीय पत्रावली क्रमांक 1 से 53 तक
ह0/अस्पष्ट
(एन0 चौधरी)
पुलिस अधीक्षक
कन्नौज।''

28. Thus the Superintedent of Police, Kannauj on consideration of the legal opinion and the judgment of acquittal dated 23.12.2006 found the petitioner suitable for the post of constable and in its discretion took a conscious decision to send the petitioner for intensive training, notwithstanding the fact that the petitioner, in his affidavit for verification did not disclose the pendency of Case Crime No. 409 of 2005 against him. The authority thus determined the suitability and condoned the lapse of the petitioner candidate in not disclosing the correct fact .

29. A perusal of the impugned order dated 7.4.2007 passed by the Superintendent of Police, Kannauj, does not show that it took care of the petitioner's acquittal dated 23.12.2006 or of the letter/order of the Superintendent of Police, Kannauj dated 8.1.2007, whereby, the petitioner, after having been found suitable for the post of constable was sent for intensive training. Once, the Competent Authority/Superintendent of Police, Kannauj found the petitioner suitable for the post after his acquittal and sent him for intensive training, the impugned order dated 7.4.2007could not be legally passed on the ground it has been passed. The imugned order thus has suffers from legal infirmity on this count as well.

30. During the continuance of the petitioner's intensive training, the impugned order dated 7.4.2007 was passed. This Court by interim order dated 1.5.2007 stayed the order dated 7.4.2007 to the extent that the petitioner was permitted to complete the training. Learned counsel for the petitioner is not able to state if the petitioner has been allowed to complete the intensive training or not.

31. In view of the order dated 8.1.2007 of the Superintendent of Police Kannauj (Annexure-5 to the Writ Petition) as quoted above, finding the petitioner suitable for the post of constable after his

acquittal and sending him for intensive training, I do not find any reason or justification to remit the mater to the Superintendent of Police, Kannauj for reconsideration of the matter.

32. Thus considered the writ petition deserves to be allowed and the impugned order dated 7.4.2007 deserves to be quashed.

33. The impugned order dated 7.4.2007 is hereby quashed. The Respondents 1 to 3 are directed to take necessary and further action consequent upon quashing of the impugned order, in the matter of the recruitment of the petitioner for his appointment on the post of constable if there is no other legal impediment. The authorities shall ensure that the petitioner is allowed to complete the intensive training, if not already completed. The entire exercise shall be done within a period of three months from the date of production of a certified copy of this judgment before the Respondent Nos. 1 to 3.

34. The writ petition is allowed. No orders as to costs.

(2020)09ILR A104
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.04.2020

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Writ A No. 25477 of 2003

Bhagwan Din & Anr. ...Petitioners
Versus
District Magistrate, Kaushambi & Ors. ...Respondents

Counsel for the Petitioners:
Sri Amar Nath Tripathi, Sri Rajendra Kumar Dubey, Sri Santosh Kumar Pandey, Sri W.A. Siddiqui, Sri K.J. Shukla

Counsel for the Respondents:
C.S.C.

A. Service Law – Regularisation –U.P. Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994 - Section 3 - U.P. Commissioners and District Officers Motor Vehicle Driver Service Rules, 1978 - Rule 14, 15; U.P. Regularization of Daily Wages Appointment on Group 'D' Posts Rules, 2001- Rule 4(1).

Appointment and Payment of salary - An in-charge arrangement is neither recognition nor is necessarily based on seniority and therefore, no rights, equities and expectations can be built upon it – The distinction between a situation where a government servant is promoted to a higher post and one where he is merely asked to discharge the duties of the higher post is too clear to require any reiteration. Asking an officer who substantively holds a lower post merely to discharge the duties of a higher post cannot be treated as a promotion.

No letter of appointment has been placed on record by petitioners appointing them as Driver. It is claimed that petitioners were engaged as Seasonal Collection Peon and since they knew driving, therefore, they were allowed to drive official vehicles but at no point of time, they were ever appointed as Driver. In the absence of any letter of appointment, it can be held that petitioners were not appointed as "Driver". (Para 16-18)

B. Regularisation – (i) U.P. Regularization of Daily Wages Appointment on Group 'D' Posts Rules, 2001: Rule 4(1) – As per Rule 4(1), in order to attract and consider an incumbent for regularisation, three things are necessary:

(i) The incumbent was directly appointed on daily wage basis on a Group 'D' Post in a Government Service before 29.6.1991;

(ii) is continuing in service as such on the date of commencement of the said Rules; i.e., 21.12.2001; and,

(iii) vacancies were available on the date of commencement of Rules against which such incumbent could have been considered for regularisation. (Para 21)

In the present case, it is not the case of petitioners that they were ever engaged as daily wage Driver on or before 29.06.1991 and that being so the very first condition provided in Rule 4 of Rules, 2001 remained unsatisfied. Hence, Rules, 2001 has no applicability to petitioners. The petitioners, therefore, cannot claim regularization under Rule, 2001. (Para 22)

(ii) U.P. Commissioners and District Officers Motor Vehicle Driver Service Rules, 1978: Rule 14, 15 - No person can claim regularization when he is not appointed after following procedure prescribed in law, unless Rules for regularization are specifically applicable.

It is not in dispute that recruitment to the post of Driver is governed by statutory rules framed under proviso to Article 309 of the Constitution, i.e., Rules, 1978. The procedure prescribed in the said Rules includes determination of vacancies and procedure for recruitment. Admittedly, the prescribed procedure has not been followed with regard to appointment of petitioners. Therefore, it cannot be said that petitioners were ever appointed after following the statutory rules. Hence, petitioners have no claim on the post of Driver. (Para 22, 23)

(iii) Scope of Article 226 - The High Courts, in exercising power u/Article 226 of the Constitution will not issue directions for regularization, absorption or permanent continuance, unless the employees claiming regularization had been appointed in pursuance of a regular recruitment in accordance with relevant rules in an open competitive process, against sanctioned vacant posts. (Para 23, 31, 32)

Court is bound to insist upon the State to make regular and proper recruitments. Adherence to the rule of equality in public employment is a basic feature of our Constitution and since the rule of law is the core of our Constitution, a Court of law and even a Court of equity would certainly be disabled to pass an order upholding violation of Article 14 or directing the State to overlook the need of compliance of Article 14 read with 16 of Constitution of India and thereby giving certain advantage to a person who is beneficiary of such violation. Considering the scheme of public employment in the context of fundamental rights and in particular the right of equal opportunity of employment, Court would insist upon appointment to be made in terms of the relevant rules and after a proper competition amongst qualified persons instead of conferring a right on non selected appointees who have come from a channel not recognised in law. Such appointees cannot be conferred a valid entry being in breach of Article 14 and 16 of the Constitution. (Para 24 -27, 31)

(iv) Merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules - There is no fundamental right envisaged in those who have been employed on daily wages or temporarily or on contractual basis, to claim that they have a right to be absorbed in service. They cannot be said to be holders of a post, since, a regular appointment could be made only by making appointments consistent with the requirements of Articles 14 and 16 of the Constitution. (Para 33-35)

C. Words & Phrases – 'Backlog Vacancies' - Only those vacancies can be declared backlog vacancies, within the reserved category, which were subject-matter of advertisement but remained unfilled because of non-availability of suitable candidates, within the reserved category, after selection. It is only in respect of such vacancy that the procedure qua backlog vacancy can be adopted. Any vacancy, which has not been subjected to a complete process of selection, even though vacant, cannot be treated as a backlog vacancy. (Para 39, 40)

D. When a vacancy is not a part of backlog vacancy, then in a recruitment 100 per cent vacancies cannot be reserved since it is well settled that in one selection more than 50 per cent vacancies cannot be kept reserved except the cases where recruitment is in respect of backlog vacancies. (Para 41)

Writ petition is partly allowed to the extent that advertisement dated 06.06.2003 is quashed. W.r.t. other reliefs writ petition is dismissed. (E-4)

Precedent followed:

1. Smt. Vijay Rani Vs Regional Inspectress of Girls Schools, 2007 (2) ESC 987 (Para 17)

2. Ramakant Shripad Sinai Advalpalkar Vs U.O.I. & ors., 1991 Supple (2) SCC 733 (Para 17)

3. Secretary, St. of Karn. Vs Uma Devi, (2006) 4 SCC 1 (Para 22-25)

4. Surinder Prasad Tiwari Vs U.P. Rajya Krishi Utpadan Mandi Parishad & ors., (2006) 7 SCC 684 (Para 25)

5. U.P.S.C. Vs Girish Jayanti Lal Vaghela, (2006) 2 SCC 482 (Para 26)

6. St. of Karnataka & ors. Vs G.V. Chandrashekhar, JT 2009 (4) SC 367 (Para 27)

7. Man Singh Vs Commissioner, Garhwal Mandal, Pauri & ors., JT 2009 (3) SC 289 (Para 28)

8. St. of Bihar Vs Upendra Narayan Singh & ors., (2009) 5 SCC 65 (Para 29)

9. Pinaki Chatterjee & ors. Vs Union of India & ors., (2009) 5 SCC 193 (Para 30)

10. St. of Raj. & ors. Vs Daya Lal & ors., (2011) 2 SCC 429 (Para 31, 32)

11. St. of U.P. & ors. Vs Rekha Rani, JT (2011) 4 SC 6 (Para 32)

12. Brij Mohan Lal Vs Union of India, (2012) 6 SCC 502 (Para 33)

13. University of Raj. & ors. Vs Prem Lata Agarwal & ors., (2013) 3 SCC 705 (Para 34)

14. Secretary to Government, School Education Department, Chenni & ors. Vs Thiru R. Govindaswamy & ors., (2014) 4 SCC 769 (Para 35)

15. Upendra Singh Vs St. of Bihar & ors., (2018) 3 SCC 680 (Para 36)

16. St. of U.P. & ors.. Vs Sangam Nath Pandey & ors., (2011) 2 SCC 105 (Para 39)

17. Dr. Narendra Singh & ors. Vs St. of U.P. & ors., 2014 (4) ADJ 356 (Para 40)

18. Suresh Kumar & ors. Vs St. of U.P. & anr., 2016 (10) ADJ 391 (Para 40)

19. Indra Sawheny Vs Union of India, 1992 Supp. (3) SCC 217 (Para 42)

Present petition challenges advertisement dated 06.06.2003, published by District Magistrate, Kaushambi; Advertisement dated 19.07.2007, issued by District Magistrate, Kaushambi.

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

1. Two petitioners namely, Bhagwan Din and Dharm Raj Singh, have filed this writ petition under Article 226 of Constitution of India challenging recruitment sought to be made by respondents on the posts of Driver. They have also sought a mandamus commanding respondents to consider petitioners for regularization on the posts of Driver.

2. During pendency of this writ petition, petitioners have got writ petition amended by inserting two more prayers and, therefore, all prayers made by petitioners in the writ petition are reproduced as under:

"(i) a writ, order or direction in the nature of certiorari calling for the record and quash the impugned advertisement dated 6.6.2003 published by

the District Magistrate, Kaushambi as contained in Annexure-10 to the writ petition as it relates to the recruitment of two posts of drivers in the officer of the District Magistrate, Kaushambi of which one post is reserved for Scheduled Casts/Scheduled Tribes and the other post is reserved for OBC category.

(i-A) a suitable writ, order or direction in the nature of certiorari quashing the advertisement dated 19.07.2007 issued by District Magistrate, Kaushambi (Annexure-1 to supplementary affidavit to be treated as Annexure-11 to the main writ petition).

(ii) a writ, order or direction in the nature of mandamus commanding the respondent authorities to regularise the services of the petitioners as drivers attached with two ambassador cars being registration No. UP70-L 4444 and UP70-L 3333 in the official use of the District Magistrate, Kaushambi in terms of the Rule 4 of the Uttar Pradesh Regularisation of Daily Wags Appointment on Group D Posts Rules, 2001 with effect from 21.12.2001 and to give all consequential benefits and pay other allowances to the petitioners admissible under the relevant service rules.

(ii-A) since both the petitioners were working as driver of two Ambassador Car sanctioned as per G.O. dated 11.6.1997 ever since creation of new District Kaushambi continuously till date the said two post of Drivers are still vacant and not filled, as such without prejudice to other grounds in writ petition the petitioners are entitled for declaration that they be treated as regularized as drivers, w.e.f. 11.6.1997 with pay scale of post of driver and all benefit and increments in terms of U.P. Daily Wages Regularization Rules, 2001 w.e.f. 21.12.2001 and to pay all arrears of pay increments allowance and benefits till date and in future too.

(iii) a writ, order or direction in the nature of mandamus/ declaration declaring the cut-off date 29.6.1991 as arbitrary, unconstitutional and illegal inasmuch as two ambassador cars which both the petitioners are driving and which posts of driver was sanctioned by the government order dated 11.6.1997 and as such the cut-off date "instead of 29.6.1991" be read as "on or after 11.6.1997" in the Daily Wages Rules of 2001.

(iv) a writ, order or direction in the nature of mandamus commanding the respondents restraining the respondents not to take any step in respect of the recruitment proceedings in terms of the impugned advertisement dated 6.6.2003 (Annexure-10 to the writ petition. "

3. Facts in brief giving rise to present writ petition are that District Kaushambi was newly created as a Revenue District vide Government Order dated 04.04.1997. For the New District, vide Government order dated 11.06.1997 posts of District Magistrate was created. The aforesaid Government Order also created attached posts with the Office of District Magistrate temporarily upto 28.02.1998. It included two posts of Drivers in the pay scale of Rs. 950-1500/-. It also permitted to purchase two Ambassador Cars besides other vehicles. Petitioner-1 was required to work as Driver with effect from 05.09.1997 on a fixed pay of Rs. 1200/- per month. Petitioner-2 was already working as Driver with Sub-Divisional Magistrate, Manjhanpur in District Allahabad with effect from 02.08.1995. After creation of new District he was attached and appointed to work as Driver to run second Ambassador Car purchased for District Kaushambi.

4. Having worked for sometimes, petitioners made a representation dated 10.04.2002 requesting District Magistrate,

Kaushambi to regularize them. Additional District Magistrate, Kaushambi vide letter dated 09.07.2002 made recommendation for consideration of petitioners to be appointed as Driver on regular basis referring to U.P. Commissioners and District Officers Motor Vehicle Driver Service Rules, 1978 (hereinafter referred to as "Driver Rules, 1978"). By letter dated 17.07.2002 District Magistrate requested Secretary, Board of Revenue, U.P., Lucknow, to allow relaxation in the matter of appointment of Drivers who were already working to run two Ambassador Cars purchased in District Kaushambi. Secretary, Board of Revenue by letter dated 31.07.2002 directed all the District Magistrates in State of U.P. to fill up backlog vacancies in Group-C and D, in reserved category. Consequently, District Magistrate, Kaushambi published advertisement dated 06.06.2003 for recruitment on the post of Drivers in Category D in the Office of District Magistrate, Kaushambi in accordance with Driver Rules, 1978 wherein one post was reserved for Scheduled Caste and another for OBC. This advertisement was challenged by petitioners in the present writ petition seeking a further mandamus to consider them for regularization.

5. While entertaining the writ petition, this Court passed following interim order on 12.06.2003:

"Learned standing counsel has accepted notices on behalf of respondent nos. 1 to 3. He prays for and is granted three weeks time to file counter affidavit. The learned counsel for the petitioner shall have one week thereafter for filing rejoinder affidavit.

List in the week commencing 14th July, 2003.

The contention of the petitioner is that in the newly created District of Kaushambi, there were only two sanctioned posts of Driver and the petitioners have been working on the said posts since 1997. The petitioner has challenged the advertisement issued for recruitment of two Drivers on several grounds including that both the posts could not have been reserved, in view of the decision of the Apex Court. The further contention is that after promulgation of the regularization rules of 2001, no direct selection could be made without first considering the case of the petitioner.

The ***selection in pursuance of the impugned advertisement may go on but the result shall not be declared till 14th July, 2003."*** *(emphasis added)*

6. However, during pendency of writ petition, another advertisement dated 19.07.2007 was published by District Magistrate, Kaushambi for recruitment of one Driver on one of two posts already sought to be filled in. Hence, challenging the aforesaid advertisement dated 19.07.2007, amendment was made and aforesaid advertisement has also been challenged.

7. Heard Sri Amar Nath Tripathi, learned Senior Advocate, assisted by Sri K.J. Shukla, Advocate, for petitioner and learned Additional Chief Standing Counsel for respondents.

8. Sri Tripathi, learned Senior Advocate, contended that petitioners are working for a long time and, therefore, entitled to be considered for regularization under U. P. Regularization of Daily Wages Appointments on Group 'D' Posts Rules, 2001 (hereinafter referred to as the "Rules, 2001"). He further contended that since

petitioners are discharging duties as Driver but are being paid only fixed salary, hence they should be given salary in minimum of pay scale of Driver. He also contended that for the purpose of District Kaushambi, since it was created on 04.04.1997 therefore, the said date should be treated as cut-off date and right of petitioners should be considered accordingly.

9. Petitioners filed a Misc. Application No. 174996 of 2004 seeking a direction to the respondents to pay salary to petitioners since July, 2003 and onwards since they are working to discharge duties as Driver, but salary was not paid to petitioners after filing writ petition.

10. On the said application, this Court passed order dated 22.11.2004, corrected on 07.12.2004, which reads as under:

"Vide order dated 12-6-03 the learned Standing Counsel was granted time to file counter affidavit and certain other conditions were also imposed by the aforesaid order, and the interim order has also been granted unless it is vacated or modified earlier.

It has been stated by the counsel for the petitioners that a short counter affidavit has been filed though in view of the order dated 12-6-03 a detailed counter affidavit stating the fact regarding sanctioned posts had to be clarified by the respondents.

Learned Standing Counsel prays for and is granted a month's time to file counter affidavit.

In view of the direction issued by this Court dated 12-6.03 the petitioners have filed an application no. 174996 of 2004 in which the petitioner have submitted that in spite of the order of this Court salary of the petitioners from July 2003 which was being paid to the petitioners has not yet been paid, and the petitioners are still working.

In view of the aforesaid facts ***the respondent no. 1-District Magistrate, Kaushambi is directed to pay the salary of the petitioners for which they are entitled or to show cause."***

11. Supplementary Counter Affidavit sworn by Sri Dhirendra Kumar, Tehsildar, Manjhanpur has been filed stating that there was ban on appointment of Drivers, and, in any case, District Kaushambi was dismantled on 13.01.2004, therefore, petitioners have no cause of action surviving. He also stated that petitioners were not appointed as 'Driver' but were engaged as Seasonal Collection Peon and allowed to drive the Vehicles. With respect to advertisement, it is said that same was published for filling in backlog vacancies of reserved category candidates.

12. The period of engagement of petitioners as Seasonal Collection Peon was given in the form of chart as SCA-1 and SCA-2 which reads as under:

Periods of engagement of petitioner-1	**Periods of engagement of petitioner-2**
From 11.08.1998 to 31.08.1998	From 15.02.1996 to 29.02.1996
From 23.11.1998 to 31.12.1998	From 01.03.1996 to 31.03.1996
From 01.09.1998 to 30.09.1998	From 01.05.1996 to 30.06.1996
From 01.01.1999 to 31.01.1999	From 05.08.1996 to 31.08.1996
From 13.02.1999 to 31.03.1999	From 01.09.1996 to 30.09.1996
From 09.04.1999 to 29.04.1999	From 14.11.1996 to 31.12.1996
From 07.08.1999 to 30.09.1999	From 16.12.1997 to 31.01.1998

From 11.02.2000 to 31.03.2000	From 10.02.1998 to 28.02.1998
From 12.07.2000 to 30.09.2000	From 08.03.1998 to 31.03.1998
From 24.10.2000 to 30.12.2000	From 11.08.1998 to 31.08.1998
From 10.01.2001 to 31.03.2001	From 23.11.1998 to 31.12.1998
From 01.05.2001 to 30.06.2001	From 01.01.1999 to 31.01.1999
From 01.08.2001 to 31.08.2001	From 13.02.1999 to 31.03.1999
From 01.09.2001 to 29.09.2001	From 09.04.1999 to 29.04.1999
From 07.11.2001 to 31.01.2002	From 07.08.1999 to 30.09.2000
From 13.06.2003 to 30.06.2003	From 11.02.2000 to 31.03.2000
From 01.07.2003 to 31.07.2003	From 12.07.2000 to 30.09.2000
-	From 24.10.200 to 30.12.2000
-	From 10.01.2001 to 31.03.2001
-	From 01.05.2001 to 30.06.2001
-	From 01.08.2001 to 31.08.2001
-	From 01.09.2001 to 29.09.2001
-	From 07.11.2001 to 31.01.2002
-	From 13.06.2003 to 30.06.2003
-	From 01.07.2003 to 31.07.2003

13. During the pendency of Writ Petition, on 06.02.2018 a further interim order was passed as under:

"An interim order was passed on 12.6.2003, whereby this Court permitted selection in pursuance of impugned advertisement to go on, but it was provided that the result would not be declared. Sri A. N. Tripathi, learned senior counsel appearing on behalf of the petitioners submitted that the petitioners have been continuously working as driver since 1997 and are entitled for their services being regularised under the Regularisation Rules.

Sri Amit Manohar, learned Addl. Chief Standing Counsel is not in a position to dispute that in case petitioners have been working since 1997, they are at least entitled for being considered for regularisation of their services under the Regularisation Rules, 2001.

Accordingly, ***the respondents are directed to consider the petitioners for regularisation under the U.P. Daily wages Regularisation Rules, 2001, within a period of three months from the date of production of a certified copy of this order before the first respondent.***

List the matter after three months." (emphasis added)

14. Since petitioners also initiated contempt proceedings for non compliance of aforesaid interim order, an order was passed by District Magistrate, Kaushambi on 19.04.2018 rejecting claim of regularization. Copy of this order has been filed as Annexure-1 to affidavit of compliance filed by Sri Jitendra Kumar Srivastava, Deputy Collector, Kaushambi.

15. In short, the issues up for consideration in this writ petition are; (1) whether petitioners were ever appointed as Driver in District Kaushambi or at any other place; (2) whether appointment of petitioners was made in accordance with Rules; (3) whether petitioners were entitled to be considered for regularization under Rules, 2001; (4) whether petitioners were entitled for payment of salary on the post of Driver; and (5) whether respondents are justified initially by making direct recruitment on the two posts of Drivers

treating the same to be backlog reserved vacancies and in the subsequent advertisement by direct recruitment.

16. The first question relates to appointment of petitioners as Driver and right to claim salary of Driver. No letter of appointment has been placed on record by petitioners appointing them as Driver. Respondents claim that petitioners were engaged as Seasonal Collection Peon and since they knew driving, therefore, they were allowed to drive official vehicles but at no point of time, they were ever appointed as Driver. In the absence of any letter of appointment showing that petitioners were ever appointed on the post of Driver, I have no hesitation in holding that petitioners were not appointed as "Driver".

17. If the petitioners were not appointed as "Driver", whether they can claim salary on the post of Driver? Similar issue has been considered by this Court in **Smt. Vijay Rani Vs. Regional Inspectress of Girls Schools 2007 (2)ESC 987**, and it has been held:

" ... the Petitioner-Appellant was only required to look after and discharge the duties of the officiating Principal ***but was never promoted/appointed on the said post.*** *In other words, it can be said that the Petitioner-Appellant was given only current duty charge in addition to her substantive post and this arrangement did not result in promotion to the post of which, the current duty charge was handed over. In* ***State of Haryana Vs. S.M. Sharma AIR 1993 SC 2273,*** *the Chief Administrator of the Board entrusted Sri S.M. Sharma, with the current duty charge of the post of Executive Engineer, which was subsequently withdrawn as a result of his transfer to other post. He challenged the said order stating that it amounts to reversion. The Apex Court held that Sri Sharma was only having current duty charge of the Executive Engineer and was never promoted or appointed to the aforesaid post and therefore, on transfer to some other post, it did not result in reversion from the post of Executive Engineer.*

A somewhat similar situation occurred in ***Ramakant Shripad Sinai Advalpalkar Vs. Union of India and others, 1991 Supple (2) SCC 733*** *and the Apex Court observed as under:-*

"The ***distinction between a situation where a government servant is promoted to a higher post and one where he is merely asked to discharge the duties of the higher post is too clear to require any reiteration. Asking an officer who substantively holds a lower post merely to discharge the duties of a higher post cannot be treated as a promotion."*** *(emphasis added)*

18. It was further held that such situations are contemplated where exigencies of public service necessitate such arrangements and even consideration of seniority do not enter into it sometimes. However the person continues to hold substantive lower post and only discharges duties of the higher post essentially as a spot-gap arrangement. A further contention was raised that if such an arrangement continued for a very long period it would give some kind of right to continue on the post but negativing such contention, it was held that an in-charge arrangement is neither recognition nor is necessarily based on seniority and therefore, no rights, equities and expectations can be built upon it.

19. Questions-(1) and (4), therefore, are answered against petitioners.

20. Now coming to question-(3), contention of petitioners' counsel is that engagement of petitioners should be treated as daily wage Driver and, therefore, petitioners are entitled to be considered for regularization under Rules, 2001; I find that apparently aforesaid Rules have no application to petitioners' case. Rule 4(1) of Rules, 2001 reads as under:

*"**4. Regularisation of daily wages appointments on Group ''D' posts.**- (1) Any person who-*

*(a)was directly appointed on daily wage basis on a Group ''D' post in the Government service before June 29, 1991 and is **continuing in service as such on the date of commencement of these rules;** and*

*(b)possessed requisite qualification prescribed for regular appointment for that post at the time of such appointment on daily wage basis under the relevant service rules, **shall be considered for regular appointment in permanent or temporary vacancy, as may be available in Group ''D' post, on the date of commencement of these rules** on the basis of his record and suitability before any regular appointment is made in such vacancy in accordance with the relevant service rules or orders."*

(2) In making regular appointments under these rules, reservations for the candidates belonging to the Scheduled Castes, Scheduled Tribes, Other Backward Classes of citizens and other categories shall be made in accordance with the Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994, and the Uttar Pradesh Public Services (Reservation for Physically Handicapped, Dependents of Freedom Fighters and Ex-servicemen Act, 1993 as amended from time to time and the orders of the Government in force at the time of regularisation under these rules.

(3) For the purpose of sub-rule (1) the Appointing Authority shall constitute a Selection Committee in accordance with therules, 2001 relevant provisions of the service rules.

(4) The Appointing Authority shall, having regard to the provisions of sub-rule (1), prepare an eligibility list of the candidates, arrange in order of seniority as determined from the date of order of appointment on daily wage basis and if two or more persons were appointed together, from the order in which their names are arranged in the said appointment order. The list shall be placed before the Selection Committee along with such relevant records pertaining to the candidates, as may be considered necessary, to assess their suitability.

(5) The Selection Committee shall consider the cases of the candidates on the basis of their records referred to in sub-rule (4), and if it considers necessary, it may interview the candidates also.

(6) The Selection Committee shall prepare a list of selected candidates in order of seniority, and forward the same to the Appointing Authority." (emphasis added)

21. A bare perusal thereof shows that in order to attract and consider an incumbent for regularisation, three things are necessary:

(i) The incumbent was directly appointed on daily wage basis on a Group 'D' Post in a Government Service before 29.6.1991;

(ii) is continuing in service as such on the date of commencement of the said Rules; i.e., 21.12.2001; and,

(iii) vacancies were available on the date of commencement of Rules against which such incumbent could have been considered for regularisation.

22. In the present case, it is not the case of petitioners that they were ever engaged as daily wage Driver on or before 29.06.1991 and that being so the very first condition provided in Rule 4 of Rules, 2001 remained unsatisfied. Hence, Rules, 2001 has no applicability to petitioners. The petitioners, therefore, cannot not claim regularization under Rule, 2001. A Constitution Bench in **Secretary, State of Karnataka Vs. Uma Devi 2006 (4) SCC 1** has clearly held that unless Rules for regularization are specifically applicable, no person can claim regularization when he is not appointed after following procedure prescribed in law. It is also not in dispute that recruitment to the post of Driver is governed by statutory rules framed under proviso to Article 309 of the Constitution, i.e., Rules, 1978. The procedure prescribed in the said Rules includes determination of vacancies and procedure for recruitment; as under:

*"**14. Determination and communication of the number of vacancies.**- The appointing authority shall determine and intimate to the local or the concerned Employment Exchange in accordance with the rules and orders for the time being in force the number of vacancies to be filled during the course of the year, as also the number of vacancies to be reserved for candidates belonging to the Scheduled Castes/Schedules Tribes and other categories under rule 6.*

***15. Procedure of recruitment.**- (1) For the purpose of recruitment, there shall be constituted a Selection Committee comprising.-*

(i) the appointing authority or an officer not below the rank of A.D.M. Nominated by it;

(ii) an officer not below the rank of Deputy Collector nominated by the appointing authority; and

(iii) the District Employment Officer.

(2) The Selection Committee shall scrutinise the applications received and require all the eligible candidates to appear for interview before it.

(3) The Selection Committee shall prepare a list of candidates in order of merit as disclosed by the marks obtained in the interview. If two or more candidates have obtained equal marks the Selection Committee shall arrange their names in order of merit on the basis of their general suitability for the post. The number of candidates in the list shall be a little larger but not larger by more than 25 per cent than the number of vacancies."

23. Admittedly, the aforesaid procedure has not been followed with regard to appointment of petitioners. Therefore, it cannot be said that petitioners were ever appointed after following the statutory rules. Hence, also petitioners have no claim on the post of Driver, as held by Constitution Bench in **Secretary, State of Karnataka Vs. Uma Devi (supra)** observing:

"The High Courts acting under Article 226 of the Constitution, should not ordinarily issue directions for absorption, regularization or permanent continuance unless the recruitment itself was made regularly and in terms of the Constitutional Scheme."

24. The above issue in the light of decision in **Uma Devi (supra)** has been

considered in a catena of decisions and following **Uma Devi (supra),** Court has held that regularisation is not a source of recruitment and if initial appointment was made without complying with the requirement of Article 16 (1) of the Constitution, regularisation is not permissible particularly in absence of any statutory provision. I do not propose to give an exhaustive list of all such precedents, but it would be appropriate to place on record, in brief, as to how the matter, of late, has been treated by Supreme Court in the light of the law laid down by the Constitution Bench in **Uma Devi (supra).**

25. Following **Uma Devi (supra),** in **Surinder Prasad Tiwari Vs. U.P. Rajya Krishi Utpadan Mandi Parishad & others, 2006 (7) SCC 684,** it was held:

"Equal opportunity is the basic feature of our Constitution. ...Our constitutional scheme clearly envisages equality of opportunity in public employment. .... This part of the constitutional scheme clearly reflects strong desire and constitutional philosophy to implement the principle of equality in the true sense in the matter of public employment.

In view of the clear and unambiguous constitutional scheme, the courts cannot countenance appointments to public office which have been made against the constitutional scheme. In the backdrop of constitutional philosophy, it would be improper for the courts to give directions for regularization of services of the person who is working either as daily-wager, ad employee, probationer, temporary or contractual employee, not appointed following the procedure laid down under Articles 14, 16 and 309 of the Constitution."

26. Elaborating the procedure of regular appointment, in **Union Public Service Commission Vs. Girish Jayanti Lal Vaghela 2006 (2) SCC 482,** the Court observed that regular appointment to a post under the State or Union cannot be made without issuing advertisement in the prescribed manner, which would include inviting of applications from the employment exchange where eligible candidates get their names registered. Any regular appointment made on a post under the State or Union without issuing advertisement inviting applications from eligible candidates and without holding a proper selection where all eligible candidates get a fair chance to compete would violate the guarantee enshrined under Article 16 of the Constitution.

27. Deprecating the practice of the State to make appointment in ad hoc manner without caring to the recruitment in accordance with rules, Supreme Court in **State of Karnataka & others Vs. G.V. Chandrashekhar JT 2009 (4) SC 367** said that the State Government should not allow to depart from the normal rule and indulge in temporary employment in permanent posts. Court is bound to insist upon the State to make regular and proper recruitments. The Court is also bound not to encourage or shut its eyes to the persistence transgression of the rules of regular recruitment. Any direction to the State to consider the persons for regularisation even though they have not been recruited in accordance with rules would only encourage the State to flout its rules and to confer undue benefits on a selected few at the cost of many waiting to complete. Adherence to the rule of equality in public employment is a basic feature of our Constitution and since the rule of law is the core of our Constitution, a Court of law

and even a Court of equity would certainly be disabled to pass an order upholding violation of Article 14 or directing the State to overlook the need of compliance of Article 14 read with 16 of Constitution of India and thereby give certain advantage to a person who is beneficiary of such violation. Considering the scheme of public employment in the context of fundamental rights and in particular the right of equal opportunity of employment, this Court would insist upon appointment to be made in terms of the relevant rules and after a proper competition amongst qualified persons instead of conferring a right on non selected appointees who have come from a channel not recognised in law. Such appointees cannot be conferred a valid entry being in breach of Article 14 and 16 of the Constitution. In **G.V. Chandrashekhar (supra),** Court also said:

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

28. The same view has been reiterated in **Man Singh Vs. Commissioner, Garhwal Mandal, Pauri & others JT 2009 (3) SC 289.**

29. In **State of Bihar Vs. Upendra Narayan Singh & others (2009) 5 SCC 65,** Court held that any regular appointment made on a post under the State or Union without issuing advertisement, inviting applications from eligible candidates and without holding a proper selection where all eligible persons get a fair chance to complete is in violation of guarantee enshrined under Article 226 of the Constitution. Ad hoc/ temporary/ daily wage employees are not entitled to claim regularisation in service as a matter of right. If an illegality or irregularity has been committed in favour of any individual or a group of individuals or a wrong order has been passed by a judicial forum, others cannot invoke the jurisdiction of the higher of superior Court for repeating or multiplying the same irregularity or illegality or for passing wrong order.

30. In **Pinaki Chatterjee & others Vs. Union of India & others 2009 (5) SCC 193,** Court observed that it is no

doubt true that the respondents under certain circumstances had been appointed directly as casual mates and they continued as such and further by virtue of their continuance they acquired temporary status but that by itself does not entitle them to be regularised as mates since that would be contrary to the rules in force. The Court further held that the respondents did not acquire a right for regularisation as mates from the mere fact of their continuance as casual mates for a considerable period.

31. In **State of Rajasthan and others Vs. Daya Lal & others, 2011(2) SCC 429,** Court following the decision in Uma Devi (supra) held as under:

"The High Courts, in exercising power under Article 226 of the Constitution will not issue directions for regularization, absorption or permanent continuance, unless the employees claiming regularization had been appointed in pursuance of a regular recruitment in accordance with relevant rules in an open competitive process, against sanctioned vacant posts. The equality clause contained in Articles 14 and 16 should be scrupulously followed and Courts should not issue a direction for regularization of services of an employee which would be violative of constitutional scheme."

32. In **State of U. P. and others vs. Rekha Rani, JT 2011 (4) SC 6,** Court referring to its decision in **Daya Lal (supra),** in para 12 of the judgment, said :

"12. It has been held in a recent decision of this Court in State of Rajasthan vs. Daya Lal, 2011 (2) SCC 429 following the Constitution Bench decision of this Court in State of Karnataka vs. Umadevi (2006) 4 SCC 1 that the High Court in exercise of its power under Article 226 cannot regularize an employee."

33. In **Brij Mohan Lal vs. Union of India (2012) 6 SCC 502,** referring to **Uma Devi (supra)**, Court said :

"A Constitution Bench of this Court has clearly stated the principle that in matters of public employment, absorption, regularization or permanent continuance of temporary, contractual or casual daily wage or ad hoc employees appointed and continued for long in such public employment would be de hors the constitutional scheme of public employment and would be improper. It would also not be proper to stay the regular recruitment process for the concerned posts."

34. In **University of Rajasthan and others vs. Prem Lata Agarwal and others, (2013) 3 SCC 705** referring to Constitution Bench judgment in Uma Devi (supra), Court said :

".....the Constitution Bench, after survey of all the decisions in the field relating to recruitment process and the claim for regularization, in paragraph 43, has held that consistent with the scheme for public employment, it is the duty of the court to necessarily hold that unless the appointment is in terms of the relevant rules, the same would not confer any right on the appointee. The Bench further proceeded to state that merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules."

35. In **Secretary to Government, School Education Department, Chennai and others Vs. Thiru R. Govindaswamy and others (2014) 4 SCC 769,** referring to **Uma Devi (supra)** Court said that there is no fundamental right in those who have been employed on daily wages or temporarily or on contractual basis, to claim that they have a right to be absorbed in service. As has been held by this Court, they cannot be said to be holders of a post, since, a regular appointment could be made only by making appointments consistent with the requirements of Articles 14 and 16 of the Constitution.

36. In **Upendra Singh Vs. State of Bihar and others, (2018) 3 SCC 680** referring to **Uma Devi (supra),** Court said :

"Law pertaining to regularisation has now been authoritatively determined by a Constitution Bench judgment of this Court in ***Secretary, State of Karnataka and Ors. vs. Umadevi and Ors. (2006) 4 SCC 1****. On the application of law laid down in that case, it is clear that the question of regularisation of daily wager appointed contrary to law does not arise. This ration of the judgment could not be disputed by the learned Counsel for the Appellant as well."*

37. In view of above authorities and binding precedent of Supreme Court, prayer for regularization de hors the rules, cannot be considered and any direction issued by this Court otherwise, which is contrary to the Statute, would be impermissible.

38. So far as second question, whether appointment of petitioner on the post of Driver was made in accordance with Rules, is concerned, neither it has been claimed nor pleaded nor demonstrated by petitioners that they were appointed as Driver after following the procedure prescribed in Rules, 1978. Hence, this question is also answered against petitioners.

39. Now coming to advertisement dated 06.06.2003, I find that only two posts of Driver were advertised and both were kept reserved, one for Scheduled Caste and one for Other Backward Caste. Therefore, it is a case where all advertised vacancies have been kept reserved, i.e., 100 per cent reservation. Respondents tried to justify this reservation on the ground that it was to fill in backlog vacancies but it is not stated as to when these vacancies were advertised earlier and remained unfilled in the earlier selection and, therefore, became backlog vacancies. In fact, it was a new and fresh advertisement for filling these vacancies which were created in 1997. These cannot be said to be backlog vacancies. When a vacancy can be treated to be a "backlog vacancy", has been considered in **State of U.P. and Ors. Vs. Sangam Nath Pandey and Ors (2011) 2 SCC 105** and Court in para 33 has said :

"... that ***only those vacancies can be declared backlog vacancies, within the reserved category, which were subject-matter of advertisement but remained unfilled because of non-availability of suitable candidates, within the reserved category, after selection.*** *It is only in respect of such vacancy that the procedure qua backlog vacancy can be adopted. Any vacancy, which has not been subjected to a complete process of selection, even though vacant, cannot be treated as a backlog vacancy." (emphasis added)*

40. This has been followed by another Division Bench of this Court in **Dr. Narendra**

Singh & Ors. Vs. State of U.P. & Ors. 2014 (4) ADJ 356 and by a learned Single Judge in **Suresh Kumar & Ors. Vs. State of U.P. and Another 2016 (10) ADJ 391.**

41. When a vacancy is not a part of backlog vacancy, then in a recruitment 100 per cent vacancies cannot be reserved since it is well settled that in one selection more that 50 per cent vacancies cannot be kept reserved except the cases where recruitment is in respect of backlog vacancies. This is clearly provided in Section 3 second proviso of U.P. Public Services (Reservation For Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994 (hereinafter referred to as "Act, 1994") which read as under :

"Provided further that reservation of vacancies for all categories of persons shall not exceed in any year of recruitment fifty per cent of the total vacancies of that year as also fifty per cent of the cadre strength of the service to which the recruitment is to be made."

42. This is also settled law by a Constitution Bench in **Indra Sawhney Vs. Union of India, 1992 Supp. (3) SCC 217.**

43. In view of above, advertisement, in my view, with regard to two vacancies of Driver is patently illegal and liable to be quashed.

44. In the result, writ petition is partly allowed to the extent that advertisement dated 06.06.2003 is quashed. In respect of second advertisement, I find that nothing has been proceeded further, therefore, it would be appropriate for the respondents to advertise vacancies afresh and fill in the same in accordance with Rules.

45. With respect to other reliefs, since petitioners are not entitled for the same, writ petition is dismissed.

(2020)09ILR A118
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.01.2020

BEFORE
THE HON'BLE ASHWANI KUMAR MISHRA, J.

Writ A No. 29911 of 2012

Sri Rajesh Kumar Srivastava & Ors.
...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Satya Prakash Pandey, Sri Vivek Srivastava

Counsel for the Respondents:
C.S.C., Sri R.S. Prasad, Sri Vikram Bahadur Singh, Sri Naresh Chandra Tripathi

A. Administrative Law – Termination – Maintainability of writ petition - Private Institutions imparting education to students from the age of six years onwards, including higher education, perform public duty primarily a State function, therefore are amenable to judicial review of the High Court under Article 226 of the Constitution of India. (Para 7 as held in *Roychan Abraham* (infra), 15)

The Police Modern School, 12th Battalion, PAC, Fatehpur, is an educational institution established by the U.P. Police Shiksha Samiti, a Society registered under the Act of 1860. The Society runs the educational institution and it is governed by the rules/bye-laws of the Society. The institution is not receiving any aid from the State and finances for its running are generated by way of collections received from fee and voluntary contributions made by the police officials of the 12th Battalion, PAC, Fatehpur. Association of police officers is managing the affairs of the Society and the institution purely

for private purposes inasmuch as exercise of power by them flows from the provisions of the bye-laws and not by any statute/law. The institution is, therefore, a private person having separate and distinct entity which is not shown to be 'State' within the meaning of Article 12 of the Constitution of India. (Para 13)

Notwithstanding the fact that such institution is not a' State' within the meaning of Article 12, in view of what has been held by the Larger Bench in *Roychan Abraham* (infra) this writ petition would be maintainable against privately managed unaided educational institution. (Para 15)

B. Contractual and commercial obligations are enforceable only by ordinary action and not by judicial review. Even if a body performing public duty is amenable to writ jurisdiction, all its decisions are not subject to judicial review. Only those decisions which have public element therein can be judicially reviewed under writ jurisdiction. (Para 18)

In the facts of the present case, it is admitted that service conditions of petitioners are not governed by any statutory service regulations. The employment offered to petitioners, therefore, would lie purely in the realm of private contract of service. The petitioners are, in essence, seeking enforcement of their private contract by grant of necessary directions/writ. **The principle that contract of personal service cannot be enforced is a well recognized principle in law.** This law, however, is subjected to three exceptions as have been noticed by the Apex Court in *Executive Committee of Vaish Degree College* (infra), which are extracted hereinafter:

(i) where a public servant is sought to be removed from service in contravention of the provisions of Article 311 of the Constitution of India; (ii) where a worker is sought to be reinstated on being dismissed under the Industrial Law; and (iii) where a statutory body acts in breach or violation of the mandatory provisions of the statute. (Para 16)

The case in hand is not shown to be covered by any of the three exceptions to the proposition that contract of personal service cannot be enforced. Neither the protection of Article 311 of the Constitution of India would be available to petitioners nor they are entitled to any benefit/protection of the Industrial Disputes Act. The petitioners would not fall in the third category also inasmuch as the employer herein is not a 'State' within the meaning of Article 12 nor any violation of statutory rules or regulations is shown to exist in the facts of the present case. (Para 17)

Petitioners in respect of their employment offered by the privately managed unaided educational institution are subject to contract of personal service as per the common law rights and are not covered by any of the three exceptions noticed by the Apex Court in *Executive Committee of Vaish Degree College* (infra) which may justify a writ or direction by this Court to allow the petitioners to continue in the employment, in exercise of its writ jurisdiction. (Para 20)

Writ Petition dismissed. (E-4)

Precedent followed:

1. Roychan Abraham Vs St. of U.P. & ors., 2019 (3) ADJ 391 (FB) (Para 7, 14)

2. Executive Committee of Vaish Degree College, Vs Lakshmi Narain & ors., (1976) 2 SCC 58 (Para 12, 16)

3. K.K. Saksena Vs International Commission ON Irrigation and Drainage and others, (2015) 4 SCC 670 (Para 11)

4. Ajai Hasia & ors. Vs Khalid Mujib Sehravardi & ors., (1981) 1 SCC 722 (Para 18)

5. Shri Anadi Mukta Sadguru Shree Muktajee Vandasjiswami Suvarna Jayanti Mahotsav Smarak Trust & ors. Vs V.R. Rudani & ors., (1989) 2 SCC 691 (Para 18)

6. Ramana Dayaram Shetty Vs International Airport Authority of India, (1979) 3 SCC 489 (Para 18)

7. Pradeep Kumar Biswas & ors. Vs Indian Institute of Chemical Biology & ors., (2002) 5 SCC 111 (Para 18)

8. M/s Zee Telefilms Limited & anr. Vs Union of India & ors., (2005) 4 SCC 649 (Para 18)

9. Ramakrishna Mission & anr. Vs Kago Kunya & ors., Civil Appeal No. 2394 of 2019 (Para 11)

Precedent cited:

1. Ramesh Ahluwalia Vs St. of Punjab & ors., (2012) 12 SCC 331 (Para 7)

2. M.K. Gandhi & ors. Vs Director of Education (Secondary) U.P., & ors., 2006 (62) ALR 27 (Para 7)

3. Committee of Management LA Martiniere College, Lucknow through its Principal & anr. Vs Vatsal Gupta & ors., Order dated 26.07.2016, passed by Apex Court in Civil Appeal No. 7030 of 2016 (Para 9)

Present petition challenges notice/orders dated 27.03.2012 and 31.03.2012, passed by Commandant, 12th Battalion P.A.C. Fatehpur/Manager, Managing Committee, Police Modern School, 12th Bn. P.A.C., Fatehpur.

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

1. Petitioners, who are four in number, have filed the present writ petition challenging notice/orders dated 27.3.2012 and 31.3.2012, passed by respondent no.5, which are contained in Annexure-11 & 13 to 16 to the writ petition. The order dated 31.3.2012 notices that the petitioners had failed to appear in the screening test organized by the institution to assess the teaching ability and that they had failed to participate in such test previously also. An inference, therefore, has been drawn that petitioners have failed to provide qualitative teaching in the institution and by giving them a month's salary their services have been terminated. These orders have been passed by the Commandant, 12th Battalion, PAC, Fatehpur in his capacity as an office bearer of the Society running the educational institution in question.

2. The orders are assailed primarily on the ground that principles of natural justice have been breached inasmuch as no notice or opportunity of any kind was given to the petitioners before terminating their services. It is also urged that the petitioners were selected after undergoing a fair and transparent process, long back, and therefore, they cannot be compelled to appear in the screening test for which no provision otherwise exists in the rules of the Society that governs the institution. It is also urged that petitioners' act of not participating in the screening test cannot be construed as an act of misconduct, nor would it justify the order of termination against petitioners. The petitioners further claim that they were provided pay scale of Rs.1100-1550 vide letter dated 13.4.2000 and have been denied benefit of pay revision consequent upon introduction of Sixth Pay Commission Report.

3. The petition is opposed by the institution on the ground that a writ would not lie against it, which is purely a private body and is neither receiving any aid nor is regulated by any statutory provisions. It is sought to be contended that the police personnel for the welfare of their children have formed a Society known as Uttar Pradesh Police Shiksha Samiti, which is duly registered under the Societies Registration Act, 1860. The payment of salary to the employees/teachers is released from the funds generated by way of contribution made by the police personnel whose children are studying in the institution and/or from the fee collected from students and that no budgetary support or aid of any kind is provided by the State.

4. A supplementary counter affidavit has been filed in which it is asserted that merely because officials of the Police Department of the State of Uttar Pradesh are members of the Society, it would not change the nature of the Society itself, which is governed by its own bye-laws. The rules of the Society as also its registration etc. have been annexed alongwith the supplementary counter affidavit. Clause 11 of the bye-laws of Society provides that financial resources for the institution would be arranged from the fee received from the students or from the contributions made by the members. A sum of Rs.10 is contributed by each officer/employee posted in the Battalion and a separate fund in the name of PAC Shiksha Nidhi, 12th Battalion, Fatehpur is created. A member also contributes to the funds by voluntary contributions/donations etc. In para 2 of the supplementary counter affidavit it is asserted that the institution is purely a private unaided educational institution which is not receiving any grant-in-aid from the State and is not subject to any statutory regulations or control. A letter of the Central Board of Secondary Education dated 10.7.2012 addressed to the Principal, Police Modern School, 12th Battalion, Fatehpur is also annexed, as per which approval of middle class syllabus (I-VIII) has been provisionally approved for a period of three years i.e. 1.4.2012 to 31.3.2015. The letter of CBSE also provides that the school shall appoint only qualified and eligible staff as per the qualifications laid down in the rules.

5. The petitioners, however, contend that institution has been created for the benefit of children of state employees and the management vests exclusively in the officials of the State, and therefore, a writ would lie against the institution. According to them, the orders of termination are liable to be quashed for the reasons already noticed above.

6. From the respective submissions advanced following issues arise for consideration in the facts of the present case:-

(I) Whether the privately managed unaided educational institution is a 'State' within the meaning of Article 12 of the Constitution of India and a writ petition would be maintainable against it?

(II) Whether any writ is liable to be issued for quashing the order of termination, and thereby allow the petitioners to continue in the employment of the institution, as is prayed for?

7. Learned counsel for the petitioner has placed reliance upon a recent Full Bench Judgment of this Court in Roychan Abraham vs. State of U.P. and others, 2019 (3) ADJ 391 (FB). The reference to the Larger Bench was occasioned in view of the conflict of opinion on the issue, particularly after the judgment of the Apex Court in Ramesh Ahluwalia vs. State of Punjab and others, (2012) 12 SCC 331. The correctness of earlier Full Bench Judgment in M. K. Gandhi and others vs. Director of Education (Secondary) U.P. and others, 2006 (62) ALR 27 was doubted. The Full Bench has examined the issue in detail and following observations contained in paras 60 to 65 of the judgment in Roychan Abraham (supra) are reproduced hereinafter:-

"60. The question as to whether a private institution imparting education is amenable to judicial review under Article 226 of the Constitution, though not a 'State' within the meaning of Article 12 of the

Constitution, was not an issue in M.K. Gandhi. The Full Bench decision is confined to the facts arising in the case and is not an authority on the question that we are called upon to answer. The Full Bench for the reasons stated in para 36 and 37 declined to entertain writ petition against the private educational institution.

"36. Is a writ petition maintainable for,

violation of the bye-laws that do not have statutory force?

enforcement of a private contract between the school and the teacher?

We are afraid; our answer has to be in the negative. The Full Bench of our Court in Aley Ahmad Abidi v. District Inspector of Schools, AIR 1977 All 539, (The Aley Abidi Case) has held that:

"The Committee of Management of an Intermediate College is not a statutory body. Nevertheless, a writ petition filed against it is maintainable if such petition is for enforcement of performance of any legal obligations or duties imposed on such committee by a statute."

37. The committee of management of the D.P.S. School is recognised by the Board but it is neither a statutory body nor a State within the meaning of Article 12. The legal obligation or duty on the D.P.S. School is neither imposed by any statute nor by any statutory provision : it has been imposed by the affiliation bye-laws and agreement which is a contract between the parties and non-statutory. In view of this the writ petition is not maintainable against the D.P.S. School for violation of the affiliation bye-laws."

61. In Anjani Kumar Srivastava, the Division Bench though noticing Ramesh Ahluwalia declined to interfere for the reason that private contract of service between the master and servant was not enforceable in writ jurisdiction. The case is confined to the facts obtaining therein.

62. In Ms. Geeta Pushp v. Union of India and others, 2018(3) ADJ 98, the petitioner therein was a teacher in Army Public School managed by the Army Welfare Education Society, registered under the Societies Registration Act, 1860. The question for determination in the facts of the case was whether a writ petition by an employee or teacher for enforcement of service contract against the private institution was maintainable. It was held that while retiring a teacher there was no public law element in the action of the private body. The Court, therefore, declined to enforce the service contract in writ jurisdiction. The cases herein above are not reflective of the position of law that private educational institution render public duty and are amenable to judicial review under Article 226 of the Constitution of India. The Court in the given facts obtaining therein declined the relief to the petitioner as in the opinion of the Court there was no public law element in the offending act complained against the educational institution.

Conclusion:

63. We accordingly proceed to answer the reference in the following terms:

64. Question (i): Private Institutions imparting education to students from the age of six years onwards, including higher education, perform public duty primarily a State function, therefore are amenable to judicial review of the High Court under Article 226 of the Constitution of India.

65. Question (ii): The broad principle of law which has been formulated in the judgement of the Full Bench in M.K. Gandhi and Division Bench in Anjani Kr. Srivastava is confined to the facts obtaining

therein and is not an authority on the proposition of law that private educational institutions do not render public function and, therefore, are not amenable to judicial review of the High Court. The judgements do not require to be revisited."

8. It is contended on behalf of the petitioners that the present writ petition would be maintainable against the respondent institution, even if it is a privately managed unaided institution, in view of the Full Bench Judgment in Roychan Abraham (supra) and as the impugned action is otherwise shown to be arbitrary, the orders impugned are liable to be quashed and the petitioners are entitled to continue in service.

9. Per contra, Sri N. C. Tripathi, learned counsel appearing for the respondent institution has placed reliance upon an order dated 26.7.2016, passed by the Apex Court in Civil Appeal No.7030 of 2016 (Committee of Management LA Martiniere College, Lucknow through its Principal and another vs. Vatsal Gupta and others), which reads as under:-

"Leave granted.

We have heard learned counsel for the parties.

Appellant No.1 is an unaided minority private institution. We see no reason how a writ petition against that institution could be entertained. The High Court was clearly in error in entertaining the writ petition and passing subsequent directions.

Under the circumstances, the appeal is allowed and the impugned judgment and order passed by the High Court is set aside."

10. The aforesaid appeal before the Apex Court was directed against a Division Bench Judgment in Special Appeal No.530 of 2015, whereby the appellant was allowed to pursue his educational career in 11th & 12th in the institution concerned, subject to restrictions noticed therein, notwithstanding the fact that the institution was a privately managed unaided institution.

11. Reliance is also placed upon judgments of the Apex Court in Ramakrishna Mission and another vs. Kago Kunya and others in Civil Appeal No.2394 of 2019 and K. K. Saksena vs. International Commission on Irrigation and Drainage and others, (2015) 4 SCC 670 to submit that in essence the petitioners are seeking mandatory injunction to continue in employment of private employer which is impermissible in view of the law settled that contract of personal service cannot be enforced. The judgments are also relied upon for the proposition that the writ petition itself would not be maintainable against the privately managed unaided institution in question.

12. Learned counsel for the respondent institution also places reliance upon the judgment of the Apex Court in Executive Committee of Vaish Degree College vs. Lakshmi Narain and others, (1976) 2 SCC 58 to submit that contract of personal service otherwise cannot be enforced and since the three exceptions laid down by the Apex Court, therein, are not attracted in the facts of the present, therefore, no writ or direction can be issued to enforce the contract of personal service.

13. Perusal of the materials brought on record would go to show that the Police Modern School, 12th Battalion, PAC,

Fatehpur, is an educational institution established by the Uttar Pradesh Police Shiksha Samiti, a Society registered under the Act of 1860. The Society and the educational institution run by it is governed by the rules/bye-laws of the Society. The institution is not receiving any aid from the State and finances for its running are generated by way of collections received from fee and voluntary contributions made by the police officials of the 12th Battalion, PAC, Fatehpur. The association of police officers in managing the affairs of the Society and the institution is purely for private purposes inasmuch as exercise of power by them flows from the provisions of the bye-laws and not by any statute/law. The institution is, therefore, a private person having separate and distinct entity which is not shown to be 'State' within the meaning of Article 12 of the Constitution of India.

14. Much emphasis is laid by the petitioners to contend that this petition filed under Article 226 of the Constitution of India would be maintainable in view of the Full Bench Judgment of this Court in Roychan Abraham (supra).

15. The question as to whether a writ petition would be maintainable against a privately managed unaided educational institution has already been considered by the Full Bench of this Court in Roychan Abraham (supra), notwithstanding the fact that such institution is not a 'State' within the meaning of Article 12 of the Constitution of India. In view of what has been held by the Larger Bench in Roychan Abraham (supra) this writ petition would be maintainable. The first issue, therefore, does not pose much difficulty. However, what has to be seen is that even if a writ petition is held to be maintainable against privately managed unaided educational institution, yet a writ or direction is liable to be issued in favour of teachers concerned?

16. In the facts of the present case, it is admitted that service conditions of petitioners are not governed by any statutory service regulations. The employment offered to petitioners, therefore, would lie purely in the realm of private contract of service. The petitioners are, in essence, seeking enforcement of their private contract by grant of necessary directions/writ. The principle that contract of personal service cannot be enforced is a well recognized principle in law. This law, however, is subjected to three exceptions as have been noticed by the Apex Court in para 18 & 19 of the judgment in Executive Committee of Vaish Degree College (supra), which are extracted hereinafter:-

"18. On a consideration of the authorities mentioned above, it is, therefore, clear that a contract of personal service cannot ordinarily be specifically enforced and a court normally would not give a declaration that the contract subsists and the employee, even after having been removed from service can be deemed to be in service against the will and consent of the employer. This rule, however, is subject to three well recognised exceptions -- (i) where a public servant is sought to be removed from service in contravention of the provisions of Article 311 of the Constitution of India; (ii) where a worker is sought to be reinstated on being dismissed under the Industrial Law; and (iii) where a statutory body acts in breach or violation of the mandatory provisions of the statute.

19. In view of our finding that the Executive Committee of the college in the instant case was not a statutory body, the

present case does not fall within any of the excepted categories mentioned above, and hence prima facie, the plaintiff/respondent is not entitled to any declaration or injunction. The learned Counsel for the respondent, however, placed great reliance on the decision of this Court in *Sirsi Municipality* case in order to contend that this decision had included within the fold of its exceptions a fourth category, namely, an institution which even though was a non-statutory body, but was a local or a public authority. Reliance was placed particularly on the following observations of Ray, J., as he then was, in that case : [SCC p. 413 : SCC (L&S) p. 210, paras 17, 18]

"The third category of cases of master and servant arises in regard to the servant in the employment of the State *or of other public or local authorities or bodies created under statute.*

In the case of servant of the *State or of local authorities or statutory bodies,* courts have declared in appropriate cases the dismissal to be invalid if the dismissal is contrary to rules of natural justice or if the dismissal is in violation of the provisions of the statute."

17. The case in hand is not shown to be covered by any of the three exceptions to the proposition that contract of personal service cannot be enforced. Neither the protection of Article 311 of the Constitution of India would be available to petitioners nor they are entitled to any benefit/protection of the Industrial Disputes Act. The petitioners would not fall in the third category also inasmuch as the employer herein is not a 'State' within the meaning of Article 12 of the Constitution of India nor any violation of statutory rules or regulations is shown to exist in the facts of the present case.

18. In K. K. Saksena (supra) the Supreme Court had the occasion to extensively examine the issue of maintainability of the writ petition as also the question of issuance of a writ to specifically enforce contract of personal service of an employee of a private Society which allegedly was performing public function. The Court in K. K. Saksena (supra) after examining the earlier judgments of the Apex Court in Ajay Hasia and others vs. Khalid Mujib Sehravardi and others, (1981) 1 SCC 722, Shri Anadi Mukta Sadguru Shree Muktajee Vandasjiswami Suvarna Jayanti Mahotsav Smarak Trust and others vs. V. R. Rudani and others, (1989) 2 SCC 691, Ramana Dayaram Shetty vs. International Airport Authority of India, (1979) 3 SCC 489, Pradeep Kumar Biswas and others vs. Indian Institute of Chemical Biology and others, (2002) 5 SCC 111 and M/s Zee Telefilms Limited and another vs. Union of India and others, (2005) 4 SCC 649, on the issue, proceeded to observe as under in para 43 to 53:-

"43. What follows from a minute and careful reading of the aforesaid judgments of this Court is that if a person or authority is "State" within the meaning of Article 12 of the Constitution, admittedly a writ petition under Article 226 would lie against such a person or body. However, we may add that even in such cases writ would not lie to enforce private law rights. There are a catena of judgments on this aspect and it is not necessary to refer to those judgments as that is the basic principle of judicial review of an action under the administrative law. The reason is obvious. A private law is that part of a legal system which is a part of common law that involves relationships between individuals, such as law of contract or torts. Therefore,

even if writ petition would be maintainable against an authority, which is "State" under Article 12 of the Constitution, before issuing any writ, particularly writ of mandamus, the Court has to satisfy that action of such an authority, which is challenged, is in the domain of public law as distinguished from private law.

44. Within a couple of years of the framing of the Constitution, this Court remarked in *Election Commission of India v. Saka Venkata Rao [Election Commission of India v. Saka Venkata Rao,* AIR 1953 SC 210] that administrative law in India has been shaped in the English mould. Power to issue writ or any order of direction for "any other purpose" has been held to be included in Article 226 of the Constitution with a view apparently to place all the High Courts in this country in somewhat the same position as the Court of the King's Bench in England. It is for this reason ordinary "private law remedies" are not enforceable through extraordinary writ jurisdiction, even though brought against public authorities *(see Administrative Law,* 8th Edn., H.W.R. Wade and C.F. Forsyth, p. 656). In a number of decisions, this Court has held that contractual and commercial obligations are enforceable only by ordinary action and not by judicial review.

45. On the other hand, even if a person or authority does not come within the sweep of Article 12 of the Constitution, but is performing public duty, writ petition can lie and writ of mandamus or appropriate writ can be issued. However, as noted in Federal Bank Ltd. *[Federal Bank Ltd. v. Sagar Thomas,* (2003) 10 SCC 733] , such a private body should either run substantially on State funding or discharge public duty/positive obligation of public nature or is under liability to discharge any function under any statute, to compel it to perform such a statutory function.

46. In the present case, since ICID is not funded by the Government nor is it discharging any function under any statute, the only question is as to whether it is discharging public duty or positive obligation of public nature.

47. It is clear from the reading of the impugned judgment that the High Court was fully conscious of the principles laid down in the aforesaid judgments, cognizance whereof is duly taken by the High Court. Applying the test in the case at hand, namely, that of ICID, the High Court opined that it was not discharging any public function or public duty, which would make it amenable to the writ jurisdiction of the High Court under Article 226. The discussion of the High Court is contained in paras 34 to 36 and we reproduce the same for the purpose of our appreciation: *(K.K. Saksena case [K.K. Saksena v. International Commission on Irrigation and Drainage, 2011 SCC OnLine Del 1894 : (2011) 180 DLT 204] , SCC OnLine Del)*

"34. On a perusal of the preamble and the objects, it is clear as crystal that the respondent has been established as a scientific, technical, professional and voluntary non-governmental international organisation, dedicated to enhance the worldwide supply of food and fibre for all people by improving water and land management and the productivity of irrigated and drained lands so that there is appropriate management of water, environment and the application of irrigation, drainage and flood control techniques. It is required to consider certain kind of objects which are basically a facilitation process. It cannot be said that the functions that are carried out by ICID are anyway similar to or closely related to those performable by the State in its sovereign capacity. It is fundamentally in the realm of collection of data, research,

holding of seminars and organising studies, promotion of the development and systematic management of sustained irrigation and drainage systems, publication of newsletter, pamphlets and bulletins and its role extends beyond the territorial boundaries of India. The memberships extend to participating countries and sometimes, as bye-law would reveal, ICID encourages the participation of interested national and non-member countries on certain conditions.

35. As has been held in *Federal Bank Ltd. [Federal Bank Ltd. v. Sagar Thomas*, (2003) 10 SCC 733] solely because a private company carries on banking business, it cannot be said that it would be amenable to the writ jurisdiction. The Apex Court has opined that the provisions of the Banking Regulation Act and other statutes have the regulatory measure to play. The activities undertaken by the respondent Society, a non-governmental organisation, do not actually partake the nature of public duty or State actions. There is absence of public element as has been stated in *V.R. Rudani [Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust v. V.R. Rudani, (1989) 2 SCC 691] and Sri Venkateswara Hindu College of Engg. [K. Krishnamacharyulu v. Sri Venkateswara Hindu College of Engg.,* (1997) 3 SCC 571 : 1997 SCC (L&S) 841] It also does not discharge duties having a positive application of public nature. It carries on voluntary activities which many a non-governmental organisations perform. The said activities cannot be stated to be remotely connected with the activities of the State. On a scrutiny of the Constitution and bye-laws, it is difficult to hold that the respondent Society has obligation to discharge certain activities which are statutory or of public character. The concept of public duty cannot be construed in a vacuum. A private society, in certain cases, may be amenable to the writ jurisdiction if the writ court is satisfied that it is necessary to compel such society or association to enforce any statutory obligation or such obligations of public nature casting positive public obligation upon it.

36. As we perceive, the only object of ICID is for promoting the development and application of certain aspects, which have been voluntarily undertaken but the said activities cannot be said that ICID carries on public duties to make itself amenable to the writ jurisdiction under Article 226 of the Constitution."

48. We are in agreement with the aforesaid analysis by the High Court and it answers all the arguments raised by the learned Senior Counsel appearing for the appellant. The learned counsel argued that once the society is registered in India it cannot be treated as international body. This argument is hardly of any relevance in determining the character of ICID. The focus has to be on the function discharged by ICID, namely, whether it is discharging any public duties. Though much mileage was sought to be drawn from the function incorporated in the MoA of ICID, namely, to encourage progress in design, construction, maintenance and operation of large and small irrigation works and canals, etc. that by itself would not make it a public duty cast on ICID. We cannot lose sight of the fact that ICID is a private body which has no State funding. Further, no liability under any statute is cast upon ICID to discharge the aforesaid function. The High Court is right in its observation that even when object of ICID is to promote the development and application of certain aspects, the same are voluntarily

undertaken and there is no obligation to discharge certain activities which are statutory or of public character.

49. There is yet another very significant aspect which needs to be highlighted at this juncture. Even if a body performing public duty is amenable to writ jurisdiction, all its decisions are not subject to judicial review, as already pointed out above. Only those decisions which have public element therein can be judicially reviewed under writ jurisdiction. In *Praga Tools Corpn. v. C.A. Imanual* [(1969) 1 SCC 585] , as already discussed above, this Court held that the action challenged did not have public element and writ of mandamus could not be issued as the action was essentially of a private character. That was a case where the employee concerned was seeking reinstatement to an office.

50. We have also pointed out above that in *Saka Venkata Rao [Election Commission of India v. Saka Venkata Rao*, AIR 1953 SC 210] this Court had observed that administrative law in India has been shaped on the lines of English law. There are a catena of judgments in English courts taking same view, namely, contractual and commercial obligations are enforceable only by ordinary action and not by judicial review. In *R. (Hopley) v. Liverpool Health Authority* [2002 EWHC 1723 (Admin) : 2002 Lloyd's Med Rep 494] (unreported)(30-7-2002), Justice Pitchford helpfully set out three things that had to be identified when considering whether a public body with statutory powers was exercising a public function amenable to judicial review or a private function. They are: (i) whether the defendant was a public body exercising statutory powers; (ii) whether the function being performed in the exercise of those powers was a public or a private one; and (iii) whether the defendant was performing a public duty owed to the claimant in the particular circumstances under consideration.

51. Even in *Andi Mukta Sadguru [Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust v. V.R. Rudani,* (1989) 2 SCC 691] , which took a revolutionary turn and departure from the earlier views, this Court held that "any other authority" mentioned in Article 226 is not confined to statutory authorities or instrumentalities of the State defined under Article 12 of the Constitution, it also emphasised that if the rights are purely of a private character, no mandamus could issue.

52. It is trite that contract of personal service cannot be enforced. There are three exceptions to this rule, namely:

(i) when the employee is a public servant working under the Union of India or State;

(ii) when such an employee is employed by an authority/body which is a State within the meaning of Article 12 of the Constitution of India; and

(iii) when such an employee is "workmen" within the meaning of Section 2(s) of the Industrial Disputes Act, 1947 and raises a dispute regarding his termination by invoking the machinery under the said Act.

In the first two cases, the employment ceases to have private law character and "status" to such an employment is attached. In the third category of cases, it is the Industrial Disputes Act which confers jurisdiction on the Labour Court/Industrial Tribunal to grant reinstatement in case termination is found to be illegal."

19. The judgment of the Apex Court in K. K. Saksena (supra) has recently been followed by the Apex Court in Ramakrishna Mission (supra), where their

Lordships proceeded to observe as under in para 36 to 39:-

"36. For the reasons that we have adduced above, we hold that neither the Ramakrishna Mission, nor the hospital would constitute an authority within the meaning of Article 226 of the Constitution.

37. Before concluding, it would be necessary to also advert to the fact that while the learned Single Judge had come to the conclusion that the appellants are "State' within the meaning of Article 12, the Division Bench has not accepted that finding. The Division Bench ruled, as we have noticed earlier, that the appellants do not fall within the description of "State' under Article 12. This finding has not been challenged before this Court by the State of Arunachal Pradesh.

38. Even otherwise, we are clearly of the view that the tests which have been propounded in the line of authority of this Court in Ajay Hasia v Khalid Mujib Sehravardi9, Pradeep Kumar Biswas v Indian Institute of Chemical Biology 10 and Jatya Pal Singh v Union of India11 support the conclusion of the High Court that the appellants are not "State' within the meaning of Article 12 of the Constitution of India.

39. For the above reasons, we allow the appeal and set aside the judgment and order of the High Court dated 6 April 2018 in Writ Appeal No 25 (AP/2017). In consequence, the writ petition filed before the High Court namely W.P. (Civil) No 520 (AP/2015) shall stand dismissed. There shall be no order as to costs. 40 Pending application(s), if any, shall stand disposed of."

20. From the discussions, aforesaid, it is apparent that petitioners in respect of their employment offered by the privately managed unaided educational institution are subject to contract of personal service as per the common law rights and are not covered by any of the three exceptions noticed by the Apex Court in Executive Committee of Vaish Degree College (supra) which may justify a writ or direction by this Court to allow the petitioners to continue in the employment, in exercise of its writ jurisdiction. No writ, order or direction, therefore, is liable to be issued in favour of petitioners for enforcement of contract of personal service against the privately managed unaided educational institution. Writ petition lacks merit and is, accordingly, dismissed. No order is passed as to costs.

(2020)09ILR A129
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 02.01.2018

BEFORE

THE HON'BLE RAKESH SRIVASTAVA, J.

Service Single No. 31762 of 2017

Prem Prakash Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Vishva Nath Pratap Singh

Counsel for the Respondents:
C.S.C., Ajay Kumar

A. Service Law – Alteration of Date of Birth – At the fag end of the career, a party cannot be allowed to raise dispute regarding his date of birth. (Para 4 to 8)

There is nothing on record to indicate that prior to the filing of the present writ petition, the petitioner has ever approached the authorities for altering the date of birth recorded in his service record. (Para 3)

The very conduct of non-raising of an objection as to his date of birth, by the employee, who was in service for over decades, should be sufficient reason for the High Court, not to entertain the applications on grounds of acquiescence, undue delay and laches. (Para 8)

Writ petition dismissed. (E-4)

Precedent followed:

1. U.O.I. Vs Harnam Singh, (1993) 2 SCC 162 (Para 5)

2. Home Department Vs R. Kirubakaran, (1994) Supp (10) SCC 155 (Para 6)

3. St. of T.N. Vs T.V. Venugopalan, (1994) 6 SCC 302 (Para 7)

4. Burn Standard Company Ltd. Vs Dinabandhu Majumdar & anr., (1995) 4 SCC 172 (Para 8)

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

1. Heard Shri Vishva Nath Pratap Singh, learned counsel for the petitioner, learned Standing Counsel for respondent nos.1 and 3 and Shri Ajay Kumar, learned counsel for respondent no.4.

2. The petitioner was initially appointed as Collection Assistant on daily wage basis in the Uttar Pradesh Schedule Caste Finance and Development Nigam Limited (for short "the Nigam") on 27.05.1988. Subsequently, by an order dated 05.06.1989 of the Managing Director of the Nigam, the petitioner was appointed to the said post on ad hoc basis. The petitioner was required to furnish certain documents including certificates in support of his educational qualification. The petitioner filed his High School Certificate according to which his date of birth was 15.01.1958. Consequently, the same date of birth was recorded in his service record. Subsequently, the petitioner was regularised on the said post.

3. According to the date of birth recorded in his service record, the petitioner shall attain the age of superannuation on 14.01.2018. On 17.12.2017, just 28 days before his superannuation, the petitioner has preferred this writ petition seeking a direction to the respondents not to retire the petitioner on the basis of date of birth recorded in his service record. There is nothing on record to indicate that prior to the filing of the present writ petition, the petitioner has ever approached the authorities for altering the date of birth recorded in his service record.

4. By a catena of decisions of the Apex Court, it is now settled that at the fag end of the career, a party cannot be allowed to raise a dispute regarding his date of birth.

5. In *Union of India v. Harnam Singh, (1993) 2 SCC 162*, the Apex Court has laid down as under:

"15. In the instant case, the date of birth recorded at the time of entry into service as 20th May, 1934 had continued to exist, unchallenged between 1956 and September, 1991, for almost three and a half decades. The respondent had the occasion to see his service book at different places at different points of time. Never did he object to the recorded entry. The same date of birth was also reflected in the seniority lists of L.D.C. and U.D.C., which the respondent had admittedly seen. He remained silent and did not seek alteration till September, 1991 just a few months prior to the date of his superannuation. *Inordinate and unexplained delay or laches on the part of the respondent to seek the necessary correction would in any case have justified the refusal of relief to him.* Even if the respondent had sought

correction of the date of birth within five years after 1979, the earlier delay would not have non-suited him but he did not seek correction of the date of birth during the period of five years after the incorporation of Note 5 to FR 56 in 1979 either. *His inaction for all this period of about thirty-five years from the date of joining service, therefore precludes him from showing that the entry of his date of birth in service record was not correct."*

(emphasis supplied)

6. In *Home Department v. R. Kirubakaran, (1994) Supp (1) SCC 155,* the Apex Court cautioned the Courts to be extremely careful when the application for alteration of date of birth is filed on the eve of superannuation or near about that time. The relevant portion of the said report is being quoted below:

"9. .....As such whenever an application for alteration of the date of birth is made on the eve of superannuation or near about that time, the Court or the Tribunal concerned should be more cautious because of the growing tendency amongst a section of public servants, to raise such a dispute, without explaining as to why this question was not raised earlier. In the facts and circumstances of the case, it is not possible to uphold the finding recorded by the Tribunal."

(emphasis supplied)

7. In *State of T.N. v. T.V. Venugopalan, (1994) 6 SCC 302,* the Apex Court reiterated that a Government servant should not be permitted to correct the date of birth recorded in his service record at the fag end of his career. The relevant portion of the said report is reproduced below:

"7. ...The government servant having declared his date of birth as entered in the service register to be correct, would not be permitted at the fag end of his service career to raise a disputed as regards the correctness of the entries in the service register. It is common phenomenon that just before superannuation, an application would be made to the Tribunal or court just to gain time to continue in service and the Tribunal or courts are unfortunately unduly liberal in entertaining and allowing the government employees or public employees to remain in office, which is adding an impetus to resort to the fabrication of the record and place reliance thereon and seek the authority to correct it. When rejected, on grounds of technicalities, question them and remain in office till the period claimed for, gets expired."

(emphasis supplied)

8. In *Burn Standard Company Limited & Ors. v. Dinabandhu Majumdar & Anr, (1995) 4 SCC 172,* the Apex Court has reiterated that ordinarily this Court should not entertain a writ petition filed by an employee of the Government or its instrumentality towards the fag end of his service. The Apex Court in paragraph no. 10 has opined as under:

"10. Entertainment by High Courts of writ applications made by employees of the Government or its instrumentalities at the fag end of their services and when they are due for retirement from their services, in our view, is unwarranted. It would be so for the reason that no employee can claim a right to correction of birth date and entertainment of such writ applications for correction of dates of birth of some

employees of Government or its instrumentalities will mar the chances of promotion of their juniors and prove to be an undue encouragement to the other employees to make similar applications at the fag end of their service careers with the sole object of preventing their retirements when due. *Extraordinary nature of the jurisdiction vested in the High Courts under Article 226 of the Constitution, in our considered view, is not meant to make employees of Government or its instrumentalities to continue in service beyond the period of their entitlement according to dates of birth accepted by their employers, placing reliance on the so-called newly-found material. The fact that an employee of Government or its instrumentality who will be in service for over decades, with no objection whatsoever raised as to his date of birth accepted by the employer as correct, when all of a sudden comes forward towards the fag end of his service career with a writ application before the High Court seeking correction of his date of birth in his Service Record, the very conduct of non-raising of an objection in the matter by the employee, in our view, should be a sufficient reason for the High Court, not to entertain such applications on grounds of acquiescence, undue delay and laches.* Moreover, discretionary jurisdiction of the High Court can never be said to have been reasonably and judicially exercised if it entertains such writ application, for no employee, who had grievance as to his date of birth in his `Service and Leave Record' could have genuinely waited till the fag end of his service career to get it corrected by availing of the extraordinary jurisdiction of a High Court. *Therefore, we have no hesitation, in holding, that ordinarily High Courts should not, in exercise of its discretionary writ jurisdiction, entertain a writ application/petition filed by an employee of the Government or its instrumentality, towards the fag end-of his service, seeking correction of his date of birth entered in his Service and Leave Record' or Service Register with the avowed object of continuing in service beyond the normal period of his retirement."*

(emphasis supplied)

9. Turning to the facts and circumstances of the case at hand, admittedly the petitioner entered in the service of Nigam in the year 1989 and the date of birth entered in the service record was on the basis of High School certificate submitted by him. It is not the case of the petitioner that his service book was never shown to him or that the petitioner did not know about the date of birth entered into his service record.

10. Even though the petitioner has put in 28 years of service, before approaching this Court, the petitioner has neither disputed the correctness of his serviced record nor has he been able to state any cogent reason for the change in the date of birth entered in his service record.

11. In view of the consistent legal position, the relief prayed for cannot be granted. The petition is devoid of merit and is accordingly dismissed.

(2020)09ILR A132
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.04.2020

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.

Writ-A No. 39283 of 2004

Ramdhani & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri S.A. Lari, Sri Digvijay Tiwari

Counsel for the Respondent:
C.S.C., Sri K.K. Roy, Sri Rajendra Srivastava, Sri Rakesh Kumar Srivastava, Sri Shyam Krishna Gupta

A. Service Law –U.P. Basic Education Act, 1972 - Civil Service Regulation: Regulation 368- Regulations framed under U.P. Basic Education Act, 1972- Regulation 44- Government Order No.3-1152/Vas-915-86 dated 01.07.1989- Government Orders dated 14.06.1978, 30.06.1996, 17.06.1996- Pension –Employee appointed on fixed pay/salary -Difference in the nature of appointment of temporary employee vis-à-vis any employee who is appointed on fixed salary – a temporary appointment can be made against a permanent or temporary post, whereas for the appointment on fixed pay there is no requirement of a post. (Para 11)

Temporary or substantive services rendered by work charged employees will qualify for pension when they are given monthly salary on regular pay scale and are also allowed to cross efficiency bar. In other words, when there is no qualitative difference between them and other employees of regular establishment. (Para 14)

The petitioners in the present case were appointed on fixed monthly salary. The appointments were neither on substantive posts nor were given regular pay scales. Therefore, it was held that the services rendered by the petitioners on Fixed Pay as Class IV employee will not be treated as qualifying service. (Para 6, 16)

Writ Petition dismissed. (E-4)

Precedent followed:

1. St. of U.P. & ors. Vs Gaya Ram, 2009 (2) ESC 1145 (All.) (Para 11, 13)

2. Basic Shikhsha Parishad . & ors. Vs Ram Awadh & ors., Special Appeal No 536 of 2011, decided on 17.01.2013 (Para 13)

3. District Basic Education Officer . & ors. Vs Ram Awadh Yadav and another, Special Appeal No. 1462 of 2011, decided on 02.09.2015 (Para 13)

Precedent distinguished:

1. Prem Singh Vs St. of U.P. & ors., Civil Appeal No. 6798 of 2019, decided on 02.09.2019 (Para 14)

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

1. Heard Sri Digvijay Tiwari, learned counsel for learned counsel for petitioners, learned Standing Counsel for State-respondent-1 and Sri Shyam Krishna Gupta, learned counsel for respondent-2.

2. This writ petition under Article 226 of Constitution of India has come up before this Court at the instance of two petitioners namely, Ramdhani son of Shri Mahesh and Mallu son of Ghaur, who have prayed for issue of a writ of mandamus commanding respondents to pay pension to petitioners from the date of their retirement and continue to pay the same, month to month, as and when it falls due. Petitioners have also prayed for a writ of mandamus commanding respondents to pay Life Insurance Policy amount of petitioner-2 with interest.

3. Facts in brief, giving rise to present writ petition, are, that "Junior High School" of Avra Chauro, Area Baitalpur, District-Deoria is a recognized "Senior Primary School" governed by the provisions of U. P. Basic Education Act, 1972 (hereinafter

referred to as "Act, 1972") and Rules framed thereunder. Petitioner-1 was appointed as Class IV employee on 01.10.1972 and petitioner-2, similarly, was appointed as Class IV employee on 01.01.1957. After completing 31 and 47 years of service, petitioner-1 attained age of superannuation and retired on 31.03.2003 while petitioner-2 retired on 03.08.2001. After retirement, petitioner-2 was paid a sum of Rs.4538/- towards Insurance amount on 29.10.2003.

4. Petitioner-2 was paid fixed salary from 01.01.1957 to 30.11.1997 and thereafter the prescribed pay scale of Rs.750-940/- with effect from 01.12.1997. Petitioner-1 was given fixed pay up to 31.10.1997 and thereafter he was placed in prescribed pay scale w.e.f. 01.11.1997.

5. Since, pensionary benefits were not given, petitioners made representation dated 01.07.2003. Seeking clarification, whether pension is payable to petitioner-2, a letter was sent by District Basic Education Officer, Deoria (hereinafter referred to as "DBEO") to Deputy Director, Secretariat Training and Management Institute, Gorakhpur Branch, Gorakhpur informing that petitioner-2 was appointed on 01.01.1957 on Class IV post (Peon) and paid fixed pay of Rs.24/- per month w.e.f. 01.01.1957, Rs.34/- per month w.e.f. 01.01.1976, Rs.165/- per month w.e.f. 01.04.1979, Rs.305/- per month w.e.f. 01.11.1982, Rs.750/- per month w.e.f. 01.01.1986 and Rs.2550/- per month w.e.f. 01.01.1996, besides dearness allowance. Petitioner-2 was placed in regular pay scale vide order dated 01.12.1997 and his pay was fixed as Rs.2550/- per month. He retired on 30.08.2001. He was declared permanent w.e.f. 01.12.1998. As per Regulation 368 of Civil Service Regulation (hereinafter referred to as "CSR"), no pension is payable unless government servant is permanent. In the present case, petitioner-2 became permanent on 01.12.1998 and has not completed 10 years of service till date of his retirement, as a confirmed employee. However, vide Government Order No.3-1152/Vas-915-86 dated 01.07.1989 it has been provided that those who have completed 10 years of regular service, shall be paid pension as payable to permanent employees. In these circumstances, DBEO, Deoria sought clarification whether pension is payable to petitioner-2 or not.

6. Contesting writ petition, counter affidavit has been filed on behalf of respondents sworn by Sri Awadhesh Narayan, Basic Shiksha Adhikari, Deoria. It is said that petitioner-1 was appointed in Primary School maintained by Basic Education Board (hereinafter referred to as "Board") on 01.10.1972 on fixed salary of Rs.20/- per month. In District-Deoria there were 100 sanctioned posts of Peon in Junior High School, run and controlled by Board. Government orders provided that appointment of Peon on fixed salary cannot be made on sanctioned posts in case vacancies are available. Petitioner-1 was appointed on sanctioned post after permanent vacancy occurred on 01.01.1998 and on completion of 60 years of age retired on 31.03.2003. Similarly, petitioner-2 was appointed on fixed salary of Rs.20/- per month on 01.01.1957 and in 1997 he was given appointment against sanctioned post. He retired after completion of 60 years of age in 2001. In respect of enquiry made, it is said that State Government has provided that those Class IV employees who were appointed on fixed pay are not regular employees hence not entitled to pensionary benefits. Finance and Accounts

Officer, Basic Shiksha Parishad, Deoria by letter dated 20.07.2004 informed that since petitioners have not completed 10 years of service on substantive vacancies in regular pay scale, hence, not entitled to pension. There are 100 sanctioned posts of Peon in District-Deoria whereagainst appointments could have been given on fixed salary on vacant substantive posts. However, pension is payable after completion of 10 years of regular service.

7. In rejoinder affidavit filed by petitioner, facts already stated are virtually reiterated and it is said that petitioners having worked continuously, followed by substantive appointments, their entire service is liable to be computed for pension and otherwise view taken by respondents is incorrect.

8. Supplementary affidavit has also been filed bringing on record Government Orders (hereinafter referred to as 'G.O.') dated 14.06.1978, 30.06.1996 and 17.06.1996.

9. Learned Standing Counsel said that since only G.O.'s have been placed on record, no supplementary counter affidavit would be necessary. These are matters of record and Court may examine the same.

10. The only issue up for consideration in this writ petition, therefore, is "Whether service rendered by petitioners on Fixed Pay is liable to be computed as qualifying service for the purpose of pension."

11. This issue I find has been specifically considered by Division Bench consisting of Hon'ble Ashok Bhushan, J. (as His Lordship then was) and Hon'ble Arun Tandon, J., in **State of U. P. and others vs. Gaya Ram, 2009 (2) ESC 1145 (All)**. Therein Gaya Ram was appointed as Class IV employee in Junior High School/Senior Primary School on Fixed Pay. He was brought in regular pay scale of Rs.750-940 by order dated 30.111995. After attaining age of superannuation on 31.12.2004 i.e. on the date of retirement, he had not completed 10 years of regular service in regular pay scale. Finance and Account Officer, Basic Education, Sonebhadra, vide letter dated 02.06.2005, informed Basic Shiksha Adhikari that service rendered on Fixed Pay, prior to appointment on regular pay scale, will not be treated as qualifying service, hence, Gaya Ram was not entitled for pension. Gaya Ram filed a writ petition claiming that his entire service be counted as qualifying service. Learned Single Judge returned a finding in favour of Gaya Ram, hence, State came in intra Court appeal. Division Bench held that as per Rules a Class IV employee working under the control of Basic Shiksha Parishad having rendered 10 years qualifying service, is eligible for grant of pension. This fact was not disputed that a Class IV employee of Junior High School who has put in 10 years of qualifying service was entitled for pension. Under Regulation 44 of Regulations framed under U. P. Basic Education Act, 1972 (hereinafter referred to as "U.P. Act, 1972"), temporary and officiating services, if on the same post or another post by incumbent, can be added as qualifying service. However, Court held that Regulation 44 was not applicable in the case, since, services of Gaya Ram as Class IV employee on Fixed Pay could not be termed as temporary or officiating service but it was an employment on fixed emoluments. Court explained difference in the nature of appointment of temporary employee vis-a-vis any employee who is

appointed on fixed salary, and said as under :

"15. ***There is a difference in the nature of the appointment of temporary employee vis-a-vis an employee who is appointed on fixed salary.*** *A temporary appointment can be made against a permanent or temporary post,* ***whereas for the appointment on fixed pay there is no requirement of a post. Thus, there is a major difference in the nature of appointment of two classes of employees.*** *Thus, the judgment in the case of Hans Raj Pandey (supra), insofar as it holds that the period of service rendered on fixed pay, prior to regularisation, shall also be added in his qualifying service, cannot be upheld.*

16. Learned Counsel for the Respondent submits that in the service-book of the Petitioner the word "temporary" has been mentioned, he was a temporary employee. Petitioner has also produced photo copy of the service-book, which we have perused. From the perusal of the service-book it is clear that the Respondent was initially appointed on fixed emolument of Rs.165 per month and the said fixed emolument was subsequently increased w.e.f. 1.1.1986 to Rs.750 which emolument was paid till he was regularised. While fixing the scale w.e.f. 1.1.1986 it has been mentioned that his salary was Rs.750. In the order dated 2.6.2005 the Finance and Account Officer has also noted that the Respondent, prior to regularisation, was working on fixed pay of Rs.750."

(emphasis added)

12. In the present case, it is not in dispute that petitioners were initially appointed as Class IV employee on fixed pay.

13. Thus the above law squarely applied to this case. Above Division Bench in **State of U.P. vs. Gaya Ram (supra)** has been followed in **Special Appeal No.536 of 2011, Basic Shiksha Parishad and others vs. Ram Awadh and others** decided **on 17.01.2013** and by another Division Bench in **Special Appeal No.1462 of 2011, District Basic Education Officer and others vs. Ram Awadh Yadav and another, decided on 02.09.2015.**

14. Learned counsel for appellant, however, placed reliance on Supreme Court's recent judgment, in **Prem Singh vs. State of U.P. and others, Civil Appeal No.6798 of 2019, decided on 02.09.2019,** wherein a Three Judges Bench of Supreme Court has held that even service rendered in Work charge establishment will qualify for pension, but I find that there was no issue that employees in Work Charge establishment were appointed on fixed pay. When they were substantively appointed, they were given regular pay scale. On the contrary, para 22 of the judgment shows that Advocate General appearing for the State of U. P. himself contended that employees engaged in work charge were temporary and, therefore, it is clear that they were not employees who were appointed initially on fixed pay and thereafter they were given appointment in regular pay scale. The only issue was whether temporary or substantive service rendered in Work Charge will qualify for pension or not and that has been answered by Supreme Court holding that services rendered by work charged employee will qualify for pension. Work charge employees before Supreme Court were given monthly salary and they were also allowed to cross efficiency bar. Court, therefore, found no qualitative difference between them and other employees of

regular establishment. Observations made in paragraph 29 of judgment are reproduced hereinunder :

".....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-charged employment has been misused by offering the employment on exploitative terms for the work which is regular and perennial in nature. The work-charged employees had been subjected to transfer from one place to another like regular employees as apparent from documents placed on record. In Narain Dutt Sharma & Ors. v. State of Uttar Pradesh & Ors. (CA No._____2019 @ SLP (C) No.5775 of 2018) the appellants were allowed to cross efficiency bar, after ''8' years of continuous service, even during the period of work-charged services. Narain Dutt Sharma, the appellant, was appointed as a work-charged employee as Gej Mapak w.e.f 15.9.1978. 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.*

(emphasis added)

15. Reasons for considering work charge services as qualifying service has been given in paragraphs 32, 33 and 34, which read as under :

"32. The question arises whether the imposition of rider that such service to be counted has to be rendered in-between two spells of temporary or temporary and permanent service is legal and proper. We find that once regularization had been made on vacant posts, though the employee had not served prior to that on temporary basis, considering the nature of appointment, though it was not a regular appointment it was made on monthly salary and thereafter in the pay scale of work-charged establishment the efficiency bar was permitted to be crossed. It would be highly discriminatory and irrational because of the rider contained in Note to Rule 3(8) of 1961 Rules, not to count such service particularly, when it can be counted, in case such service is sandwiched between two temporary or in-between temporary and permanent services. There is no rhyme or reason not to count the service of work-charged period in case it has been rendered before regularisation. In our opinion, an impermissible classification has been made under Rule 3(8). It would be highly unjust, impermissible and irrational to deprive such employees benefit of the qualifying service. Service of work-charged period remains the same for all the employees, once it is to be counted for one class, it has to be counted for all to prevent

discrimination. The classification cannot be done on the irrational basis and when respondents are themselves counting period spent in such service, it would be highly discriminatory not to count the service on the basis of flimsy classification. The rider put on that work-charged service should have preceded by temporary capacity is discriminatory and irrational and creates an impermissible classification.

33. As it would be unjust, illegal and impermissible to make aforesaid classification to make the Rule 3(8) valid and non discriminatory, we have to read down the provisions of Rule 3(8) and hold that services rendered even prior to regularisation in the capacity of work-charged employees, contingency paid fund employees or non- pensionable establishment shall also be counted towards the qualifying service even if such service is not preceded by temporary or regular appointment in a pensionable establishment.

34. In view of the note appended to Rule 3(8), which we have read down, the provision contained in Regulation 370 of the Civil Services Regulations has to be struck down as also the instructions contained in Para 669 of the Financial Handbook."

16. Therefore, bound by Division Bench judgments of this Court, noticed above, I have no option but to hold that services rendered by petitioners on Fixed Pay as Class IV employee will not be treated as qualifying service, hence, relief prayed by petitioners, cannot be granted.

17. Writ petition lacks merit. It is dismissed accordingly. Interim order, if any, stands vacated.

(2020)09ILR A138
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.08.2018

BEFORE
THE HON'BLE B. AMIT STHALEKAR, J.
THE HON'BLE JAYANT BANERJI, J.

Writ A No. 53897 of 2017

Dashrath Singh Yadav ...Petitioner
Versus
The Central Administrative Tribunal, Allahabad & Ors. ...Respondents

Counsel for the Petitioner:
In Person

Counsel for the Respondents:
Sri Devendra Pratap Singh

A. Service Law – Departmental Enquiry – Penalty - P & T Manual Volume – III: Rule 129; Central Civil Services (Classification, Control and Appeal) Rules, 1965; Education Code: Article 80.

Jurisdiction of Tribunal – Tribunal cannot sit in review over the previous order of the Tribunal while deciding a fresh Original Application - Tribunal in a previous order dated 28.08.2009 had quashed and set aside order dated 22.4.1991 (penalty order of disciplinary authority, by which the pay was reduced by four stages) as well as the appellate order dated 18.01.1996 and remitted the matter to the appellate authority to decide the appeal. Appellate authority rejected the appeal and upheld the penalty order vide order dated 26.11.2009. (Para 6-8)

In the order impugned dated 13.09.2017, the Tribunal held that the previous Tribunal while passing the order dated 28.08.2009 had never questioned the order of the disciplinary authority dated 22.04.1991 and was very clear in its mind that it was only quashing the appellate order and had only remitted the matter back to the appellate authority to reconsider the appeal of the applicant. The

Tribunal further held that the petitioner also never challenged the proceedings before the appellate authority and therefore, it was not open for him to raise this issue before the Tribunal. (Para 11)

The Court held that **it was not permissible for Tribunal to sit in review over the previous order of the Tribunal dated 28.8.2009, while deciding a fresh Original Application** and there was no review pending before the Tribunal against the previous order dated 28.8.2009. Once the Tribunal in the previous proceedings, vide order dated 28.8.2009 had quashed the penalty order dated 22.4.1991, nothing remained to be remitted to the appellate authority as any pending appeal before the appellate authority would have as a consequence become infructuous once the punishment order itself stood quashed. Order of appellate authority, which was otherwise illegal and a nullity, would not become valid, if petitioner did not challenge the proceedings before the appellate authority. (Para 12, 13)

B. Applicability of the provisions of Rule 129 of the P & T Manual, Volume-III to the proceedings before Kendriya Vidyalaya Sangthan - The said rule has no application to Kendriya Vidyalaya Sangthan, which is governed by its own rules and regulations and the Central Civil Services (Classification, Control and Appeal) Rules, 1965. (Para 13)

The Court finds it unjustified to remit the matter back to the disciplinary authority as the matter has been travelling in and out of the portals of the Tribunal and of this Court since 1991 and the petitioner who is now 64 years of age has also retired from service. Order dated 13.09.2017 has been quashed being wholly illegal and without jurisdiction and the petitioner who has retired and cannot be reinstated in service, is held entitled for regularization of the period he was under suspension with all consequential benefits. (Para 14, 16)

Writ Petition allowed. (E-4)

Present petition challenges order dated 13.09.2017, passed by the Central Administrative Tribunal, Allahabad.

(Delivered by Hon'ble B. Amit Sthalekar, J.)

1. The petitioner is appearing in person and is seeking quashing of the order dated 13.9.2017 passed by the Central Administrative Tribunal, Allahabad with a consequential direction to the respondents to pay him arrears of salary for the period he was under suspension alongwith dearness allowance at the current rate and also interest and also to enhance the pensionary benefits including fixation of amount of pension, gratuity, leave encashment etc. by treating the period of suspension as treated on duty and increments for the same.

2. Briefly stated the case of the petitioner is that when he was posted as Librarian in the Kendriya Vidyalaya, Thawe, Gopalganj he was transferred to Kendriya Vidyalaya, Phulpur, Allahabad and was again transferred to Kendriya Vidyalaya, IDPL, Virbhadra, Rishikesh. On 30.08.1988 he was placed under suspension but was allowed to report to the office everyday and sign the attendance register. It is stated that when the departmental enquiry was not being initiated he filed Writ Petition No.11763 of 1989 seeking quashing of the order of suspension. It is also stated that during the pendency of the writ petition an order was passed by the Assistant Commissioner, Kendriya Vidyalaya Sangathan, Lucknow on 22.04.1991 by which the pay of the petitioner was reduced by four stages from Rs.1,750/- to Rs.1,560/- with cumulative effect for a period of two years affecting his future increment of pay also on the basis of an enquiry report dated 23.04.1990. The petitioner filed departmental appeal which was not decided. Thereafter he filed Writ Petition No.33295 of 1995 and the same was disposed of by the High Court by order

dated 22.11.1995 with a direction to the respondents to decide the petitioner's departmental appeal. It is stated that the appellate authority finally passed an order dated 22.11.1995 deciding the petitioner's appeal. The petitioner then filed Writ Petition No.14175 of 1996. The writ petition was transferred to the Uttrakhand High Court, Nainital and again transferred back to the Central Administrative Tribunal, Allahabad Bench and numbered as T.A. No.02 of 2005. The Tribunal by its judgment and order dated 28.08.2009 passed in the T.A. No.02 of 2005 quashed the order dated 22.04.1991 of the disciplinary authority as well as the appellate order dated 18.01.1996 and remitted the matter to the appellate authority to reconsider the appeal. In pursuance of the direction of the Tribunal the appellate authority reconsidered the appeal of the petitioner and by order dated 26.11.2009 rejected the appeal upholding the penalty of reduction of pay by four stages in terms of the previous penalty order dated 22.04.1991.

3. The case of the petitioner before the Tribunal was that once the Tribunal while deciding T.A. No.02 of 2005 had by its judgment and order dated 28.08.2009 quashed the penalty order of the disciplinary authority dated 22.04.1991 nothing remained to be decided in the departmental appeal and therefore, the order of the appellate authority dated 26.11.2009 was a nullity. Reference was made to Rule 129 of the P & T Manual Volume-III, which provides that the appellate order replaces the punishment order, therefore, if the appellate order is set aside for procedural defects, the punishment order will also simultaneously stand quashed and in such a case, it would be necessary to initiate de novo proceedings against the concerned officer. The extract of the instructions and Rule 128 of the P & T Manual, Volume-III has been filed as Annexure-3 to the writ petition.

4. The Tribunal has, however held that while quashing the appellate order dated 18.01.1996 the previous bench of the Tribunal had also quashed the order dated 22.04.1991 of which the petitioner was trying to take advantage whereas the Tribunal had in fact only remitted the matter back to the appellate authority to reconsider the appeal of the petitioner within a period of three months. The Tribunal also held that the previous bench of the Tribunal while deciding T.A. No.02 of 2005 was very clear in its mind that it was quashing the appellate authority order which was a cryptic and non-speaking order and therefore, the Tribunal was amply justified in quashing the appellate order and to direct the appellate authority to reconsider the appeal of the petitioner and therefore, there was no occasion for the Tribunal to quash the order of the disciplinary authority and even if it has done so it is clear that the Tribunal only intended to quash the appellate authority order. So far as the applicability of Rule 129 of the P & T Manual, Volume-III is concerned, the Tribunal held that the same is not applicable in Kendriya Vidyalaya Sangthan as Kendriya Vidyalaya Sangthan is governed by its own rules and regulations and the Central Civil Services (Classification, Control and Appeal) Rules, 1965 are applicable in the case of the employees of Kendriya Vidyalaya Sangthan by virtue of provisions of Article 80 of the Education Code. The Tribunal accordingly dismissed the claim petition/original application filed by the petitioner.

5. We have heard the petitioner in person and Shri D.P. Singh, learned counsel for the respondents

6. The petitioner has reiterated his case before the Tribunal by submitting that once the Bench of the Tribunal while deciding T.A. No.02 of 2005 had quashed the order of the disciplinary authority dated 22.04.1991 as well as the appellate order dated 18.01.1996 it had only remitted the matter to the appellate authority to decide the appeal since by the quashing of the penalty order no appeal remained pending before the Appellate Authority.

7. Shri D.P. Singh, learned counsel for the respondents, on the other hand, sought to justify the order of the Tribunal and submitted that the intention of the Tribunal while deciding T.A. No.02 of 2005 was very clear that it was not quashing the penalty order of the disciplinary authority dated 22.04.1991 rather it was setting aside the appellate order dated 18.01.1996, in as much as in its operative portion the direction was issued to the appellate authority to reconsider the petitioner's appeal.

8. We are not inclined to accept the submission of the learned counsel for the respondents. The operative portion of the order of the Tribunal dated 28.08.2009 deciding T.A. No.02 of 2005 reads as under:

"We have also noticed against the order dated 2.8.2006 passed by the Hon'ble High Court, Allahabad, the respondents have filed Special Appeal before Hon'ble Supreme Court and the matter is still subjudice there. Having given our thoughtful consideration to the pleas advanced by the parties counsel, we are finally of the view that the appellate order dated 18.1.1996 passed by the appellate authority is cryptic non-speaking and not according to law. We accordingly allow the O.A. partly and quash and set aside the order dated 22.4.1991 and 18.1.1996 (Annexure No.2 and 3) respectively. The matter is remitted back to the Appellate Authority to reconsider the appeal of the appellant within a period of three months from the date of receipt of copy of this order."

9. There is absolutely no ambiguity so far as the order dated 28.08.2009 is concerned in that the Tribunal had quashed and set aside the order dated 22.04.1991 as well as the appellate order dated 18.01.1996. Once the penalty order had been set aside there remained nothing thereafter for the appellate authority to decide since the appellate authority could only decide a pending appeal and once the penalty order itself was quashed any pending appeal would have become infructuous unless there was a direction by the Tribunal to the disciplinary authority to pass a fresh order and if a fresh order had been passed by the disciplinary authority the petitioner would have had a fresh right to file an appeal before the appellate authority.

10. In the order dated 13.09.2017 impugned herein the Tribunal has sought to clarify the earlier order of the Tribunal dated 28.08.2009 and has held as under:

"8. After giving thoughtful consideration to the written submissions made by both the parties as also the pleadings available on records, we are of the view that the stand taken by the applicant is not justified as it is not disputed that the T.A. No.02/2005 was decided by this Tribunal vide its Order dated 28.08.2009, the operative part of the said Order reads as under:-

"We have also noticed against the order dated 2.8.2006 passed by the Hon'ble

High Court, Allahabad, the respondents have filed Special Appeal before Hon'ble Supreme Court and the matter is still subjudice there. Having given our thoughtful consideration to the pleas advanced by the parties counsel, we are finally of the view that the appellate order dated 18.1.1996 passed by the appellate authority is cryptic not-speaking and not according to law. We accordingly allow the O.A. partly and quash and set aside the order dated 22.4.1991 and 18.1.1996 (Annexure No.2 and 3) respectively. The matter is remitted back to the Appellate Authority to reconsider the appeal of the appellant within a period of three months from the date of receipt of copy of this order."

Both the parties have relied upon the aforesaid operative portion of the said Order. We also observe that the Tribunal while passing the aforesaid Order dated 28.08.2009 in T.A. No.02/2005 specifically noted that the order of the appellate authority dated 18.01.1996 was cryptic, not-speaking and not according to the law and this Tribunal allowed the said OA partly. However, while quashing the order dated 18.1.1996, the Tribunal also mentioned quashing of order dated 22.4.1991 and the applicant in fact wants to take the benefit of quashing of order dated 22.4.1991. However, this Tribunal while passing the aforesaid Order further specifically held that 'the matter is remitted back to the Appellate Authority to reconsider the appeal of the applicant within a period of three months from the date of receipt of copy of this order.' Meaning thereby that this Tribunal was very much clear in their mind that they were quashing the appellate authority's order, which was a cryptic, non-speaking and not according to law. Therefore, this Tribunal was amply justified to quash the appellate authority's order and to direct the appellate authority to reconsider the appeal of the applicant and further that this Tribunal while deciding the said OA has neither questioned the order passed by the disciplinary authority nor anywhere is it stated that it is not in accordance with law. Hence, there was no question for the Tribunal to quash the order of the disciplinary authority. Even if it is mentioned in the Order, it is amply clear that this Tribunal only intended to quash the appellate authority's order and for that reason, the matter was remitted back to the appellate authority only to reconsider the appeal of the applicant."

11. The Tribunal has held that the previous Tribunal while passing the order dated 28.08.2009 had never questioned the order of the disciplinary authority dated 22.04.1991 and was very clear in its mind that it was only quashing the appellate order and had only remitted the matter back to the appellate authority to reconsider the appeal of the applicant. The Tribunal further held that the petitioner also never challenged the proceedings before the appellate authority and therefore, it was not open for him to raise this issue before the Tribunal.

12. In fact we find that the Tribunal while passing the impugned order dated 13.09.2017 was virtually sitting in review over the previous order of the Tribunal dated 28.08.2009 passed in T.A. No.02 of 2005 which was not permissible while deciding a fresh Original Application and there was no review pending before the Tribunal against the previous order dated 28.08.2009.

13. In our opinion, the findings recorded by the Tribunal in this regard are

thoroughly misconceived and rather in the nature of a review of its earlier judgment and order dated 28.08.2009 passed in another claim proceeding. Once the Tribunal in the previous proceedings, while passing the order dated 28.08.2009 had quashed the penalty order dated 22.04.1991 nothing remained to be remitted to the appellate authority as any pending appeal before the appellate authority would have as a consequence become infructuous once the punishment order itself stood quashed. May be the petitioner who is appearing in person had not challenged the proceedings before the appellate authority that would not validate the order of the appellate authority which was otherwise illegal and a nullity. So far as the applicability of the provisions of Rule 129 of the P & T Manual, Volume-III to the proceedings before Kendriya Vidyalaya Sangthan is concerned, we are satisfied that the said rule has no application to Kendriya Vidyalaya Sangthan, which is governed by its own rules and regulations and the Central Civil Services (Classification, Control and Appeal) Rules, 1965.

14. We in fact note that the department had never approached the High Court challenging the order dated 28.08.2009 nor did it file any application for review or for clarification of the said order with regard to the quashing of the punishment order dated 22.04.1991. The respondents also in their counter affidavit have not disclosed what was the nature of the charges against the petitioner which resulted in his dismissal from service. The charge sheet has not been filed with the counter affidavit nor has any enquiry report been placed before us. We find that the matter has been travelling in and out of the portals of the Tribunal and of this Court since 1991 and the petitioner is now 64 years of age has also retired from service and that it would not serve the ends of justice to remit the matter back to the disciplinary authority. Even otherwise, as already noted above, the previous order of the Tribunal was never put to challenge by the respondents, therefore our considered view is that the matter should be given a quietus now.

15. We, therefore find that the order of the Central Administrative Tribunal, Allahabad dated 13.09.2017 is wholly illegal and without jurisdiction and the same is accordingly quashed.

16. We also find that since the penalty order dated 22.04.1991 had itself been set aside by the Tribunal in previous proceedings and thereafter there were no proceedings pending before the Tribunal nor was any direction given to proceed afresh in the departmental proceedings at any stage the petitioner who has long retired and cannot be reinstated in service, will nevertheless be entitled for regularization of the period he was under suspension with all consequential benefits. The respondents shall settle all the consequential benefits, financial benefits and retiral dues of the petitioner within a period of four months from the date of receipt of the certified copy of this order.

17. The writ petition stands **allowed.**

18. There shall be no order as to cost.

(2020)09ILR A143
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.11.2019

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Writ A No. 55658 of 2004

Smt. Abha Singh ...Petitioner
Versus
The State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Radha Kant Ojha, Sri Shailendra Kumar Sharma, Sri A.R. Dwivedi

Counsel for the Respondents:
C.S.C., Sri P.K. Bhardwaj, Sri Umesh Vats

A. Service Law U.P. Basic Education Act, 1972 - Uttar Pradesh Junior High Schools (Payment of Salaries of Teachers and Other Employees) Act, 1978 - Section 10 - U.P. Recognized Basic Schools (Junior High Schools) Recruitment and Conditions of Service of Teachers) Rules, 1978 - Rules 4, 5 - Payment of salary –Whenever a person claims salary from State Exchequer, it is obligation upon such person to prove that he has been validly appointed on the post in question and, therefore, entitled to salary. (Para 16)

For a valid appointment to the post of Teacher in a recognized Junior High School one must possess requisite minimum qualification prescribed in Rule 4 and payment of salary shall be liability of State Government. S.10 contemplates a valid appointment in the eyes of law before making State Government liable for payment of salary. (Para 12)

B. Service Law – Appointment - Appointment of a person who does not possess requisite qualification prescribed under Statute is void ab-initio. It is illegal since inception. It does not confer any right upon such person to hold the post. (Para 18)

Petitioner did not dispute those qualifications namely, B.T.C., C.T., J.T.C. and H.T.C. or equivalent qualifications would not include L.T., therefore, it cannot be said that petitioner possessed requisite minimum qualification prescribed in Rule-4 of Rules, 1978 and without such appointment, Rule-5 put a complete embargo on appointment of any person on the post of Assistant Teacher in a Junior High School. (Para 17)

Writ Petition dismissed. (E-4)

Precedent followed:

1. Pramod Kumar Vs U.P. Secondary Education Services Commission & ors., (2008) 7 SCC 153 (Para 16, 20)

2. Mohd. Sartaj & anr. Vs St. of U.P. & ors., (2006) 2 SCC 315 (Para 21)

3. Rakesh Kumar Sharma Vs Govt. of NCT of Delhi & ors., (2013) 11 SCC 58 (Para 25)

4. St. of U.P. & ors. Vs Anand Kumar Yadav & ors., (2017) 8 SCALE 220 (Para 26)

5. Ashok Kumar Sonkar Vs U.O.I. & ors, (2007) 4 SCC 54 (Para 27)

Precedent distinguished:

1. Committee of Management Vs St. of U.P., (2009) 1 UPLBEC 381 (Para 22)

Present petition challenges order dated 20.06.2013, passed by District Basic Education Officer, Jaunpur.

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

1. Heard Sri Radha Kant Ojha, learned Senior Advocate assisted by Sri Shailendra Kumar Sharma, learned counsel for petitioner, learned Standing Counsel for respondents- 1 to 4 and Sri Umesh Vats, learned counsel for respondent-5.

2. This writ petition under Article 226 of Constitution of India has been filed by sole petitioner Smt. Abha Singh being aggrieved by order dated 20.06.2013 (Annexure-19 to the writ petition) passed by District Basic Education Officer, Jaunpur *(hereinafter referred to as "DBEO")* i.e. respondent-3 holding that petitioner did not possess minimum qualification on the post of Assistant Teacher in a Junior High School on the date of her appointment, hence, her appointment is patently illegal and approval granted to her appointment on 27.01.2003 stands

cancelled. Petitioner has also prayed for issue of a writ of mandamus directing respondents to pay her salary as and when it falls due.

3. Facts, in brief, giving rise to present writ petition are that Naraini Devi Girls Junior High School, Dhanuha Rampur, District Jaunpur *(hereinafter referred to as "School")* is a recognized Junior High School by Uttar Pradesh Board of Basic Education *(hereinafter referred to as "Basic Board")* and is governed by the provisions of U.P. Basic Education Act, 1972 (hereinafter referred to as "Act, 1972"). School is also in grant-in-aid list and for the purpose of payment of salary to teaching and non-teaching staff, it is governed by Uttar Pradesh Junior High Schools (Payment of Salaries of Teachers and Other Employees) Act, 1978 *(hereinafter referred to as "Act, 1978")*. Terms and conditions of recruitment and appointment of Teachers of Junior High School are governed by U.P. Recognized Basic Schools (Junior High Schools) (Recruitment and Conditions of Service of Teachers) Rules, 1978 *(hereinafter referred to as the "Rules, 1978").*

4. School had nine sanctioned posts comprising of one Head Mistress, four Assistant Teachers, one Clerk and three Class-IV employees. One post of Assistant Teacher fell vacant on 30.01.1998 since incumbent, holding the post, was appointed as Head Mistress. Management of School sent a letter dated 07.12.2000 requesting DBEO to grant permission to fill in substantive vacancy on the post of Assistant Teacher. Said permission was granted by DBEO vide letter dated 05.03.2001. Vacancy was advertised and put on notice board by Management of School on 08.03.2001 inviting applications of eligible persons. Petitioner applied. She and four others were interviewed by Selection Committee who placed petitioner at Serial No.1 in merit list. Qualifications possessed by petitioner are High School (1978), Intermediate (1980), Bachelor of Arts (1982), Master of Art (1984) and Licentiates Teacher (1998). Ultimately, letter of appointment was issued to petitioner on 08.05.2001 appointing her as Assistant Teacher in the School. Petitioner joined on 10.05.2001. Aforesaid appointment was also approved by DBEO vide letter dated 27.01.2003 (Annexure-12 to the writ petition). Petitioner also received salary as Assistant Teacher from 27.01.2003 to January, 2004. A letter was issued by Regional Director of Education (Basic) on 20.05.2004 that no payment of salary to the Teachers be made who are appointed newly after 20.01.2003. Pursuant thereto, salary of petitioner was stopped. Whereagainst, she moved representation dated 05.10.2004 and 16.10.2004 and thereafter filed present writ petition.

5. This writ petition was entertained on 23.12.2004 when this Court passed following interim order:-

"Learned standing Counsel has accepted notice on behalf of respondents no.1 to 4.

Issue notice to respondent no.5.

Each one of the respondents is granted six weeks time to file counter affidavit. Rejoinder affidavit may be filed within two weeks thereafter.

List this petition on 14.2.2005 alongwith the record of Civil Misc. Writ Petition No.37312 of 2004 and 45562 of 2004.

Till the next date of listing operation of the order dated 11.6.2004 passed by respondent no.2 shall remain

stayed, in respect to petitioner. However, this Court has not stayed enquiry, which would be undertaken and same be concluded in accordance with law."

6. Writ Petition No.45562 of 2004 has been dismissed as withdrawn vide Court's order dated 01.07.2014. Writ Petition No. 37312 of 2004 has been decided along with four other connected writ petitions led by Writ Petition No.11130 of 2014, Shiv Baran Shukla vs. State of U.P. and others, vide judgement dated 17.07.2017 and said order reads as under:-

"Five writ petitions have come connected together and it has been informed by Sri V.K. Singh that with regard to the same institutions, the matter has been referred to Secretary, Basic Education by an order dated 19.10.2011 passed in Writ-A No. 58736 of 2011 to consider and decide in accordance with law and secondly by order passed in a Public Interest Litigation on 23.6.2017 filed by Jitendra Kumar Goyal & another, namely Public interest Litigation No. 27796 of 2017 again to the Secretary, Basic Education to consider all aspects of the matter with regard to sanctioning of posts, students strength, mode of recruitment etc. of respondent nos. 5 to 11 therein, who are said to be teachers of the institution concerned, getting salary without due approval by the Competent Authority.

It has been submitted that these writ petitions may be disposed of with a direction to the Secretary, Basic Education to look into the matter and decide along with the matter of respondent nos. 5 to 11, who have been mentioned in Public Interest Litigation No. 27796 of 2017 to be drawing salary from the public exchequer without due approval by the Competent Authority.

All these writ petitions are therefore disposed of, without entering into the merits of the case, with a direction to the Secretary, Basic Education to look into all records of the writ petitions filed by teachers of this institution in the past and orders passed by this Court in all such writ petitions whether pending or decided including detailed examination of the facts mentioned in the affidavits filed by the State respondents and the Committee of Management in these writ petitions and pass appropriate orders in accordance with law.

The Secretary, Basic Education shall give opportunity of hearing to the Basic Shiksha Adhikari, Jaunpur as well as to the Committee of Management of the Institution concerned and all teachers whose appointments have been shown to be doubtful in Public Interest Litigation No. 27796 of 2017 and also in these writ petitions, namely Writ Petition Nos. 11130 of 2014, 6203 of 2014, 14066 of 2001, 48434 of 2004 and 37312 of 2004.

This order has been passed with the due assistance of Sri Mrigraj Singh, Advocate, who appears for the Public Interest Litigation."

7. Pursuant to order dated 23.12.2004 passed in present writ petition, DBEO made enquiry into the validity of appointment of petitioner and found that she did not possess requisite minimum qualification of training, hence, her appointment is patently illegal and void ab initio and approval granted on 27.01.2003 has been cancelled.

8. Learned Senior Counsel appearing for petitioner did not dispute that appointment of Assistant Teacher in a Junior High School is governed by Rules, 1978.

9. Thus, the first question up for consideration is "whether petitioner at the time of appointment possess requisite minimum qualification for valid appointment as Assistant Teacher in a Junior High School ?"

10. Rules 4 and 5 of Rules, 1978 read as under:

"4. Minimum qualification.- (1) The minimum qualification ***for the post of Assistant teacher of a recognised school shall be Intermediate Examination*** *of the Board of High School and Intermediate Education, Uttar Pradesh or equivalent examination with Hindi and* ***Teacher's training Course recognised by State Government*** *or a Board such as* ***Hindustani Teaching Certificate, Junior Teaching Certificate, Basic Teaching Certificate or Certificate of Training.***

(2) The ***minimum qualifications for the appointment*** *to the post of Headmaster of a recognised school shall be as follows:*

(a) A degree from a recognised University or an equivalent examination recognised as such;

(b) A teacher's training course recognised by the State Government or the Board, such as Hindustani Teaching Certificate, Junior Teaching Certificate, Certificate of Training or Basic Teaching Certificate; and

(c) Three years' teaching experience in a recognised school."

"5. Eligibility for appointment.-- ***No person shall be appointed*** *as Headmaster or* ***Assistant Teacher*** *in substantive capacity in* ***any recognised school*** *unless-*

(a) he ***possesses the minimum qualifications prescribed for such post;***

(b) he is recommended for such appointment by the Selection Committee."

(Emphasis Added)

11. Rules, 1978 do not possess any provision empowering any authority, whatsoever, to relax minimum qualification prescribed therein for appointment of a Teacher in a recognised school.

12. From the perusal of Rules, 1978 and Act, 1978 and in particular Rules 4 and 5 and Section 10, it is evident that for a valid appointment to the post of Teacher in a recognised Junior High School one must possess requisite minimum qualification prescribed in Rule 4 and salary for payment of such a Teacher of a recognised Junior High School shall be liability of State Government. Section 10 of Act, 1978, therefore, it also contemplates a valid appointment in the eyes of law before making State Government liable for payment of salary to such a Teacher of a recognised Junior High School.

13. Learned Senior Counsel appearing for petitioner did not dispute that petitioner lacks requisite minimum training qualification prescribed in Rules, 1978 and also could not dispute that L.T. Training qualification is not equivalent to training qualification mentioned in Rule-4 of Rules, 1978 but it is a training qualification for Secondary Classes. However, he submits that having been appointed since January, 2003, petitioner worked continuously till December, 2004 when present writ petition was filed and thereafter pursuant to interim order dated 23.12.2004 and that being so, her appointment now should not be disturbed after such a long time.

14. I will consider this aspect a little bit later but first of all, I decide the

question with regard to lack of requisite minimum qualification and its effect on petitioner's appointment.

15. This question has to be examined in the light of the fact that petitioner has sought a writ of mandamus commanding respondents for payment of salary from State Exchequer and for asserting her right, petitioner is under an obligation to show that she was validly appointed on the post on which she is claiming salary.

16. This could not be disputed by learned counsels for parties that whenever a person claims salary from State Exchequer, it is obligation upon such person to prove that he has been validly appointed on the post in question and, therefore, entitled to salary. In **Pramod Kumar Vs. U.P. Secondary Education Services Commission and others, 2008(7) SCC 153** considering a similar question, Court held as under:

"The appellant, however, ***has filed a writ application for issuance of or in the nature of a writ of mandamus.*** *He, therefore,* ***must establish existence of a legal right in himself and a corresponding legal duty in the State. If he did not possess the requisite qualification to hold a post, he could not have any legal right to continue.*** *It was, therefore, immaterial as to why and when the said proceeding had been initiated against him"*

(Emphasis Added)

17. Since learned Senior Counsel for petitioner did not dispute that qualifications namely, B.T.C., C.T., J.T.C. and H.T.C. or equivalent qualifications would not include L.T., therefore, it cannot be said that petitioner possessed requisite minimum qualification prescribed in Rule-4 of Rules, 1978 and without such appointment, Rule-5 put a complete embargo on appointment of any person on the post of Assistant Teacher in a Junior High School.

18. Appointment of a person who does not possess requisite qualification prescribed under Statute is void ab-initio. It is illegal since inception. It does not confer any right upon such person to hold the post.

19. If there is a provision in the statute which empowers the authorities to relax qualification prescribed in the statute and authority exercising such power, make appointment, or, depending upon the language of statute, if appointing authority has made appointment in anticipation of relaxation of qualification prescribed in the rules where power of relaxation is vested elsewhere and ultimately such relaxation is granted, position may be different but when statute does not talk of any such relaxation and there is no such power, yet, if an appointment is made in violation of rules or statute prescribing a particular qualification for appointment to a particular post, such appointment would be a nullity.

20. In Pramod Kumar (supra) Court has clearly said in para 16 and 18 of the judgement as under:

"16. The qualifications for holding a post have been laid down under a statute. ***Any appointment in violation thereof would be a nullity."***

"18. ***If the essential educational qualification for recruitment to a post is not satisfied, ordinarily the same cannot be condoned. Such an act cannot be ratified.*** *An appointment which is contrary to the statute/statutory rules would be void in law.* ***An illegality cannot be regularized,***

particularly, when the statute in no unmistakable term says so. Only an irregularity can be."

(Emphasis Added)

21. Earlier also a similar controversy came up for consideration in **Mohd. Sartaj and another Vs. State of U.P. and others, 2006(2) SCC 315** and in paragraphs 11, 19 and 21 of the judgement, Court held as under:

"11. ... Thus under the Rules, the ***basic qualification*** *for the post of Assistant Teacher, apart from the educational qualification, was* ***the training qualification of the Basic Teacher's Certificate or Hindustani Teacher's Certificate or Junior Teacher's Certificate or Certificate of Teaching or equivalent training course recognized by the State Government.*** *It is an admitted position by both the parties that these qualifications are required for appointment to the post of Assistant Teacher. It is also not the case of the appellants that the academic qualifications were amended at the time of their appointment. Thus,* ***admittedly on the date of appointment, the appellants did not hold the training qualification to be appointed to the post of Assistant Teachers as prescribed under Rule 8."***

*"19. In the present case, t****he appellants' case fall within the exception laid down in S.L. Kapoor's case (supra) and other supporting cases, as admittedly, the appellants were not qualified and they did not possess the B.T.C. or Hindustani Teacher's Certificate or Junior Teacher's Certificate or Certificate of Teaching or certificate of any other training course recognized by the State Government as equivalent thereto at the time of their initial appointment. In view of the basic lack of qualifications, they could not have been appointed nor their appointment could have been continued.*** *Hence the appellants* ***did not hold any right over the post*** *and therefore no hearing was required before the cancellation of their services."*

"21. It is settled law that the qualification should have been seen which the candidate possessed on the date of recruitment and not at a later stage unless rules to that regard permit it. The minimum qualification prescribed under Rule 8 should be fulfilled on the date of recruitment. Equivalence of degree of Moallium-e-Urdu, Jamia Urdu Aligarh with that of B.T.C. in the year 1994 would not entail the benefit to the appellants on the date they were appointed."

(Emphasis Added)

22. Learned counsel for petitioner then contended that similar view taken by this Court in **Committee of Management Vs. State of U.P. (2009) 1 UPLBEC 381** has been considered by Supreme Court in appeal and it has observed that teachers working be not disturbed. I find that in the above case, Teachers possessed qualification of B.Ed. It was not found equivalent to teaching qualification required under Rules. Therefore, judgment of learned Single Judge was set aside by Division Bench of this Court and appeal of Committee of Management was allowed. It was declared that appointment of petitioners was a nullity. In appeal, preferred before Supreme Court, i.e., Special Leave to Appeal (C) No. 14907 of 2009 decided on 14.07.2017, Supreme Court passed following order:

"Heard learned counsel for the parties.

Having regard to the fact that the petitioners have been in service for a long period, ***we are of the view that their appointments ought not be disturbed only on the ground of alleged lack of qualification which is contested by the petitioners.***

Accordingly, the special leave petitions are disposed of by directing that the services of the petitioners be not disturbed on the above grounds.

Pending applications(s), if any, shall also stand disposed of."

(Emphasis Added)

23. Court did not find anything wrong in the judgment of this Court but exercising its powers under Constitution i.e. Article 142, and giving due weight to the fact that petitioners in those cases were working for long period and also contested the issue whether they possessed requisite qualification, it passed an order that their appointments be not disturbed on the ground of lack of qualification which was contested by petitioners and appeal was disposed of. Judgment of Division Bench of this Court has not been set aside.

24. Be that as it may, so far as this Court is concerned, when it is found that a person lacks requisite qualification prescribed under the Rules, and Rules, specifically prohibit appointment of a person, who does not possess requisite qualification, this Court cannot decide a matter in the teeth of Rules and contrary to Rules and cannot allow a person to continue despite otherwise provided in the Rules. This Court is under an obligation of upholding Rule of law and not to be governed by its own whims and caprices.

25. In **Rakesh Kumar Sharma Vs. Govt. of NCT of Delhi and Ors. (2013) 11 SCC 58,** Court said :

"There is no obligation on the court to protect an illegal appointment. Extraordinary power of the court should be used only in an appropriate case to advance the cause of justice and not to defeat the rights of others or create arbitrariness. Usurpation of a post by an ineligible candidate in any circumstance is impermissible."

26. In **State of Uttar Pradesh & Ors. Vs. Anand Kumar Yadav & Ors. 2017 (8) SCALE 220**, Supreme Court affirmed judgment of this Court holding that essential qualification must be held by the person on the date of entering into service and experience gained by such persons can never be construed as a substitute for an essential qualification that is statutorily prescribed.

27. In **Ashok Kumar Sonkar Vs. Union of India and others (2007) 4 SCC 54,** Court said :

"Indisputably, the appellant herein did not hold the requisite qualification as on the said cut-off date. He was, therefore, not eligible therefore."

28. In view thereof, I do not find that any relief in extraordinary and equitable jurisdiction under Article 226 of Constitution of India can be granted.

29. Writ petition lacks merit. Dismissed.

30. Interim order, if any, stands vacated.

(2020)09ILR A151
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.09.2020

BEFORE

THE HON'BLE GAUTAM CHOWDHARY, J.

Criminal Misc. Bail Application No. 16668 of 2020

Mohd. Farook ...Applicant(In Jail)
Versus
Union of India ...Opposite Party

Counsel for the Applicant:
Sri Dileep Kumar Srivastava, Sri Mohammad Waseem

Counsel for the Opposite Party:
Sri Krishna Agarawal

Civil Law - The Customs Act, 1962- Section 108-Statement of the accused – Is admissible in evidence- The statement recorded under Section 108 of the Act is admissible as evidence.

In view of the law settled by the Supreme Court, the statement of the accused u/s 108 of the Customs act is admissible in evidence.

Civil Law - The Customs Act, 1962 - Section 135 – Is a non-bailable offence.

Sections *104* (6) (c) and 104 (6) (d) of the Act, 1962 of the Act provide that the offence u/s 135 of the Act shall be non-bailable, as also held by the High Court in the case of Mahendra Soni Vs. State of U.P. passed in Criminal Misc. Bail Application No.33313 of 2019.

Bail Application rejected. (Para 6, 8) (E-3)

Case law relied upon/ Discussed: -

1. Om Prakash Bhatia Vs Commissioner of Customs, Delhi AIR 200 SC 581

2. Mahendra Soni Vs St. of U.P., Crl Misc. Bail Appl. No.33313 of 2019

(Delivered by Hon'ble Gautam Chowdhary, J.)

1. This application has been filed seeking the release of the applicant on bail in Case Crime No. Nil of 2020, u/s 135 of Customs Act, 1962, Police Station- D.R.I. Varanasi (Directorate of Revenue Intelligence), District- Varanasi.

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

3. Submission of counsel for the applicant is that the applicant was travelling from Guwahati to Kanpur and he was arrested from Pandit Deendayal Upadhyay Railway Station (Mughalsarai). Submission is that there is no evidence on record that the alleged gold biscuits (3652.270 gms. amounting Rs.1,42,07,330/) were smuggled by the applicant as the real owner of the said article is one D.K. Khan and the applicant was only carrying the said biscuits from Guwahati to Kanpur. Further submission is that the statement of the applicant allegedly recorded by the officials of Customs Department under section 108 of the Customs Act, 1962 is not volunteer statement of the applicant and the same was obtained by coercion.

4. Shri Krishna Agarawal, learned counsel for the opposite party has opposed the prayer for bail and has submitted that as the applicant could not show any relevant paper regarding the article (gold) obtained from the possession of the applicant of such quantity, it is deemed proper that the said material was being smuggled. Learned counsel in this regard has also placed reliance upon several judgments of Hon'ble Supreme Court which are held as under:-

K.I. PAVUNNY V. ASSTT. COLLECTOR (HQ), CENTRAL EXCISE COLLECTORATE in which it has been held as under :-

"8. In Ramesh Chandra Mehta v. State of W.B. [(1969) 2 SCR 461 : AIR 1970 SC 940] a Constitution Bench of this Court held at p. 466 that the Customs Officers are entrusted with the powers specifically relating to the collection of customs duties and prevention of smuggling and for that purpose they are invested with the power to search any person on reasonable suspicion, to summon, X-ray the body of the person for detecting secreted goods, to arrest a person against whom a reasonable suspicion exists that he has been guilty of an offence under the Act, to obtain a search warrant from a Magistrate, to search any place within the local limits of the jurisdiction of such Magistrate, to collect information by summoning persons to give evidence and produce documents and to adjudge confiscation. He may exercise these powers for preventing smuggling of goods dutiable or prohibited and for adjudging confiscation of those goods. For collecting evidence the Customs Officer is entitled to serve summons to produce a document or other thing or to give evidence and the person so summoned is bound to attend either in person or by an authorised agent, as such officer may direct, is bound to state the truth upon any subject respecting which he is examined or makes a statement and to produce such documents and other things as may be required. The power to arrest, the power to detain, the power to search or obtain a search warrant and the power to collect evidence are vested in the Customs Officer for enforcing compliance with the provisions of the Sea Customs Act. He is empowered to investigate into the infringement of the provisions of the Act primarily for the purpose of adjudicating forfeiture and penalty. He has no power to investigate into an offence triable by a Magistrate, nor has he the power to submit a report under Section 173 of the Code of Criminal Procedure (for short "the Code"). He can only make a complaint in writing before a competent magistrate. The above law was laid down under the Sea Customs Act, the predecessor of the Act. The ratio therein equally applies to the powers exercised by the Customs Officer under the Act. The Act enlarges his powers. The Customs Officer is not a police officer nor is he empowered to file charge-sheet under Section 173 of the Code though he conducts enquiry akin to an investigation under some of the provisions of the Code. His acts are in the nature of civil proceedings for collecting evidence to take further action to adjudicate the infringement of the Act and for imposition of penalty prescribed thereunder which would be self-evident from sub-section (4) of Section 108."

5. Further in the year 2009 Hon'ble Apex Court has well considered the abovenoted facts and in the judgment of **Union of India Vs. Padam Narain Agarwal Etc. AIR 2009 SC 254** has observed as follows :-

"Sections 107-09 confer power on Custom Officers to examine persons, to summon them to give evidence and to produce documents.

55. Section 108 which is a material provision, reads thus;

Power to summon persons to give evidence and produce documents.--(1) Any gazetted officer of customs duly empowered by the Central Government in this behalf, shall have power to summon any person whose attendance he considers necessary either to give evidence or to produce a

document or any other thing in any inquiry which such officer is making under this Act.

(2) A summons to produce documents or other things may be for the production of certain specified documents or things or for the production of all documents or things of a certain description in the possession or under control of the person summoned.

(3) All persons so summoned shall be bound to attend either in person or by an authorized agent as such officer may direct; and all persons so summoned shall be bound to state the truth upon any subject, respecting which they are examined or make statements and produce such documents and other things as may be required;

Provided that the exemption under Section 132 of the Code of Civil Procedure, 1908 (5 of 1908), shall be applicable to any requisition for attendance under this section.

(4) Every such inquiry as aforesaid shall be deemed to be a judicial proceeding within the meaning of section 193 and section 228 of the Indian Penal Code (45 of 1860)

56. This section does not contemplate magisterial intervention. The power is exercised by a Gazetted Officer of the Department. It obliges the person summoned to state truth upon any subject respecting which he is examined. He is not absolved from speaking truth on the ground that such statement is admissible in evidence and could be used against him. The provision thus enables the officer to elicit truth from the person examined. The underlying object of Section 108 is to ensure that the officer questioning the person gets all the truth concerning the incident.

57. As held by Constitution Bench of this Court in Ramesh Chandra Mehta v. State of West Bengal, (1969) 2 SCR 461, a person called upon to make a statement before the Custom Authorities cannot be said to be an accused of an offence. It is, therefore, clear that if a person is called upon to make a statement under Section 108 of the Act and summon is issued for the said purpose, he is bound to comply with such direction. This view has been reiterated in several cases thereafter.

58. In Assistant Collector of Central Excise, Rajamundry v. Duncan Agro Industries Ltd., (2000) 7 SCC 53, this Court stated;

"Section 108 of the Customs Act does not contemplate any magisterial intervention. The power under the said section is intended to be exercised by a gazetted officer of the Customs Department. Sub-section (3) enjoins on the person summoned by the officer to state the truth upon any subject respecting which he is examined. He is not excused from speaking the truth on the premise that such statement could be used against him. The said requirement is included in the provision for the purpose of enabling the gazetted officer to elicit the truth from the person interrogated. There is no involvement of the magistrate at that stage. The entire idea behind the provision is that the gazetted officer questioning the person must gather all the truth concerning the episode. If the statement so extracted is untrue its utility for the officer gets lost".

(emphasis supplied)

59. It is thus clear that statements recorded under Section 108 of the Act are distinct and different from statements recorded by Police Officers during the course of investigation under the Code."

6. After perusal of the aforesaid judgment, it is very clear that the statement

recorded under Section 108 of the Act is admissible as evidence, hence, the arguments advanced by the applicant is not sustainable.

7. Lastly, learned counsel for the applicant has also tried to place reliance upon the judgment of Hon'ble Apex Court in Om Prakash Bhatia Vs. Commissioner of Customs, Delhi AIR 200 SC 581 and submitted that it is a bailable offence.

8. In the counter of argument advanced by learned counsel for the applicant, Shri Krishna Agarawal, learned counsel for opposite party has brought the attention of the Court towards the judgment of **Mahendra Soni Vs. State of U.P**. and submitted that the case of **Om Prakash Bhatia Vs. Commissioner of Customs, Delhi AIR 200 SC 581** is being well discussed and considered by the preceding Bench of this Court in case of **Mahendra Soni Vs. State of U.P.** passed in Criminal Misc. Bail Application No.33313 of 2019. He further submits that it has been held in the aforesaid judgment that it is a non-bailable offence. The relevant paragraphs of the judgment are being quoted here :-

"It has been argued by the learned counsel for the applicant that the applicant is innocent. The applicant has not committed any crime but due to ulterior motive, he has been challaned in the present case falsely. The applicant has not claimed ownership of the alleged gold bars and he has been falsely implicated as nothing was recovered from his possession. Two gold bars are alleged to have been recovered from the possession of the applicant and the same were valued at Rs. 66,94, 640/-, therefore, as per the relevant provision, the alleged office is bailable offence as the same is below Rs. 1 crore. In support of his plea, learned counsel for the applicant has placed reliance upon the judgment of the Apex Court in the case of ***Om Prakash & Another Vs. Union of India & Another reported in (2012) 3 SCC (Cri) 1249****, wherein after considering the relevant provisions of the Act, 1962, the Apex Court has held that the offence committed is said to be bailable offence under the Act, 1962. The applicant has no criminal history. It is next contended that there is no possibility of the applicant of fleeing away from the judicial process or tampering with the witnesses and in case, the applicant is enlarged on bail, the applicant shall not misuse the liberty of bail. The applicant is in jail since 14th February, 2019.*

Per contra, learned counsel for the opposite party no.1 and the learned A.G.A. for the State have opposed the bail prayer of the applicant by contending that the innocence of the applicant cannot be adjudged at pre trial stage, therefore, he does not deserves any indulgence. They have submitted that the contention of the learned counsel for the applicant that the applicant has not committed any crime has only been stated to be rejected on the ground that the applicant was apprehended with huge quantity of the smuggled foreign origin gold along with the co-accused Sanjay Kumar Agrwal. Both the accused could not show any valid papers of the impugned gold bards and categorically admitted in their statement tendered under Section 108 of the Act, that the same were smuggled from neighbouring country Bangladesh and the specific marks have intentionally been erased so as to avoid identification. They have further submitted that the contention of the learned counsel for the applicant that the applicant is not the owner of the alleged gold bars as nothing has been recovered from his

possession is also liable to be rejected on the ground that on the information received, when the officers of D.R.I. intercepted the applicant and the co-accused Sanjay Kumar Agrawal, upon enquiry whether they were carrying any contraband/gold bars etc., they accepted that they were carrying foreign origin gold bards with them concealed in waist belt worn by the applicant and in the trousers' pocket and shoes worn by the co-accused Sanjay Kumar Agrawal.

Learned counsel for the opposite party no.2 as well as learned A.G.A. for the State have next submitted that both the accused persons, namely, the applicant and the co-accused Sanjay Kumar Agarwal were travelling together, therefore, recovery is to be seen in that manner and five gold bars of 4,996.05 grams, which were of the value of Rs. 1, 67,36, 767/- has been done from the applicant as well as from the co-accused Sanjay Kumar Agrawal. It is further submitted that the same were seized under Section 110 of the Act, 1962 under the reasonable plea that they have brought the alleged gold bars India from Bangladesh in violation of provisions of Sections 7 (1) (C), 11 and 46 of the Act, 1962 read with Rule 3 (2) & (3) of the Foreign Trade (Development and Regulation) Act, 1962 and Rules 11 and 12 of the Rules, 1993. They have next submitted that the recovered gold bars were liable to be confiscated under Section 111 of the Act, 1962. The panchnama proceedings were also drawn in the presence of two independent witnesses. It is further submitted that the judgment relied upon by the learned counsel for the applicant in the case of ***Om Prakash & Another (Supra)*** *has no application as the recovered gold bars as prohibited goods, as defined under Section 2 (33) of the Act, 1962.*

Learned counsel for the opposite party no.2 and the learned A.G.A. for the State have referred to Section 104 (6) (c) and 104 (6) (d) of the Act, 1962 for the proposition of law that the alleged offence committed by the applicant and the co-accused are not bailable offence. For ready reference, Section 104 (6) (c) and 104 (6) (d) of the Act, 1962 reads as follows:

"104. Power to arrest:---.....

.....

.....

(6) Notwithstanding anything contained in the Code of criminal Procedure 1973 (2 of 1974), an offence punishable under Section 135 relating to----

.....

(c) import or export of any goods which have not been declared in accordance with the provisions of this Act and the market price of which exceeds one crore rupees; or

(d) fraudulently availing of or attempt to avail of drawback or any exemption from duty provided under this Act, if the amount of drawback or exemption from duty exceeds fifty lack rupees,

shall be ***non-bailable."***

9. After considering all the arguments advanced by the parties and the judgments relied upon by the parties and further considering to the nature of offence, its gravity and the evidence in support of it and the overall circumstances of this case, this Court is of the view that the applicant has not made out a case for bail.

10. The prayer for bail of the applicant therefore, stands **rejected.**

(2020)09ILR A156
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.08.2020

BEFORE

THE HON'BLE SAMIT GOPTAL, J.

Criminal Misc. Bail Application No. 18920 of 2020
with
Criminal Misc. Bail Application No. 17051 of 2020

Rishipal Singh ...Applicant(In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri R.P.S. Chauhan

Counsel for the Opposite Party:
G.A., Sri D.P.S. Chauhan, Sri Dharmendra Pratap Singh Chauhan, Sri Surya Bhan Singh, Sri Shiv Nath Singh

Criminal Law -Code of Criminal Procedure, 1973- Section 439 (1)- Bail- Accused / applicant already granted bail while deceased was injured- No distinction in injuries at both stages- The applicants are not named in the first information report- After death of the deceased the present case was converted into one from an offence under Section 307 IPC to an offence under Section 302 IPC along with other Section. While the matter was for offence under Section 307 IPC the applicant applied for bail before the court below which was allowed-In so far as the applicant is concerned, he was granted bail by Sessions Judge in the present matter itself and the injuries received by the deceased at the time of grant of bail to him were the same at the time of his death. There was no distinction in so far as the prosecution case and the evidence is concerned at the time of grant of bail to the applicant by the Sessions Judge.

The accused / applicant was already granted bail by the court below for the offence u/s 307 of the IPC and the nature of injuries remained the same after the case was converted u/s 302 IPC, hence in the facts of the case the applicant has made out a case for the grant of bail.

Bail Application allowed. (Para 14) (E-3)

Case law relied upon/ Discussed: -

1. Dataram Singh Vs St. of U.P., (2018) 3 SCC 22

(Delivered by Hon'ble Samit Gopal, J.)

1. Heard Sri R.P.S. Chauhan, learned counsel for the applicants in both the bail applications who is present in Court, Sri Shiv Nath Singh, learned Senior counsel assisted by Sri Surya Bhan Singh, learned counsel on behalf of the first informant through video conferencing and Sri I.P.S. Rathore, learned AGA for the State who is also present in Court and perused the material on record.

2. These bail application under Section 439 of Code of Criminal Procedure have been filed by the applicants Rishipal Singh and Abhishek Alias Fota, seeking enlargement on bail during trial in connection with Case Crime No. 399 of 2019, under Sections 302, 120B IPC registered at P.S. Chhajlet, District Moradabad.

3. Vide order dated 26.08.2020 passed by this Court, office was directed to trace out a supplementary affidavit sent by the learned counsel for the applicants through e-mail to the nominated e-mail ID of the office of this Court as the same was not on record. As per office report dated 27.08.2020 a supplementary affidavit has been traced out and the same is placed on record which is bearing no. 3 of 2020. The compliance of the order dated 26.08.2020 has thus been done by the office.

4. Since both the bail applications relate to the same case crime number and

the applicants herein are co-accused in the same, the same are being heard together are being decided by a common order. Learned Senior counsel appearing for the first informant and the learned AGA have no objection to the same.

5. Sri R.P.S. Chauhan, learned counsel for the applicant states that he shall be referring to the paper book of bail application of Rishipal Singh while arguing the matter.

6. Sri R.P.S. Chauhan, learned counsel for the applicants argued that the occurrence in the present matter took place on 01.11.2019 at about 9.15 a.m. for which a first information report was lodged on 02.11.2019 at about 22.12 hours by Sharad Kumar son of the deceased which was registered under Section 307 IPC against unknown persons. Version as stated in the first information report is that of 01.11.2019 at about 9.15 a.m. the father of the first informant namely Suraj Singh along with the wife of the first informant namely Smt. Poonam Rani who is a teacher in a primary school were going on motorcycle driven by Suraj Singh for dropping Smt. Poonam Rani to the school and when they reached somewhere between Chhajjupura and Pachokara a Scorpio vehicle came from the front and hit them as a result of which both the persons fell down. The vehicle was occupied by 3-4 unknown persons who were armed with lathi, danda and sariya who with an intention to kill, started assaulting his father on which his wife raised a shout whereon one person ran to assault his wife and on seeing persons coming from the nearby fields who were working their all the persons fled away in the said vehicle. Father of the first informant was left in a bad condition at the said place who as of know is in AIIMS Delhi and his treatment is going on but his condition is very critical. It is thus, stated in the first information report that the family members of the first informant are facing threat of their lives from the unknown assailants. It is thus, stated in the end that a report against the said unknown assailants be registered and legal action be initiated.

7. It is argued that the first informant is not an eye witness of the incident.

8. Learned counsel has then placed the injury report of the injured Suraj Singh which is annexure 2 to the affidavit prepared while he was in an injured condition and while placing the said injury report has argued that the injury 4 being a lacerated wound appears to be a fatal injury as the other 5 injuries cannot in any manner be construed to be fatal at all. Further learned counsel has then placed another injury report of Suraj Singh which along with other documents is also annexed as annexure 2 particularly at page 50 of the paper book and has argued that the contents in the same would go to show that the present case was reported as a case of accident and the injured was hit by four wheeler as has been noted therein. He has placed the injuries which have been gone through. However, the CT scan report of the head has been placed which is at page 52 of the paper book in which Doctor has found fracture of the temporal bone and facial bones. Learned counsel has then drawn the attention of the Court to the site plan which is annexed as annexure 3 and has proceeded to argued that the place of occurrence has been shown therein which is a road which is surrounded by agricultural fields on both the sides. Learned counsel has then placed before the Court that Smt. Poonam Rani the wife of

the first informant and the daughter in law of Suraj Singh was a crucial witness of the incident and the only person present at the place of occurrence from the side of the prosecution as per the first information report. Her statement recorded under Section 161 Cr.P.C, copy of which is annexure amongst other statements as annexure 4 particularly at page 68 which is dated 06.11.2019 has been placed and it has argued that she has also towed the same version as that of the first information report as stated that the present incident has been committed by unknown persons. It is further argued while placing the second statement of Smt. Poonam Rani recorded under Section 161 Cr.P.C. on 07.11.2019 which is at page 69 of the paper book that it is for the first time after recording of the first statement on the very next day she discloses the features of three persons by stating her physical appearances. Even it is argued that no one is named as an accused therein. Learned counsel has then stated and argued while placing reliance on annexure 6 that on 18.11.2019 the Investigating Officer notes in CD No. 9 that he meets the first informant at his house and asks about the said incident on which the first informant states that his wife Smt. Poonam is a witness present at the place of occurrence who has disclosed him that Ranveer Singh and Yashveer Singh are the eye witnesses of the incident. It is then argued that immediately thereupon the Investigating Officer interrogates Yashveer Singh and Ranveer Singh on 18.11.2019 itself and their statements are also annexed along with the said noting in the case diary and are also annexure 6 who claimed themselves to be eye witnesses of the incident and have for the first time disclosed the name of the applicants Rishipal Singh, Abhishek @ Fota and one other person by describing him as a person of grey complexion as accused. While criticising the evidence of Yashveer Singh and Ranveer Singh learned counsel for the applicants states that Yashveer Singh is a family member of the first informant and Ranveer Singh is the nephew of the deceased. Learned counsel for the applicant then placed before the court CD No. 25 dated 15.01.2020 which is annexed as annexure 7 and states that then the names of two persons namely Mitendra Singh and Virendra Singh s/o Jagdish Singh have been introduced by the first informant on being asked about eye witnesses of the incident. Immediately thereupon on the same day i.e., 15.01.2020 Virendra Singh son of Jagdish Singh and Mitendra Singh are also interrogated under Section 161 Cr.P.C. who disclose the name of three persons as accused in the present matter and claim themselves to be eye witnesses. The names of the said three persons are Rishipal Singh, Abhishek @ Fota and Sachin Kumar. Learned counsel has then placed annexure 8 to the affidavit being CD No. 41 dated 08.03.2020 and has stated that the Investigating Officer states therein that the first informant has come to the police station and has stated that one Virendra Singh son of Jaiveer Singh went to him and stated that he wants to tell something about the incident on which he stated that the same may be disclosed to the SHO at the police station and both the persons reach the police station and inform the same to the SHO after which the statement of Virendra Singh son of Jaiveer Singh was recorded on 08.03.2020. It is then stated that Virendra Singh son of Jaiveer Singh discloses that two persons are involved in the present incident in which one is Rishipal singh who is alleged to be armed with danda and one other unknown person was alleged to be armed with rod and nephew of Rishipal who is called Fota was

shouting from the vehicle to speed up as someone is coming and till the time they would reach the place of occurrence the accused fled away. He then states that previously he did not disclose anything to anyone as the matter was of his village but now since Suraj Singh has died, his conscience has knocked now and he is telling the truth whatever he saw. Learned counsel then stated that on 22.01.2020 an alleged recovery was affected wherein the police has shown the recovery of a danda and an iron rod on the pointing out of Abhishek @ Fota from a place at the back of the house of Rishipal Singh which though have been shown to be recovered, are not incriminating in any manner. It is further argued that the Suraj Singh died on 10.02.2020 at 10.40 a.m. and after his death the present case was converted into one from an offence under Section 307 IPC to an offence under Secction 302 IPC along with other Section. It is further argued that while the matter was for offence under Section 307 IPC Rishipal Singh applied for bail before the court below through Criminal Misc. Bail Application No. 399 of 2020 (Rishipal Singh Vs State of U.P.) which was allowed vide order dated 28.01.2020 passed by the Sessions Judge Muradabad the copy of which is annexure 10 to the affidavit. It is argued that in so far as Rishipal Singh is concerned he was granted bail on 28.01.2020 by the court below on the same material as was collected except for the statement of Birendra Singh s/o Jaiveer Singh who had volunteered to disclose certain facts to the first informant and was brought by the first informant to the police station and the other event of the death of Suraj Singh but the evidence and the injuries as received by Suraj Singh remained the same from 28.01.2020 i.e., the date of his being granted bail, to 10.02.2020 i.e., the death of Suraj Singh. It is thus argued that the applicants have been falsely implicated without any reliable and cogent evidence on record. It is next argued that the prosecution has not come out with any motive for the applicants to commit the murder. The presence of the alleged eye witnesses apart from Smt. Poonam Rani has been challenged and her disclosing the name of Ranveer Singh and Yashveer Singh at a belated stage is argued to be a falsity. While placing the criminal history of Rishipal Singh, learned counsel for the applicant has placed before the Court para 2 of the supplementary affidavit and has stated that he has been reported to be involved in six cases. It is argued that the explanation of all the six cases being given in para 3 to 7 of the supplementary affidavit. In the first and the second case, being Case Crime No. 186 of 2019 and 147 of 2015, the said cases have been wrongly shown against the applicant Rishipal Singh as he was never an accused in the matter and was never ever prosecuted therein. In the third case being Case Crime No. 281 of 1996, under Section 25 Arms Act, as per the instruction of the counsel and the averments in para 4 the applicant was granted bail by the court below. In the fourth case being Case Crime No. 212 of 2019, under Section 308, 324, 325, 504 IPC the year has been wrongly reported which should have been 2003 and in the same the applicant Rishipal Singh has been acquitted. The explanation is tendered in para 5 of the supplementary affidavit. Further the fifth case being Case Crime No. 341 of 1986, under Section 302, 201 IPC is one in which the applicant Rishipal Singh has been acquitted of the charges as mentioned in para 6 of the supplementary affidavit. In the last case as reported being Case Crime No. 272 of 1996, under Sections 395, 397, 412 IPC it is averred

that the applicant Rishipal Singh was never an accused in the same but was only called and put up for identification and even therein he was not identified as an accused and as such he has not been an accused in the said matter. A part from the said six case one more case has been disclosed and explained in para 8 of the supplementary affidavit being Case Crime No. 289 of 2015, under Sections 498A, 323, 504 IPC and ¾ Dowry Prohibition Act, which has been explained in the same para as has been lodged by the daughter-in-law of Rishipal Singh pertaining to a marital dispute between her and her husband. It is thus stated that the applicant has clean antecedents as of know. It is further stated that the applicant is in jail since 12.03.2020.

9. Sri R.P.S. Chauhan, learned counsel for the applicant while placing the arguments in connected matter of Abhishek Singh @ Fota has adopted all the arguments as placed in the bail application of Rishipal Singh but has clarified that he has no criminal history as has been alleged in para 43 of the affidavit in support of the bail application. It has been stated that he is in jail since 23.01.2020.

10. It has been assured on behalf of the applicants that they are ready to cooperate with the process of law and shall faithfully make themselves available before the court whenever required. There is no likelihood of early conclusion of trial and hence, the applicants may be released on bail during pendency of trial.

11. Per contra, Sri Shiv Nath Singh, learned Senior counsel has argued that naming the accused in the first information report is not important at all specially looking to the nature of the present incident. It is argued that there has been a recovery on the pointing out of Abhishek @ Fota for which the recovery memo is annexed and was even placed by the learned counsel for the applicant.

12. Learned Senior counsel has placed reliance upon the statement of Sunil Saini, Yashveer Singh, Ranveer Singh and Virendra Singh son of Jaiveer Singh, annexed specifically and more particularly at pages 71, 91, 92 and 102 of the paper book of the bail application of Rishipal singh and has proceeded to argue that the said witnesses have specifically claimed themselves to be eye witnesses and have named both the accused persons. It is argued that the presence of the said persons at the place of occurrence cannot be doubted and even from the version as given by them of the incident goes to corroborate the version of the prosecution in full thereby leaving no doubt of their presence at the place of occurrence. In so far as Rishipal Singh is concerned the learned Senior counsel has stated that previously he was involved in six cases which shows that he was a person of criminal bent of mind.

13. Learned AGA has opposed the prayer for bail and has stated that he adopts the arguments of learned counsel for the first informant in full and only adds to it that there is recovery of certain articles from pointing out of Abhishek @ Fota which would be a recovery under Section 27 of the Indian Evidence Act, 1872.

14. After perusing the records in the light of the submissions made at the bar and after taking an overall view of all the facts and circumstances of this case, it is clear that the applicants are not named in the first information report. The prosecution has come out initially with

Smt. Poonam Rani as only the star witness of the incident from 02.11.2018 till 18.11.2018 on which date subsequently Ranveer Singh and Yashveer Singh were introduced as eye witnesses and then later on Ranveer Singh and Mitendra Singh were further introduced as eye witnesses on 15.01.2020 and in the last on 08.03.2020 Virendra Singh son of Jaiveer Singh was also introduced as an eye witnesses. In the end prosecution stands as of know with five eye witnesses of the incident though their names were not disclosed in the FIR, the two statements recorded under Section 161 Cr.P.C of Smt. Poonam Rani the sole person accompanying the deceased on a motorcycle. In so far as Rishipal Singh is concerned he was granted bail by Sessions Judge in the present matter itself and the injuries received by Suraj Singh at the time of grant of bail to him were the same at the time of his death. There was no distinction in so far as the prosecution case and the evidence is concerned at the time of grant of bail to Rishipal Singh by the Sessions Judge expect for the injured Suraj Singh being death and sudden appearance of Virendra Singh son of Jaiveer Singh as an eye witnesses on 08.03.2020 that to who volunteered himself, reached the first informant to disclose certain facts who was then accompanied by the first informant to the police station and was branded as an eye witness.

15. The Hon'ble Apex Court in the case of **Dataram Singh v. State of U.P. : (2018) 3 SCC 22** held that freedom of an individual can not be curtailed for indefinite period, especially when his/her guilt is yet to be proved. It has further been held by the Hon'ble Apex Court in the aforesaid judgment that a person is believed to be innocent until found guilty. It has been held as under:

"2. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception. Unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society.

3. There is no doubt that the grant or denial of bail is entirely the discretion of the judge considering a case but even so, the exercise of judicial discretion has been circumscribed by a large number of decisions rendered by this Court and by every High Court in the country. Yet, occasionally there is a necessity to introspect whether denying bail to an accused person is the right thing to do on the facts and in the circumstances of a case.

4. While so introspecting, among the factors that need to be considered is whether the accused was arrested during investigations when that person perhaps has the best opportunity to tamper with the evidence or influence witnesses. If the investigating officer does not find it necessary to arrest an accused person during investigations, a strong case should be made out for placing that person in judicial custody after a charge sheet is

filed. Similarly, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Surely, if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimised, it would be a factor that a judge would need to consider in an appropriate case. It is also necessary for the judge to consider whether the accused is a first-time offender or has been accused of other offences and if so, the nature of such offences and his or her general conduct. The poverty or the deemed indigent status of an accused is also an extremely important factor and even Parliament has taken notice of it by incorporating an Explanation to Section 436 of the Code of Criminal Procedure, 1973. An equally soft approach to incarceration has been taken by Parliament by inserting Section 436A in the Code of Criminal Procedure, 1973.

5. To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to police custody or judicial custody. There are several reasons for this including maintaining the dignity of an accused person, howsoever poor that person might be, the requirements of Article 21 of the Constitution and the fact that there is enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in In Re-Inhuman Conditions in 1382 Prisons."

16. The nature of evidence, the period of detention already undergone, the unlikelihood of early conclusion of trial and also the absence of any convincing material to indicate the possibility of tampering with the evidence, larger mandate of the Article 21 of the Constitution of India and the dictum of Hon'ble Apex Court in the case of Dataram Singh (supra), this Court is of the view that the applicants may be enlarged on bail.

17. Let the applicants- **Rishipal Singh and Abhishek Alias Fota,** be released on bail in the aforesaid case crime number on furnishing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned with the following conditions which are being imposed in the interest of justice:-

i) The applicants will not tamper with prosecution evidence and will not harm or harass the victim/complainant in any manner whatsoever.

ii) The applicants will abide the orders of court, will attend the court on every date and will not delay the disposal of trial in any manner whatsoever.

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

(iv) The applicants will not misuse the liberty of bail in any manner whatsoever. In case, the applicants misuse the liberty of bail during trial and in order to secure their presence proclamation under section 82 Cr.P.C., may be issued and if applicants fail to appear before the court on the date fixed in such proclamation, then, the trial court shall initiate proceedings against them, in accordance with law, under section 174-A I.P.C.

(V) The applicants shall remain present, in person, before the trial court on

dates fixed for (1) opening of the case, (2) framing of charge and (3) recording of statement under Section 313 Cr.P.C. If in the opinion of the trial court absence of the applicants are deliberate or without sufficient cause, then it shall be open for the trial court to treat such default as abuse of liberty of bail and proceed against them in accordance with law and the trial court may proceed against them under Section 229-A IPC.

(vi) The trial court may make all possible efforts/endeavour and try to conclude the trial expeditiously after the release of the applicant.

18. The identity, status and residential proof of sureties will be verified by court concerned and in case of breach of any of the conditions mentioned above, court concerned will be at liberty to cancel the bail and send the applicants to prison.

19. The bail applications are allowed.

20. The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad.

21. The computer generated copy of such order shall be self attested by the counsel of the party concerned.

22. The concerned Court/Authority/Official shall verify the authenticity of such computerized copy of the order from the official website of High Court Allahabad and shall make a declaration of such verification in writing.

(2020)09ILR A163
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.09.2020

BEFORE

THE HON'BLE GAUTAM CHOWDHARY, J.

Criminal Misc. Bail Application No. 19880 of 2020

Bahadur Prasad ...Applicant(In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Sanjeev Kumar Shukla

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

Criminal Law-Narcotics Drugs and Psychotropic Substances Act - Sections 8/20 –Narcotics Control Bureau- Standing Instruction No. 1/88- Recovery of Contraband from possession of the applicant- Sample has not been taken from each packet and hence it could not be said that the amount of contraband material obtained is of such quantity as has been shown by the police. The Narcotic Control Bureau, New Delhi by issuing standing Instruction No.1/88 has laid down the standards of procedure to be followed in the matters of recovery of contraband substances and taking of their samples. These instructions have been issued with a view to bring uniformity of approach in such matters and also to provide for a secure system of handling of drugs' samples which is to standardise the procedure with regard to drawing, forwarding and testing of samples.

Samples from each recovered packet of recovered contraband have to be taken in accordance with the directions contained in Standing Order No. 1/88 of the NCB, failing which the recovery of the contraband may not be considered genuine.

Bail Application allowed. (E-3)

Case law relied upon/ Discussed: -

1. Dataram Singh Vs St. of U.P.: (2018) 3 SCC 22

(Delivered by Hon'ble Gautam Chowdhary, J.)

1. Heard learned counsel for the applicant and learned A.G.A. for the State and perused the material brought on record.

2. The present bail application has been filed on behalf of the applicant, Bahadur Prasad, with a prayer to release him on bail in Case Crime No. 0282 of 2019, under Sections 8/20 N.D.P.S. Act, Police Station- Kotwali, District- Ballia, during pendency of trial.

3. The submission advanced by learned counsel for the applicant is that the quantity of the material obtained from the possession of the applicant is that 27 packets (amounting 1 quintal 70 kgs) of the contraband material was found but the sample has not been taken from each packet and hence it could not be said that the amount of contraband material obtained is of such quantity as has been shown by the police. It is also submitted that there is no eye witness present of the alleged incident. Further contention is that the statutory provisions of the Narcotic Drugs and Psychotropic Substances Act, 1985 have not been complied with in the right manner. Several other submissions in order to demonstrate the falsity of the allegations made against the applicant have also been placed before the Court. The circumstances which, according to the counsel, led to the false implication of the accused have also been mentioned. It has also been assured on behalf of the applicant that he is ready to cooperate with the process of law and shall faithfully make himself available before the court whenever required and is also ready to accept all the conditions which the Court may deem fit to impose upon him. It is further contended by learned counsel for the applicant that the applicant is languishing in jail since 12.07.2019.

4. In support of his argument, learned counsel for the applicant has placed reliance upon the judgment of **Jaswinder Singh and Another Vs. State of Punjab 2012 LawSuit (P&H) 5446** wherein sampling of packets has been well considered. Counsel in this regard has also tried to place reliance upon the judgment given earlier by the preceding Bench of this Court in the case of **Haider Ansari Vs. State of U.P.,** wherein it was submitted that The Narcotic Control Bureau, New Delhi by issuing standing Instruction No.1/88 has laid down the standards of procedure to be followed in the matters of recovery of contraband substances and taking of their samples. These instructions have been issued with a view to bring uniformity of approach in such matters and also to provide for a secure system of handling of drugs' samples which is to standardise the procedure with regard to drawing, forwarding and testing of samples. The relevant portions of the said instructions are being reproduces herein below :-

"1.5.- Place and time of drawal of sample

"Samples from the Norcotic Drugs and Psychotropic Substances seized, must be drawn on the spot of recovery, in duplicate, in the presence of search(Panch) witnesses and the person from whose possession the drug is recovered, and a mention to this effect should invariably be made in the panchnama drawn on the spot."

1.6.- Quantity of different drugs required in the sample

"The quantity to be drawn in each sample for chemical test should be 5 grams in respect of all norcotic drugs and psychotropic substances except in the cases of Opium, Ganja and Charas/Hashish where a quantity of 24 grams in each case

is required for chemical test. The same quantities should be taken for the duplicate sample also. The seized drugs in the packages/containers should be well mixed to make it homogenous and representative before the sample in duplicate is drawn."

1.7.- Number of samples to be drawn in each seizure case

"(a) In the case of seizure of a single package/container one sample in duplicate is to be drawn. Normally it is advisable to draw one sample in duplicate from each package/container in case of seizure of more than one package/container.

(b) However, when the package/containers seized together are of identical size and weight, bearing identical markings and the contents of each package given identical results on colour test by U.N. Kit, conclusively indicating that the packages are identical in all respect/packages/container may be carefully bunched in lots of 10 packages/containers. In case of seizure of Ganja and Hasish, the packages/containers may be bunched in lots of 40 such packages/containers. For each such lot of packages/containers, one sample in duplicate may be drawn."

(c) Where-after making such lots, in the case of Hashish and Ganja, less than 20 packages/containers remain, and in case of other drugs less than 5 packages/containers remain, no bunching would be necessary and no samples need be drawn.

(d) If it is 5 or more in case of other drugs and subsistances and 20 or more in case of Ganja and Hasish, one more sample in duplicate may be drawn for such remainder package/containers.

(e) While drawing one sample in duplicate from a particular lot, it must be ensured that representative drug in equal quantity is taken from each package/container of that lot and mixed together to make a composite whole from which the samples are drawn for that lot.

1.8.- Numbering of packages/containers.

Subject to the detailed procedure of identification of packages/containers, as indicated in para 1.4 each package/container should be securely sealed and an identification slip pasted/attached on each one of them at such place and in such manner as will avoid easy obliteration of the marks and numbers on the slip. Where more than one sample is drawn, each sample should also be serially numbered and marked as S-1, S-2, S-3 and so on, both original and duplicate sample. It should carry the serial number of the packages and marked as P-1, 2, 3, 4 an so on.

1.9.- "It needs no emphasis that all samples must be drawn and sealed in the presence of the accused, panchnama witness and seizing officer and all of them shall be required to put their signature on each sample. The official seal of the seizing officer should also be affixed. If the person from whose custody the drugs have been recovered, wants to put his own seal on the sample, the same may be allowed on both the original and the duplicate of each of the sample."

1.10.- Packing and sealing of samples

"The sample in duplicate should be kept in heat sealed plastic bags as it is convenient and safe. The plastic bag container should be kept in a paper envelope may be sealed properly. Such sealed envelope may be marked as original and duplicate. Both the envelopes should also bear the S.No. Of the package (s)/container(s) from which the sample has been drawn. The duplicate envelope

containing the sample will also have a reference of the test memo. The seals should be legible. This envelope along with test memos should be kept in another envelope which should also be sealed and marked "secret-Drug sample/Test memo" to be sent to the concerned chemical laboratory."

5. Learned AGA for the State has vehemently opposed the prayer for bail but could not argue the aforesaid fact.

6. Having considered the material on record, larger mandate of the Article 21 of the Constitution of India and the dictum of Apex Court in the case of ***Dataram Singh Vs. State of U.P. and another, reported in (2018) 3 SCC 22*** and without expressing any opinion on the merits of the case, let the applicant involved in the aforesaid crime be released on bail on his furnishing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned with the following conditions that :-

1. The applicant shall not tamper with the prosecution evidence by intimidating/ pressurizing the witnesses, during the investigation or trial.

2. The applicant shall cooperate in the trial sincerely without seeking any adjournment.

3. The applicant shall not indulge in any criminal activity or commission of any crime after being released on bail.

4. In case the applicant has been enlarged on short term bail as per the order of committee constituted under the orders of Hon'ble Supreme Court his bail shall be effective after the period of short-term bail comes to an end.

5. The applicant shall be enlarged on bail on execution of personal bond without sureties till normal functioning of the courts is restored. The accused will furnish sureties to the satisfaction of the court below within a month after normal functioning of the courts are restored.

6. The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad.

7. The concerned Court/Authority/Official shall verify the authenticity of such computerized copy of the order from the official website of High Court Allahabad and shall make a declaration of such verification in writing.

7. In case of breach of any of the above conditions, it shall be a ground for cancellation of bail.

(2020)09ILR A166
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 24.01.2020

BEFORE

THE HON'BLE RAKESH SRIVASTAVA, J.

First Appeal From Order No. 430 of 2016

Jiaul Hasan & Ors. ...Appellants
Versus
Vijendra Singh & Anr. ...Respondents

Counsel for the Appellants:
Balendu Shekhar

Counsel for the Respondents:
Awadhesh Kumar Shukla, Kunwar Ravi Prakash, Tarun Kumar Misra

A. Civil Law-Motor Accident Claim– Deduction towards personal and living expenses – Where the deceased was a bachelor and the claimants are the parents, 50% deduction is to be made towards personal and living expenses of the deceased – Held, Tribunal wrongly

deducted one-third towards the personal and living expenses of the deceased. (Para 12 and 13)

B.Civil Law - Motor Accident Claim – Application of Multiplier – Sarla Verma's principle – Age of deceased was 20 years – A multiplier of 18 ought to have been applied – Held, Tribunal wrongly applied the multiplier of 16. (Para 16)

C. Civil Law -Motor Accident Claim – Determination of Compensation – Future Prospects – The issue regarding future prospects has now been settled in the case of Pranay Sethi – Tribunal has erred in not awarding any amount towards future prospects – The appellant nos. 1 and 2 would be entitled to an addition of 40% of the income of the deceased towards future prospects. (Para 17 and 19)

D. Civil Law -Motor Accident Claim – Determination of Compensation – Funeral expenses, loss of consortium and loss of estate – Pranay Sethi's Principle – As a rule of thumb Rs. 15,000, Rs 40,000 and Rs. 15,000 has to be awarded towards loss of estate, loss of consortium and funeral expenses respectively – Claimant is entitled for the same – Compensation is accordingly increased. (Para 20, 21 and 23)

Appeal disposed of. (E-1)

Cases relied on :-

1. Sarla Verma & ors. Vs Delhi Transport Corporation & ors., (2009) 6 SCC 121

2. National Insurance Company Ltd. Vs Pranay Sethi & ors., (2017) 16 SCC 680

3. Hem Raj Vs Oriental Insurance Co. Ltd., (2018) 15 SCC 654

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

1. Heard Shri Balendu Shekhar, learned counsel for the appellants and Shri Tarun Kumar Misra, learned counsel for respondent no.2. No one has appeared on behalf of respondent no.1

2. This is a claimant's appeal for enhancement of compensation against the judgment and award dated 15.3.2016 passed by the Motor Accident Claims Tribunal/Additional District Judge, Court No.14, Lucknow in Motor Accident Claims Case No.186 of 2014 (Jia-Ul-Hasan and others v. Vijendra and others).

3. The deceased, Dawood Hasan, was the son of claimants-appellant nos.1 and 2 and brother of claimants-appellant nos.3 and 4 herein. On 20.3.2014, at about 7:30 PM, a truck bearing registration no. HR 74-2918, which was being driven rashly and negligently dashed against a car bearing registration No. UP 32 EL 2099. The accident took place near Prashant Dhaba at Kanpur Lucknow Highway under Police Station Sarojini Nagar. As a result of the said accident both Dawood Hasan and Vishal Shobhit, who were travelling in the said car suffered grievous injuries and died on the spot.

4. Jiaul Hasan and Nargis Bano (the parents of Dawood Hasan) along with Farheen and Malak Hasan (sisters of Dawood Hasan) filed a claim petition under the Motor Vehicle Act, 1988 (for short the Act) claiming compensation of Rs 7,50,000. The appellants pleaded that the accident was caused due to rash and negligent driving of the truck and that, at the time of his death the deceased was 20 years of age and was doing his second year B.Tech in Mechanical Engineering from Azad Engineering College, L.I.T., Bijnor and was earning a sum of Rs 3300 per month from tutions.

5. The claim was contested by Vijendra, respondent no.1 herein, the owner of the offending truck. It was stated that Iqbal, the driver of the truck was a skilled driver and had a valid and effective driving

license on the date of the alleged accident. The factum of accident was denied and it was additionally mentioned that the truck was insured with Chola Mandalam M.S. General Insurance Company, respondent no.2 herein and that there being no breach of the terms and conditions of the policy, the compensation, if any, was to be paid by respondent no.2. Respondent no. 2, the insurer also contested the claim by filing their written statement.

6. On the pleading of the parties, the Tribunal framed the following issues:

1– क्या दिनांक 20.03.2014 को समय करीब 7.30 बजे शाम स्थान प्रशान्त

3– क्या दुर्घटना के समय ट्रक संख्या एच0आर0 74–2918 के चालक के पास वैद्य एवं प्रभावी चालन अनुज्ञप्ति थी?

4– क्या प्रस्तुत याचिका पक्षकारों के असंयोजन के दोष से दूषित है जैसा कि विपक्षी सं0 2 का अपने प्रतिवादपत्र के प्रस्तर 21 में अभिकथन है?

5– क्या याची प्रतिकर की धनराशि पाने के अधिकारी है, यदि हाँ तो कितनी और किससे?

7. On behalf of the appellants, Jiaul Hasan was examined as PW 1 and Janardan Agarwal was examined as PW 2. No oral evidence was led by the respondents. The parties filed documentary evidence in support of their respective cases.

8. After analysing the evidence on record the Tribunal held that the accident was caused due to negligent and rash driving of offending truck. The Tribunal also held that the appellants nos. 3 and 4 (the sisters of the deceased) were not dependent upon him. While deciding the quantum of compensation the Tribunal, in the absence of any documentary evidence, took the notional income of the deceased at Rs 3000 per month. It also determined that the deceased was a bachelor and was aged about 20 years at the time of accident. The Tribunal deducted one-third of the monthly income towards his personal and living expenses and determined that the effective loss of earnings to the family was Rs 2000 per month (or Rs 24,000 per annum). The Tribunal then applied the multiplier of 16 for determining the compensation amount. The Tribunal also provided compensation of Rs 5000 towards funeral expenses and declared that the appellant nos. 1 and 2 were entitled to the compensation of Rs 3,89,000 along with interest @ 7% per annum from the date of filing of the claim petition till the date of actual payment.

9. Learned counsel for the appellants has submitted that as per the age of the deceased, the Tribunal ought to have applied the multiplier of 18 instead of 16. He has further submitted that the claimants were also entitled to compensation under the head of future prospect and were also entitled to the compensation under the conventional head.

10. Shri Tarun Kumar Misra, learned counsel for respondent no.2 has supported the impugned award. He has, however, submitted that since the deceased was a bachelor and only the parents of the deceased have been held to be his dependents, one-half should have been deducted towards his personal and living expenses instead of one third.

11. Admittedly, against the award under challenge in the present appeal, neither any appeal nor any cross objection has been filed on behalf of the respondents and as such the finding regarding the rash and negligent driving of the driver of the offending vehicle is upheld. The appellants have not assailed the finding recorded by

the Tribunal that the appellant nos. 3 and 4, the sisters of the deceased, were not dependant on him and as such the same is also upheld.

12. On the issue of deduction towards personal and living expenses, it is no more res integra that where the deceased was a bachelor and the claimants are the parents, 50% deduction is to be made towards personal and living expenses of the deceased.

13. The Tribunal has made a deduction of one-third towards the personal and living expenses of the deceased and as rightly contended by the learned counsel for the insurer, the deceased being a bachelor and only his parents having being held to be dependent upon him, the deduction of one-half should have been made towards his personal and living expenses as per the settled law in this regard. The issued is decided accordingly.

14. In so far as the multiplier is concerned, the Apex Court in *Sarla Verma and others v. Delhi Transport Corporation and others, (2009) 5 SCC 121* has held that the multiplier to be used should be as mentioned in column (4) of the table set out in paragraph 40 of the said judgment which starts with the multiplier of 18. Paragraph 42 of the said report 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 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, M14 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. In *National Insurance Company Limited v. Pranay Sethi and others, (2017) 16 SCC 680,* a Constitution Bench of the Apex Court, reproduced paragraph 42 of *Sarla Verma's case* and approved the same by stating thus:

"42. As far as the multiplier is concerned, the Claims Tribunal and the courts shall be guided by Step 2 that finds place in para 19 of Sarla Verma read with para 42 of the said judgment."

16. As the age of the deceased at the time of his death was 20 years, as per *Sarla Verma's case,* a multiplier of 18 ought to have been applied. The Tribunal, taking into consideration the age of the deceased, wrongly applied the multiplier of 16. The issue is decided accordingly.

17. The next question relates to the addition of future prospects. The Tribunal, in the present matter, has not awarded any amount towards future prospects. The issue regarding future prospects has now been settled in the case of *Pranay Sethi (supra).* The relevant portion of the said report is being reproduced below for ready reference:

"56. .... We are inclined to think that there can be some degree of difference as regards the percentage that is meant for or applied to in respect of the legal representatives who claim on behalf of the deceased who had a permanent job than a person who is self employed or on a fixed

salary. But not to apply the principle of standardisation on the foundation of perceived lack of certainty would tantamount to remaining oblivious to the marrows of ground reality. And, therefore, degree-test is imperative. Unless the degree test is applied and left to the parties to adduce evidence to establish, it would be unfair and inequitable. The degree-test has to have the inbuilt concept of percentage. *Taking into consideration the cumulative factors, namely, passage of time, the changing society, escalation of price, the change in price index, the human attitude to follow a particular pattern of life, etc., an addition of 40% of the established income of the deceased towards future prospects and where the deceased was below 40 years an addition of 25% where the deceased was between the age of 40 to 50 years would be reasonable."*

(emphasis supplied)

18. In *Hem Raj v. Oriental Insurance Co. Ltd., (2018) 15 SCC 654,* the Apex Court repelled the submission made on behalf of the Insurance Company that in the absence of actual evidence of income the principle of adding on account of future prospects cannot be applied where income is determined by guesswork and held that there cannot be distinction where there is positive evidence of income and where minimum income is determined on guesswork in the facts and circumstances of a case.

19. In view of the above, the Tribunal has erred in not awarding any amount towards future prospects. The appellant nos. 1 and 2 would be entitled to an addition of 40% of the income of the deceased towards future prospects.

20. In *Pranay Sethi (supra)* the Apex Court has held that as a rule of thumb Rs. 15,000, Rs 40,000 and Rs. 15,000 has to be awarded towards loss of estate, loss of consortium and funeral expenses respectively.

21. In view of the above, the compensation awarded under the head funeral expenses is enhanced from Rs. 5,000/- to Rs.15,000. The appellant nos. 1 and 2 are also held entitled to a sum of Rs. 15,000 towards loss of estate and Rs 40,000/- towards loss of consortium on the death of their son.

22. Thus, in the light of the above mentioned principles, notional income of the deceased is assessed as Rs 3000/- per month (or Rs 36,000/- per annum). Considering the principles of dependence, half of the income of the deceased is liable to be deducted towards the amount, which he would have spent upon himself, if he had remained alive. After deducting half from his annual income towards his personal and living expenses, his contribution to the family is assessed as Rs 18,000/- per annum. Since the age of the deceased was less than 40 years, an addition of 40% of the annual income should be made on account of future prospects on the basis of Pranay Sethi (supra). The annual income of the deceased would thus be Rs.25,200/-. Considering the age of the deceased, a multiplier of 18 is to be applied. Accordingly, the loss of dependency is assessed as Rs. 4,53,600/-. In addition to the above, the claimants are also entitled to Rs 15,000/- towards funeral expenses, Rs 15,000/- for loss of estate and Rs 40,000- towards consortium.

23. Thus the total compensation to which the claimants are entitled is Rs 5,23,600/- The compensation is accordingly increased from Rs 3,89,000/- to Rs

5,23,600/-. The increased amount shall carry interest @ 7% per annum from the date of claim petition till the time of its actual payment.

24. The impugned judgment and award stands modified to the above extent.

(2020)09ILR A171
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 20.11.2019

BEFORE

THE HON'BLE RAKESH SRIVASTAVA, J.

First Appeal From Order No. 890 of 2017

The Oriental Insurance Co. Ltd., Lko ...Appellant

Versus

Smt. Saroj & Ors. ...Respondents

Counsel for the Appellant:
Vashu Deo Mishra

Counsel for the Respondents:
Akhilesh Kumar Srivastava, Chandra Bhanu Singh, Hari Shanker Tewari, Mukesh Singh

A. Civil Law -Motor Vehicle Act, 1988 – Section 103 – U.P. State Road Transport Services (Development) Rules, 1974 – Permit issued to State Transport Undertaking – Requirement of mentioning the bus numbers – Held, There is no statutory requirement of mentioning the bus number in a permit issued to the State Transport Undertaking. (Para 14)

B. Civil Law -Motor Accident Claim – Doctrine of estoppels – Plea of violation of insurance policy – Not raised before the court below – Held, appellant is now estopped from contending that by attaching his bus with the Corporation, the insured has violated the terms and conditions of the policy and it was not liable to indemnify the insured. (Para 22, 23 and 24)

Appeal dismissed. (E-1)

Cases relied on :-

1. The Oriental Insurance Co. Ltd. Vs U.P.S.R.T.C. & ors., 2015 (33) LCD 2814

2. U.P.S.R.T.C. Vs Kulsum; (2011) 8 SCC 142

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

1. This first appeal from order has been filed by the Insurer under Section 173 of the Motor Vehicle Act, 1988 (for short 'the Act') against the judgment and award dated 23.08.2017 passed by the Motor Accident Claims Tribunal/ Additional District Judge, Court No. 2, Faizabad in MACP No. 252 of 2015, Smt. Saroj and others v. Laxman Prasad Verma and others.

2. On 03.08.2015, Vinod Kumar was returning to his village Doshpur from Faizabad on his bicycle. At about 9 pm, a bus bearing No. UP-36T-1103, which was being driven rashly and negligently, came from behind and hit his bicycle. As a result of the said collision Vinod Kumar suffered serious injuries in his head and body. He was taken to District Hospital, Faizabad from where he was referred to Trauma Centre, Lucknow. On 05.08.2015, he died while undergoing treatment at Lucknow. A First Information Report was lodged at police station Pura Kalandar, District Faizabad. Smt. Saroj, widow of late Vinod Kumar, along with her daughters Ruchi Verma and Kamimi Verma and son Anuj, filed a claim petition under Section 166 of the Act, claiming compensation of Rs. 16,35,000/- for the unfortunate death of Vinod Kumar in the road accident.

3. Laxman Prasad Verma, the owner of the offending vehicle, the respondent no. 5 herein, in his written statement admitted that he was the registered owner of the offending bus. However, he denied the accident and the involvement of the bus in

question. He stated that Hemraj Verma, the driver of the bus, had a valid license. At the time of accident the offending bus was insured with the Appellant and was plying under an Agreement of Contract dated 04.06.2015 with the Uttar Pradesh State Road Transport Corporation (for short "the Corporation'), a State transport undertaking. It was also stated that the bus was plying on the route as per the permit granted by the Regional Transport Officer in favour of the Corporation. The driver of the vehicle, respondent no. 2 herein, was proceeded against ex-parte since he remained absent despite service of notice upon him in the proceeding.

4. The Appellant also filed its written statement denying the averments made in the claim petition. A general defence was taken that at the time of the accident the driver of the bus did not have an effective driving license and that the bus in question was plying on the road without a valid permit and fitness, in violation of the terms of the policy and as such the Appellant was not liable to indemnify the owner.

5. The Regional Manager of the Corporation (respondent no. 4 herein), in his written statement, admitted the accident. However, he alleged negligence on the part of the deceased. It was admitted that the offending vehicle was running on contract with the Corporation for the period 04.06.2015 to 18.05.2025. It was, however, stated that as per the terms of the contract, if any accident took place during the subsistence of the contract, the responsibility to pay the compensation was that of the owner and the insurance company.

6. The Tribunal framed appropriate issues regarding negligence of the driver of the bus, violation of the terms of the policy, entitlement of the claimants to compensation and the quantum of compensation. The claimants examined Smt. Saroj as PW 1 and Ram Ashish Verma as PW 2. No oral evidence was led on behalf of the owner of the bus, the insurer and the Corporation. The contesting parties filed documentary evidence in support of their respective cases. The respondent no. 4 filed the registration certificate, insurance policy, permit dated 07.01.2009, office order dated 04.06.2015 and the letter dated 30.08.2015 of the Appellant.

7. On an appraisal of oral and documentary evidence on record, the Tribunal, through the impugned award, held that the accident took place due to rash and negligent driving on the part of driver of the bus Hem Raj, as a result of which the deceased suffered grievous injuries and died. The offending vehicle was insured with the Appellant. The Tribunal held that that there was no violation of the insurance policy. The Tribunal, thereafter, on the basis of the post mortem report assessed the age of the deceased between 46 to 50 years. In the absence of convincing evidence, the Tribunal assessed the annual income of the deceased at Rs. 54,000/- and applying the multiplier of 13, awarded the compensation of Rs. 4,91,122/- along with interest @ 7% from the date of application till the time of its actual payment.

8. Feeling aggrieved, the Appellant has filed this appeal. During the hearing of this appeal, Sri Vasudeo Mishra, learned counsel for the Appellant has made only two submissions:

(a) That the permit dated 07.01.2009 related to only 100 buses of Corporation for the route Sultanpur-

Kurebhar-Khajurahat-Bikhapur-Faizabad but it did not contain the registration number of the bus in question and as such it could not be established that the offending bus was one of the 100 buses authorized to ply under the said permit; and

(b) That the insurer had attached his bus with the Corporation in violation of the insurance policy and as such the Appellant was absolved of his liability to indemnify the insured.

9. No one has appeared on behalf of the respondent no. 5 and 6, though the name of Sri Hari Shanker Tewari is printed in the cause list. Sri Mukesh Singh, the learned counsel for the respondent nos. 1 to 4 has supported the impugned award. Sri Akhilesh Kumar Srivastava, learned counsel for the respondent no. 7 has submitted that there is no statutory requirement of mentioning the bus numbers in the permit issued to the Corporation under Section 103 of the Act. He has further submitted that under sub-section (1A) of Section 103 of the Act, as applicable in the State of Uttar Pradesh, the Corporation is empowered to hire any vehicle to ply on the route for which permit has been obtained by it from the Transport Authority.

10. Section 66 of the Act emphasizes the necessity for permits. As per Section 66 of the Act a vehicle defined under Section 2(28) of the Act can only be used as a "transport vehicle" as defined under Section 2(47) of the Act, only if it has a "permit" as defined under Section 2(31) of the Act. Sub-section (3) of Section 66 of the Act carves out certain exceptions to sub-section (1). Relevant portion of Section 66 of the Act reads as under:

"66. Necessity for permits.--(1) No owner of a motor vehicle shall use or permit the use of the vehicle as a transport vehicle in any public place whether or not such vehicle is actually carrying any passengers or goods save in accordance with the conditions of a permit granted or countersigned by a Regional or State Transport Authority or any prescribed authority authorising him the use of the vehicle in that place in the manner in which the vehicle is being used."

11. The provision for grant of permit to the State Transport undertakings, in pursuance of an approved Scheme is provided in Section 103 of the Act. Sub-section (1) of Section 103 of the Act being relevant is reproduced as under:-

"103. Issue of permits to State transport undertakings.-- (1) Where, in pursuance of an approved scheme, any State transport undertaking applies in such manner as may be prescribed by the State Government in this behalf for a stage carriage permit or a goods carriage permit or a contract carriage permit in respect of a notified area or notified route, the State Transport Authority in any case where the said area or route lies in more than one region and the Regional Transport Authority in any other case shall issue such permit to the State transport undertaking, notwithstanding anything to the contrary contained in Chapter V."

12. It appears that the State of Uttar Pradesh approved a Scheme No. 763टीo/XXX708टीo/1950 dated 12.02.1951 under Section 100 of the Act for Sultanpur-Kurebhar-Khajurahat-Bikapur-Faizabad route. After the scheme was approved, the Corporation got the right, to the exclusion of all other persons, to run and operate road transport services on the said route.

13. The Regional Transport Authority, Faizabad under Section 103 of the Act,

issued a permit no. 04/फ़ैज़ाo/09 dated 07.01.2009 in favour of the Corporation for running 100 buses of the Corporation till the subsistence of the scheme. The said permit does not contain the bus numbers.

14. In *The Oriental Insurance Co. Ltd. v. U.P.S.R.T.C. and others, 2015 (33) LCD 2814,* a Division Bench of this Court considered the question as to whether there was any statutory requirement of mentioning the bus numbers in a permit issued under section 103 of the Act to the State Transport Undertaking by the State Transport Authority or the Regional Transport Authority as the case may be. This Court after taking into account the relevant provisions of the Act and the Rules, along with the U.P. State Road Transport Services (Development) Rules, 1974 answered the said question in the negative. Paragraph 9 (relevant portion), 10, 11, 12 and 13 of the said report are extracted below:

"9. The only point which has been put forward by Sri B.C. Pandey, learned counsel for the Insurance Company is that the permit filed before the Tribunal was a photostat copy and the same was not got proved by anybody and the same does not contain any number of bus. The aforesaid argument has to be considered in the light of provision contained under the Act. Section 103 of the Act is as under:

* * *

10. The procedure provided under Rule 10 of the Rules of 1974 is very clear and explicit, which says that as and when an application under Sub-Rule (1) is made, the State Transport Authorities or Regional Transport Authorities, as the case may be, may issue a permit to the State Transport Undertaking for the notified route or notified area accordingly.

11. Counsel for UPSRTC has laid emphasis on the words "notified route or notified area' are the only requirement as contemplated under the Act and to substantiate his case, he has further drawn the attention of the Court towards Form IV Part A of the permit. *Form IV part A goes to indicate that notified route or notified area is the only requirement and nothing more than that. And the requirement is also to the same effect that the State Transport Authorities or Regional Transport Authorities are required to issue permit to the State Transport Undertaking indicating notified route or notified area.*

12. *Once the requirement for issuance of permit for notified route or notified area has been made, the argument of learned counsel for the appellant that bus number must be mentioned on the permit cannot be accepted and neither termed to be statutory requirement as contemplated under the Act or Rules.* The further argument of learned counsel for the appellant is that the said permit has not been proved. It is to be noted that photostat copy of the permit was filed by UPSRTC. The UPSRTC happens to be a public body. The custodian of the original record is the said public body and, therefore, attested photostat copy of the same has been filed by UPSRTC before the Tribunal, therefore, it cannot be said that it is not a correct document and the same cannot be considered."

(emphasis supplied)

15. The judgment in the case mentioned above has been followed by this Court in a number of subsequent cases. In *First Appeal From Order No. 194 of 2011, The Oriental Insurance Co. Ltd. Lucknow Thru Manager* a co-ordinate Bench of this Court, following the Division Bench

decision mentioned in the preceding paragraph, has held as under:

"13. The learned counsel for the respondent no.3 has referred to a judgment of the Division Bench of this Court rendered in FAFO No. 1090 of 2011, decided on 23.7.2015. In this case also similar question was raised and the Division Bench held that once the requirement for issuance of permit for notified route or notified area has been made, the argument of learned counsel for the appellant that bus number must be mentioned on the permit, cannot be accepted. It was also held that no such statutory requirement is contemplated either under the Act or under the Rules. A Co-ordinate Bench of this Court also had an occasion to examine this aspect of the matter in FAFO No. 462 of 2016 and FAFO No. 504 of 2014. In both the cases the Co-ordinate Bench came to the conclusion that Section 103 of the Motor Vehicles Act envisages the procedure of issuance of permit in favour of U.P.S.R.T.C. *The Honb'le Single Judge, while deciding the appeals considered the matter in detail and found that once a motor vehicle operated by U.P.S.R.T.C. is covered under Chapter VI of the Act, no permit as provided under Section 66 of the Act is required. It was also considered by the Court that Rule 130 of the U.P. Motor Vehicle Rules 1998 prescribes the procedure for issuance of permit in favour of U.P.S.R.T.C. The prescribed form for obtaining permit is Form No. S.R. 46. This form also clearly mentions the issuance of permit under Section 103 of the Act. The other vehicles which are operated privately or issued permit in form S.R. 29 are regulated by Section 66 of the Act.*

14. So far as the validity of permit is concerned, the Rules clearly provide that the permit issued, shall remain valid till the scheme remains in force. Since the scheme of the U.P.S.R.T.C. to ply the buses on specified routes, is still in force therefore, there is no question of expiry of any permit. Although permit was granted under the old Act and the Rules but by the enactment new Act in the year 1998, the permit granted under the old Act remained uneffected. It was clearly provided, that the permits granted under the old Act will continue to remain valid in the new Act.

* * *

18. Having heard learned counsel for the parties and having considered the various provisions of the Act as well as the law on the subject referred by the learned counsel for the parties, *I find that the only requirement for the buses belonging to U.P.S.R.T.C. is that they should be used within the notified area on the specified routes mentioned in the permit. There is no requirement that the permit should be issued in respect of the each and every bus belonging to Corporation."*
(emphasis supplied)

16. The law in this regard appears to be fairly well settled. In both the cases mentioned above, the appeal was filed by the Oriental Insurance Company, the Appellant herein. The judgment of the Division Bench of this Court was not assailed by the Appellant before the higher forum and has, thus, become final. The conduct of the Appellant in raising the same issue again and again in every case involving the Corporation cannot be countenanced. The first contention of the counsel for the Appellant is accordingly repelled.

17. The second contention of the counsel for the Appellant is also without substance.

18. By Uttar Pradesh Amendment Act 5 of 1993, sub-section (1A) was inserted after sub-section (1) of Section 103 of the Act w.e.f. 16.01.1993. Sub-section (1A) is extracted below:

"(1A) It shall be lawful for a State transport undertaking to operate on any route as stage carriage, under any permit issued therefor to such undertaking under sub-section (1), any vehicle placed at the disposal and under the control of such undertaking by the owner of such vehicle under any arrangement entered into between such owner and the undertaking for the use of the said vehicle by the undertaking."

19. Sub-section (1A) of Section 103 of the Act, empowers the Corporation to hire any vehicle which could be plied on any route for which permit had been issued by the Transport Authority in its favour.

20. In *U.P.S.R.T.C. v. Kulsum, (2011) 8 SCC 142,* the Apex Court considered the question as to whether in case of an accident of an insured vehicle (in the said case a mini bus) plying under an agreement of contract with the Corporation, on the route as per permit granted in favour of the Corporation, the Insurance Company would be liable to pay compensation or would it be the responsibility of the Corporation or the owner and held as under:

"23. A critical examination thereof would show that the appellant and the owner had specifically agreed that the vehicle will be insured and a driver would be provided by owner of the vehicle but overall control, not only on the vehicle but also on the driver, would be that of the Corporation. Thus, the vehicle was given on hire by the owner of the vehicle together with its existing and running insurance policy. In view of the aforesaid terms and conditions, the Insurance Company cannot escape its liability to pay the amount of compensation.

* * *

26. Thus, in the light of the aforesaid, it is clear that the Insurance Company is trying to evade its liability on flimsy grounds or under misconception of law.

27. On account of the aforesaid discussions, it is crystal clear that actual possession of the vehicle was with the Corporation. The vehicle, driver and the conductor were under the direct control and supervision of the Corporation.

* * *

30. Thus, for all practical purposes, for the relevant period, the Corporation had become the owner of the vehicle for the specific period. If the Corporation had become the owner even for the specific period and the vehicle having been insured at the instance of original owner, it will be deemed that the vehicle was transferred along with the insurance policy in existence to the Corporation and thus the Insurance Company would not be able to escape its liability to pay the amount of compensation.

31. The liability to pay compensation is based on a statutory provision. Compulsory insurance of the vehicle is meant for the benefit of the third parties. The liability of the owner to have compulsory insurance is only in regard to third party and not to the property. *Once the vehicle is insured, the owner as well as any other person can use the vehicle with the consent of the owner. Section 146 of the Act does not provide that any person who uses the vehicle independently, a separate insurance policy should be taken.* The

purpose of compulsory insurance in the Act has been enacted with an object to advance social justice."

(emphasis supplied)

21. *In Oriental Insurance Co. Ltd. v. Smt. Asha Devi And Ors, First Appeal From Order No. 310 of 2016,* a co-ordinate Bench of this Court, relying upon the case of *Kulsum (supra),* has held that in case of an accident of a private bus plying under a contract with the Corporation, the liability to pay the compensation would be that of the insurance company. Paragraph 2 and 3 of the said report are extracted below:

"2. The appellant Oriental Insurance Company Ltd. has questioned the validity of the award dated 6.2.2016, passed by the Motor Accident Claims Tribunal, Barabanki in Motor Accident Claim Case No. 8/2013 on the ground that the Bus No. U.P. 41 T/2122 was a private bus and there was no permit as required under Section 66 of the Motor Vehicles Act. The appellant is therefore not liable for payment of compensation because the use of vehicle without valid permit would amount to violation of policy condition. The learned Tribunal has wrongly fixed the liability upon the appellant.

3. The learned counsel for the respondents have on the other hand submitted that it is an admitted fact that when the accident took place, the bus was being used under agreement with U.P.S.R.T.C. It has been held by the Hon'ble Supreme Court in the case of Kulsoom and others reported in 2011 (29) LCD Page 1648 that if the accident is caused by an insured bus plying under the contract attached with U.P.S.R.T.C., the liability to pay compensation to third party would be of the Insurance Company and the Insurance Company cannot escape its liability for payment of compensation. *It has further been held that when the vehicle was under the contract of U.P. S.R.T.C., the question of violation of any condition by the owner does not arise. Moreover the requirement to obtain permit under Section 66 of the Act is only for the private owner to ply their transport vehicles on the route but once the vehicle comes under the contract of U.P.S.R.T.C., the Corporation is free to use the bus on notified route on notified area as obtained by it under Section 103 of the Act."*

(emphasis supplied)

22. In the present case, it is not in dispute that at the relevant time the offending bus was insured with the Appellant and the policy was very much in force and in existence. It has also not been contended on behalf of the Appellant that the driver was not entitled to drive the said vehicle and in view of the decision of the Apex Court in the case of *Kulsum (supra)* the Appellant cannot be heard to contend that by attaching his bus with the Corporation, the insured has violated the terms and conditions of the policy and as such the Appellant was absolved of his liability to indemnify the insured.

23. That apart, the Appellant had not raised this contention before the Court below. The record reveals that the insured had entered into a contract with the Corporation only after getting a "no objection' from the Appellant. The letter dated 30.08.2015 of the Appellant is extracted below:

"ओरिएण्टल इंश्योरेंस कम्पनी लिमिटेड
चिनहट, लखनऊ
सेवा में,
क्षेत्रीय प्रबन्धक
उ0 प्र0 परिवहन निगम फैजाबाद

परिवहन निगम से मिनी बस सं0 न्च 36 ज 1103 को अनुबन्ध करने में बीमा कम्पनी को कोई आपत्ती नहीं है तथा बीमा कम्पनी द्वारा बीमित बस से अनुबन्ध अवधि में कारित दुर्घटना के फलस्वरूप देय प्रतिकर का दायित्व बीमा कम्पनी का होगा।

दि

ओरिएण्ट इंश्योरेंस कम्पनी लिमिटेड
चिनहट लखनऊ"
(emphasis supplied)

24. In the circumstances, in any case, the Appellant is now estopped from contending that by attaching his bus with the Corporation, the insured has violated the terms and conditions of the policy and it was not liable to indemnify the insured.

25. In view of the aforesaid discussion, it is apparent that the appeal is absolutely misconceived and is devoid of merit and is accordingly dismissed.

26. No order as to cost.

(2020)09ILR A178
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 26.11.2019

BEFORE

THE HON'BLE RAKESH SRIVASTAVA, J.

First Appeal From Order No. 1078 of 2013

Oriental Insurance Company Ltd.
...Appellant
Versus
Smt. Roop Rani & Anr. ...Respondents

Counsel for the Appellant:
Rajeev Misra

Counsel for the Respondents:
Ram Pher Singh

A. Civil Law -Motor Vehicle Act, 1988 – Sections 149 and 170 – Right of insurer to contest – Ground available to insurer – If the insurer is only a noticee, it can only raise such of those grounds as are permissible in law under Section 149(2) – But if insurer is a party-respondent, it can gets a right to contest the claim on all or any of the grounds that are available to the insured. (Para 10)

B. Civil Law -Motor Vehicle Act, 1988 – Sections 66 and 149 – Absence of valid fitness certificate – Liability of Insurer – Use of a vehicle in a public place without a permit or in violation of any condition is a fundamental breach – Absence of a fitness certificate amounts to the absence of a valid permit – Offending vehicle would be deemed to be without registration and without a valid permit and as such the liability cannot be imposed upon the insurer. (Para 11 and 20)

C. Civil Law -Motor Vehicle Act, 1988 – Doctrine of pay and recover – Breach of policy condition – In case of third-party risks, the insurer had to indemnify the compensation amount payable to the third-party and the insurance company may recover the same from the insured – Held, the impugned award directing the appellant to indemnify the owner is set aside. (Para 21 and 25)

Appeal partly allowed. (E-1)

Cases relied on :-

1. United India Insurance Co. Ltd. Vs. Shila Datta; (2011) 10 SCC 509

2. Narinder Singh Vs New India Assurance Co. Ltd.; (2014) 9 SCC 324

3. National Insurance Co. Ltd. Vs Challa Upendra Rao; (2004) 8 SCC 517

4. Amrit Paul Singh Vs TATA AIG General Insurance Co. Ltd.; (2018) 7 SCC 558

5. Ramankutty & anr.Vs Pareed Pillai & anr.; 2018 SCC Online Ker 3542

6. National Insurance Co. Ltd. Vs Swaran Singh; (2004) 3 SCC 297

7. National Insurance Co. Ltd. Vs Laxmi Narain Dhut; (2007) 3 SCC 700

8. Premkumari Vs Prahlad Dev; (2008) 3 SCC 193

9. Oriental Insurance Co. Ltd. Vs Nanjappan; (2004) 13 SCC 224

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

1. This First Appeal From Order has been filed by the Oriental Insurance Company Limited (for short 'Company') under Section 173 of the Motor Vehicles Act, 1988 (for short 'Act') challenging the judgment and award dated 30.8.2013 passed by the Motor Accident Claims Tribunal/ Additional District Judge, Court No.9, Lucknow in Motor Accident Claim Petition No. 344 of 2011 (Smt. Roop Rani v. Pawan Kumar and another) whereby and whereunder the Tribunal has awarded compensation of Rs.1,32,272 along with interest at the rate of 6% per annum.

2. Smt. Roop Rani, the claimant in the original claim, and respondent no. 1 herein, filed a claim petition. According to her, on 8.3.2011, she was going from Mullahi Khera to her village Rahimpur. While she was waiting for a tempo near Scooter India Crossing, at about 10:30 AM, a DCM Truck No. UP 17A 8562 hit her, as a result of which, she suffered grievous injuries and she became 100% invalid.

3. Pawan Kumar, respondent no. 2 herein, admitted that he was the owner and driver of the offending vehicle. He denied the factum of accident. It was, however, asserted on his behalf, that the vehicle was insured with the Oriental Insurance Company Ltd as per the insurance policy, and that the vehicle was registered and he had the requisite driving licence. The insurer, the appellant herein, opposed the claim on the ground that the vehicle in question was driven in violation of the terms of the insurance policy and further that the driver was not having a valid and effective driving licence and, therefore, it was not obliged to indemnify the insured.

4. The Tribunal after taking into account the oral and documentary evidence on record held that the claimant was entitled to compensation of Rs. 1,32,272 along with 6% interest from the date of accident till the time of actual payment. While allowing the claim petition the Tribunal categorically held that, on the date of the accident, the respondent no.2 did not have a valid fitness certificate for the offending vehicle. The Tribunal, however, held that the absence of a fitness certificate was not one of the defences available to the Insurer under Section 149 of the Act and that the insurer had not led any evidence to establish that the offending vehicle was not fit for plying. In the circumstances, it was held that the Insurer could not be absolved of its liability to indemnify the insured and accordingly directed the appellant to indemnify the respondent no. 2. The relevant portion of the judgment is extracted below:

36– बीमा कम्पनी के विद्वान अधिवक्ता द्वारा यह तर्क प्रस्तुत किया गया है कि वाहन का फिटनेस नहीं था और इस परिप्रेक्ष्य में यह ध्यान आकर्षित कराया गय कि फार्म–54 में आर.टी.ओ. बागपत के रिकार्ड अनुसार फिटनेस दिनांक 8.3.11 को वैध नहीं था और छाया प्रति मांगने का उद्धण है और उसके परिशीलन से विदित है कि फिटनेस दिनांक 4.4.14 तक वैध था, परन्तु फिटनेस दुर्घटना की तिथि पर वैध था, स्पष्ट नहीं है। पंजीयन प्रमाण की छाया प्रति सी–35/4 दाखिल किया गया है उसमें फिटनेस का तस्करा नहीं है और दुर्घटना की तिथि पर फिटनेस वैध था, इसका कोई भी प्रमाण याचिनी द्वारा दाखिल नहीं किया गया है और न ही वाहन स्वामी द्वारा दाखिल किया गया है। ऐसी

स्थिति में यह अवधारणा की जायेगी कि फिटनेस वाहन का वैध नहीं था।

* * *

38– *अब विचारणीय प्रश्न यह है कि फिटनेस के अभाव में बीमा कम्पनी पर दायित्व निर्धारित किया जा सकता है अथवा नहीं।*

39– बीमा कम्पनी को मोटर वाहन अधिनियम की धारा 149 के तहत ही उनके उत्तरदायित्व से उन्मुक्त किया जा सकता है। *धारा 149 एम.वी.ऐक्ट में फिटनेस का होना दर्शाया नहीं गया है। अतः फिटनेस के अभाव में बीमा कम्पनी को उनके दायित्व से उन्मुक्त नहीं किया जा सकता है। बीमा कम्पनी द्वारा ऐसा कोई प्रमाण दाखिल नहीं किया गया है जिससे यह स्पष्ट हो सके कि प्रस्तुत वाहन चलायमान नहीं था। ऐसी परिस्थितियों में मामले के तथ्य व परिस्थितियों में क्षतिपूर्तिक की अदायगी का उत्तरदायित्व बीमा कम्पनी पर निर्धारित किया जाना न्यायोचित पाया जाता है।"*

(emphasis supplied)

5. The appeal has been taken up for hearing in the revised list. The respondent no. 2 though served, remains unrepresented.

6. In support of the appeal, Sri Rajeev Misra, the learned counsel for the appellant has contended that plying a vehicle without a valid fitness certificate is a breach of a specific condition of the insurance policy and the Tribunal has grossly erred in holding otherwise. The counsel has submitted that in the absence of a valid fitness certificate, the indemnification of the claimants is the responsibility of the owner of the vehicle involved in the accident.

7. Sri R.P. Singh, the learned counsel for the claimant-respondent no. 1 has supported the impugned award and has, in the alternative, contended that the claimants should not be made to suffer for the inter se dispute between the appellant and respondent no. 2 with respect to their liability to pay the amount of compensation to the claimants. According to the learned counsel, the amount of compensation as directed by the Tribunal has to be released to the claimants and the appellant can realise the said amount from the owner of the vehicle in accordance with law.

8. Sections 2(28), 2(31) and 2(47) of the Act that define "motor vehicle" or "vehicle", "permit" and "transport vehicle" are reproduced below:

"2.(28) "motor vehicle" or "vehicle" means any mechanically propelled vehicle adapted for use upon roads whether the power of propulsion is transmitted thereto from an external or internal source and includes a chassis to which a body has not been attached and a trailer; but does not include a vehicle running upon fixed rails or a vehicle of a special type adapted for use only in a factory or in any other enclosed premises or a vehicle having less than four wheels fitted with engine capacity of not exceeding twenty-five cubic centimetres;

* * *

(31) "permit" means a permit issued by a State or Regional Transport Authority or an authority prescribed in this behalf under this Act authorising the use of a motor vehicle as a transport vehicle

* * *

(47) "transport vehicle" means a public service vehicle, a goods carriage, an educational institution bus or private service vehicle.

9. Section 147 of the Act prescribes the requirements of policies and limits of liabilities whereas section 149 deals with the duty of insurer to satisfy judgments and awards against persons insured in respect

of third-party risks. Sub-section (2) of Section 149 is extracted below:

"149. Duty of insurers to satisfy judgments and awards against persons insured in respect of third party risks.--

(1) .....

(2) No sum shall be payable by an insurer under sub-section (1) in respect of any judgment or award unless, before the commencement of the proceedings in which the judgment or award is given the insurer had notice through the Court or, as the case may be, the Claims Tribunal of the bringing of the proceedings, or in respect of such judgment or award so long as execution is stayed thereon pending an appeal; and an insurer to whom notice of the bringing of any such proceedings is so given shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely:--

(a) that there has been a breach of a specified condition of the policy, being one of the following conditions, namely:--

(i) a condition excluding the use of the vehicle--

(a) for hire or reward, where the vehicle is on the date of the contract of insurance a vehicle not covered by a permit to ply for hire or reward, or

(b) for organised racing and speed testing, or

(c) for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a transport vehicle, or

(d) without side-car being attached where the vehicle is a motor cycle; or

(ii) a condition excluding driving by a named person or persons or by any person who is not duly licensed, or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification; or

(iii) a condition excluding liability for injury caused or contributed to by conditions of war, civil war, riot or civil commotion; or

(b) that the policy is void on the ground that it was obtained by the non-disclosure of a material fact or by a representation of fact which was false in some material particular."

10. The grounds available to an insurer to contest the claim of the injured or heirs of the deceased, when it is only a noticee and not a party, are enumerated in sub-section (2) of Section 149 of the Act, whereas, under Section 170 of the Act, the insurer gets a right to contest the claim on all or any of the grounds that are available to the insured. In *United India Insurance Co. Ltd. v. Shila Datta, (2011) 10 SCC 509,* the Apex Court has held that if the insurer is only a noticee, it can only raise such of those grounds as are permissible in law under Section 149(2). But if he is a party-respondent, it can raise, not only those grounds which are available under Section 149(2), but also all other grounds that are available to a person against whom a claim is made.

11. Section 149(2)(a)(i) relates to a vehicle not covered by a permit to ply for hire or reward. Use of a vehicle in a public place without a permit or in violation of any condition thereof is a fundamental breach and in that contingency liability cannot be cast upon the insurer.

12. As per Section 39 of the Act a motor vehicle as defined under section 2(28) of the Act has to be compulsorily registered in accordance with the provisions of the Act before it is plied in a public place. Section 39 of the Act reads as under:

Section 39. Necessity for registration. - *No person shall drive any motor vehicle and no owner of a motor vehicle shall cause or permit the vehicle to be driven in any public place or in any other place unless the vehicle is registered in accordance with this Chapter* and the certificate of registration of the vehicle has not been suspended or cancelled and the vehicle carries a registration mark displayed in the prescribed manner:

Provided that nothing in this section shall apply to a motor vehicle in possession of a dealer subject to such conditions as may be prescribed by the Central Government.

(emphasis supplied)

13. Section 56 of the Act lays down that without a valid fitness certificate, a transport vehicle shall be deemed to be without registration. Relevant portion of section 56 reads as under:

Section 56. Certificate of fitness of transport vehicles. -

(1) Subject to the provisions of sections 59 and 60, *a transport vehicle shall not be deemed to be validly registered for the purposes of section 39, unless it carries a certificate of fitness in such form containing such particulars and information as may be prescribed by the Central Government,* issued by the prescribed authority, or by an authorised testing station mentioned in sub-section (2), to the effect that the vehicle complies for the time being with all the requirements of this Act and the rules made thereunder:

(emphasis supplied)

14. In *Narinder Singh v. New India Assurance Co. Ltd., (2014) 9 SCC 324* the Apex Court has held that the use of a motor vehicle in a public place without any registration is a fundamental breach of the terms and conditions of a policy contract. Paragraph 12 of the said report is extracted below:

"12. Indisputably, a temporary registration was granted in respect of the vehicle in question, which had expired on 11-1-2006 and the alleged accident took place on 2-2-2006 when the vehicle was without any registration. Nothing has been brought on record by the appellant to show that before or after 11-1-2006, when the period of temporary registration expired, the appellant, owner of the vehicle, either applied for permanent registration as contemplated under Section 39 of the Act or made any application for extension of period as temporary registration on the ground of some special reasons. In our view, therefore, *using a vehicle on the public road without any registration is not only an offence punishable under Section 192 of the Motor Vehicles Act but also a fundamental breach of the terms and conditions of policy contract."*

(emphasis supplied)

15. As per section 66 of the Act a vehicle defined under Section 2(28) of the Act can only be used as a "transport vehicle" as defined under Section 2(47) of the Act, only if it has a "permit" as defined under Section 2(31) of the Act. Sub-section (3) of Section 66 of the Act carves out certain exceptions to sub-section (1). Relevant portion of Section 66 of the Act reads as under:

66. Necessity for permits.--(1) *No owner of a motor vehicle shall use or permit the use of the vehicle as a transport*

vehicle in any public place whether or not such vehicle is actually carrying any passengers or goods *save in accordance with the conditions of a permit* granted or countersigned by a Regional or State Transport Authority or any prescribed authority authorising him the use of the vehicle in that place in the manner in which the vehicle is being used.

(emphasis supplied)

16. Section 84 of the Act lays down the general conditions attaching to all permits. As per Sub-section (a) of Section 84 of the Act every vehicle having a permit should have a valid certificate of fitness at all times. Relevant portion of section 84 reads as under:

Section 84. General conditions attaching to all permits. - The following shall be conditions of every permit--

(a) that the vehicle to which the permit relates carries valid certificate of fitness issued under section 56 and is at all times so maintained as to comply with the requirements of this Act and the rules made thereunder;

(emphasis supplied)

17. In *National Insurance Co. Ltd. v. Challa Upendra Rao, (2004) 8 SCC 517*, the Apex Court observed as under:

"12. The High Court was of the view that since there was no permit, the question of violation of any condition thereof does not arise. The view is clearly fallacious. *A person without permit to ply a vehicle cannot be placed on a better pedestal vis-à-vis one who has a permit, but has violated any condition thereof. Plying of a vehicle without a permit is an infraction.* Therefore, in terms of Section 149(2) defence is available to the insurer on that aspect. The acceptability of the stand is a matter of adjudication. The question of policy being operative had no relevance for the issue regarding liability of the insurer. The High Court was, therefore, not justified in holding the insurer liable."

(emphasis supplied)

18. In *Amrit Paul Singh v. TATA AIG General Insurance Co. Ltd., (2018) 7 SCC 558* the Apex Court following *Challa Upendra Rao* (supra) has held that plying of a transport vehicle in a public place without a permit is a fundamental breach. Paragraph 12 of the said report being relevant is extracted below:

"24. In the case at hand, it is clearly demonstrable from the materials brought on record that the vehicle at the time of the accident did not have a permit. The appellants had taken the stand that the vehicle was not involved in the accident. That apart, they had not stated whether the vehicle had temporary permit or any other kind of permit. The exceptions that have been carved out under Section 66 of the Act, needless to emphasise, are to be pleaded and proved. The exceptions cannot be taken aid of in the course of an argument to seek absolution from liability. *Use of a vehicle in a public place without a permit is a fundamental statutory infraction*. We are disposed to think so in view of the series of exceptions carved out in Section 66. The said situations cannot be equated with absence of licence or a fake licence or a licence for different kind of vehicle, or, for that matter, violation of a condition of carrying more number of passengers. Therefore, the principles laid down in *Swaran Singh and Lakhmi Chand* in that

regard would not be applicable to the case at hand. That apart, the insurer had taken the plea that the vehicle in question had no permit. It does not require the wisdom of the "Tripitaka", that the existence of a permit of any nature is a matter of documentary evidence. Nothing has been brought on record by the insured to prove that he had a permit of the vehicle. In such a situation, the onus cannot be cast on the insurer. Therefore, the Tribunal as well as the High Court had directed that the insurer was required to pay the compensation amount to the claimants with interest with the stipulation that the insurer shall be entitled to recover the same from the owner and the driver. The said directions are in consonance with the principles stated in *Swaran Singh* and other cases pertaining to pay and recover principle."

(emphasis supplied)

19. In *Ramankutty and another v. Pareed Pillai and another, 2018 SCC Online Ker 3542,* a 5 Judge Bench of the Kerala High Court considered the question as to whether the absence of "Permit' or "Fitness Certificate' relating to a transport vehicle is only a "technical breach' or a "fundamental breach'. The Bench relying upon the dictum of the Apex Court in the case of *Challa Upendra Rao* held it to be a "fundamental breach'. Paragraphs 16, 17 and 18 of the said report is extracted below:

"16. *As mentioned above, fitness of a vehicle, to be used as a transport vehicle, is of paramount importance.* The necessity to have "Fitness Certificate' is prescribed under Section 56 of the Act. Sub-section (1) of Section 56 clearly stipulates that, a transport vehicle [subject to the provisions of Section 59 (power to fix the age limit of motor vehicle) and Section 60 (registration of the vehicles belonging to the Central Government)] shall not be deemed to be validly registered for the purpose of Section 39, *unless it carries a "Certificate of Fitness' as prescribed. By virtue of Section 84(a), as mentioned already, it is a mandatory requirement of every Permit, that the vehicle to which the Permit relates, shall carry valid "Certificate of Fitness' issued under Section 56 at all time, absence of which will automatically lead to a situation that the vehicle will not be deemed as having a Permit [if it is not having a "Fitness Certificate' on a given date].* Using a motor vehicle in an unsafe condition in any public place itself is an offence under Section 190 of the Act. Separate penalty is prescribed under Section 192 for driving or using the motor vehicle in contravention of Section 39 of the Act [i.e. without registration]; which at the first instance by fine upto Rs. 5000/- [not less than Rs. 2000/-] and for the second or subsequent offences, it may be with imprisonment, which may extend to one year or fine upto Rs. 10,000/- [not less than Rs. 5000/-] or with both; of course, conferring power upon the Court to impose a lesser punishment, for reasons to be recorded. Similarly, separate punishment is provided for using vehicles without "Permit' as provided under Section 192A [first offence with fine upto Rs. 5000/- which shall not be less than Rs. 2000/- and for any subsequent offence with imprisonment upto one year [which shall not be less than 3 months or with fine upto Rs. 10,000/- which shall not be less than Rs. 5000/-] or with both; here again conferring power on the Court to impose lesser punishment, for reasons to be recorded. Reference is made to the above provisions only to illustrate the utmost requirement to have a valid "Registration, Permit and Fitness Certificate'.

17. Importance of the fitness/road worthiness of a vehicle, right from the time of registration of the vehicle, is further discernible from Rule 47 of the Central Motor Vehicles Rules 1989 [referred to as Central Rules]. The said Rule deals with application for registration of motor vehicles, which, among other things, stipulates that it shall be accompanied by various documents. Under sub-rule (1)(g), it is mandatory to produce road worthiness certificate in Form 22 from the manufacturers [Form 22A from the body builders]. On completing the formalities/procedures, "Certificate of Registration' is to be issued in terms of Rule 48 of the Central Rules in Form 23/23A, as the case may be. The said Rule contains a proviso, insisting that, when Certificate of Registration pertains to a transport vehicle, it shall be handed over to the registered owner only after recording the Certificate of Fitness in Form 38. Validity of the Certificate of Fitness is only to the extent as envisaged under Rule 62 of the Central Rules, which mandates, as per the proviso, that the renewal of a Fitness Certificate shall be made only after the Inspecting Officer or authorised Testing Station as referred to in sub Section 1 of Section 56 of the Act has carried out the test specified in the table given therein.

18. *The stipulations under the above provisions clearly substantiate the importance and necessity to have a valid Fitness Certificate to the transport vehicle at all times. The above prescription converges on the point that Certificate of Registration, existence of valid Permit and availability of Fitness Certificate, all throughout, are closely Interlinked. In the case of a transport vehicle and one requirement cannot be segregated from the other. The transport vehicle should be completely fit and road worthy, to be plied on the road, which otherwise may cause threat to the lives and limbs of passengers and the general public, apart from damage to property. Only If the transport vehicle is having valid Fitness Certificate, would the necessary Permit be issued In terms of Section 66 of the Act and by virtue of the mandate under Section 56 of the Act, no transport vehicle without Fitness Certificate will be deemed as a validly registered vehicle for the purpose of Section 39 of the Act, which stipulates that nobody shall drive or cause the motor vehicle to be driven without valid registration in public place or such other place, as the case may be. These requirements are quite "fundamental' in nature;* unlike a case where a transport vehicle carrying more passengers than the permitted capacity or a goods carriage carrying excess quantity of goods than the permitted extent or a case where a transport vehicle was plying through a deviated route than the one shown in the route permit which instances could rather be branded as "technical violations'. In other words, when a transport vehicle is not having a Fitness Certificate, it will be deemed as having no Certificate of Registration and when such vehicle is not having Permit or Fitness Certificate, nobody can drive such vehicle and no owner can permit the use of any such vehicle compromising with the lives, limbs, properties of the passengers/general public. Obviously, since the safety of passengers and general public was of serious concern and consideration for the law makers, appropriate and adequate measures were taken by incorporating relevant provisions in the Statute, also pointing out the circumstances which would constitute offence; providing adequate penalty. *This being the position, such lapse, if any, can only be regarded as a fundamental breach and not a technical*

breach and any interpretation to the contrary, will only negate the intention of the law makers.

(emphasis supplied)

20. The facts of the present case have to be examined in the light of the above-settled proposition of law. The conclusion recorded by the Tribunal clearly shows that the accident occurred on 8.3.2011 and the respondent no. 2 failed to establish that on the date of accident the offending vehicle had a valid fitness certificate. It is not the case of the insured that the offending vehicle was covered by any of the exceptions mentioned in sub-section (3) of Section 66 of the Act. In the circumstances, in view of the settled legal position that absence of a fitness certificate amounts to the absence of a valid permit, the offending vehicle, in the present case, would be deemed to be without registration and without a valid permit and as such the liability cannot be imposed upon the insurer. The impugned award directing the appellant to pay the compensation is set aside.

21. The question now remains as to the direction to be issued in this case. Doctrine of "pay and recover" was considered by the Apex Court in the case of *National Insurance Co. Ltd. v. Swaran Singh, (2004) 3 SCC 297*. In the said case, the Apex Court examined the liability of the insurance company in case of breach of policy condition and held that in case of third-party risks, the insurer had to indemnify the compensation amount payable to the third-party and the insurance company may recover the same from the insured.

22. The view expressed in *Swaran Singh* (supra) has been followed by the Apex Court in *National Insurance Co. Ltd. v. Laxmi Narain Dhut, (2007) 3 SCC 700, Premkumari v. Prahlad Dev (2008) 3 SCC 193. In Laxmi Narain Dhutt* (supra) the Apex Court held as under:

"5. The decision in *Swaran Singh* case has no application to cases other than third-party risks and in case of third-party risks the insurer has to indemnify the amount and if so advised, to recover the same from the insured."

23. In view of the above there is no reason to deviate from the doctrine of "pay and recover" in the present case.

24. So far as the recovery of the amount from the owner of the vehicle is concerned, the insurance company shall recover as held in the decision in *Oriental Insurance Co. Ltd. v. Nanjappan, (2004) 13 SCC 224* wherein the Apex Court held as under:

"8. ... For the purpose of recovering the same from the insured, the insurer shall not be required to file a suit. It may initiate a proceeding before the executing court concerned as if the dispute between the insurer and the owner was the subject-matter of determination before the Tribunal and the issue is decided against the owner and in favour of the insurer."

25. In view of the above discussion, the appeal is partly allowed. The impugned award directing the appellant to indemnify the owner - respondent no. 2 is set aside. The appellant is directed to pay the compensation along with accrued interest to the claimant-respondent no.1 and recover the same from the owner.

26. No order as to cost.

(2020)09ILR A187
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.02.2020

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE AJIT KUMAR, J.

First Appeal From Order Defective No. 1270 of 2019

H.D.F.C. ERGO General Insurance Co. Ltd. ...Appellant

Versus

Sarthak Jain & Ors. ...Respondents

Counsel for the Appellant:
Sri Sushil Kumar Mehrotra

Counsel for the Respondents:
Sri Vidya Kant Shukla, Sri Vipin Chandra Dixit

A. Civil Law -Motor Accident Claim – Defects in vehicle fitness certificate – Question never pressed before the tribunal – No issue has been framed regarding this point of vehicle fitness certificate and the route permit of the truck – No evidence has been led by the Insurance Company to prove that there was sufficient evidence and the tribunal failed to consider the same – Held, No such issue can be framed in appeal. (Para 18 and 19)

B. Civil Law -Motor Accident Claim – 100% Disability – Computation of Compensation – Factors required to be considered – If the person dies, it comes as a cyclonic blow to the family that everybody seems to be ruined for a moment but gets recovered with the passage of time – But in a case of injury if a person is reduced to a stage where he is completely bed ridden and not able to speak, nor eat himself and half of the body is paralysed then it causes death everyday to the members of the family – It is not a death of one person but it reduces the entire family to go under the trauma every moment of every hour, every day and such a situation can be said to be the worse than that of a death of a person – Court found no error in award. (Para 20)

Appeal dismissed. (E-1)

Cases relied on :-

1. Babli Dixit & anr. Vs Satendra Kumar, 2018 SCC Online (Del)13153

2. M.R. Krishna Murthi Vs The New India Assurance Company Ltd. & ors. AIR (2019) SC 5625

3. Raj Kumar Vs Ajai Kumar & anr. (2011)1 SCC, 343

4. H.D.F.C Ergo General Insurance Co. Ltd. Vs Rattan Kumar Dwivedi (2017) SCC Online, Delhi 9874

5. United India Insurance Company Ltd. Vs Anita (2017) SCC Online Delhi 11152

6. Municipal Corporation of Delhi Vs Association of Victims of Uphaar Tragedy (2011)17SCC 481

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

1. Heard Sri Sushil Kumar Mehrotra, learned counsel for the appellant and Sri Vidya Kant Shukla, learned Counsel for the Claimant-respondent no.1.

2. This First Appeal From order is directed against the award dated 6.7.2019 passed by the Motor Accident Claims Tribunal/Additional District Judge, Court No.13, Meerut allowing the claim petition of the claimant-respondent no.1, bearing number 524 of 2020 for compensation of Rs.66,39,947/-.

3. Briefly stated facts of the case are that the injured Sarthak Jain met with an accident on 2.5.2017 with a truck while he was driver upon a motorcycle of his friend Pranay Bist and the injured was moving in a right direction to the left of the road

whereas truck driver was driving the truck rashly and hit the motorcycle. The truck driver immediately fled the spot. The injured fainted and was immediately taken to the hospital and went under treatment. The impact of the injury upon the injured was of the nature and decree that he suffered disability to the extent of 100% and motor system disability to the extent of 75%. The speech disability was also found to be too severe to the extent of 100% and 100% is the post head injury resulting in fits. Motor system disability is 75%. Bladder disability is 100%. So in the language of the medical practitioner, the highest score of disability is 100%. It has come to be established on record that the injured at the time of accident was 21 years of age and was a student of B.Tec. 2nd year. The tribunal framed as many as seven issues for determination which are quoted as under:-

A. Whether the driver of the truck No.U.P-17-AT-1888 was driving the truck rashly and negligently and hit the motorcycle of the injured as a result of such driving on 2.5.2017.

B. Whether the driver of the motorcycle was having valid driving licence.

C. Whether the truck driver was having valid licence.

D. Whether the truck U.P.17-AT-1888 was duly ensured with HDFC Ergo General Insurance Company Ltd.

E. Whether it is a case of contributory negligence of the two vehicle drivers and if so what would be the effect.

F. Whether the Claim Petition was liable to be dismissed for non-joinder of necessary parties.

G. Whether the claimant is entitled for any compensation and if yes to what amount.

4. Both the Insurance Company as well as the claimant led their evidence in the matter. The Tribunal discussed and decided issue no.1 and 5 together as they are related to each other.

5. Discussing the oral as well as documentary evidence led in regard to the above two issues. The Claims Tribunal recorded a categorical finding to the effect that soon after the accident, First Information Report (for short FIR) was lodged against the driver of the truck namely Shadab under Section 279, 337, 338 and 427 of Indian Penal Code and in which the charge sheet had also been submitted by the police.

6. The tribunal relied upon the testimony of P.W.2 namely Pranay Bist who was driving the motorcycle being an independent witness account of the incident and who in his testimony has clearly narrated that the was driving a motorcycle on left side of the road and the truck driver while rashly and negligently driving the truck, hit the motorcycle from the wrong side and the truck driver soon thereafter fled the scene. Then the Tribunal relied upon the spot inspection memo from which it could be clearly located that the truck was almost moving in the middle of the road and hit the motorcycle which was coming from the opposite direction by taking the truck virtually across the road and, therefore, the Tribunal arrived at conclusion that there was no contributory negligence on the part of the motorcyclist in the accident and it was all due to rash and negligent driving of the truck driver. The Tribunal held that since the conduct of the truck driver in running away from the scene clearly established that he was at wrong and there was no evidence much less a substantial one of false implication of the truck driver in the incident.

7. The issue no.2 is decided in the affirmative that the motorbike rider who was driving the vehicle was in possession of a valid driving license.

8. On issue no.3 also it was held that looking to the driving license it was clearly established that the truck driver was also having valid driving license.

9. On issue no.4 also court relied upon the insurance policy and held that the insurance cover was w.e.f 16.2.2017 to 15.2.2018 and since the incident took place on 2.5.2017, the vehicle was fully ensured on the said date.

10. On the question of issue no.6 the driver held to be not having any substance and so decided in the negative and on the question of compensation while deciding issue no.7, the court held that initially the injured was admitted to the Kailashi Hospital, Meerut where he was operated by Dr. Vipul Tyagi and as the condition started worsening, he was taken to Delhi on 7.5.2017 and was admitted in the Apollo Hospital and remained there from 8.5.2017 till 24.7.2017. In Delhi hospital surgery was done upon him and after some time he was again admitted to the hospital from 18.1.2018 till 23.1.2018. The tribunal has come to record the finding of fact that though the operation had been conducted upon the injured but injured left side had paralysed and was not able to rise from the bed and everything was carried on the bed itself. He was being fed by some other person and not able to conduct even his daily routine.

11. The tribunal examined various receipts and the prescriptions papers led in evidence before it about about the expenses incurred in the operation and the medicines etc.

12. P.W.3 Mukesh Kumar was directed by the Deputy Director of the Apollo Hospital to be present before the tribunal and place the records relating to the admission, surgery etc. and the medication done upon the injured. The tribunal relied upon those documents which were not only duly certified even but even proved by the officer concerned who was sent by the Deputy Director of the Apollo Hospital for the said purpose. So the bills and expenses incurred upon the treatment of injured was Rs.3,32,895/- vide receipt no.18C/88 which bears the signature of the cashier of the Hospital Mr. Dinesh Kumar and so far as bill dated 24.7.2017 is concerned, the total bill was 15,64,460/- in which payment was made up-to 70,140/- and there was bill dated 17.9.2017 for Rs.13,03,180/- out of which Rs.3,00,000/- were paid vide receipt no.18-C dated 23.1.2018 and yet another bill was generated dated 23.1.2018 for Rs.4,02,085 out of which Rs.28,420 was paid. So the tribunal calculated the entire expenses incurred upon the treatment of the injured both in Kailashi Hospital, Meerut and also in Apollo Hospital, Delhi and the other bills of medicines etc. and total expenses incurred was found to the extent of Rs.15,28,947/-. The tribunal held that the insurance company could not dispute all the bills nor, could establish that those bills in any manner were forged or fraudulent. The tribunal recorded that the condition of the injured clearly established that he had suffered maximum disability which also got fully proved from the testimony of P.W.1 and other certificates of treatment as well as medical certificate of the patient.

13. Considering the entire evidence led by the claimant in respect of the treatment of the injured, medical certificate and the medical reports, the tribunal came to the conclusion that the injured suffered

from 100% disability. The injured was the student of B.Tech MIET, Meerut which has not been disputed by any one. Relying upo the judgement of Delhi High Court in the case of **Babli Dixit and another Vs. Satendra Kumar, 2018 SCC Online (Del)13153** wherein the monthly income of the injured was determined to be Rs.20,000/- who was B.Tech student. The tribunal determined the monthly income of the injured as R.15,000/- and thus Rs.1,80,000/- per annum and since the injured has suffered disability of 100%, his income has been assessed to be Rs.1,80,000/- without any deduction. The multiplier of 18 has been applied. 40% as future prospects has been added and so annual income has come to be assessed of Rs.2,52,000/-. Towards the pain and suffering and loss of amenities Rs.2,00,000/- have been added, towards future medical expenses 2,50,000/- has been added, towards loss of amenities Rs.2,50,000/- has been added, for external nourishment Rs.25,000/- has been added and Rs.1,00,000/- towards attendant charges have been added. Total compensation there that has been computed is Rs.66,39,947/- to be paid to the injured. However, Rs.30,00,000/- has been directed to be deposited in the FDR for a period of three years.

14. Assailing the aforesaid, three arguments have been advanced by learned counsel for the appellant; one is contributory negligence, secondly vehicle had no permit; and had no statutory certificate and then the third one is that quantum of the compensation is too high in case of injured.

15. As far as the arguments of contributory negligence is concerned, we made a pointed query to the learned counsel for the appellant as to how could he show from the site plan that the findings returned by the tribunal is perverse on the said issue which was decided as issue no.5 along with issue no.1, learned counsel for the appellant submitted that though the site plan has not been brought on record but from the discussions and the order of the tribunal it is clearly revealed that the truck had hit from the side of the motorcyclist and, therefore, it was a case where the motorcycle and truck were moving in the same direction and, therefore, according to the learned counsel for the appellant, the finding of the tribunal that there was no case of contributory negligence is perverse. In order to test this argument we took our scanning eyes again through the findings of the tribunal on issue no.1 and 5. It is a fact admitted to the parties that the Pranay Bist who was the friend of injured was the pillion rider on a motorcycle which was being driven by the injured. There is no other eye-witness account of the incident. The insurance Company has also did not get any witness examined to establish as an independent witness account of the incident. So the testimony of Pranay Bist become significant to arrive at a conclusion as to in what manner the accident occurred. Pranay Bist in his testimony has clearly stated that on 2.5.2017 at 9.30 hours in the morning while he along with his friend Sarthak Jain, the injured were going from Pallavpuram to MIET College Bye-Pass, Meerut that a truck No. U.P.17-AT-1888 being driven quite rashly and negligently, hit the motorcycle by coming to a wrong side and that it hit the motorcycle from the front. Soon thereafter the truck driver fled the scene. Both Pranay Bist and the injured were studying in the B.Tech. 2nd year. Even in the cross-examination, he stated that at 10 a.m. there was exam and at around 9.20 when they reached bye pass of

Pallavpuram square and were about to move on the Sardhana flyover, that they had seen the truck at some distance and that the front part of the truck of the driver side had hit the motorcycle. Sarthak had the helmet on his head but suffered fracture and soon he took the injured to the Kailashi Hospital.

16. These statements made in the testimony of the Pranay Bist have got fully corroborated by the spot inspection memo because in the spot inspection memo also as the tribunal has discussed, it is clearly reflected that the truck was on the middle of the road and immediately it turned to the right and hit the motorcycle while coming on the other side and the motorcyclist was already on his left, so naturally and rightly so, the conclusion is drawn that the truck hit the motorcycle from the front side and it was the fault of the truck driver alone that resulted in the accident and this is also further established from the conduct of the truck driver who immediately fled the scene. Had the motorcycle dashed into the truck, the situation would have been otherwise and then the motorcyclist would have dashed not from the front side but from the back side but this is not the case of the Insurance Company nor, the Insurance Company has led any evidence to establish that the spot inspection memo was wrongly prepared or that the testimony of the witness account of the incident was not trustworthy. Even before us the counsel for the Insurance Company could not dispute the spot inspection memo and the statement of fact recorded by the tribunal on the basis of testimony of the eye-witness account namely P.W.2.

17. In such above view of the matter, therefore, the findings on issue no.1 and 5 particularly issue no.5 as has been questioned by the learned counsel for the Insurance Company, cannot be held to be perverse and the argument, therefore is rejected.

18. In so far as issue no.2 is concerned, we find that there is nothing on record to establish that this question was ever pressed before the tribunal because no issue has been framed regarding this point of vehicle fitness certificate and the route permit of the truck nor, any evidence has been led by the Insurance Company to prove that there was sufficient evidence and the tribunal failed to consider the same. All that has been argued before this Court is that in the written statement there was specific plea taken by the Insurance Company but while going through the entire written statement that has been appended to the affidavit filed in support of this appeal as annexure no.2, we do not find that any such additional plea was taken before the tribunal and so consequently and rightly the tribunal did not frame any issue. Even otherwise if the plea was taken, it was the duty of the Insurance Company to have pressed the issue and if not framed, to make appropriate application but we find that the objection of route permit and fitness certificate have been very casually taken as a general objections in the written statement. Had the Insurance Company ben serious about this point, it would have taken it as an additional plea in the written statement and would have insisted upon the tribunal to frame issue in that regard.

19. In such above view of the matter, we now in this appeal are not inclined to frame any such issue nor, we find any argument supported by any material evidence in support thereof is brought on record in the present appeal to demonstrate that the truck did not have route permit or

suffered from the fitness. This second argument is, therefore, rejected.

20. Now coming to the third argument regarding the computation of compensation, we have noticed in this regard that the medical certificate clearly demonstrate that the injured suffered almost 100% disability. Even if there is locomotive activity in the sense that parts are moving a little bit but if a person is suffering from paralysis and is not able to speak a word as he suffers from 100% disability and he also suffers from the fits due to head injury and is not able to eat himself, it is a case of vegetative stage. If the person dies, it comes as a cyclonic blow to the family that everybody seems to be ruined for a moment but gets recovered with the passage of time but in a case of injury if a person is reduced to a stage where he is completely bed ridden and not able to speak, nor eat himself and half of the body is paralysed then it causes death everyday to the members of the family. It is not a death of one person but it reduces the entire family to go under the trauma every moment of every hour, every day and such a situation can be said to be the worse than that of a death of a person. In the present case we find that despite heavy medical treatment carried out where huge medical expenses have been incurred and yet body of injured is reduced to status of a dead wood. A body lying on a bed always needing an attendant by his side with recurring other medical expenses and that too at an early age of 21, is all very painful beyond imagination. How long such a person will continue when he is suffering from such a condition at a young age, nobody knows and, therefore, in our considered opinion in the various categories and heads, the amount of compensation which has been determined is quite reasonable one and does not require any interference.

21. In the Case of **M.R. Krishna Murthi Vs. The New India Assurance Company Ltd. and ors AIR (2019) SC 5625** (wherein the court was dealing with the issue of further loss of earning in case of serious disability) the Apex Court referred to the judgement of **Raj Kumar Vs. Ajai Kumar and another (2011)1 SCC, 343** vide paragraph no.22 and 23 that are as under:-

22) In the case of Raj Kumar v. Ajay Kumar & Anr., (2011) 1 SCC 343, where the victim suffered 45% disability to left lower limb and permanent functional disability of 25%, the Court held that it is a functional disability which would be the operative criteria for assessing the loss of future earnings and not physical disability. There is a detailed and lucid discussion of assessment of future loss of earning due to permanent disability, covering all possible facets and discussing every nuance of the subject matter. After explaining the meaning of permanent disability and contrasting it with temporary disability and also the manner in which permanent disability of different limbs expressed by Doctors in the Disability Certificates is to be interpreted, the Court clarified that the assessment of compensation under the head of loss of future earnings would depend upon the effect and impact of such permanent disability on his earning capacity. The manner in which the assessment is to be carried out is contained in the following passages in the said judgment:

"12. Therefore, the Tribunal has to first decide whether there is any permanent disability and, if so, the extent of such permanent disability. This means

that the Tribunal should consider and decide with reference to the evidence:

(i) whether the disablement is permanent or temporary;

(ii) if the disablement is permanent, whether it is permanent total disablement or permanent partial disablement;

(iii) if the disablement percentage is expressed with reference to any specific limb, then the effect of such disablement of the limb on the functioning of the entire body, that is, the permanent disability suffered by the person.

If the Tribunal concludes that there is no permanent disability then there is no question of proceeding further and determining the loss of future earning capacity. But if the Tribunal concludes that there is permanent disability then it will proceed to ascertain its extent. After the Tribunal ascertains the actual extent of permanent disability of the claimant based on the medical evidence, it has to determine whether such permanent disability has affected or will affect his earning capacity.

13. Ascertainment of the effect of the permanent disability on the actual earning capacity involves three steps. The Tribunal has to first ascertain what activities the claimant could carry on in spite of the permanent disability and what he could not do as a result of the permanent disability (this is also relevant for awarding compensation under the head of loss of amenities of life). The second step is to ascertain his avocation, profession and nature of work before the accident, as also his age. The third step is to find out whether (i) the claimant is totally disabled from earning any kind of livelihood, or (ii) whether in spite of the permanent disability, the claimant could still effectively carry on the activities and functions, which he was earlier carrying on, or (iii) whether he was prevented or restricted from discharging his previous activities and functions, but could carry on some other or lesser scale of activities and functions so that he continues to earn or can continue to earn his livelihood.

xx xx xx

19. We may now summarise the principles discussed above:

(i) All injuries (or permanent disabilities arising from injuries), do not result in loss of earning capacity.

(ii) The percentage of permanent disability with reference to the whole body of a person, cannot be assumed to be the percentage of loss of earning capacity. To put it differently, the percentage of loss of earning capacity is not the same as the percentage of permanent disability (except in a few cases, where the Tribunal on the basis of evidence, concludes that the percentage of loss of earning capacity is the same as the percentage of permanent disability).

(iii) The doctor who treated an injured claimant or who examined him subsequently to assess the extent of his permanent disability can give evidence only in regard to the extent of permanent disability. The loss of earning capacity is something that will have to be assessed by the Tribunal with reference to the evidence in entirety.

(iv) The same permanent disability may result in different percentages of loss of earning capacity in different persons, depending upon the nature of profession, occupation or job, age, education and other factors."

23) From the conjoint reading of the aforesaid judgments, inter alia, following principles can be culled out which would be relevant for deciding the instant appeal:

(i) In those cases where the victim of the accident is not an earning person but a student, while assessing the compensation for loss of future earning, the focus of the examination would be the career prospect and the likely earning of such a person in future. For example, where the claimant is pursuing a particular professional course, the poseer would be: what would have been his income had he joined a service commensurating with the said course. That can be the future earning.

(ii) There may be cases where the victim is not, at that stage, doing any such course to get a particular job. He or she may be studying in a school. In such a case, future career would depend upon multiple factors like the family background, choice/interest of the complainant to pursue a particular career, facilities available to him/her for adopting such a career, the favourable surrounding circumstances to see which would have enabled the claimant to successfully pick up the said career etc. If the chosen field is employment, then the future earning can be taken on the basis of salary and allowances which are payable for such calling. In case, career is a particular profession, the future earning would depend on host of other factors on the basis of which chances to achieve success in such a profession can be ascertained.

(iii) There may be cases like Deo Patodi where even a student, the claimant would have made earnings on part-time basis or would have received offer for a particular job. In such cases, these factors would also assume relevance.

(iv) After ascertaining the likely earning of the victim in the aforesaid manner, the nature of injuries and disability suffered as a result thereof would be kept in mind while determining as to how much earning has been affected thereby. Here, impact of injuries on functional disability is to be seen. In case of death of victim, it would result in total loss of earning. In the case of injuries, the nature of disability becomes important. Such an exercise was undertaken in N. Manjegowda case.

22. The tribunal in the present case has relied upon the judgment of Delhi High Court in the case of **Babli Dixit and another Vs. Satendra Kumar and ors. (Iffco Tokio General Insurance Co. Ltd.) wherein Midha, J.** referred to judgement of Delhi High Court in the case of **H.D.F.C Ergo General Insurance Co. Ltd. Vs. Rattan Kumar Dwivedi (2017) SCC Online, Delhi 9874** and another Judgement of Delhi High Court in the case of **United India Insurance Company Ltd. Vs. Anita (2017) SCC Online Delhi 11152** vide paragraph nos.11, 12 and 13 that run as under:-

11. In HDFC Ergo General Insurance Co. Ltd. v. Rattan Kumar Dwivedi, 2017 SCC OnLine Del 9874, the accident dated 21st July, 2008 resulted in the death of a national level sportsperson who was a student of B. Com. (Hons.). The Claims Tribunal awarded Rs.10,40,000/- by taking the earning capacity of the deceased as Rs.10,000/- per month which was challenged on the ground that minimum wages should have been applied by the Claims Tribunal. Applying the principles laid down by the Supreme Court in Municipal Corporation of Delhi v. Association of Victims of Uphaar Tragedy, AIR 2012 SC 100, this Court rejected the application of minimum wages to such cases. Considering the brilliant record of the student as a sportsperson, this Court determined the earning capacity of the deceased as Rs.25,000/- per month and enhanced the compensation from

Rs.10,40,000/- to Rs.24,50,000/-. The relevant portion of the judgment is as under:

"14. In the present case, the deceased Apoorva Dwivedi was a student of B.Com (Hons.) at Bharti College, Delhi University. She was a sports person having won 86 prizes/certificates in athletics, track and field, gymnastics, baseball, soft ball, basketball, cricket etc. The deceased had secured second place in team event at 40th Delhi State Gymnastics Championship, 2001; best athlete of the year 2003-2004 at school and zonal level and first position in baseball in 52nd National School Games conducted by School Games Federation of India held from 23rd December to 28th December, 2006. The deceased was sports captain of Holy Child Senior Secondary School, Tagore Garden, New Delhi for the academic year 2007-08. Judicial notice is taken of the notifications for government job for sports persons as well as advertisements in private jobs for sports persons, under which a graduate sports person can secure a job with a job in the pay scale of Rs.30,000/- to Rs.40,000/- per month. Considering that the deceased was a sports person with an extraordinary talent in various sports, namely, athletics, track and field, gymnastics, baseball, soft ball, basketball, cricket etc. and having been awarded 86 prizes/certificates, it is presumed that the deceased would have earned Rs.25,000/- per month after completing her graduation. Deducting 50% towards the personal expenses of the deceased and applying the multiplier of 14 according to the age of her mother, the loss of dependency is computed as Rs.21,00,000/- [(Rs.25,000- 50%)x12x14]. The compensation for loss of love and affection is enhanced from Rs.25,000/- to Rs.1,00,000/-; and compensation for pain and suffering is enhanced from Rs.25,000/- to Rs.1,00,000/-. Adding Rs.1,30,000/- towards medical expenses and Rs.20,000/- towards funeral expenses, total compensation is computed as Rs.24,50,000/- [21,00,000/- + 1,00,000/- + 1,30,000/- + 1,00,000/- + 20,000/-]. The Claims Tribunal has awarded interest @ 7.5% per annum which is on a lower side considering that the Supreme Court as well as this Court are consistently awarding interest @ 9% per annum. The rate of interest is enhanced from 7.5% to 9% per annum."

12. In HDFC Ergo General Insurance Co. Ltd. Lalta Devi, 2015 ACJ 2526, the accident dated 19th June, 2011 resulted in the death of a third year student of B. Tech. The Claims Tribunal awarded compensation of Rs. 19,50,000/- by taking the earning capacity of the deceased as Rs. 25,000/- per month. The insurance company and the claimants both challenged the award before this Court. This Court held the earning capacity of the deceased to be Rs.26,815/- per month by relying on the basis pay of a junior engineer and the compensation amount was enhanced from Rs. 19,50,000/- to Rs.22,94,871/-.

13. In United India Insurance Company Limited v. Anita, 2017 SCC OnLine Del 11152, the accident dated 16th June, 2009 resulted in the death of a 21 year old student of B. Tech. (Mechanical and Automation Engineering). The Claims Tribunal awarded Rs.34,65,689/- by taking the earning capacity of the deceased as Rs.26,815/- per month and 50% future prospects thereon, which was challenged by the insurance company. This Court upheld the award of the Claims Tribunal and dismissed the appeal. The relevant portion of the judgment is as under:

"5. The Claims Tribunal took the income of the deceased as Rs.26,851/- following the judgment of this Court in

HDFC Ergo General Insurance Co. Ltd. v. Lalta Devi, 2015 ACJ 2526 in which this Court took the income of a B.Tech third year student in a similar university as Rs.26,851/- according to the salary drawn by a Junior Engineer. The learned Tribunal has also taken into consideration that the deceased had passed the 5th semester in December 2008 and had received the approval for six weeks industrial training with Indian Airlines. The Claims Tribunal also considered the mark sheets of the deceased for 3rd, 4th and 5th semester along with certificate of excellence for 3rd semester and deceased had stood first in the 3rd semester examination in December, 2007. The Claims Tribunal also considered the statement of PW-2 who was a class fellow of the deceased and had initially joined Maxim Group in 2011 at a monthly salary of Rs.16,000/- as Production Engineer and thereafter, another company with a package of Rs.4,34,000/- per annum with 18% increment in the salary.

6. This Court is of the view that the income of the deceased computed by the Claims Tribunal and the future prospects added thereon are fair and reasonable and does not warrant any interference."

23. Finally, while computing the compensation Midha, J. referred to the judgement of Apex Court in the case of **Municipal Corporation of Delhi Vs. Association of Victims of Uphaar Tragedy (2011)17SCC 481** vide para no.16 thus:-

16. There is no merit in the contention of the insurance company that the compensation be computed by taking the minimum wages of Rs.11,414/- per month as the income of the deceased. The law is well settled that it is not mandatory to resort to minimum wages to compute the compensation in each and every case. Reference is made to Municipal Corporation of Delhi v. Association of Victims of Uphaar Tragedy (supra), in which 59 persons died in 1997 and the Supreme Court granted compensation of Rs.10,00,000/- to the victims above 20 years of age by taking their income as Rs.8,333/- per month whereas the minimum wages at the relevant time were less than Rs.2600/- per month. The relevant portion of the judgment is as under:

"38. ... It can be by way of making monetary amounts for the wrong done or by way of exemplary damages, exclusive of any amount recoverable in a civil action based on tortuous liability. But in such a case it is improper to assume admittedly without any basis, that every person who visits a cinema theatre and purchases a balcony ticket should be of a high income group person. In the year 1997, Rs. 15,000 per month was rather a high income. The movie was a new movie with patriotic undertones. It is known that zealous movie goers, even from low income groups, would not mind purchasing a balcony ticket to enjoy the film on the first day itself. To make a sweeping assumption that every person who purchased a balcony class ticket in 1997 should have had a monthly income of Rs. 15,000 and on that basis apply high multiplier of 15 to determine the compensation at a uniform rate of Rs. 18 lakhs in the case of persons above the age of 20 years and Rs. 15 lakhs for persons below that age, as a public law remedy, may not be proper. While awarding compensation to a large group of persons, by way of public law remedy, it will be unsafe to use a high income as the determinative factor. The reliance upon Neelabati Behera (AIR 1993 SC 1960 :

1993 AIR SCW 2366) in this behalf is of no assistance as that case related to a single individual and there was specific evidence available in regard to the income. Therefore, the proper course would be to award a uniform amount keeping in view the principles relating to award of compensation in public law remedy cases reserving liberty to the legal heirs of deceased victims to claim additional amount wherever they were not satisfied with the amount awarded. Taking note of the facts and circumstances, the amount of compensation awarded in public law remedy cases, and the need to provide a deterrent, we are of the view that award of Rs. 10 lakhs in the case of persons aged above 20 years and Rs. 7.5 lakhs in regard to those who were 20 years or below as on the date of the incident, would be appropriate. We do not propose to disturb the award of Rs. 1 lakh each in the case of injured. The amount awarded as compensation will carry interest at the rate of 9% per annum from the date of writ petition as ordered by the High Court, reserve liberty to the victims or the LRs. of the victims as the case may be to seek higher remedy wherever they are not satisfied with the compensation. Any increase shall be borne by the Licensee (theatre owner) exclusively."

24. In view of the above legal position in matters of compensation to the injured victim who virtually suffered 100% incapability to earn his livelihood and rather became a life long liability upon the parents, we do not find any manifest error in the award qua compensation awarded. The First Appeal From Order, accordingly, lacks merit and is **rejected.**

25. Rs. 25,000/- deposited by the appellant shall be remitted to the tribunal for being adjusted against the award.

(2020)09ILR A197
APPELLATE JURISDICTION

CIVIL SIDE
DATED: ALLAHABAD 02.06.2020

BEFORE

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

First Appeal From Order No. 2473 of 2009
&
First Appeal From Order No. 734 of 2011 & 2538 of 2019

The New India Assurance Co. Ltd., Noida ...Appellant

Versus

Smt. Barisa & Ors. ...Respondents

Counsel for the Appellant:
Sri Amit Manohar

Counsel for the Respondents:
Sri Nigamendra Shukla

A. Civil Law -Motor Accident Claim – Contributory negligence and Composite Negligence–Meaning–A person who either contributes or is author of the accident would be liable for his contribution to the accident having taken place. (Para 7)

B. Civil Law -Motor Accident Claim– Vehicles of unequal magnitude – Liability of both Drivers as tortfeasors – Motorcycle driver died on spot – Truck came on the wrong side and caused the accident – Truck driver has not stepped into the witness box – No evidence to demonstrate that the deceased was a coauthor of accident – Held, the decision of the Tribunal holding the driver of the insured vehicle of the appellant to be negligent cannot be disturbed. (Para 8, 9 and 10)

C. Civil Law -Motor Accident Claim – Breach of Policy – Burden of proof – The driving licence if is said to be fake the insurance company should have prove the same – The finding of fact of the Tribunal as far as non breach of policy condition cannot be found fault with. (Para 12)

D. Motor Accident Claim – Computation of Compensation – Deduction for personal

expenses – For the death of a bachelor, 50% should be deducted for the personal expenses. (Para 17)

E. Civil Law -Motor Accident Claim– Computation of Compensation – Multiplier – Basis of application – Multiplier should be based on the age of the deceased and not on the age of the parents. (Para 17)

Appeal of Claimant partly allowed.

One Appeal of Insurance Company partly allowed.

Another Appeal of Insurance Company dismissed. (E-1)

Cases relied on :-

1. First Appeal From Order No. 1818 of 2012; Bajaj Allianz General Insurance Company Limited Vs Smt. Renu Singh & ors.) decided on 19.7.2016

2. Pawan Kumar & anr Vs M/S Harkishan Dass Mohan Lal & ors decided by Supreme Court on 29 January, 2014

3. Mohd. Siddiqui Vs National Insurance Company Ltd., 2020 ACJ SC 751

4. Khenyei Vs New India Assurance Company Ltd. & ors. (2015) 9 SCC 273

5. National Insurance Company Limited Vs Pranay Sethi , 2017 ACJ 2700

6. Royal Sundaram Alliance Insurance Company Ltd. Vs Mandala Ydagari Goud, (2019) 5 SCC 554

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

1. Heard Sri Amit Manohar, learned counsel for appellant-insurance company and Sri Nigmendra Shukla, learned counsel for respondent-claimants. Parties are referred to as Insurance Company and claimants and or appellant and respondent respectively as they appear in all three appeals.

2. Two appeals, under section 173 of Motor Vehicle Act, 1988 (hereinafter referred to as the "Act, 1988") are filed at the instance of appellant- The New India Assurance Co. Ltd. and one appeal, at the instance of claimants has arisen from the awards dated 28.3.2009 passed by Motor Accident Claim Tribunal/ Additional District Judge-I, Gautam Budh Nagar (hereinafter referred to as "Tribunal") in Motor Accident Claim Petition No. 174 of 2007, whereby compensation of Rs.1,96,500/- and in Motor Accident Claim Petition No. 177 of 2007 whereby compensation of Rs.3,21,500/-. It is not understood why the same Tribunal did not decide both the claim petitions by a common judgment and wasted or rather copy pasted the judgments for compensation in both the matters which arose out of the same accident.

3. On the fateful day namely 29.6.2007 two persons were returning from Palwal to Jewar on Motor Cycle No. U.P.-16S-6927. As the illfated motor cycle reached on Palwal Hamadpur Road ahead of Jhuppa Check Post at about 7:15 p.m. the offending Truck No. HR-37-B-5198 coming from Hamadpur side (opposite direction) at a very high speed in negligent and careless manner, suddenly turned to its right side non-metal road(kuchcha patri) of the road and dashed against the motor cycle causing this horrible accident in which both the deceased sustained multiple, accidental injuries to which one died on spot and motor cycle was also badly damaged. At the time of accident the deceased Raess was driving motorcycle on extreme left side of the road at moderate speed with full care and caution. The accident is the result of negligent driving of the driver of truck. At the time of accident the driver of the offending vehicle was driving his vehicle being Truck No. HR-37-B-5198 at very high speed and in a negligent, careless and

reckless manner without any care and caution. It appeared that at the time of the accident, the driver of the vehicle truck had no control over the steering of the offending vehicle, had the driver of offending vehicle-truck been not negligent, then this unfortunate accident would not have happened.

4. It is submitted by Sri Amit Manohar , Advocate for insurance company that the vehicle collided in the middle of the road and therefore not considering that the deceased was also a coauthor of the accident or rather he was the greator contributor to the accident is bad and requires to be interfered with as had the deceased-driver of scooter taken care on seeing the opposite vehicle coming he would have averted the accident having taken place. He has submitted that the decision of the apex court in Bijoy Kumar Dugar Versus Bidyadhar Dutta and others, 2006(2) Supreme 374 and Yerramma and others Versus G. Krishnamurthy and another, 2014 (4) TAC 337 SC would show that this aspect has not been considered by the Tribunal. The Tribunal according to the learned counsel for the appellant Insurance Company has misread the evidence on record and has come to a erroneous decision on issue of negligence.

5. As against this, learned counsel for the respondent-claimant has relied on the judgment of the undersigned in First Appeal From Order No. 631 of 2005 United India Insurance company Versus Ram Kishor and others) decided on 7.2.1019 and has contended that in absence of any evidence led by the insurance company or the driver and owner of the other offending vehicle and in absence of proving the same the said decisions cited by the counsel for the insurance company cannot be made applicable in the facts of this case as for as negligence is considered.

6. The Division Bench of this Court in First Appeal From Order No.1818 of 2012 (Bajaj Allianz General Insurance Company Limited Versus Smt. Renu Singh and others) decided on 19.7.2016 has held as under: -

"16. The term negligence means failure to exercise required degree of care and caution expected of a prudent driver. Negligence is the omission to do something which a reasonable man, guided upon the considerations, which ordinarily regulate conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. Negligence is not always a question of direct evidence. It is an inference to be drawn from proved facts. Negligence is not an absolute term, but is a relative one. It is rather a comparative term. What may be negligence in one case may not be so in another. Where there is no duty to exercise care, negligence in the popular sense has no legal consequence. Where there is a duty to exercise care, reasonable care must be taken to avoid acts or omissions which would be reasonably foreseen likely to cause physical injury to person. The degree of care required, of course, depends upon facts in each case. On these broad principles, negligence of drivers is required to be assessed.

17. It would be seen that burden of proof for contributory negligence on the part of deceased has to be discharged by the opponents. It is the duty of driver of the offending vehicle to explain the accident. It is well settled law that at intersection where two roads cross each other, it is the duty of a fast moving vehicle to slow down and if driver did not slow down at

intersection, but continued to proceed at a high speed without caring to notice that another vehicle was crossing, then the conduct of driver necessarily leads to conclusion that vehicle was being driven by him rashly as well as negligently.

18. 10th Schedule appended to Motor Vehicle Act, 1988 contain statutory regulations for driving of motor vehicles which also form part of every Driving License. Clause-6 of such Regulation clearly directs that the driver of every motor vehicle should slow down vehicle at every intersection or junction of roads or at a turning of the road. It is also provided that driver of the vehicle should not enter intersection or junction of roads unless he makes sure that he would not thereby endanger any other person. Merely, because driver of the Truck was driving vehicle on the left side of road would not absolve him from his responsibility to slow down vehicle as he approaches intersection of roads, particularly when he could have easily seen, that the car over which deceased was riding, was approaching intersection. This is termed negligence.

19. In view of the fast and constantly increasing volume of traffic, motor vehicles upon roads may be regarded to some extent as coming within the principle of liability defined in ***Rylands V/s. Fletcher, (1868) 3 HL (LR) 330*** *from the point of view of pedestrian, the roads of this country have been rendered by the use of motor vehicles, highly dangerous. 'Hit and run' cases where drivers of motor vehicles who have caused accidents, are unknown. In fact such cases are increasing in number. Where a pedestrian without negligence on his part is injured or killed by a motorist, whether negligently or not, he or his legal representatives, as the case may be, should be entitled to recover damages if principle of social justice should have any meaning at all.*

20. In light of the above discussion, I am of the view that even if courts may not by interpretation displace the principles of law which are considered to be well settled and, therefore, Courts cannot dispense with proof of negligence altogether in all cases of motor vehicle accidents, it is possible to develop the law further on the following lines; when a motor vehicle is being driven with reasonable care, it would ordinarily not meet with an accident and, therefore, rule of res-ipsa loquitor as a rule of evidence may be invoked in motor accident cases with greater frequency than in ordinary civil suits.

21. By the above process, the burden of proof may ordinarily be cast on the defendants in a motor accident claim petition to prove that motor vehicle was being driven with reasonable care or that there is equal negligence on the part of driver of another vehicle."

7. The term contributory negligence and composite negligence has been discussed time and again a person who either contributes or is author of the accident would be liable for his contribution to the accident having taken place. The Apex Court in **Pawan Kumar & Anr vs M/S Harkishan Dass Mohan Lal & Ors decided** on 29 January, 2014 has held as follows:

7. Where the plaintiff/claimant himself is found to be a party to the negligence the question of joint and several liability cannot arise and the plaintiff's claim to the extent of his own negligence, as may be quantified, will have to be severed. In such a situation the plaintiff can only be held entitled to such part of

damages/compensation that is not attributable to his own negligence. The above principle has been explained in T.O. Anthony (supra) followed in K. Hemlatha & Ors. (supra). Paras 6 and 7 of T.O. Anthony (supra) which are relevant may be extracted hereinbelow:

"6. "Composite negligence" refers to the negligence on the part of two or more persons. Where a person is injured as a result of negligence on the part of two or more 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 is it 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 stand reduced in proportion to his contributory negligence.

7. Therefore, when two vehicles are involved in an accident, and one of the drivers claims compensation from the other driver alleging negligence, and the other driver denies negligence or claims that the injured claimant himself was negligent, then it becomes necessary to consider whether the injured claimant was negligent and if so, whether he was solely or partly responsible for the accident and the extent of his responsibility, that is, his contributory negligence. Therefore where the injured is himself partly liable, the principle of "composite negligence" will not apply nor can there be an automatic inference that the negligence was 50:50 as has been assumed in this case. The Tribunal ought to have examined the extent of contributory negligence of the appellant and thereby avoided confusion between composite negligence and contributory negligence. The High Court has failed to correct the said error."

8. In view of the decision of this High Court in United India Insurance company Versus Ram Kishor and others) and First Appeal From Order No. 79 of 2000 wherein concept of considering negligence are considered in cases where two vehicles are involved which are of unequal magnitude can it be said that both the drivers have to be considered to be tortfeasors, at times it may be so but in our case the finding of fact by the Tribunal was such which goes to show that the driver of the scooter who died on the spot could not have even visualzied that the truck whose driver has not stepped into the witness box would come on the wrong side and cause the accident as deposed by eye witness in both the matters though decided separately

9. The fact that the driver of the truck who was the best person to have deposed about the manner in which the accident occurred has conveniently absented himself and the charge sheet and the FIR as well as the fact that the driver of the motor cycle died on the spot shows the magnitude with which the accident had occurred. The judgment in Bijoy Kumar Dugar (supra) and Yarramma and others Versus G. Krishnamurthy and another,

2014(4) T.A.C. 337 (S.C.) will apply to the facts of this case as in this case it is not the case that the driver of the truck showed any indicator or blew horn. In this case the observation in the judgment of Yerramma (supra) will apply as the driver of the truck did not take any caution, came on the wrong side dashed with the motorcycle causing fatility of two persons. The judgment in Bijoy Kumar Dugar (supra) will not apply, the reason being the movement of the bus in the said matter was in a zig-zag manner and the bus as per the judgment of Apex Court could have been visualised by the driver of the maruti car and driver of maruti car could have avoided the accident. In our case, neither the evidence shows the accident that the driver of the truck had taken any caution to avoid the accident. None has come forward to depose in favour of the truck driver nor is it demonstrated before this Court that the deceased was a coauthor of accident.

10. In that view of the matter the decision of the Tribunal holding the driver of the the insured vehicle of the appellant to be negligent herein cannot be disturbed, I am supported in my view by the decision of the Apex Court reported in **Mohd. Siddiqui Versus National Insurance Company Limited, 2020 ACJ SC 751** and therefore in absence of any evidence to prove that the deceased victim contributed either to the accident taken place or that the death was attributable to the fault of the deceased driver. He can not be held to be liable.

11. The decision of Supreme Court in **Khenyei Vs. New India Assurance Company Limited and Others (2015) 9 SCC 273** which would also apply in the facts of this case as qua one of the deceased it was a case of composite negligence.

Breach of Policy

12. As far as the submission that there was breach of policy condition the said is not proved as the copy filed by the respondent owner was verified and was found to be meeting the standard for which the truck driver was authorized to drive and therefore the said ground fails and just because the driving licence of Raise was not found it cannot be said that he was negligent or there was breach of policy condition. Raies was not a trotfeasor. The licence which is material for our purpose is that of the driver of the truck. The driving licence if is said to be fake the insurance company should have prove the same. The finding of fact of the Tribunal as far as non breach of policy condition cannot be found fault with.

13. The finding is very clear that the driving licence of the driver of the truck whose driving licence number 22183 E-9 / 0033 which was issued and was valid from 29-12-2005 to 28-12-2008. The document was not proved to be fake rather the said document was accepted to be a valid and effective driving licence and therefore the insurance company did not press the said objection. Having proved in the case between Sabana Versus New India Assurance Company Limited in MACP No. 177 of 2007 the judgment which is impugned herein the said ground cannot be accepted.

Compensation in MACP No.177 of 2007 giving rise to FAFO No. 734 of 2011 .

14. The submission of the counsel for the insurance company is that the income of the deceased should have been taken to be Rs.15000/- per annum and the Tribunal has considered Rs.36000/- per annum which is bad and that the deduction of 1/3rd is also bad. The quantum requires to be recalucated in view of the decision in **National Insurance Company Limited Versus Pranay Sethi , 2017 ACJ 2700** and

also reliance is placed on the decision of this High Court wherein it is held that as per the principle of just compensation even if no appeal is filed the Court under Order 41 Rule 33 of the Code of Civil Procedure , 1908, this Court will be obliged to grant what is known as just compensation. The awarded amount is not disturbed.

15. As far as the FAFO No.2473 of 2009 and FAFO No. 2538 of 2019 are concerned the re-calculation would have be remade. I am in agreement with the submission of Sri Amit Manohar that the deduction for a bachelor person, expenses has to be ½ half and not 1/3rd as done by the Tribunal.It is submitted by Sri Shukla for the claimants that the claimants were the parents of the deceased who was a bachelor was 19 years of age the tribunal granted multiplier as per the age of the parents and not on the basis of age of deceased and granted only Rs.4500/- under the head of non pecuniary damages.

16. The deceased can be said to be earning Rs.4000/- per month as he was a skilled labourer and was having his own repair garage for repairing motorcycle and therefore the calculation has to be made likewise. Rs.4,000/- + Rs.1,600 = Rs.5,600/-, the said amount has to be deducted by ½ half as personal expenses of the deceased which would be Rs.2,800/- multiplied by 12 and then 18 as the deceased. The judgment in the case of Royal Sundaram Alliance Insurance Company Limited Versus Mandala Ydagari Goud, (2019 5 SCC 554) holding that for the death of a bachelor 50% should be deducted for the personal expenses and that multiplier should be based on the age of the deceased and not on the age of the parents and, therefore, the appeal preferred by Insurance Company being FAFO No. 2473 of 2009 will have to be partly allowed. was 19 years of age + Rs.70000/- under other heads. Hence, the appeal preferred by Barrisa mother of the deceased as well as the appeal preferred by the Insurance Company will have to be accepted.The judgment in the case of Royal **Sundaram Alliance Insurance Company Limited Versus Mandala Ydagari Goud, (2019 5 SCC 554)** holding that for the death of a bachelor 50% should be deducted for the personal expenses and that multiplier should be based on the age of the deceased and not on the age of the parents and, therefore, the appeal preferred by Insurance Company being FAFO No. 2473 of 2009 will have to be partly allowed.

17. The judgment in the case of Royal Sundaram Alliance Insurance Company Limited Versus Mandala Ydagari Goud, (2019 5 SCC 554) holding that for the death of a bachelor 50% should be deducted for the personal expenses and that multiplier should be based on the age of the deceased and not on the age of the parents and, therefore, the appeal preferred by Insurance Company being FAFO No. 2473 of 2009 will have to be partly allowed.

18. The claimants would now be entitled to Rs.2800 x 12 x 18 + Rs.70000 = Rs.6,74,800/- with interest as would be decided herein below.

Interest

19. Recently the Apex Court in the case of National Insurance Company Versus Birendra decided on 13.1.2020 hence, the interest should be 9%. However, the recalculation goes to show that the insurance company will have to deposit amount as First Appeal From Order No.2588 of 2019 which was filed by the

claimants for enhancement in the year 2010 but the delay came to be condoned while hearing the appeals on merits and therefore the submission of Sri Amit Manohar that the interest should be computed from 2019 cannot be accepted.

20. In the final analysis FAFO No. 2538 of 2009 and FAFO No.2473 of 2009 are partly allowed whereas F.A.F.O. No.734 of 2011 preferred by the Insurance Company is dismissed.

21. Record and proceedings be sent back to the Tribunal.

22. The Insurance company shall deposit the difference of the amount within 12 weeks from today.

23. The matters were ordered to be listed for pronouncement on 23.3.2020 but due to lockdown the pronouncement was deferred. Pronounced belatedly today.

(2020)09ILR A204
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.03.2020

BEFORE

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

First Appeal From Order No. 2643 of 2003

National Insurance Company Ltd., Division Office, Gorakhpur ...Appellant
Versus
Smt. Usha Devi & Ors. ...Respondents

Counsel for the Appellant:
Sri Anand Kumar Sinha

Counsel for the Respondents:
Sri Pavan Kumar, Sri Om Prakash Yadav

A. Civil Law -Motor Vehicle Act, 1988 – Section 158 and 166(4) – Claim – Power of tribunal – Argument of late reporting of accident and doubt on Involvement of vehicle in accident – Section 158 and 166(4) provide that particulars of vehicles involved in the accident have to be collected by investigating agency and forwarded to the Tribunal as accident information report in Form 54 which shall be treated as claim application – Motor Vehicles Act empowers the Tribunal to award compensation to the claimant even in absence of formal claim application – Moreover, no objections was raised before the tribunal that the vehicle was not involved in the said accident – Argument found not liable to be accepted. (Para 10 and 11)

Appeal dismissed. (E-1)

Cases relied on :-

1. Joshi Rajendrakumar Popatlal Vs Thakor Ramnaji Hamirji & ors., 2020 ACJ 365

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

1. Sri Anand Kumar Sinha, learned counsel for the Insurance Company and Sri Om Prakash Yadav, learned counsel for the claimants are present. None appears for the owner.

2. By way of this appeal the Insurance Company has challenges the award and decree dated 29.07.2003 passed by the Motor Accident Claims Tribunal/Special Judge (SC/ST Act), Court No.3, Deoria, in MACP No.102 of 2001.

3. The brief facts are that on 02.11.2000 at about 6.00 P.M. deceased Ramnath Chauhan was returning from Shardiha Inter College to his home and as soon as he reached near ITI School, Motorcycle No. U.P.-52C-5319 dashed with him. He fell on the road and during his treatment he passed away in the Gorakhpur

Medical College. The claimants are the legal heirs of the deceased. The incident was reported by way of first information report. The vehicle/motorcycle was owned by Abhinandan Yadav and was insured with appellant-insurance company. The vehicle was insured from 31.01.2000 to 30.01.2001. The deceased was 26 years of age and was a carpenter by profession. It was averred that he was earning Rs.150/- per day.

4. The owner of the vehicle filed his written statement contending that the accident occurred due to fault of the deceased and not by the fault of the driver of the vehicle, as the deceased came on the wrong side and that is why the accident was authored by the deceased and not by the driver of the motorcycle. The cover note was filed, which shows that vehicle was insured with the appellant insurance company.

5. Insurance Company filed reply contending that no accident occurred with the said vehicle, even denied that the deceased was a carpenter by profession and that they were breach of policy condition.

6. The Tribunal framed four issues and held all against the owner of the vehicle and the insurance company. The Tribunal also held that the deceased was earning Rs.3,000/- per month and not Rs.150/- per day, and deducted one third(1/3), and that the deceased was aged between 24-30 years, therefore, applied the multiplier of 18, and granted Rs.4,32,000/- and added Rs.9,500/- for non pecuniary damages with 9% interest.

7. The Insurance Company has contended that the FIR which was lodged on 11.11.2000 by the brother of the deceased was against an unknown vehicle, but the police was informed that Vehicle/Motorcycle No. U.P.-52C-5319 was involved in the said accident. It is submitted by the counsel for the Insurance Company that the actual vehicle involved was not traced and therefore, the claimants planted this vehicle with the collusion of the owner. It is further submitted that the income should have been Rs.15,000/- per annum as per Schedule. The deceased was not earning Rs.3,000/- per month, as he was a daily wager.

8. While going through the record it is very clear that the Tribunal has considered the income of the deceased to be Rs.3,000/- per month and in the year of accident a laborer can earned the said amount. The Tribunal has not added any amount for future loss of income and has granted meager amount under the head of non pecuniary damages, hence the submission that the income is on higher side cannot be accepted, rather the amount is on conservative side, hence the said submission of the counsel for the appellant cannot be accepted.

9. The submission of the counsel for the appellant before this Court that the vehicle was not involved in the said accident and that no eye witness was examined who would prove that the vehicle was involved in the accident. It is further submitted that the FIR was lodged after nine days of the accident and that too against an unknown vehicle. The final report by police also showed that vehicle was not involved in the accident.

10. The submission of learned counsel for the appellant that accident was reported late and therefore, this Court should hold that the vehicle was not involved in the

accident, cannot be accepted. *Section 158 and 166(4) provide that particulars of vehicles involved in the accident have to be collected by investigating agency and forwarded to the Tribunal as accident information report in Form 54 which shall be treated as claim application. Motor Vehicles Act empowers the Tribunal to award compensation to the claimant even in absence of formal claim application.* I am supported my view by the recent judgment of Gujarat High Court passed in the Case of **Joshi Rajendrakumar Popatlal Vs. Thakor Ramnaji Hamirji and others, reported in 2020 ACJ 365,** and therefore, it cannot be said that the vehicle was not involved in the accident. The further contention of the counsel for the appellant that the compensation awarded is on higher side also fails.

11. In this case the insurance company has not examined any investigating office and has not even raised any objections before the tribunal that the vehicle was not involved in the said accident. In his further statement also, the said contention has not been raised, rather the written statement was to the effect that the driver did not have proper driving license. Further, while going through the record, it is very clear that the insurance company also accepted that the vehicle was involved in the accident. No issue was raised to the said effect.

12. The appeal fails and is **dismissed.**

13. The record be sent back to the Tribunal.

(2020)09ILR A206
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.01.2020

BEFORE

THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE SHAMIM AHMED

First Appeal From Order No. 3226 of 2013
Connected with
First Appeal From Order No. 577 of 2019

The Branch Manager, The Oriental Insurance Company Ltd. ...Appellant
Versus
Smt. Anarkali Devi & Ors. ...Opposite Parties

Counsel for the Appellant:
Sri Vivek Kumar Birla, Sri Arun Kumar Shukla, Sri Pankaj Kumar Asthana

Counsel for the Respondents:
Sri Pankaj Kumar Asthana, Sri Rakesh Chandra Tiwari

A. Civil Law - Motor Accident Claim – Determination of Compensation – Future Prospects – Funeral expenses, loss of consortium and loss of estate – The deceased was permanently employed and his age was 54 years 10 months –While determining the income, the amount of 15% of his actual salary shall be added to the income of the deceased towards future prospects – Reasonable figures under 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 – Tribunal's award modified. (Para 10, 11 and 14)

Appeal disposed of. (E-1)

Cases relied on :-

1. Smt. Sarla Verma & ors. Vs Delhi Transport Corp. & anr., 2009 (2) T.A.C. 677 (S.C.)

2. National Insurance Company Ltd. Vs Pranay Sethi & ors. reported in 2017 LawSuit (SC) 1093

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

1. Heard learned counsel for the parties.

2. This F.A.F.O. No. 3226 of 2013 has been preferred by The Branch Manager, The Oriental Insurance Company Limited, Sonebhadra against the judgement and award dated 19.08.2013 passed by the Motor Accidents Claims Tribunal/District Judge, Sonebhadra in M.A.C.P. No. 299 of 2010 (Smt. Anarkali Devi and others Vs. Gulab Chandra Yadav and others) by which a sum of Rs. 32,33,500/- has been awarded as compensation to the claimants-respondents for the death of one Hosila Prasad Dubey, husband of claimant-respondent no. 1 and father of claimant-respondent nos. 2 to 4, caused on 9.10.2010 as a result of the injury received by him in an accident which had taken place on 8.10.2010 due to rash and negligent driving of the driver of Indigo bearing registration no. U.P. 64L/8596 while the deceased was going on his motorcycle.

3. The F.A.F.O. No. 577 of 2019 has been preferred by the claimant-appellants for enhancement of compensation.

4. The only ground on which the learned counsel for the appellant in F.A.F.O. No. 3226 of 2013 has assailed the impugned judgment and award is that considering the age of the deceased at the time of his death, the Tribunal ought to have applied the multiplier of 11 in place of 13 as per the dictum laid down by the Apex court in the case of **Smt. Sarla Verma and others Vs. Delhi Transport Corporation and another reported in 2009 (2) T.A.C. 677 (S.C.).**

5. There is no dispute about the fact that at the time of his death, the deceased was aged about 54 years and 10 months and he was employed in N.T.P.C. and earning a sum of Rs. 30,828/- per month.

6. Paragraph 21 of **Smt. Sarla Verma (supra)** which is relevant for our purpose reads as hereunder :

"21. 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. Thus, in view of the above, the multiplier which should have been applied by the Tribunal for ascertaining the loss of dependency, should have been 11 and not 13.

8. It has been contended by learned counsel for the appellants in F.A.F.O. No. 577 of 2019 that the Tribunal while computing the compensation, has failed to award any amount towards future prospects and the amount awarded under the conventional heads is not in consonance with the principle propounded by the Apex Court in the case of **National Insurance Company Ltd. Vs. Pranay Sethi and Others reported in 2017 LawSuit (SC) 1093.**

9. The constitutional Bench of the Apex Court in the judgment rendered in the case of **Pranay Sethi and Others (supra)**

in sub-paragraph (iii) to (viii) of paragraph 61 has ruled inter-alia; that 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; 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.

10. In the instant case, there is no dispute about the fact that the deceased was permanently employed and his age was 54 years 10 months as per the salary slip of the deceased and hence the Tribunal ought to have awarded 15% of actual income of the deceased towards future prospects. We therefore, hold that while determining the income, the amount of 15% of his actual salary shall be added to the income of the deceased towards future prospects.

11. We find that the Tribunal has awarded a sum of Rs. 2,000/- for funeral expenses, Rs. 5,000/- towards loss of consortium and Rs. 2,500/- towards loss of estate. In sub-para (viii) of paragraph 61 of the **Pranay Sethi and Others (supra),** the Apex Court has observed that reasonable figures under 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.

12. We, accordingly, direct that the claimant-appellants in F.A.F.O. No. 577 of 2019 shall be entitled to sums of Rs. 15,000/-, Rs. 40,000/- and Rs. 15,000/- under the conventional heads namely funeral expenses, loss of consortium and loss of estate respectively.

13. We, accordingly, proceed to recalculate the compensation in the light of the aforesaid principles. As noted above, the actual salary of the deceased was Rs. 30,828/- per month or Rs. 3,69,936/- p.a. less tax. By adding 15% towards future prospects as the deceased was between the age of 50 to 60 years, the deemed gross income of the deceased would be Rs. 30,828/- + 15% of Rs. 30,828/- = Rs. 35,452/- per month or Rs. 4,25,424/- p.a. After deducting 1/4th amount (i.e. 35,452-8863) towards the living and personal expenses of the deceased, his contribution to the family is determined as Rs. 26589/- per month or Rs. 3,19,068/- p.a. By applying the multiplier of 11, the total loss of dependency is assessed at Rs. 35,09,748/-. We further award a sum of Rs. 15,000/- towards funeral expenses, Rs. 40,000/- under the head of loss of consortium and Rs. 15,000/- towards loss of estate. We accordingly increase the compensation awarded to the claimants-respondents by the Tribunal from Rs. 32,33,500/- to Rs. 35,79,748/-. The claimants-respondents shall further be entitled to interest @ 6% p.a. on the increased amount of compensation from the date of filing of the claim petition till the actual payment is made.

14. The impugned judgment and award stands modified to the extent indicated hereinabove.

15. Both the appeals stand disposed of accordingly.

16. The parties shall bear their own costs.

(2020)09ILR A209
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.02.2020

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE AJIT KUMAR, J.

First Appeal From Order No. 3573 of 2010

Nand Lal Ram & Anr. ...Appellants
Versus
Oriental Insurance Co. Ltd.,Meerut & Ors. ...Respondents

Counsel for the Appellants:
Sri Anurag Sharma, Sri Shashank Shekhar

Counsel for the Respondents:
Sri N.K. Chatterjee, Sri S.D. Dube, Sri Neeraj Dube, Sri Arun Kumar Shukla

A. Civil Law - Motor Accident Claim – Application of Multiplier – Sarla Verma's principle – Age of deceased is 35 years – The multiplier of 16 should have been applied – Held, Tribunal wrongly applied the multiplier of 8. (Para 15)

B. Civil Law -Motor Accident Claim – Determination of Compensation – Future Prospects – Pranay Sethi's principle applied – Supreme Court has provided for 50% future prospects for a person aged below 40 years – Directed for the award of compensation include 50% towards future prospects of the income of deceased. (Para 16 and 20)

C. Civil Law -Motor Accident Claim – Determination of Compensation – Funeral expenses and loss of estate – Pranay Sethi's principle – 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 – Directed for the award of compensation include Rs. 15,000/- each for funeral expenses and loss of estate. (Para 18, 19 and 20)

Appeal allowed. (E-1)

Cases relied on :-

1. Raghuvir Singh Vs Hari Singh 2009 (2) ACCD 1120 (SC)

2. National Insurance Company Ltd. Vs Indira Srivastava 2008 ACJ 614 (SC)

3. National Insurance Company Ltd. Vs Pranay Sethi & ors., (2017) 16 SCC 680

4. Sarla Verma (Smt.) & ors Vs Delhi Transport Corporation & anr (2009) 6 SCC 121

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

1. Heard Sri Shashank Shekhar, learned Advocate holding brief of Sri Anurag Sharma, learned counsel for the appellants and Sri Arun Kumar Shukla, learned counsel for the Insurance Company.

2. In view of the office report dated 05.02.2020 service of notice is deemed sufficient upon the proforma respondent nos. 4 to 6.

3. Sri N.K. Chatterjee and Sri S.D. Dube, learned counsels for the respondents are not present.

4. This first appeal from order has been preferred for enhancement of compensation awarded under the award of Motor Accident Claims Tribunal dated 26.08.2010 passed in Motor Accident Claim Petition No. 1006 of 2008.

5. The total compensation that has been awarded is Rs. 18,71,146/- along with the

interest @ 6% from the date of presentation of application till the actual payment of the compensation. The appellants have assailed the award on the point of computation of compensation and have thus claimed enhancement of compensation and thereby modification of the award.

6. The undisputed facts that have emerged out of the pleadings and award are that the deceased Tapesh Kumar while on board of Santro Car No. WB 02 Q 8264 met a fatal accident on Delhi-Meerut Highway in the night of 15.09.2008. The accident occurred because of the standing truck bearing no. HR 58 A 2127 along the divider of the road which could not be sited by Tapesh Kumar who was driving the Car and the Car dashed into the truck. The truck was loaded with iron bars that fatally injured both husband and wife who died on the spot. At the time of death the deceased Tapesh Kumar was aged about 35 years and he was working in Oil and Natural Gas Corporation (ONGC), Mumbai as Deputy Superintending Engineer and his monthly income at the time of accident was Rs. 1,00,088.55 paise. The deceased was survived by old aged parents Nand Lal and Smt. Parvati Devi and four brothers namely Anil, Deepak, Vijay and Ajay.

7. On the issue of computation of compensation, two fold argument was led by the Insurance Company before the Tribunal: firstly, the argument was that the monthly salary of the deceased included additional allowances and therefore, only net income should be assessed; and secondly, there should be 2/3rd deduction because both husband and wife had died in the accident and direct dependents were only the parents.

8. Considering the above two arguments and relying upon two judgments of the Apex Court in the case of **Raghuvir Singh v. Hari Singh 2009 (2) ACCD 1120 (SC)** and **National Insurance Company Ltd. v. Indira Srivastava 2008 ACJ 614 (SC)** the Tribunal deducted only the income tax from the salary and thus salary was assessed as Rs. 77,870.72 paise and accordingly the annual income was assessed as Rs. 9,34,448.60 paise. The Tribunal made 1/2 deduction towards personal expenses of the deceased and his deceased wife and so after deducting 1/2 of the amount, the annual income was assessed to be Rs. 4,67,224.30 paise. Thereafter, the Tribunal proceeded to apply the multiplier on the basis of age of the parents and accordingly applied the multiplier of 8 and assessed the annual income as Rs. 37,37,792/-. Towards the funeral expenses Rs. 2,000/- was awarded and also for the loss of estate Rs. 2,000/- was awarded. Thus, total income **was calculated as Rs. 37,42,292/-.**

9. Since it was a case of contributory negligence, so 50% of the liability was fastened upon the car driver who is the deceased himself and accordingly 50% of the amount of total compensation assessed as Rs. 18,71,146/-, was directed to be awarded.

10. Assailing the aforesaid computation, three fold arguments have been led by the learned counsel for the appellants: **(i)** the multiplier has wrongly been applied of the dependants whereas, the multiplier should have been considering the age of deceased at the time of accident; **(ii)** no amount has been added towards future prospects; **(iii)** the amount towards loss of estate and funeral is too meagre an amount.

11. Learned counsel for the appellants in support of his arguments has relied upon

the judgment of Apex Court in **National Insurance Company Limited Vs. Pranay Sethi & others, (2017) 16 SCC 680.**

12. *Per contra* the argument of learned counsel for the Insurance Company is that the Tribunal has rightly applied the multiplier and has correctly calculated the compensation and the award does not warrant any interference.

13. Having heard learned counsels for the parties and their respective arguments raised across the bar and having gone through the judgments, we find that three points raised by the learned counsel for the appellants do require consideration.

14. Coming to the first argument regarding application of multiplier, we are reminded of the judgment of Apex Court in the case of **Sarla Verma (Smt.) & Ors v. Delhi Transport Corporation & Anr (2009) 6 SCC 121** in which vide para 42 the Court has held thus:

"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 of 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, 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 years to 70 years."

15. The Apex Court in the case of **Pranay Sethi** *(supra)* has affirmed the judgment of **Sarla Verma** *(supra)* and has held that since the multiplier has already been fixed in **Sarla Verma** which has been approved in **Reshma Kumari.** Applying the aforesaid principle and considering the age of deceased being 35 years, we are of the considered opinion that the multiplier of 16 should have been applied and therefore, we find merit in the argument of learned counsel for the appellants that multiplier of 8 has wrongly been applied by the Tribunal.

16. Coming to the second question relating the future prospects, we find that the aspect of future prospects has also been considered in detail by the Supreme Court in the case of **Pranay Sethi** *(supra)*. In **Pranay Sethi** *(supra)* Supreme Court has provided for 50% future prospects for a person aged below 40 years.

17. In so far as the deduction is concerned, we are satisfied with 1/2 deduction because both husband and wife have died and virtually left behind their aged parents. The other brothers cannot be claimed to be direct dependents upon the deceased brother nor, any evidence has been led to prove that other brothers were equally dependents like parents.

18. On the question of loss of estate and funeral expenses also we are of the opinion that the formula applied in **Pranay Sethi** *(supra)* should be made applicable in which Rs. 15,000/- in each of those categories have been provided for. Vide para 52 and 59 of the judgment in **Pranay Sethi's** case, the Apex Court has held thus:

"52. As far as the conventional heads are concerned, we find it difficult to agree with the view expressed in Rajesh. It has granted Rs. 25,000/- towards funeral expenses, Rs. 1,00,000/- loss of consortium

and Rs. 1,00,000/- towards loss of care and guidance for minor children. The head relating to loss of care and minor children does not exist. Though Rajesh refers to Santosh Devi, it does not seem to follow the same. The conventional and traditional heads, needless to say, cannot be determined on percentage basis because that would not be an acceptable criterion. Unlike determination of income, the said heads have to be quantified. Any quantification must have a reasonable foundation. There can be no dispute over the fact that price index, fall in bank interest, escalation of rates in many a field have to be noticed. The court cannot remain oblivious to the same. There has been a thumb rule in this aspect. Otherwise, there will be extreme difficulty in determination of the same and unless the thumb rule is applied, there will be immense variation lacking any kind of consistency as a consequence of which, the orders passed by the Tribunals and courts are likely to be unguided. Therefore, we think it seemly to fix reasonable sums. It seems to us that reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs. 15,000/-, Rs. 40,000/- and Rs. 15,000/- respectively. The principle of revisiting the said heads is an acceptable principle. But the revisit should not be fact-centric or quantum-centric. We think that it would be condign that the amount that we have quantified should be enhanced on percentage basis in every three years and the enhancement should be at the rate of 10% in a span of three years. We are disposed to hold so because that will bring in consistency in respect of those heads.

"59. In view of the aforesaid analysis, we proceed to record our conclusions:-

59.1. The two-Judge Bench in Santosh Devi v. National Insurance Co. Ltd. (2012) 6 SCC 421 should have been well advised to refer the matter to a larger Bench as it was taking a different view than what has been stated in Sarla Verma, a judgment by a coordinate Bench. It is because a coordinate Bench of the same strength cannot take a contrary view than what has been held by another coordinate Bench.

59.2. As Rajesh v. Rajbir Singh (2013) 9 SCC 54 has not taken note of the decision in Reshma Kumari, which was delivered at earlier point of time, the decision in Rajesh (supra) is not a binding precedent.

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.*

59.5. For determination of the multiplicand, the deduction for personal and living expenses, the Tribunals and the courts shall be guided by paragraphs 30 to

32 of Sarla Verma which we have reproduced hereinbefore.

59.6. The selection of multiplier shall be as indicated in the Table in Sarla Verma read with paragraph 42 of that judgment.

59.7. The age of the deceased should be the basis for applying the multiplier.

59.8. 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 aforesaid amounts should be enhanced at the rate of 10% in every three years."

(emphasis added)"

19. Thus, in view of the above principles, we made a pointed query to the learned counsel for the Insurance Company as to what argument he would lead to counter the argument advanced by learned counsel for the appellants, the learned counsel appearing for Insurance Company has only submitted that the determination of compensation has been made as per law that existed at that point of time and therefore, appellants should not be benefited under the subsequent judgment.

20. To the above view, we do not subscribe because the law declared by Apex Court is taken to be a law always in existence. In matter of beneficial legislation where the issue is of quantum of compensation, the Court should always take pragmatic view and we find no reason as to why the principles laid in **Pranay Sethi** *(supra)* may not be made applicable to the case in hand while determining compensation, and accordingly we hereby direct for the award of compensation to include 50% towards future prospects of the income of the deceased, Rs. 15,000/- each for funeral expenses and loss of estate.

21. We have already held above, the multiplier of 16 corresponding to the age of deceased shall be applicable. Accordingly, therefore, the award of the Tribunal dated 26.08.2010 is modified by enhancement. Now the compensation will be transcribed as under:

Income as salaried employee, of the deceased minus taxes	Rs. 77,871/- p.m.	Rs. 9,34,452/- p.a.
Future Prospects	50% of Rs. 9,34,452/-	Rs. 4,67,226/-
Total Income		Rs. 14,01,678/-
Deduction towards personal expenses	1/2 of total income	Rs. 7,00,839/-
Dependency		Rs. 7,00,839/-
Multiplier		16
Compensation	Rs. 7,00,839/- x 16	Rs. 112,13,424/-
Funeral Expenses		Rs. 15,000/-
Loss of Estate		Rs. 15,000/-
Total Compensation		Rs. 112,43,424/-

22. Thus, the compensation awarded by the court below is enhanced from Rs. 18,71,146/- to Rs. 112,43,424/- with 6% per annum rate of interest from the date of presentation of the application till actual payment is made.

23. In view of the above, the appeal stands **allowed.** The compensation awarded

to the claimants/ appellants under the order of the Tribunal dated 26.08.2010 is accordingly enhanced and award stands modified to the extent indicated herein above.

(2020)09ILR A214
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 31.07.2020

BEFORE

THE HON'BLE ATTAU RAHMAN MASOODI, J.

First Appeal No. 59 of 1978

Rahmat Ali ...Appellant
Versus
Rashid & Ors. ...Respondents

Counsel for the Appellant:
M.A. Khan, Mohd. Arif Khan, Mohiuddin

Counsel for the Respondents:
R.S. Tripathi, Mohd. Abid Ali, Mohd. Adil Khan, Ram Ujagir Verma, V.V. Tripathi, Z. Rahman

Suit for specific performance decreed in favour of Respondent-Plaintiff-against which Appeal filed-substitution of Legal Heir was objected not to be a rightful heir-Admission of Respondent that the Legal Heir is son of the Original Plaintiff's sister-his right could not be ruled out altogether-decree upholded-relief modified by increasing the sale consideration.

First Appeal dismissed. (E-9)

Cases referred: -

1. Dashrath Rao Kate Vs Brij Mohan Srivastava, (2010) 1 SCC 277

2. Gulabchand Chotalal Parik Vs St. of Guj., AIR 1965 SC 1153

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

1. The defendants' first appeal instituted under Section 96 CPC has arisen against the judgement and decree rendered by the trial court decreeing the suit for specific performance in favour of the respondents-plaintiff and the same has come up for hearing after more than 40 years.

2. Heard Sri Mohd. Arif Khan, learned Senior Advocate assisted by Sri Mohiuddin Khan for the appellant and Sri Mohd. Abid Ali assisted by Smt. Atiya Abid for the respondents.

Brief description of the lis and parties

3. The subject matter involved in the Regular Suit No. 14 of 1971 filed by the predecessor in interest of respondents no. 1/a to 1/i is a house property which was agreed to be sold through an oral agreement pursuant to which part payment was made under a receipt duly witnessed. Non-performance of the agreement gave rise to the suit.

4. The case set up by the plaintiff was that for a sum of Rs. 12000/- the house in dispute was orally agreed to be sold by late Ashraf and his wife Ahmadi who were impleaded as defendants no. 1 and 2 respectively in the suit. Defendant no. 1 died during pendency of the suit whereas defendant no. 2 has died during pendency of the present appeal. Defendant no. 2 who was appellant no. 1 herein consequent upon her death has come to be substituted by appellants no. 1/1 and 1/2 by transposition. The occasion for transposition arose for the reason that the two daughters of main contesting defendants (late Ashraf and Ahmadi) though being substituted as defendants in place of late Ashraf while the

suit was pending, were nevertheless impleaded as respondents no. 2 and 3 in the present appeal. As to why the two daughters of original defendants no. 1 and 2 did not join the appellant no. 1 (mother) through this appeal at the time of approaching this Court remains unexplained. Defendants no. 3 and 4 entered into possession over the disputed property allegedly as tenants *pendente lite*, therefore, the real controversy insofar as the oral agreement for specific performance is concerned, is confined between the legal heirs of appellant no. 1 viz. Appellant nos. 1/1 and 1/2 and respondent no. 1/a to 1/i. Appellant no. 2 (defendant no. 4) who admittedly was a tenant *pendente lite* had also joined in the present appeal with appellant no. 1 and after his death has come to be substituted by appellants no. 2/1 to 2/12. The other defendants bound by the principle of lis pendence have niether contested the suit nor the present appeal, hence their role is proforma.

5. From the array of parties described above, it does appear as if the appeal is rather strongly pursued by the legal heirs of defendant no. 4 (tenant *pendente lite*) who stands substituted by appellants no. 2/1 to 2/12. It is a case where the saying "Fishing in the troubled waters" *("Aa bael mujhe maar" in Hindi)* completely fits in. It is the tenants *pendente lite* who have rather dragged on the pendency of this appeal is well established from the order sheet and affidavits exchanged.

Background of the case

6. It was averred in the plaint that one Nazir Baksh had entered into an oral agreement with one Ashraf and his wife Ahmadi for sale of a house property bearing no. 580 (old no. 471) situate in Mohalla Atal Behari Nagar, Pargana, Tehsil and District Unnao for a sum of Rs. 12000/- out of which a sum of Rs. 4000/- was paid in advance and Rs. 2400/- towards redemption of mortgage created in favour of one Shiv Narain Awasthi and in this manner a sum of Rs. 6400/- was acknowledged to be received by late Ashraf through a receipt duly witnesseth on 11.1.1971. The remaining amount was agreed to be paid at the time of executing the sale deed and this was stipulated in the receipt itself. Non performance of the agreement on the part of late Ashraf and Smt. Ahmadi gave rise to a registered notice sent on 18.3.1971 which was duly served. The promissors having denied any such agreement, refused to comply with the notice by setting up a different story in response, therefore, a suit for specific performance was filed before the competent civil court.

7. During the lifetime of the original plaintiff viz. late Nazir Baksh, it appears that the suit proceeded up to the stage of framing of issues 1 to 7 but before the same could be decided in the light of evidences led by the parties, the sole plaintiff died on 23.2.1976. Due to the death of sole plaintiff, an application for substitution i.e. 217A came to be filed by one Rashid who in the plaint was stated to be the son by the original plaintiff himself, as such the application was allowed on 15.10.1976. The substitution of Rashid in place of the sole plaintiff by an order passed under Order XXII Rule 3 CPC on 15.10.1976 was objected on the same date by filing objections i.e. 43/D. The objections so filed were rejected on 22.11.1976 looking to the version set out in the plaint by the original plaintiff. The substitution of Rashid was thus confirmed. The order passed on 22.11.1976 was assailed by the contesting

respondent under Section 115 CPC by filing a revision which was allowed and the matter was remanded back to the trial court for determination of the question of legal representative/heirship as son under Order XXII Rule 5 CPC. The parties availed full opportunity of leading evidence and the issue was contested tooth and nail.

8. After due consideration of the entire evidence placed on record, the trial court decided the question in favour of Rashid holding him to be the son of original plaintiff viz. late Nazir Baksh. An exhaustive judgement/order was rendered by the trial court on 4.3.1977 following a procedure akin to trial and the same was questioned by the contesting defendant (Ahmadi) before the revisional court in Civil Revision No. 19 of 1977 under Section 115 CPC.

9. The revisional court yet by a detailed judgement rejected the civil revision and thereby affirmed the findings of the trial court on the issue of substitution of Rashid as son in place of the deceased sole plaintiff. The judgement and order rendered by the revisional court on 23.5.1977 attained finality. It is after the issue fallen for consideration under Order XXII Rule 5 CPC had attained finality that an amendment application was filed by Rashid to straighten the pleadings and the formal amendment so prayed for was allowed. The contesting defendant no. 2 also sought amendment in the written statement which was allowed. Parties carried out the amendments in their respective pleadings. Amended copies of the pleadings were accordingly filed before the trial court.

10. Interestingly, issues no. 1 to 5 were framed on 25.1.1973 i.e. during lifetime of the original plaintiff who died on 23.2.1976. Issues no. 3 and 5 related to the admissibility of oral agreement and court fee. The trial court decided both the issues in favour of the plaintiff by an order passed on 21.5.1973. This position is evident from the impugned trial court judgement itself. Issues no. 6 and 7 were also framed during original plaintiff's lifetime i.e. on 19.2.1975. All these issues were framed having due regard to the written statements filed by the defendants no. 1 and 2 separately wherein they had denied Rashid to be the son of late Nazir Baksh and had rather termed him to be the son of original plaintiff's sister whose name was not disclosed in any of the written statements.

11. At the time when the amended pleadings were taken on record, it appears that a copy of the additional written statement sworn on 29.11.1976 was simultaneously filed by the *pendente lite* tenant (defendant no. 4) jointly with Smt. Ahmadi (defendant no. 2) setting out a pedigree for the first time wherein the newly substituted plaintiff Rashid was shown as son of one of the unnamed sisters of the original plaintiff. Issues no. 8, 9 and 10 were nonetheless framed by the trial court on 29.11.1976 in the light of pleadings on record.

12. Later on the *pendente lite* tenant jointly with the defendant no. 2 (Smt. Ahmadi) sought amendment in the written statement filed by her much earlier through an application made on 10.9.1977 which was allowed. The newly substituted plaintiff Rashid in the amendment sought to be made for in the written statement was now shown to be the son of one **Bhagbari** in the family tree and this is how the name of original plaintiff's sister surfaced.

13. It is in the light of above amendment in the written statement that issues number 11 and 12 were further framed in the suit on 14.9.1977 which for ready reference may be extracted below:

"(11) Whether Sri Rashid is the son of Sri Nazir Bux? If so, its effect?

(12) Whether the plea covered by issue no. 11 is barred by res judicata? If so, its effect?"

14. Parties were allowed to lead additional evidence on the issues framed. The trial court having regard to the evidence on record decided all the issues in favour of the respondents no. 1/a to 1/i i.e. plaintiff. The suit for specific performance of the oral agreement dated 11.1.1971 was accordingly decided and decreed in favour of the plaintiff Rashid survived by his legal heirs herein as respondent no. 1/a to 1/i.

15. The trial court rendered the judgement and decree in favour of the plaintiff on 23.5.1978. The operative part of the judgement and decree reads as under:

"The suit of the plaintiff for specific performance of contract of sale in respect of the house in suit is decreed with costs against the defendants. The plaintiff is directed to deposit Rs. 5600/- the remaining price in this court to the credit of defendants 1/1 to 1/4 and 2 within two months. After this amount is deposited by the plaintiff, the defendants 1/1 to 1/4 and 2 are hereby ordered to execute a sale deed and to get the same registered in favour of the plaintiff in respect of the house in suit within a period of three months. After the sale deed is executed all the defendants are hereby directed to hand over possession to the plaintiff over the house in suit within 15 days. If the defendants fail to comply the aforesaid order the decree shall be executed against the defendants through process of the court at the costs of the defendants according to law."

16. It is against this judgement/decree that the present appeal under Section 96 CPC has come to be filed and the same was admitted by this Court on 2.9.1978. An order of stay of the decree subject to payment of an amount fixed by the court is operating

Points of determination

17. Looking to the mandate of Order XLI Rule 31 CPC, the points of determination which arise for consideration are; **(i) as to whether** the trial court has rightly construed the principle of res judicata between the parties on the issue of Rashid being the son of the original plaintiff late Nazir Baksh, if yes, its consequence; **(ii) as to whether** the trial court having framed issue no. 11 and 12 after finality of order passed under Order XXII Rule 5 CPC has erred in not delving into issue no. 11 on the basis of additional evidence adduced and exhibited in trial; **(iii) as to whether** the trial court failed to frame an issue in the light of Section 16 of the Specific Relief Act to the effect that the plaintiff had failed to aver his readiness and willingness to perform the agreement and prove the same; and **(iv) as to whether** the evidence on record was rightly appreciated by the trial court so as to conclude all the issues in favour of the respondents no. 1/a to 1/i herein i.e. plaintiff and the suit was rightly decreed.

Discussion on the points of determination

18. On the aspect of the principle of res judicata it has strenuously been argued

by learned Senior Counsel for the appellant that the dispute decided within the scope of Order XXII Rule 5 CPC is solely for the purpose of continuity of proceedings and the issue in relation to legal representation as son framed in the suit was nevertheless liable to be adjudicated upon in the light of additional evidence placed on record.

19. Sri Mohd. Arif Khan, learned Senior Counsel for the appellants in order to buttress his submissions, has placed reliance upon a catena of judgements to show that an order passed under Order XXII Rule 5 CPC would merely confer a right of continuing the suit proceedings but would not have a bearing upon the real issue of Rashid being treated as son of the original plaintiff, if arisen for trial. The submission put forth is that an order passed under Order XXII Rule 5 CPC is summary in nature. It is thus urged that once an issue was subsequently framed as to whether Rashid was a son of the sole plaintiff late Nazir Baksh or not, the trial court notwithstanding the finality of earlier order passed under Order XXII Rule 5 CPC, ought to have considered the additional evidence led by the appellant-defendants which was duly exhibited and non consideration of the same has thus resulted into a grave error for which the judgement rendered by the trial court stands vitiated in the eye of law.

20. Taking up the first two points of determination together, the Court may note that the suit instituted by late Nazir Baksh and upon his death by his legal representative Rashid was for the performance of an oral agreement. The question of legal heir as a son had arisen incidentally due to the death of the original plaintiff late Nazir Baksh who did not leave behind any other child. In order to get rid of the suit proceedings, the contesting defendants chose to object to the substitution of Rashid in place of the sole plaintiff questioning his right to continue the proceedings on the ground that the cause to sue as a result of the death of original plaintiff had since extinguished being it a personal claim of late Nazir Baksh, therefore, the applicant Rashid not being his son had no right to continue the proceedings inasmuch as the right to sue did not devolve upon him.

21. It is in this background that the question as to the legal representative or legal heir as son of the original plaintiff late Nazir Baksh arose before the trial Court. In nutshell a dispute as to the devolution of the right to sue arose before the trial court for consideration and the same was decided within the scope of Order XXII Rule 5 CPC which for ready reference is extracted below:

"5. Determination of question as to legal representative.

Where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant, such question shall be determined by the Court:

Provided that where such question arises before an Appellate Court, that Court may, before determining the question, direct any subordinate Court to try the question and to return the records together with evidence, if any, recorded at such trial, its findings and reasons therefor, and the Appellate Court may take the same into consideration in determining the question."

22. This Court may note that the proviso to Order XXII Rule 5 CPC has come to be appended by Amendment Act No. 104 of 1976 w.e.f. 1.2.1977.

23. From a plain reading of the aforesaid provision, it is clear that the question of being a legal representative may arise between the parties in a variety of circumstances. In the present case the substitution of Rashid in place of the original plaintiff upon his death was initially decided summarily by an order passed by the trial court on 22.11.1976. This order was challenged in the revisional proceedings under Section 115 CPC by the contesting defendants i.e. predecessor in interest of appellants no. 1/1 and 1/2. The revision was allowed and the question was remitted to the trial court for decision afresh after affording opportunity to the parties for leading evidence. This clearly implies that parties to the suit on the issue of devolution of right to sue as a legal representative/son were granted due opportunity to lead evidence. The question as to whether Rashid was the son of late Nazir Baksh or not, the same was concluded after a full fledged opportunity. The procedure observed for determination of such an issue, as a matter of fact, was akin to regular trial and cannot be understood purely summary in nature. In the present case, however, the dispute went up to the revisional court. Detailed judgement on the aspect of legal representation/heirship favourable to Rashid was also rendered by the revisional court which attained finality.

24. This Court from a catena of judgements relied upon by learned counsel for the appellants may profitably take note of paragraph 15 of the judgement reported in **(2008) 8 SCC 521 (Jaldi Sugna (deceased through Lrs) v. Satya Sai Central Trust and others,** which reads as under:

"15. Filing an application to bring the legal representatives on record, does not amount to bringing the legal representatives on record. When an LR application is filed, the court should consider it and decide whether the persons named therein as the legal representatives, should be brought on record to represent the estate of the deceased. Until such decision by the court, the persons claiming to be the legal representatives have no right to represent the estate of the deceased, nor prosecute or defend the case. If there is a dispute as to who is the legal representative, a decision should be rendered on such dispute. Only when the question of legal representative is determined by the court and such legal representative is brought on record, it can be said that the estate of the deceased is represented. The determination as to who is the legal representative under Order 22 Rule 5 will of course be for the limited purpose of representation of the estate of the deceased, for adjudication of that case. Such determination for such limited purpose will not confer on the person held to be the legal representative, any right to the property which is the subject matter of the suit, vis-a-vis other rival claimants to the estate of the deceased."

25. In the case at hand, it is significant to note that no other person has claimed any hereditary or testamentary right in the suit property except Rashid who was stated to be the son by the original plaintiff himself in the plaint. The substitution of Rashid was strongly opposed by the appellants disputing his heirship as son. The case set up by the defendants at the trial stage of suit proceedings as mentioned above was that Rashid was rather the son of Bhagbari who was shown as the sister of the original plaintiff late Nazir Baksh in the pedigree.

26. This Court may note that even if it is assumed for the sake of argument that

Rashid was the son of original plaintiff's sister yet his substitution in place of the original plaintiff late Nazir Baksh could not be questioned by the defendants for their own admission. In Mohammedan Law even a deceased sister's son was an interested party with whom the right to represent the estate i.e. the suit property would intermeddle upon the death of sole plaintiff. In view of the own admission of the appellants that Rashid was son of original plaintiff's sister, the said applicant did not stand ousted from being recognised a legal representative altogether. "Legal representative' is a wider term inclusive of heirs by succession or any person claiming testamentary rights. Mohammedan Law does not recognise the concept of adoption, therefore, the plea as to whether Rashid was the son of original plaintiff late Nazir Baksh or not seems to have been pressed, as if disproving the said fact would frustrate the suit proceedings altogether but such is not the consequence insofar as the case at hand is concerned. A legal representative may have an exclusive right whether hereditary or testamentary or he may have a joint hereditary or testamentary right in the disputed property left behind by a deceased plaintiff. In both the eventualities, an interested person having a limited heritable or testamentary claim in the suit property would have a right to represent the estate or the suit property and the right to sue would stand devolved for the entire relief sought in the plaint. In the present case, however, the defendants in any view of the matter were duty bound to perform the agreement giving rise to the suit whether pursued by a person having exclusive right or a limited claim. In either of the two situations, the promissor in the present case was bound to perform the agreement and it is for this reason that the law permits a legal representative to continue the proceedings for the entire relief, irrespective of the extent of share or interest based on which the right devolves giving life to the cause. Moreover, the question as to whether Rashid was the son of late Nazir Baksh or not had no direct bearing upon any adversarial hereditary or testamentary claim between the parties except for the continuity of proceedings. This question was concluded between the parties after due opportunity of leading evidence which the parties availed of before the trial court. The trial court as well as the revisional court concluded the issue in favour of Rashid after considering the evidences in detail. The judgement rendered by the trial court under Order XXII Rule 5 CPC attained finality with the rejecting of civil revision on 23.5.1977.

27. The principle of res judicata binding between the parties on a question being tried under Order XXII Rule 5 CPC is more succinctly dealt with by the apex court in the case reported in ***2010 (1) SCC 277 (Dashrath Rao Kate Vs. Brij Mohan Srivastava)*** wherein an order passed between the parties under Order XXII Rule 5 CPC upon leading of evidence was held binding and not open to trial between the same parties. The order of this description, of course, would not be binding upon a non-party or a party having a direct adversarial hereditary or testamentary rival claim determination whereof may not stand affected under the principle of res judicata. This Court would gather that the purpose of the proviso appended to the Rule embodied under Order XXII Rule 5 is none other than to bind the parties for bringing the proceedings to its logical conclusion.

28. The principle of res judicata has transcended to serve the object of law from very old times traceable to a judgement of

1776 taken note of by the apex court in the case reported in ***AIR 1965 SC 1153 (Gulabchand Chotalal Parik v. State of Gujarat)***. In para-33 of the apex court judgement referred supra, the apex court records as under:

"33. Before discussing the law of res judicata as laid down in the Code of Civil Procedure, we may refer to the opinion of the Judges expressed in 1776 in the Duches of Kingston's Case(1) to which reference has been invariably made in most of the cases to be considered by us. It was said in that case :

"From the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true : first that judgment of a Court of concurrent jurisdiction, directly upon the point. is as a plea, a bar, or as evidence conclusive, between the same parties, upon the same matter, directly in question in another Court; secondly that the judgment of a Court of exclusive jurisdiction, directly upon the point, is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another Court, for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment." It is to be noticed that the opinion does not take into account whether the earlier judgment was in a suit or any other proceeding and whether it was used as res judicata in another suit or proceeding. The emphasis is that the judgment be of a Court and that it is relied upon as res judicata in another Court. Of course, the essential conditions that the judgment be directly upon the same point which is for determination in the subsequent suit and be between the same parties are also to be satisfied. It is obvious that the judgment of a Court of exclusive jurisdiction is to be treated as res judicata upon the same matter in another Court which will not be a Court having jurisdiction over the matter."

29. It cannot be disputed much that decision of a court/forum following summary procedure on an issue involved directly between the parties is binding upon the same parties in another proceedings of the same nature while the courts exercise exclusive jurisdiction. In the case of concurrent jurisdiction exercisable equally under Order XXII Rule 5 CPC, the procedure available to the litigating parties or the court is more than one. The parties or the court may allow the question of substitution for the continuity of proceedings settle summarily between parties or allow the same to be tried on the basis of full fledged opportunity to lead evidence. The purpose is to ascertain as to whether the right to sue has devolved upon an applicant or not besides survival of cause.

30. Once the option of objections is exercised by a party and the court protects the opportunity of leading evidence, then in that case, the same evidence or opportunity to lead further evidence on the issue of continuity of proceedings between the same parties, the question must stand closed in the exercise of concurrent jurisdiction even at different stages of the same proceeding. It is for this purpose alone that a proviso has come to be appended to the Rule embodied under Order XXII Rule 5 CPC. Treating the proceedings on legal representation under Order XXII Rule 5

CPC nevertheless summary between the same parties would be against the spirit of law and the very object of public policy aiming to culminate the rights as final between the parties. The right to represent the proceedings once concluded under Order XXII Rule 5 CPC, therefore, must operate as res judicata between the same parties without affecting the extent of the rival hereditary or the testamentary rights which does not appear to be the situation at hand.

31. In the present case, according to the own admission of contesting respondents, Rashid is admitted to be the son of the original plaintiff's sister (Bhaghbhari) as such, the right to represent the estate of late Nazir Baksh in the event of his death howsoever minimal the claim of sister's son may be, the same could not be ruled out altogether. The devolution of right to sue as son cropped up on the strength of objections filed by the contesting respondents who failed to prove their case in the proceedings under Order XXII Rule 5 CPC. This Court in such a situation does not find any justifiable fault in the principle of res judicata as construed and applied by the trial court simply because the proceedings drawn under Order XXII Rule 5 CPC are summary in nature. This question would have had a relevance only if the dependence of the continuity of proceedings was solely dependent on the determination of Rashid as son of the original plaintiff and failure to prove the same would entail a consequence of abatement or the proceedings becoming inoperative for want of a legal representative.

32. Once for the own admission of the contesting defendants, neither of the two consequences envisaged above follow, the submission advanced by learned Senior Counsel that the additional evidence exhibited on issue no. 11 ought to have been considered becomes fallacious and the finality of order passed under Order XXII Rule 5 CPC remains unquestionable. The submission urged, therefore, does not hold any water and is groundless.

33. This Court may note that the issue as to whether Rashid was the son of original plaintiff ought not to have arisen once he was admitted by the appellants to be the son of original plaintiff's sister and for this admission too, the suit would not abate. Secondly, the appellants had failed to prove their case in the proceedings drawn under Order XXII Rule 5 CPC and lastly the said question did not have a direct bearing on the heritable or testamentary rights of any rival claimant.

34. This Court in the light of resultant position as aforesaid may fruitfully refer to Order XX Rule 5 CPC which reads as under:

***"5. Court to state its decision on each issue**.-- In suits in which issues have been framed, the Court shall state its finding or decision, with the reasons therefor, upon each separate issue unless the finding upon any one or more of the issue is sufficient for the decision of the suit."*

35. The rule reproduced above clearly provides for a discretion which a court is permitted to exercise for deciding more than one issue collectively once the decision on a particular issue is sufficient for the decision of suit. The trial court having rightly construed and applied the principle of res judicata in the present case while deciding issue no. 12, was thus not

bound to record independent findings on issue no. 11 taking note of the additional evidences which stood barred by the principle of res judicata. The exhibition of the additional evidence on issue no. 11 was thus of no avail to the appellants. The decision on issue no. 12 within its sweep rendered the requirement of any independent findings on issue no. 11 as nugatory. The observation is necessary for the reason that the findings recorded on issue no. 12 were good enough to continue with the conclusion of suit proceedings. It is for this reason that Order XIV Rule 2 CPC also supports the determination of a legal issue before embarking on a factual issue. In the present case the legal issue once determined finally has rightly been held binding between the parties.

36. The first two points of determination in view of what has been observed hereinabove are accordingly decided against the appellants and in favour of the respondent-plaintiffs. The findings recorded by the trial court on the construction and application of the principle of res judicata are hereby affirmed.

37. The second limb of arguments relates to the aspect of plaintiffs having failed to aver and prove the readiness and willingness on their part to perform the agreement. The submission put forth proceeds on the premise of a question put to Rashid (plaintiff) during cross examination where he stated not to have inherited any bank account or financial status on the death of original plaintiff viz. Late Nazir Baksh. There is no doubt that a plaintiff in the case of an oral or written contract while seeking a remedy of specific performance of contract is bound to aver and prove the readiness and willingness on his part to perform the contract and the legal position is fortified by virtue of Section 16 of Specific Relief Act and interpretation thereof in a catena of judgements. Moreover, the question of readiness and willingness to perform the contract is a question of fact and law but which must be pleaded by the plaintiff so as to give rise to an issue in the light of conduct of parties and the reply filed.

38. It is a settled position of law that both the ingredients have to be satisfied by a plaintiff while seeking remedy for the specific performance of contract against a promissor. In the present case, however, when the notice for specific performance of oral contract was sent on 18.3.1971 to the predecessor in interest of appellant no. 1/1 and 1/2, namely, late Ashraf and his wife late Smt. Ahmadi, they denied the execution of any such oral contract with the original plaintiff late Nazir Baksh and in response to the legal notice proceeded to set up a different case altogether. The very existence of contract within the scope of Section 10 of the Indian Contract Act, 1872 was denied and for this reason, the aggrieved plaintiff instituted the suit immediately thereafter on 31.5.1971. Insofar as the willingness and readiness to perform the contract is concerned, there was a definite plea made in paragraph-9 of the plaint to which there was a formal denial in the background of a different story pleaded in the additional pleas.

39. The case at hand involved rather a peculiar situation where the promissors denied the very fact of having entered into an oral contract. The contesting defendants stuck to the stand of denial in the written statement without raising any counter claim on the basis of reply to the legal notice. In such a situation, the burden on the part of

the plaintiff was rather heavy to prove the agreement of which the readiness and willingness to perform though pleaded remained unquestioned at all by the defendants while replying to the legal notice or in the written statements filed. Once the very existence of agreement was denied by the promissors in their written statement, the issues that were vitally necessary for the decision of the suit were rightly framed as to the existence of contract between the parties and its part performance. The readiness and willingness to perform the contract at no point of time was factually questioned or doubted on the part of promissee who had advanced more than half of the amount and the same was proved on the basis of credible evidence. The financial capacity for rest of the part being it a small transaction could not be doubted much, therefore, there was no such prayer ever made by the appellant-defendants for framing of issues relating to willingness and readiness on the part of the plaintiff who had specifically pleaded the same and to which there was a bald denial. Issues no. 1 and 2 being the foundation of dispute were accordingly framed between the parties as under:

1. Whether plaintiff entered into an oral agreement with defendants under which the defendant agreed to sell the property in suit to plaintiff for consideration of Rs. 12000/- as alleged?

2. Whether the plaintiff in part performance of the contract paid Rs. 4000/- as earnest money to defendant and paid off the debt of Rs. 2400/- to Sri Narain, due to Sri Narain from defendants no. 1 and 2 and returned the mortgage deed to defendants after obtaining the endorsement of full satisfaction, as alleged?

40. Once the oral contract within the meaning of Section 10 of the Indian Contract Act, 1872, by itself was denied by the contesting defendants, the question of failure to frame an issue regarding the readiness and willingness to perform the contract would also not arise once the suit was instituted soon after the legal notice pleading the necessary facts. The question of readiness and willingness to perform the contract may have arisen when there was a delay on the part of the promissee to approach the court or when there was no such plea on his part in the plaint. After the death of original plaintiff, the successor in interest viz. Rashid entered the witness box and deposed his willingness and readiness to perform the contract. The conduct on the part of plaintiff was clear to meet the ingredients of Section 16 of the Specific Relief Act. To say that the trial court ought to have framed the issue as regards the willingness and readiness on the part of promisee at this stage without there being any protest during the course of trial reflects an evasive tactics on the part of the appellants throughout to prolong the proceedings. On the aspect of willingness and readiness to perform the contract was rather proved by Rashid who entered the witness box for implementation of the agreement even after the death of late Nazir Baksh (original plaintiff). Therefore, the statement that Rashid did not inherit any financial support from his father was inconsequential. Rashid in his statement has nowhere accepted that his own financial condition was poor, as such, his readiness to perform the contract cannot be disbelieved on the premise of what is argued by the learned counsel for the appellants at this stage. None of the witnesses who were produced by the contesting appellant-defendants denied the existence of contract, therefore, the proceedings would not stand vitiated on the premise a ground which is no more than

technical. The submission put forth that the relevant issues were not framed by the trial court does not merit and is rejected.

41. The trial court in order to adjudicate upon the issues aforesaid has fully adhered to the procedure of opportunity being granted to the parties for leading evidence. The plaintiff in order to establish the existence of contract proved the fact of house property being released from mortgage and in pursuance of the agreement of sale, the part payment of Rs. 6400/- to the promissor was fully proved on the basis of credible evidence. The witnesses Shiv Narain and Mohd. Akbar Raza have proved the contents of receipt which witnessed the release of property from mortgage and payment of advance money in pursuance of the sale agreement relating to the disputed house which was agreed to be sold for a total sum of Rs. 12000/-. Both the contesting defendants took a stand in reply to legal notice that no such agreement took place rather some signed paper was handed over to Mohd. Akbar Raza from whom the promissors pleaded to have borrowed the deficient money for the release of mortgaged property. This fact was not proved by the promissors (Ashraf and Smt. Ahmadi) on the basis of any evidence whatsoever nor did they succeed in fishing out any doubt in the statement of Akbar Raza or Shiv Narain during cross examination. That apart Smt. Ahmadi who herself was surviving at the stage of evidence even did not choose to enter the witness box to prove her own case, therefore, the evidence of witnesses relied upon by the respondent-plaintiffs assumed a higher degree of credibility. The trial court on the application of relevant case law in this regard has equally not committed any error of law. The trial court has thus relied upon an impeccable existence of the two witnesses for coming to a formidable conclusion in favour of the plaintiff-respondents. Once the evidence of contract was proved free from the cloud of any unfair advantage or an inequitable consideration as postulated under Section 20 of the Specific Relief Act, the grant of relief in favour of the respondent plaintiffs became imminent at the stage of trial. In view of what has been recorded above, the appeal fails on the third point of determination as well.

42. Indian philosophy on promises made by a person attaches sanctity to the "spoken words' and the Mohammedan Law recognises adherence to any such promise in no less rigid terms or form. It is for this reason that the constitutional morality under our system also recognises the definition of law inclusive of the customs and usages. It were the "spoken words' for which Lord Rama would have pardoned Ravan on his surrender or when the promise made to Vibhishan was honoured irrespective of the equitable considerations it involved or for that matter any other promise that we gather in the epic of Ramayan. In the matter of contracts for which free consent is a condition precedent, the understanding and obligation on the part of promissor to perform the contracts ought not to settle on a principle inferior to folklore, *"Pran Jaye Par Vachan Na Jaye"*. The tendency to resile from the agreements is against the objects of public policy. A person in the society must have a fearless faith and trust to enter into relationship, business, trade and commerce with another person and it is adherence to the "spoken words' that knits the fabric of developing societies into a civilised order. The highest treasure in a living human society is the existence of trust and faith in each other's behaviour and the sense of responsibility to

carry out promises made, failing which it is difficult to conceive a social order deliver progress for the generations to succeed. The enforceable dependence of contracts in a liberal economy must drive on the firm belief in the sanctity of spoken words and adherence thereto by the natural/legal entitites rather allowing to rest on judicial remedies complex in procedure and uncertain in time. This would be necessary in a society where capitalism and socialism prevails in a blended form. Therefore, the spoken contract must be honoured irrespective of the consequences it involves so long as the subject matter of suit is traceable and the rights do not become unenforceable on any just cause recognised by law.

43. The other issues (issues no. 3 to 10) except issues already discussed read as under:

3. Whether the alleged agreement is inadmissible in evidence for want of proper stamp duty?

4. Relief?

5. Whether the suit undervalued and the court fees paid insufficient?

6. Whether the suit is bad for mis-joinder of defendants 3 and 4?

7. Whether the defendant no. 4 has been the tenant of the property in suit. If so, its effect?

8. Whether the suit is bad for non joinder of necessary parties? If so, its effect?

9. Whether the suit stands abated as pleaded in additional written statement of defendants 2 to 4?

10. Whether the agreement to sell in favour of deceased plaintiff was a personal one and not heritable? If so, its effect?

44. The trial court judgement on all other issues was not questioned much by the appellants except projecting Smt. Ahmadi to be a *Pardanashin lady*, as such, the promise made by her was lastly argued not to be binding between the parties. The submission advanced by learned counsel for the appellant, in my humble consideration, is neither reflected from the reply to legal notice nor there was any plea on the basis of which such an issue would have fallen necessary for consideration by the trial court, hence the appellate court would not delve upon the competence of its power to give a new dimension to the dispute untraceable to a definite plea on record. Therefore, the decision of the trial court on the residual issues not being questioned or argued on the basis of any tangible ground, calls for no further consideration except what has been recorded by the court below both on the points of law and facts after following due procedure. The findings so recorded deserve to be affirmed. It is ordered accordingly.

45. Lastly, the most difficult question as to what relief would serve the ends of justice at this stage is also an aspect which requires consideration within the legal framework. It is well settled that the relief for specific performance of a contract is discretionary. It is to be kept in mind that specific performance of contract is a condition concomitant when a party cannot be adequately compensated in terms of money for the injury giving rise to a suit. In order to balance equity between the parties, it is necessary to take note of the order sheet. By an order passed by this Court on 22.11.1978, the execution of the impugned decree was stayed. Later on, the stay of decree was made conditional by order dated 6.10.1980 according to which the stay would operate subject to the deposit of a sum of Rs. 6500/- in the trial court by

appellant no. 1 and for a further deposit of Rs. 500/- by the appellant no. 2 (tenant *pendente lite*) who would also deposit Rs. 90/- half yearly of which the first instalment commenced before 30.6.1981 and the subsequent instalments before 31st December and 30th June every year. There seems to have arisen a confusion with respect to the deposits which were to be made for the operation of interim order but on a careful consideration of the order sheet it is gathered that the deposit of Rs. 6500/- was ascertained to have been made before the trial court as is evident from the order passed by this Court on 9.3.1987 when the interim order passed earlier on 6.10.1980 was confirmed. The deposit of Rs. 500/- coupled with a further deposit of Rs. 90/- half yearly by the appellant no. 2 further fell in confusion in the year 2017 when an order was passed on 7.12.2017 permitting the legal representatives of appellant no. 2 to deposit at their own risk.

46. The question that crops up for consideration is as to whether the deposit of Rs. 6500/- by appellant no. 1 who herself died on 22.2.1981 and was transposed by respondents no. 2 and 3 as appellants no. 1/1 and 1/2 purportedly in compliance of an unclear order dated 4.7.2008, would meet the ends of justice or it is the relief granted by the trial court that would serve the purpose of law. The deposit made by the tenants *pendente lite* which again has not been reviewed from time to time has not served any purpose except that of the promissor who may have harvested some hidden deal for adding a complication to the ongoing suit. The conduct of parties to a proceeding for determination of rights is also a relevant consideration which in the present case tilts the balance more in favour of the contesting respondents for having parted with more than half of the sale consideration yet remaining deprived of the property and at the same time the promissor who had agreed to sell the property, also remained deprived of the entire sale consideration but has enjoyed the property throughout.

47. The house which is the subject matter of sale agreement is certainly a property of ascertainable market value. The evaluation of index value of Rs.12000/- looking to the banking norms or the financial schemes floated by the government ever since 1971 poses no difficulty to quantify the value of Rs.12000/- as on date or the current sale consideration of the disputed house. A rough idea of the market value was also solicited from the parties.

48. Looking to the entirety of facts and other relevant considerations, this Court while upholding the decree would mould the relief by observing that the appellants no. 1 and 2 inclusive of the deposit of Rs. 6500/- alongwith the interest lying deposited before the trial court shall be entitled to receive a total sale consideration of Rs. 5 lakhs from respondents 1/a to 1/i payable within a period of nine months from the date of judgement and on the deposit of the same before the trial court, the court below shall proceed to implement the decree passed in favour of the respondents no. 1/a to 1/i by ensuring the execution of sale deed of the disputed house property bi, 580 (old no. 471) situated in Mohalla Atal Bihari Nagar, Pargana, Tehsil and District Unnao in their favour. The occupational cost fixed @ Rs. 90/- half yearly inclusive of Rs. 500/- as per order dated 6.10.1980deposited before the trial court is also permitted to be apportioned by the contesting respondents-plaintiffs towards the sum of Rs. 5 lakhs.

The trial court shall ensure delivery of vacant possession of the house in dispute to respondents no. 1/a to 1/i on the deposit of Rs. 5 lakhs as aforesaid without recognising any occupational rights of the tenants *pendente lite*. In the event of default, the amount of Rs. 6500/- alongwith interest may be released in favour of the contesting respondents but the occupational cost deposited by the tenants *pendente lite* shall be released in favour of the appellants no. 1/1 and 1/2. Cost of litigation is made easy.

49. The first appeal is dismissed.

(2020)09ILR A228
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.12.2019

BEFORE

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

First Appeal Defective No. 373 of 2019

Smt. Dimple Tyagi ...Appellant
Versus
Himanshu Tyagi ...Respondent

Counsel for the Appellant:
Sri Anshul Pathak

Counsel for the Respondent:
Sri Rahul Singh Dahiya

Civil law - Hindu Marriage Act,1955 - Section 14- - Divorce with mutual consent filed-within 3 months of marriage-Family Court rejected application-no fact was concealed by parties-impugned judgment quashed-remanded back to reconsider if case falls under exception of section 14.

Held - Proviso to Section 14 is intended to relax one year's limit though in very exceptional cases. It, however, enables Court to exercise discretion to grant leave to present such petition before expiry of one year's limit in case of exceptional hardship to petitioner or exceptional depravity of respondent. Court while considering application to grant leave for entertaining application within one year, must not act in a casual pedantic manner but should look into the objective, intention and spirit of Legislation. In deciding an application to leave, no elaborate enquiry is required. It does not require to be considered as a preliminary trial. In our view, Court in exercise of discretion to grant leave, should take into consideration the petition and objection, if any. **(Para 12)**

In the present case, application was filed by both the parties and there was no objection. It is not the case that any fact was concealed by parties or whatever they had stated in the application was incorrect. In these facts and circumstances, the manner in which application has been dealt with by Court below, appears to be unfair, illegal and unreasonable. In fact, from the order which we have quoted above, we could not discern any application of mind and valid reason on the part of Court below for declining to grant leave. **(Para 13)** (E-9**)**

Cases referred: -

1. Rabindra Nath Mukherjee Vs Iti Mukherjee 1991 (1) CLJ 209

2. Indumathi Vs Krishnamurthy (1998) 3 MLJ 435

3. Mr. X Vs Mrs. Y 2001 MLJ 696.

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

1. The delay in filing this appeal having been condoned vide order of date passed on Delay Condonation Application, as requested by counsels for both the parties, we proceed to decide this appeal at this stage on the basis of paper book of the appeal itself since a short legal issue is involved in the matter.

2. This appeal under Section 19 of Family Courts Act, 1984 (hereinafter

referred to as "Act, 1984") has arisen from judgment and order dated 10.05.2019 passed by Principal Judge, Family Court, Ghaziabad in Original Suit No. 188 of 2019 rejecting application for entertaining Petition under Section 14 of Hindu Marriage Act, 1955 (hereinafter referred to as "Act, 1955") before expiry of one year from the date of marriage and returning plaint to plaintiff-appellant being pre-mature.

3. Facts in brief, giving rise to present appeal are that appellant, Smt. Dimple Tyagi and respondent, Himanshu Tyagi were married according to Hindu rituals on 09.02.2019. The marriage was solemnized at Ghaziabad. After one week of marriage, both the parties developed strained relations and differences as a result whereof appellant came to her parents' residence on 10.03.2019 and residing thereat since then. Both the parties ultimately found it difficult to continue in the matrimonial relationship with each other, hence resolved to seek divorce with mutual consent and for this purpose an application dated 09.05.2019 under Section 14 of Act, 1955 was filed by both the parties in the Court of Principal Judge, Family Court, Ghaziabad which was registered as Petition No. 188 of 2019. Since application was filed within one year of marriage, they also sought permission of Court below to entertain application before expiry of period of one year and allow mutual divorce in terms of compromise which was recorded in the form of an affidavit dated 05.04.2019, filed before Court below.

4. The application came up for consideration before Family Court on 10.05.2019. It rejected application seeking permission for filing divorce petition with mutual consent before expiry of one year on the ground that as per report of Munsarim, one year period has not elapsed and there is no sufficient reason to grant permission to the parties to move application under Section 14 of Act, 1955 before expiry of period of one year. The short order passed by Family Court reads as under:

"पत्रावली प्रस्तुत हुई।

अंगीकरण के बिन्दु पर सुना तथा मुंसरिम की आख्या का अवलोकन किया। मुंसरिम की आख्या के अनुसार पक्षकारों की शादी को अभी एक वर्ष की अवधित पूर्ण नहीं हुई है। उभय पक्ष की ओर से धारा 14 हिन्दु विवाह अधिनियम के अन्तर्गत उक्त याचिका को समय पूर्व दाखिल करने की अनुमति चाही गयी है।

सुना व मुसरिम आख्या का अवलोकन किया।

मुंसरिम आख्यानुसार पक्षकारों की शादी को अभी एक वर्ष की अवधि पूर्ण नहीं हुई है। उभय पक्ष की ओर से समय पूर्व याचिका दायर करने की **अनुमति** हेतु दायर प्रार्थना–पत्र अन्तर्गत धारा– 14 हिन्दू विवाह अधिनियम **उचित आधार ना होने के कारण निरस्त किया जाता है** एवं वाद प्रीम्चयौर होने के कारण नियमानुसार वापस किया जाता है।"

"File produced.

Heard on the point of maintainability and perused the report of the Munsarim. As per the report of the Munsarim, a period of one year hasn't yet elapsed since the time of marriage of parties. Leave to file the said petition u/s 14 of the Hindu Marriage Act prior to expiration of the aforesaid period has been sought on behalf of both the parties.

Heard, and perused report of the Munsarim.

As per the report of the Munsarim, a period of one year hasn't yet elapsed since the time of marriage of parties. *The application filed u/s 14 of the Hindi Marriage Act on behalf of both the parties seeking* ***leave*** *to file the petition prior to expiration of the aforesaid period*

*is **rejected as having no appropriate ground,** and the suit is returned on account of it being premature." (English Translation by Court)*

(emphasis added)

5. Learned counsel for appellant contended that impugned order is wholly unreasoned, non speaking and has not considered the circumstances disclosed by both the parties in their application seeking leave of Court to entertain mutual divorce petition before expiry of one year under Section 14 of Act, 1955. Court below in a abrupt manner has simply rejected application observing that no sufficient ground is mentioned, without discussing or considering the same.

6. Point for determination to decide this appeal is "whether Court below was justified in rejecting application of appellant and respondent seeking leave of Court to entertain mutual divorce petition under Section 14 of Act, 1955 before expiry of one year of marriage?"

7. In order to consider this question, we may have a glance over Section 14 of Act, 1955 as amended by Act No. 68 of 1976 and it reads as under:

*"**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 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 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 before 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." (emphasis added)

8. Section 14(1) in mandatory terms provides that no application for mutual divorce shall be competent to be entertained by any Court unless at the date of presentation of petition, one year has elapsed since the date of marriage. However, by means of Proviso, an exception has been provided by Legislature empowering Trial Court to allow a petition to be presented before one year has elapsed on an application made to it in this behalf if it is shown that the case is one of exceptional hardship to applicant or of

exceptional depravity on the part of respondent. Sub-section (2) also provides that in disposing of an application for leave to present a petition for divorce before expiration of one year from the date of marriage Court shall have regard to interests of any children of the marriage and to the question whether there is an reasonable probability of reconciliation between the parties before expiration of the said one year. Thus rigour of sub-section (1) of Section 14 has been diluted by Proviso to Sub-section (1). Proviso therefore is in the nature of an exception and what has to be considered by Court below has been further clarified in Sub-section (2).

9. In the present case, since application was filed almost within three months from the date of marriage, and there was no issue (child) to the parties, hence Trial Court had to consider question of reasonable probability of reconciliation between the parties before expiration of one year. However, order quoted above clearly shows that nothing has been considered at all. Section 14 on the one hand intends to discourage married couple to seek divorce in a hurried manner and thus period of one yeas has been given so that difference or dispute, if any, between couple, on account of minor issues, the same may be sorted out and marriage may be saved by reconciliation between the parties with the passage of time. The period of one year has been thought appropriate for this purpose. However, Legislature has consciously given a right to either of couple, to move such application before one year has elapsed since the date of marriage, if it is established that the case is one of exceptional hardship to the petitioner or exceptional depravity on the part of opposite party. Even if leave is granted at initial stage, it can be recalled, if other party may show that it was obtained by misrepresentation or concealment of fact. Even if a decree is passed, Court may defer operation of such decree until after expiry of one year from the date of marriage or may even dismiss the petition without prejudice to move another application after expiration of period of one year upon the same or substantially same facts.

10. Looking to the language of Section 14 in its entirety, a Division Bench of Kolkatta High Court in **Rabindra Nath Mukherjee V. Iti Mukherjee 1991 (1) CLJ 209** had taken a view that Section 14 itself is directory and not mandatory. The above view was followed by a learned Single Judge of Madras High Court in **Indumathi Vs. Krishnamurthy (1998) 3 MLJ 435.**

11. A Division Bench of Bombay High Court also examined this issue in **Mr. X Vs. Mrs. Y 2001 MLJ 696.** It observed that a bare reading of Section 14 shows that a petition can be presented before expiry of one year from the date of marriage by obtaining leave of Court. Section 14 though was enacted with object of discouraging young spouses to take recourse to legal proceedings for divorce in a frivolous and irresponsible manner but Section (2) provides exception, i.e., where petitioner has faced exceptional hardship or exceptional depravity at the hands of respondents. It is for Trial Court, who hears the application, to decide as per the circumstances, whether prima facie case of exceptional hardship or depravity has been made out. Legislature, therefore, has permitted relaxation in the period mentioned in Section 14(1) and, in our view, that should have been given due consideration by Court below. s

12. Looking to the history of Section 14, we find that initially it provided a period of three years from the date of marriage. It was amended in 1976 and period of three years was reduced to one year. Proviso to Section 14 is intended to relax one year's limit though in very exceptional cases. It, however, enables Court to exercise discretion to grant leave to present such petition before expiry of one year's limit in case of exceptional hardship to petitioner or exceptional depravity of respondent. Court while considering application to grant leave for entertaining application within one year, must not act in a casual pedantic manner but should look into the objective, intention and spirit of Legislation. In deciding an application to leave, no elaborate enquiry is required. It does not require to be considered as a preliminary trial. In our view, Court in exercise of discretion to grant leave, should take into consideration the petition and objection, if any.

13. In the present case, application was filed by both the parties and there was no objection. It is not the case that any fact was concealed by parties or whatever they had stated in the application was incorrect. In these facts and circumstances, the manner in which application has been dealt with by Court below, appears to be unfair, illegal and unreasonable. In fact, from the order which we have quoted above, we could not discern any application of mind and valid reason on the part of Court below for declining to grant leave.

14. The point for determination, formulated above, therefore, is answered in favour of appellant. Impugned judgment and order dated 10.05.2019 is accordingly held unsustainable.

15. In the result, appeal is allowed. Judgment and order dated 10.05.2019 passed by Principal Judge, Family Court, Ghaziabad in Petition No 188 of 2019 is hereby set aside.

16. Matter is remanded to Family Court to reconsider application dated 09.05.2019 and pass appropriate order in the light of discussions made above and in accordance with law, expeditiously.

17. No costs.

(2020)09ILR A232
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.05.2020

BEFORE
THE HON'BLE AJAY BHANOT, J.

Second Appeal No. 904 of 2003

Cantonment Board, Agra ...Appellant
Versus
Smt. Pushpa Rani Gupta & Ors. ...Respondents

Counsel for the Appellant:
Sri C.B. Gupta

Counsel for the Respondents:
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Right of erecting or re-erecting the constructions in a cantonment area-solely conferred by statute-strictly regulated-civil court simply ousted-Court below acted in excess of its jurisdiction.

Held, The plaintiffs respondents did not contest the proceedings on merit, by showing cause to the competent authority. The suit was brought even while the adjudication proceeding before the competent authority, was pending. No final order of demolition, or any final decision on the unauthorized constructions, was rendered by the competent authority in the said proceedings. **(Para 83)**

The institution of the suit was clearly to preempt, and prevent adjudication by the

competent authority in law. The suit was prematurely filed. **(Para 84)**

By injuncting defendant no. 1 -appellant from demolishing the construction in dispute,the learned courts below have illegally imposed a prior restraint upon the authorities.**(para 85)** (E-9)

Cases referred: -

1. Dhulabhai Vs St. of M.P. & ors., reported at AIR 1969 SC 78

2. Munshi Ram & ors. Vs Municipal Committee, Chheharta reported at 1979 (3) SCR 463

3.Raja Ram Kumar Bhargava (dead) by L.Rs. Vs U.O.I. reported at AIR 1988 SC 752

4.Atul Kumar Jain Vs Cantonment Board, Meerut Cantt reported at 2007 (3) ALJ 282

5.Premier Automobiles Ltd. Vs Kamlekar Shantaram Wadke of Bombay & ors. reported at 1976 (1) SCC 496,

6. Municipal Committee, Montgomery Vs Master Sant Singh reported at AIR 1940 Lah 377

7.State of Kerala Vs N. Ramaswami Iyer & Sons reported at AIR 1966 SC 1738

8.Vajesingji Joravarsingji Nayak vs The Secretary of State For India, reported at AIR 1924 PC 21.

9. Raja Rajinder Chand Vs Sukhi,reported at AIR 1957 SC 286.

10. Haryana Vs Raghubir Dayal, (1995) 1 SCC 133

11. N.K. Chauhan Vs St. of Gujarat & ors., (1977) 1 SCC 308

12.P.T. Rajan Vs T.P.M. Sahir & ors., (2003) 8 SCC 498

13. Sharif Ud Din Vs Abdul Gani Lone, (1980) 1 SCC 403

14.Vikas Trivedi Vs St. of U.P. & ors., (2013) 2 UPLBEC 1193,

15.Karnal Improvement Trust, Karnal Vs Smt. Parkash Wanti (Dead) & anr., (1995) 5 SCC 159

16. St. of Haryana Vs P.C. Wadhwa, IPS, 26 Inspector General of Police & anr., (1987) 2 SCC 602

17.Regional Provident Fund Commissioner Vs K.T. Rolling Mills Pvt. Ltd. (1995) 1 SCC 181.

18. The Cantonment Board, Meerut Vs Chandra Prakash Jain & ors., 1979 ALJ 1000.

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

1. The instant second appeal arises out of the judgment and decree dated 28.03.2003 entered by the learned Additional District and Sessions Judge, Court No. 17, in Civil Appeal No. 159 of 1999 (Cantonment Board, Agra Cantt. Vs. Smt. Pushpa Rani Gupta and Others), which has affirmed the judgment and decree dated 29.04.1999, rendered by the learned IInd Additional Civil Judge (Senior Division), Agra, in Original Suit No. 1300 of 1984, Sri Chiman Lal (since deceased) Through L.Rs. Vs. Cantonment Board, Agra and Others), granting an injunction in favour of the plaintiff.

2. This appeal has been instituted by the Cantonment Board, Agra, arrayed as defendant no. 1, in the Original Suit No. 1300 of 1984, Sri Chiman Lal (since deceased) Through L.Rs. Vs. Cantonment Board, Agra and others).

3. On orders passed by this Court on 05.03.2019 notices were issued to the respondents, by ordinary process as well as by RPAD. The service report on notice sent by RPAD records, "neither undelivered cover nor AD received back after service as yet". The report of the process server regarding service of notice upon respondents 1 to 9, endorsed the remark "refused to accept".

4. In view of the service reports mentioned above, the service upon the respondents is sufficient. No one has appeared on behalf of respondent nos. 1 to 9, despite service of notices. The Court proceeded to hear the matter on merits.

5. Civil action was brought by the plaintiff, by instituting Original Suit No. 1300 of 1984, Sri Chiman Lal Gupta (since deceased) through L.Rs. Vs Cantonment Board, Agra and others before the learned IInd Additional Civil Judge (Senior Division), Agra. The plaintiff prayed for permanently injuncting the defendant no. 1/Cantonment Board from demolishing or damaging any part of the suit property. The description of the property as given at the foot of the plaint is, 90 Grand Parade Road, Agra Cantt, Agra. The L.Rs. of the plaintiff Chiman Lal (since deceased) were duly substituted on 14.07.1987 in the court below.

6. According to the plaint, the plaintiff-respondents sought requisite sanction from the competent authority of the Cantonment Board, Agra, for renovation and reconstruction of the disputed property. The sanction was not granted by the competent authority. The plaintiff, however, started reconstruction of the disputed property. The defendant no. 1-appellant took out proceedings under the Cantonments Act, 1924 (as amended from time to time) against the plaintiffs, for erecting constructions/re-erection of constructions without requisite permission from the competent authority under the Cantonments Act, 1924 (as amended from time to time). The defendant no. 1-appellant noticed the plaintiffs on 05.12.1984, to show cause as to why the newly erected constructions be not demolished, for want of sanction and having been made in violation of the provisions of the Cantonments Act, 1924 (as amended from time to time). The cause of action for the suit, according to the plaint, arose when the defendant no.1-appellant issued a notice dated 05.12.1984, for demolition of the aforesaid constructions raised by the plaintiffs on the disputed property.

7. The defendant no. 1-appellant entered a written statement in opposition to the plaint. The written statement asserted that the construction was unauthorised, and was liable to be demolished under the provisions of the Cantonments Act, 1924 (as amended from time to time). The defendant no. 1-appellant took a specific plea of lack of jurisdiction of the trial court.

8. According to the written statement, the suit was premature since no demolition order was passed against the appellants.

9. The Cantonment Board also took out other notices dated 03.12.1984 (Paper no. 66-ga) 04.12.1984, (Paper no. 68-ga), 05.12.1984 (Paper no. 11-ga, 11.12.1984 (Paper no. 75-ga) issued under Section 179 read with Section 184 of the Cantonments Act, 1924 (as amended from time to time). The notice dated 03.12.1984 directed the plaintiff to show cause, as to why he should not be prosecuted under Section 184 of the Cantonments Act, 1924 (as amended from time to time), and why action be not taken for demolition of the unauthorised constructions under Section 185 read with Section 256 of the Cantonments Act, 1924 (as amended from time to time).

10. Various communications sent by the Cantonment Board, (which are in the record), required the plaintiff to furnish information regarding the building plan in

triplicate, together with one copy of tracing cloth showing the plinth area of the constructions. These communications also reveal that the building plan submitted by the appellant was rejected, and forwarded to the Cantonment Board for formal rejection.

11. The learned trial court in its judgment and decree entered on 29.04.1999, found that the suit was not barred, and the jurisdiction of the civil court was not ousted. The suit was for an injunction, to restrain the defendants from demolishing the property in dispute. There was no requirement to give any notice under Section 273 of the Cantonments Act, 1924 (as amended from time to time). Consequently failure to give any notice under Section 273 of the Cantonments Act, 1924 (as amended from time to time) did not vitiate the suit proceedings. By the said judgment and decree the learned trial court found for the plaintiffs/respondents, and permanently injuncted the defendant no. 1-appellant from demolishing the property in dispute.

12. The defendant no. 1-appellant took the judgment and decree of the learned trial court in appeal, by instituting Civil Appeal No. 159 of 1999 (Cantonment Board, Agra Cantt. Vs Smt. Pushpa Rani Gupta and others). The appellate court in its judgment and decree dated 28.03.2003, agreed with the findings of the learned trial court, and held that the civil court was possessed of the jurisdiction to try the suit. The injunction granted in favour of the plaintiff-respondents was upheld.

13. Sri C.B. Gupta, learned counsel for the appellant contends that the suit was premature, as no cause of action had arisen. The notice under Section 179 read with Section 184 and Section 185 of the Cantonments Act, 1924 (as amended from time to time), only required the plaintiff to show cause on the issue of illegal constructions. The competent authority did not finally adjudicate the matter.

14. It is also submitted that the Cantonments Act, 1924 (as amended from time to time) is a complete code. The jurisdiction of the trial court stands impliedly barred in view of provisions of Section 9 of CPC, read with the relevant provisions of the Cantonments Act, 1924 (as amended from time to time).

15. Sri C.B. Gupta, learned counsel for the appellant agrees, that following substantial questions of law arise for determination in the instant second appeal;

(I) Whether the learned courts below lacked the jurisdiction to try the suit? If yes, the consequences thereof ?

(II). Whether in view of the fact that the plaintiff not replied to the show cause notices issued by the competent authority, under Section 179 read with Section 184 and Section 185 of the Cantonments Act, 1924 (as amended from time to time), and the proceedings pursuant to the show cause notices had not culminated in any final order, the suit was premature and was liable to be dismissed as such and the learned courts below erred in law by injuncting the defendant no.1-appellant from demolishing or interfering with the disputed construction ?

16. The facts found by the courts below, which relevant to this appeal are these. Notices dated 03.12.1984/04.12.1984, 05.12.1984 and 11.12.1984 under Section 179 read with Section 184 and read with Section 185 of

the Cantonments Act, 1924 (as amended from time to time) were issued to the plaintiffs/respondents. The said notices, required the plaintiffs-respondents to show cause against acts of unauthorised constructions and encroachment of cantonment lands.

17. Deemed approval of the building plan was found in favour of the plaintiffs-respondents. Pertinently however, the rejection application of the plaintiffs-respondents for sanction of the building plan, by the Cantonment Board, remained undisputed. The other notices dated 03.12.1984 (Paper no. 66-ga) 04.12.1984, (Paper no. 68-ga), 05.12.1984 (Paper no. 11-ga, 11.12.1984 (Paper no. 75-ga) under the like provisions of the Cantonments Act, 1924 (as amended from time to time), and bear the same content are in the record. The notice dated 04.12.1984 also referenced the unauthorised constructions made on the disputed premises, and recites the documents relied upon by the Cantonment Board.

18. In this narrow compass of established facts, the substantial questions of law shall be decided.

19. The narrative will now be taken forward with assistance of authorities, on implied ouster of jurisdiction of civil courts.

20. Upon an exhaustive survey of authorities holding the field, the Hon'ble Supreme Court in **Dhulabhai Vs State of Madhya Pradesh and another,** reported at **AIR 1969 SC 78,** laid down the following broad principles regarding the exclusion of jurisdiction of the civil court:

" The result of this inquiry into the diverse views expressed in this Court may be stated as follows :-

(1) Where the statute gives a finality to the orders of the special tribunals the Civil Courts' jurisdiction must be held to be excluded if there is adequate remedy to do what the Civil Courts would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.

(2) Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court.

Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all ques- tions about the said right and liability shall be determined by the tribunals so constituted, and whether remedies normally associated with actions in Civil Courts are prescribed by the said statute or not.

(3) Challenge to the provisions of the particular Act as ultra vires cannot be brought before Tribunals constituted under that Act. Even the High Court cannot go into that question on a revision or reference from the decision of the Tribunals.

(4) When a provision is already declared unconstitutional. or the constitutionality of any provision is to be challenged, a suit is open. A writ of certiorari may include a direction for refund if the claim is clearly within the time prescribed by the Limitation Act but it is not a compulsory remedy to replace a suit.

(5) Where the particular Act contains no machinery for refund' of tax

collected in excess of constitutional limits or illegally collected a suit lies.

(6) Questions of the correctness of the assessment apart from its constitutionality are for. the decision of the authorities and a civil suit does not lie if the orders of the authorities are declared to be final or there is an express prohibition in the particular Act. In either case the scheme of the particular Act must be examined because it is a relevant enquiry.

(7) An exclusion of the jurisdiction of the Civil Court is not readily to be inferred unless the conditions above set down apply."

21. Whether statutes providing for specific remedies to be sought from a particular forum in a prescribed manner caused the ouster of jurisdiction of the civil court, was posed for consideration before the Hon'ble Supreme Court in **Munshi Ram and others Vs Municipal Committee, Chheharta** reported at **1979 (3) SCR 463.** After considering the scheme of the Punjab Municipal Act, in particular Sections 84 and 86, which provide for hearing and determination of objections to the levy of provisional tax under the said Act, law was laid down by the Hon'ble Supreme Court in the following terms:

" From a conjoint reading of Sections 84 and 86, it is plain that the Municipal Act, gives a special and particular remedy for the person aggrieved by an assessment of tax under this Act, irrespective of whether the grievance relates to the rate or quantum of tax or the principle of assessment. The Act further provides a particular forum and a specific mode of having this remedy which is analogous to that provided in Section 66(2) of the Indian Income tax Act, 1922 Section 86 forbids in clear terms the person aggrieved by an assessment from seeking his remedy in any other forum or in any other manner than that provided in the Municipal Act.

It is well-recognised that there a Revenue Statute provides for a person aggrieved by an assessment thereunder, a particular remedy to be sought in a particular forum, in a particular way, it must be sought in a particular form in a particular way it must be sought in that form and in that manner, and all other forums and modes of seeking it are excluded. Construed in the light of this principle, it is clear that Sections 84 and 86 of the Municipal Act bar, by inevitable implication, the jurisdiction of the Civil Court where the grievance of the party relates to an assessment or the principle of assessment: under this Act."

22. The rights created by the statute and the existence of machinery for enforcement of such rights, are germane considerations in an enquiry into the issue of implied ouster of jurisdiction of civil courts, according to following holding of the Hon'ble Supreme Court in **Raja Ram Kumar Bhargava (dead) by L.Rs. Vs Union of India reported at AIR 1988 SC 752**:

" Generally speaking the broad guiding considerations with regard to institution of suits are that wherever a right, not pre-existing in common law, is created by a statute and that statute itself provides a machinery for the enforcement of the right, both the right and the remedy having been created uno-flatu and a finality is intended to the result of the statutory proceedings, then, even in the absence of an exclusionary provision the civil courts' jurisdiction is impliedly barred. If, however, a right pre-existing in common law is

recognised by the statute and a new statutory remedy for its enforcement provided, with out expressly excluding the Civil Courts' jurisdiction, then both the common law and the statutory remedy might become concurrent remedies leaving open an element. Of election to the persons of inherence."

23. This Court in **Atul Kumar Jain Vs Cantonment Board, Meerut Cantt** reported at **2007 (3) ALJ 282** held a suit against the Cantoment authorities to be incompetent, on account of existence of an internal remedy of appeal provided by the Cantonments Act, 1924 under Section 274, by holding thus:

" As regards the bar of suit under section 41(h) of the Specific Relief Act, it is quite obvious that since service of notice upon the appellant is held to be sufficient, he had every opportunity and occasion to file appeal as provided under section 274 of the Cantonment Act and if he has not availed of the said remedy before coming to the Civil Court for the relief of permanent injunction, the suit cannot be held to be competent for the grant of such relief. The findings recorded in this regard by the Courts below are also wholly justified."

24. In **Premier Automobiles Ltd. Vs Kamlekar Shantaram Wadke of Bombay and others** reported at **1976 (1) SCC 496**, the jurisdiction of the civil court to entertain labour disputes arose for consideration, in the context of the rights created and the remedies offered by the Industrial Disputes Act. The Hon'ble Supreme Court in **Premier Automobiles Ltd. (supra)** relied upon the well established and cogently enunciated principles of law laid down by the English courts:

" The decision of the House of Lords in the case of Barraclough v. Brown and other(1) is very much to the point. The special statute under consideration there gave a right to recover expenses in a court of Summary Jurisdiction from a person who was not otherwise liable at common law. It was held that there was no right to come to the High Court for a declaration that the applicant had a right to recover the expenses in a court of Summary Jurisdiction. He could take proceedings only in the latter court. Lord Herschell after referring to the right conferred under the statue "to recover such expenses from the owner of such vessel in a court of summary Jurisdiction" said at page 620.

"I do not think the appellant can claim to recover by virtue of the statute, and at the same time insist upon doing so by means other than those prescribed by the statute which alone confers the right."

Lord Watson said at page 622:

"The right and the remedy are given uno flatu, and the one cannot be dissociated from the other."

In other words if a statute confers a right and in the same breach provides for a remedy for enforcement of such right the remedy provided by the statute is an exclusive one. But as noticed by Lord Simonds in Cutler v. Wandsworth Stadium Ltd. (supra) at page 408 from the earlier English cases, the scope and purpose of a statute and in particular for whose benefit it is intended has got to be considered. If a statute:

"intended to compel mine owners to make due provision for the safety of the man working in their mines, and the persons for whose benefit all these rules are to be enforced are the persons exposed to danger,"

there arises at common law:

"a co-relative right in those persons who may be injured by its contravention."

Such a type of case was under consideration before Lord Goddard, C.J. in the case of Solomons v. R. Gertzenstain Ltd. and other vide page 831. Lord Denning M. R. relied upon the principles enunciated by Lord Tenterden in Doe v. Bridges approved in Pasmore's case (supra) at page 743 in the case of Southwark London Borough Council v. Williams and another(2). The celebrated and learned Master of the Rolls said at page 743.

"Likewise here in the case of temporary accommodation for those in need. It cannot have been intended by Parliament that every person who was in need of temporary accommodation should be able to sue the local authority for it: or to take the law into his own hands for the purpose."

25. Thereafter reliance was also placed on a Full Bench judgment of the Lahore High Court in **Municipal Committee, Montgomery Vs Master Sant Singh** reported at **AIR 1940 Lah 377,** wherein the consequences of a special piece of legislation creating particular rights, and providing special remedies was considered in the following passage:

"If therefore a demand made by a Committee is not authorised by the Act and the person affected thereby objects to the payment on the ground that in making the demand the Committee was exercising a jurisdiction not vested in it by law, it can, by no stretch of language, be said that he is objecting to his liability to be taxed under the Act. Any special piece of legislation may provide special remedies arising therefrom and may debar a subject from having recourse to any other remedies, but that bar will be confined to matters covered by the legislation and not to any extraneous matter."

26. Finally the Hon'ble Supreme Court in **Premier Automobiles Ltd. (supra)** held thus:

"31. On the facts of this case it is all the more clear that the civil court has no jurisdiction to try it. The manner of voluntary reference of industrial disputes to arbitration is provided in section 10A of the Act. The reference to arbitration has to be on the basis of a written agreement between the employer and the workman. As provided in sub-section (5) nothing in the Arbitration Act, 1940 shall apply to arbitrations under section 10A of the Act. There is no provision in the Act to compel a party to the agreement to nominate another arbitrator if its nominee has withdrawn from arbitration. The company had terminated the agreement dated the 14th March, 1968 under section 19(2) of the Act. On the authority of this Court in Sought South Indian Bank Ltd. V A.R. Chacko, Mr. Iyer endeavoured to argue that in spite of the termination of the agreement it still continued to be in force. Apart from the fact that the decision of this Court was with reference to the termination of the award under section 19, it is clear that the termination of the agreement in this case was accepted by the union. It sought to challenge it by the institution of a suit. It is clear that the suit was in relation to the enforcement of a right created under the Act. The remedy in Civil Court was barred. The only remedy available to the workmen concerned was the raising of an industrial dispute. It was actually raised, and, as a matter of fact, shortly after the institution of the suit the disputes were referred by the Government to the Industrial Tribunal in

I.T. No. 33 of 1972 on the 25th January, 1972.

32. For the reasons stated above both the appeals are allowed, the judgments and orders of the courts below are set aside. But in the circumstances we shall make no order as to costs in either of the appeals."

27. In State of **Kerala Vs N. Ramaswami Iyer and Sons reported at AIR 1966 SC 1738,** in the context of the Travancore-Cochin General Sales Tax Act the Hon'ble Supreme Court, applied principle of implied ouster of the civil court on the foot, that the legislature had set up a special tribunal, to determine the question relating to rights or liabilities which had been created by the statute.

28. The consistent propositions of law which can be distilled from the preceding authorities, are that the courts will not readily presume ouster of jurisdiction of the civil court. A statute may explicitly oust the jurisdiction of the civil courts. In cases where no express ouster of jurisdiction is made by an explicit command of legislature, the jurisdiction of the civil courts may be excluded by application of doctrine of implied ouster.

29. To decide the issue of implied ouster of jurisdiction of civil courts, the courts have to make an enquiry on the following lines. The enquiry will commence with the determination of the legislative intent, or the mischief sought to be cured by the legislature while enacting the statute. This line of enquiry shall be pursued by examining the scheme of the statute. The courts shall consider, whether the rights claimed are common law rights, or statutory rights. In case the rights are exclusively created and fully regulated by the statute, it will strengthen the presumption of implied ouster of jurisdiction of civil courts. However, the enquiry shall not cease just yet. The courts shall scrutinize the procedure and mechanism of adjudication of such statutory rights. The efficacy and finality of statutory remedies of appeals against the adjudicatory orders, under the statute will then be searchingly tested. The result of this enquiry will enable the court, to determine whether the jurisdiction of the civil court has been impliedly ousted or not. Affirmative answers to such enquiries will tilt the judicial opinion in favour of ouster of jurisdiction of civil courts.

30. The Cantonments Act, 1924 (as amended from time to time), does not expressly oust the jurisdiction of the civil courts, in regard to matters of erection of unauthorized constructions. It has to be enquired, whether the jurisdiction of civil courts is impliedly ousted in such issues.

31. The survey of the provisions of the Cantonments Act, 1924 (as amended from time to time), will be foregrounded with insights into the establishment of cantonments, and development of laws in regard to the lands and properties comprised therein.

32. The lands comprised in the cantonments throughout the country were originally acquired by the British Government in India (the predecessor of the Government of India) for military purposes, either by right of conquest or by treaty arrangements with a Ruling Chief / ruling of the day, or by payment of compensation. The cantonments were established for military facilities, and quartering military personnel. **(Ref: Cantonment Laws by J.P. Mitthal)**

33. The nature of the rights of the inhabitants of such areas acquired or ceded, to the British Government in India fell for determination before the Privy Council in **Vajesingji Joravarsingji Nayak vs The Secretary of State For India,** reported at **AIR 1924 PC 21**. After summarising the law on the point, the Privy Council held thus:

"But a summary of the matter is this: 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 nnoccupied by a recognized ruler. In all cases the result is the same. Any inhabitant of the territory can only make good in the municipal Courts established by the new sovereign such rights as the sovereign has, through his officers, recognised. Such rights as he had under the rule of predecessors avail him nothing. Nay more, even if in a treaty of cession it is. stipulated that certain inhabitants should enjoy certain rights, that does not give a title to these inhabitants to enforce these stipulations in the municipal Courts. The right to enforce remains only with the High Contracting Parties.

34. The Privy Council judgment in **Vajesingji Joravarsingji Nayak (supra)** was followed in **Raja Rajinder Chand vs Sukhi,** reported at **AIR 1957 SC 286.**

35. After the acquisition of lands and inception of the cantonments the lands comprising the cantonment areas were vested in the Government of India. Right of private ownership of such lands situated within the cantonments did not exist.

36. From time to time, the lands and permission to erect constructions thereon were granted by the Government of India /cantonment authorities to private individuals. The allotment of land to erect houses in the Cantonment, did not confer the allottee with proprietary rights on the land. The rights of such individuals were confined only to the ownership of the buildings erected on the cantonment lands. The land continued to be the property of the Government, and was resumable at the pleasure of the Government according to the prescribed conditions.

37. The tenure under which permission was given to occupy government land in the Cantonments, for constructions of bungalows, came to be known as "Old Grant". Such grants of land and permission for constructions, was always guided and strictly controlled by Government policy, and the military/cantonment authorities administering the cantonment area.

38. The summation of land rights in cantonments is this. The rights of ownership of land and proprietary rights in the soil in cantonment lands, always vested exclusively in the Government of India. The right of ownership of land was not conferred upon in any individual allottee. Right of construction of buildings in cantonments has always been granted, restricted and controlled by the Government authorities/cantonment authorities. The common law rule that whatever is affixed to the soil, belongs to the soil was not made applicable to lands in cantonment areas. Rights of individuals over cantonment lands are not rights at common law. The right of private individuals to erect constructions on land in cantonment areas, is not a right existing from time immemorial.

39. The right of residents of cantonment areas to construct buildings thereon, was thus always conferred and

controlled by cantonment authority / government authority since the inception of cantonments as are understood in this country. Various legal instruments of the day were employed by cantonment/Government authority, to create, regulate and restrict the right to erect constructions in the cantonment areas.

40. These factors militate against construing the right of erection of a fresh building, or repairing of an old building in a cantonment area, as preexisting common law rights. These are not common law rights. The authorities and the courts cannot be shackled, by common law doctrines, in regard to the aforesaid rights. It is evident now, and the subsequent discussion will fully confirm, that the right to erect fresh constructions or repair old constructions in cantonment lands is a statutory right.

41. The pre-existing restrictions on the right to raise constructions in the cantonment lands, and the power vested in the authorities to regulate such restrictions were consolidated and formalised in the Cantonments Act, 1924 (as amended from time to time).

42. The Cantonments Act, 1924, (as amended from time to time) was brought into being, to consolidate and amend the law relating to the administration of cantonments. The cantonments which are covered by the Cantonments Act, 1924 (as amended from time to time), are areas where military garrisons and establishments are located, along side habitations of civilian populations. Serving military personnel and their families are quartered in the cantonments. Sensitive military assets and installations, are also situated in the cantonment areas.

43. The cantonment areas by there very nature have a direct bearing on national security. The Cantonments Act,1924 (as amended from time to time) read with Rules created thereunder, form a complete code. The Cantonments Act, 1924 (as amended from time to time) provides a comprehensive blueprint of administration of cantonments areas. The legislature has very neatly balanced the imperatives of national security, with the demands of individual rights. Under the Cantonments Act,1924 (as amended from time to time) the rights of the civilian populations, are not overborne or overridden only in the name of the national security. Various statutory rights have been conferred upon the civilian population, under the Cantonments Act, 1924 (as amended from time to time).

44. Provisions of the Cantonments Act, 1924 (as amended from time to time), relevant to the controversy are discussed hereinunder:

45. Chapter II and III of the Cantonments Act, 1924 (as amended from time to time) provide for the definition and delimitation of the cantonments. Section 3 of the Cantonments Act, 1924 (as amended from time to time) contemplates that the Central Government may by a notification, define the limits of the cantonment. The cantonment is a place as declared in the notification, in which any part of the defence forces are quartered, or places are in the vicinity of any such place, or are required for the service of such forces to be a cantonment for the purposes of the Cantonments Act, 1924 (as amended from time to time).

46. The administration of the cantonment is managed by the Cantonment Board created under Chapter III. Chapter III also provides for constitution of the

Cantonment Boards. The provisions of Chapter III contemplate elections for members of the Cantonment Board. The municipal governance of Cantonments is carried out by the Cantonment Boards constituted under Section 13 of the Cantonments Act, 1924 (as amended from time to time). The members of the Cantonment Boards, are elected by the electoral college composed of the persons who are enrolled as Electors, under the Cantonments Act, 1924 (as amended from time to time). In this regard reference may be made to Sections 26 to 28 of the Cantonments Act, 1924 (as amended from time to time). Procedures for meetings of the Cantonment Board are also provided under various provisions of Chapter III.

47. The Cantonment Board is vested with powers of taxation under Chapter V. The powers for suppression of nuisances are contemplated in provisions contained in Chapter IX. Sanitation and the measures for prevention and treatment of diseases are visualized in provisions of Chapter X of the Cantonments Act, 1924 (as amended from time to time).

48. Chapter XII and provisions contained therein contemplate markets, slaughter-houses, trades and occupations and regulation thereof. Provisions regarding water-supply, drainage system and lighting are contained in Chapter XIII of the Cantonments Act, 1924 (as amended from time to time). The provisions as discussed above reveals that the Cantonment Board virtually functions like an autonomous local body.

49. The control over building constructions, streets, boundaries, trees etc. in the cantonment premises, are vested in the competent authorities of the cantonment, by virtue of provisions of Chapter XI of the Cantonments Act, 1924 (as amended from time to time).

50. Chapter XI commences with the heading "Control Over Buildings, Streets, Boundaries, Trees, etc."

51. Section 178-A provides for sanction for building:

"Sanction for building.- No person shall erect or re-erect a building on any land in a cantonment-

(a) in an area, other than the civil area, except with the previous sanction of the Board,

(b) in a civil area, except with the previous sanction of the Executive Officer,

nor otherwise than in accordance with the provisions of this Chapter and of the rules and bye-laws made under this Act relating to the erection and re-erection of buildings."

52. Section 179 contemplates a written notice of intent to erect or re-erect any building in the Cantonment:

*"**179.** Notice of new buildings.- Whoever intends to erect or re-erect any building in a cantonment shall [apply for sanction by giving notice] in writing of his intention to the [Board].*

(2) For the purposes of this Act, a person shall be deemed to erect or re-erect a building who-

(a) makes any material alteration or enlargement of any building, or

(b) converts into a place for human habitation any building not originally constructed for that purpose, or

(c) converts into more than one place for human habitation a building originally constructed as one such place, or

(d) converts two or more places of human habitation into a greater number of such places, or

(e) converts into a stable, cattle-shed or cowhides any building originally constructed for human habitation, or

(f) makes any alteration which there is reason to believe is likely to affect prejudicial the stability or safety of any building or the condition of any building in respect of drainage, sanitation or hygiene, or

(g) makes any alteration to any building which increases or diminishes the height of, or area covered by, or the cubic capacity of, the building, or which reduces the cubic capacity of any room in the building below the minimum prescribed by any bye-law made under this Act."

53. Section 180 provides for the conditions of a valid notice:

"180. Conditions of valid notice.-*(1) A person giving the notice required by section 179 shall specify the purpose for which it is intended to use the building to which such notice relates.*

(2) No notice shall be valid until the information required under sub-section (1) and any further information and plans which may be required under bye-laws made under this Act have been furnished to the satisfaction of the [Board].along with the notice"

54. Certain powers of the Board in regard to constructions are exercisable by the Executive Officer under Section 180-A:

"180-A: Powers of Board under certain sections exercisable by Executive Officer- *The powers, duties and functions of the Board under section 181, sub-section (1) of section 182, section 183, section 183-A and section 185 [excluding the provisos to sub-section (1) and the proviso to sub-section (2) of the said section 185] shall be exercised or discharged in a civil area by the Executive Officer."*

55. The power to grant or refuse the sanction of erection or re-erection, is vested in the Board by virtue of Section 181 and 181-A:

"181. Power of Board to sanction of refuse.- *(1) The [Board] may either refuse to sanction the erection or re-erection, as the case may be, of the building, or may sanction it either absolutely or subject to such directions as it thinks fit to make in writing in respect of all or any of the following matters, namely:-*

(a) the free passage or way to be left in front of the building;

(b) the space to be left about the building to secure free circulation of air and facilitate scavenging and the prevention of fire;

(c) the ventilation of the building, the minimum cubic area of the rooms and the number and height of the storyes of which the building may consist;

(d) the provision and position of drains, latrines, urinals, cesspools or other receptacles for filth;

(e) the level and width of the foundation, the level of the lowest floor and the stability of the structure;

(f) the line of frontage with neighbouring buildings if the building abuts on a street;

(g) the means to be provided for agrees from the building in case of fire;

(h) the materials and method of construction to be used for external and party walls for rooms, floors, fire-places and chimneys;

(i) the height and slope of the roof above the uppermost floor upon which human beings are to live or cooking operations are to be carried on; and

(j) any other matter affecting the ventilation and sanitation of the buildings;

and the person erecting or re-erecting the building shall obey all such written directions in every particular.

[(2) The Board may refuse to sanction the erection or re-erection of any building, either on grounds sufficient in the opinion of the Board affecting the particular building, or in pursuance of a general scheme sanctioned by the Officer Commanding-in-Chief, the Command, restricting the erection or re-erection of buildings within specified limits for the prevention of over-crowding or in the interests of persons residing within such limits or for any other public purpose.

(3) The Board, before sanctioning the erection or re-erection of a building on land which is under the management of the Military Estates Officer, shall refer the application to the Military Estates Officer for ascertaining whether there is any objection on the part of Government to such erection or re-erection; and the Military Estates Officer shall return the application together with his report thereon to the Board within thirty days after it has been received by him.

(4) The Board may refuse to sanction the erection or re-erection of any building-

(a) when the land on which it is proposed to erect or re-erect the building is held on a lease from the Government, if the erection or re-erection constitutes a breach of the terms of the lease, or

(b) when the land on which it is proposed to erect on re-erect the building is not held on a lease from the Government, if the right to build on such land is in dispute between the person applying for sanction and the Government.

(5) If the Board decides to refuse to sanction the erection or re-erection of the building, it shall communicate in writing the reason for such refusal to the person by whom notice was given.

(6) Where the Board neglects or omits, for one month after the receipt of a valid notice, to make and to deliver to the person who has given the notice any order of any nature specified in this section, and such person thereafter by a written communication sent by registered post to the Board calls the attention of the Board to the neglect or omission, then, if such neglect or omission continues for a further period of fifteen days from the date of such communication the Board shall be deemed to have given sanction to the erection or re-erection, as the case may be, unconditionally:

Provided that, in any case to which the provisions of sub-section (3) apply, the period of one month herein specified shall be reckoned from the date on which the Board has received the report referred to in that sub-section.]"

"[181A. Power to sanction general scheme for prevention, of overcrowding, etc

The Officer Commanding-in-Chief, the Command may sanction a general scheme of erection or re-erection of buildings within such limits as may be specified in the sanction for the prevention of over-crowding or for purpose of sanitation, or in the interest of persons residing within those limits or for any other purpose, and may, in pursuance of such scheme, impose restrictions on the erection or re-erection of buildings within those limits:

Provided that no such scheme shall be sanctioned by the Officer

Commanding-in-chief, the Command, unless an opportunity has given by a public notice to be published locally by the Executive Officer requiring persons affected or likely to be affected by the proposed scheme, to file their objections or suggestions in the manner specified in the notice, within a period of fifteen days of the publication of such notice, and after considering such objections and suggestions, if any, received by the Executive Officer within the said period.]"

56. Section 183 provides for lapse of sanction:

*"**Section 183 - Lapse of sanction***

Every sanction for the erection or re-erection of a building given or deemed to have been given by the1[Board] as hereinbefore provided shall be available for one year from the date on which it is given, and, if the building so sanctioned is not begun by the person who has obtained the sanction or some one lawfully claiming under him within that period, it shall not thereafter be begun2[unless the Board on application made therefore has allowed an extension of that period]."

57. Section 183-B contemplates the submission of a completion notice, to be given in writing to the Board or Executive Officer:

"183B. Completing notice

Every person to whom sanction for the erection or re-erection of any building in any area in a cantonment has been given or deemed to have been given under section 181 by the Board or the Executive Officer, as the case may be, shall, within thirty days after completion of the erection or re-erection of the building give a notice of completion in writing to the Board or the Executive Officer, as the case may be, and the Board or the Executive Officer shall on receipt of such notice cause the building to be inspected in order to ensure that the building has been completed in accordance with the sanction given by the Board of the Executive Officer, as the case may be.]"

58. Section 184 provides for penal consequences of illegal erection or re-erection:

"Section 184 - Illegal erection and re-erection

Whoever begins, continues or completes the erection or re-erection of a building--

(a) without having given a valid notice as required by sections 179 and 180, or before the building has been sanctioned or is deemed to have been sanctioned, or

(b) without complying with any direction made under sub-section (1) of section 181, or

(c) when sanction has been refused, or has ceased to be available1[or has been suspended by the Officer Commanding-in-Chief, the Command, under clause (b) of sub-section (1) of section 52],

shall be punishable with fine which may extend to2[five thousand rupees]."

59. Section 185 provides for the power to stop the erection or re-erection or to demolish unauthorized constructions, and also makes illegal erection or re-erection an offence:

"Section 185 - Power to stop erection or re-erection or to demolish

1[(1)]2[Board] may, at any time, by notice in writing, direct the owner, lessee

or occupier of any land in the cantonment to stop the erection or re-erection of a building in any case in which the2[Board] considers that such erection or re-erection is an offence under section 184, and may in any such case3[or in any other case in which the Board considers that the erection or re-erection of a building is an offence under section 184, within4[twelve months] of the completion of such erection or re-erection] in like manner direct the alteration or demolition, as it thinks necessary, of the building, or any part thereof, so erected or re-erected:

Provided that the2[Board] may, instead of requiring the alteration or demolition of any such building or part thereof, accept by way of composition such sum as it thinks reasonable:

5[Provided further that the Board shall not, without the previous concurrence of the Officer Commanding-in-Chief, the Command, accept any sum by way of composition under the foregoing proviso in respect of any building on land which is not under the management of the Board.

(2) A Board shall by notice in writing direct the owner, lessee or occupier of any land in the cantonment to stop the erection or re-erection of a building in any case in which the order under section 181 sanctioning the erection or re-erection has been suspended by the Officer Commanding-in-chief, the Command, under clause (b) of sub-section (1) of section 52, and shall in any such case in like manner direct the demolition or alteration as the case may be of the building or any part thereof so erected or re-erected where the Officer Commanding-in-chief, the Command, thereafter directs that the order of the Board sanctioning the erection or re-erection of the building shall not be carried into effect or shall be carried into effect with modifications specified by him :

Provided that the Board shall pay to the owner of the building compensation for any loss actually incurred by him in consequence of the demolition or alteration of any building which has been erected or re-erected prior to the date on which the order of the Officer Commanding-in-Chief, the Command, has been communicated to him.]"

60. Section 186 of the Cantonments Act, 1924 contains the power to make rules in regard to raising constructions and matters allied thereto:

186. Power to make bye laws- *"1[Board] may make bye-laws prescribing-*

(a) the manner in which notice of the intention to erect or re-erect a building in the cantonment shall be given to the2[Board or the Executive Officer, as the case may be,] and the information and plans to be furnished with the notice;

3[(aa) the manner in which and the form in which a notice of completion of erection or re-erection of any building in the cantonment shall be given to the Board or the Executive Officer, as the case may be, and the information and plans to be furnished with the notice;]

(b) the type or description of buildings which may or may not, and the purpose for which a building may or may not, be erected or re-erected in the cantonment or any part thereof];

(c) the minimum cubic capacity of any room or rooms in a building which is to be erected or re-erected;4[* *]*

(d) the fees payable on provision by the1[Board] of plans or specifications of the type of buildings which may be erected in the cantonment or any part thereof;

5[(e) the circumstances in which a mosque, temple or church or other sacred building may be erected or re-erected; and

(f) with reference to the erection or re-erection of buildings, or of any class of building, all or any of the following matters, namely :--

(i) the line of frontage where the building abuts on a street;

(ii) the space to be left about the building to secure free circulation of air and facilities for scavenging and for the

prevention of fire;

(iii) the materials and method of construction to be used for external and party-walls, roofs and floors;

(iv) the position, the material and the method of construction of6[staircases, fire places], chimneys, drains, latrines, privies, urinals and cesspools;

(v) height and slope of the roof above the uppermost floor upon which human beings are to live or cooking

operations are to be carried on;

(vi) the level and width of the foundation, the level of the lowest floor7[, the stability of the structure and the protection of building from dampness arising from sub-soil];

(vii) the number and height of the storeys of which the building may consist;

(viii) the means to be provided for egress from the building in case of fire;

(ix) the safeguarding of wells from pollution; or

(x) the materials and method of construction to be used for god owns intended for the storage of food grains in excess of8[eighteen quintals] in order to render them rat proof.]"

61. The powers of the Board in case of non compliance with the notices, are stated in Section 256 of the Cantonments Act, 1924 (as amended from time to time):

256. In the event of non-compliance with the terms of any notice, order or requisition issued to any person under this Act, or any rule or bye-law made thereunder, requiring such person to execute any work or to any act, it shall be lawful for the [Board] [or the civil area committee or the Executive Officer at whose instance the notice, order or requisition has been issued], whether or not the person in default is liable to punishment for such default or has been prosecuted or sentenced to any punishment therefore, after giving notice in writing to such person, to take such action or such steps as may be necessary for the completion of the act or work required to be done or executed by him, and all the expenses incurred on such account shall be [recoverable by the Executive Officer on demand, and if not paid within ten days after such demand, shall be recoverable in the same manner as moneys recoverable by the Board under section 259:

Provided that where action or step relates to the demolition of any erection or re-erection under section 185 or the removal of any projection or encroachment under section 187, the Board or the civil area committee or the Executive Officer may request any police officer to render such assistance as considered necessary for the lawful exercise of any power in this regard and it shall be the duty of such police officer to render forthwith such assistance on such requisition.

62. Chapter XV provides for a comprehensive system of appeals, penalties and procedures. Appeals from executive orders are provided under Section 274 of the Cantonments Act, 1924 (as amended from time to time). The provisions has a bearing on, and the dispute is reproduced here under:-

*"**274. Appeals from executive orders.** -*

(1) Any person aggrieved by any order described in the [third column] of Schedule V may appeal to the authority specified in that behalf in the [fourth column] thereof.

(2) No such appeal shall be admitted if it is made after the expiry of the period specified in that behalf in the [fifth column] of the said Schedule.

(3) The period specified as aforesaid shall be computed in accordance with the provisions of the [Limitation Act, 1963 (36 of 1963)], with respect to the computation of periods of limitation thereunder"

63. The relevant columns of Schedule V states thus:-

S.No.	Section	Executive Order	Appellate Authority	Time for appeal
9	181	(a) Refusal to sanction the erection or re-erection of a building in a civil area. (b) Refusal to sanction the erection or re-erection of a building in a cantonment (other than a civil area).	Board. Officer Commanding -in-Chief, the Command, or other authority authorised in this behalf by the Central Government.	Thirty days from service of communication.
10	185	(a) Notice to stop erection or re-erection of, or to alter or demolish, a building in a civil area. (b) Notice to stop erection or re-erection of, or to alter or demolish, a building in a cantonment (other than a civil area)	Board. Officer Commanding -in-Chief, the Command, or other authority authorised in this behalf by the Central Government.	Thirty days from service of communication. Thirty days from service of communication.

64. The procedure for appeal is provided under Section 275 of Cantonments Act, 1924 (as amended from time to time).

***275. Petition of appeal.**-(1) Every appeal under section 274 shall be made by petition in writing accompanied by a copy of the order appealed against.*

(2) Any such petition may be presented to the authority which made the order against which the appeal is made, and that authority shall be bound to forward it to the appellate authority, and may attach thereto any report which it may desire to make by way of explanation.

65. Section 276 vests the appellate authority, with the power of suspending of any action, while an appeal is pending before it. Section 276 states thus:-

*"**[276. Suspension of action pending appeal.** -On the admission of an appeal from an order, other than an order contained in a notice issued under section 140, section 176, section 181, section 206 or section 23 8, where the appellate authority so directs, all proceedings to enforce the order and all prosecutions for any contravention thereof shall be held in abeyance pending the decision of the appeal, and, if the order is set aside on appeal, disobedience thereto shall not be deemed to be an offence.]"*

66. Section 279 discloses the legislative intent to ensure that the provisions of appeal provides for a fair opportunity of hearing. Section 279 is reproduced below:-

***"279. Right of appellant to be heard.** -No appeal shall be decided under this Chapter unless the appellant has been heard, or has had a reasonable opportunity of being heard in person or through a legal practitioner."*

67. Section 278 accords finality to appellate orders. Section 278 reads as under:-

***"278. Finality of appellate orders.** -Save as otherwise provided in section 277, every order of an appellate authority shall be final."*

68. The scheme of the Cantonments Act, 1924 relating to erection and re-erection of constructions, reveals that the provisions in regard to grant of sanction for construction contain the word "shall". Illegal erection and re-erection are offences under the Cantonments Act, 1924 (as amended from time to time). Specific provisions provide for the penal consequences of illegal constructions. The presence of word "shall", the provisions creating the offences for illegal constructions, and imposition of penalty for violating the provisions for sanction of constructions, disclose the imperative intent of the legislature. The provisions are clearly mandatory in character, according to settled canons of statutory interpretation. Reference to some good authorities can be profitably made to fortify this conclusion. **(Haryana Vs. Raghubir Dayal, (1995) 1 SCC 133, N.K. Chauhan Vs. State of Gujarat and others, (1977) 1 SCC 308, P.T. Rajan Vs. T.P.M. Sahir and others, (2003) 8 SCC 498, Sharif-Ud-Din Vs. Abdul Gani Lone, (1980) 1 SCC 403, Vikas Trivedi Vs. State of U.P. and others, (2013) 2 UPLBEC 1193, Karnal Improvement Trust, Karnal Vs. Smt. Parkash Wanti (Dead) and another, (1995) 5 SCC 159, State of Haryana Vs. P.C. Wadhwa, IPS, Inspector General of Police and another, (1987) 2 SCC 602, Regional Provident Fund Commissioner Vs. K.T. Rolling Mills Pvt. Ltd. (1995) 1 SCC 181.)**

69. The right of erecting fresh constructions or re-erecting or repairing old constructions in cantonments, is a right exclusively conferred, strictly controlled, and meticulously regulated by the Cantonments Act, 1924 (as amended from time to time). The right of constructions of fresh building or repairing of old buildings in cantonment areas is thus a statutory right.

70. The reasons for creation of statutory rights of erecting or re-erecting buildings, and also the strict regulation of such rights under the Cantonments Act, 1924 (as amended from time to time) are not far to seek. Unauthorised and illegal constructions are a bane of cantonment administrations. Unauthorized constructions can pose direct and imminent danger to national security. Treating these rights of erecting constructions as exclusively statutory rights, is in accord with the legislative intent and scheme of the Cantonments Act, 1924.

71. However, the second facet of the legislative intent now requires attention. The civilian population under the Cantonments Act, 1924 (as amended from time to time), is not denuded of its rights of raising constructions. But the rights are clearly defined and well regulated. It is this scheme of the Act, both vesting and regulating the right to make constructions, which has to be implemented to achieve the intent of the legislature.

72. The Cantonments Act, 1924 (as amended from time to time) creates a statutory authority, to decide matters relating to grant of constructions or raising unauthorised constructions. The adjudications have to be preceded by a show cause notice. An opportunity to the noticee to tender his defence, has to be granted before a final order is passed. The legislature has ensured full procedural safeguards, which are in conformity with principles of natural justice.

73. The appeal against such orders, will lie to an authority superior to the adjudicating authority. Orders passed in

appeal are final in nature. Adjudication in appeals is according to a prescribed procedure, which is consistent with principles of natural justice, good conscience, equity and fair play.

74. Providing for fair adjudicatory system, and creation of an independent appellate system in statutes has been a legislative innovation. The purpose of a complete code for grievance redressal, and adjudication of statutory rights, is to dispense impartial and fair justice in an expeditious time frame. Such adjudicatory authorities and appellate tribunals, are not constrained by cumbersome procedures, leading to long drawn trials. The legislature was clearly cognizant of interminable delays, caused by such cumbersome procedures. The legislation seeks to curb the mischief.

75. The alternative grievance redressal and adjudication system created by the legislature, can be given effect to by reposing faith in it. Many unscrupulous litigants resort to civil courts, to defeat or preempt an early adjudication by the statutory authorities. In such cases, law can be upheld by relegating parties to the statutory remedies. The lawful statutory adjudication has to run its course, and cannot be prematurely interdicted.

76. To sum up, the right of erecting or re-erecting the constructions in a cantonment area, is conferred solely by statute and is strictly regulated by it. A fair adjudicatory mechanism has been provided to deal with disputes, arising out of such matters. An independent appellate system has been created, in which faith can be reposed for dispensing fair and expeditious justice. Finality has been accorded to orders of the appellate authority. The legislature went the whole length to expedite the decision making, without diluting the demands of fair justice. The Cantonments Act, 1924 (as amended from time to time), and the provisions in regard to erecting or re-erecting constructions in the cantonment areas constitute a complete code.

77. In light of this discussion, this Court concludes that the jurisdiction of the civil court stood impliedly ousted by the provisions of the Cantonments Act, 1924 (as amended from time to time). The courts below acted in excess of jurisdiction, by entering their respective judgments and decrees.

78. At this stage, reference may also be made to Section 273 of the Cantonments Act, 1924, the provision is extracted hereinunder:

"Section 273 - Notice to be given of suits

(1) No suit shall be instituted against any1[Board] or against any member of a Board, or against any officer or servant of a1[Board], in respect of any act done, or purporting to have been done, in pursuance of this Act or of any rule or bye-law made thereunder, until the expiration of two months after notice in writing has been left at the office of the1[Board], and, in the case of such member, officer or servant, unless notice in writing has also been delivered to him or left at his office or place of abode, and unless such notice states explicitly the case of action, the nature of the relief sought, the amount of compensation claimed, and the name and place of abode of the intending plaintiff, and unless the plaint contains a statement that such notice has been so delivered or left.

(2) If the1[Board], member, officer or servant has, before the suit is instituted, tendered sufficient amounts to

the plaintiff, the plaintiff shall not recover any sum in excess of the amount so tendered, and shall also pay all costs incurred by the defendant after such tender.

(3) No suit, such as is described in sub-section (1), shall, unless it is an action for the recovery of immovable property or for a declaration of title thereto, be instituted after the expiry of six months from the date on which the cause of action arises.

(4) Nothing in sub-section (1) shall be deemed to apply to a suit in which the only relief claimed is an injunction of which the object would be defeated by the giving of the notice or the postponement of the institution of the suit or proceeding."

79. Section 274 carves out an exception to the matters covered by Section 273. An alternative justice delivery system has been created by the statute, only in regard to matters falling within the ambit of Section 274. Matters falling within the ambit of Section 274, are clearly excepted from the ambit of Section 273. The case at hand falls within the ambit of Schedule 5 under Section 274, being a matter relating to erection/reerection of buildings. It is beyond the scope of Section 273 of the Cantonments Act, 1924. Reliance by the courts below upon Section 273 of the Cantonments Act, 1924, was misconceived and vitiates both the impugned judgments.

80. Learned counsel for the appellant rightly distinguished the judgment rendered by this Court in **The Cantonment Board, Meerut Vs Chandra Prakash Jain and others, 1979 ALJ 1000.** In the case of **Chandra Prakash Jain (supra),** a challenged was laid to the notice under Section 185 before the trial court. The notice under Section 185 was directly in issue. The courts below found that the notice was void. The suit was held to be maintainable on the ground of challenge to the aforesaid notice. In the instant case no challenge to the notice has been laid. Further the judgment of this Court in **Chandra Prakash Jain (supra)**, with due respect does not consider the complete scheme of the Act and authorities in point, while deciding the issue of jurisdiction.

81. The first substantial question of law is answered as follows:

"Courts below did not have the jurisdiction to try Original Suit No. 1300 of 1984, Sri Chiman Lal (since deceased) Through L.Rs. Vs. Cantonment Board, Agra Cantt. and others) and Civil Appeal No. 159 of 1999 (Cantonment Board, Agra Cantt. Vs. Smt. Pushpa Rani Gupta and others) respectively. The judgments and decrees dated 29.04.1999 and 28.03.2003 rendered by the respective courts below are nullities being beyond jurisdiction."

82. The show cause notices issued under the provisions of the Cantonments Act, 1924 (as amended from time to time) contain full material particulars of the violations, allegedly made by the plaintiffs-respondents, while erecting unauthorized constructions. The said notices are issued in exercise of powers under Section 179 read with Section 184 and Section 185, of the Cantonments Act, 1924 (as amended from time to time). No defect in the proceedings so taken out under the Cantonments Act, 1924 (as amended from time to time), could be pointed out by the plaintiffs-respondents, which went to the root of the aforesaid proceedings. There is no jurisdictional error in the action taken by the cantonment authorities, which gave rise to the cause of action of the suit. No infirmity in the notices issued under the

provisions of the Cantonments Act, 1924 (as amended from time to time) and the consequent proceedings taken out under the Cantonments Act, 1924 (as amended from time to time) could be established. The notices issued under the provisions of the Cantonments Act, 1924 (as amended from time to time) are upheld as valid, lawful and within the jurisdiction of the noticing authority.

83. The plaintiffs-respondents did not contest the proceedings on merit, by showing cause to the competent authority. The suit was brought even while the adjudication proceeding before the competent authority, was pending. No final order of demolition, or any final decision on the unauthorized constructions, was rendered by the competent authority in the said proceedings.

84. The institution of the suit was clearly to preempt, and prevent adjudication by the competent authority in law. The suit was prematurely filed.

85. By injuncting defendant no. 1-appellant from demolishing the constructions in dispute, the learned courts below have illegally imposed a prior restraint upon the authorities. The impugned judgments and decrees prematurely, and without legal basis interdicted lawful statutory proceedings, and prevented adjudication of the issue of illegal constructions by the competent statutory authority. The impugned judgments and decrees of the learned courts below, unlawfully issued an injunction against lawful proceedings, taken out by the competent authority having jurisdiction, under the Cantonments Act, 1924 (as amended from to time). The suit was clearly premature, and was liable to be dismissed on this ground alone.

86. Before parting, a few words on a residual issue would complete the picture and help in concluding the controversy. Deemed sanction of the construction plan was defence of the plaintiff.

87. The findings of the courts below on the issue of deemed sanction are vitiated and unsustainable. The fact of the rejection of the construction plan of the plaintiff by the cantonment authority, was construed by learned courts below in a perverse and unlawful manner. I will not say any further. This matter is liable to be determined independently by the competent statutory authority. Any finding at this stage, would unfairly influence the statutory authority or worse prematurely interdict the statutory proceedings.

88. The second substantial question of law is answered as follows:

"The suit instituted by the plaintiffs-respondents was premature and was liable to be dismissed as such, and the learned courts below erred in law by respectively rendering the impugned judgments and decrees injuncting the defendant no. 1-appellant from demolishing the disputed construction."

89. The judgment and decree dated 29.04.1999 passed by IInd Additional Civil Judge (Senior Division), Agra in Original Suit No. 1300 of 1984 (Sri Chiman Lal (since deceased) Through L.Rs. Vs. Cantonment Board, Agra Cantt. and others) and the judgment and decree dated 28.03.2003 passed by the Additional District and Sessions Judge, Court No. 17, Agra in Civil Appeal No. 159 of 1999 (Cantonment Board, Agra Cantt. Vs. Smt. Pushpa Rani Gupta and others), are quashed.

90. The notices and the proceedings taken out by the cantonment authorities, regarding illegal constructions have been upheld as lawful. The proceedings have to run their course. Long years have passed since the proceedings were stalled, by interdicts of the courts. In view of the holding of this Court, following directions are issued to the appellant/competent authority:

I. The appellant/competent authority shall proceed with the adjudication of the controversy, in pursuance of the said notices issued to the plaintiffs-respondents under various provisions of the Cantonments Act, 1924 (as amended from time to time).

II. Fresh copies of the said notices shall be issued to the plaintiffs-respondents, within a period of four months from the date of receipt of a certified copy of this order.

III. The plaintiffs-respondents shall be granted six weeks time to tender their reply to the said notices.

IV. The competent appellant/cantonment authority shall thereafter decide the controversy on its merits by a reasoned and speaking order, to be passed within a period of three months, from the date of receipt of the reply of the plaintiffs-defendants.

V. In case the plaintiffs-respondents do not respond to the aforesaid notices or fail to tender their reply to the same, the appellant/competent authority, shall be at full liberty to proceed against them in accordance with law.

91. The appeal is allowed.

(2020)09ILR A254

APPELLATE JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 07.08.2020

BEFORE

THE HON'BLE RAVI NATH TILHARI, J.

Second Appeal No. 1111 of 2009

Braj Bhooshan Mittal ...Appellant

Versus

Jeet Singh ...Respondent

Counsel for the Appellant:

Sri Vijaya Prakash

Counsel for the Respondent:

Civil Law - Limitation Act, 1963 -Article 54-Suit For Specific Performance-date for performance not fixed-refusal to perform was in 1994-suit filed in 2001-barred u/A 54 of the Limitation Act.

Second Appeal dismissed. (E-9)

Cases referred: -

1. Gunwantbhai Mulchand Shah & ors. Vs Anton Elis Farel & ors, AIR 2006 SC 40

2.Kanailal & ors. Vs Ram Chandra & ors. (2018) 13 SCC 715

3. R.K. Parvatharaj Gupta Vs K.C. Jayadeva Reddy, (2006) 2 SCC 428

4. Ahmmadsahab Abdul Mulla (2)(D) By(LRs) Vs Bibijan & ors., (2009) 5 SCC 462

5. Madina Begum & anr. Vs Shiv Murti Prasad Pandey & ors., (2016) 15 SCC 327

6.Janardhanam Prasad Vs Ramdas, reported in (2007) 15 SCC 174

7.Church of Christ Charitable Trust & Educational Charitable Society, Vs M/s Ponniamman Educational Trust, (2012) 8 SCC 706

8. Kuldeep Singh Pathania Vs Bikram Singh Jaryal, (2017) 5 SCC 345

9. Madanuri Sri Ram Chanda Murthy Vs Syed Jalal, (2017) 13 SCC 174

10. Chhotanben & anr. Vs Kiritbhai Jalkrushnabhai Thakkar & ors., (2018) 6 SCC 422

11. Madiraju Venkata Ramana Raju Vs Peddireddigari Ramachandra Reddy & ors.,(2018) 14 SCC 1

12.Fatehji & Company & anr Vs L.M. Nagpal & ors., (2015) 8 SCC 390

13. S. Brahmanand & ors. vs K. R. Muthugopal & ors. AIR 2006 SC 40

(Delivered by Hon'ble Ravi Nath Tilhari, J.)

1. This second appeal has been filed challenging the judgment dated 18.7.2009 and the decree dated 22.7.2009 passed by the learned Additional District Judge, Court No.11, Meerut in Regular Civil Appeal No.41 of 2008 (Braj Bhooshan Mithal vs. Jeet Singh) dismissing the appeal arising out of O.S. No.130 of 2008, filed by the plaintiff-appellant which was dismissed by the learned Civil Judge (Junior Division), City Meerut vide the judgment dated 11.3.2008 and the decree dated 17.3.2008, rejecting the plaint as barred by the provisions of Order VII Rule 11 of Code of Civil Procedure, 1908(CPC).

2. The facts of the case are that the plaintiff-appellant had instituted O.S. No.130 of 2001(Braj Bhooshan Mithal vs. Jeet Singh) before Civil Judge (Junior Division), City, Meerut for specific performance of contract, directing the defendant-respondent to execute the sale deed in pursuance of the registered agreement to sell dated 04.01.1983, in favour of the plaintiff-appellant in respect of land of Khata No.39, Khasra No.27, area 0-15-0, Khata No.33/1, area 2-0-0 and Khasra No. 84/12 Min. area 1-10-00; total 3 numbers, total area 4-5-0, situated in village Mohammadpur Goomi, pargana, tehsil and district Meerut, after receiving the balance of the sale consideration of Rs.2000/ from the appellant out of the total sale consideration of Rs.17000/-, as an amount of Rs.15,000/- had already been paid to the defendant-respondent, at the time of registration of agreement to sell. The plaintiff-appellant's case is that as per the agreement to sell the defendant-respondent had to obtain permission from the competent authority(Ceiling), Meerut and intimate the plaintiff-appellant through registered post, and the plaintiff-appellant had to get the sale deed executed, within a period of one year from the date of receipt of said registered intimation after making payment of the balance of the sale consideration. The plaintiff-appellant sent a notice to the defendant-respondent on 31.12.1993, requesting him to be present at the office of Sub Registrar, Meerut on 28.1.1994 for execution of sale deed but the defendant-respondent did not accept notice sent through registered post. However, notice sent through UPC was served upon the defendant-respondent. On 28.1.1994, the plaintiff-appellant remained present at the office of Sub Registrar, Meerut for execution/registration of the sale deed but the defendant-respondent did not turn up. On the next day the defendant-respondent approached plaintiff-appellant; offered excuses and assured that he would execute the sale deed after completing the requisite formalities but he did not execute the sale deed in spite of many oral and written requests. The plaintiff-appellant as such sent another notice dated 4.1.2001, requesting the defendant-respondent to be present at the office of Sub Registrar, Meerut for execution of the sale deed on 30.1.2001 but on that date also defendant-respondent did not appear and sent an evasive reply. It was also pleaded that time was not the essence of contract and the possession of the land had already been delivered to the plaintiff- appellant at the time of registration of the agreement to sell.

The plaintiff-appellant had always been and is still ready and willing to perform his part of the contract.

3. The defendant-respondent filed written statement. He denied execution of agreement to sell in favour of plaintiff-appellant. He pleaded that the value of the land in question is Rs.20-00 lac and in the year 1983 it was about Rs.5-00 lac, therefore, question of execution of registered agreement to sell for a sale consideration of Rs.17,000/- did not arise. The defendant-respondent pleaded that the suit was barred by time and the plaint was liable to be rejected under Order VII Rule 11 C.P.C.

4. Learned trial court on 12.7.2004 framed issues in the suit. Issue No.4 as framed, is as follows:-

"Whether the plaintiff's suit is barred by the provisions of Order VII Rule 11 C.P.C.?"

5. Learned Civil Judge (Junior Division), City, Meerut, decided Issue No.4 in the affirmative i.e. against the plaintiff-appellant, holding that the suit was barred by Order VII Rule 11 C.P.C., being barred by time, and dismissed the suit by the judgment dated 11.3.2008 and the decree dated 17.3.2008.

6. The plaintiff-appellant preferred Regular Civil Appeal No.41 of 2008 (Braj Bhooshan Mithal vs. Jeet Singh) before the learned District Judge, Meerut. The appeal was dismissed by judgment dated 18.7.2009 and the decree dated 22.7.2009, passed by the learned Additional District Judge, Court No.11, Meerut.

7. The appellate court affirmed the judgment and decree passed by the trial court. It held that the trial court rightly concluded that the limitation to file the suit by the plaintiff-appellant would commence from 28.1.1994 and the suit filed in the year 2001 was barred by limitation.

8. The second appeal is for admission under Order XLI Rule 11 C.P.C.

9. Sri Vijay Prakash Yadav, learned counsel for the appellant was heard.

10. Sri Vijay Prakash Yadav, learned counsel for the plaintiff-appellant submitted that as the registered notice sent to the defendant-respondent on 4.1.2001 requesting him to remain present in the office of the Sub Registrar, Meerut on 30.1.2001 for execution/registration of the sale deed was not complied with by the defendant-respondent, the suit filed on 8.3.2001 was within the period of limitation of three years from 30.1.2001. His submission is that the period of limitation would start running from 30.1.2001 and not from the date of non compliance with the earlier notice dated 31.12.1993 by which the defendant-respondent was requested to be present in the office of the Sub Registrar on 28.1.1994.

11. He has next submitted that the rejection of plaint under Order VII Rule 11 C.P.C. is not justified and the suit should have been decided on merits after evidence.

12. Learned counsel for the appellant has placed reliance upon the decision of the Hon'ble Supreme Court in the case of **Gunwantbhai Mulchand Shah & Ors vs Anton Elis Farel & Ors,** reported in **AIR 2006 SC 40.**

13. I have considered the submissions advanced by the learned counsel for the

appellant and perused the record of the second appeal.

14. Before proceeding further, it is considered appropriate to refer to the judgment of the Hon'ble Apex Court in the case of **Kanailal & Ors. v. Ram Chandra & Ors.** reported in **(2018) 13 SCC 715**, in which it has been held that while deciding the second appeal which lies only to the High Court, the Court has to ensure compliance of the requirements of Section 100 of the Code in addition to the requirements of Order XLI Rule 31 of the Code. It has further been held that the High Court while hearing the appeal at the time of admission has to first find out whether the second appeal involves any substantial question of law(s) and if it is involved then substantial question(s) of law is/are to be formulated and then the appeal can be heard only on such formulated question (s). If, however, the Court at the time of hearing the appeal on the question, comes to a conclusion that the appeal does not involve such question within the meaning of Section 100 C.P.C., then it has to pass a reasoned order keeping in view the requirements of Order 41 Rule 31 C.P.C. It is relevant to reproduce paragraphs 11 to 16 of the judgment in **Kanailal** (supra) as under:-

"11) That apart, Order 41 Rule 31 of the Code which deals with the contents, date and the signature of judgment is also apposite to take note of. It reads as under:

"31. Contents, date and signature of judgment.- The judgment of the Appellate Court shall be in writing and 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, and shall at the time that it is pronounced be signed and dated by the Judge or by the Judges concurring there in."

12) It is clear from mere reading of the Rule 31(a) to (d) that it makes it legally obligatory upon the Appellate Court (both-first and second Appellate Court) as to what should the judgment of the Appellate Court contain.

13) Sub-clause(a) provides that the judgment must formulate and state the points arising in the case for determination. Sub-clause(b) provides that the Court must give decision on such points and sub-clause(c) provides that the judgment shall state the reasons for the decision. So far as sub-clause

(d) is concerned, it applies in those cases where the Appellate Court has reversed the decree. In such case, the Court has to specify the relief to which the appellant has become entitled to as a result of the decree having been reversed in appeal at his instance.

14) While deciding the second appeal which lies only to the High Court, the Court has to further ensure compliance of the requirements of Section 100 of the Code in addition to the requirements of Order 41 Rule 31 of the Code set out above.

15) In other words, the High Court while hearing the second appeal at the time of its admission has to first find out whether the second appeal involves any substantial question(s) of law and if the Court finds that the appeal does involve any substantial question(s) of law then such question(s) is/are required to be formulated. The appeal can be then heard finally only on such formulated question(s). (See Santosh Hazari (supra).

16) If however, the Court, at the time of hearing the appeal on the question of admission, comes to a conclusion that the appeal does not involve any such question within the meaning of Section 100 of the Code, then it has to pass a reasoned order keeping in view the requirements of Order 41 Rule 31 set out above. Indeed, this being the mandatory requirements of law, its non-compliance by the Appellate Court render their judgment bad in law. It has further been held that of law, its non-compliance by the Appellate Court render their judgment bad in law."

15. In view of the submissions advanced, following point arises for determination, for admission:-

"Whether the plaint has rightly been rejected under Order VII Rule 11 C.P.C.?"

16. Both the learned courts below have held that the date for performance was not fixed and in view of the refusal of the defendant-respondent on 28.1.1994 of performance, the suit for specific performance filed in the year 2001 was barred under Article 54 of the Limitation Act.

17. At this stage, it would be appropriate to consider the law on the point of limitation for filing a suit for specific performance of contract and on rejection of plaint under Order VII Rule 11 C.P.C.

18. Article 54 of the Limitation Act provides as under:-

Description of suit	Period of limitation	Time from which period begins to run.
For specific performance of a contract.	Three years	The date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused.

19. Thus, Article 54 of the Limitation Act, is in two parts. It provides a period of three years to institute a suit for specific performance of contract. The period would start running from the date fixed for the performance. If any such date is not fixed the period of limitation would start running when the plaintiff has notice that performance is refused.

20. In **R.K. Parvatharaj Gupta vs K.C. Jayadeva Reddy, (2006) 2 SCC 428,** the Hon'ble Supreme Court has held that in terms of the said Article(Article 54), a suit for specific performance of a contract is required to be filed within three years; in the event no date is fixed for the performance, from the date when the plaintiff has notice that performance is refused. Paragraph 10 of this judgment is reproduced as under:-

"10. In terms of the said Article, a suit for specific performance of a contract is required to be filed within three years; in the event no date is fixed for the performance, within a period of three years from the date when the plaintiff has notice that performance is refused."

21. In the case of **Ahmmadsahab Abdul Mulla (2)(D) By(LRs) vs Bibijan & Ors, (2009) 5 SCC 462** the Hon'ble Supreme Court held that the expression `date' used in Article 54 of the Schedule to the Limitation Act, is a crystallized notion. When a date is fixed it means there is a definite date fixed for doing a particular act. The expression 'date' is definitely

suggestive of a specified date in the calender. Again, 'when the plaintiff has notice that performance is refused,' there is a definite point of time, when the plaintiff notices refusal. It is relevant to reproduce paragraphs 11 and 12 of the report as under:-

"11. The inevitable conclusion is that the expression `date fixed for the performance' is a crystallized notion. This is clear from the fact that the second part "time from which period begins to run" refers to a case where no such date is fixed. To put it differently, when date is fixed it means that there is a definite date fixed for doing a particular act. Even in the second part the stress is on `when the plaintiff has notice that performance is refused'. Here again, there is a definite point of time, when the plaintiff notices the refusal. In that sense both the parts refer to definite dates. So, there is no question of finding out an intention from other circumstances.

12. Whether the date was fixed or not the plaintiff had notice that performance is refused and the date thereof are to be established with reference to materials and evidence to be brought on record. The expression `date' used in Article 54 of the Schedule to the Act definitely is suggestive of a specified date in the calendar. We answer the reference accordingly. The matter shall now be placed before the Division Bench for deciding the issue on merits."

22. In **Madina Begum & Anr vs Shiv Murti Prasad Pandey & Ors, (2016) 15 SCC 327**, the Hon'ble Supreme Court reiterated the same principle. It is relevant to reproduce paragraphs 18 to 20 of the report, as under:-

18. In Ahmadsahab Abdul Mulla (2) (Dead) v. Bibijan and Ors.(2009) 5 SCC 462, the following question was considered by a three judge Bench of this Court: "Whether the use of the expression "date" used in Article 54 of the Schedule to the Limitation Act, 1963 (in short "the Act") is suggestive of a specific date in the calendar?"

19. While answering this question on a reference made to the three judge Bench, this Court considered the meaning of the word "date" and "fixed" appearing in Article 54. Upon such consideration, this Court held that the expression "date fixed for the performance" is a crystallized notion. When a date is fixed it means there is a definite date fixed for doing a particular act. Therefore, there is no question of finding out the intention from other circumstances. It was reiterated that the expression "date" is definitely suggestive of a specified date in the calendar. Paragraphs 11 and 12 of the Report in this regard are of importance and they read as follows:-

"11. The inevitable conclusion is that the expression "date fixed for the performance" is a crystallized notion. This is clear from the fact that the second part "time from which period begins to run" refers to a case where no such date is fixed. To put it differently, when date is fixed it means that there is a definite date fixed for doing a particular act. Even in the second part the stress is on "when the plaintiff has notice that performance is refused". Here again, there is a definite point of time, when the plaintiff notices the refusal. In that sense both the parts refer to definite dates. So, there is no question of finding out an intention from other circumstances.

12. Whether the date was fixed or not the plaintiff had notice that performance is refused and the date thereof are to be established with reference to materials and evidence to be brought on

record. The expression "date" used in Article 54 of the Schedule to the Act definitely is suggestive of a specified date in the calendar. We answer the reference accordingly. The matter shall now be placed before the Division Bench for deciding the issue on merits."

20. Quite independently and without reference to the aforesaid decision, another Bench of this Court in Rathnavathi and Another v. Kavita Ganashamdas (2015) 5 SCC 223 came to the same conclusion. It was held in paragraph 42 of the Report that a mere reading of Article 54 would show that if the date is fixed for the performance of an agreement, then non-compliance with the agreement on the date would give a cause of action to file a suit for specific performance within three years from the date so fixed. But when no such date is fixed, the limitation of three years would begin when the plaintiff has notice that the defendant has refused the performance of the agreement. It was further held, on the facts of the case that it did not fall in the first category of Article 54 since no date was fixed in the agreement for its performance."

23. In **Janardhanam Prasad Vs. Ramdas,** reported in **(2007) 15 SCC 174**, the Hon'ble Supreme Court has held that the Court, in applying the period of limitation, would first inquire as to whether any time was fixed for performance of agreement of sale. If it was so fixed, the suit must be filed within the period of three years, failing which the same would be barred by limitation. Where, however, no time for performance was fixed it is for the Courts to find out the date on which the plaintiff had notice that the performance was refused and on arriving at a finding in that behalf, to see whether the suit was filed within three years thereafter.

24. This Court has, therefore, first, to ascertain, if any date was fixed for performance or if no date was fixed for performance as to when the plaintiff-appellant had notice that the performance was refused. If the date for performance was fixed i.e. if a specified date in the calender, then the period of 3 years would start running from that date to institute the suit. But, if the date was not so fixed, period of 3 years would start running from the date the plaintiff-appellant had notice that the performance had been refused by the defendant-respondent.

25. There is no dispute that the period of limitation is governed by Article 54 of the Schedule to the Limitation Act.

26. Now, it is relevant to reproduce the provisions of Order VII Rule 11 C.P.C., as under:-

*"**Order VII Rule 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 written 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;

(e) where it is not filed in duplicate;

(f) where the plaintiff fails to comply with the provisions of rule 9.

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 for 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."

27. The scope of Order VII Rule 11 C.P.C. has been considered in various judgments, of which some are mentioned hereinafter. In **Church of Christ Charitable Trust & Educational Charitable Society, vs. M/s Ponniamman Educational Trust, (2012) 8 SCC 706,** the Hon'ble Supreme Court has held that for deciding an application under Order VII Rule 11 C.P.C., the averments in the plaint are germane. The pleas taken by the defendant in the written statement are wholly irrelevant at that stage. It is also settled in law that plaint has to be read as a whole and not in piecemeal.

28. It is relevant to reproduce paragraphs 10, 11 and 12 of the **Church of Christ Charitable Trust and Educational Charitable Society**(supra), as under:-

10. Since the appellant herein, as the first defendant before the trial Judge, filed application under Order VII Rule 11 of the Code for rejection of the plaint on the ground that it does not show any cause of action against him, at the foremost, it is useful to refer the relevant provision: Order VII Rule 11 of the Code:

"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;

(e) where it is not filed in duplicate;

(f) where the plaintiff fails to comply with the provision of Rule 9:

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 for 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." It is clear from the above that where the plaint does not disclose a cause of action, the relief claimed is undervalued and not corrected within the time allowed by the Court, insufficiently stamped and not rectified within the time fixed by the Court, barred by any law, failed to enclose the required copies and the plaintiff fail to comply with the provisions of Rule 9, the Court has no other option except to reject the same. A reading of the above provision also makes it clear that power under Order VII Rule 11 of the Code can be exercised at any stage of

the suit either before registering the plaint or after the issuance of summons to the defendants or at any time before the conclusion of the trial.

11. This position was explained by this Court in *Saleem Bhai & Ors. v. State of Maharashra, (2003) 1 SCC 557,* in which, while considering Order VII Rule 11 of the Code, it was held as under: (SCC p.560, para 9)

"9. A perusal of Order VII Rule 11 CPC makes it clear that the relevant facts which need to be looked into for deciding an application thereunder are the averments in the plaint. The trial court can exercise the power under Order VII Rule 11 CPC at any stage of the suit -- before registering the plaint or after issuing summons to the defendant at any time before the conclusion of the trial. For the purposes of deciding an application under clauses (a) and (d) of Rule 11 of Order VII CPC, the averments in the plaint are germane; the pleas taken by the defendant in the written statement would be wholly irrelevant at that stage, therefore, a direction to file the written statement without deciding the application under Order VII Rule 11 CPC cannot but be procedural irregularity touching the exercise of jurisdiction by the trial court."

It is clear that in order to consider Order VII Rule 11, the Court has to look into the averments in the plaint and the same can be exercised by the trial Court at any stage of the suit. It is also clear that the averments in the written statement are immaterial and it is the duty of the Court to scrutinize the averments/pleas in the plaint. In other words, what needs to be looked into in deciding such an application are the averments in the plaint. At that stage, the pleas taken by the defendant in the written statement are wholly irrelevant and the matter is to be decided only on the plaint averments. These principles have been reiterated in *Raptakos Brett & Co. Ltd. vs. Ganesh Property, (1998) 7 SCC 184 and Mayar (H.K.) Ltd. and Others vs. Owners & Parties, Vessel M.V. Fortune Express and Others (2006) 3 SCC 100.*

12. It is also useful to refer the judgment in T. Arivandandam vs. T.V.Satyapal &

Anr, (1977) 4 SCC 467, wherein while considering the very same provision, i.e. Order VII Rule 11 and the duty of the trial Court in considering such application, this Court has reminded the trial Judges with the following observation:

"5. .....The learned Munsif must remember that if on a meaningful - for formal - reading of the plaint it is manifestly vexatious, and meritless, in the sense of not disclosing a clear right to sue, he should exercise his power under Order VII, Rule 11 C.P.C. taking care to see that the ground mentioned therein is fulfilled. And if clever drafting has created the illusion of a cause of action nip it in the bud at the first hearing by examining the party searchingly under Order X, C.P.C. An activist Judge is the answer to irresponsible law suits. The trial Courts would insist imperatively on examining the party at the first hearing so that bogus litigation can be shot down at the earliest stage. The Penal Code is also resourceful enough to meet such men, (Chapter XI) and must be triggered against them."

It is clear that if the allegations are vexatious and meritless and not disclosing a clear right or material(s) to sue, it is the duty of the trial Judge to exercise his power under Order VII Rule 11. If clever drafting has created the illusion of a cause of action as observed by Krishna Iyer J., in the above referred decision, it should be nipped in the bud at the first hearing by examining the parties under Order X of the Code."

29. In **Kuldeep Singh Pathania vs. Bikram Singh Jaryal, (2017) 5 SCC 345,** the Honble Supreme Court held that the scope of the enquiry at the stage of Order VII rule 11 CPC is limited only to the pleadings of the plaintiff. Neither the written statement nor the averments, if any, filed by the opposite party for rejection under Order VII rule 11 C.P.C. or any other pleadings of the respondents can be considered for that purpose. It is relevant to reproduce paragraphs 7, 8, 9 and 10 of the report as under:-

"7. The whole purpose of trial on preliminary issue is to save time and money. Though it is not a mini trial, the court can and has to look into the entire pleadings and the materials available on record, to the extent not in dispute. But that is not the situation as far as the enquiry under Order VII Rule 11 is concerned. That is only on institutional defects. The court can only see whether the plaint, or rather the pleadings of the plaintiff, constitute a cause of action. Pleadings in the sense where, even after the stage of written statement, if there is a replication filed, in a given situation the same also can be looked into to see whether there is any admission on the part of the plaintiff. In other words, under Order VII Rule 11, the court has to take a decision looking at the pleadings of the plaintiff only and not on the rebuttal made by the defendant or any other materials produced by the defendant.

8. It appears, the High Court committed a mistake in the present case, since four out of the six issues settled were taken as the preliminary issues. Two such issues actually are relatable only to Order VII Rule 11 of the Code, in the sense those issues pertained to the rejection at the institution stage for lack of material facts and for not disclosing a cause of action. Merely because it is a trial on preliminary issues at the stage of Order XIV, the scope does not change or expand. The stage at which such an enquiry is undertaken by the court makes no difference since an enquiry under Order VII Rule 11(a) of the Code can be taken up at any stage.

9. Thus, for an enquiry under Order VII Rule 11 (a), only the pleadings of the plaintiff-petitioner can be looked into even if it is at the stage of trial of preliminary issues under Order XIV Rule 2(2). But the entire pleadings on both sides can be looked into under Order XIV Rule 2(2) to see whether the court has jurisdiction and whether there is a bar for entertaining the suit.

10. In the present case, the issue relates to an enquiry under Order VII Rule 11(a) of the Code, and hence, there is no question of a preliminary issue being tried under Order XIV Rule 2(2) of the Code. The court exercised its jurisdiction only under Section 83(1) (a) of the Act read with Order VII Rule 11(a) of the Code. Since the scope of the enquiry at that stage has to be limited only to the pleadings of the plaintiff, neither the written statement nor the averments, if any, filed by the opposite party for rejection under Order VII Rule 11(a) of the Code or any other pleadings of the respondents can be considered for that purpose.

30. In **Madanuri Sri Ram Chanda Murthy vs. Syed Jalal, (2017) 13 SCC 174**, the Hon'ble Supreme Court held that the relevant facts which need to be looked into for deciding the application for rejection of plaint are the averments of the plaint only. The averments in the written statement as well as the contentions of the defendant are wholly immaterial. Even when the allegations made in the plaint are taken to be correct as a whole on their face

value, if they show that the suit is barred by any law, or do not disclose cause of action, the application for rejection of plaint can be entertained and the power under Order VII Rule 11 C.P.C. can be exercised. It is relevant to reproduce paragraph 7 of the judgment in **Madanuri case** (supra), as under:-

"7. The plaint can be rejected under Order VII Rule 11 if conditions enumerated in the said provision are fulfilled. It is needless to observe that the power under Order VII Rule 11, CPC can be exercised by the Court at any stage of the suit. The relevant facts which need to be looked into for deciding the application are the averments of the plaint only. If on an entire and meaningful reading of the plaint, it is found that the suit is manifestly vexatious and meritless in the sense of not disclosing any right to sue, the court should exercise power under Order VII Rule 11, CPC. Since the power conferred on the Court to terminate civil action at the threshold is drastic, the conditions enumerated under Order VII Rule 11 of CPC to the exercise of power of rejection of plaint have to be strictly adhered to. The averments of the plaint have to be read as a whole to find out whether the averments disclose a cause of action or whether the suit is barred by any law. It is needless to observe that the question as to whether the suit is barred by any law, would always depend upon the facts and circumstances of each case. The averments in the written statement as well as the contentions of the defendant are wholly immaterial while considering the prayer of the defendant for rejection of the plaint. Even when, the allegations made in the plaint are taken to be correct as a whole on their face value, if they show that the suit is barred by any law, or do not disclose cause of action, the application for rejection of plaint can be entertained and the power under Order VII Rule 11 of CPC can be exercised. If clever drafting of the plaint has created the illusion of a cause of action, the court will nip it in the bud at the earliest so that bogus litigation will end at the earlier stage.

31. The same principle has been re-affirmed in **Chhotanben & another v/s Kiritbhai Jalkrushnabhai Thakkar & Others, (2018) 6 SCC 422**, and in **Madiraju Venkata Ramana Raju v/s Peddireddigari Ramachandra Reddy & Others, (2018) 14 SCC 1.**

32. Thus, it is settled in law that the plaint can be rejected under Order VII Rule 11 C.P.C. on the grounds under Clauses (a) to (f). In considering the question of rejection of the plaint, the Court has to look into the plaint and plaint alone. The plaint has to be read in its entirety. On the averments made in the plaint which are to be taken as correct as a whole on their face value, if the suit appears to be barred by any law, then the plaint will be rejected under Order VII Rule 11(d) C.P.C.

32. This Court has, therefore, to consider if from reading of the entire plaint statement, what is the date fixed for performance of the contract, and if no date is fixed for performance, as to when the plaintiff-appellant had notice that the performance had been refused. Thereafter it is to be considered if the suit filed was within 3 years from the relevant date under first or the second part of Article 54 of the Limitation Act.

33. The plaint statements clearly show that (i) no date was fixed for performance of contract, (ii) the plaintiff-appellant had

sent a notice dated 31.12.1993 through registered post as well as Under Postal Certificate(UPC) to the defendant-respondent for execution /registration of the sale deed, (iii) the UPC was received by the defendant-respondent, (iv) by the said notice the plaintiff-appellant had fixed 28.1.1994 requiring the defendant-respondent to appear in the office of the Sub Registrar, Meerut, for execution/registration of the sale deed, and (v) on the date fixed i.e. 28.1.1994, the defendant-respondent did not appear for performance although the plaintiff-appellant remained present with balance of the sale consideration.

34. As no date was fixed for the performance of the contract, the first part of Article 54 of the Limitation Act would not apply. The limitation period of 3 years would, therefore, start running from the date the plaintiff-appellant had notice of refusal of performance by the defendant-respondent.

35. The performance of contract was refused by the defendant-respondent on 28.1.1994 as he did not appear for execution of the sale deed before the Sub Registrar, Meerut on that date in pursuance of the notice dated 31.12.1993 sent by the plaintiff-appellant. As the plaintiff-appellant was present on 28.1.1994 in the office of the Sub Registrar, Meerut for getting the execution of the sale deed, after making payment of balance of the sale consideration to the defendant-respondent, the plaintiff-appellant actually knew that the performance was refused by the defendant-respondent on 28.1.1994 itself. He, as such had the notice of refusal of performance on 28.1.1994.

36. In view of the above, the period of limitation of 3 years to institute the suit for specific performance of contract, started to run from 28.1.1994 and came to an end on 27.1.1997. The suit filed in the year 2001 was, thus, clearly barred by law of limitation on the averments made in the plaint itself under Order VII Rule 11(d) C.P.C.

37. The next submission of the learned counsel for the appellant is that as per the plaint averments, on the next date i.e. on 29.1.1994, the defendant-respondent approached the plaintiff-appellant with excuses and assured that the sale deed would be executed at the earliest after getting requisite permission from the Ceiling Department and the Income-tax Department. Relying on the said assurances of the defendant-respondent, the plaintiff-appellant did not institute the suit and waited for the performance by the defendant-respondent. However, as the defendant-respondent did not keep the assurances, the plaintiff-appellant sent a second notice on 4.1.2001 which was served on the defendant-respondent but the defendant-respondent did not comply with the said notice as well and did not appear in the office of the Sub Registrar, Meerut on the date fixed i.e. 30.1.2001 for execution of the sale deed. The submission is that the period of limitation would start running from 30.1.2001 and thus, the suit filed in the year 2001 was within the period of limitation of 3 years.

38. The aforesaid submission of the learned counsel for the plaintiff- appellant deserves rejection. It is settled in law, as has been held by the Hon'ble Supreme Court in **Fatehji & Company & Anr vs L.M. Nagpal & Ors, (2015) 8 SCC 390** that if any permission is to be obtained prior to the performance/completion of the contract, the mere fact that the defendants

have not obtained the said permission would not lead to inference that no cause of action for filing the suit for specific performance would arise. The performance having been refused on 28.1.1994, even if the plaintiff-appellant acted upon the assurance of the defendant-respondent, which is said to have been given on 29.1.1994, still the suit was required to be filed by 27.1.1997 within 3 years from the notice of refusal of performance on 28.1.1994.

39. Learned counsel for the appellant placed reliance on the case of S. **Brahmanand and Ors vs K. R. Muthugopal and Ors. AIR 2006 SC 40,** in support of his contention that the conduct of defendant-respondent in giving assurance and the plaintiff appellant acting on such assurance in not instituting the suit, was required to be considered and the period of limitation should be considered to have started running from the date of notice of refusal of performance in pursuance of the second notice dated 4.1.2001, i.e. from 30.1.2001.

40. In **S. Brahmanand**(supra) there was a fixed date for performance in the original agreement. When the date is fixed for performance, the first part of Article 54 to Schedule of Limitation Act is attracted. However, time was extended and in spite of such extension, performance was refused on a particular date of which plaintiff had acquired notice. It was held that from the date of notice of refusal to performance, limitation would start running under the second part of Article 54 of the Limitation Act. In the present case, as per the plaint averments, any date was not fixed for performance of contract. The present is not the case of an agreement to sell which specified a date for performance and later on by extension of time, without specifying a particular date for performance, became an agreement to sell where no date was fixed for performance. In the present case, since the very beginning, as per the plaint averments, no time was fixed for performance. As such the period of limitation of 3 years would start running from the date the plaintiff- appellant had notice of refusal of performance for the first time which is 28.1.1994. In S. Brahmanand (supra) the Hon'ble Supreme Court considered the period of limitation as running from the date the plaintiff had notice of refusal. S. Brahmanand case is, therefore, of no help to the plaintiff-appellant.

41. Further, in **S. Brahmanand case**(supra)**,** the Hon'ble Supreme Court specifically held in paragraph 36 considering the case of *Pazhaniappa Chettiyar v. South Indian Planting and Industrial Co. Ltd and Anr.AIR 1953 Trav-C 161* that the contract when initially made had a fixed date for the performance but the Court was of the view that in the events that happened, the agreement though started with fixation of a period for the completion of the transaction became one without such period. If it became one in which no time was fixed for its performance, the limitation which was originally covered by the first part of Article 113 of the Limitation Act, 1908(old) would fall under the second part of that Article because of the very circumstances of that case. The present case, falls in the second part of Article 54 since the very beginning. There is no supervening circumstance to convert the agreement from the first part to the second part of Article 54,Limitation Act.

42. In **Ahmmadsahab Abdul Mulla**(supra), the Hon'ble Supreme Court on a reference made to three Judge Bench, considered the meaning of the words "date"

and "fixed" appearing in Article 54. The Hon'ble Supreme Court considered the judgment in **S. Brahmanand** (supra) and held that when a date is fixed, it means a definite date fixed for doing a particular act. Therefore, there is no question of finding intention from other circumstances. Thus, this Court is of the considered view that the intention/conduct of the defendant-respondent, as per the plaint pleadings i.e. giving assurance etc., is of no importance so far as the period of limitation is concerned or the time from which it starts running.

43. The next submission of the learned counsel for the appellant that the possession of the property had already been delivered to plaintiff-appellant in pursuance of the registered agreement to sell and, therefore, Article 54 of the Limitation Act should not bar institution of the suit, also deserves rejection. Article 54 of the Limitation Act which provides for a period of 3 years for institution of the suit, does not make any distinction between suits for specific performance of contract, on the basis of delivery of possession, pursuant to agreement to sell or part performance of agreement. Here, the judgment of the Hon'ble Apex Court, on this point in the case of **Fatehji and others**(supra) paragraph 6 thereof requires reference, in which it has been held that the fact that the plaintiff was put in possession of the property agreed to be sold on the date of agreement, would not make any difference with regard to limitation for filing a suit for specific performance of contract. Article 54 of the Limitation Act does not make any difference between the cases where the property had been delivered in part performance of the agreement or otherwise and the cases where it has not been so delivered.

44. The enquiry under Order VII rule 11 C.P.C. is only on institutional defects. If the Court finds that the suit is barred by law of limitation on the averments made in the plaint, the plaint shall be rejected. There shall be no occasion for the Court to proceed to decide the suit on merits after allowing the parties to lead evidence. In view thereof, the submission of the learned counsel for the plaintiff-appellant that the Trial Court should have decided the suit on merits after evidence also deserves rejection.

45. No other point was raised by the learned counsel for the appellant.

46. Thus, considered, I find that the learned courts below have not committed any error of law in rejecting the plaint and in dismissing the appeal.

47. The second appeal does not raise any substantial question of law and it is hereby **dismissed** at the admission stage.

(2020)09ILR A267
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.07.2020

BEFORE

THE HON'BLE J.J. MUNIR, J.

Second Appeal No. 1289 of 1988

Sumer & Ors. ...Appellants
Versus
Bator & Ors. ...Respondents

Counsel for the Appellants:
Sri Faujdar Rai, Sri M.C. Tiwari, Sri R.S. Yadav, Sri Chandra Kumar Rai

Counsel for the Respondents:

Sri Gajendra Pratap, Sri R.S. Kushwaha, Sri Ramesh Singh Kushwaha

Civil Law - U.P. Zamidari Abolition and Land Reform Act, 1950 - Section 11-C-provision is to protect Gaon Sabha land or State land from being declared -in another's favour-it has no relevance in private dispute before civil Court-Defendants have neither title nor possession-cannot interfere with Plaintiff's possession - Appeal dismissed with cost of Rs. 10,000/-

Held, So far as the plaintiffs are concerned, they have been held to be in possession by the Lower Appellate Court. Even if their possession is traceable to a defective title based on the patta owing to its non-approval by the Sub-Divisional Officer as claimed, though this Court does not say so that it is without approval, their possession is one held under colour of title on the basis of a Gaon Sabha patta. They are not rank trespassers. Even if they were rank trespassers but in settled possession, the defendants who have neither title or possession, have no business to go about interfering with the plaintiffs' possession over the suit property by asking them not to construct a boundary wall around it or raise any constructions. The Lower Appellate Court, thus, on the ground of possession traceable to the patta found for the plaintiffs, if not on the basis of title, has rightly decreed the Suit against the defendants. **(para 39)**

Appeal dismissed. (E-9)

Cases referred: -

1. Palakdhari Vs Deputy Director of Consolidation, Gorakhpur & ors., 1992 AWC 228 All.

2. Sita Ram Vs Deputy Director of Consolidation & ors., 1981 SCC OnLine All 797

3. Hira Teli Vs Shripati Rai & ors., 1981 SCC OnLine All 512

4. Ram Daan (dead) through LRs vs. Urban Improvement Trust, (2014) 8 SCC 902

(Delivered by Hon'ble J.J. Munir, J.)

1. This is a defendants' Second Appeal arising from a Suit for permanent prohibitory injunction and, alternatively, for possession.

2. By this Appeal, the defendants of Original Suit no.36 of 1976, seek reversal of the judgment and decree passed by Mr. H.L. Kureel, the then Additional District Judge, Ghazipur, dated 18.02.1988 in Civil Appeal no.134 of 1984, allowing the Appeal and decreeing the Suit, that was dismissed by the Trial Court vide judgment and decree dated 02.05.1984.

***Parti*es to the lis**

3. The Suit was instituted by Bator son of Buddhiram and Shiv Chand son of Bator, arrayed as plaintiffs nos.1 and 2 in that order. The defendants to the Suit were seven in number, to wit, Sumer, Muneshwar, Uddhav, Munni, Jhuri, Radhey and Tufani, all sons of Sahdev. The said defendants were arrayed as defendants nos.1 to 7 in that order. This Appeal was lodged by all the defendants, who at the time of presentation of the Appeal, had grown to a figure of nine. This increase was on account of the death of defendant no.5 to the Suit, Jhuri, who was survived by his wife, Smt. Behafi and two sons, Mansha and Ramesh. Ramesh at the time of presentation of this Appeal was a minor and was, therefore, represented through his mother, Smt. Behafi, acting as his next friend. Pending Appeal, of the nine original defendants-appellants, four died. They are: Sumer, Muneshwar, Uddhav and Munni. Each of these deceased defendants-appellants are now represented on record by their heirs and legal representatives.

4. Amongst the plaintiffs-respondents, Shiv Chand son of Bator died pending

Appeal. His heirs too have been brought on record. The nine defendants-appellants who lodged this Appeal, including the heirs and legal representatives of the deceased defendants-appellants, shall hereinafter be referred to as "the defendants', except where the reference is to a *parti*cular defendant. The two plaintiffs-respondents to this Appeal, originally impleaded, including the heirs and legal representatives of the plaintiff-respondent no.2, Shiv Chand, shall be hereinafter referred to as "the plaintiffs', except where the reference is to a *parti*cular plaintiff.

The suit property

5. The suit property is non-aggricultural land, bearing plot no.114, admeasuring a total of 2 *biswas*, 12 *dhurs*, situate at Village Palia, *Pargana* Pachochar, District Ghazipur. It is denoted in the plaint, giving rise to the suit, by letters अ ब स द य र अ.

The substantial question of law involved

6. This Appeal was admitted to hearing on 19.05.1988 on the following substantial question of law:

"Whether the decree passed by the lower appellate court suffers from an error of law because it has upset the findings recorded by the Trial Court about execution of lease in accordance with the provisions of the U.P. ZA. & L.R. Act."

The plaintiffs' case

7. The plaintiffs' case is that they are father and son, and natives of Village Palia, *Pargana* Pachochar, District Ghazipur. The land, over which the plaintiffs' old house is located, has been assigned a new no.183 and abutting it, is plot no.184. Prior to the notification of consolidation operations, the locale of new plot no.183 had a number of houses standing there. The last mentioned plot has a large number of dwelling houses, located thereon. The adjacent plot no.184 is *parti*. Prior to the notification of consolidation operations, the site of plot no.184 has always been *banjar* (uncultivable land). It has now been assigned plot no.184. The ingress and egress to the plaintiffs' house is oriented to the east. Lying in front of their entrance is a *sehan* carrying dimensions, expressed in indigenous units as 1- ½ *lattha* wide and 3 *lattha* long. This *sehan* is utilized by the plaintiffs, where they sit and move about and tether their cattle with great inconvenience - a pair of oxen and two buffaloes. Abutting the land where the plaintiffs' house is situate, on its west and south, is plot no.184. The aforesaid land being *parti*, is *Gaon Sabha*'s property. Further west of plot no.184 and contiguous to it, is a *kachcha* public road, proceeding from Ghazipur to Gorakhpur.

8. It is pleaded that land of plot no.184, lying between the plaintiffs' house and the last mentioned public road, bears a total area of 2 *biswas* and 12 *dhurs*. It is the plaintiffs' case that they were in dire need of a *sehan* to meet their needs whereas the last mentioned land, that is, *parti* to the south and west of their house, was lying unutilized. Therefore, they applied to the Village Pradhan, Palia that this land which is denoted in the plaint by letters अ ब स द य र अ and a part of plot no.184, may be allotted to them on a *abadi patta* for their use as *abadi* and *sehan*. It is claimed that the Village Pradhan, in accordance with law and after publication by beat of drum

with prior information to members of the Gram Samaj, convened a meeting of the Land Management Committee on 14.05.1970. Since there was a solitary application by the plaintiffs staking claim to the land denoted by letters अ ब स द य र अ, the Land Management Committee allotted 1 biswa 10 *dhurs* of the said land to plaintiff no.1, Bator and 1 biswa 2 *dhurs* of land, last mentioned, to plaintiff no.2, Shiv Chand son of Bator. The allotment aforesaid was made for the purpose of construction of their house by the plaintiffs on two *abadi patta*, each in favour of plaintiffs nos.1 & 2, after receiving a sum of Rs.30/- and Rs.22/- respectively, towards premium/ settlement charges. A formal *patta* was drawn and granted in favour of the plaintiffs.

9. It is averred that post-grant of *patta* in their favour by the *Gaon Sabha* over the suit property, they extended their old house by raising some *kachcha* constructions over a part of it. The plaintiffs plead that they also put up a thatched-roof construction (*madai*) leaving the residue of the suit property as a *sehan* and space reserved to tether cattle and to store agricultural implements. It is also pleaded that the *kachcha* and thatched construction erected over the suit property are shown in the plaint map, denoted by the letters त थ द ध. There is then some pleading as to the finer detail about utilization of every inch of the suit property, which indicates that to the west of the *madai*, denoted by letters त थ द ध, a stretch of about 10 dhur of land has been cultivated to raise a wheat crop. To the north of the wheat crop and west of the plaintiffs' house, a stretch of about 16 dhur has been utilized to cultivate potatoes.

10. It is also detailed that the land abutting the public road has three beds, where onion has been cultivated. The residue of the suit property, that lies to the north of the *madai*, is utilized to tether cattle and as an open-area living space. It is pleaded that on 16.02.1976, the defendants trespassed into the suit property and uprooted fixtures placed there to tether and feed cattle. The neighbours intervened and dissipated a possible crime. The plaintiffs have restored those fixtures immediately in the protection of the intervening neighbours. The plaintiffs after the said event proceeded to enclose the suit property with a boundary wall, which the defendants prevented them from doing. It is the plaintiffs' case that the defendants say that they would occupy the suit property and force the *Gaon Sabha* to settle it with the defendants on a *patta*. It is on this cause of action that the Suit was instituted on 19.02.1976 before the Court of the learned *Munsif*, Saidpur, District Ghazipur.

Reliefs claimed in the Suit

11. The following reliefs have been claimed by the plaintiffs:

"(A) By a decree in favour of the plaintiffs and against the defendants, the defendants be restrained in perpetuity from obstructing the plaintiffs in any manner in raising a boundary wall or constructions over plot no.184 denoted by letters अ ब स द य र अ;

(B) If the Court comes to a conclusion that the plaintiffs have been dispossessed in consequence of an illegal act by the defendants, a decree of possession be passed in favour of the plaintiffs ordering them to be put in possession of the suit property after dispossessing the defendants through process of Court;"

The defendants' case

12. A written statement was filed, jointly on behalf of all the seven defendants, denying the plaint allegations, with an assertion that there is no old house of the plaintiffs in existence in a part of plot no.183. It is asserted that the plaintiffs are henchmen of the Village Pradhan, Jagannath Rai, and eke out a living for themselves staying in the Pradhan's house. About 8-9 years ago, Jagannath Rai got a thatch-worked dwelling house built for the plaintiffs in the new *abadi*, that came into existence post-consolidation operations in the village. This new *abadi* lies to the north-west of Jagannath Rai's house. The plaintiffs have been living in the aforesaid thatched house. Their assertions to the contrary are incorrect.

13. It is further pleaded that the plaintiffs' thatched dwelling unit is situate at a distance of about a furlong to the south-west of the disputed house. The plaintiffs' thatched dwelling unit is located close by to Jagannath Rai's house. It is pleaded that the suit property is not located in plot no.183. The defendants then plead that the disputed house together with a *sehan* (courtyard) was got constructed by their father to look after his field in plot no.276. The house was also used to tether cattle, to store household wares, besides serving as a living room for menfolk. During consolidation operations, plot no.276 was recorded as an *abadi* to the extent of the 12 *dhurs* and remainder of the area stayed with the defendants as part of their original holding that was included in their *chak*. The defendants' *chak* was assigned *chak* no.185. It is asserted that by the side of the road, abutting the defendants' *chak* on its western boundary, the house in dispute stands since long. It is pleaded that after close of consolidation operations, the defendants have pooled together, according to their convenience, some land from their *chak*, last mentioned and some of it from the south of the house in dispute, besides still more from the east, all of which they have utilized to demarcate a *sehan* for themselves. This new *sehan* of theirs is in addition to the one that they have on the western side. It is also pleaded that in their aforementioned *sehan*, they have a standing *Neem* tree, besides a Well.

14. It is also the defendants' case that to the south-east of the house in dispute, in one corner, their father had got a Well sunk some 14-15 years ago, which continues in existence and is utilized by the defendants to irrigate their fields and provide water to their cattle. It is averred that the plaintiffs have nothing to do with the said Well. There is then a specific pleading that plot no.184 lies to the north of the disputed house and the defendants' *chak* no.185. It is in the shape of an alley *(gali)*. In some part thereof, houses of Annu and others stand. Plot no.184 to the north of the line अ ट is shown in the plaint map. It is averred that line अ ट is shown in the Commissioner's map by letters T D A. It is specifically pleaded in paragraph 12 of the written statement that the suit property is part and parcel of the defendants' old house and their land comprised in plot no.185. It is asserted that there is no crop or other cultivation done over the land in dispute by the plaintiffs. Whatever crop or other cultivation is there, belongs to the defendants. The suit has been instituted as a vexatious action to harass the defendants. It is a *mala fide* action.

15. It is also pleaded that there are no tethering hooks or feeding troughs fixed to any part of the suit property, which the defendants are claimed to have damaged or destroyed. There is a specific plea in

paragraph 15 to the effect that the plaintiffs have not acquired any right to the suit property through a *patta abadi*, executed by the *Gaon Sabha* and that the *Gaon Sabha* has no right to grant the land in dispute on a *patta*. It is also asserted that the plaintiffs never entered possession of the suit property on the basis of the *Gaon Sabha patta*, they rely on. There are pleadings in paragraph 16 of the written statement that show animosity between the plaintiffs and the defendants on account of defendant no.2 standing witness in some case (not specified) against Jagannath Pradhan, that had left the Pradhan with ruffled feathers. He had threatened the defendants with trouble on this score. It is also said that in the preceding year's election, the defendants were not politically aligned with Jagannath Rai, the Pradhan, which further enangered him. He, therefore, caused the plaintiffs, who are his henchmen, to institute the present Suit *mala fide* in order to harass the defendants on vexatious pleadings. It is also pleaded that the defendants do not know that if the plaintiffs had secured some forged *patta* from the Pradhan, which if there, would not bind them.

Issues framed in the Suit

16. The Trial Court, on the pleadings of *parti*es, framed the following issues (rendered into English from Hindi vernacular):

"(1) Whether the plaintiffs are owners in possession of the disputed land?

(2) Whether the house together with plot no.184 is the land in dispute?

(3) Whether the suit is barred by time?

(4) Whether the suit is barred by principles of estoppel and waiver?

(5) Whether the suit has been correctly valued and sufficient court fees has been paid?

(6) Whether the plaintiffs are entitled to any other relief, and if so, to what extent?"

Findings of the Trial Court

17. The Trial Court answered issue no.2 in the affirmative, relying on a report of the Survey Commissioner, dated 20.02.1984, on the basis of which it was held that the suit property lies in plot no.184. The Trial Court also looked into the evidence of DW-1, Tufani, from which also the Court concluded that the suit property is located in plot no.184. Issue no.2 was, therefore, answered in the affirmative in the terms indicated.

18. While deciding issue no.1, the Trial Court noticed that the plaintiffs' case is that they took the property in dispute on an *abadi patta* from the *Gaon Sabha* where they have various fixtures meant for tethering and feeding cattle, that are no concern of the defendants. It has been remarked by the Trial Court that once the defendants assert that the suit property is not located in plot no.184, but 185, which is their courtyard, the said property is neither the plaintiffs' or the *Gaon Sabha*'s, where the *Gaon Sabha* may have a right to execute a *patta* in favour of the plaintiffs. To arrive at this conclusion, the Trial Court has looked into the dock evidence of PW-1, Bator as also the DW-1, Tufani and DW-2, Parasnath Rai. On an evaluation of the oral evidence of PW-1 and DW-1, the Trial Court has concluded that the plaintiffs' house is not located in plot no.184. The Court has also looked into Exs. 2 and 3, that are *patta* dated 04.05.1970, granted in favour of the plaintiffs by the *Gaon Sabha*.

Regarding these documents, it is remarked that the same are not proved by the Pradhan, who is said to have granted these *patta*. Then Ex. 4 has also been looked into, which is a resolution of the *Gaon Sabha*, sanctioning grant of the two *patta* in favour of the plaintiffs. The Trial Court has taken exception to the fact that the Pradhan, who granted the *patta*, has not been produced as a witness. The absence of the Pradhan from the dock has led the Trial Court to infer that no *patta* had been executed in favour of the plaintiffs on 14.05.1970.

19. It is also remarked by the Trial Court that a look at the *patta* shows that these have been granted for the purpose of *abadi*, whereas the plaintiffs say that they are also cultivating. This inconsistent user, may be of a small part of the suit property, has been looked upon by the Trial Court as a suspicious circumstance. The Trial Court has, in *parti*cular, relied upon the report of the Commissioner to say that there is a standing crop of wheat, but no *patta* granted for agricultural purposes. It is also remarked that the plaintiffs have not filed any document to show that plot no.183 was the ownership of the *Gaon Sabha*. It is reasoned then that so far as evidence of DW-1, Tufani is concerned, his cross-examination shows that plots nos.275 and 276, were his old numbers, that were taken away during consolidation and in lieu thereof, he has got a field in plot no.185, as part of his *chak*. The Trial Court has then noted that DW-2, Parasnath Rai, has acknowledged in his cross-examination that plot no.184 was in the ownership of the *Gaon Sabha*. The Trial Court has remarked that it appears that the *Gaon Sabha* is the title-holder to the suit property, but the plaintiffs have not proved that it is *Gaon Sabha* land.

20. It is also said by the Trial Court that once the *patta* were granted for *abadi* purposes, there is no sense about cultivating that land. The Trial Court has also looked into Ex. A-1 and concluded therefrom that plot no.185 is recorded in the defendants' holding, whereas plot no.184 has been left as naveen *parti*. The Trial Court has remarked that it appears that close to the suit property, the defendants had their *parti*, wherein a Well exists. The Trial Court has gone on to observe that from a perusal of Ex. A-3, it appears that plot no.183, wherein the plaintiffs claim that their house stands, is recorded as grove. This shows, according to the Trial Court, that the plaintiffs do not have any old house close by to the suit property. In the opinion of the Trial Court, it is, therefore, difficult to believe that the plaintiffs have a house abutting the suit property, which led them to take the suit property on *patta* from the *Gaon Sabha*. The Trial Court has found PW-1, Bator to be contradicting himself, inasmuch as he says that plot no.184 is located to the east of his house, whereas in the plaint it is shown to be located in the north of it. The Trial Court has inferred that this witness's testimony being at variance with his pleadings, no faith can be reposed in what he says.

21. The Trial Court has, *parti*cularly, recorded a finding that since there is no approval of the *patta* by the Sub-Divisional Officer, which is essential to imbue it with life, the *patta* cannot be held valid. The Trial Court has answered this issue in the negative in terms that the plaintiffs have neither been able to prove their title or possession, *vis-a-vis* the suit property. On these findings, the Trial Court proceeded to dismiss the suit with costs.

The findings of the Lower Appellate Court

22. The Lower Appellate Court in reversing the Trial Court has remarked that while answering issue no.2, the Trial Court has held that the suit property is plot no.184. The defendants have not filed any cross-objections. It is further said by the Lower Appellate Court that the defendant has admitted during his cross-examination that the suit property is located in plot no.184. The Lower Appellate Court has proceeded to hold that it has, thus, become clear that the suit property is plot no.184 alone. The Lower Appellate Court has also remarked that it has figured in the defendant's evidence that plot no.184 has been carved out, out of the defendants' plots nos.275 and 276 and that he has been granted valuation of this land while adjusting his holdings, consolidated into *chak* no.185. The Lower Appellate Court has held that these circumstances prove that the defendant has no concern so far as the suit property goes. The Lower Appellate Court has emphasized that the defendants having acknowledged in their dock evidence that during consolidation operations this adjustment was made, where they received the value of plot no.184 elsewhere, puts an end to the matter, *vis-a-vis* the defendants' right to the suit property. The Lower Appellate Court has also held that this adjustment having been brought about during consolidation operations, the bar under Section 49 of the U.P. Consolidation of Holdings Act applies.

23. The Lower Appellate Court has also noticed that in the defendants' evidence, it has figured that the suit property belongs to the *Gaon Sabha*. It is admitted by the defendants that the suit property was reserved for the village *abadi*. The Lower Appellate Court has deduced that if this fact is correct that the suit property is under the management of the *Gaon Sabha*, the *Gaon Sabha* is entitled to transfer the same through a *patta*. The Lower Appellate Court has taken note of the fact that the plaintiffs have testified on oath that the *Gaon Sabha* has granted *patta*, bearing paper nos.10-C and 11-C in their favour. The plaintiffs have filed on record a certified copy of the proceedings of the *Gaon Sabha*, that carry a resolution to grant them land on *patta*. The Lower Appellate Court has reasoned that the defendants' plea that the *patta* are forged is bereft of any circumstances, pointed out by the defendants to show that forgery. The Lower Appellate Court has, therefore, held title in favour of the plaintiffs, based on the *patta*, numbering two.

24. The Lower Appellate Court has not rested the matter there. It has been remarked that the Trial Court has said that the plaintiffs have not proved the *patta* and the resolution of the *Gaon Sabha* and, therefore, these documents do not lend any support to the plaintiffs' claim about title. The Lower Appellate Court about this part of the Trial Court's findings says that it is based on an error. The reason to conclude to that effect is that certified copies of these documents that are public documents, do no require formal proof. They are read in evidence as public documents. The Lower Appellate Court has delved further into the matter. It has been noted that there is no evidence on record to show that the *patta* on the basis of which the plaintiffs' claim have been cancelled by any competent Authority. It has been recorded by the Lower Appellate Court that the defendants do not say that they have filed any application before the Collector or any other revenue Authority, seeking cancellation of the two *patta*. The Lower Appellate Court has said that cancellation of a *patta* is a matter exclusively in the

domain of the Assistant Collector, First Class, under Section 198 of the U.P. Z.A. & L.R. Act. It is not in the jurisdiction of any other Authority to cancel a *patta*, already granted.

25. The Lower Appellate Court has held further that a *patta*, if not cancelled, is a valid title document in favour of the allottee. The Lower Appellate Court has held the plaintiffs to be in physical possession. It has been held also that even if the plaintiffs be held not in possession, they are entitled to relief because the defendants also have no possession over plot no.184. This crucial finding about possession is recorded by the Lower Appellate Court, in the following words:

"Plaintiffs exercise physical possession over the suit property since the date of the *patta*s. It is stated by the plaintiff on oath that he has his use over the suit property. On the contrary it is clarified by the defendant that he has all his use over 185. In view of these circumstances, the plaintiff is the owner in possession. Even if it is taken for granted that the plaintiff has no possession, then also plaintiff is entitled to relief because defendant has also no possession over 184."

26. Heard Mr. M.C. Tiwari, learned Counsel for the defendants (appellants) and Mr. Ramesh Singh Kushwaha, learned Counsel appearing on behalf of the plaintiffs (respondents).

27. At this stage, it is of utmost importance to point out that this Court while hearing the matter on 28th January, 2020, asked the learned Counsel appearing for the defendants about their right to resist the plaintiffs' claim, since it appears that the way the evidence figures and findings of fact by the Lower Appellate Court go, the defendants neither hold title to or possession of plot no.184. Mr. M.C. Tiwari, learned Counsel for the defendants very fairly conceded to the position that the defendants neither hold title to or possession of plot no.184, but submitted on an alternate foundation for his right to resist the plaintiffs' claim, that would be considered during the course of this judgment. Nevertheless, this Court recorded an order, which discloses the defendants' stand at the hearing before this Court, coming from Mr. M.C. Tiwari. The relevant part of the order dated 28.01.2020 is extracted below:

"Learned counsel for the appellant, Sri M.C. Tiwari has taken a stand that he has neither title or possession of plot no. 184 but at the same time, he submits that the plaintiff-respondent has not been granted *patta* over plot no. 184. He has trespassed into that land and constructed a thatched house. The defendant-appellant objects to the plaintiff-respondent raising constructions or a boundary wall over plot no. 184. The appellant does so in his right as a member of the *Gaon Sabha*."

28. Learned Counsel for the defendants, in accordance with his stand above extracted, has advanced his submissions. Mr. Tiwari has urged that even if the Lower Appellate Court, which is the last Court of fact, has not found for the defendants either in title or in possession, *vis-a-vis* the suit property, they are still entitled to resist the plaintiffs' claim. This submission proceeds on the basis that every member of the *Gaon Sabha* has a right to protect the interest of the *Gaon Sabha*, *vis-a-vis* its property, provided the same is not collusive or fraudulent. About this proxy

locus of every member of the *Gaon Sabha*, to act on its behalf and protect its interest, distinct from the Corporate Body's right to protect its own interest in the manner prescribed by law through a duly authorized agent, learned Counsel for the defendants draws inspiration from a decision of this Court in **Palakdhari vs. Deputy Director of Consolidation, Gorakhpur and others, 1992 AWC 228 All.** He has called attention of the Court to paragraph 9 of the report in **Palakdhari** *(supra)*, where it is held:

"9. In other words, Section 11-C of the Act is couched in a language having very wide sweep and it is to the effect that even though no objection has been filed on behalf of the *Gaon Sabha* at the proper stage, it is for the consolidation authorities to decide as to whether the right of the *Gaon Sabha* is involved even if no objection was filed by it and the land shall be directed to vest in *Gaon Sabha*. By implication the 'mens' or sententia legis, appears to be that any other person can file objection to protect the interest of the *Gaon Sabha*, provided the same is not collusive or fraudulent or to defeat its interest."

29. Mr. Tiwari says that it is in keeping with the spirit of Section 11-C of the U.P. Consolidation of Holdings Act (for short, the Act) that every member of the *Gaon Sabha* has *locus* standi to bring appropriate proceedings or defend them before any Court or Authority, where property interests of the *Gaon Sabha* are in peril or likely to be jeopardized. He exposits his submissions about the *locus* standi of every member of a *Gaon Sabha* by saying that the provisions of Section 11-C of the Act are not to be read in a pedantic manner, confining the sweep of an extended right in favour of every member of the *Gaon Sabha* to protect its interest by limiting that right to proceedings, arising out of objections under Section 9-A of the Act, alone. He submits that the provisions of Section 11-C are to be read in a purposive manner, bearing in mind the object of the Rule there and the mischief that is sought to be curtailed by it. Read that way, according to Mr. Tiwari, any member of the *Gaon Sabha* can always act to defend or pursue any proceeding in Court, where interests of the *Gaon Sabha* are likely to be jeopardized, or are in imminent peril.

30. According to learned Counsel for the defendants, the right is available, irrespective of the nature of proceeding or the forum. He argues, therefore, that since he has a right to defend the interests of the *Gaon Sabha* in his capacity as a member thereof, it does not matter that on concluded findings of fact, the defendants do not hold title to the suit property or a possessory title therein. He submits that he has a *locus* to show that the plaintiffs do not hold valid title to the suit property, passed on to them through the *patta*, executed in accordance with the provisions of the U.P. Z.A. & L.R. Act (for short, the Z.A. Act). He further submits that the plaintiffs not being lawful title holders of the suit property, which is a *Gaon Sabha* property, the defendants have a right to prevent the plaintiffs from consolidating their encroachment by erecting a boundary wall around it, or by raising further constructions thereon. To this end, the defendants are entitled to show to this Court that the plaintiffs have not been granted the *patta* in accordance with the provisions of the Z.A. Act. It is submitted that the Trial Court specifically held the *patta* to be invalid, inter alia, on the ground that the Sub-Divisional Officer had not

granted permission, envisaged under the Z.A. Act, which alone infuses life into a *patta* granted by the Land Management Committee. He emphatically points out that the learned District Judge has not recorded any finding about non-establishment by the plaintiffs of this essential condition, relating to approval of their *patta* by the Sub-Divisional Officer. The learned District Judge, in fact, has not set aside that finding by any reasons assigned, which the Trial Court recorded in relation to non-approval by the Sub-Divisional Officer. The consequence, according to learned Counsel for the defendants, is that the decree passed by the Lower Appellate Court is vitiated by a manifest error of law, inasmuch as there is no reversal of that finding by the Trial Court, about execution of a *patta* contrary to the provisions of the Z.A. Act. He adds to this submission of his by saying that the absence of permission by the Sub-Divisional Officer to the resolution of the Land Management Committee to grant the twin *patta* in favour of the plaintiffs, is a matter that goes to root of the plaintiffs' title.

31. Learned Counsel appearing for the plaintiffs, Mr. Ramesh Singh Kushwaha has refuted the submissions advanced on behalf of the defendants. Mr. Kushwaha urges that the substantial question of law, formulated at the time of admission of this Appeal to hearing, is not at all involved. He submits that this question about the validity of the *patta* and a fortiori the validity of the appellate judgment and decree, is not open to challenge at all by the defendants, who are utter strangers to the suit property. They have no kind of right, interest or even a privity in or to the suit property, entitling them to question the plaintiffs' claim. Dilating on his submissions, learned Counsel for the plaintiffs submits that admittedly the defendants do not claim title to or possession over the suit property. They found their right to object on their status as members of the *Gaon Sabha*. He submits that the proposition is too well settled to brook doubt that individual members of the *Gaon Sabha*, cannot take up cudgels on its behalf, unless authorized by that Body Corporate in the manner prescribed. Reliance is placed in support of the said contention on a decision of this Court in **Sita Ram vs. Deputy Director of Consolidation and others, 1981 SCC OnLine All 797**. The question in the said case was whether a private person, a member of the *Gaon Sabha*, could file objections under Section 9-A(2) of the Act, on behalf of the *Gaon Sabha*, seeking to expunge the name of a person recorded as a bhumidhar, alleging some illegality about it, without a resolution passed by the *Gaon Sabha* in favour of that private person under Section 128 of the *Gaon Sabha* Manual. He has drawn the attention of this Court to paragraphs 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27 of the report in **Sita Ram** *(supra)*:

"10. It is, thus, to be seen whether the objection filed by the opposite party No. 3 Sheo Prasad on behalf of the *Gaon Sabha* was a valid and competent objection under section 9A(2) of the Act and the name of the petitioner, who was recorded as Bhumidhar in the basic year Khatauni could be expunged. In this connection reference to para 128 of the *Gaon Sabha* Manual would be relevant as it prescribes the manner for the commencement of any suit or proceedings or for filing defence therein. In *Gram Samaj v. Deputy Director of Consolidation*, (1969 Rev Dec 356) Hon'ble D.S. Mathur, J. (as he then was) considering the aforesaid provision observed that:

"This paragraph (128 of the *Gaon Sabha* Manual) having been framed under the rule making power conferred on the State Government shall have the force of law."

11. Further considering the question whether the said provision is mandatory or merely directory, it was held in the aforesaid case that:

"When paragraph 128 is complete, reasonable and equitable, and lays down how the Land Management Committee can sue or defend, it must be held to be mandatory."

12. Regarding action to be taken on behalf of the *Gaon Sabha* in emergent matters, the Hon'ble Judge observed that--

"Paragraph 128 is also a complete provision. The State realized that occasions may arise where it may become necessary for the Chairman to take action before the Land Management Committee can meet to discuss the matter. Consequently it was provided in paragraph 128 that in urgent cases the Chairman can take action on his own and seek ratification of the Land Management Committee by including it in the agenda of the next ensuing meeting. The underlying purpose evidently is that eventually the decision of the Land Management Committee shall prevail. If the Land Management Committee does not approve of the action taken, such action shall become ineffective and a suit, if already instituted, shall fail."

13. The Board of Revenue also in two decisions, *Kamla Devi v. Gaon Sabha*, 1970 Rev Dec 195 and *Sardar Khan v. Gaon Sabha*, 1975 Rev Dec 287 held that the provisions of para 128 of the *Gaon Sabha* Manual are mandatory and any act done in contravention of the aforesaid provision would be unauthorised and illegal.

14. The learned counsel for the *Gaon Sabha* Sri K.B. Garg, however, referred to a single Judge decision of this Court, *Rameshwar Sahai v. Dy. Director of Consolidation, U.P., Lucknow*, 1973 All WR (HC) 238, wherein Hon'ble R.B. Misra, J. (as he then was) considered the question whether an objection under section 9 of the U.P. Consolidation of Holdings Act could be filed by an individual on behalf of the *Gaon Sabha* or not and observed that:

"It was next contended that the contesting respondents were not interested persons within the meaning of section 9 of the U.P. Consolidation of Holding Act and so the objection filed by them could not be taken to be an objection under section 9 of the U.P. Consolidation of Holdings Act. In my opinion the phrase "interested person' is wide enough to include the contesting respondent as the property in dispute being the property of the *Gaon Sabha*, every adult member of the village was entitled to raise objection in respect of the *Gaon Sabha* property especially when the contesting respondents came with the allegations that the *Gaon Sabha* had colluded with the petitioner in the allotment of land or the creation of the lease in their favour."

15. Sri K.B. Garg argued that since in the present case lease in respect of the land in question was granted by the *Gaon Sabha* to the petitioner, who is in military service at the instance of the Collector of the district, and, therefore, the *Gaon Sabha* took no interest in filing the objection and the objection filed by the opposite party No. 3 who is an adult resident of the village, would be a valid objection under section 9A(2) of the Act on behalf of the *Gaon Sabha* and thus the Deputy Director of Consolidation has not erred in ordering the land in dispute to be

recorded in the name of the *Gaon Sabha*, which is a tank land.

16. Sri K.B. Garg in support of his argument, further referred to an unreported decision in Civil Misc. Writ No. 4642 of 1969 *Bhabhuti Singh v. D.D.C.*, decided on 29-3-1972 wherein Hon'ble R.B. Misra, J. (as he then was) had held that:

"The expression "any person interested' in section 9(2) of the U.P. Consolidation of Holdings Act is wide enough to include the petitioner who had in para 7 of his objection (filed as Annexure A to the petition) stated that the continuance of the name of the contesting respondents causes injustice and prejudice to all the residents of the village and the *Gaon Sabha*. The expression "all the residents of the village' certainly included the petitioners."

17. The petitioner in the said case had alleged that he was also using the tank and the pathway and so was the case with other residents of the village as well.

18. The learned counsel for the petitioner Sri R.N. Singh, in reply, stated that against the aforesaid decision Special Appeal No. 247 of 1972, *Ambika Singh v. Bhibhuti Singh,* was filed and decided on 11-1-1973. The Division Bench held that:--

"Under rule 110-A of the U.P. Zamindari Abolition Rules any member of the Committee authorised by the Chairman of the Land Management Committee in writing, or in the absence of such authorisation, any member authorised by the Committee under a resolution to this effect, is entitled to sign any correspondence, contract or document, and to do all other things necessary for the conduct of suits and proceedings. Under rule 128 of the Gaon Samaj Manual the conduct of Gaon Samaj Litigation shall not depend upon the individual discretion of the Chairman of the Land Management Committee, but shall be a matter of the resolution of the Land Management Committee as a whole. In urgent cases, however, the chairman can take action on his own and seek ratification of the Land Management Committee afterwards. This rule when read with rule 129 make it clear that only a member of the Land Management Committee can be authorised either by the Chairman or by a resolution of the Committee.

19. Thus it is clear that the Land Management Committee can authorise a member under rule 110-A of the Zamindari Abolition Rules or under rule 128 of the Gaon Samaj Manual. In urgent cases the Land Management Committee can afterwards ratify the action of the chairman. Thus the action of Bhabhuti Singh in filing the objection was justified if he was a member duly authorised by the Land Management Committee or the Chairman. The Settlement Consolidation had, in our opinion, rightly remanded the case for determination of this question.

20. We, therefore, dismiss the appeal subject to the observation that in case it is found that Bhabhuti Singh was not a member duly authorised by the Land Management Committee his objection would not be maintainable on the ground that he was himself an interested person under section 9(2) of the Consolidation of Holdings Act"

21. Thus the view taken by the Hon'ble Single Judge in *Rameshwar Sahai* (1973 All WR (HC) 238) *(supra)* and in *Bhabhuti Singh (supra)* stands overruled by the Division Bench in the aforesaid Special Appeal of *Ambika Singh (supra)* and I am also of the same view as taken by the Division Bench, quoted above.

22. It is well settled that no person can plead for another without being

authorised by him in that behalf. It is a basic principle of law that a person cannot initiate a legal proceedings on behalf of or for the benefit of another without any authority from that other. The provisions already referred to above provide the procedure and the manner in which suits or proceedings can be filed and conducted on behalf of the *Gaon Sabha* and the same has got to be done in that *parti*cular manner.

23. In *Nazir Ahmad v. King Emperor,* AIR 1936 PC 253 (2) at p. 257 the Privy Council held that;

"Where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden."

24. The Supreme Court in State of *Gujarat v. Shanti Lal,* (1969) 1 SCC 509: AIR 1969 SC 634 at p. 654 observed that

"It is a settled rule of interpretation of statues that when power is given under a statute to do a certain thing in a certain way, the thing must be done in that way or not at all."

25. The same view was taken by Supreme Court in another decision in *Ramchandra v. Govind,* (1975) 1 SCC 559: AIR 1975 SC 915. The said cardinal principle was enunciated more than a century ago in *Taylor v. Taylor,* (1875) 1 Ch. D. 426 and it has been consistently followed. It is thus well settled that where either under the Act or in the Rules, a procedure for the performance of a *parti*cular act has been prescribed, the same has got to be done in that manner or not at all.

26. The *Gaon Sabha* is a body corporate and the Land Management Committee is an executive body of the *Gaon Sabha* charged with the functions to supervise and protect the property vested in the *Gaon Sabha* and it has to function in the manner sanctioned under law. The provisions contained in para 128 of the *Gaon Sabha* Manual and Rule 110A of the U.P. Zamindari Abolition and Land Reforms Rules prescribed the manner in which the litigation is to be conducted by and on behalf of the *Gaon Sabha*. These provisions, which are mandatory, would govern the litigation to be conducted on behalf of the *Gaon Sabha* in all proceedings under the provisions of the U.P. Consolidation of Holdings Act.

27. Thus, in view of the above I am of the opinion that the objection filed by opposite party No. 3 Sheo Prasad cannot be treated to be a valid objection on behalf of the *Gaon Sabha* under section 9A(2) of the U.P. Consolidation of Holdings Act, on the ground that he was himself an interested person under section 9A(2) of the Act, as admittedly the Land Management Committee of the *Gaon Sabha* had not passed any resolution taking decision to file objection, appeal and revision nor opposite party No. 3 was authorised to file those on behalf of the *Gaon Sabha*. It is also not disputed that the action of opposite party No. 3, in filing objections, appeal and revision on behalf of the *Gaon Sabha,* was not ratified by the Land Management Committee in its meetings. Thus, the objections, appeal and revision filed by opposite party No. 3 Sheo Prasad on behalf of the *Gaon Sabha* were wholly incompetent and opposite *parti*es Nos. 1 and 2 acted illegally and without jurisdiction in passing the impugned orders."

32. It is further urged by the learned Counsel for the plaintiffs that allotment of land in the plaintiffs' favour has to be construed according to the apparent tenor of the Land Management Committee's Resolution and the *patta* executed in their

favour, of which certified copies have been brought on record. He urges that the *patta* being granted by the Land Management Committee of the *Gaon Sabha* in exercise of their statutory powers under Section 157 of the Z.A. Act, read with Rule 115-L of the U.P. Z.A. & L.R. Rules, the presumption as to regularity relating to official acts attaches. If at all the defendants had any *locus*, they would have brought on record evidence to show that there were some essential conditions unfulfilled vitiating the *patta*, like non-grant of permission by the Sub-Divisional Officer, which they allege. He also submits that the defendants do not say that they had even applied for cancellation of the *patta*, granted in favour of the plaintiffs, before the Authority competent in the matter. The *patta* would, therefore, be presumed to be valid unless shown by the defendants by evidence to be initially invalid or subsequently cancelled. No such evidence has been led on behalf of the defendants. Again, learned Counsel for the plaintiffs submits that this question about non-discharge of burden is subject to the big hurdle of a valid *locus* standi that the defendants have not been able to cross. In support of this limb of his submission about the binding effect of an order of allotment passed under the Z.A. Act granting *patta* unless cancelled by the competent Authority, learned Counsel for the plaintiffs has placed reliance on a decision of this Court in **Hira Teli vs. Shripati Rai and others, 1981 SCC OnLine All 512.** He has called attention of this Court to the report in **Hira Teli** *(supra)*, where it is held:

"20. It is not in dispute that the order of allotment in favour of the plaintiff made on March 19, 1971 has not been cancelled by the appropriate authority, namely, the Assistant Collector in charge of the Sub-Division. The rights which the plaintiff acquired in the land in dispute under this allotment order had to be recognised. The lower appellate Court was in error in taking the view that the order was invalid for it had been made in favour of a person who was not a resident of the circle of the *Gaon Sabha* concerned. The plaintiff was entitled to a decree for possession over the suit land an account of the order of allotment in his favour dated March 19, 1971. The Courts below were in error in refusing that relief to him. Their decree cannot be upheld. ....."

33. Mr. Kushwaha, in support of that limb of his stand where he says that the substantial question of law formulated is not at all involved, submits that the Lower Appellate Court has clearly found for the plaintiffs on double count - one about their title to the suit property and the other about their possession over it. The Lower Appellate Court has clearly recorded a finding of fact that the plaintiffs are in possession of the suit property. At the same time, learned Counsel for the plaintiffs emphasized that the defendants have neither been found to hold title or possession. Thus, assuming for the sake of argument, that there is some flaw in the passage of title to the plaintiffs, on the basis of their *patta* involved, because of the alleged non-approval by the Sub-Divisional Officer, the plaintiffs are still entitled to a decree protecting their possession against third *parti*es and strangers, like the defendants, based on their possession alone. Learned Counsel for the plaintiffs, therefore, strongly urges that on account of their possession being found established by the last Court of fact with the defendants not being found either to hold title or possession, the substantial question of law framed is not involved or required to be answered.

34. It is true, going by the findings of the Lower Appellate Court on facts and the concession made before this Court by Mr. Tiwari, that the defendants do not claim title to or possession of plot no.184, that is to say, the suit property. Whatever interest they had in the suit property was taken away during consolidation proceedings with adjustment of their rights made by the Consolidation Authorities, elsewhere. The stand of Mr. Tiwari recorded by this Court in the order dated 28.01.2020, where he says that the defendants seek to prevent the plaintiffs from raising constructions or a boundary wall over the suit property in their rights as members of the *Gaon Sabha* lends support to the findings recorded by the Lower Appellate Court that the defendants have neither title or possession over the suit property. So far as the plaintiffs are concerned, the Lower Appellate Court has recorded a categorical finding that the plaintiffs are in physical possession of the suit property since the date of the *patta*, whereas the defendants are in possession and use of plot no.185. This categorical finding is enough to support an action to protect possession based on settled possession which is regarded in law as good title, or what is sometimes called possessory title, against every other person, except the true owner. A person in settled possession of property, even a trespasser, is entitled to protect his possession against intrusion by any third party, but the true owner or one who holds a real, higher or better title.

35. What the defendants seek to do is to resist the plaintiffs' claim to injunct them from interfering with the plaintiffs' possession by pleading a *jus tertii*. The *jus tertii* they claim is of the *Gaon Sabha* which they seek to assert on its behalf. In order to substantiate this kind of a *jus tertii*, the defendants have fallen back on the provisions of Section 11-C of the Act. Section 11-C reads:

"11C. 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."

36. A perusal of the aforesaid provision shows that Section 11-C of the Act has no relevance, or the slightest application, in the context of a private dispute between two *parti*es, suited before a Court of civil jurisdiction. In a case where one party seeks to protect possession on the ground of its long continuance against another, who has no title or possession by asking the Court to injunct the intruder, Section 11-C appears to be absolutely irrelevant. Section 11-C is a special provision that operates in a case where consolidation proceedings have been notified under the Act and a Consolidation Authority is siezed of title objections under Section 9-A. The purpose of Section 11-C appears to be to protect *Gaon Sabha* land or State land from being declared in title proceedings under the Act, in favour of another. The provision there has been engrafted because a decision about title, recorded by Consolidation Authorities has finality attached to it under Section 49. State or *Gaon Sabha* land or the land of a Local Body or Authority may not be lost due to inaction on their part, Section 11-C

obliges the Consolidation Authorities to ensure that even though no objection, appeal or revision has been filed in title proceedings under the Act by the Government, *Gaon Sabha*, Local Body or Authority, their lands are restored to their khata. It is in the context of the aforesaid provision that this Court in **Palakdhari** *(supra)* acknowledged a *locus* standi in a private person to represent and protect the *Gaon Sabha*'s interest. The *locus* was extended because the Authorities deciding title proceedings are obliged by the Act to safeguard the interest of the *Gaon Sabha* and the other named entities in Section 11-C.

37. The special principles as to *locus* of a private person, to act on behalf of the *Gaon Sabha*, in the context of title proceedings under Section 9-A of the Act, founded on the provisions of Section 11-C thereof, cannot be extended to plead a *jus tertii* in the *Gaon Sabha* by a private person, who is party to a suit that seeks to restrain trespass by one who is in settled possession of an immovable property/ land.

38. The law generally about the right of a person in settled possession of an immovable property to protect it against trespass by another, is well settled and oft restated by high judicial Authority. In this connection, a relatively recent decision of the Supreme Court in Ram Daan (dead) through **LRs vs. Urban Improvement Trust, (2014) 8 SCC 902** may be referred to with immense profit. In **Ram Daan** *(supra)*, their Lordships have held in paragraphs 11 and 12 of the report thus:

"11. It is settled position of law laid down by the Privy Council in *Perry v. Clissold* [1907 AC 73 (PC)]: (AC p. 79)

"It cannot be disputed that a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world but the rightful owner. And if the rightful owner does not come forward and assert his title by the process of law within the period prescribed by the provisions of the Statute of Limitations applicable to the case, his right is forever extinguished, and the possessory owner acquires an absolute title."

The above statement was quoted with the approval by this Court in Nair Service Society Ltd. v. K.C. Alexander [AIR 1968 SC 1165]. Their Lordships at para 22 emphatically stated: (AIR p. 1175)

"22. The cases of the Judicial Committee are not binding on us but we approve of the dictum in *Perry v. Clissold* [1907 AC 73 (PC)]."

12. The question, therefore, is that in view of the concurrent finding recorded by all the three courts below that the appellant has been in possession of the property (at least from the year 1959) whether the injunction as prayed for by the appellant can be denied? As can be seen from the judgment [1907 AC 73 (PC)] of the Privy Council referred to supra, a person such as the appellant in possession of land has a perfectly good title against the entire world except the rightful owner. However, the rightful owner must assert his title by the process of law within the period prescribed by the statutes of limitation applicable to the case."

39. Here, what is not in dispute is that the defendants do not hold title or possession. So far as the plaintiffs are concerned, they have been held to be in possession by the Lower Appellate Court. Even if their possession is traceable to a defective title based on the *patta* owing to its non-approval by the Sub-Divisional Officer as claimed, though this Court does

not say so that it is without approval, their possession is one held under colour of title on the basis of a *Gaon Sabha patta*. They are not rank trespassers. Even if they were rank trespassers but in settled possession, the defendants who have neither title or possession, have no business to go about interfering with the plaintiffs' possession over the suit property by asking them not to construct a boundary wall around it or raise any constructions. The Lower Appellate Court, thus, on the ground of possession traceable to the *patta* found for the plaintiffs, if not on the basis of title, has rightly decreed the Suit against the defendants. The substantial question of law formulated at the time of admission of this Appeal is really not involved. The defendants have not, during the course of hearing, brought to the notice of the Court any other substantial question of law requiring formulation. This Court too has not noticed any other substantial question of law that may be required to be formulated and the *parti*es heard on it. After hearing the plaintiffs, who are respondents to this Appeal, at length, this Court finds that this Appeal deserves to be determined under sub-Section (5) of Section 100 CPC for the reasons hereinbefore elaborately indicated.

40. This Appeal has remained pending for the past 32 years and during this time, the plaintiffs have suffered a stay of operation of the decree passed in their favour by the Lower Appellate Court. During this long period of time, the younger of the two plaintiffs has passed away. Now, the plaintiffs have shown that no substantial question of law is really involved. They would, therefore, be entitled to their costs from the defendants.

41. In the result, this Appeal fails and is **dismissed.** The plaintiffs shall be entitled to receive in costs a sum of Rs.10,000/- from the defendants.

42. Let the Lower Court Record be sent down at once, along with a copy of this judgment to the Trial Court.

(2020)09ILR A284

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: LUCKNOW 11.02.2020

BEFORE

THE HON'BLE RAKESH SRIVASTAVA, J.

Misc Single No. 1981 of 2015

Sheetla Prasad ...Petitioner

Versus

D.J., Gonda & Ors. ...Respondents

Counsel for the Petitioner:
Arvind Pratap Singh

Counsel for the Respondents:
U.N. Misra, Indrajeet Shukla

Suit for cancellation of sale deed and permanent injunction against Petitioner-Application for adjournment rejected-opportunity to cross examine PW-2 closed-four times opportunities granted—twice adjournment granted with cost-last opportunity given-again adjournment sought-rightly rejected.

Writ Petition dismissed. (E-9)

Cases referred:-

1. Bashir Ahmed Vs Mehmood Hussain Shah, (1995) 3 SCC 529

2. Shiv Cotex Vs Tirgun Auto Plast (P) Ltd., (2011) 9 SCC 678

3.B.V. Smitha Rani Vs M.K. Girish, (2009) 17 SCC 660

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

1. The undisputed facts of the case are: Smt Patiraji, the third respondent filed

a Regular Suit No. 117 of 1982, Patiraji versus Sheetla Prasad in the Court of Additional Civil Judge (Jr. Div), Court No. 8, Gonda for cancellation of sale deed and for permanent injunction against the petitioner restraining him from interfering with the peaceful possession of the third respondent over the property in dispute. In the said suit the petitioner filed his written statement. In support of her case, the third respondent examined herself as PW 1. 06.02.2015 was the date fixed for cross examination of the third respondent but instead of cross examining her, the counsel for the petitioner moved an application for adjournment. The application is extracted below:-

"न्यायालय श्रीमान् अष्टम सि0 जज महोदय, गोण्डा
पतिराजी
सा0वा0सं0–177/82,
प्रति पेशी 6/2/15
शीतला प्रसाद व अन्य

प्रार्थना पत्र वास्ते मौका

श्रीमान् जी,

विनम्र निवेदन है कि उक्त मुकदमें में प्रतिवादीगण पक्ष द्वारा माननीय उच्च न्यायालय शाखा लखनऊ में रिट प्रस्तुत कर रखा है। जिसमें अधीनस्थ न्यायालय की कार्यवाही स्थगित करने हेतु स्थगन प्रार्थना पत्र प्रस्तुत कर रखा है। परन्तु माननीय उच्च न्यायालय में हड़ताल पिछले एक माह पूर्व से हड़ताल चल रही है। जिस कारण सुनवाई नहीं हो पा रही है। न्यायहित में उक्त मुकदमें में आज मौका चाहता है।

अतः निवेदन है कि न्यायहित में मौका प्रदान करें।

प्रार्थी,
दिनांकः 06–02–2015
ह0अ0
(शीतला प्रसाद आदि)

द्वारा अधिवक्ता"

2. The trial Court rejected the application for adjournment, closed the opportunity of the petitioner to cross examine the third respondent and fixed a date for cross examination of PW 2. The trial Court passed the following order:-

"Case called out. Learned counsel from plaintiff side present no one from def. side file be produced after lunch.

File produced after lunch case called. Learned counsel from plaintiff side is present. an adjournment has been moved from the defendant side at 3:00 PM on the ground that relating to the present suit a writ petition for staying the proceeding of lower court is pending before Hon'ble High Court on which due to strike no hearing could have been made & hence another date be fixed for cross examination of P.W.1 and for adjourning today's proceedings the O.P. has endorsed on the applicant as strongly opposed.

Heard & perused the records from the perusal of records. It is clears that on 22.05.2014 the def. application for staying the proceedings of this Court was rejected by the Court & there by the defendant opp. for cross examining P.W.1. Automatically closed/ ended and there by defendant moved a recall application 258C2 which was allowed by this Court giving him an opportunity to cross examine P.W.1. Thereafter two days have been passed and the defendant in both there date respectively 16.12.14 & 01.01.15 gave the adjournment application which were allowed by court on Cost. On 01.01.2015 the Court has given last opp. to cross examine P.W.1 today again the defendant after lunch has moved adjournment applicant. The def. has till date not complied with order for payment of cost also this shows that def. is interested in delaying the matter keeping into account

the aforesaid facts & circumstances, the adjournment application is rejected & def. opportunity to cross examine P.W.1 is closed file is fixed on 18.02.15 for cross examination of P.W.2."

3. The revision bearing Civil Revision No. 48 of 2015, preferred by the petitioner against the said order has been dismissed by the District Judge by an order dated 06.02.2015. Both the said orders are under challenge in the present petition.

4. Sri Arvind Pratap Singh, learned counsel for the petitioner has submitted that in the interest of justice, one last opportunity be provided to the petitioner to cross examine PW 1. He submits that in case such an opportunity is not given, the petitioner would suffer irreparable loss. In support of his case the learned counsel for the petitioner has placed reliance upon the case of *Bashir Ahmed v. Mehmood Hussain Shah, (1995) 3 SCC 529.*

5. Sri Faiz Alam Khan holding brief of Sri Inderjeet Shukla, learned counsel for the third respondent, on the other hand has supported the order impugned and has submitted that the petitioner was adopting dilatory tactics and as such the trial Court rightly closed the opportunity of cross examination.

6. After hearing the learned counsel for the parties and on perusal of record this Court is convinced that the trial Court has committed no wrong in rejecting the application for adjournment and in closing the opportunity of the petitioner to cross examine the third respondent.

7. As is evident from the impugned order, 22.05.2014 was the date fixed for cross examination of the third respondent. On the said date, instead of cross examining the third respondent an application for staying the proceedings of the suit was moved by the petitioner. The said application was rejected by the trial Court and the opportunity of the petitioner to cross examine the third respondent was closed. The petitioner, thereafter, moved an application for recall of the order dated 22.05.2014. The said application was allowed and the petitioner was given one more opportunity to cross examine the third respondent. On the next two dates i.e. 16.12.2014 and 01.01.2015 the petitioner's counsel did not cross examine the third respondent and on both the dates sought adjournment which was allowed on payment of cost. On 01.01.2015 the matter was adjourned and the petitioner was given a last opportunity to cross examine the third respondent on 06.02.2015. The petitioner, instead of availing the said opportunity, again moved an application for adjournment.

8. A perusal of the application for adjournment would show that absolutely vague averments have been made therein. The number of the writ petition alleged to have been filed by the petitioner, the date fixed in the said writ petition, the order against which the said writ petition is alleged to have been filed were all conspicuously missing. The petitioner was unable to show any cause, what to say, sufficient cause for adjournment. The judgment of *Bashir Ahmed* (supra) on which reliance has been placed by the counsel for the petitioner is of no avail to the petitioner as in the said case, a day earlier to the date fixed for cross examination of the plaintiff witness, the counsel for the defendant had taken ill but the court refused to adjourn the matter. In the said circumstances, the Apex Court set

aside the said order on the ground that it was not possible for a lawyer engaged a day earlier to go through the record and cross examine the defendant.

9. On the contrary, in *Shiv Cotex v. Tirgun Auto Plast (P) Ltd., (2011) 9 SCC 678,* the Apex Court, while deprecating the practice of adjourning the cases at the drop of a hat, has opined as under:-

16. *No litigant has a right to abuse the procedure provided in CPC. Adjournments have grown like cancer corroding the entire body of justice delivery system.* It is true that cap on adjournments to a party during the hearing of the suit provided in the proviso to Order 17 Rule 1 CPC is not mandatory and in a suitable case, on justifiable cause, the court may grant more than three adjournments to a party for its evidence but ordinarily the cap provided in the proviso to Order 17 Rule 1 CPC should be maintained. *When we say "justifiable cause" what we mean to say is, a cause which is not only "sufficient cause" as contemplated in sub-rule (1) of Rule 1 of Order 17 CPC but a cause which makes the request for adjournment by a party during the hearing of the suit beyond three adjournments unavoidable and sort of a compelling necessity like sudden illness of the litigant or the witness or the lawyer; death in the family of any one of them; natural calamity like floods, earthquake, etc. in the area where any of these persons reside; an accident involving the litigant or the witness or the lawyer on way to the court and such like cause.* The list is only illustrative and not exhaustive."

(emphasis supplied)

10. In *B.V. Smitha Rani v. M.K. Girish, (2009) 17 SCC 660,* despite opportunity the counsel for the respondent did not cross examine the appellant and the Family Court closed the opportunity of the respondent in the said case to lead evidence. The High Court remanded the matter and granted one more opportunity to the respondent to cross examine the appellant. The Apex Court set aside the order passed by High Court and held as under:

"6. The premise on which the High Court passed the impugned order, namely, non-grant of adequate opportunity to the respondent to cross-examine the appellant and adduce his evidence is clearly erroneous, because, as mentioned above, after disposal of *Writ Petition No. 1031 of 2006 filed by the respondent, the Family Court fixed the case on three different dates for cross-examination of the appellant, but the respondent did not avail that opportunity. In this view of the matter, the Family Court had rightly closed the evidence of the respondent, heard the arguments and pronounced the judgment and the High Court committed serious error by remitting the matter for giving further opportunity to the respondent to cross-examine the appellant and adduce his evidence."*

(emphasis supplied)

11. In the present case, four times opportunity was afforded to the petitioner to cross examine the third respondent but the petitioner failed to avail the said opportunity. The trial Court was, thus, constrained to close the opportunity of the petitioner to cross examine the third respondent. In the circumstances, it cannot be said that the trail Court has committed any error in refusing to adjourn the matter and closing the opportunity of the petitioner to cross examine PW 1. Likewise, the revisional court has also committed no error in upholding the said order.

12. The petition is devoid of merit and is accordingly dismissed.

(2020)09ILR A288
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 19.04.2018

BEFORE

THE HON'BLE RAKESH SRIVASTAVA, J.

Misc Single No. 2773 of 2014

Tulsi Ram ...Petitioner
Versus
The State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sunil Kumar Singh

Counsel for the Respondents:
C.S.C.

Order of Cancellation dated 07.04.2006 - appeal rejected on 22.02.2007-W.P. filed on 05.05.2014-no satisfactory explanation for inordinate delay.

Writ Petition dismissed. (E-9)

Cases referred: -

1.City and Industrial Development Corpn. Vs Dosu Aardeshir Bhiwandiwala, (2009) 1 SCC 168

2.Chennai Metropolitan Water Supply & Sewerage Board Vs T.T. Murali Babu, (2014) 4 SCC 108

3. State of J&K Vs R.K. Zalpuri, (2015) 15 SCC 602

4.Smt. Urmila Jaiswal Vs St. Of U.P. Thru Secy. & ors., 2013 (4) ALJ 388

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

1. By this petition under Article 226 of the Constitution of India, the petitioner assails the validity of the order dated 07.04.2006 of the Sub Divisional Magistrate, Sadar, Hardoi cancelling the fair price shop agreement of the petitioner and also the order dated 22.02.2007 of the Appellate Authority, whereby the appeal preferred by the petitioner against the cancellation order has been rejected.

2. The petitioner was a licensee of a fair price shop situated in village Lilawal, Tehsil and District Hardoi. By an order dated 22.12.2005 passed by the Sub Divisional Magistrate, the license / agreement of the shop in question was suspended and the petitioner was required to submit his explanation. The petitioner on 31.03.2006 submitted his reply. After taking into account the reply submitted by the petitioner, the Sub Divisional Magistrate, by his order dated 07.04.2006, cancelled the fair price agreement of the petitioner. The appeal preferred by the petitioner against the said order was dismissed by the Appellate Authority vide order dated 22.02.2007. On 14.03.2012 the petitioner moved an application for restoration/recall of the said order, alongwith an application for condonation of delay. The Appellate Authority, by the order dated 12.02.2014, refused to condone the delay and accordingly dismissed the recall application as time barred. Notably, the order dated 12.02.2014 has not been assailed by the petitioner. Only the orders dated 07.04.2006 and 22.02.2007 are under challenge in this writ petition.

3. In their counter affidavit, the respondents have not only supported the orders under challenge, but have also raised a preliminary objection regarding the maintainability of the writ petition on the ground of delay and laches.

4. Heard Shri Sunil Kumar Singh, the learned counsel for the petitioner and the

learned Standing Counsel appearing on behalf of the State-respondents.

5. It is well settled that the power of the High Court to issue an appropriate writ under Article 226 of the Constitution of India is discretionary and the High Court in the exercise of its discretion does not ordinarily assist the tardy and the indolent or the acquiescent and the lethargic. If there is an inordinate delay on the part of the petitioner in filing a writ petition, and such delay is not satisfactorily explained, the High Court may decline to intervene and grant relief in the exercise of its writ jurisdiction.

6. In *City and Industrial Development Corpn. v. Dosu Aardeshir Bhiwandiwala, (2009) 1 SCC 168,* the Apex Court while dwelling upon the jurisdiction under Article 226 of the Constitution, has held that the Court, while exercising its jurisdiction under the said Article, is duty-bound to consider whether:

(a) adjudication of writ petition involves any complex and disputed questions of facts and whether they can be satisfactorily resolved;

(b) the petition reveals all material facts;

(c) the petitioner has any alternative or effective remedy for the resolution of the dispute;

(d) person invoking the jurisdiction is guilty of unexplained delay and laches;

(e) ex facie barred by any laws of limitation;

(f) grant of relief is against public policy or barred by any valid law; and host of other factors.

(emphasis supplied)

7. In *Chennai Metropolitan Water Supply & Sewerage Board v. T.T. Murali Babu, (2014) 4 SCC 108* the Apex Court opined as under:

"16. Thus, the doctrine of delay and laches should not be lightly brushed aside. A writ court is required to weigh the explanation offered and the acceptability of the same. The court should bear in mind that it is exercising an extraordinary and equitable jurisdiction. *As a constitutional court it has a duty to protect the rights of the citizens but simultaneously it is to keep itself alive to the primary principle that when an aggrieved person, without adequate reason, approaches the court at his own leisure or pleasure, the court would be under legal obligation to scrutinise whether the lis at a belated stage should be entertained or not.* Be it noted, delay comes in the way of equity. In certain circumstances delay and laches may not be fatal *but in most circumstances inordinate delay would only invite disaster for the litigant who knocks at the doors of the court.* Delay reflects inactivity and inaction on the part of a litigant -- a litigant who has forgotten the basic norms, namely, "procrastination is the greatest thief of time" and second, law does not permit one to sleep and rise like a phoenix. Delay does bring in hazard and causes injury to the lis."

(emphasis supplied)

8. In *State of J&K v. R.K. Zalpuri, (2015) 15 SCC 602* the Apex Court held that:

"26. In the case at hand, the employee was dismissed from service in the year 1999, but he chose not to avail any departmental remedy. *He woke up from his slumber to knock at the doors of the High Court after a lapse of five years. The staleness of the claim remained stale and it could not have been allowed to rise like a phoenix by the writ court.*

27. The grievance agitated by the respondent did not deserve to be addressed on merits, for doctrine of delay and laches had already visited his claim like the chill of death which does not spare anyone even the one who fosters the idea and nurtures the attitude that he can sleep to avoid death and eventually proclaim "deo gratias"--"thanks to God".

28. Another aspect needs to be stated. *A writ court while deciding a writ petition is required to remain alive to the nature of the claim and the unexplained delay on the part of the writ petitioner. Stale claims are not to be adjudicated unless non-interference would cause grave injustice. The present case, needless to emphasise, did not justify adjudication. It deserved to be thr*own overboard at the very threshold, for the writ petitioner had accepted the order of dismissal for half a decade and cultivated the feeling that he could freeze time and forever remain in the realm of constant present."

(emphasis supplied)

9. Here, in the present case, the appeal preferred by the petitioner against the order of cancellation dated 07.04.2006 was rejected by the Appellate Authority on 22.02.2007. The present writ petition has been filed by the petitioner on 05.05.2014. Thus, there is considerable delay on the part of the petitioner in filing the writ petition. The petitioner, however, contends that he was not aware of the order dated 22.02.2007. In paragraph 22 of the writ petition the petitioner has attempted to explain the delay in the following words -

"the petitioner has filed this appeal at this very late stage because when case was decided by the opposite party no.2 he has no knowledge about the same thereafter when the petitioner inquired the matter in February, 2012 it was found that the case has been decided in the year 2007."

10. The counsel for the petitioner submits that immediately on coming to know about the order dated 22.02.2007, the petitioner filed an application for recall, alongwith an application for condonation of delay which came to be dismissed on 12.02.2014. It is alleged that soon after the dismissal of the recall application the petitioner has approached this Court without any further delay. In these circumstances, it is contended that the delay may be condoned and the case be decided on merits.

11. The application dated 14.03.2012 moved by the petitioner for recall of the order dated 22.02.2007 is not on record. As would be evident from the order dated 12.02.2014, the petitioner had moved an application for recall on the ground that the order dated 22.02.2007 was an ex parte order. The fact that the order dated 22.02.2007 was passed after hearing the counsel for the petitioner is not in dispute. The order dated 22.02.2007, not being an ex parte order, the application for recall as such was not maintainable and as per the settled law, a quasi-judicial body such as the Appellate Authority in the present matter, could not review its own order in the absence of any specific provision giving such a power to it. Reference may be made to a Division Bench judgment of this Court in *Smt. Urmila Jaiswal v. State Of U.P. Thru Secy. and others, 2013 (4) ALJ 388,* wherein it was held, in the context of cancellation of fair price shop licenses, as follows:

"21. From the proposition of law as laid down in the above cases, it is well established that *unless the Statute/Rule*

permit, the review application is not maintainable in case of judicial/quasi judicial orders. In Order 2004, no power of review has been expressly provided nor such power can be read by implication."

12. Furthermore, the petitioner has not even challenged the order dated 12.02.2014 by which the application for condonation of delay, filed along with the application for recall, has been dismissed. As stated above, the petitioner has come to this Court challenging only the orders dated 07.04.2006 and 22.02.2007 passed by the Sub Divisional Magistrate, Sadar, Hardoi and the Appellate Authority, respectively. In such a scenario, the petitioner does not derive any benefit from the fact that the application for recall moved by the petitioner on 14.03.2012 came to be dismissed on 12.02.2014.

13. In any case, the fair price shop agreement of the petitioner was cancelled after taking into account the explanation submitted by the petitioner to the show cause notice issued to him in this regard. The appeal filed by the petitioner against the order of cancellation was rejected by the Appellate Authority vide order dated 22.02.2007 after hearing the counsel for the petitioner. It is not the case of the petitioner that on the date of hearing the petitioner was not present in Court. Neither in the writ petition nor in the rejoinder affidavit has the petitioner averred that the order dated 22.02.2007 was never communicated to him by his counsel immediately after the same was passed or soon thereafter. In the circumstances, it would be naive to believe that the petitioner was not aware of the order dated 22.02.2007.

14. In fact, the petitioner has made a contradictory statement in the writ petition regarding the delay in approaching this Court which was not the reason given by him in the application for condonation of delay moved by him alongwith the application for restoration dated 14.03.2012. As is apparent from the order 12.02.2014, before the Appellate Authority the petitioner had contended that because of the death of his parents in the year 2008 he was quite disturbed and as such he could not pursue his case, which is not his case in the present writ petition. The relevant part of the order dated 12.02.2014 is extracted below:

"उभयपक्ष के विद्वान अधिवक्ताओं की बहस सुनने एवं पत्रावली का अवलोकन करने से स्पष्ट है कि गुणदोष के आधार पर पारित अपीलीय आदेश दिनांक 22–2–2007 को वापस लिये जाने के सम्बन्ध में वाजदायर प्रार्थना पत्र लगभग 6 वर्ष बाद प्रस्तुत किया गया है जो कालबाधित है। प्रार्थना पत्र दाखिल करने में हुये विलम्ब को क्षमा किये जाने हेतु भारतीय मियाद अधिनियम की धारा–5 के अन्तर्गत प्रार्थना पत्र दिया गया है किन्तु प्रार्थना पत्र में नित्य–प्रतिदिन के विलम्ब का स्पष्टीकरण नहीं दिया गया है। *प्रार्थना पत्र के साथ प्रस्तुत किये गये शपथ पत्र में कहा गया है कि वर्ष 2008 में माता एवं पिता के स्वर्गवास हो जाने के कारण काफी परेशान था जिस कारण पैरवी नहीं कर सका किन्तु माता–पिता की मृत्यु के सम्बन्ध में कोई अभिलेखीय प्रमाण प्रस्तुत नहीं किया गया है।* प्रार्थना पत्र लगभग 6 वर्ष से भी अधिक कालबाधित है। अतः ऐसी स्थिति में प्रार्थना पत्र दाखिल करने में हुआ विलम्ब क्षमा किये जाने योग्य प्रतीत नहीं होता है।

वाजदायर प्रार्थना पत्र कालबाधित होने के कारण निरस्त किया जाता है। आदेश की एक प्रति अवर न्यायालय को भेजी जाये। बाद आवश्यक कार्यवाही इस न्यायालय की पत्रावली दाखिल दफतर हो।"

(emphasis supplied)

15. From the above, it is apparent that the petitioner was very much aware of the order dated 22.02.2007. The averment

made by the petitioner in paragraph 22 of the writ petition that he was not aware of the said order and he came to know about it only in February, 2012 is not only incorrect but is also palpably false. There is, thus, no satisfactory explanation for the inordinate delay in filing the writ petition.

16. The writ petition is, accordingly, dismissed on the ground of delay and laches.

(2020)09ILR A292
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 18.02.2020

BEFORE

THE HON'BLE RAKESH SRIVASTAVA, J.

Misc Single No. 4053 of 2018

Sanjay Singh ...Petitioner
Versus
Civil Judge J.D. Kadipur Sultanpur & Anr. ...Respondents

Counsel for the Petitioner:
Sunil Kumar Singh

Counsel for the Respondents:

Amendment Application-filed for amending order and some time limit be fixed to civil Judge to decide the suit-no amendment application touching the merit is maintainable.

Writ Petition dismissed. (E-9)

Cases referred: -

1.Bharat Amratlal Kothari Vs Dosukhan Samadkhan Sindhi, (2010) 1 SCC 234

2. State of Punjab Vs Darshan Singh, (2004) 1 SCC 328

3. Bijay Kumar Saraogi Vs St. of Jharkhand, (2005) 7 SCC 748

4.State of Haryana & ors. Vs M.P. Mohla, (2007) 1 SCC 457

5. Ram Chandra Singh Vs Savitri Devi & ors. (2004) 12 SCC 713

6.Ram Jethmalani & ors. Vs U.O.I. & ors.(2011) 9 SCC 751

7.Delhi Administration Vs Gurdip Singh Urban & ors. (2000) 7 SCC 296

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

(In Re:- C.M. Application No. 57454 of 2019)

1. Heard Sri Sunil Kumar Singh, learned counsel for the petitioner.

2. This is an application by the petitioner-applicant for amendment of the judgment and order dated 12.02.2018 passed by this Court in the above mentioned writ petition.

3. It appears that the petitioner had filed a Regular Suit No. 85 of 2007 for permanent injunction against the private respondent before the Court of Civil Judge (Junior Division), Kadipur, District Sultanpur.

4. On 31.10.2018, the petitioner had filed the above mentioned writ petition praying inter alia the following prayer:-

"Wherefore, it is most respectfully prayed that this Hon'ble Court may kindly be pleased to direct/command the opposite party no. 1 to decide the Suit No. 85 of 2007 in case of Prahlad Singh Vs. Land Management Committee and others which is still pending since very long time before the opposite party no. 1 *within a stipulated time* as contemplated in Annexure No. 1 to this petition."

(emphasis supplied)

5. On 12.02.2018, after hearing the counsel for the petitioner the writ petition was disposed of by this Court with a direction to the Court concerned to dispose of the said suit expeditiously. The order dated 12.02.2018 is extracted below:-

"Heard learned counsel for the petitioner and perused the record.

This writ petition has been filed by the petitioner for a direction to the opposite party No.1 Civil Judge (Junior Division), Kadipur, District Sultanpur for expeditious disposal of Suit No.85 of 2007.

Without entering into the merits of the case, the writ petition is finally disposed of with direction to the Civil Judge (Junior Division) Kadipur, District Sultanpur to decide the Suit No.85 of 2007 (Prahlad Singh vs. Land Management Committee and others) *as expeditious as possible* in accordance with law, if there is no legal impediment."

(emphasis supplied)

6. The record reveals that the petitioner again approached this Court by filing Writ Petition No. 10111 (M/S) of 2019, Sanjay Singh Vs. Civil Judge (J.D.), Kadipur, Sultanpur & Ors. praying for a direction to the Civil Judge to dispose of the said suit within a certain time frame. After arguing at some length the counsel for the petitioner requested that the said writ petition be dismissed as withdrawn with with liberty to the petitioner to approach the appropriate forum. This Court acceded to the request made and passed the following order:

"Heard learned counsel for the petitioner.

After making submission at length, learned counsel for the petitioner requested that this writ petition may be dismissed as withdrawn with liberty to approach the appropriate forum.

Prayer is allowed.

Accordingly, the writ petition is dismissed as withdrawn *with liberty to approach appropriate forum."*

(emphasis supplied)

7. It is, thereafter, that the petitioner has moved the present application for amendment praying that the order dated 12.02.2018 be amended and some time limit be fixed for the Civil Judge to decide the suit mentioned above.

8. The learned counsel for the petitioner has submitted that the order dated 12.02.2018 was served upon the Court concerned on 26.02.2018 but despite that till date no progress has been made in the said suit and only general dates are being fixed. In the circumstances, the counsel submits that the order dated 12.02.2018 be amended and some time limit be prescribed.

9. The application for amendment moved by the petitioner-applicant is absolutely misconceived and is an abuse of the process of the Court and is liable to be dismissed.

10. It is now well settled that an application for clarification or modification/amendment touching the merit of the matter is not maintainable. If there is an error apparent on the face of the record, an application for review would be maintainable but an application for clarification and/or modification/amendment cannot be entertained.

11. Though the provisions of the Code of Civil Procedure are not applicable to the proceedings under Article 226 of the Constitution, the general principles made in the Code will apply even to writ petitions. (see *Bharat Amratlal Kothari v. Dosukhan Samadkhan Sindhi, (2010) 1 SCC 234).*

12. Section 152 of the Code postulates correction of clerical or arithmetical mistakes or errors in judgments, decrees or orders. In *State of Punjab v. Darshan Singh,* (2004) 1 SCC 328 the Apex Court has held as under:

"12. Section 152 provides for correction of clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission. The exercise of this power contemplates the correction of mistakes by the court of its ministerial actions and *does not contemplate passing of effective judicial orders after the judgment, decree or order*. The settled position of law is that after the passing of the judgment, decree or order, the same becomes final subject to any further avenues of remedies provided in respect of the same and the very court or the tribunal cannot and, on mere change of view, is not entitled to vary the terms of the judgments, decrees and orders earlier passed except by means of review, if statutorily provided specifically therefor and subject to the conditions or limitations provided therein. The powers under Section 152 of the Code are neither to be equated with the power of review nor can be said to be akin to review or even said to clothe the court concerned under the guise of invoking after the result of the judgment earlier rendered, in its entirety or any portion or part of it. The corrections contemplated are of correcting only accidental omissions or mistakes and not all omissions and mistakes which might have been committed by the court while passing the judgment, decree or order. *The omission sought to be corrected which goes to the merits of the case is beyond the scope of Section 152 as if it is looking into it for the first time, for which the proper remedy for the aggrieved party, if at all, is to file an appeal or revision before the higher forum or review application before the very forum, subject to the limitations in respect of such review. It implies that the section cannot be pressed into service to correct an omission which is intentional, however erroneous that may be.* It has been noticed that the courts below have been liberally construing and applying the provisions of Sections 151 and 152 of the Code even after passing of effective orders in the lis pending before them. *No court can, under the cover of the aforesaid sections, modify, alter or add to the terms of its original judgment, decree or order.* Similar view was expressed by this Court in *Dwaraka Das v. State of M.P. and Jayalakshmi Coelho v. Oswald Joseph Coelho."*

(emphasis supplied)

13. In *Bijay Kumar Saraogi v. State of Jharkhand, (2005) 7 SCC 748,* the Apex Court reiterated what was said in the case of Darshan Singh in the following words:

"3. We find no reason to interfere with the order of the High Court because a mere perusal of Section 152 makes it clear that Section 152 CPC can be invoked for the limited purpose of correcting clerical errors or arithmetical mistakes in the judgment. *The section cannot be invoked for claiming a substantive relief which was not granted under the decree, or as a pretext to get the order which has attained finality reviewed.* If any authority is

required for this proposition, one may refer to the decision of this Court in State of Punjab v. Darshan Singh."

(emphasis supplied)

14. There is no dearth of cases wherein the Apex Court has held that an order can be modified only in a review proceeding. *(See: State of Haryana and Ors. vs. M.P. Mohla, (2007) 1 SCC 457, Ram Chandra Singh vs. Savitri Devi and Ors. (2004) 12 SCC 713, Ram Jethmalani and Ors. vs. Union of India and Ors.(2011) 9 SCC 751 and Delhi Administration vs. Gurdip Singh Urban and Ors. (2000) 7 SCC 296)*

15. The writ petition filed by the petitioner for disposal of his suit within a certain time frame was disposed of by this Court with a direction to the Court concerned to dispose of the said suit expeditiously. The petitioner thereafter filed a second writ petition with the same prayer which was withdrawn with liberty to approach the appropriate forum. Instead of moving an application before the Civil Judge (Jr. Div.) for expeditious disposal of the case in terms of the order passed by this Court in the second writ petition, the petitioner has filed the present application for amendment of the order dated 12.02.2020. It is a sheer abuse of the process of the Court.

16. In view of the settled legal position the application for amendment is not maintainable and is accordingly dismissed.

(2020)09ILR A295

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: LUCKNOW 28.02.2020

BEFORE

THE HON'BLE MUNISHWAR NATH BHANDARI, J.

THE HON'BLE MANISH KUMAR, J.

Misc Bench No. 5867 of 2020

M/S Ansal Prop. & Infrastructure Ltd. ...Petitioner

Versus

U.O.I. & Ors. ...Respondents

Counsel for the Petitioner:

Anurag Singh

Counsel for the Respondents:

C.S.C., A.S.G., Shobhit Mohan Shukla

Real estate (Regulation and Development) Act, 2016 - Section 43 (5)-challenge made to the section-as condition of pre deposit to be satisfied-for remedy of Appeal-claimed to be unconstitutional-Remedy of Appeal after adjudication of dispute-after opportunity of hearing to parties-not unconstitutional.

Held, If compliance of the order of the Real Estate Authority is not made, powers exist for imposition of penalty. Thus, in such circumstances, if a condition of pre deposit has been imposed by the legislature under their wisdom, it cannot be considered to be unconstitutional not being unreasonable or onerous. **(para 28)**

The object of the Act of 2016 is quite clear and Section 43 (5) is for the purpose sought to be achieved. It is to secure the complainant after adjudication of the matter by Real Estate Regulatory Authority. Thus, even on the facts of this case and in reference to the provisions of the Act of 2016, we find condition of pre deposit for hearing of the appeal to be neither unreasonable nor onerous so as to treat remedy to be illusory. The challenge to the provision cannot sustain rather for it, the writ petition is liable to be dismissed**. (para 31)**

Writ Petition dismissed. (E-9)

Cases referred: -

1. Mardia Chemicals Ltd. & ors. Vs. U.O.I.& ors. : (2004) 4 SCC 311

2. M/s. Tecnimont Pvt. Ltd. Vs St. of Punj. : AIR 2019 SC 4489

3. Seth Nand Lal & ors. Vs St. of Har. & ors. : 1980 (Supp) SCC 574

4.Anant Mills Co. Ltd. Vs St. of Guj. & ors. : (1975) 2 SCC 175

5. A.P. & ors. Vs P.Laxmi Devi : (2008) 4 SCC 720

6. Hardevi Asnani Vs St. of Raj. : (2011) 14 SCC 160

7.Seth Nand Lal & ors. Vs St. of Har. & ors. 1980 (Suppl) SCC 574

8.Gujarat Agro Industries Vs Municipal Corporation by the City of Ahmedabad & ors. : (1999) 4 SCC 468

(Delivered by Hon'ble Munishwar Nath Bhandari, J &
Hon'ble Manish Kumar, J.)

1. Shri Shobhit Mohan Shukla, Advocate appears for respondent no.3.

Shri Manjive Shukla, Advocate appears for respondent nos.2 and 5.

Shri S.B.Pandey, learned A.S.G. assisted by Shri Mahendra Mishra appears for respondent no.1.

2. By this writ petition, a challenge is made to Section 43(5) of the Real Estate (Regulation and Development) Act, 2016 (for short '**Act of 2016**').

3. The challenge is also made to order dated 25.7.2019 passed by the Real Estate Regulatory Authority (in short 'the authority') and also the recovery certificate dated 21.11.2019.

4. The writ petition has been pressed mainly to challenge to Section 43(5) of the Act of 2016. The order of Real Estate Regulatory Authority has also been challenged, though for which an appeal is maintainable before the Real Estate Appellate Tribunal.

5. Learned counsel submits that a complaint was filed against the petitioner before the Real Estate Regulatory Authority. An order in pursuance to it was passed on 25.7.2019 in ignorance of the jurisdiction under the Act of 2016. In pursuance to the order aforesaid, recovery certificate was issued on 21.11.2019. The petitioner is having a remedy of appeal against the order dated 25.7.2019 but as per Section 43 (5) of the Act of 2016, the condition of pre deposit needs to be satisfied. The condition under Section 43 (5) of Act of 2016 is hit by Article 14 and 19 of the Constitution of India being onerous making the provision to be illusory, thus be declared unconstitutional. To support the argument, learned counsel for the petitioner has referred the judgment of the Apex Court in the case of **Mardia Chemicals Ltd. and others Vs. Union of India and others : (2004) 4 SCC 311.**

6. In the case of Mardia Chemicals Ltd. (supra), Section 17 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short 'Act of 2002') was challenged. The Apex Court declared aforesaid provision to be ultra vires to the Constitution finding it to be onerous for maintaining an appeal. Therein the condition was to deposit 70% of the demand for maintaining appeal. The condition aforesaid was taken to be not only onerous and oppressive but unreasonable and arbitrary. It was thus,

declared to be ultra vires to Article 14 of the Constitution of India.

In the instant case also, Section 43 (5) of the Act of 2016 mandates deposition of at least 30% of the penalty or such higher percentage, as may be determined by the Tribunal or the total amount payable to the allottee including interests and compensation imposed on the promoter or both, before the appeal is heard. No discretion has been given to the appellate Tribunal to reduce the total amount payable to the allottee including interest and compensation. The discretion lies on the penalty, where also mandate is to deposit 30% amount. Thus, in view of the aforesaid, the present matter may be governed by the ratio propounded by the Apex Court in the case of Mardia Chemicals Ltd. (supra).

7. Learned counsel further submits that if an appeal is preferred by the complainant, condition of pre deposit has not been imposed on him, thus the provision under challenge is even discriminatory in nature offending Article 14 of the Constitution of India. Thus on the aforesaid ground also, Section 43 (5) deserves to be struck down.

8. Coming to the facts of the case, learned counsel for the petitioner submits that a complaint was maintained by the side opposite alleging that a flat under BHAROSA Scheme, Lucknow was booked with the payment of required amount but possession of the flat has not been given. The Real Estate Authority has directed to return a sum of Rs.3,62,581/- with interest. In pursuance to which the recovery citation has been issued for a sum of Rs.5,62,738. 40 paisa. If the petitioner is subjected to deposition of the entire amount payable to the complainant, then it is nothing but imposition of onerous condition for hearing of the appeal. It is despite the fact that the order passed by the authority is without jurisdiction. The prayer is accordingly to first struck down the provision under challenge and if the prayer aforesaid is not accepted, then to entertain the writ petition for quashing the order passed by the authority and the recovery citation.

No other argument has been raised for pressing the writ petition.

9. Learned Standing Counsel Shri Manjive Shukla for the State has opposed the writ petition so as Shri Shobhit Mohan Shukla, learned counsel appearing for respondent no.3 and 4.

Reference of the judgment of the Apex Court has been given where similar challenge did not sustain. It is with a clarification that judgement in the case of Mardia Chemicals Ltd.(supra) has no application to the facts of this case.

10. We have considered the rival submissions of the parties and scanned the matter carefully.

11. Challenge has been made to Section 43(5) of the Act of 2016. It would be gain full to quote Section 43 of the Act of 2016, which reads hereunder :-

"Section -43. Establishment of Real Estate Appellate Tribunal.

(1) The appropriate Government shall, within a period of one year from the date of coming into force of this Act, by notification, establish an Appellate Tribunal to be known as the-- (name of the State/Union territory) Real Estate Appellate Tribunal.

(2) The appropriate Government may, if it deems necessary, establish one or more benches of the Appellate Tribunal, for various jurisdictions, in the State or Union territory, as the case may be.

(3) Every bench of the Appellate Tribunal shall consist of at least one Judicial Member and one Administrative or Technical Member.

(4) The appropriate Government of two or more States or Union territories may, if it deems fit, establish one single Appellate Tribunal:

Provided that, until the establishment of an Appellate Tribunal under this section, the appropriate Government shall designate, by order, any Appellate Tribunal functioning under any law for the time being in force, to be the Appellate Tribunal to hear appeals under the Act:

Provided further that after the Appellate Tribunal under this section is established, all matters pending with the Appellate Tribunal designated to hear appeals, shall stand transferred to the Appellate Tribunal so established and shall be heard from the stage such appeal is transferred.

(5) Any person aggrieved by any direction or decision or order made by the Authority or by an adjudicating officer under this Act may prefer an appeal before the Appellate Tribunal having jurisdiction over the matter:

Provided that where a promoter files an appeal with the Appellate Tribunal, it shall not be entertained, without the promoter first having deposited with the Appellate Tribunal at least thirty per cent of the penalty, or such higher percentage as may be determined by the Appellate Tribunal, or the total amount to be paid to the allottee including interest and compensation imposed on him, if any, or with both, as the case may be, before the said appeal is heard.

Explanation.-For the purpose of this sub-section "person" shall include the association of allottees or any voluntary consumer association registered under any law for the time being in force."

12. A person aggrieved by any direction or decision or an order made by the authority or by an adjudicating officer can prefer an appeal. The proviso to Section 43(5) imposes condition of pre deposit if an appeal is preferred by the promoter. The appeal in the hands of promoter cannot be entertained without deposition of at least 30% of the penalty before the appellate Tribunal, or such higher percentage as may be determined by the appellate Tribunal or the total amount to be paid to the allottee including interests and compensation imposed on him if any, or both. The proviso aforesaid has been challenged alleging to be an onerous. It is mainly on the ground that no discretion has been given to the appellate Tribunal to suitably exempt or reduce the amount payable to the allottee in pursuance to the order of authority. So far as amount of penalty is concerned, minimum 30% of it has to be deposited, if amount is not subjected to higher amount by the Appellate Tribunal.

13. In the case of Mardia Chemicals Ltd. and others (supra), the condition was to deposit 75% of the amount demanded by the financial institution. The Apex Court held it to be unconstitutional. It was mainly on the ground that it is putting an onerous and oppressive condition making provision to be unreasonable and arbitrary. Whether the facts of this case are covered by the judgement in the case of Mardia Chemicals Ltd. and others (supra) is a question to be determined.

14. We have considered the main argument of the learned counsel for the

petitioner in reference to the judgment of the Apex Court in the case of Mardia Chemicals Ltd. and others (supra) but could not pursue ourselves to accept the argument. It is in reference to the other judgements of the Apex Court where validity of a provision containing similar condition of deposit for maintaining appeal or its hearing was held constitutionally valid.

15. The recent judgement on the issue is in the case of ***M/s. Tecnimont Pvt. Ltd. Vs. State of Punjab : AIR 2019 SC 4489.*** The Apex Court has extensively considered the issue in reference to a condition of pre deposit for maintaining appeal.

16. The consideration of the issue was made in reference to the provision containing a condition of pre deposit for an appeal with a discretion to the appellate authority to suitably exempt or relax the amount and also where no discretion was given to reduce or exempt the amount.

17. In the case of M/s Technimont Pvt. Ltd.(supra), the judgement of the constitutional Bench of the Apex Court in the case of ***Seth Nand Lal and others Vs. State of Haryana and others : 1980 (Supp) SCC 574*** was also considered. Paras no.9 to 12 and 14 to 18 of the judgement in the case of M/s technimont Pvt. Ltd. (supra) are quoted hereunder for ready reference :-

" 9. In Seth Nand Lal and Another vs. State of Haryana and others5, the Constitution Bench of this Court was called upon to consider whether the condition of pre-deposit for exercise of right of appeal was valid or not. A submission was raised that unlike the provision which was considered in The Anant Mills Co. Ltd.4, the Appellate Authority was not empowered to relieve the appellant of the requirement of pre-deposit. The submission was considered thus:--

"22. It is well settled by several decisions of this Court that the right of appeal is a creature of a statute and there is no reason why the legislature while granting the right cannot impose conditions for the exercise of such right so long as the conditions are not so onerous as to amount to unreasonable restrictions rendering the right almost illusory (vide : the latest decision in Anant Mills Ltd. v. State of Gujarat4). Counsel for the appellants, however, urged that the conditions imposed should be regarded as unreasonably onerous especially when no discretion has been left with the appellate or revisional authority to relax or waive the condition or grant exemption in respect thereof in fit and proper cases and, therefore, the fetter imposed must be regarded as unconstitutional and struck down. It is not possible to accept this contention for more than one reason. In the first place, the object of imposing the condition is obviously to prevent frivolous appeals and revision that impede the implementation of the ceiling policy; secondly, having regard to sub-sections (8) and (9) it is clear that the cash deposit or bank guarantee is not by way of any exaction but in the nature of securing mesne profits from the person who is ultimately found to be in unlawful possession of the land; thirdly, the deposit or the guarantee is correlated to the landholdings tax (30 times the tax) which, we are informed, varies in the State of Haryana around a paltry amount of Rs. 8 per acre annually; fourthly, the deposit to be made or bank guarantee to be furnished is confined to the landholdings tax payable in respect of the disputed area i.e. the area or part thereof which is declared surplus after leaving the permissible area to the

appellant or petitioner. Having regard to those aspects, particularly the meagre rate of the annual land-tax payable, the fetter imposed on the right of appea1/revision, even in the absence of a provision conferring discretion on the appellate/revisional authority to relax or waive the condition, cannot be regarded as onerous or unreasonable. The challenge to Section 18(7) must, therefore, fail."

10. The principles laid down in The Anant Mills Co. Ltd.4 and in Seth Nand Lal5 have consistently been followed, for instance in (i) Vijay Prakash D. Mehta and Another vs. Collector of Customs (Preventive), Bombay6; (ii) Shyam Kishore and others vs. Municipal Corporation of Delhi and another7; (iii) Gujarat Agro Industries Co. Ltd. v. Municipal Corporation of the City of Ahmedabad and others8; (iv) State of Haryana v. Maruti Udyog Ltd and others.9; (v) Government of Andhra Pradesh and others vs. P. Laxmi Devi (Smt.)10; (vi) Har Devi Asnani v. State of Rajasthan and others 11; and (vii) S.E. Graphites Private Limited v. State of Telangana and Ors.12.

11. The decisions of this Court can broadly be classified in two categories, going by the width and extent of the concerned provisions:--

a) Under the first category are the cases where, the concerned statutory provision, while insisting on pre-deposit, itself gives discretion to the Appellate Authority to grant relief against the requirement of pre-deposit if the Appellate Authority is satisfied that insistence on pre-deposit would cause undue hardship to the appellant. The decisions in this category are The Anant Mills Co. Ltd.4, Vijay Prakash D. Mehta6, Gujarat Agro Industries8 and Maruti Udyog9

b) On the other hand, the decisions in said Seth Nand Lal5, Shyam Kishore7, P. Laxmi Devi10, Har Devi Asnani11 and S.E. Graphites12 dealt with cases where the statute did not confer any such discretion on the Appellate Authority and yet the challenge to the validity of such provisions was rejected.

12. The decision of the Constitution Bench of this Court in Seth Nand Lal5 did consider whether the requirement of pre-deposit would cause undue hardship. However considering that the liability in question and consequential requirement of pre-deposit was a meagre rate of the annual land-tax payable, the fetter imposed on the right of appeal/revision, even in the absence of a provision conferring the discretion on the appellant/revisional authority to relax or waive the condition was not found to be onerous or unreasonable.

14. In P. Laxmi Devi10, validity of the proviso to Section 47A of the Indian Stamp Act, 1899 was in issue. The High Court had held said provision to be unconstitutional, which view was reversed by this Court. The proviso to said Section 47A reads:--

"Provided that no reference shall be made by the registering officer unless an amount equal to fifty per cent of the deficit duty arrived at by him is deposited by the party concerned."

The relevant discussion was as under:--

"18. In our opinion, there is no violation of Articles 14, 19 or any other provision of the Constitution by the enactment of Section 47-A as amended by A.P. Amendment Act 8 of 1998. This amendment was only for plugging the loopholes and for quick realisation of the stamp duty. Hence it is well within the power of the State Legislature vide Entry 63 of List II read with Entry 44 of List III of the Seventh Schedule to the Constitution.

19. It is well settled that stamp duty is a tax, and hardship is not relevant in construing taxing statutes which are to be construed strictly. As often said, there is no equity in a tax vide CIT v. V.MR.P. Firm Muar13. If the words used in a taxing statute are clear, one cannot try to find out the intention and the object of the statute. Hence the High Court fell in error in trying to go by the supposed object and intendment of the Stamp Act, and by seeking to find out the hardship which will be caused to a party by the impugned amendment of 1998.

20. In Partington v. Attorney General14 Lord Cairns observed as under:

"If the person sought to be taxed comes within the letter of the law he must be taxed, however, great the hardship may appear to the judicial mind. On the other hand if the court seeking to recover the tax cannot bring the subject within the letter of the law, the subject is free, however, apparently within the spirit of the law the case might otherwise appear to be."

The above observation has often been quoted with approval by this Court, and we endorse it again. In Bengal Immunity Co. Ltd. v. State of Bihar15 this Court held that if there is hardship in a statute it is for the legislature to amend the law, but the court cannot be called upon to discard the cardinal rule of interpretation for mitigating a hardship.

21. It has been held by a Constitution Bench of this Court in ITO v. T.S. Devinatha Nadar16 (vide AIR paras 23 to 28) that where the language of a taxing provision is plain, the court cannot concern itself with the intention of the legislature. Hence, in our opinion the High Court erred in its approach of trying to find out the intention of the legislature in enacting the impugned amendment to the Stamp Act.

22. In this connection we may also mention that just as the reference under Section 47-A has been made subject to deposit of 50% of the deficit duty, similarly there are provisions in various statutes in which the right to appeal has been given subject to some conditions. The constitutional validity of these provisions has been upheld by this Court in various decisions which are noted below.

23. In Gujarat Agro Industries Co. Ltd. v. Municipal Corpn. of the City of Ahmedabad8 this Court referred to its earlier decision in Vijay Prakash D. Mehta v. Collector of Customs6 wherein this Court observed: (Vijay Prakash case, SCC p. 406, para 9)

"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."

While dealing with the submission that in terms of said proviso, no relief could be granted even in cases where the requirement of pre-deposit may result in great prejudice, this Court went on to observe:--

"28. We may, however, consider a hypothetical case. Supposing the correct value of a property is Rs. 10 lakhs and that is the value stated in the sale deed, but the registering officer erroneously determines it to be, say, Rs. 2 crores. In that case while making a reference to the Collector under Section 47-A, the registering officer will demand duty on 50% of Rs. 2 crores i.e. duty on Rs. 1 crore instead of demanding duty on Rs. 10 lakhs. A party may not be able to pay this exorbitant duty demanded under the proviso to Section 47-A by the registering officer in such a case. What can be done in this situation?

29. In our opinion in this situation it is always open to a party to file

a writ petition challenging the exorbitant demand made by the registering officer under the proviso to Section 47-A alleging that the determination made is arbitrary and/or based on extraneous considerations, and in that case it is always open to the High Court, if it is satisfied that the allegation is correct, to set aside such exorbitant demand under the proviso to Section 47-A of the Stamp Act by declaring the demand arbitrary. It is well settled that arbitrariness violates Article 14 of the Constitution vide Maneka Gandhi v. Union of India17. Hence, the party is not remediless in this situation."

15. In Har Devi Asnani11 the validity of proviso to Section 65(1) of the Rajasthan Stamp Act, 1998 came up for consideration in terms of which no revision application could be entertained unless it was accompanied by a satisfactory proof of the payment of 50% of the recoverable amount. Relying on the earlier decisions of this Court including in P. Laxmi Devi10, the challenge was rejected and the thought expressed in P. Laxmi Devi10 was repeated in Har Devi Asnani11 as under:--

"27. In Govt. of A.P. v. P. Laxmi Devi10 this Court, while upholding the proviso to sub-section (1) of Section 47-A of the Stamp Act introduced by Andhra Pradesh Amendment Act 8 of 1998, observed: (SCC p. 737, para 29)

"29. In our opinion in this situation it is always open to a party to file a writ petition challenging the exorbitant demand made by the registering officer under the proviso to Section 47-A alleging that the determination made is arbitrary and/or based on extraneous considerations, and in that case it is always open to the High Court, if it is satisfied that the allegation is correct, to set aside such exorbitant demand under the proviso to Section 47-A of the Stamp Act by declaring the demand arbitrary. It is well settled that arbitrariness violates Article 14 of the Constitution (vide Maneka Gandhi v. Union of India17). Hence, the party is not remediless in this situation."

28. In our view, therefore, the learned Single Judge should have examined the facts of the present case to find out whether the determination of the value of the property purchased by the appellant and the demand of additional stamp duty made from the appellant by the Additional Collector were exorbitant so as to call for interference under Article 226 of the Constitution.

16. These decisions show that the following statements of law in The Anant Mills Co. Ltd.4 have guided subsequent decisions of this Court:

"...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.

...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.

....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."

17. In the light of these principles, the High Court rightly held Section 62(5) of the PVAT Act to be legal and valid and the condition of 25% of pre-deposit not to be onerous, harsh, unreasonable and violative of Article 14 of the Constitution of India. Now we turn to question (c) as framed by the High Court and consider whether the conclusions

drawn by the High Court while answering said question were correct or not.

18. It is true that in cases falling in second category as set out in paragraph 11 hereinabove, where no discretion was conferred by the Statute upon the Appellate Authority to grant relief against requirement of pre-deposit, the challenge to the validity of the concerned provision in each of those cases was rejected. But the decision of the Constitution Bench of this Court in Seth Nand Lal5 was in the backdrop of what this Court considered to be meagre rate of the annual land-tax payable. The decision in Shyam Kishore7 attempted to find a solution and provide some succour in cases involving extreme hardship but was well aware of the limitation. Same awareness was expressed in P. Laxmi Devi10 and in Har Devi Asnani11 and it was stated that in cases of extreme hardship a writ petition could be an appropriate remedy. But in the present case the High Court has gone a step further and found that the Appellate Authority would have implied power to grant such solace and for arriving at such conclusion reliance is placed on the decision of this Court in Kunhi1.

18. In para 10, a reference of the judgment of the Apex Court in the case of ***Anant Mills Co. Ltd. Vs. State of Gujrat and others : (1975) 2 SCC 175*** and other judgements has been given.

Para 11 of the judgment bifurcates the issue in two parts. The first part deals with the provision where appellate authority is given discretion to exempt or relax the condition of pre deposit suitably while in second part, the issue has been dealt with where no discretion has been given to the appellate authority.

19. The case in hand is covered by the judgement referred above. Therein Apex Court considered the provision for appeal where discretion was given to the appellate authority to exempt or relax the condition of pre deposit and even those cases where no such discretion was given. We are unable to accept the argument of learned counsel for the petitioner that the judgement of the Apex Court in the case of Technimont Pvt. Ltd.(supra) is not applicable to the fact of this case. If section 43(5) of the Act of 2016 is taken into consideration, it does not direct deposition of the entire amount of penalty rather it is only 30% unless higher percentage is determined by the appellate authority.

20. The condition of pre deposit under Section 43(5) cannot held to be unconstitutional in reference to the judgement of Apex Court in the case of Mardia Chemicals (Supra) because appeal under Section 43 of the Act of 2016 is after the adjudication of dispute by the Real Estate Authority where as no such adjudication has been provided under SERFASI Act of 2002 before an appeal under Section 17 of the Act of 2002.

21. So far the issue of discrimination in maintaining appeal by the complainant is concerned, it is in ignorance of the fact that if the complaint is dismissed and an appeal is preferred by him, it cannot be with a condition of pre deposit as there is no provision for imposition of penalty, interest or compensation on the complainant. Thus, the argument aforesaid is irrational, hence cannot be accepted to hold the provision to be discriminatory in nature.

22. The reference of the judgement of the Apex Court in the case of ***Govt. of A.P. and others Vs. P.Laxmi Devi : 2008(4) SCC 720*** is relevant where similar issue has been decided by the Apex court.

23. The other judgement relevant to the issue is in the case of Hardevi Asnani

Vs. State of Rajasthan : 2011 (14) SCC 160. Therein also the validity of proviso to Section 65 (1) of Rajasthan Stamps Act of 1998 was challenged. The condition of pre deposit was held constitutionally valid. The right of appeal is right given by a statute thus can be with the conditions of pre deposit. In the said case, the Apex Court had even considered the facts of the case. It was found that the amount so determined was exorbitant thus condition to deposit 50% of the amount for an appeal was taken to be onerous on facts but the provision was not struck down.The writ petition was entertained as an exception.Therein the reference of the judgement in the case of Government of A.P. Vs. P. Laxmi Devi (supra) was given. Therein also writ petition was held maintainable if the amount so determined is found exorbitant or irrational. A liberty to maintain the writ petition was given as an exception and in rarest of the rare case and not as a matter of course. It can be only when the amount so determined is found to be exorbitant, unreasonable or shocking disproportionate, making condition of pre deposit to be onerous.

24. In the case of ***Seth Nand Lal and others Vs. State of Haryana and others 1980(Suppl) SCC 574,*** the constitutional Bench elaborately discussed the issue regarding condition of pre deposit for maintaining an appeal or for its hearing. The condition of pre deposit for maintaining an appeal was held to be constitutionally valid. The argument regarding violation of Article 14 of the Constitution of India was not accepted. Para 21 and 22 of the judgement in the case (supra) are quoted herein for ready reference :-

21. The next provision challenged as unconstitutional is the one contained in section section 18(7) imposing a condition of making deposit of a sum equal to 30 times the landholdings tax payable in respect of the disputed surplus area before appeal or revision is entertained by the appellate or revisional authority-- a provision inserted in the Act by Amending Act 40 of 1976. Section 18(1) and (2) provide for an appeal, review and revision of the orders of the prescribed authority and the position was that prior to 1976 there was no fetter placed on the appellate/revisional remedy by the statute. However, by the amendments made by Haryana Act 40 of 1976, sub - section (7) and (8) were added and newly inserted sub -section (7) for the first time imposed a condition that all appeals under sub-section (1) or sub-section (2) and revisions under sub-section (4) would be entertained only on the appellant or the dispute surplus area. Under Sub-section (8) it was provided that if the appellant or the petitioner coming against the order declaring the land surplus failed in his appeal or revision, he shall be liable to pay for the period he has at any time being in possession of the land declared surplus to which he was not entitled under the law, a license fee equal to 30 times the landholdings tax recoverable in respect of this area. On June 6, 1976 the Act was further amended by Amending Act 18 of 1978 whereby the rigour of the condition imposed under sub-section (7) was reduced by permitting the appellant or the petitioner to furnish a bank guarantee for the requisite amount as an alternative to making cash deposits and while retaining sub-section (8) in its original form , a new sub-section (9) was inserted under which it has been provided that if the appeal or revision succeeds, the amount deposited or bank guarantee furnished shall be refunded or released, as the case may be , but if the appeal or revision fails the deposit or the

guarantee shall be adjusted against the license fee recoverable under sub- section (8). In the High Court two contentions were urged: First , section 18(1) and (2) , as originally enacted in 1972, gave an unrestricted and unconditional right of appeal and revision against the orders of the prescribed authority or the appellate authority but by inserting sub section (7) and (8) by Act 40 of 1976, a fetter was put on this unrestricted right which was unconstitutional ; secondly, even the mellowing down of the condition by Act 18 of 1978 did not have the effect of removing the vice of unconstitutionality, in asmuch as even the conditions imposed under the amended sub section (7) were so onerous in nature that they either virtually took away the vested right of appeal or in any event rendered it illusory. Both these contentions were rejected by the High Court and in our view rightly.

22. It is well settled by several decisions of this Court that the right of appeal is creature of statute and there is no reason why the legislature while granting the right cannot impose conditions for the exercise of such right so long as the conditions are not so onerous as to amount to unreasonable restrictions rendering the right almost illusory (vide the latest decisions in Anant Mills Ltd. Vs. State of Gujarat). Counsel for the appellants, however urged that the conditions imposed should be regarded as unreasonable onerous especially when no discretion has been left with the appellate or revisional authority to relax or waive the condition or grant exemption in respect thereof in fit and proper cases, and therefore, the fetter imposed must be regarded as unconstitutional and struck down. It is not possible to accept this contention for more than one reason. In the first place, the object of imposing the condition is obviously to prevent frivolour appeal and revision that impede the implementation of the ceiling policy. Secondly, having regard to sub section (8) and (9), it is clear that the cash deposit or bank guaranteee is not by way of any exaction but in the nature of securing mesne profits from the person who is ultimately found to be in unlawful possession of the land ; thirdly the deposit or the guarantee is co related to the land holdings tax (30 times the tax) which, we are informed, varies in the state of Haryana around a paltry amount of Rs.8 per acre annually ; fourthly, the deposit to be made or bank guarantee to be furnished is confined to the land holdings tax payable in respect of the disputed area i.e. the area or part thereof which is declared surplus after leaving the permissible area to the appellant or petitioner. Having regard to those aspects, particularly the meagre rate of the annual land tax payable, the fetter imposed on the right of the appeal/revision, even in the absence of a provision conferring discretion on the appellate/revisional authority to relax or waive the condition, cannot be regarded as onerous or unreasonable. The challenge to section 18 (7) must, therefore, fail."

25. In the case of ***Gujarat Agro Industries Vs. Municipal Corporation by the City of Ahmedabad and others : 1999 (4) SCC 468,*** the Apex Court held that the right of appeal, being statutory right and not inherent thus a condition for pre deposit can be imposed. It remains on the wisdom of the legislature. It can impose an appropriate condition of pre deposit for an appeal. In the said case, the appellate authority was given liberty to reduce the amount only to the extent of 25%.

The Apex Court did not accept challenge to the condition of pre deposit.

The issue was dealt with specifically in reference to Article 14 of the Constitution of India.

Paragraph 8 of the said judgement is quoted hereunder :-

"8. By the amending Act 1 of 1979 discretion of the court is 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 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. 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)."

26. In the light of the judgement referred to above, challenge to the constitutional validity of Section 43 (5) of the Act of 2016 cannot be accepted. It cannot be even in reference to the judgement of the Apex Court in the case of Mardia Chemicals Ltd. (supra). In the case of Mardia Chemicals, Section 17 of the SERFESI Act, 2002 was struck down to the extent of imposing condition of pre deposit for maintaining the appeal. It was after considering section 13 (2) and 13(4) apart from Section 14 of the Act of 2002. In the provisions aforesaid, the financial institution has been given right to secure its amount by taking the security interest of property by applying Section 13(4) and 13 of the Act of 2002. It was found that the amount is determined by the financial institution and not by an authority and otherwise the amount is secured by security interest in the property thus no reason remains to impose a condition of pre deposit. It was also found that the amount so demanded by the financial institution is by their unilateral act. It is not determined by any Tribunal, Authority or the Court. It was taken to be a case of unilateral demand, thus condition to deposit 75% of the amount for maintaining an appeal was held constitutional. The Apex Court even found Section 17 not to be a remedy of appeal in essence but for challenge to the notice under Section 13(4) of the Act of 2002. Thus on those grounds, the condition of pre deposit for invoking Section 17 of the Act of 2002 was held constitutionally invalid.

27. Contrary to the above, Section 43 of the Act of 2016 provides remedy of appeal after adjudication of the dispute by the Real Estate Regulatory Authority after providing opportunity of hearing to the parties. Thus, appeal thereupon is after adjudication of the complaint and not against a unilateral act of any party.

28. If compliance of the order of the Real Estate Authority is not made, powers exist for imposition of penalty. Thus, in

such circumstances, if a condition of pre deposit has been imposed by the legislature under their wisdom, it cannot be considered to be unconstitutional not being unreasonable or onerous.

29. If the facts of this case are taken into consideration, it shows that the petitioner had booked Flat No.K-6/A-7/0610 on a total value of Rs.8,40,000/-. When the possession of the flat was not given despite deposit of initial amount, the Real Estate Authority directed for its return alongwith interests and that too only the amount which was deposited by the complainant.

30. In those circumstances, if petitioner is directed to comply the direction of Section 43(5), it cannot be said to be unreasonable or onerous on the petitioner for maintaining the appeal.

31. The object of the Act of 2016 is quite clear and Section 43 (5) is for the purpose sought to be achieved. It is to secure the complainant after adjudication of the matter by Real Estate Regulatory Authority. Thus, even on the facts of this case and in reference to the provisions of the Act of 2016, we find condition of pre deposit for hearing of the appeal to be neither unreasonable nor onerous so as to treat remedy to be illusory. The challenge to the provision cannot sustain rather for it, the writ petition is liable to be dismissed.

32. The petitioner is given liberty to avail the remedy of appeal as per provisions of law, if he so chooses because writ petition on the facts of this case would not be maintainable for challenge to the order of the Real Estate Regulatory Authority.

33. With the liberty aforesaid, the writ petition is dismissed.

(2020)09ILR A307
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 18.09.2020

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Misc Single No. 24573 of 2019

Aditya Tiwari & Anr. ...Petitioners
Versus
The State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Aditya Tiwari-In Person, Anurag Tripathi-In Person

Counsel for the Respondents:
C.S.C., Amit Jaiswal, Savitra Vardhan Singh

Scholarship and Fees reimnursmnet for first few semesters was given on technical glitches-elligibility for scholarship-60% marks in intermediate-Petitioners have less than 60 % marks-inelligible.

Petition dismissed. (E-9)

Cases referred: -

1. Shaunak Gupta Vs U.O.I.-W.P. No.5104 (M/S) of 2013

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

1. This petition was originally filed, praying for quashing of Rule 6(i)(a) and Rule 5(xv)(Gha) of the Government Order dated 20.9.2014, and Government Order dated 14.4.2016 respectively and for quashing of the order dated 26.8.2019 passed by the District Social Welfare Officer, Lucknow, (opposite party no.3), rejecting the representation of the petitioners for full fee and scholarship reimbursement and for a direction to the opposite party nos.1 to 4 to release the

remaining scholarship and fee reimbursement for academic years 2015-16, 2017-18, and 2018-19 and also for issuance of a mandamus commanding the University (Opposite party no.5) and City Academy Law College (opposite party no.6) to allow the petitioners to submit their examination form and take the forthcoming semester examinations of LL.B. Honours Five-years Course.

2. This writ petition was filed on 5.9.2019 and an amendment application was moved on 16.9.2019, praying for a mandamus directing the opposite party no.6 to demand and charge the fees correctly and also to direct the State-respondents to take necessary action against the opposite party no.6 for charging excess fee from the petitioners. A further mandamus was sought to the opposite party no.5, the University to give the details of course fee for LL.B. Honours Five-years Course as fixed by it for private unaided institutions like the opposite party no.6. Further, an amendment application was later filed on 15.7.2020, praying for addition of certain pleadings and also for a direction to be issued to the opposite parties to immediately release the remaining amount of scholarship and fee reimbursement also for the year 2019-20, and a mandamus to be issued to the opposite party nos.1 to 5 to fix the course fee of LL.B. Honours Five-years Course of opposite party no.6, and a direction to be issued to the University and the College concerned to allow the petitioners to appear in the forthcoming semester examination. This amendment application was allowed on 16.9.20.

3. The aforesaid reliefs have been claimed by the petitioners while alleging that they had initially filed Writ Petition No.10763 (MS) of 2019 (Aditya Tiwari and another versus State of U.P. and others), which has been disposed off by this Court with a direction to the petitioners to submit a fresh representation before the District Social Welfare Officer, Lucknow, who would pass a reasoned and speaking order thereon. It has been submitted that the representation of the petitioners has been rejected arbitrarily by the opposite party no.3.

4. The petitioners have argued that they were admitted in LL.B. Honours Five-years integrated Course on 25.6.2015 in the City Academy Law College, Lucknow, opposite party no.6, which is a private unaided and affiliated College of Lucknow University. The course comprises of 10 semesters with two semesters every year and the course fee is Rs.25,000/- per semester i.e. Rs.50,000/- per academic year. The petitioners belong to General Category and have a very poor background as the annual income of their father is only Rs.48,000/- per year as per the Income Certificate issued by the Tehsildar, Musafirkhana, District Amethi.

5. It has been stated by the petitioners that the State of U.P. initiated a Scholarship Scheme, namely, Uttar Pradesh Samanya Varg Dashmottar Chhattravritti Yojna, 2012 (hereinafter referred to as "the Scheme of 2012'). It provided for reimbursement of fee and also scholarship to be given to economically poor unreserved category students. The Scheme of 2012 was amended by Government Order dated 20.9.2014 (hereinafter referred to as "the Scheme of 2014') and thereafter further amended by another Government Order issued on 14.4.2016 (hereinafter referred to as "the Scheme of 2016').

6. The petitioners took admission under the Scheme of 2012 as amended by

the Scheme of 2014, in the academic year 2015-16 and, therefore, the amended Scheme of 2016 was inapplicable to them. It has been argued that the petitioners being fully eligible for fee reimbursement and scholarship for the academic sessions 2015-16 to 2018-19 submitted online application forms, but except for academic year 2016-17 where they received full amount of Rs.56,360/- as scholarship and fee reimbursement, petitioner no.1 has not received full fee reimbursement and scholarship in the remaining years. Similarly, petitioner no.2 has received full fee reimbursement and scholarship for two academic sessions of 2015-16 and 2016-2017, but thereafter no fee reimbursement has been made to the petitioner no.2 also.

7. A chart explaining year-wise scholarship and fee reimbursement amount received by the two petitioners has been given in Paragraph-14 of the writ petition, which is being reproduced below:-

Session Year	Petition No.1 (Aditya Tiwari)	Petition No.2 (Anurag Tripathi)
2015-16	Rs.0/-	Rs.54,770/-
2016-17	Rs.56,360/-	Rs.56,360/-
2017-18	Rs.0/-	Rs.0/-
2018-19	Rs.19,440/-	Rs.19,440/-

The petitioners being aggrieved made several representations, but did not receive any response.

8. The opposite party no.6, on the other hand, claimed that the Lucknow University, the opposite party no.5 had digitally locked wrong fee of Rs.13,080/- in respect of each academic year for the college concerned instead of Rs.50,000/- fixed earlier.

9. The petitioners have stated that this Court on 8.4.2019 in Writ Petition No.5101 (MS) of 2013 (Shounak Gupta versus Union of India and others) had allowed full fee reimbursement to a similarly situated writ petitioner. The petitioners had, therefore, filed Writ Petition No.10763 (MS) of 2019, which was disposed off, directing the petitioners to approach the District Social Welfare Officer through a fresh representation. The petitioners' representation has now been rejected.

10. It has been argued that in the earlier writ petition filed by the petitioners, the District Social Welfare Officer had filed a counter affidavit in which, it was submitted that due to Rule 5(xv)(Gha) of the Scheme of 2016, the petitioners were found ineligible for full fee reimbursement and scholarship. It is the petitioners' case that the petitioners had taken admission in June, 2015 and, therefore, the amended Scheme of 2016 was inapplicable to them. They have also challenged the amended scheme.

11. It has been argued by the petitioners that since the opposite party no.6 is an affiliated Law College of the Lucknow University, it shall have to follow the fee schedule for five year LL.B. Honours Course as fixed by the Lucknow University. The fee schedule for Lucknow University LL.B. Honours Five-year Course has been fixed through letters dated 25.5.2015, 10.5.2018 and 30.7.2018 collectively filed as Annexure-15 to the writ petition.

12. It has been further argued that neither opposite party no.5 nor any other

competent authority has fixed course fee for opposite party no.6, therefore, the opposite party no.5 has arbitrarily and wrongly locked reduced fee of Rs.13,080/- instead of real feel of opposite party no.6 of Rs.50,000/- per academic year.

13. It has been argued that in the order dated 26.8.2019, the opposite party no.4 has mentioned that only students, who have obtained more than 60% marks in Intermediate Examination are eligible for full fee reimbursement and scholarship. It has been argued that the basic eligibility of student for the scheme is financial incapacity of the guardian and not the type of educational institution he gets admitted in, or the possession of high percentage of marks in Intermediate Exam. The Rule as cited in the order dated 26.8.2019 is arbitrary and, therefore, deserves to be quashed. Moreover, in the original Scheme of 2012, there is no compulsory Rule of getting 60% marks in Intermediate for grant of benefit of fee reimbursement and scholarships.

14. The petitioners, however, admit that they had obtained 58% and 57% marks respectively in Intermediate examination and the eligibility criteria for taking admission in LL.B. Honours Five-years Course in the college of opposite party no.6 is only possession of 50% marks in Intermediate.

15. It has further been argued that as per Rule 11(v) of the Scheme of 2012, weightage marks to students is calculated on the basis of income of the guardian and marks obtained in the previous semester examination and not the Intermediate examination, therefore, the interpretation of the Rules by the opposite party no.4 that the petitioners having less than 60% marks in Intermediate is arbitrary. The opposite parties have wrongly interpreted the Rules to minimize the number of eligible students for grant of fee reimbursement and scholarship.

16. Also, it has been argued by the petitioners that if the concerned college has wrongly filled up the course fee in the University database and any recovery notice has been issued to the college concerned, then it would not prejudice the case of the petitioners, who are independently entitled for fee reimbursement and scholarship.

17. It has been argued that the students of other private institutions as well as Lucknow University and some autonomous Institutions having equal status to that of opposite party no.6 for LL.B. and LL.B. Honours Courses have been given full fee reimbursement and scholarship. One famous college in the city affiliated to Lucknow University has its fees determined for LL.B. Honours Course by the State Government by its letter no.573/sadar-1-2018-16(29)/2018 Dated 3.7.2018 at Rs.25,000/- per semester and fees for its students is being reimbursed on the basis of fees of Rs.50,000/- per year.

18. The college of the petitioners is a private college like the college whose fee has been determined by letter of Government dated 3.7.2018 and the course fee for LL.B. Honours Course has been fixed as Rs.50,000/- per year, which is equal to the fees of Lucknow University students course fee in identical Self Financed Courses. The Lucknow University has arbitrarily reduced the course fee to Rs.13,080/- per academic year for the petitioners' college.

19. Lastly, it has been argued that the petitioners have taken loans from their

relatives to pay the fees of the college for the semester examinations held in the past and they are entitled to be given the benefit of judgement rendered by this Court in Shaunak Gupta (supra).

20. A short counter affidavit has been filed on behalf of opposite party no.5 by the Registrar of the University, wherein it has been stated that the fee for associated and affiliated colleges of Lucknow University has to be determined by the State Government, but the State Government has not yet determined the fee. The Lucknow University has no power to determine the fee of private institutions affiliated with it. The Registrar, Lucknow University through letter dated 10.5.2018 made a request to the State Government that fees had already been determined for Self Financed Courses run by the Lucknow University through University Ordinance in May, 2015 and till such determination of fee is made by the State Government with respect to private affiliated colleges, the fee determined for Self Financed Courses run by Lucknow University should also be made applicable to private institutions. In response to the letter sent by the Registrar, State Government had issued a letter on 30.7.2018, which was placed in the meeting of Executive Council of Lucknow University on 10.8.2018 as Agenda Item No.1A. The Executive Council of the Lucknow University has resolved that the fee determined through University Ordinance dated 25.5.2015 for its professional Self Financed Courses run within the campus of Lucknow University, should also be made applicable to private institutions running identical courses. A proposal under Section 52(3)(c) of the State Universities Act, 1973 has been made to the State Government for its approval. The Registrar, Lucknow University also sent reminders on 14.8.2018 and 20.8.2018 to the State Government for fixation of fee for affiliated private colleges running identical courses. A reply was still awaited.

21. A rejoinder affidavit to the short counter affidavit filed by the opposite party no.5 has also been filed by the petitioners where they have reiterated the contents of the writ petition and the rejoinder affidavit filed by them earlier saying that now the opposite party no.5 has also admitted in its short counter affidavit that the Lucknow University has no power to fix the course fee for Five years' LL.B. Honours Course run by its affiliated colleges like the opposite party no.6. The power to determine fee is vested in the State Government. Yet the University has wrongly locked fee digitally on its portal for students of private colleges like the petitioners.

22. The Opposite Party No.6 has filed a counter affidavit in which it has reiterated that it charges Rs.25,000/- per semester i.e. Rs.50,000 per year from its students for LLB Honours course being run by it. It has referred to the University Ordinance issued on 25th May 2015 in relation to course fee for students studying in Constituent and Associated Colleges as Fee Ordinance notified also for self financed courses run in private colleges.

23. This Court has carefully perused Page-9 of the counter affidavit which clearly states that it is an Ordinance by Lucknow University relating to fee prescribed for faculty of Arts, Science, Commerce, Law, Education and Finance for the Academic Session 2015-2016 onwards. On perusal of Page-20 of the counter affidavit of Opposite Party No.6, it is apparent that it relates to proposed

Ordinance relating to fee prescribed for Lucknow University self financed courses for the year 2015-2016 in its various faculties.

24. Opposite Party No.6 has also referred to a letter issued on 26th June 2018 by the Registrar Lucknow University saying that for Academic year 2018-2019, the fee was fixed as before. It has been mentioned in the counter affidavit of Opposite Party No.6 that affiliated colleges of Lucknow University may charge only the newly prescribed Examination Fee and Enrollment fee from new students for the year 2018-2019, whereas other fees shall remain the same as per the document annexed with the said letter which document mentions the fee for L.L.B. Honours Five-year self Financed Course as Rs.25,580.

25. A counter affidavit has been filed by the Opposite Party No.3 in which he has referred to the Government Order dated 14.04.2016 by which Rule 5 (xv) (Gha) has been amended and it has been provided that private degree colleges recognised by the University have to get their fee determined by the Competent Authority. In case of non-determination of fee by the Competent Authority, the students will be reimbursed according to the fee fixed for regular and identical courses run by the University and its constituent Colleges, or the actual fee paid by the student or Rs.50,000/- per Academic year, whichever is less. It has been submitted that excess fee had been mentioned by the Opposite Party No.6 while verifying the Online Forms of its students as a result where of excess money has been paid under the Scheme of 2016 to the Opposite Party No.6. Recovery notices have been issued by the District Magistrate, Lucknow/Chairman of the Scholarship Sanctioning Committee Lucknow. It has further been stated that the Registrar by his letter dated 10.05.2018 had made a request to the Higher Education Department for implementation of the fee determined and approved by the Executive Council of the University for courses run by it and proposed that the same should also be made applicable to private Institutions affiliated to the Lucknow University. The Special Secretary Higher Education by letter dated 30.07.2018 has issued directions to enforce the fee determined by the Executive Council for self financed Courses run by it, through issuance of Ordinance by the University.

26. In pursuance of the directions of the Higher Education Department, no Ordinance has been issued as yet by the Lucknow University so as to enable the Department of Social Welfare to make fee reimbursement in accordance with the fee determined by the Executive Council for self financed courses run by Lucknow University. Earlier the Higher Education Department through various Government Orders had fixed the fee for B.A., B.Sc., B.Com., M.A. M.Sc., M.Com. Courses which has been revised from time to time as also B.Ed. courses run by private unaided colleges. Similarly, the Higher Education Department alone is entitled to fix the fees for L.L.B. Honours five-year course also for private unaided Institutions but the same has not been fixed till date by the Higher Education Department.

27. The Opposite Party No.3 has also stated in Paragraph-7 that the Registrar, Lucknow University by a letter dated 01.09.2017 had informed the District Magistrate, Lucknow/Chairman Post Matric Scholarship and Fee Reimbursement Sanctioning Committee

that Lucknow University only determines the curriculum and the number of seats of a particular course being recognised by it for a private college and except for enrollment fee and examination fee no other fee is fixed by the University for private colleges. The fees determined for private Institutions has to be done by the Government and not the University. Since fee for running L.L.B. Honours five years course in private Institutions like Opposite Party No.6 has not been determined by the Government, Fee reimbursement under the Scheme of 2016 is being done by the Opposite Party No.3 under the advice of the Chairman Scholarship Sanctioning Committee as per Rule 5 (xv) (Gha) of the amended scheme for 2016. As and when fee is determined by the Competent Authority or a clarification is made by the Lucknow University of its letter dated 01.09.2017, the appropriate proceedings for fee reimbursement shall be undertaken by the Opposite Party No.3.

28. It has been stated in Paragraph-8 of the counter affidavit that the Director, Social Welfare Department through a letter dated 18.09.2019 has sought a comprehensive report in respect of fees from the Registrar, Lucknow University which is still awaited. The Opposite Party No.3 has reiterated that after considering all relevant records and the Rules of 2014 and 2016 as well as the judgement rendered by this Court on 08.04.2019 in **Shaunak Gupta Vs. Union of India (supra),** a reasoned and speaking order has been passed by him rejecting the representations of the petitioners. It has been stated that the amended Rules of 2016 shall be applicable to all students studying in any year including second year, third year, fourth year and fifth year students L.L.B. Honours five years course. It has further been stated in Paragraph-17 of the counter affidavit that the Petitioner No.1 did not qualify for fee reimbursement and Scholarship because he had not obtained more than 60% marks in Intermediate which is the required criteria for fee reimbursement. Petitioner No.2 was found eligible by the State-Level Committee and payment of Rs.54,770 was made to him for the Academic year 2015-2016. The students are expected to fill up Online Forms for fee reimbursement and scholarship. The Educational Institution in which they are studying is required to fill up the fee charged from such students in Master database which is thereafter verified and forwarded by the University concerned. Opposite Party No.6 did not digitally lock the correct fee therefore, wrong payments and excess payment was made. The District Scholarship Committee has issued notices to 165 similarly situated Institutions affiliated with the Lucknow University for recovery of excess amount reimbursed to the students in Academic session 2016-2017.

29. It has been stated in Paragraph-17 of the counter affidavit that an order of preference has been given under Rule 11 (iv) of the Scheme of 2014 and fee reimbursement and scholarship has to be done only in accordance with the order of preference given therein. Since the petitioners did not possess 60% marks in Intermediate, the qualifying examination for admission in private unaided Institution like the Opposite Party No.6, the application of the petitioners was rejected for the year 2017-2018 by the Sanctioning Committee. Notices have been issued for recovery of excess payment made to the petitioners because of the fault of the Opposite Party No.6 The District Social Welfare Officer has also stated that as per the decision of the Scholarship Sanctioning Committee and the amended Rules of 2016,

payment has been made to the petitioners of Rs.13,080 towards L.L.B. Honours fourth year fee and Rs.6,360/- towards scholarship that is a total amount of Rs.19,440 only. The Opposite Party No.3 has also distinguished the judgement rendered by this Court on 8th April 2019 in Writ Petition No.5104 (M/S) of 2013 **(Shaunak Gupta Vs. Union of India)** on the ground that it relates to Other Backward Classes Candidate.

30. In Paragraph-32 of the counter affidavit of Opposite Party No.3 the distinction has been made between students like the petitioners and the students of Central and State Universities and Private Universities created through enactment by State Legislature. The Opposite Party No.6 however, is a private Educational Institution to which only affiliation has been granted by the Lucknow University. The Institution is not having the status equal to that of an autonomous Institution or a constituent or associated college of Lucknow University.

31. In their rejoinder affidavit to counter affidavit of Opposite Party No.3 the petitioners have very cleverly quoted Rule 5 (xv) (Gha) of the Rules of 2016 leaving out the portion relating to exception carved out for self financed courses run by the Lucknow University. The petitioners have stated that City Academy Law College is recognised private Institution affiliated to a State University i.e. the Lucknow University and the course fee for similarly placed L.L.B. Honours students in Lucknow University is Rs.25,000/- per Semester or Rs.50,000 per year, and the Opposite Party No.6 is charging the same fee. The petitioners have also paid the full course fee i.e. Rs.25,000/- per Semester from Semester 1 to 7 to the Institution and have submitted Online applications for Fee reimbursement and scholarship within time but the opposite parties are discriminating amongst similarly situated students of private Institutions and those studying in Lucknow University in reimbursement of fee and scholarship amount. The respondents are reducing every year the amount of scholarship and fee reimbursement from Rs.50,000/- to Rs.13,080/- in the Academic year 2018-2019 and further reduced the amount to Rs.4500/- for Academic year 2019-2020 whereas only Examinations Fee for L.L.B. Honours student this year is Rs.8,065/-. The University itself has stated in Paragraph-7 of its affidavit that it has no power determine or to reduce the amount of fee for L.L.B. Honours five years course in the master Database of the Scholarship Portal as against the original fee charged by the Institution. Without fixation of course fee for private Institutions by Competent Authority, the reduction of fees of students on the Scholarship Portal and reduction in the amount of reimbursement by the University unilaterally, has adversely affected the students.

32. It has further been stated by the petitioners that by putting onerous conditions successively through various amendments to the Original Scholarship Scheme, State-respondents intend to maliciously eliminate deserving General Category students defeating the very object of the Scheme. The only eligibility required for grant of fee reimbursement and scholarship under the Scheme of 2012 is the financial incapacity of the applicant student, not the type of educational Institution in which he was studying, or the high percentage of marks in Intermediate. It has further been submitted that it is not open for the State-respondents to now refer

to limited funds available with them as the State cannot shirk from its already committed liability. The petitioners took admission in June, 2015 and therefore shall be governed by the unamended scheme.

33. In Paragraph-27 of the rejoinder affidavit, it has been stated that fixation of fee for private Institution is the subject matter of State Government or the University but the students cannot be allowed to suffer for no fault of theirs. The Opposite Party No.6 is charging the same fee in L.L.B. Honours five years course as is being charged by the Lucknow University self financed L.L.B. Honours five years course. Additionally, in Paragraph-28 of the rejoinder affidavit, a reference has been made to Online application having been made by the petitioners for the Academic year 2019-2020 which has been rejected by the respondent.

34. A supplementary counter affidavit has been filed by the opposite party no.3, wherein it has been stated that the Competent Authority under the Amended scheme of 2016 shall determine the fee to be charged by the private recognized institutions and in case such fee has not been fixed by the competent authority, Rule 5 (XV)(d) provides that fee that is being charged for the same course by State Universities (except self-financed course) or the fee being charged by the institution concerned or Rs.50,000/-, whichever is less, would be reimbursed. The Lucknow University has locked Rs.50,000/- as fee charged by the institution without verifying/examining the data uploaded by the college concerned and without looking into the eligibility criteria for fee reimbursement and scholarship.

35. It has further been stated that by Government order dated 30.07.2018, the University had been informed that the fee determined by it for running self-financed courses may be implemented also for affiliated institutions running similar courses. It is therefore for the affiliating University to have issued neccessary ordinance. Despite such clear instructions from the Government, the University has not fixed fee for courses running by private affiliated colleges by issuing any orders in this regard, however, it has verified Rs.50,000/- as charged by the opposite party no.6. The mistake of the affiliating University in the year 2016-17 has now been rectified by the affiliating University when correct facts were brought to its notice and now the Scholarship Sanctioning Committee has issued notices for recovery of excess payment made to the students.

36. Having heard the petitioner no.1, who appeared through video link, Sri Savitra Vardhan Singh, learned counsel for the respondent and Sri Amit Jaiswal, learned counsel for the respondent, this Court has carefully perused the order dated 26.08.2019 passed by the District Social Welfare Officer, Lucknow, on the representation of the petitioners. It is apparent therefrom that the opposite party no.3 has firstly referred to the facts as mentioned in the representation of the petitioners for reimbursement to be made to them for the Academic Years i.e. 2015-16, 2016-17, 2017-18 and 2018-19. He has referred to the provision given under Rule 5(xv) (Gha) and the letter No.573/sattar-1-2018-16(29)/2018 dated 30.07.2018, by which fee for L.L.B. Honours five-years course has been determined for self-financed courses being run by the Lucknow University. The petitioners had submitted that since the Government had approved the proposal of the Executive Council of the Lucknow University dated 25.05.2015, the same fee can be charged by the City

Academy Law College- respondent no.6. The opposite party no.3 has refuted the claim of the petitioners on the ground that the University, in pursuance of the letter of Higher Education Department dated 30.07.2018 has not issued any order fixing any fee for its affiliated colleges therefore the contention of the petitioners that the fee determined by the University Executive Council for self-financed courses being run by it shall be applicable to City Academy Law College also. The opposite party no.3 has also referred to the Amended scheme notified by the Government Order dated 14.04.2016 and Rule 6(i)(a) which clearly indicates that in all professional courses where admission is taken on the basis of marks obtained in qualifying Intermediate examination/ Class XII examination, fee reimbursement and scholarship shall be given to only those students who had obtained 60% marks in such Class XII/Intermediate examination. The L.L.B. Honours course is a professional course and fee reimbursement and scholarship can be given to only those students who obtained 60% marks in the Intermediate examination which is the qualifying examination. The opposite party no.3 has rejected the claim of the petitioners that the amended Rule of 2016 shall not be applicable to them they having already studied for two years and being in the third year, and that they cannot be divested of their right to claim reimbursement. The opposite party no.3 in his order dated 26.08.2019 states that the elegibility criteria of obtaining at least 60% marks in Interimediate examination has been applicable with effect from 20.09.2014, and the petitioners took admission in L.L.B. Honours five-years course in June, 2015 in the Academic Session 2015-16.

37. The contention of the petitioners that Rule 11(v) shall be applicable to them and not Rule 6(i)(a) has also been rejected by opposite party no.3 as misconceived, as he found Rule 11(v) as only referring to the order of preference to be followed for giving renewal of fee reimbursement and scholarship to initially eligible candidates. The petitioners according to the opposite party no.3 were not eligible initially to get the fee reimbursement and scholarship, therefore, there was no question of renewal on the basis of the order of preference given under Rule 11(v).

38. The opposite party no.3 has also rejected the contention raised by the petitioners in their representation that wrong fee has been digitally locked in the master database by the College concerned and recovery notices have been wrongly issued. The order dated 26.08.2019 clearly states that the amended scholarship scheme notified on 20.09.2014 provided the eligibility criteria and the amount of fee to be reimbursed and if any wrong or excess payment has been made on the basis of wrong uploading of data on the master database by the City Academy Law College, the petitioners being beneficiaries thereof would also be liable for recovery.

39. The arguments regarding discrimination between similarly situated students raised by the petitioners in their representation has also been dealt with by the opposite party no.3 by referring the conditions of admission of students in State or Central Universities/ Colleges and aided private colleges associated with them and the difference in admission procedure of private un-aided but recognized and affiliated colleges.

40. From a perusal of the order dated 26.08.2019, this Court finds that each and every contention raised by the petitioners in their representation dated 13.08.2019 has been considered and a reasoned and

speaking order has been passed by the opposite party no.3. Now this Court has to consider the validity of the reasons given by the opposite party no.3 in rejecting the claim of the petitioner.

41. This Court has carefully gone through the original scheme as notified by the Government Order dated 07.01.2013. The Government Order clearly states that the scheme was floated for helping "meritorious" students of un-reserved category whose guardian's financial status was such as would prevent them from pursuing their professional courses smoothly. The original scholarship scheme as notified on 07.01.2013 was made applicable with effect from July, 2012 for Academic Session 2012-2013. It refers to "free" seats and "paid" seats and admission in professional courses by poor un-reserved category students and the amount of fee reimbursement and scholarship etc. available to them. Certain professional courses however have been excluded from the applicability of the scheme which are not being referred here as they are irrelevant for decision of this case. A master database was to be created of all recognized educational institutions running such professional courses by the Social Welfare Department. Fee had to be given initially by the student concerned and reimbursement alone was to be made admissile after verifying online applications submitted.

42. The scheme of 2012 was amended by the Government Order dated 20.09.2014 and the said Government Order was made applicable with effect from Academic Session 2014-15.

43. As the petitioners having challenged Rule 5(xv)(Gha), it is necessary to quote Rule 5(xv)(Gha) of the amended Scheme of 2016.

"5(xv)(Gha). Pradesh ke Vishvidhyalayon se sambadh jin niji kshetron ke manyata prapt sansthano mein sanchalit pathyakramon ke shulk saksham pradhakari star se nirdharit nahi hain un sanchalit pathyakramon hetu pradesh ke kisi bhi rajya Vishvidhyalayon mein sanchalit usi pathyakramon (swatah vitt poshit pathyakramon ko chhodte hue) mein nirdharit nyuntam shulk athwa sanstha dwara chatron se jama karayi gayi vastavik fees athwa Rs.50,000/- mein se jo bhi kam ho, ki pratipurti ki jayigi."

44. It is apparent from a perusal of the said Rule challenged in this petition that it refers to those Private and unaided colleges whose fees has not been determined by the competent authority. Students of such colleges would be entitled to either the fees being charged for identical course (except Self Financed Course) by any State University, or the fees actually deposited by the student in the college concerned or Rs.50,000/-, whichever is lower.

45. The petitioners have also challenged Rule 6(i)(a) of the Scheme of 2014, which is being quoted here in below:

"6(i)(a). Chhatravritti hetu samanya varg ke abhiyarthi nimnlikhit sharton/pratibantho ke adhin patra honge:-

(i) kewal ve hi abhyarthi iske patra honge, jo Uttar Pradesh rajya se sambandhit ho arthat Uttar Pradesh rajya ke sthai niwasi ho evam jo Uttar Pradesh rajya kshetra ke sambandh mein vinirdisht samanya varg se sambandhit ho aur jinhone kisi manyata prapt vishwavidhyalya ya madhyamik shiksha board ki matriculation ya higher secondary

ya isse koi uchhattar pariksha utrin kar li ho thatapi:-

(a) Private sansthano mein parishisth-jha mein ankit professional pathyakramo mein jahan kaksha-12 ke praptanko ke adhar per pravesh diya jata hai, wahan chhatravritti evam shulk pratipurti prapt karne hetu benchmark kaksha-12 ki pariksha mein 60 pratishat nyuntam praptank hoga. Yah pravidhan gair professional pathyakramo per lagu nahi honge."

46. It is apparent from a perusal of Rule 6(i)(a) that Benchmark for eligibility for full fee reimbursement and scholarship is securing 60% marks in Class 12th examination for those students who take admission in unaided private institutions, which run professional courses and in which, the criteria to give admission is on the basis of marks secured in Class 12th examination. This amendment was introduced by Government Order dated 20.9.2014 and was applicable to the petitioners who took admission in LL.B. Honours Course in the college concerned in academic session 2015-16.

47. Rule 11(i) of the Government Order dated 20.9.2014 is also important for determining the eligibility of the petitioners to obtain full fee reimbursement and scholarship under the amended Scheme of 2014. It is being quoted here in below:

"11. Chatra ko anurakshan bhatta va shulk pratipurti ke bhugtaan hetu shikshan sanstao ki variyata kram ka nirdharan.

(i) chhatrivritti evam shulk pratipurti hetu ahar chatra/chatraon ko anurakshan bhatta evam shulk pratipurti dhanrashi ka ekmusht bhugtaan kiya jayega.

*(ii) *****

*(iii) *****

(iv) simit vittaya sansadhno ko drishtigat rakhte hue, shikshan sansthano mein adhyanrat chhatro ko anurakshan bhatta evam shulk pratipurti ki dhanrashi ka navinikaran evam taduprant naye chhatro ko anurakshan bhatta evam shulk pratipurti ki dhanrashi nimnankit variyata kram mein budget ki uplabdhta ki seema tak nirdharit avadhi mein online bhare gaye aavedan patro mein se parta paye gaye chhatra-chhatraon ko unke dwara bank mein khole gaye bachat khate mein sidhe antarit karke bhugtaan ki jayegi-

(ka)- kendra athwa rajya sarkaar ke vibhago/nikayo dwara sanchalit rajkiya shikshan sansthano va rajkiya swayatshashi shikshan sansthano mein adhyanrat chhatra/chhatraye.

(kha)- kendra athwa rajya sarkaar se shashkiya sahayata prapt niji kshetra ke shikshan sansthano mein adhyanrat chhatra/chhatraye.

(ga)- niji kshetra ke manyata prapt shikshan sansthano ke manyata prapt pathyakramo mein adhyanrat chhatra/chhatraye tatha rajya vishwavidhyalayon ke swavittposhit pathyakramo mein adhyanrat chhatra/chhatraye."

48. It is apparent that an order of preference has been created under Rule 11, which has to be followed while providing fee reimbursement and scholarships to meritorious students of General Category under the Scheme of 2014. It has been mentioned that due to limited financial resources being available with the Government to continue the Scheme, it has been decided that now availability of budget shall be one of the criteria for all those students who are already admitted in professional courses, and renewal of fee

reimbursement and scholarships for the current year onwards, as well as for new students who take admission in professional courses would be for (a) course run by State Universities, private Universities, (b) aided autonomous Institutions, (c) private unaided Colleges in descending order i.e. the order of preference would be firstly for students studying in professional courses run by either Central or State Government departments or Institutions, thereafter for recognised and aided privately run institutions, and lastly for students of recognised but unaided privately run institutions.

49. This Court has perused the Government Order dated 14.4.2016 notifying the fourth amendment to the Scheme of 2016 and of Rule 5(xv)(Gha) shows that there is not much of a difference in the meaning, although the language of the Rule has changed a little. It also refers to fee reimbursement for students of institutions run privately, where the course fee has not been determined by competent authority and it refers to course fee being charged by State Universities for identical professional courses (except for State Self Financed Courses) and to the fees actually charged from the students by the institution, or Rs.50,000/- whichever is less as the earlier unamanded Rule of Scheme of 2014.

50. Rule 6(i)(a) has also remained unchanged as also the order of preference given under Rule 11. Except for the addition of a note under Rule 11(iv), stating that the preference order given in the said Rules shall be followed for all students of a particular category of college concerned and if funds were available, the next category of students shall be given reimbursement. The Note as added by Government Order dated 16.4.2016 is being quoted below:

"Note- Uprokt variyata kram mein hi budget ki uplabdhata ke anusaar chhatravritti evam shulk pratipurti dhanrashi vitrit ki jayegi. Ek variyata kram ke samast chhatra-chhatrao ko vitran ke pashtaat hi budget ki uplabdhta ki seema tak agle variyata kram ke chhatra-chhatraon ko dhanrashi vitrit ki jayegi. Yah kram ukt variyata sheni-'ka' se "ga' tak jari rahega."

51. Rule 11(v) has also been added which states that in a particular category students shall be given reimbursement on the availability of funds by ascertaining the annual income of their guardians, maximum marks obtained by them in the last semester examination and in order of preference to course/curriculum being undertaken by them. The weightage given for percentage of marks obtained have been mentioned in a tabular form thereunder.

52. The Lucknow University by a letter dated 26.3.2015 has proposed fee for regular courses run by it as also for Self Financed Courses. In response to a letter sent by the Secretary, Higher Education Department, the Lucknow University by its letter dated 10.5.2018 had informed that under Under Section 51(2) of the U.P. State Universities Act, 1973, a University is entitled to fix fee for courses run by its associated and affiliated colleges also. The University Ordinance had fixed the fees for regular and Self Financed Courses by Ordinance dated 26.3.2015, and the fees so fixed for academic session 2015-16 continues to be applicable in later years. It proposed that in the Ordinance dated 26.3.2015, the fee fixed for Self Financed

Courses can be made applicable to private unaided recognised associated and affiliated colleges till their fee is determined separately by competent authority.

The University's letter sent on 10.5.2018 has been filed at Page-295 of the writ petition.

53. In Response to such letter, the Government sent its approval on 30.7.2018 saying that the fee structure given in the University Ordinance, which became effective from 25.5.2015, for Self Financed Courses run in the University campus be also made applicable to identical courses being run by private unaided associated and affiliated colleges of the Lucknow University.

A copy of the letter dated 30.7.2018 has been filed at Page 298 of the writ petition.

54. The petitioner no.1 has also argued that since no fee has been determined by the competent authority for the opposite party no.6 and the opposite party no.6 has admittedly charged Rs.50,000/- from the petitioners per academic year, they shall be entitled for reimbursement of the amount under the scholarship scheme under paragraph-5 (xv).

55. This Court finds from the arguments made by Sri Savitra Vardhan Singh, learned counsel appearing on behalf of the opposite party no.5, that the University does not determine the fee being charged for professional courses by private affiliated colleges. It only determines the fee charged by its constituent and associated colleges for regular and self financed courses being run by them. The Executive Council of the Lucknow University had determined the fees in its meeting held in May, 2015 and consequently after approval of the State Government, Ordinance was issued in this regard for regular courses and self-financed courses run by the faculty of arts, science, law, commerce etc. For determination of fee of private institutions running similar courses, the State Government had issued the letter on 30.07.2018 that the same fee as is being charged for self-financed courses be charged by the private institutions as well till their determination otherwise by the Competent Authority.

56. It has been admitted by the counsel appearing on behalf of the Lucknow University that the Lucknow University does not run L.L.B. Honours five-years course as a regular course. It runs only a three-years L.L.B. course as a regular course. However, the Lucknow University does conduct L.L.B. Honours five-years course as self-financed course, for which it charges Rs.25,580/- per semester. However, the college concerned i.e. opposite party no.6 being a private institution only affiliated to the University, it cannot fix its fee in accordance with the fee determined by the Lucknow University for its five-years L.L.B. Honours self-financed course.

57. This Court had considered the arguments raised by the counsel for the opposite party no.6 and the counsel for the opposite party no.5 in a detailed order passed by it on 06.02.2020 where it had come to a conclusion that the University was competent in view of the Government Order dated 30.07.2018, for fixing the fee of five-years L.L.B. Honours course being run by private colleges affiliated to it on the same terms as the earlier Government

Order dated 25.05.2015. Under some misconception, the Registrar referred the matter once again to the State Government for approval which was not required, and therefore the matter remained pending. The opposite party no.6 being a private affiliated college, in view of the Government's order dated 30.07.2018, the University is competent to fix the colleges' fee on the same terms as the earlier Government Order dated 25.05.2015, and opposite party no.6 was entitled to charge the fee it was charging from its students.

58. However, this is not a issue that can be raised by the students of the opposite party no.6 like the petitioners herein because the petitioners have been found to have been initially ineligible for the fee reimbursement and scholarship.

59. In paragraph-5 (XV)(d) of the said scheme, it was clearly stated that the Fee being charged by the State run colleges for professional courses (except self-financed courses) or the actual fees, or Rs.50,000/-, whichever was less, was to be reimbursed. Under Rule 6(i)(a) the eligibility criteria for fee reimbursement and scholarship was given. It was provided that in those private institutions running professional courses where students are admitted on the basis of their marks obtained in Intermediate Examination, at least 60% marks should have been obtained by the student claiming fee reimbursement and scholarship. This Government Order was applicable to the petitioners who took admission in the college of opposite party no.6 in June, 2015. It is not open for the petitioners to now turn around and challenge the said condition as being onerous or discriminatory. The benefit under the Government Order was to be accepted or rejected as a whole. There could not be any part acceptance and part rejection of the Government Order under which the benefit of fee reimbursement and scholarship is being claimed by the petitioners.

60. The Rule 11(i) referred to by the petitioner no.1 in his argument relates to order of preference while renewing fee reimbursement and scholarship amount. It cannot be said that a student who is originally ineligible to claim fee reimbursement shall become eligible for the same if his college falls under one of the categories mentioned therein.

61. During the course of arguments, the petitioner no.1 repeatedly emphasized that petitioners having been given scholarship by respondent nos.3 and 4 initially they cannot now be refused only on the ground that they did not obtain 60% marks in their Intermediate Examination. The case of the petitioners being that of renewal, the initial eligibility criteria fixed by the Government Order dated 20.09.2014 will not be applicable to them.

62. The argument raised by the petitioner no.1 is misconceived to say the least. There cannot be any Estoppel against the law. If the petitioners had been wrongly given fee reimbursement and scholarship earlier, due to wrong verification of thier claims by the college authorites, it cannot be said that the petitioners have now a vested or accrued right to get such reimbursement as their case would be considered only for renewal and condition of initial eligibility cannot be seen. No mandamus can be issued by this Court to the State respondents to act against the provisions of law.

63. It is a settled legal proposition that if initial action is not in consonance with

law, all subsequent and consequential proceedings would fall through for the reason that illegality strikes at the root of the order. In such a fact-situation, the legal maxim **"sublato fundamento cadit opus"** meaning thereby that if foundation is removed, the super structure or the whole work falls come into play, and applies on all fours to the present case.

64. The petitioners' challenge to the Amended scheme of 2014-2016 also on the ground of discrimination between similarly situated students is without any basis. The petitioners are not similarly situated students as the candidates who qualify the Combined Law Aptitude Test (CLAT) Examinations or go through admission process determined by the University and who are alloted colleges on the basis of their marks obtained in the said Aptitude Test or Selection Test held by the State University to various colleges. The students who are admitted through statewide counselling are first alloted to Government Colleges and to Autonomous Institutions/ Deemed Universities and then to recognized Aided Institutions. The students with lesser marks in the Aptitude Test or Selection Test or even students who have not appeared in the Aptitude Test at all, then take admission in private unaided colleges like opposite party no.6.

65. It was admitted during the course of arguments of the petitioners that they did not appear in CLAT. They did not take any Selection Test held by the Lucknow University either. They were admitted on the basis of marks obtained by them in their Intermediate Examination by the respondent no.6. The petitioner no.1 had secured 58% marks and the petitioner no.2 had secured 57% marks in their Intermediate Examination. They cannot be said to be similarly or identically placed to those students who had appeared in CLAT or any other Selection Test held by the Lucknow University. There cannot be equality amongst unequals. Therefore, there cannot be any grievance of discrimination also.

66. The opposite parties are entitled to issue recovery notice to the opposite party no.6 as wrong fee reimbursement and scholarship was given to the petitioners only because of wrong data being verified and locked digitally on the master database by the college.

67. The writ petition is ***dismissed***. No order as to costs.

(2020)09ILR A322
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.09.2020

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.
THE HON'BLE AJIT KUMAR, J.

Public Interest Litigation (PIL) No. 574 of 2020

In Re: Inhuman Condition of Quarantine Centres and for providing Better Treatment to Corona Positive ...Petitioner
Versus
State of U.P. ...Respondent

Counsel for the Petitioner:
Sri Gaurav Kumar Gaur, Sri Aditya Singh Parihar, Sri Amitanshu Gour, Sri Jitendra Kumar, Sri Katyayini, Sri Rahul Sahai, Sri Rishu Mishra, Sri S.P.S. Chauhan, Sri Satyaveer Singh, Sri Shailendra Garg, Sunita Sharma, Sri Swetasha Agarwal, Sri Uttar Kumar Goswani

Counsel for the Respondents:
C.S.C., Sri Dhiraj Singh, Sri Hari Nath Tripathi, Purnendu Kumar Singh, Sri Satyavrat Sahai, Sri Sunil Dutt Kautilya

A. Public Interest Litigation - Street Vendors (Protection of Livelihood and Regulation of

Street Vending) Act, 2014 - U.P. Urban Planning and Development Act, 1973: Section 26(A) - the U.P. Municipal Corporation Act, 1959: Section 295 , 296, 112-B, 114, 138(A), 139 - Indian Penal Code: Sections 188/267/270 - Pandemic Act - The Court had passed orders in five issues.

Issue 1 - The court directed Nagar Nigam and Vyapar Mandal to conjointly sort the problem of unauthorized parking in the civil lines area.

Issue 2 - The Court orders that the Town Vending Committee shall swing into action immediately and the exercise of approval of vending zones to be completed within a stipulated time as provided. Further to identify vending zones shall also be carried out side by side.

Issue 3 - The Court directed Nagar Nigam to inform all commercial shop keepers of different commercial places to place disposal bins for collecting used masks and Nagar Nigam shall collect the same on a day to day basis.

Issue 4 - The Court issued the writ of mandamus for the whole of the State of Uttar Pradesh that no person should be seen outside his/her house without a mask on his/her face and he/she should check that the masks covers both nose and the mouth.

Issue 5 - The Court directed the Administration to ensure that every information which is provided should be entered against the name of the person in respect of whom the enquiry was being made and the portal should genuinely be updated on a day to day basis. Further if a person who is in home isolation requires CT scan and X-ray then no pathology entertains that patient. Every district in the State of U.P. should have a dedicated clinic where a person who is in home quarantine can go and get his CT scan or X-ray done. (E-10)

(Delivered by Hon'ble Siddhatha Varma, J.
Ajit Varma, J.)

Compliance affidavit filed today by Sri S.D. Kautilya, Advocate be kept on record.

Order on Letter Petition

Letter petition filed by Ms. Urmika Pandey be kept on record.

Let a copy of this petition be served upon the State within 48 hours.

Office is directed to allot regular number to this petition.

When the case is listed next, the name of Ms. Urmika Pandey be shown in the cause list.

Order on Letter Petition

Letter petition filed by Mr. Diggaj Pathak be kept on record.

Let a copy of this petition be served upon the State within 48 hours.

Office is directed to allot regular number to this petition.

When the case is listed next, the name of Mr. Diggaj Pathak be shown in the cause list.

Order on Letter Petition

This letter petition filed by Mr. Sunil Choudhary is taken on record.

Office is directed to allot regular number to this petition.

Copy of this petition has already been served upon the State.

In this letter petition, the grievance has been raised in respect of an incident that had taken place at S.R.N. hospital with a patient under treatment namely, Ayush Shukla. It is alleged that instead of conducting an inquiry into the complaint made on behalf of the mother of the patient, the doctors of the hospital got lodged first information report bearing Case Crime No.- 117 of 2020 against the patient and his mother under various sections in the Indian Panel Code.

The high handedness of the doctors towards patient during COVID-19 has been complained of as a misconduct and the allegations are also to the effect that Chief Medical Officer of Prayagraj acted in connivance with the doctors of the S.R.N. hospital and forwarded the complaint to the Kaudihar block, Prayagraj, whereas the incident had taken place on 13/14.5.2020 at S.R.N. hospital, Prayagraj.

Mr. Manish Goyal, learned Additional Advocate General seeks time to have instructions in the matter by the next date fixed.

Time prayed for is allowed.

When the case is listed next, the name of Mr. Sunil Choudhary be shown in the cause list.

In Re: Civil Misc. Intervention Application No. Nil of 2020

(Dated 21.9.2020 filed by Sri Shahid Kazmi, Advocate on behalf of Vishal Talwar)

This application be kept on record and be given a number.

Learned Additional Advocate General may take instructions in the matter.

Sri Shahid Kazmi, learned counsel may also provide a list of Doctors who intend to continue and serve the Corona patients on contract basis.

Order on the petition

Heard learned counsel for the parties.

Today, we have heard this case on the following five issues:-

I. Encroachment of public land and the menace of parking;

II. Discharge of function by the Town Vending Committee;

III. Disposal of used masks;

IV. Public wearing of masks; and

IV. Further medical facility during COVID-19.

In compliance of our order dated 18th August, 2020, the Advocate Commissioners Sri Chandan Sharma and Sri Dwivedi, have submitted their joint report, which has been taken on record.

Issue No.I:

Sri Chandan Sharma, learned Advocate has submitted that particularly in respect of point No.- (A) & (B) of our order dated 18th August, 2020 that after conducting inspection of various areas of the city where the encroachment removal drive had been undertaken by the Municipal Corporation, they have found that still substantial part of the public land and road side land continued to be occupied by the encroachers and that encroachment drive is yet to be carried out at several places. In those areas where drive has been undertaken, the unauthorized encroachers have reoccupied the places. He has submitted that after the encroachments were removed, it was a bounden duty of the concerned police station to have undertaken the exercise of restraining these encroachers from reoccupying those places.

On this above issue, reply is needed to be obtained by the Additional Advocate General as to why police administration has not undertaken the desired exercise and, accordingly, we direct that the copy of the report be supplied to the Additional Advocate General who shall address us on this issue on the next date fixed.

On the question of parking of vehicles on public places and on road side land which has been creating traffic congestion, it has been submitted by Sri Sharma that parking areas have not been identified by the Nagar Nigam and even in Civil Lines area where vehicle parking has been

developed of several floors, it is not being utilized and vehicles are being parked on the road. On a pointed query being made to Sri Kautilya, learned counsel appearing for the Nagar Nigam as to why the parking place which has already been constructed, has not been utilized, Sri Kautilya submitted that Vyapar Mandal of Prayagraj has shown concern for this on the ground that if people are not permitted to bring their vehicles near the shop, it causes loss to their business. Although he submits that drive of removal of illegally parked vehicle has already taken place in the past with the help of police, it is a matter of concern that the Nagar Nigam and the Police are unable to make people park their vehicles at their designated places.

Be that as it may, we want to clarify that no illegal parking of vehicles can be permitted in Civil Lines area where a parking place has already been assigned and a huge building for the same has been constructed. People may utilize the services of electric rickshaw etc. to reach the places of shops but the vehicle should be parked in the parking zone only. For this, we direct Nagar Nigam and Vyapar Mandal to discuss this issue sitting across the table and if Vyapar Mandal has still any problem with the direction that we are issuing for clearing public road from unauthorized parked vehicles, they should move proper applications before this Court for the ventilation of their grievance. However, we direct that the parking issue be resolved within two weeks.

Issue No.II:

On the issue of vending zones also, Sri Sharma has submitted a report and has also annexed an order of Chairman of Town Vending Committee, according to which, only 7 zones have been approved and allotments have been made. It is another matter that till date people have not occupied those places which have been allotted to them. He has brought to the notice of the Court that 29 zones are still pending for approval by the Committee. Sri Kautilya, learned Advocate appearing for Nagar Nigam has submitted that Town Vending Committee has been constituted under the Chairmanship of the Municipal Commissioner under the Street Vendors (Protection of Livelihood and Regulation of Street Vending) Act, 2014.

On being repeatedly asked as to why the Committee has not further approved the remaining vending zones, Sri Kautilya has submitted that he would take up the issue with the Municipal Commissioner.

Looking at the scenario of the city of Prayagraj where almost every nook and corner and every street is flooded with Thela and street vendors who continue their businesses from morning till evening, causing not only traffic congestions but also result in serious threats of COVID-19 upon the society, we are of the considered opinion that the Committee should not further linger the matter of approval of the vending zones that have been placed before it for consideration and we further find, so also Sri Sharma argues, that 38 vending zones are not sufficient to accommodate thousands of vendors in the city and therefore, we direct that the Committee shall in consultation with the Nagar Nigam and the District Administration further earmark vending zones in different parts of the city besides 29 zones which are still under consideration before the Committee. However, we clarify that these vending zones should not be developed on the road side land of the city along the main roads of the city and also they should not be in the congested areas of the city where crowd

accumulates. We also direct that after vending zones which are pending consideration are approved, immediate allotment exercise shall be undertaken and once the allotment is made as per the rules and the Act, vendors will be permitted to occupy the places. If they fail to occupy the allotted places, their vending license should be cancelled and they should be restrained from carrying on any business activity in the places from where they had been directed to be removed.

Accordingly, we order that the Town Vending Committee shall swing into action immed**iately and the exercise of approval of pending zones be completed within a week from today and allotment exercise shall further be carried out within three days thereafter and side by side exercise to further identify vending zones shall also be carried out and be completed within the next 15 days. A comprehensive report regarding approval of the allotment shall be submitted on or before 1st October, 2020 and exercise for identifying new vending zones and its approval shall be further carried out in next 15 days and report regarding that shall also be submitted by 17th October, 2020.**

Issue No.-III:

On the issue of disposal of used masks in disposal bins at different places, Sri Kautilya has submitted that as far as the offices are concerned in the city, the collection bins have been placed and besides that, persons have also been employed by Nagar Nigam to collect masks from identified places for disposal. However, he further submits that as far as commercial places are concerned the shop keepers may also be directed to keep disposal bins for used masks outside their shops so that people visiting the shops, can throw their masks in them and Nagar Nigam shall carry out exercise of collecting used masks from such places on a day to day basis.

We find the above request so made, to be genuine considering that fight against COVID-19 is to be jointly fought by one and all and so we direct that Nagar Nigam shall inform all the commercial shop keepers of different commercial places to place disposal bins for collecting used masks and Nagar Nigam shall collect the same on a day to day basis.

It is further directed that if shop keepers violate the directions issued hereinabove, they shall be given notice by the Nagar Nigam and shall appropriately be penalized for the same.

On the issue of removal of unauthorized construction of permanent structures of road side land/ public land, there appears confusion regarding powers between two authorities, namely, Nagar Nigam and Urban Planning and Development Authority. Learned counsel for the Nagar Nigam submits that in view of insertion of Section 26 (A) vide 1997 amendment in the Uttar Pradesh Urban Planning and Development Act, 1973 the powers have been taken away for the operation and vested in the Planning Development Authority whereas it has been argued by Sri Paul, learned counsel appearing for the Development Authority that the powers under Section 295 and 296 and onwards except Chapter IX of the Corporation Act, 1959 still have not yet been repealed.

Both the counsel seek time to address on this issue and, accordingly, the matter is adjourned for this purpose till Monday.

Yet another issue had been raised on the last date by the learned counsel for the

Nagar Nigam relating to the financial constraints of the Corporation in performing its duties as enumerated under Section 112-B and Section 114 of the Uttar Pradesh Municipal Corporation Act, 1959.

Learned counsel for the Nagar Nigam has drawn our attention towards Sections 138(A) and Section 139 of the Corporation Act, 1959 which provide for review of the expenses to be incurred by the State Finance Commission and then recommendation for making deficiency of the shortfall, good. The creation of funds of the Corporation did consist, as he argues, of funds to be given as grant-in-aid by the Government from the State Consolidated fund.

Sri Goel, learned Additional Advocate General had sought time to have instructions in the matter and today Sri Goel has submitted that the instructions are still awaited and has sought a week's further time in this regard. Accordingly, the matter on this issue is adjourned as well and we hope and trust that Sri Goel shall have sufficient instructions in the matter by the next date.

Issue No.- IV :

Now, coming to the issue of containment of wide spread pandemic COVID-19, we have repeatedly in our earlier orders raised concern regarding non-compliance of the COVID-19 guidelines which have been modified from time to time as the Government has proceeded to unlock the Government and public activities in stages.

Ever since the first lock down was imposed on 25.03.2020, we have been experimenting with various ways and means to control the pandemic. To control the pandemic, we have to stop the spread and also treat the people who have got the infection of COVID-19 virus. As of today, to stop the spreading of pandemic, humanity has realized that the only methods available to it were that it has to maintain social distancing and wear masks.

The New England Journal of Medicine (NEJM) which was published on 08.09.2020 reports that the latest research is that wearing of masks does not only prevent the person who is wearing the mask from getting the infection but it says that if everyone wears a mask it shall also lessen the force of the virus for the whole world, resulting in the elimination of the virus. From the reading of the article it appears to us that this is the last opportunity now available to rescue civilization from the effect of this pandemic. If we do not take action today, we will not be able to face our progenies, who would always look up to us questioningly as to why we did not take requisite actions despite the fact that we had the power to take the same. The article about which we would further elaborate in this judgment of ours says that the mutating/ changing virus might get a vaccine in the coming months but it also says that there is no surety of the fact that it would last for a very long time. It also mentions that today there is no proof of the fact that what would be the after effects of the vaccine. This much the researchers, however, are sure that if 100% masking is done by us then the virus by itself would die a natural death.

Sri Goel has placed before this Court the instructions that he has received *qua* policing and setting up the requisite Task Force to ensure that the public wears masks, besides the statistics regarding registration of the first information reports, submission of the charge sheets in cases of violation of COVID-19 guidelines inviting application of Penal provisions under Sections 188/267/270 of I.P.C. and the Pandemic Act.

Sri Goel has drawn the attention of the Court towards the order issued by the Deputy Inspector of General of Police/ Senior Superintendent of Police, Prayagraj on 22nd September, 2020. In this order task forces have been constituted police station wise in the municipal area of Prayagraj. He informs that two task forces have been constituted at each of the police station and each task force, it has been submitted, would consist of a Sub-Inspector, a head constable and a constable. It is submitted by Sri Goel that this task force shall carry out a round the clock vigil in the city in coordination of each other in the territorial limits of their respective police stations to ensure that the public wearing of masks would not only remains a slogan but would become a public order. He submits that policing shall be made more strict and the vigil shall be intensified on public roads and public places to ensure that everyone wears a mask once he is out of his house. He has assured that this police task force is in addition to the forces that have already been deployed by the police department in the city area to ensure full and strict compliance of COVID-19 guidelines. Though we do not doubt the concern shown by the administration and the *bona fides* of the police administration in the city to take steps to convince and at times force people to wear masks so that the pandemic is contained but we find from the photographs that have been brought on record by the learned Additional Advocate General as part of the instructions that huge assemblies of people at various public places are still there and that people also are not wearing masks as a routine. The police force thus, in our clear view, does not constitute requisite force and if situation like this continues, we do not think that the pandemic is going to be contained. The manner, in which the positive cases are being reported every day, fully establishes that until a person is tested, his status qua COVID-19 is not known and he continues to infect all those who come in contact with him and thus the chain goes on. The testing of COVID-19 infection is only an exercise to identify people and isolate them but it has its own limitations and no one can rule out that if the number of testing is increased by five times, the number of positive patients would also increase by five times. Thus, whatever the statistics is being published regarding number of positive cases, it can be said is only the tip of the iceberg. There is no possibility of any vaccination getting into action in the State very soon as the researches are still underway at different stages by different research institutes and scientists.

Under the circumstances, therefore, one has to find out ways and means to contain spread of pandemic COVID-19. Research in New England Journal of Medicine as we have already referred to above in earlier paragraphs of this order further states *"viral shedding from the noses and mouths of patients who were presymtomatic or asymptomatic - shedding rates equivalent to those among symptomatic patients. Universal facial masking seemed to be a possible way to prevent transmission from asymptomatic infected people"* and that is why much emphasis has been laid from time to time that "public wearing mouth/ face cover masks" should be followed in all areas be it of community spread or other areas with high rates of transmission. The journal reports further that *while we await results of vaccine trials, any public health measure that could increase proportion of asymptomatic SARS-CoV-2 infections may both make the infection less deadly and increase population wide immunity without severe illness and deaths.*

We are, therefore, convinced with the study shown in the journal leading to the conclusion that the "100% population masking" is the only strategy by which we can attempt on containing the spread of pandemic COVID-19 totally.

Dr. Naresh Trehan of Medanta Hospital, New Delhi has expressed his view that COVID-19 infection should not be taken lightly as it may seriously and adversely affect the heart and lungs and it could be known only after passage of some time and at times the infection could even be brought home by those who are hale and hearty because of carelessness of people and their elderly family members and children at home may get infected adversely and, therefore, besides the doctor, and Government, public has also to involve itself in the fight against COVID-19.

Another doctor, Dr. Devi Shetty of Bengaluru has expressed his view that this pandemic may well continue to last for a further year and, therefore, more and more doctors have to be appointed to meet the situation that may arise because of the large scale infected people coming to the hospital in near future.

Dr. S.K. Sarin of Delhi has stated that it is imperative to make a rule "no mask no entry" in public places and institutions including banks etc. He rightly said that if everyone wears a mask, it will act like a vaccine and no second person will get infected.

Under such circumstances, we issue a writ of mandamus for the whole of the State of Uttar Pradesh that no person should be seen outside his/ her house without a mask on his/her face and he or she should check that the mask covers both the nose and the mouth. The police in all the districts of the State of Uttar Pradesh should in all police stations of all the districts deploy Task Forces to implement this mandamus. Each task force should consist of many more police personnel than presently have been deployed. Needless to say that violation of this mandamus would entail rigorous punishments. The Police and the Administration cannot get away by saying that people are to be blamed for not wearing the masks. They cannot say that despite their best efforts, masks are not being worn. The people and the Administration should realize that today wearing of masks is not only for the protection of the person who is wearing it but it is now also important for protecting the whole society and if a person commits a crime against society, he has to be punished. We further direct that the police of the entire State of Uttar Pradesh has to necessarily take appropriate action under relevant provisions of the various Penal laws, the moment it finds a person without a mask in the public.

The Advocate Commissioners whom we have appointed shall report to the Zonal officers and the Municipal Commissioners through the email Id which have been provided to them in the Court itself by Sri Kautilya, learned counsel appearing for the Municipal Corporation. They shall also mail their report regarding the exercise of the task forces on a daily basis to the Registrar, Legal Cell, High Court Allahabad on his email Id and shall also forward the same to the Additional Advocate General.

On the next date fixed we shall have due consideration of the reports submitted by the Advocate Commissioners regarding the policing to enforce public wearing of masks, by the task forces.

Issue No.- V:

So far as the treatment part is concerned, it is evident that despite the best efforts of the Government there are shortcomings. From the various arguments which have been placed at the Bar before us, we find that there are certain remedial measures which are important and they should be brought in:-

(i) Medical facilities should be made available to one and all.

(ii) The Task Forces which have been constituted for rendering medical help should have empathy towards the ill.

The Court is aware of a case where after the COVID-19 patient had passed away. A phone call came to the relative of the person who had died asking him as to whether the person who had got infected would go for hospitalization or would he like to remain in home isolation. To the first call, the relative had responded that the person about whom the enquiry was being made had already died. Thereafter, repeated phone calls were being made to the relative of the deceased asking the very same question as to whether the person who had got infected would like to get hospitalized or would prefer home isolation. The relative kept on informing that the person about whom the enquiry was being made had passed away. The telephone calls were being made from the following numbers:-

(i) 8887680362; (ii) 0532-2641582; (iii) 0532-2641579; (iv) 8299373859; (v) 0532-2641594; (vi) 0532-2641584; (vii) 0522-2723481; (viii) 0532-2500281; and (ix) 0532-2500287

The Court, therefore, feels that the portal is not being updated. In the case in hand, the person who had got infected had died but it is a matter of concern as to what would happen if a person had not died and had informed to the person who was making the enquiries about his illness etc.? One can understand the plight of a person who instead of getting medicines and medical advice gets only telephone calls.

The Court finds that these enquiries, therefore, are only empty formalities and there is no sincerity on the part of the person who makes the enquiry, which surely shows that the portals are only for namesake and are not actually being updated. From all this, the Court gathers that the phone calls were being made from professional call centres who were not interested in the treatment of the person infected but were only making empty phone calls for some payment they might be getting.

Thus, the Administration in this regard is directed to ensure that every information which is provided, should be entered against the name of the person in respect of whom the enquiry was being made and the portal should genuinely be updated on a day to day basis. Further problem which has come to the notice of the Court is that if a person who is in home isolation requires CT scan and X-ray then no pathology entertains that patient. Every district in the State of U.P. should have a dedicated clinic (it can be in the clinics of the municipality of every district) where a person who is in home quarantine can go and get his/her CT scan or X-ray done.

Put up this matter again on 28th September, 2020 at 10:00 A.M.

Let a copy of this order be sent to the Additional Chief Secretary (Home), State of Uttar Pradesh, Director General of Police, Uttar Pradesh, Lucknow and all the District Magistrates, Senior Superintendents of Police and Superintendents of Police of all the districts of the State within 48 hours for necessary action and compliance of this order at their end.

(2020)09ILR A331
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.07.2020

BEFORE

THE HON'BLE PANKAJ MITHAL, J.
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Public Interest Litigation (PIL) No. 749 of 2020

Dr. Mohammad Ayub ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Arvind Kumar , Sri Rahul Chaudhary

Counsel for the Respondents:
C.S.C.

A. Public Interest Litigation - Covid - 19 - the restrictions imposed by the State Government imposing lockdown for two days in a week during the extraordinary situation created due to COVID-19 pandemic cannot be said to impinge upon any of the Fundamental Rights of the petitioners or members of any religious community. It is further observed that the Fundamental Rights is subject to reasonable restrictions which may be necessary in the interest of public order. (Para 8, 9)

PIL Rejected. (E-10)

(Delivered by Hon'ble Pankaj Mithal, J. & Hon'ble Dr. Yogendra Kumar Srivastava, J.)

1. Heard Sri Rahul Chaudhary, learned counsel for the petitioner and the learned Standing Counsel appearing for the State-respondents.

2. The petitioner is claiming to be a renowned surgeon and a member of Peace Party. He has preferred this writ petition in public interest alleging that *Qurbani* (sacrifice) is mandatory on the festival of *Eid-ul-Adha* which is falling on 31.07.2020. He orally submits that the festival is actually on Saturday, 1st of August, 2020. The petitioner, therefore, prays that for the purposes of *Qurbani* on the said day of festival relaxations may be provided in the guidelines of the State Government dated 12.07.2020 which contemplate for a two days' lockdown in view of COVID-19 pandemic on every Saturday and Sunday.

3. The submission of the learned counsel for the petitioner is that the lockdown which is applicable on every Saturday and Sunday infringes with the right guaranteed under Articles 21 and 25 of the Constitution of India.

4. Fundamental Rights as contained under Part III of the Constitution have always enjoyed a special and privileged place in the Constitution and occupy a unique place in the lives of the civilised societies. They have been held to be transcendental, inalienable and primordial. However, the Fundamental Rights under Part III are not of an absolute nature, and the same are subject to reasonable restrictions.

5. Article 25 secures to every person the freedom of conscience and free profession, practice and propagation of religion.

6. The entitlement to freedom of conscience and the right freely to profess, practice and propagate religion is, however, subject to public order, morality and health and to other provisions of Part III.

7. The right to freedom of religion guaranteed under Article 25 of the Constitution thus cannot override the interests of public order, morality and health and is also subject to other provisions contained under Part III.

8. The right under Article 25 guaranteeing freedom of conscience, profession, practice and propagation of religion being subject to "public order, morality and health", and also "to other provisions" of Part III of the Constitution, the restrictions imposed by the State Government imposing lockdown for two days in a week during the extraordinary situation created due to COVID-19 pandemic, cannot be said to impinge upon any of the Fundamental Rights of the petitioners or members of any religious community.

9. It is pertinent to mention that guarantee of the Fundamental Rights has been made subject to reasonable restrictions which may be imposed by the State. The power to impose reasonable restrictions may be necessary in the interest of public order, morality and health provided the restrictions so imposed are not unreasonable and arbitrary.

10. We, in such a situation, where the restrictions imposed have neither been shown to be arbitrary or unreasonable, find no reason whatsoever for relaxing the conditions contained under the guidelines.

11. The counsel for the petitioner is unable to establish before us as to in what manner the restrictions imposed in terms of the guidelines issued by the State Government in the light of the prevailing COVID-19 pandemic impinge upon any of the fundamental rights of the petitioner or of any person especially in these unprecedented times of COVID-19 pandemic which casts an onerous obligation upon the State to take measures to secure the health and lives of its citizens.

12. Having regard to the aforementioned facts and circumstances, we do not find any element of public interest in the present petition so as to persuade us to exercise our extraordinary jurisdiction under Article 226 of the Constitution of India.

13. The writ petition thus fails and is, accordingly, dismissed.

(2020)09ILR A332
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.09.2020

BEFORE

THE HON'BLE SHASHI KANT GUPTA, J.
THE HON'BLE SHAMIM AHMED, J.

Public Interest Litigation (PIL) No. 801 of 2020

Nageshwar Mishra ...Petitioner
Versus
The Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Shailesh Kumar Tripahi

Counsel for the Respondents:
A.S.G.I., Sri Arvind Agrawal

A. Indian Citizenship Act, 1955- Section 10(2)-Constitution of India-Section 5 to 11-Public Interest Litigation- Deprivation of Citizenship -The provisions for depriving the citizenship can be invoked only against those persons who have become citizen by naturalization or by virtue only of clause (c) of Article 5 of the Constitution of India or but registration otherwise than under clause (b) (ii)

of Article 6 of the Constitution of India or clause (a) of sub-section (1) of section 5 of this Act. But since the respondent no. 3 is an Indian citizen by taking birth in the territory of India therefore the question of deprivation of citizenship does not arise. (Paras 6, 7, 8)

Public Interest Litigation Rejected. (E-10)

(Delivered by Hon'ble Shashi Kant Gupta, J. & Hon'ble Shamim Ahmed, J.)

1. The present writ petition in the form of Public Interest Litigation has been filed inter alia for the following relief:-

"(a) issue a writ, order or direction in the nature of Mandamus commanding the respondent authorities to deprive the Indian Citizenship of the Kanhaiya Kumar (Respondent No. 3)."

2. The allegations have been made in the petition against the Respondent No. 3, Kanhaiya Kumar, a former President of the Students' Union of Jawahar Lal Nehru University Delhi for allegedly raising anti national slogans during an event that took place in JNU campus on 9.2.2016. Following the said incident Kanhaiya Kumar and others are facing the trial after receiving nod for prosecuting them in a sedition case.

3. Learned counsel for the petitioner stated that despite the anti-national slogans raised by the Respondent No. 3, Kanhaiya Kumar, the Government of India, is not taking any action to terminate his Indian Citizenship. It has been further averred in the writ petition that Kanhaiya Kumar and his associates are supporting the freedom struggle of terrorist groups who are working on the instigation of Pakistan to destabilize the unity and disturb the peace and tranquility of our country. It has been further averred that a criminal case has been instituted by lodging an FIR (No. 110 of 2016) under Sections 124-A, 323, 143, 149 and 120-B IPC againstKanhaiya Kumar and his associates for raising anti-national slogans. It has been further stated that keeping in view the anti-national activities, Respondent No. 3, Kanhaiya Kumar be deprived of citizenship under Clause (2) of Section 10 of the Indian Citizenship Act, 1955.

4. Heard Sri, Shailesh Kumar Tripathi, learned counsel for the petitioner, Sri Arvind Agrawal, learned counsel representing the Union of India, Respondent No. 1 and perused the record.

5. From the perusal of the record, it appears that the learned counsel for the petitioner before filing the present writ petition has neither gone through the provisions of Constitution of India nor The Indian Citizenship Act, 1955. It will be appropriate, at this stage, to quote Sub-clause 1 and 2 of Section 10 of The Indian Citizenship Act, 1955 which are as follows:-

"10. Deprivation of citizenship.-- (1) A citizen of India who is such by naturalisation or by virtue only of clause (c) of article 5 of the Constitution or by registration otherwise than under clause (b) (ii) of article 6 of the Constitution or clause (a) of sub-section (1) of section 5 of this Act, shall cease to be a citizen of India, if he is deprived of that citizenship by an order of the Central Government under this section.

(2) Subject to the provisions of this section, the Central Government may, by order, deprive any such citizen of Indian citizenship, if it is satisfied that--

(a) the registration or certificate of naturalisation was obtained by means of fraud, false representation or the concealment of any material fact; or

(b) that citizen has shown himself by act or speech to be disloyal or disaffected towards the Constitution of India as by law established; or

(c) that citizen has, during any war in which India may be engaged unlawfully traded or communicated with an enemy or been engaged in, or associated with, any business that was to his knowledge carried on in such manner as to assist an enemy in that war; or

(e) that citizen has been ordinarily resident out of India for a continuous period of seven years, and during that period, has neither been at any time a student of any educational institution in a country outside India or in the service of a Government in India or of an international organisation of which India is a member, nor registered annually in the prescribed manner at an Indian consulate his intention to retain his citizenship of India.

(3) The Central Government shall not deprive a person of citizenship under this section unless it is satisfied that it is not conducive to the public good that the person should continue to be a citizen of India.

(4) Before making an order under this section, the Central Government shall give the person against whom the order is proposed to be made notice in writing informing him of the ground on which it is proposed to be made and, if the order is proposed to be made on any of the grounds specified in sub-section (2) other than clause (e) thereof, of his right, upon making application therefor in the prescribed manner, to have his case referred to a committee of inquiry under this section.

(5) If the order is proposed to be made against a person on any of the grounds specified in sub-section (2) other than clause (e) thereof and that person so applies in the prescribed manner, the Central Government shall, and in any other case it may, refer the case to a Committee of Inquiry consisting of a chairman (being a person who has for at least ten years held a judicial office) and two other members appointed by the Central Government in this behalf.

(6) The Committee of Inquiry shall, on such reference, hold the inquiry in such manner as may be prescribed and submit its report to the Central Government; and the Central Government shall ordinarily be guided by such report in making an order under this section."

6. A bare reading of Section 10 of The Indian Citizenship Act, 1955 and the relevant provisions i.e. Article 5 to 11 of Constitution of India contained in Part II of the Constitution of India dealing with the citizenship clearly indicates that the provision for depriving the citizenship can be invoked only against those persons who have become citizen of India by naturalisation or by virtue only of clause (c) of Article 5 of the Constitution of India or by registration otherwise than under clause (b) (ii) of Article 6 of the Constitution of India or clause (a) of sub-section (1) of section 5 of this Act. Such persons shall cease to be citizens of India, if they are deprived of their citizenships by an order of the Central Government under this section.

7. In the present case, admittedly, the Respondent No. 3, Kanhaiya Kumar was born in the territory of India, as such, by

virtue of Article 5(a) of Constitution of India, he is a citizen of India. For ready reference, Article 5 of the Constitution of India is quoted hereinbelow:-

"5. Citizenship at the commencement of the Constitution:- At the commencement of this Constitution every person who has his domicile in the territory of India and-

(a) who was born in the territory of India; or

(b) either of whose parents was born in the territory of India; or

(c) who has been ordinarily resident in the territory of India for not less than five years preceding such commencement, shall be a citizen of India"

8. Thus in view of the above Respondent No. 3, cannot be deprived of his citizenship, in as much as he has not become a citizen of India by naturalisation or by virtue only of clause (c) of Article 5 of the Constitution of India or by registration as provided under sub section (1) of Section 10. Therefore, the powers under sub section (2) of Section 10 cannot be invoked against him, since they are expressly subject to the provisions of Section 10 and can only be invoked for **such citizens** as provided for under Sub section (1) of Section 10. Therefore it is evident that the petition is completely devoid of merit and is wholly misconceived.

9. In any view of the matter, the question of deprivation of citizenship cannot arise, merely because the Respondent No. 3 is facing Trial before the Court in Delhi on charges of allegedly raising the inflammatory slogans. Also, under the present proceedings we are not competent to express any opinion with regard to the merit of the criminal case pending against the Respondent no. 3. It must be noted that deprivation of citizenship is a serious aspect as it would affect a person's right to live in India, and it may also result in making the person stateless.

10. It appears that the present writ petition, filed under the garb of public interest litigation has been preferred with the sole motive of gaining cheap publicity, without even going through the relevant provisions of the Constitution of India and The Indian Citizenship Act, 1955. As such, valuable time of this Court, which is functioning in its limited strength, during the period of the pandemic, has been wasted by filing the present writ petition. Intention of the petitioner, in our opinion, is not to espouse the interest of the public, but only of his own self, by gaining publicity. Such conduct is highly condemnable. The present public interest litigation is wholly frivolous and an abuse of the process of law. Therefore, we deem it fit to impose heavy cost.

11. In view of the above, we dismiss the present public interest litigation imposing a cost of Rs. 25,000/- (Rs. Twenty Five Thousand Only) on the petitioner. The petitioner is directed to deposit the said cost of Rs. 25,000/- by way of Bank Draft in favour of the Registrar General, High Court Allahabad within a period of 30 days from today.

12. The amount so deposited with the Registrar General, High Court shall be remitted to the Advocate Association, High Court, Allahabad.

13. In case of default in depositing the said money within the stipulated period, the

same shall be recovered from the petitioner as arrears of land revenue by theDistrict Collector, Varanasi.

14. Let a copy of this order be placed before the Registrar General of this Court to ensure necessary compliance of this order.

15. A copy of this order may also be sent to the District Collector, Varanasi for necessary follow up action.

(2020)09ILR A336
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.08.2020

BEFORE

THE HON'BLE SHASHI KANT GUPTA, J.
THE HON'BLE SHAMIM AHMED, J.

Public Interest Litigation (PIL) No. 840 of 2020
with
Public Interest Litigation (PIL) No. 841, 842, 848 of 2020

Roshan Khan & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Viquar Mehdi Zaidi, Sri M.J. Akhtar, Sri Imran Khan, Sri S.F.A. Naqvi

Counsel for the Respondents:
C.S.C.

A. Public Interest Litigation - The Court observed that the right to practice and propagate religion has been made subject to public order, morality and health even under the Constitution of India. Therefore, vide Notification dated 10.08.2020 and 23.08.2020 the State Government adopted the same yardstick for all religious communities and they have been restricted from carrying on any processions or jhankis or activities that have a danger of large congregations that may lead to a spread of pandemic Covid-19. (Para 12, 22)

Public Interest Litigation Rejected. (E-10)

List of cases cited: -

1. Odisha Vikash Parishad Vs U.O.I. & ors.

2. Syed Kalbe Jawad Writ Petition (Civil) No. 924 of 2020

(Delivered by Hon'ble Shashi Kant Gupta, J.)

1. Since the controversy raised in all the aforesaid Writ Petitions is identical, they are being decided by a common order, treating Public Interest Litigation (PIL) No. 840 of 2020 (Roshan Khan and Others Versus State of U.P. and others) as the leading case.

2. In sum and substance, the Petitioners seek to challenge the Government Orders dated 10.08.2020 and 23.08.2020 passed by the State Government, in so far as they prohibit the petitioners and members of their community, from taking out the Moharram Processions, and further seek the issuance of a direction to the Respondent Authorities to permit them to perform religious mourning rituals/practice connected with Moharram, during the period of ten days i.e. up to 30.08.2020, amid the pandemic restrictions in the State of Uttar Pradesh.

3. The main thrust of the argument of the learned counsel for the petitioners is that Government Orders issued by State of Uttar Pradesh dated 10.08.2020 and 23.08.2020 are discriminatory in nature, insofar as they provide for a complete ban in taking out the Moharram processions. It has been further submitted that such

guidelines are discriminatory, targeting only one community in particular. In support of his contention, he has referred to the Guidelines dated 29.07.2020, issued by the Government of India, Ministry of Home Affairs as well as Government Orders issued by the State Government dated 10.08.2020 as well as 23.08.2020. Relevant portions of Government Orders dated 10.08.2020 and 23.08.2020 are quoted herein below:

Guidelines For Phased Re-opening (Unlock 3)

[As per Ministry of Home Affairs (MHA) Order No. 40-3/2020-DM-1(A) dated 29th July 2020]

1. Activities Permitted during Unlock 3 period outside the Containment Zones.

In Areas outside the Containment Zones, All activities will be permitted, except the following:

i. ... ...

v. Social/political/sports/entertainment/ academic cultural/religious functions and other large congregations. ... ...

... ...

5. States/UTs based on their assessment of the situations may prohibit certain activities outside the containment zones or impose such restrictions as deemed necessary. ... ...

...

Government Order dated 10.08.2020

सेवा मे,

समस्त जिलाधिकारी वरिष्ठ पुलिस अधीक्षक/पुलिस अधीक्षक, उ०प्र०।

प्रतिलिपि समस्त जोनल अपर पुलिस महानिदेशक, उ०प्र०।

अपर पुलिस महानिदेशक(ए०टी०एस०) उ०प्र०।

समस्त मण्डलायुक्त/पुलिस महानिरीक्षक/पुलिस उप महानिरीक्षक(परिक्षेत्र)

उ०प्र०। अपर पुलिस महानिदेशक, कानून एवं व्यवस्था/अभिसूचना/सुरक्षा/रेलवे, उ०प्र०।

पुलिस कमिश्नर, लखनऊ/गौतमबुद्ध नगर।

समस्त डी०आर०एम०, रेलवे, उ०प्र०।

प्रबन्ध निदेशक, उ०प्र० राज्य सड़क परिवहन निगम, लखनऊ।

पुलिस महानिदेशक, उत्तर प्रदेश, लखनऊ।

सूचनार्थः अपर मुख्य सचिव , मा० मुख्यमंत्री जी, उ०प्र०शासन।

स्टाफ ऑफिसर, मुख्य सचिव, उ०प्र० शासन।

प्रेषकः- गृह विभाग, उत्तर प्रदेश, लखनऊ।

संख्याः- 687K/VI-सानिप्रा-20-7(3)/2005 लखनऊः दिनांक 10 अगस्त, 2020

माह अगस्त, 2020 में पड़ने वाले त्योहार यथा जन्माष्टमी, गणेश चतुर्थी एवं मोहर्म जो कि विभिन्न तिथियों में आयोजित होंगे, को गृह मंत्रालय, भारत सरकार की कोविड-19 की गाईडलाइन्स का पालन करते हुए सादगी से मनाया जाए। इन त्योहारों पर कोई भी जुलूस, झाँकी न निकाली जाए एवं किसी भी दशा में भीड़ एकत्रित न हो पाए।

वर्तमान परिस्थितियों में सुरक्षा स्थिति के दृष्टिगत सम्भावित खतरों से सतर्क रहने की आवश्यकता है। सभी धार्मिक स्थलों विशेषकर मथुरा स्थित श्रीकृष्ण जन्मभूमि, श्री रामजन्म भूमि, अयोध्या पर असामाजिक तत्वों/आतंकवादियों एवं समाज में अस्थिरता फैलाने वाले व्यक्तियों पर सतर्क दृष्टि रखने की आवश्यकता है।

इस अवधि मे असामाजिक तत्वों द्वारा कानून-व्यवस्था को भंग करने का प्रयास किया जा सकता है एव आतंकवादी नागरिकों को

नुकसान पहुंचा सकते है। अतः उक्त मौकों पर सतर्क रहने की आवश्यकता है।

वर्णित परिस्थितियों में सावधानी हेतु निम्न निर्देश दिये जा रहे है:-

1. राज्य सरकार द्वारा समय-समय पर कोविड-19 महामारी के रोकथाम हेतु निर्देश निर्गत किये गए है, जिसका कड़ाई से अनुपालन सुनिश्चित कराया जाए।

2. कोविड-19 में जन्माष्टमी के मौके पर किसी को भी जुलूस/झाँकी की अनुमति नही दी जाए।

3. गणेश चतुर्थी के मौके पर कोई भी पूजा-पंडाल में कोई भी मूर्ति स्थापित न की जाए और न ही कोई शोभा-यात्रा की अनुमति दी जाए। सभी श्रद्धालुओं को प्रेरित किया जाए कि उक्त त्योहार को अपने-अपने घरों पर ही मनायें।

4. इसी प्रकार मोहर्रम के अवसर पर किसी प्रकार के जुलूस/ताजिया की अनुमति न दी जाए एवं धर्म-गुरूओं से संवाद स्थापित कर कोविड-19 के दिशा-निर्देशो का अनुपालन करें।

5. ऐसे समस्त कार्यक्रमों की पीस कमेटी की मीटिंग कराते हुए सभी सामाजिक एवं धर्म -गुरूओं से व्यवस्था बनाये रखने में सहयोग लिया जाए।

6. संवेदनशील/साम्प्रदायिक एवं कन्टेनमेन्ट जोन में पर्याप्त संख्या में पुलिस बल की तैनाती की जाए।

7. किसी भी धार्मिक स्थल पर लोगों की भीड़ एकत्र न होने पाए, यह सुनिश्चित किया जाए।

8. त्योहारों पर सार्वजनिक स्थल यथा बस स्टेशन, रेलवे स्टेशन और संवेदनशील स्थान/धार्मिक स्थल पर यथावश्यक व्यवस्थायें/चेकिंग कराई जाए।

Government Order dated 23.08.2020

प्रबन्ध निदेशक, उ०प्र० राज्य सड़क परिवहन निगम, लखनऊ।

पुलिस महानिदेशक, उत्तर प्रदेश, लखनऊ।

सूचनार्थ अपर मुख्य सचिव, मा० मुख्यमंत्री, उत्तर प्रदेश शासन, लखनऊ।स्टाफ आफिसर, मुख्य सचिव, उत्तर प्रदेश शासन, लखनऊ।

प्रेषकः गृह विभाग उत्तर प्रदेश शासन , लखनऊ।

संख्या-777 के/छः-सानिप्र-2020 लखनऊःदिनांक-23 अगस्त, 2020

कृपया माह अगस्त, 2020 मे पड़ने वाले त्यौहारो को गृह मंत्रालय, भारत सरकार की कोविड़-19 की गाइड लाइन्स का पालन करते हुये सादगी से मनाये जाने विषयक शासन के आदेश संख्या-678 के/छः-सानिप्र20-7(j)/2005, दिनांक 10 अगस्त 2020 का संदर्भ ग्रहण करने का कष्ट करे जिसके द्वारा माह अगस्त मे पड़ने वाले त्यौहारो पर कोई भी जुलूस, झाँकी न निकलने एवं किसी भी दशा मे भीड़ एकत्रित न होने के संबंध मे विस्तृत दिशा निर्देश निर्गत किये गये है।

2 उक्त के क्रम मे वर्तमान परिस्थितियों के दृष्टिगत प्रदेश के सभी धार्मिक स्थलो विशेषकर श्री कृष्ण जन्म भूमि मथुरा, श्री राम जन्म भूमि तीर्थ क्षेत्र , अयोध्या, श्री काशी विश्वनाथ मन्दिर मन्दिर वाराणसी एवं ऐतिहासिक स्थल ताजमहल आगरा की सुरक्षा व्यवस्था तथा कोविड-19 महामारी के संबंध मे भारत सरकार नई दिल्ली एवं उत्तर प्रेदश, शासन द्वारा समय-समय पर निर्गत निर्देशो के आलोक मे असामाजिक तत्वो/आतंकवादी एवं समाज मे अस्थिरता फैलाने वाले व्यक्तियों पर सर्तक दृष्टि रखने की आवश्यकता है।

3 उक्त के दृष्टिगत आगामी अवधि मे असामाजिक तत्वो द्वारा कानून-व्यवस्था एवं सम्प्रदायिक सौहार्द को भंग करने का प्रयास किये जाने तथा आतंकवादियो द्वारा सामान्य

नागरिकों को नुकसान पहुचाने की संभावना तथा कोविड-19 महामारी के प्रभाव को कम करने के लिये निम्नलिखित निर्देश दिये जा रहे है:-

दिनांक -30 सितम्बर 2020 तक कोई भी सार्वजनिक समारोह, धार्मिक उत्सव एवं राजनैतिक आन्दोलन एवं सभाये आयोजित नही होंगी।

सार्वजनिक रूप से मूर्तियों , ताजिया एवं अलग स्थापित नही किये जायेंगे।

सभी प्रकार जुलूस एवं झाँकी प्रतिबन्धित होंगी, अर्थात जुलूस एवं झाँकी नही निकाले जा सकते है।

मूर्तियां, ताजिया एवं अलग की स्थापना अपने-अपने घरो मे किये जाने पर किसी प्रकार की रोक नही होगी।

कोविड-19 महामारी के दृष्टिगत उत्तर प्रदेश शासन द्वारा समय-समय पर निर्गत दिशा निर्देशो का कडाई से अनुपालन सुनिश्चित कराया जाये।

4. Learned counsels for the petitioners have further submitted that Hon'ble Apex Court had allowed the devotees access to the places of worship and permitted the Annual Chariot Procession at the Jagganath Temple, Puri besides recently permitting the offer of Paryushan prayers in three Jain Temples in Mumbai. It is further submitted that the prohibition is arbitrary especially when the proposed rituals can be regulated by prescribing reasonable restrictions, like limiting the number of people to carry out the Taziyas till Karbala for burial. It was submitted that in this way neither there would be transmission of Covid-19 infections nor would any chaos be created.

5. Per contra, learned Additional Chief Standing Counsel appearing on behalf of the State has strongly opposed the contention so made by the learned counsel for the petitioners. It was vehemently argued by him that the aforesaid Government Orders are in no way discriminatory in nature. While referring to the Government Orders dated 10.08.2020 and 23.08.2020, it was argued that restrictions have also been imposed upon the Hindu community and they have been prohibited from raising any Pooja Pandals or installing any statues/idols or even taking out processions during the festival of Ganesh Chaturthi and the devotees were encouraged to celebrate the festival in their respective homes. Likewise, the Muslim community has also been restricted from taking out any Taziyas or processions, in order to prevent the spread of Covid-19. He further submitted that restrictions have been imposed on all the communities.

6. Learned Standing Counsel also referred Clause 5 of the Notification dated 29.07.2020 of the Central Government, wherein the States/Union Territories (UTs) have been duly empowered to prohibit certain activities outside the Containment Zones or impose such restrictions as deemed necessary, based on their assessment of the situation.

He further submitted that the State Government considering the rapid surge of Covid-19 cases in the State of Uttar Pradesh, issued Guidelines on 10.08.2020, directing all the concerned Officers of the State to prohibit any kind of procession, falling in the month of August, 2020 for example Janmashtami, Ganesh Chaturthi and Morahham, as such, the State Government has imposed restrictions/ban on any kind of procession, across all communities, without any discrimination. He further submitted that the drastic step of prohibition has been taken for all communities, on account of the extraordinary situation created due to the

pandemic and, therefore, in the given circumstances the total prohibition is reasonable and not violative of the fundamental rights of the petitioners or members of the any community, as sought to be alleged.

It was further argued that in case the petitioners are permitted to take out processions or Taziyas for burial at the Karbala, it may lead to chaos and an uncontrollable surge of the pandemic.

7. Learned Standing Counsel further stated that the Division Bench of this Court in Public Interest Litigation No. 749 of 2020 (Dr. Mohammad Ayub Versus State of U.P. and others) vide its judgment dated 29.07.2020 had dismissed the writ petition, wherein a relief was sought for relaxing the guidelines for the festival of Eid-ul-Adha. He further referred to the decision of the Hon'ble Apex Court in the case of ***Odisha Vikash Parishad Vs. Union of India and others,*** wherein in paragraph no. 9 of the judgment the Hon'ble Apex Court has observed as follows:

"(9) The bare minimum number of people shall be allowed by the Committee to participate in the rituals and in the Rath Yatra. We take note of the fact that the State of Orissa has a good record of having controlled the pandemic with a very little loss of life. We see no reason why the same attitude of care and caution should not be applied to the Rath Yatra."

8. Heard Mr. V.M. Zaidi, Senior Advocate, Mr. S.F.A. Naqvi, Senior Advocate, Mr. S.K.A. Rizvi, Mr. K.K. Roy, learned counsels for the petitioners, Mr. S.P. Singh, learned Addl. Solicitor General of India assisted by Mr. A.N. Rai, Counsel for the Union of India, Mr. Ramanand Pandey, and learned Additional Chief Standing Counsel, appearing on behalf of the State and perused the material available on record, particularly Notification dated 29.07.2020 issued by Central Government and Notification dated 10.08.2020 and 23.08.2020 issued by the State Government.

9. It is notable that earlier a writ petition, filed by **Syed Kalbe Jawad i.e. Writ Petition (Civil) No. 924 of 2020,** before the Apex Court which was dismissed as withdrawn with liberty to approach the Allahabad High Court on 27.08.2020 and no relief was granted by the Apex Court in the aforesaid matter.

10. That in view of the aforesaid contentions, the issues that arise for determination before this Court are:

(1) Whether the impugned Government Orders are arbitrary and discriminatory inasmuch as they seek to target a particular community?

(2) Whether the complete prohibition on carrying out processions or Taziyas on 30.08.2020, violates the Fundamental Right to practice and profess religion guaranteed under Part III of the Constitution of India and whether the rituals ought to be permitted by imposition of reasonable restrictions instead?

(3) Whether in view of the prevalent situation of the pandemic, the imposition of complete prohibition from carrying out processions or Taziyas on 30.08.2020, is reasonable and justified?

11. With regard to the **first issue** it may be noted that the main thrust of the argument of the learned counsel for the petitioners has been that restrictions imposed by the State Government are

discriminatory in nature and only one community has been targeted in the aforesaid Government Order. This argument advanced by the learned counsel for the petitioner has no legs to stand on and appears to be patently misconceived.

12. A bare perusal of the Notifications dated 10.08.2020 and 23.08.2020, issued by the State Government, clearly indicates that the same yardstick has been adopted for all religious communities and they have been restricted from carrying on any processions or Jhankis or activities that have a danger of large congregations that may lead to a spread of the pandemic-Covid-19. Regard may be had to Clause (2) of the Notification dated 10.08.2020, that clearly indicates that no processions or Jhankis have been permitted during the Janmastami festival. Similarly, Clause (3) of the said Notification also indicates that during the Festival for Ganesh Chaturthi too, the Hindu community has been prohibited from erecting any Pooja Pandals and from installing any statues/idols. Likewise, the Muslim community has been prohibited from taking out processions/Tazias during Moharram.

13. Thus, it is clear that in view of controlling the spread of Covid-19, the State Government has imposed a complete prohibition on all religion activities that may involve a large conglomeration of people, across communities, and as such the government orders are not discriminatory nor do they target any Community, in particular.

14. Since the Second and the Third issues are interrelated, they are being dealt with together. The contention of the learned counsel for the petitioners is that the total prohibition imposed on the processions and carrying out Tazias is completely arbitrary especially when reasonable restrictions could easily be imposed, keeping in mind the Guidelines, issued by the Government for prevention of spread of Covid-19. It is therefore accepted that with the prevalent rate of transmission in Uttar Pradesh, large processions cannot be permitted and certain restrictions are necessary for controlling the spread of the pandemic.

15. It has further been sought to be urged that even the Hon'ble Apex Court had allowed the devotees to access the place of worship and permitted the Annual Chariot procession (Rath Yatra) of Jagganath Temple, Puri and further permitted to offer Paryushan prayer in three Jain Temples in Mumbai, then the petitioners, too must be permitted to carry out procession during Moharram.

16. In this regard it may be noted that the Apex Court had not passed any general directions, but the permission to carry out the Annual Chariot Procession (Rath Yatra), pertained to a specific place, Puri, and only from one point to another. Further, the intensity of Covid-19 spread in Orissa, was also duly noted by the Hon'ble Apex Court, while granting the permission.

17. However, the present case, is clearly distinguishable from the aforesaid cases since it pertains to the entire State of Uttar Pradesh and is not confined to one or a few districts. In this regard it may be noted that it would be discriminatory to grant permission to certain districts while prohibiting the others. Further the intensity of the spread of the contagion in the State is rising at an alarming rate.

18. That we have also given serious thought to working out some mechanism in

order to permit the processions for Taziyas burials, while imposing certain restrictions. However, no such workable mechanism could be suggested even by the Counsels for the Petitioners.

19. It may be noted that Taziyas are a replica of the tomb of Husain, the martyred grandson of Prophet Muhammad, and the same is taken to be buried to a burial ground (Karbala) by innumerable groups as well as by individuals on the 10th day of the Muharram or the day of Ashura. It is also a custom that any person who makes a Taziya must take it himself and bury it at the designated burial ground. Many individuals even seek to bury the Taziyas as a fulfilment of their Vows.

20. Therefore there is no doubt that the burial of the Taziyas at the burial ground is a solemn and important part of custom of Muharram. However, it is necessary to note that every locality/colony has Taziyas, besides various individual families, all of whom have to get to the burial ground, since the burial of Taziyas cannot be deputed but has to be done personally. There is no mechanism fathomable, by the means of which it can be ensured that all such persons be permitted to take the Taziyas to the burial ground in a single day, while avoiding the risk of transmission of the contagion or following basic rules of social distancing, which are an absolute necessity in these unprecedented times. Another important aspect of the matter is that no restriction can be placed only on certain groups or individuals while permitting the others, since that would clearly amount to forming a class within a class, which would be arbitrary and discriminatory.

21. Further, at this juncture regard may be had to the intensity of Covid-19 transmission in the State of Uttar Pradesh, which is alarmingly high. It may be noted that the Uttar Pradesh is the most populated State in the Country and is at the Stage of Community Transmission on account of which it has quicky reached the 4th spot amongst the States in the number of active cases, with each passing day, the highest number of cases being reported. Further, this Court in P.I.L. No. 574 of 2020, while taking cognizance of the rise in intensity of the rise of Covid-19 cases across the state, directed the State Government vide order dated 25.08.2020, to present an action-plan to contain the contagion. The Court also observed that any step lesser than a lock down would be of no help.

22. Therefore, although the complete prohibition of practices which are essential to our religions is an extraordinary measure, it is very much in proportion to the unprecedented situation we are faced with, owing to the pandemic. The right to practise and propagate religion has been made subject to public order, morality **and health,** even under the Constitution of India.

23. The Pandemic is spreading like wild fire, despite harsh lockdowns. We are standing naked at the shore and don't know when the huge wave of Corona may sweep us into the deep sea. We really don't know what tomorrow holds. Adoption of safe practices are needed to win over the health crisis. We need to understand the Art of living with the Corona Virus.

24. Therefore it is with a heavy heart that we hold that in these testing times, it is not possible to lift the prohibition by providing any guidelines for regulating the mourning rituals/practice connected with the 10th day of Moharram. We must hope and trust that God would perceive our restraint in our customary practices, not as

a slight, but as an act of compassion for our brothers and sisters and give us the opportunity to celebrate all festivals with greater faith and fervour in future. It is only together with co-operation, understanding and support, we as "One Nation', can emerge stronger from these treacherous times and overcome this season of darkness.

25. In view of the above, we do not see justification to issue any directions in the matter. The present Public Interest Litigation as well as Public Interest Litigation Nos. 841 of 2020, 842 of 2020 and 848 of 2020 are accordingly, dismissed.

(2020)09ILR A343
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.09.2020

BEFORE

THE HON'BLE ASHOK KUMAR, J.

Sales/Trade Tax Revision No. 85 of 2020
&
Sales/Trade Tax Revision No. 87 , 88 of 2020

M/S Mondelez India Foods Pvt. Ltd.,Ghaziabad ...Petitioner
Versus
Commissioner of Commercial Taxes, Lucknow ...Respondent

Counsel for the Petitioner:
Sri Nishant Mishra, Sri Tanmay Saadh

Counsel for the Respondent:
C.S.C.

A. Trade Tax - Remand - Value Added Tax, 2008: Section 58 - At first, the first appellate authority and the second appellate authority reduced the disputed tax amount upto 60% and 70% respectively but when the matter was again remanded to these authorities, it only reduced the disputed tax amount upto 50% only.

The first and the second appellate authority failed to obey the directions given by the Hon'ble High Court by not examining the books of accounts thoroughly. (para 33)

Revision Disposed of. (E-10)

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

1. प्रस्तुत निगरानी वाणिज्य कर पुनरनिरीक्षण (रिवीजन) याचिकाएँ अन्तर्गत धारा 58 उ०प्र० वाणिज्यकर अधिनियम, 2008 के अन्तर्गत व्यापारी सर्वश्री माण्डलेज इण्डिया फूड्स प्रा०लि०, खसरा सं०- 146 से 149 व 153 ग्राम गालन्द रिलायन्स रोड जिन्दल नगर, गाजियाबाद द्वारा प्रस्तुत की गई।

2. सम्बन्धित पुनरनिरीक्षण याचिकाएँ वर्ष 2013-14 (प्रान्तीय) वैट अधिनियम, 2013-14 केन्द्रीय बिक्री कर अधिनियम एवं 2014-15 प्रान्तीय /वैट अधिनियम के अन्तर्गत प्रस्तुत की गई है।

3. प्रस्तुत पुनरनिरीक्षण याचिकाएँ सदस्य, वाणिज्यकर अधिकरण, गाजियाबाद पीठ-I, गाजियाबाद द्वारा पारित आदेश दिनांक 20.03.2020 के विरुद्ध प्रस्तुत की गई है।

4. संक्षेप में प्रस्तुत वादों के तथ्य इस प्रकार हैं कि अपीलार्थी द्वारा चाकलेट, बॉर्नवीटा, कोको एवं हाल्स इत्यादि की खरीद बिक्री एवं उसे प्रदेश के बाहर से आयात किया जाता है।

5. व्यापारी द्वारा कर निर्धारण अधिकारी के सम्मुख प्रत्येक वर्ष की वार्षिक विवरणी प्रस्तुत की गई जिसके निरीक्षणोंपरान्त कर निर्धारण अधिकारी के कार्यालय द्वारा नियम 45(13ए) के अन्तर्गत व्यापारी की लेखा पुस्तकों

में जो कमियाँ पायी गयीं उन्हें दूर करने हेतु समय प्रदान किया गया। व्यापारी द्वारा नोटिस का कोई उत्तर नहीं प्रस्तुत किया गया न ही व्यापारी का कोई प्रतिनिधि कर निर्धारण अधिकारी के सम्मुख उपस्थित हुआ अतएव कर निर्धारण अधिकारी द्वारा व्यापारी को कारण बताओ नोटिस निर्गत किया गया। कारण बताओ नोटिस के परिपेक्ष्य में व्यापारी की ओर से अधिकृत प्रतिनिधि उपस्थित हुए परन्तु उनके द्वारा समुचित उत्तर नहीं दिया जा सका।

6. कर निर्धारण अधिकारी द्वारा व्यापारी द्वारा प्रस्तुत विवरण एवं उत्तर को दृष्टिगत रखते हुए लेखाबहियों का निरीक्षण एवं परीक्षण किया गया एवं जाँचोपरान्त अन्तर्गत धारा 28(2)(i) कर निर्धारण आदेश दिनांक 27.10.2016 व 30.01.2018 पारित किये गये।

7. कर निर्धारण अधिकारी द्वारा वर्ष 2013-14 प्रान्तीय में कुल जमा राशि के अलावा रु० 1,26,03,691.00 की माँग सृजित की गयी। वर्ष 2013-14 केन्द्रीय में स्टॉक ट्रांसफर को अस्वीकृत करते हुए रु० 8,05,098/- की माँग सृजित की गई।

8. अपीलार्थी द्वारा उपरोक्त सृजित माँग के विरुद्ध एडिश्नल कमिश्नर ग्रेड-2 (अपील) प्रथम वाणिज्यकर, गाजियाबाद के सम्मुख अपीलें योजित की गई साथ ही सृजित माँग के विरुद्ध स्थगन प्रार्थनापत्र प्रस्तुत किये गये।

9. एडिश्नल कमिश्नर ग्रेड-2 (अपील) प्रथम वाणिज्यकर, गाजियाबाद द्वारा प्रस्तुत स्थगन प्रार्थनापत्र के तथ्यों को दृष्टिगत रखते हुए विवादित कर की धनराशि का 60% वर्ष 2013-14 यू.पी. (प्रान्तीय) की वसूली अपील के निर्णित होने तक स्थगित की गई।

10. वर्ष 2013-14 केन्द्रीय एवं वर्ष 2014-15 प्रान्तीय में प्रथम अपीलीय अधिकारी द्वारा 50% विवादित कर की धनराशि की वसूली अपील के निर्णित होने तक स्थगित की गई।

11. व्यापारी द्वारा प्रथम अपीलीय अधिकारी के स्थगन प्रार्थनापत्र में पारित आदेशों (दिनांकित 08.12.2016 / 26.02.2018) के विरुद्ध वाणिज्यकर अधिकरण, गाजियाबाद के सम्मुख अपीलें प्रस्तुत की गईं।

12. वाणिज्यकर अधिकरण, गाजियाबाद द्वारा प्रस्तुत अपीलों पर दिनांक 22 दिसम्बर, 2016 (वर्ष 2013-14 प्रान्तीय व केन्द्रीय) एवं दिनांक 05 मार्च, 2018 (वर्ष 2014-15 प्रान्तीय) में विवादित कर की धनराशि का 70% की वसूली प्रथम अपील के निस्तारण होने तक स्थगित करने का आदेश पारित किया गया।

13. अपीलार्थी द्वारा इस न्यायालय के सम्मुख अधिकरण के उपरोक्त आदेशों, दिनांकित 22 दिसम्बर, 2016 एवं 05 मार्च, 2018 के विरुद्ध व्यापारकर पुनरनिरीक्षण याचिकाएँ संख्या- 24 सन् 2017, 25 सन् 2017 एवं 107 सन् 2018 प्रस्तुत की गई जिनमें उच्च न्यायालय द्वारा दिनांक 12.01.2017 एवं दिनांक 15.03.2018 को निम्न आदेश पारित किए गए:-

सेल्स/ट्रेड टैक्स रिवीजन नं०-24 सन् 2017 {वर्ष 2013-14 (प्रान्तीय)}:-

"Revisionist is aggrieved by an order passed by the Tribunal dated 22nd December, 2016, in so far as it requires the revisionist to deposit 30% of the disputed amount of tax, during the pendency of its appeal before the first appellate authority.

Learned counsel for the revisionist contends that during the course of assessment proceedings, the revisionist had prayed for certain additional time to submit required documents and certificates, in order to demonstrate that revisionist is

entitled to exemption, but such request was turned down, and the assessing authority has proceeded to pass an order of assessment against the revisionist. It is pointed out that it has already deposited about Rs.47 crores towards the admitted tax payable, and the dispute survives in respect of raising of additional demand to the extent of Rs.12 and odd crores. It is stated that revisionist has already deposited 10% of the disputed tax amount. It is also contended that the appeal filed by the revisionist raises substantial questions, and even otherwise, the revisionist intends to bring on record materials to demonstrate that requisite certificates and documents are available with the company for establishing that no further amount of tax is payable, and in such circumstances, the appeal itself is liable to be heard. Learned counsel submits that in such circumstances, it would be appropriate to direct the first appellate authority to decide the appeal, on merits, without insisting upon the revisionist to deposit any further amount towards tax.

Learned Standing Counsel appearing for the revenue does not dispute that Rs.47 crores has been deposited by the revisionist towards admitted tax for the assessment year, and in respect of the disputed amount also, the revisionist has deposited 10% of the amount. Learned Standing Counsel, therefore, submits that the appeal itself can be disposed of finally by the first appellate authority.

Considering the facts and circumstances, noticed above, this Court is of the opinion that in the peculiar facts and circumstances, interest of justice would be served in directing the first appellate authority to dispose of the appeal finally, on merits, provided the revisionist furnishes security other than cash and bank guarantee to the satisfaction of the assessing authority, in respect of balance 20% amount of the tax demanded. In case such security is furnished to the satisfaction of the assessing authority within two weeks from today, the first appellate authority shall proceed to dispose of the appeal finally, on merits, without insisting upon the revisionist to deposit any further amount.

The revision is, accordingly, disposed of."

सेल्स/ट्रेड टैक्स रिवीजन नं०- 25 सन् 2017 {वर्ष 2013-14 (केन्द्रीय)}:-

"This revision is directed against an order passed by the Tribunal dated 22nd December, 2016, in so far as it requires the revisionist to deposit 30% of the tax amount quantified at Rs.8,05,098/- within 30 days before the assessing authority.

Learned counsel for the revisionist submits that the tax has been imposed upon the revisionist in respect of stock transfer only, because Form 'F' has not been produced before the assessing authority. Revisionist submits that it had sought time before the assessing authority for producing necessary documents, but such request has been rejected, and the order of assessment has been passed. Revisionist submits that it shall submit the requisite forms, during the course of hearing of the appeal, and therefore, at this stage, it be not directed to deposit any further amount of tax, for the purpose of grant of interim protection. Learned counsel states that it has already deposited 10% amount payable towards tax, and admitted tax has also been paid.

Learned Standing Counsel submits that in the facts and circumstances, the appeal itself can be considered and disposed of, in accordance with law.

In view of the fact that revisionist has already deposited 10% of the disputed tax amount, and the issue is only as to

whether Form 'F' had been issued to the revisionist in respect of stock transfer, it would be appropriate that appeal itself be heard and decided finally, without insisting upon the revisionist to deposit any further amount of tax, provided the revisionist furnishes security other than cash and bank guarantee to the satisfaction of the assessing authority, in respect of balance 20% amount of the tax demanded, since the Tribunal has already granted stay qua 70% of the disputed tax amount.

The revision is, accordingly, disposed of."

सेल्स/ट्रेड टैक्स रिवीजन नं०- 107 सन् 2018 {2014-15 (प्रान्तीय)}:-

"It is stated that as against total demand of Rs. 64,37,18,466/-, the revisionist has deposited a sum of Rs.54,27,70,112/- and in respect of balance disputed amount of about Rs. 10 crores, appeal is pending. It is stated that the first appellate authority has permitted the revisionist to deposit 50% of the amount which condition stands modified under the order of the Tribunal by staying the demand to the extent of 70%. Submission is that there is no consideration of prima-facie case and the aspect of financial condition has also not been correctly examined.

Learned Standing Counsel, on the other hand, points out that no evidence was led by the assessee with regard to its financial hardship.

In the facts and circumstances of the case, it is apparent that no consideration with regard to prima-facie case of the assessee, has been made. The assessee has otherwise deposited substantial amount towards the tax payable. In such circumstances, ends of justice would be met in directing the first appellate authority to decide the appeal on merits, upon the revisionist's furnishing security in respect of balance amount other than cash and bank guarantee, within a period of four weeks from today. All endeavours would be made to dispose of the appeal by fixing short date, at the earliest possible."

14. उपरोक्त आदेशों के द्वारा उच्च न्यायालय द्वारा अपीलार्थी को निर्देशित किया गया कि वे दो सप्ताह में अधिकरण द्वारा आदेशित जमा धनराशि के विरुद्ध वर्ष 2013-14 (प्रान्तीय) में 10% विवादित धनराशि, जो अपीलार्थी द्वारा जमा की गई है के अलावा 20% विवादित धनराशि की बैंक गॉरण्टी कर निर्धारण अधिकारी के सम्मुख प्रस्तुत कर जमा का प्रमाण प्रस्तुत करें।

15. वर्ष 2013-14 (केन्द्रीय) में भी अपीलार्थी द्वारा 10% विवादित कर जमा किया गया अतएव 20% की सिक्योरिटी नगद अथवा बैंक गॉरण्टी के अलावा जमा करने हेतु आदेशित किया गया।

16. वर्ष 2014-15 (प्रान्तीय) में इस न्यायालय द्वारा आदेश दिनांक 15.03.2018 को प्रथम अपीलीय अधिकारी को अपील निस्तारित करने हेतु आदेशित किया गया तथा अपीलार्थी को बिना कैश व बैंक गॉरण्टी के सिक्योरिटी चार सप्ताह में दाखिल करने हेतु निर्देशित किया गया।

17. अपीलार्थी द्वारा उच्च न्यायालय के उपरोक्त आदेशों का अनुपालन किया गया तथा विवादित कर का 10% आदेश के पूर्व ही जमा किया गया जिसका विवरण उच्च न्यायालय के ऊपरलिखित आदेशों में दिया गया।

18. प्रथम अपीलीय अधिकारी द्वारा अपीलों का निस्तारण दिनांक 28.09.2018 के आदेश द्वारा किया गया एवं सभी बिन्दुओं पर

विवेचना के उपरान्त अपीलों को स्वीकृत किया गया तथा वादों को पुनः कर निर्धारण अधिकारी को इस निर्देश के साथ प्रतिप्रेषित किया गया कि प्रथम अपीलीय अधिकारी द्वारा दिये गए निर्देशों के अनुपालन में पुनः कर निर्धारण की कार्यवाही सुनिश्चित की जावे।

19. प्रतिप्रेषित आदेशों के परिप्रेक्ष्य में कर निर्धारण अधिकारी द्वारा दिनांक 13.02.2020 को कर निर्धारण आदेश धारा 28(2)(ii) प्रतिप्रेषित वाद के अन्तर्गत एवं धारा 9(2) केन्द्रीय बिक्री कर अधिनियम प्रतिप्रेषित वाद के अन्तर्गत पारित किये गए एवं व्यापारी द्वारा प्रस्तुत आँकड़ों को अस्वीकार करते हुए न्याय व विवेक से कर निर्धारण की कार्यवाही की गई तथा अपवंचित टर्नओवर व्यापारी के व्यापार की प्रकृति व प्रसार को देखते हुए हाल्स (मेडिसिन) की 50 लाख तथा बॉर्नवीटा, चॉकलेट, कोको आदि की रु० 91,50,000,00.00 की अपवंचित प्रान्तीय बिक्री (वर्ष 2013-14) की, निर्धारित की गई साथ ही केन्द्रीय बिक्री कर अधिनियम के अन्तर्गत व्यापारी को फार्म एफ के विरुद्ध कर मुक्ति का लाभ देने के पश्चात शेष धनराशि रु० 57,39,996.00 के फार्म एफ दाखिल न करने के विरुद्ध व्यापारी पर रु० 8,03,600.00 की कर की माँग सृजित की गई।

20. कर निर्धारण अधिकारी द्वारा अन्ततः व्यापारी के विरुद्ध प्रान्तीय व केन्द्रीय (वर्ष 2013-14) के अन्तर्गत कुल रु०12,98,75,556.00 एवं 8,03,600.00 की मांग सृजित की गई।

21. वर्ष 2014-15 प्रान्तीय वाद में व्यापारी की लेखा पुस्तकों को अस्वीकार करते हुए कर निर्धारण अधिकारी द्वारा व्यापारी के विरुद्ध कुल माँग रु० 10,09,48,354/- सृजित की गई।

22. उपरोक्त कर निर्धारण आदेशों, दिनांकित 13.02.2020 के विरुद्ध अपीलार्थी द्वारा पुनः एडिश्नल कमिश्नर (अपील) के सम्मुख अपीलें प्रस्तुत की गई साथ ही स्थगन प्रार्थनापत्र भी प्रस्तुतद किये गये।

23. अपीलार्थी के स्थगन प्रार्थनापत्रों का निस्तारण प्रथम अपीलीय अधिकारी द्वारा दिनांक 05.03.2020 को किया गया जिसके द्वारा प्रथम अपीलीय अधिकारी ने वर्ष 2013-14 प्रान्तीय एवं केन्द्रीय एवं वर्ष 2014-15 प्रान्तीय में विवादित धनराशि का 50% अपील निर्णय होने तक के लिए स्थगित किया गया। अर्थात विवादित धनराशि का 50% जमा करने का आदेश पारित किया गया।

24. उक्त आदेशों दिनांक 05.03.2020 के विरुद्ध अपीलार्थी की ओर से वाणिज्यकर अधिकरण के सम्मुख अन्तर्गत धारा 57 उ०प्र० वैट अधिनियम, 2008 के अन्तर्गत अपीलें योजित की गईं।

25. वाणिज्यकर अधिकरण द्वारा उपरोक्त अपीलों का निस्तारण दिनांक 20.03.2020 द्वारा किया गया।

26. विद्वान वाणिज्यकर अधिकरण द्वारा अपीलों को निस्तारित करते हुए निम्न तथ्यों का उल्लेख किया गया:-

"प्रश्नगत कर निर्धारण आदेशों, अपील मीमों, लिखित बहस एवं अपीलों के साथ संलग्न दस्तावेजों पर सरसरी दृष्टि डालने के उपरान्त इस अधिकरण का मत है कि विवादित कर की 50% से अधिक धनराशि को स्थगित किये जाने का कोई आधार उपलब्ध नहीं है। सरसरी दृष्टि से नजर डालने पर प्रश्नगत कर निर्धारण आदेशों में कोई विधि एवं तथ्य की विसंगति प्रतीत नहीं होती है। प्रश्नगत आदेश में कोई विसंगति है अथवा नहीं, इसके लिए पत्रावली के सम्यक अवलोकन की आवश्यकता है जिसका माननीय

सर्वोच्च न्यायालय द्वारा उपरोक्त पेन्नार इण्डस्ट्रीज लि० विरुद्ध स्टेट ऑफ आन्ध्र प्रदेश 2009 (वाल्यूम-3) एस०सी०सी०-पृष्ठ-170 में प्रतिपादित विधि व्यवस्था के प्रकाश में इस स्तर पर किया जाना उचित नहीं है। यह उल्लेखनीय है कि प्रथम अपीलों के लम्बित रहने के दृष्टिगत प्रथम अपील के विवादित बिन्दु पर गुण दोष के आधार पर मत व्यक्तद किया जाना उचित नहीं है। फार्म-एफ भी इस स्तर पर प्रस्तुत नहीं किये गये हैं। अपीलार्थी द्वारा अपनी दुर्बल आर्थिक स्थिति को सिद्ध करने के लिए कोई सुसंगत साक्ष्य भी प्रस्तुत नहीं किया गया है।"

27. अपीलार्थी के विद्वान वरिष्ठ अधिवक्ता श्री तरुण गुलाटी का कथन है कि वाणिज्यकर अधिकरण का आदेश दिनांक 20.03.2020 प्रथम दृष्ट्या अविधिक है।

28. विद्वान अधिवक्ता का कथन है कि पूर्व में इसी वाणिज्यकर अधिकरण द्वारा अपीलार्थी के वादों में, जो कि कर निर्धारण वर्ष 2013-14 एवं 2014-15 से सम्बंधित थें में स्वंय 70/80% तक की विवादित कर की वसूली स्थगित की गई तदोपरान्त माननीय उच्च न्यायालय द्वारा अपीलार्थी को आदेशित किया गया कि वह वर्ष 2013-14 के बकाया विवादित धनराशि के एवज में बैंक गारण्टी प्रस्तुत कर अपनी दायर अपीलों का निस्तारण करावें। इसी प्रकार वर्ष 2013-14 (केन्द्रीय) में बिना कैश व बैंक गारण्टी के अपीलों की सुनवाई हेतु निर्देशित किया गया।

29. विद्वान वरिष्ठ अधिवक्ता ने यह कथन किया कि प्रथम अपीलीय अधिकारी द्वारा प्रतिप्रेषित वाद के निर्णय द्वारा कर निर्धारण अधिकारी को स्पष्ट रूप से आदेशित किया था कि वे तथ्यों को विस्तृत रूप से सत्यापित करें तथा अपीलार्थी की लेखा पुस्तकों का सम्यक परीक्षण करने के उपरान्त निर्देशों का अनुपालन करते हुए आदेश पारित करें, परन्तु कर निर्धारण अधिकारी द्वारा अपने वरिष्ठ अपीलीय अधिकारी के आदेशों का पूर्णतः उल्लंघन किया गया तथा अपने स्वयं के विवेक के आधार पर व्यापारी के विरुद्ध भारी कर आरोपित किया गया।

30. अपीलार्थी के विद्वान अधिवक्ता ने कथन किया कि अधिकरण द्वारा पूर्व में पारित स्वयं के एवं माननीय उच्च न्यायालय के आदेशों को पूर्णतः अनदेखा किया गया साथ ही माननीय न्यायालय के आदेशों का घोर उल्लंघन व अवमानना की गई।

31. विद्वान स्थायी अधिवक्ता श्री बी.के. पाण्डेय द्वारा अधिकरण के आदेशों को सही बताया गया तथा यह कथन किया गया कि कर निर्धारण अधिकारी द्वारा प्रतिप्रेषित आदेशों का पूर्णतः पालन किया गया एवं व्यापारी के विरुद्ध सही कर निर्धारित किया गया।

32. मेरे द्वारा व्यापारी के ओर से उपस्थित वरिष्ठ अधिवक्ता श्री तरुण गुलाटी, श्री निशान्त मिश्रा एवं श्री कुमार विशालक्ष (Kumar Visalaksh) अधिवक्ताद्वय को एवं विभाग की ओर से विद्वान स्थायी अधिवक्ता श्री बी.के. पाण्डेय को विस्तृत रूप से सुना गया एवं उपलब्ध प्रपत्रों का परिशीलन किया गया एवं यह पाया गया कि पूर्व में प्रथम अपीलीय अधिकारी एवं वाणिज्यकर अधिकरण द्वारा स्वंय ही 60% एवं 70% तक विवादित कर को स्थगित किया गया था तब ऐसी क्या परिस्थिति हुई जो प्रथम अपीलीय अधिकारी एवं वाणिज्यकर अधिकरण द्वारा वाद के प्रतिपेषित होने के पश्चात कर निर्धारण अधिकारी द्वारा पारित आदेश के विरुद्ध विवादित कर का मात्र 50% की धनराशि ही स्थगित की गई।

33. प्रथम अपीलीय अधिकारी एवं अधिकरण द्वारा पूर्व में पारित उच्च न्यायालय के आदेशों का भी स्पष्ट रूप से उल्लंघन किया गया जो कदापि सही प्रतीत नहीं होता है।

34. प्रस्तुत वाद के तथ्यों पर बिना किसी गुण-दोष एवं मत को प्रकट किए हुए एवं इस तथ्य का संज्ञान लेते हुए कि अपीलार्थी कम्पनी द्वारा स्वयं में वर्ष 2013-14 में लगभग 65 करोड़ रु० कर जमा किया गया है, इसी प्रकार वर्ष 2014-15 में भी अपीलार्थी कम्पनी द्वारा स्वंय लगभग 54 करोड़ रू० कर की धनराशि जमा की गई है एवं यह कि व्यापारी एक रजिस्टर्ड प्रतिष्ठित कम्पनी है अतएव उपरोक्त परिस्थितियों को दृष्टिगत रखते हुए अपीलार्थी को यह निर्देशित किया जाता है कि वह वर्ष 2013-14 (प्रान्तीय) में कुल रु० 2 करोड़ वर्ष 2013-14 केन्द्रीय में कुल रु० 10 लाख एवं वर्ष 2014-15 प्रान्तीय में कुल रु० 2 करोड़ एक माह के अन्दर जमा करें। यदि अपीलार्थी उपरोक्त निर्देशित धनराशि उसे प्रदान किये गए समय के अन्तर्गत जमा करेगा तब उस परिस्थिति में अपीलार्थी के द्वारा दाखिल प्रथम अपीलों का निस्तारण प्रथम अपीलीय अधिकारी द्वारा तीन माह के अन्दर गुण-दोष के आधार पर किया जावेगा।

35. उपरोक्त निर्देशों के साथ प्रस्तुत तीनों पुनरनिरीक्षण याचिकाएँ अन्तिम रूप से निस्तारित की जाती है।

(2020)09ILR A349
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.07.2020

BEFORE

THE HON'BLE PANKAJ MITHAL, J.
THE HON'BLE DR. YOGENDRA KUMAR SRIVSATAVA, J.

Writ Tax No. 365 of 2020

Raj Kishor Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Manish Dwivedi

Counsel for the Respondents:
C.S.C.

A. U.P. Motor Vehicles Taxation Act, 1997- Sections 4, 9, , 12, 20 - Tax - Liability for payment of tax - the Act levies compulsory payment of tax on every registered vehicle. The plea that the vehicle was in repair/maintenance cannot be a ground to evade the liability for payment of tax by the owner of the motor vehicle whose name is entered in the certificate of registration in the absence of the certificate having been surrendered as per the statutory provisions. (Para 17)

Writ Petition Rejected. (E-10)

List of cases cited: -

1. St. of Orissa & ors Vs Bijaya C. Tripathy (2004) 7 SCC 139

2. St. of Karn. Vs K.Gopalakrishna Shenoy & ors. (1987) 3 SCC 655

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

1. The present petition seeks to raise a challenge to recovery proceedings initiated pursuant to a recovery certificate dated 15.09.2019 issued by the respondent no. 3 exercising powers under Section 20 of the Uttar Pradesh Motor Vehicles Taxation Act, 19971. The petitioner also seeks to challenge the subsequent recovery citation dated 10.10.2019 for recovery of Rs. 1,10,880/-.

2. As per the facts pleaded in the writ petition, the petitioner is the owner of a commercial vehicle having a registration no. UP90.T.1382. It is sought to be contended that the motor vehicle in question had been handed over to the dealer

from whom it has been purchased for the purpose of maintenance on account of certain defects and for the said reason the petitioner was not liable for payment of tax which is sought to be recovered from him

3. Learned Standing Counsel appearing for the State respondents has submitted that the petitioner being the registered owner of the motor vehicle, the liability in respect of the payment of tax under the provisions of the Act, 1997 would be of the petitioner. It is further submitted that there is no material to suggest that the petitioner had applied for surrender of the vehicle at any stage and therefore he cannot escape the liability of tax.

4. The question which thus falls for consideration before us is as to whether the owner of a motor vehicle can escape the liability for payment of tax under Section 4 of the Act, 1997 by raising a plea that the vehicle was not put to use on the road, even though the certificate of registration continued to be in his name and had not been surrendered.

5. The provisions with regard to imposition of tax in the State of Uttar Pradesh on motor vehicles are governed in terms of the Uttar Pradesh Motor Vehicles Taxation Act, 1997 [U.P. Act No. 21 of 1997]. The definition of the term 'owner' in respect of a motor vehicle has been defined under Section 2 (h) of the Act, 1997 and for ease of reference, the said provision is being extracted below :-

"2 (h) 'Owner' in respect of a motor vehicle means the person whose name is entered in the certificate of registration issued in respect of such vehicle, and where such vehicle is the subject of an agreement of hire-purchase or lease or hypothecation, the person in possession of the vehicle under that agreement and where any such person is a minor, the guardian of such minor."

6. Section 4 of the Act, 1997 which provides for imposition of tax reads as follows :-

"**4. Imposition of tax** - (1) Save as otherwise provided in this Act or the rules made thereunder, no motor vehicle other than a transport vehicle, shall be used in any public place in Uttar Pradesh unless a one-time tax at the rate applicable in respect of such motor vehicle, has been paid in respect thereof.

Provided that in respect of an old motor vehicle instead of a one time tax, annual tax applicable to such motor vehicle as may be specified by the State Government by notification in the Gazette may be paid.

[(1-A) Save as otherwise provided in this Act or the rules made thereunder no three wheeler motor cab and goods carriage having gross vehicle weight not exceeding 3000 kilograms, shall be used in any public' place in Uttar Pradesh unless yearly tax at such rate of such motor vehicle, as may be specified by the State Government by notification in the Gazette, has been paid in respect thereof:

Provided that in respect of a motor vehicle under this sub-section in lieu of yearly tax such amount of one time tax may be payable as specified by the State Government by notification in the Gazette.

Provided also that from the date of commencement of the Uttar Pradesh Motor Vehicles Taxation (Amendment) Act, 2014 no motor vehicle other than a transport vehicle shall be used in any public place after the expiry of validity of

registration under the Motor Vehicles Act, 1988 unless a green tax at the rate applicable to such Motor Vehicles as may be specified by notification, by the State Government has been paid in respect thereof.

(2) Save as otherwise provided by or under this Act no goods carriage other than those specified in sub-section (1-A),construction equipment vehicles, specially designed vehicles,motor cab (other than three wheeler motor cab), maxi cab and public service vehicles owned or controlled by the State Transport Undertaking, shall be used in any public place in Uttar Pradesh unless a quarterly tax at the rate applicable to such motor vehicle as may be specified by the State Government by notification in the Gazette, has been paid in respect thereof.

Provided that in respect a motor vehicle under this sub-section instead of quarterly tax, an yearly tax at such rate as may be specified by the State Government may be payable.

(2-A) Save as otherwise provided by or under this Act no public service vehicle other than those referred in sub-section (1-A) and sub-section (2) shall be used in any public place in Uttar Pradesh unless a monthly tax at such rate as may be notified by the State Government is paid in respect thereof:

Provided that in respect a motor vehicle under this sub-section instead of monthly tax, a quarterly or an yearly tax at such rate as may be notified by the State Government may be payable.

(2-B) Where any reciprocal agreement relating to taxation of goods carried by road is entered into between the Government of Uttar Pradesh and any other State government or a Union Territory, the levy of tax under sub-section (1-A) or sub-section (2) shall, notwithstanding anything contained in the said sub-section, be in accordance with the terms and conditions of such agreement:

Provided that the tax so levied shall not exceed the tax which would otherwise been levied under the Act.

(3) Where any motor vehicle other than a transport vehicle is found plying as a transport vehicle, such tax therefore as may be notified by the State Government, shall be payable.

(4) The State Government may, by notification, increase by not more than fifty percent, the rates of tax, specified in Part 'B', Part 'C' or Part 'D' of the First Schedule.

7. In terms of Section 9, a time frame is provided for payment of tax and it is also provided that in case of non-payment within the stipulated period, a penalty shall be payable. Section 9 of the Act, 1997 reads as follows :-

"9. Payment of tax and penalty - (1) Subject to the provisions of Section 11,-

(i) the tax payable under sub-section (1) of Section 4 shall be paid at the time of the registration of the vehicle under the Motor Vehicles Act, 1988 :

Provided that in respect of an old motor vehicle, the tax shall be payable in advance on or before the fifteenth day of January in each year;

(ii) the tax payable under sub-section (1-A) of Section 4, shall be payable in advance for one year at the time of the registration of the vehicle under the Motor Vehicles Act, 1988 and thereafter on or before the fifteenth day of the first calendar month of the each year next following.

(iii) the tax payable under sub-section (2) of Section 4 shall be payable in advance for one quarter at the time of

registration of the vehicle under the Motor Vehicles Act, 1988 and thereafter on or before the fifteenth day of the first calendar month of the each quarter next following.

(iv) (a) the tax payable under sub-section (2-A) of Section 4 shall be payable in advance for one calendar month at the time of registration of the vehicle under the Motor Vehicles Act, 1988 and thereafter on or before the fifteenth day of each calendar month next following.

(b) in respect of vehicles covered by temporary permit issued for the conveyance of passengers on special occasions, such as to and from fairs and religious gatherings or to carry marriage parties, tourist parties or such other reserved parties shall be paid at the time of issuance of such temporary permit.

(2) When any person transfers a motor vehicle registered in his name to any other person, then without prejudice to the liability of the transfer or in this regard, the transferee shall be liable to pay the arrears of tax, additional tax and penalty, if any, in respect of the motor vehicle so transferred, due on or before the date of its transfer, as if the transferee was the owner of the said motor vehicle during the period for which such tax, additional tax or penalty is due.

(3) Where the tax or additional tax I respect of a motor vehicle is not paid within the period specified in sub-section (1), in addition to the tax or the additional tax due, a penalty at such rate, as may be prescribed, shall be payable, for which the owner and the operator if any shall be jointly and severally liable.

(4) In computing the amount of tax, additional tax or penalty under this Act the amount shall be rounded off to the nearest rupee, that is to say a fraction of a rupee being fifty paise or more shall be rounded off to the next higher rupee and any fraction less than fifty paise shall be ignored."

8. Section 12 is in respect of non-use of vehicle and refund of tax and in terms of sub-section (2) thereof, the owner of a motor vehicle, in case he does not intend to use his vehicle, is required to surrender the certificate of registration, before the date the tax is due, to the Taxation Officer of the region, and upon such surrender no tax under the Act shall be payable in respect of such vehicle for each complete calendar month of the period during which the vehicle remains withdrawn from use and the aforesaid documents remain surrendered with the Taxation Officer. Section 12 of the Act, 1997, referred to above, is being extracted below :-

"12. Non-use of vehicle and refund of tax - (1) When any person who has paid the tax in respect of a transport vehicle, proves to the satisfaction of the Taxation Officer in the prescribed manner that the motor vehicle in respect whereof such tax has been paid, has not been used for a continuous period of one month or more since the tax was last paid, he shall be entitled to a refund of an amount equal to one third of the rate of quarterly tax or one twelfth of the yearly tax, as the case may be payable in respect of such vehicle for each thirty days of such period for which such tax has been paid.

Provided that no such refund shall be admissible unless such person has surrendered the certificate of registration, the token, if any, issued in respect of the vehicle and the permit, if any, to the Taxation Officer, before the period for which such refund is claimed.

Provided further that where one-time tax has been paid for a motor vehicle under sub-section (1-A) of Section 4, the amount equivalent to 1/20 for each month shall be refunded in respect of such vehicle.

(2) Where the operator or, as the case may be, the owner of a motor vehicle,

does not intend to use his vehicle for a period of one month or more he shall, before the date the tax or additional tax, as the case may be, is due, surrender the certificate of registration, the token, if any, issued in respect of the motor vehicle and the permit, if any, to the Taxation Officer of the region where the tax or additional tax was last paid and on such surrender, no tax or additional tax under this Act shall be payable in respect of such vehicle for each complete calendar month of the period during which the vehicle remains withdrawn from use and the aforesaid documents remain surrendered with the Taxation Officer:

Provided that in case such vehicle is found plying during the period when its documents as mentioned in this sub-section remain surrendered with the Taxation Officer, such owner or operator, as the case may be, shall be liable to the tax and the additional tax as if the documents were not surrendered and shall also be liable to the penalty equivalent to five-times of the tax and additional tax.

(3) Where the owner of a motor vehicle in respect whereof one-time tax has been paid under this Act proves to the satisfaction of the Taxation officer in prescribed manner that such motor vehicle has not been used for a continuous period of one month or more, he shall be entitled to a refund of such tax may be specified by the State Government by Notification in the Gazette for the said period.

Provided that no such refund shall be admissible, unless the certificate of registration and the token, if any, issued in respect of the vehicle are surrendered by the owner with the Taxation Officer:

Provided further that the total amount of refund under this sub-section shall not exceed the one-time tax paid under this Act.

(4) In calculating the amount of refund under sub-section (3) any portion of the period being less than a month shall be ignored.

(5) The owner of a motor vehicle other than a transport vehicle, in respect whereof one time tax has been paid under this Act shall be entitled to refund of such tax at the rates specified by the State Government by notification in the Gazette on the ground that he has, after payment of such tax, paid tax in respect of such vehicle under any enactment relating to any tax on motor vehicles in any other State or Union Territory as a consequence of such vehicle having been brought over permanently to such other State or Union Territory or that such motor vehicle has been converted into a transport vehicle or that the registration of such motor vehicle has been cancelled.

(6) Where any person who has paid the tax other than one-time tax in respect of an old motor vehicle, proves to the satisfaction of the Taxation Officer that the motor vehicle in respect of which such tax has been paid, has not been used for a continuous period of one month or more since the tax or installment was last paid, he shall be entitled to a refund of an amount equal to one-twelfth of the rate of annual tax payable in respect of such vehicle for each complete calendar month of such period for which such tax has been paid:

Provided that no such refund shall be admissible unless such person has surrendered the certificate of registration and the token, if any, issued in respect of the vehicle to the Taxation Officer, before the period for which such refund is claimed.

(7) An operator of a transport vehicle entitled to any refund of tax under sub-section (1), shall also be entitled to refund of such portion of the additional tax

paid under Section 6 as is attributable to the period for which he is entitled to refund under sub-section (1); and the amount of such refund shall be calculated on the same principle as is laid down in the said sub-section.

(8) Where the operator, or as the case may be, the owner of a motor vehicle is unable to use his motor vehicle due to an accident of the said vehicle and the certificate of registration, the token, if any, issued in respect of the said vehicle and the permit, if any, are surrendered to the Taxation Officer within a week from the date of such accident together with a copy of the first information report, such surrender shall be deemed to have been made on the date of the accident."

9. A conjoint reading of the aforementioned statutory provisions make it clear that as per the scheme under the Act, 1997, the owner of a motor vehicle i.e. a person whose name is entered in the certificate of registration issued in respect of such vehicle would be liable for tax as per the rates applicable and no vehicle is to be used in the State without payment of tax. Further, the liability for payment of tax would continue unless the owner applies for surrender of the certificate of registration and only on such surrender, no tax under the Act shall be payable in respect of such vehicle for each complete calendar month of the period during which the vehicle remains withdrawn from use and the documents remain surrendered with the Taxation Officer.

10. The effect of failure to give prior intimation and undertaking about non-use of the vehicle and the presumption in such case that the vehicle had been used or kept for use within the State resulting in the liability for payment of tax was considered in the case of **State of Orissa and others Vs. Bijaya C. Tripathy2** and it was held that if a transport vehicle has a valid certificate of registration then it will be presumed that the vehicle is kept for use entailing the liability for payment of tax. Referring to a similar provisions under the Orissa Motor Vehicles Taxation Act, 1975, it was held as follows :-

"2. In order to consider the correctness of this judgment it becomes necessary to look at the relevant provisions of the Orissa Motor Vehicles Taxation Act. Section 2 (b) defines a motor vehicle as any vehicle which is mechanically propelled and adapted for use upon roads whether the power of propulsion is transmitted from an external or internal source. It is an admitted position that the respondent's vehicle is a motor vehicle within the meaning of this definition.

Section 3 reads as follows :

3. Levy of tax - (1) Subject to the other provisions of this Act, there shall be levied on every motor vehicle used or kept for use within the State a tax at the rate specified in Schedule I.

(2) The State Government may by notification, from time to time, increase the rate of tax specified in Schedule I :

Provided that such increase shall not exceed fifty per cent of the rate specified in Schedule I.

(3) All references made in this Act to Schedule I shall be construed as references to Schedule I as for the time being amended in exercise of the powers conferred by this section.

Explanation - An owner who keeps a transport vehicle for which the certificate of fitness and the certificate of registration are valid, or an owner who keeps any other motor vehicle, of which the certificate of registration is valid, shall, for

the purpose of this Act, be presumed to keep such vehicle for use :

Provided that if the Taxing Officer finds a motor vehicle having been used on any day during the period for which the registration certificate of a vehicle has been suspended or cancelled under the relevant provisions of the Motor Vehicles Act such vehicle shall be deemed to have been kept for use for the whole period without payment of tax.

4. Thus, it has to be seen that tax is levied on every motor vehicle which is "used or kept for use". The Explanation makes it very clear that if a transport vehicle has a valid certificate of fitness and a valid certificate of registration then it will be presumed that the vehicle is kept for use. This presumption arises in respect of all motor vehicles, whether they are light motor vehicles or transport vehicles and would also include vehicles which do not have a stage carriage permit.

5. Section 4 provides that the tax is to be paid in advance by the registered owner or person having possession or control of the vehicle.

6. Section 10 which is also relevant reads as follows :

10. prior intimation of temporary discontinuance of use of a vehicle - (1) Whenever any motor vehicle is intended not to be used for any period, the registered owner or person having possession or control thereof shall on or before the date of expiry of the term for which tax has been paid, deliver to the Taxing Officer, an undertaking duly signed and verified in the prescribed form and manner specifying the period aforesaid and the place where the motor vehicle is to be kept along with such other particulars as may be prescribed and the registration certificate, fitness certificate, permit and tax token, then current and shall from time to time by delivering, further undertakings give prior intimation to the Taxing Officer concerned of the extension, if any, of the said period and the changes, if any, of the place where the motor vehicle shall be kept:

Provided that no such undertaking shall relate to a period exceeding one year at a time.

(2) If at any time during the period covered by an undertaking as aforesaid the motor vehicle is found being used or is kept at a place in contravention of any such undertaking, such vehicle shall, for the purposes of this Act be deemed to have been used throughout the said period without payment of tax.

(3) In the absence of any undertaking delivered under sub-section (1) every motor vehicle liable to tax under this Act shall be deemed to have been used or kept for use within the State.

7. Thus under Section 10 if a person is not intending to use a motor vehicle for any period then intimation has to be given along with an undertaking and the documents mentioned therein have to be handed over to the Taxation Officer. Sub-section (3) makes it very clear that in the absence of any undertaking under sub-section (1) it shall be presumed that the motor vehicle has been used or kept for use withing the State."

11. A similar view had earlier been taken in the case of **State of Karnataka Vs. K.Gopalakrishna Shenoy and another3,** wherein in the context of Mysore Motor Vehicles Taxation Act, 1957 it was held that the owner having a motor vehicle, in respect of which a certificate of registration is current, is bound to pay the tax even if the vehicle is incapable of being put in use. It was held that the principle underlying the Taxation Act is that every motor vehicle having a certificate of

registration is to be deemed a potential user of the roads all through the time the certificate of registration is current and therefore, liable to pay tax. The relevant observations made in the judgment are as follows :-

"7...The resultant position that emerges is that Section 3 (1) confers a right upon the State to levy a tax on all motor vehicles which are suitably designed for use on roads at prescribed rates without reference to the roadworthy condition of the vehicle or otherwise. Section 4 enjoins every registered owner or person having possession or control of the motor vehicle to pay the tax in advance. The Explanation to Section 3 (1) contains a deeming provision and its effect is that as long as the certificate of registration of a motor vehicle is current it must be deemed to be a vehicle suitable for use on the roads. The inevitable consequence of the Explanation would be that the owner or a person having control or possession of a motor vehicle as long as the certificate of registration is current irrespective of the condition of the vehicle for use on the roads and irrespective of whether the vehicle had a certificate of fitness with concurrent validity or not..."

8...The scheme of the Taxation Act is such that the tax due on a motor vehicle has got to be paid in terms of Section 3 at the prescribed rate and in advance and the liability to pay tax continues as long as the certificate of registration is current but if it so happens that in spite of the certificate of registration being current, the vehicle had not actually been put to use for the whole of the period or a continuous part thereof, not being less than one calendar month, the person paying the tax should apply to the prescribed authority and obtain a refund of the tax for the appropriate period after satisfying the authorities about the truth and genuineness of his claim. Sections 3 and 4 are absolute in their terms and the liability to pay the tax in advance is not dependent upon the vehicle being covered by a certificate of fitness or not. Even if the vehicle was not in a roadworthy condition and could not be put to use on the roads without the necessary repairs being carried out, the owner or person having possession or control of a vehicle is enjoined to pay the tax on the vehicle and then seek a refund. Perhaps in exceptional cases where the vehicle has met with a major accident or where it is in need of such extensive repairs that it would be impossible to put the vehicle to use or where the transport authorities themselves prohibit the use of the vehicle due to its defective condition and cancel the certificate of fitness or suspend it, the person concerned may surrender the certificate of registration and other documents like permit etc. and seek the permission of the transport authorities to waive the payment of tax on the ground that no proof of non-user was necessary and as such payment of tax on the one hand and an automatic application for refund on the other would be a needless ritualistic formality and if the permission sought for is granted, he need not pay the tax. In all other cases the only course left open is for the person concerned to pay the tax in advance and thereafter apply to the authorities and obtain refund of tax after proving that the vehicle was not fit for use on the roads and has in fact not been made use of. The principle underlying the Taxation Act is that every motor vehicle issued a certificate of registration is to be deemed a potential user of the roads all through the time the certificate of registration is current and therefore liable to pay tax under Section 3 (1) read with Section 4. If however, the vehicle had not

made use of the roads because it could not be put on the roads due to repairs, even though the certificate of registration was current, the owner or person concerned has to seek for and obtain refund of the tax paid in advance after satisfying the authorities about the truth of his claim. It is not for the transport authorities to justify the demand for tax by proving that the vehicle is in a fit condition and can be put to use on the roads or that it had plied on the roads without payment of tax. It would be absolutely impossible for the State to keep monitoring all the vehicles and prove that each and every registered vehicle is in a fit condition and would be making use of the roads and is therefore liable to pay the tax. For that reason the State had made the payment of tax compulsory on every registered vehicle and that too in advance and has at the same time provided for the grant of refund of tax whenever the person paying the tax has not made use of the roads by plying the vehicle and substantiates his claim by proper proof. Any view to the contrary would defeat the purpose and intent of the Taxation Act and would also afford scope and opportunity for some of the persons liable to pay the tax to ply the vehicle unlawfully without payment of tax and later on justify their non-payment by setting up a plea that the vehicle was in repair for a continuous period of over a month or the whole of a quarter, half-year or year as they choose to claim."

12. In the facts of the present case there is no dispute that the petitioner is the registered owner of the vehicle in question and that the said registration has not been surrendered by him till date. In view of the above, the liability for the payment of tax is entirely upon the petitioner. Submission of learned counsel for the petitioner that since the vehicle has been handed over to the dealer, he is not liable for payment of tax is unacceptable inasmuch as the definition of the owner contained in Section 2 (h) of the Act, 1997 clearly provides that the owner of a motor vehicle i.e. a person whose name is entered in the certificate of registration issued in respect of such vehicle would be liable for tax as per the rates applicable. The question as to whether the petitioner was in possession of the vehicle or otherwise would be immaterial and so long as the vehicle continues to be registered in his name indicating that he is a registered owner the liability on the petitioner in respect of payment of tax does not cease.

13. Moreover, the petitioner having not applied for surrender of certificate of registration, as per the scheme of the Act, 1997 the liability for payment of tax continues to be of the petitioner.

14. The scheme of the Act, 1997 creates a liability on the owner of a motor vehicle for payment of tax and also of imposition of penalty in case of default. The owner of the motor vehicle is thus statutorily obliged to pay the tax as long as the certificate of registration is current and in the event the owner does not intend to use his vehicle, he is required to surrender the certificate of registration and only upon such surrender having been made to the Taxation Officer the owner can make a claim that no tax is payable.

15. We may reiterate the principle underlying the Motor Vehicles Taxation Act, 1997 that every motor vehicle in respect of which a certificate of registration has been issued is to be deemed a potential user of the roads during the period when the certificate of registration is current creating a liability upon the owner to pay

the tax. The non-use of the vehicle may entitle the owner to seek a refund after proving to the satisfaction of the Taxation Officer in the prescribed manner that the motor vehicle in respect whereof the tax has been paid, had not been used, as provided for under Section 12 of the Act, 1997 subject to surrender of the certificate of registration.

16. The plea that the vehicle was not in a road worthy condition and could not be put to use on the roads without necessary repairs being carried out cannot absolve the owner or the person having possession of the vehicle from the liability to pay tax. In the event of the vehicle having not been put to use on the roads during the currency of the certificate of registration it is open to the owner of the vehicle or the person concerned to apply for refund of tax in the manner prescribed. The law does not require the Taxation Officer to justify the demand for tax by proving that the vehicle is in a fit condition and can be put to use or that it had actually been plied on the roads. The payment of tax and that too in advance on every registered vehicle has been made compulsory. At the same time the statute also creates a provision for grant of refund of tax whenever the person paying the tax has not made use of the road by plying the vehicle and substantiates his claim to the satisfaction of the Taxation Officer. A further provision for surrender of registration has also been made in a case where the owner of a motor vehicle does not intend to use his vehicle for a period of one month or more.

17. The payment of tax on every registered vehicle having been made compulsory as per the terms of the Act, 1997, the plea that the vehicle was in repair/maintenance cannot be a ground to evade the liability for payment of tax by the owner of the motor vehicle whose name is entered in the certificate of registration in the absence of the certificate having been surrendered as per the statutory provisions. Any other view would defeat the intent and purpose of the Taxation Act.

18. In view of the foregoing discussions, we do not find any merit in the writ petition.

19. The writ petition stands accordingly dismissed.

(2020)09ILR A358
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.07.2020

BEFORE

THE HON'BLE J.J. MUNIR, J.

Writ-B No. 25271 of 1988

Roop Narain & Anr. ...Petitioners
Versus
D.D.C. , Varanasi & Anr. ...Opposite Parties

Counsel for the Petitioners:
Sri D.S.P. Singh, Sri C.S. Garg, Sri D.S. Mishra, Sri Dhan Shyam Mishra, Sushma Devi, Sri Bipin Kumar Singh

Counsel for the Opp. Parties:
S.C., Sri Hari Kesh Singh, Sri O.P. Srivastava, Sri Ram Chandra, Sri Ratnesh Srivastava

A. U.P. Consolidation of Holdings Act, 1953 - Section 12-objections filed by the petitioners-the burden lies on petitioner who assails a registered conveyance as one executed by an imposter, has not been discharged by the petitioners beyond reasonable doubt-order passed by D.D.C. can not be faulted-jurisdiction of the

D.D.C. to decide both questions of fact and law is very wide-Apex Court approved the principle that where the findings are perverse or not supported by evidence, it would be the duty of D.D.C. to examine the entire case and appreciate any oral or documentary evidence. (Para 3 to 40)

The petition is dismissed. (E-6)

List of cases cited: -

1. Krishnapal & ors. Vs St. Of U.P. thru DM, Banda & ors.,(2010) 110 RD 210

2. Prem Singh & ors. Vs Birbal & ors.,(2006) 5 SCC 353

3. Sheo Nand & ors. Vs D.D.C., Alld. & ors., (2000) 3 SCC 103

4. U.O.I. Vs M/s Chaturbhai M. Patel & Co., (1976) 1 SCC 747

5. Iqbal Ahmad Vs Naimul,(2004) 3 AWC 1974 (LB)

(Delivered by Hon'ble J.J. Munir, J.)

1. This writ petition arises from proceedings commenced on objections brought under Section 12 of the U.P. Consolidation of Holdings Act, 1953 (for short, "the Act'). These objections, one filed by the petitioners and other by the second respondent, were determined variously by the Consolidation Authorities in the first instance, in appeal and in revision. The petitioners, who had succeeded in their claim to be mutated over the land in dispute, in place of the original *chak* holder, Smt. Dauli @ Daulati before the Consolidation Officer and the Settlement Officer of Consolidation, lost in revision before the Deputy Director of Consolidation, who found in favour of the second respondent, Chandrawali. That is what has brought the petitioners to this Court, assailing the order of the Deputy Director of Consolidation dated 12.12.1988, under Article 226 of the Constitution.

2. The facts giving rise to the dispute that have led to this writ petition, besides the course of proceedings before the Authorities below, require elucidation.

3. The property in dispute, of which details shall be given hereinafter, is a moiety of 1/3rd of the tenure of one Sudipal. Sudipal had three sons, who in turn had one son each. Of them, Mahadeo, who represents the branch of Hublal, died intestate leaving his widow, Smt. Dauli @ Daulati and two daughters, Smt. Pyari w/o Gulab and Smt. Dudha Devi w/o Chandrawali. As indicated above, Chandrawali is the second respondent to this writ petition. The following pedigree would facilitate understanding about the succession of tenure from Sudipal:

Sudipal

Hublal

Shyambaran Molai

Mahadeo

Shobhey RoopNarain

Hublal

Shyambaran Molai

Mahadeo

Shobhey RoopNarain

Mahadeo Shobhey RoopNarain

Mahadeo Shobhey RoopNarain

Mst. Dauli @ Daulati

Mst. Dauli @ Daulati

4. Now, a one-third moiety of the tenure held by Sudipal, was inherited by

Smt. Dauli @ Daulati upon Mahadeo's decease. The two daughters of Mahadeo admittedly did not inherit any share, going by the provisions of Section 171 of the U.P. Z.A. & L.R. Act, as these stood at the relevant time. The widow, Smt. Dauli @ Daulati inherited her husband's right as a *bhumidhar* with all powers of disposition *inter vivos*, but if she were to die intestate, the land would revert to the branches of her husband's brothers, that is to say, Shyambaran and Molai. Roop Narain, petitioner no.1, since deceased and now represented by his LRs and Shobhey, petitioner no.2, also deceased and now represented by his LRs, who are sons of Molai and Shyambaran, respectively, would take by succession the share of Smt. Dauli @ Daulati. It is the failure of the male line in the branch of Hublal that has apparently given rise to the present dispute.

5. The dispute between parties precipitated during consolidation operations. The land in dispute comprises three *chak*s located in three different villages, to wit: *Chak* No.319, situate at village Paschimpur, *Chak* No.163, situate at village Amilaun and *Chak* No.107, situate at village Dhananjaypur, all falling in the district of Varanasi. The land above described is hereinafter referred to as "the land in dispute'.

6. Objections were filed under Section 12 of the Act by the petitioners, Roop Narain s/o Molai and Shobhey s/o Shyambaran before the Assistant Consolidation Officer saying that Smt. Dauli @ Daulati had died intestate on 12.04.1978. The petitioners, being her heirs at law, are entitled to mutation over the land in dispute. The Assistant Consolidation Officer, by his order dated 01.08.1978, mutated the names of the petitioners in place of Smt. Dauli @ Daulati, recording them as her heirs. It is the second respondent's case that Smt. Dauli @ Daulati was alive when all this happened. She filed an appeal to the Settlement Officer of Consolidation, East, Varanasi from the order of the Assistant Consolidation Officer dated 01.08.1978, claiming that the order was without basis as she was alive. Smt. Dauli is said to have filed an affidavit in support of the appeal, swearing therein that she is Dauli @ Daulati, widow of the late Hublal and a resident of village Dhananjaypur, district Varanasi. It was also said in the affidavit that she is alive and not dead. The petitioners challenged the fact that this appeal was filed by Smt. Dauli @ Daulati. Their stand in the appeal was that the appellant, Dauli was an imposter. The appeal aforesaid, that was registered on the file of the Settlement Officer of Consolidation, East, Varanasi as Appeal No. 8, came to be allowed by a judgment and order dated 27.11.1978 with a remit of the matter to the Consolidation Officer (Final Records), Varanasi, to hear and determine the objections afresh, after opportunity to all parties. The issue about Smt. Dauli @ Daulati being an imposter was not decided by the Settlement Officer of Consolidation, who left it open to be determined by the Consolidation Officer, on a trial of the matter along with other issues.

7. Consequent upon remand, two objections were registered on the file of the Consolidation Officer, under Section 12 of the Act. Case No.59 was registered at the instance of respondent no.2, Chandrawali, whereas Case No.60 represented the original objections brought by the petitioners, Roop Narain and Shobhey. According to the second respondent, Smt.

Dauli @ Daulati died on 14.11.1979, pending decision of the remanded proceedings by the Consolidation Officer. But, much transpired before Smt. Dauli is acknowledged to have died by the second respondent.

8. It also appears from the record that post-remand, the objections were decided vide an order dated 02.05.1979 in favour of Chandrawali, the second respondent, on the basis of the sale deed from Smt. Dauli, but the petitioners claimed that order to be *ex parte*. The petitioners, therefore, filed a restoration application on 02.05.1979, which was allowed by an order dated 23rd August, 1979, restoring the objections to their original file and number. The objections were thereafter consolidated, heard together and determined vide judgment and order dated 25.01.1984 passed by the Consolidation Officer.

9. It is the second respondent's case that Smt. Dauli did not die on 12.04.1978, as claimed by the petitioners. She was alive until much later. Dauli sought permission from the Settlement Officer of Consolidation, East, Varanasi to sell the property in dispute. The Settlement Officer of Consolidation granted this permission vide an order dated 17.07.1978, under Section 5(ii) of the Act. Consequent upon grant of permission to transfer, Smt. Dauli is said to have executed the sale deed dated 18.07.1979, conveying the property in dispute in favour of the second respondent, who is admittedly Dauli's son-in-law. Smt. Dauli filed an affidavit in case Nos.59 and 60 before the Consolidation Officer, stating that she had executed a sale deed dated 18.07.1979 in favour of Chandrawali, respondent no.2 and that she acknowledged the execution and registration of the said sale deed. This affidavit was filed by Smt. Dauli on 15.06.1979. Smt. Dauli, according to the second respondent, passed away on 14.11.1979, while case Nos.59 and 60 were still pending before the Consolidation Officer. She was cremated, again according to the second respondent, at the Manikarnika Ghat, Varanasi.

10. It must be remarked here that the parties are seriously at issue about the date of Smt. Dauli's death. While according to the petitioners she passed away on 12.04.1978, the stand of the second respondent is that she died on 14.11.1979. This variable stand of the parties about the date of Smt. Dauli's death, was in accordance with their respective cases, set up to assert title to the property in dispute. In case, it were proved that Smt. Dauli died on 12.04.1978 intestate, the property in dispute would devolve upon the petitioners as the heirs of the last male tenure holder. It would also establish the petitioners' case that the sale deed dated 18.07.1979, executed by Smt. Dauli, in favour of the second respondent was a bogus and a sham document secured through the hands of an imposter. On the other hand, if the date of Smt. Dauli's death were established to be 14.11.1979, the second respondent would have a strong claim about title to the property in dispute, based on a registered conveyance from Smt. Dauli, executed during her lifetime.

11. In the aforesaid perspective, the parties went to trial of their objections on the following issues (translated into English from Hindi vernacular):

"(i) Whether Smt. Dauli @ Daulati died on 12.04.1978 and Roop Narain and others are her heirs?

(ii) Whether Chandrawali is *bhumidhar* in possession of the property in

dispute on the basis of sale deed dated 18.07.1979?

(iii) Whether the sale deed dated 18.07.1979 is forged and the sale deed was executed after Dauli's death?"

12. All the three issues were dealt with together by the Consolidation Officer, who held on the crucial fact about date of Smt. Dauli's death that she passed away on 12.04.1978. It was consequently held that the petitioners were her heirs in accordance with the provisions of Section 171 of the U.P. Z.A. & L.R. Act. A *fortiori* it was held that the sale deed dated 18.07.1979, was a forged document, executed by some imposter after Dauli's death. On the basis of these conclusions, by his order dated 25.01.1984, the Consolidation Officer accepted the objections of the petitioners, ordering them to be mutated over the land in dispute. Chandrawali's objections were ordered to be consigned to the record.

13. The second respondent appealed the decision of the Consolidation Officer, last mentioned, to the Settlement Officer of Consolidation, where his appeal was registered as Appeal No.130/1971. The Settlement Officer of Consolidation by his judgment and order dated 14.08.1985, dismissed the second respondent's appeal and affirmed the Consolidation Officer's order of January the 25th 1984.

14. Aggrieved, the second respondent carried a revision to the Deputy Director of Consolidation, under Section 48(1) of the Act. The revision aforesaid, that was numbered as Revision No.413/ 849 on the file of the Deputy Director of Consolidation, Varanasi, came up for determination on 12.12.1988. The Deputy Director of Consolidation by his judgment and order dated 12.12.1988, allowed the revision, set aside the orders, last mentioned, passed by the Consolidation Officer and the Settlement Officer of Consolidation and reversing those orders allowed the second respondent's objections. He has ordered the name of the second respondent to be mutated over the land in dispute, on the basis of the sale deed from Smt. Dauli, ordering the petitioners' name, earlier mutated by right of succession, to be expunged. The petitioners now lay challenge to the order dated 12.12.1988, passed by the Deputy Director of Consolidation in revision, last mentioned, which shall hereinafter be referred to as "the impugned order'.

15. Heard Sri Bipin Kumar Singh, learned Advocate holding brief of Sri D.S.P. Singh, learned Counsel for the petitioners and Sri Hari Kesh Singh, learned Counsel appearing for respondent no.2.

16. The central issue which the Authorities below have determined, divergently though, is whether Smt. Dauli died on 12.04.1978 or 14.11.1979. The Consolidation Officer has proceeded to accept the petitioners' case about the date of Smt. Dauli's death, based on a certified copy of a document, described as a Register of Deaths, 1978 for Village Dhananjaypur. The certified copy of the said Register, filed on behalf of the petitioners, shows the date of death of Smt. Dauli to be 12.04.1978 and is noted by the Consolidation Officer to be entered at serial no.6 of the document. The Consolidation Officer has remarked that the Register of Deaths is a public document, as it is maintained under Section 109- A of the Uttar Pradesh Panchayat Raj Act, 1947. He has further remarked that there is no reason to disbelieve this document. The

Consolidation Officer has also taken note of the oral evidence of Roop Narain, petitioner no.1, who testified as a witness before him. He has said in his testimony that Smt. Dauli died on 12.04.1978. Also taken note of, is the evidence of a certain Dev Raj, said to be the brother's son of the late Smt. Dauli. He too has testified to the fact that Smt. Dauli died on 12.04.1978. The Consolidation Officer while examining the second respondent's case about Smt. Dauli's death being 14.11.1979 has considered the extract of the Death Register, Manikarnika Ghat, Nagar Palika, Varanasi, where her death is shown to be 14.11.1979; the time being 9 p.m.

17. In evaluating the worth of the last mentioned document, the Consolidation Officer has remarked that the parties *are ad idem* about the fact that Smt. Dauli was a native of village Dhananjaypur and that she died there. He has further remarked that if Smt. Dauli died on 14.11.1979 at village Dhananjaypur, there ought to be an entry in the Gaon Sabha Register (about deaths) relative to the said date. The Consolidation Officer has then gone on to analyse the testimony of witnesses appearing for the petitioners. He has considered the testimony of one Baliram, about whom the Consolidation Officer says that the witness acknowledges the fact that Roop Narain and Smt. Dauli have a familial connection, but he has not been able to indicate the precise relationship of Sakhran and Smt. Dauli. It is then noticed by the Consolidation Officer that Sakhran has not entered the witness box. From this evidence, the Consolidation Officer has concluded that Sakhran is not Smt. Dauli's brother-in-law *(Dewar)*. This finding serves as a deductive link to disbelieve the petitioners' case about Smt. Dauli's death on 14.11.1979, where it is said that her funeral pyre was lit by her brother-in-law *(Dewar)*, Sakhran at the Manikarnika Ghat, Varanasi.

18. About that part of the second respondent's case that against the permission secured by Smt. Dauli under Section 5-C of the Act to transfer the land in dispute, the petitioners did not take any steps, it is remarked by the Consolidation Officer that Smt. Dauli never appeared in any Court. As such, the possibility cannot be ruled out that someone else, impostering as Dauli, moved that application. The Consolidation Officer has then said that the necessity shown in the sale deed for Smt. Dauli to execute a sale deed of the land in dispute is to raise funds to meet the expenses of her pilgrimage and to liquidate debt. The Consolidation Officer has found it to be a contradiction that the witnesses, Banshi and Harinath have said that no money was paid in their presence to Smt. Dauli. The Consolidation Officer has then proceeded to remark that there is no cause to disbelieve the certified copy of the Register of Deaths of Village Dhananjaypur, a fact mentioned hereinbefore.

19. It is also remarked that Harinath, a Special Power of Attorney Holder for Chandrawali and another witness, Banshi, are not natives of the parties' village. It has then been noticed by the Consolidation Officer that so far as Baliram is concerned, there is litigation over land pending between Roop Narain and Baliram, a fact that renders the former inimical to Roop Narain. In the assessment of the Consolidation Officer, Baliram is not an independent witness.

20. By contrast, the Consolidation Officer has held that the petitioners'

witness, Dev Raj is a nephew to Smt. Dauli, being her brother's son, whereas Roopan, the other witness for the petitioners, is the Village Pradhan. These witnesses have been held to be reliable. Thus, relying on the certified copy of the extract of the Register of Deaths in question, the evidence of Roopan and Dev Raj, besides other circumstances noticed, the Consolidation Officer has held the date of Smt. Dauli's death to be 12.04.1978. Consequently, the sale deed has been adjudged void and one executed by an imposter, after Smt. Dauli's decease.

21. The Settlement Officer of Consolidation, who heard the appeal, also preferred the certified copy of the Register of Deaths, filed on behalf of the petitioners, over the copy of the Register of Deaths from the Manikarnika Ghat, Varanasi, relied upon by the second respondent. The Appellate Authority found the testimony of witnesses, Roop Narain, petitioner no.1 and Dev Raj, a son of Smt. Dauli's brother, to be relevant, cogent and reliable. The Appellate Authority has remarked that Smt. Dauli did not testify before the Authority of first instance. It has also been remarked that the Assistant Settlement Officer of Consolidation, while deciding Smt. Dauli's Appeal from the order of mutation passed by the Assistant Consolidation Officer, did not go into the question whether Smt. Dauli is alive or it was an imposter who had come forward with the Appeal. This question was left to be determined at the hearing of objections under Section 12 of the Act. It has, therefore, been held by the Appellate Authority that prior to the current proceedings, it has never been held for a fact whether the Appeal from the mutation order, preferred by Smt. Dauli, was indeed her Appeal or an imposter's Appeal. The issue about Smt. Dauli being herself or an imposter was not held concluded in terms of the earlier order, passed in Appeal no.8 at the instance of Smt. Dauli, but was found to be a question open to decision in the present proceedings.

22. On the perspective of evidence hereinbefore detailed, the Appellate Authority concurred with the Authority of first instance to find in favour of the petitioners that Smt. Dauli died on 12.04.1978. The sale deed of 1979 urged by the second respondent as the basis of his right was, therefore, held to be void and one executed by an imposter.

23. The Revisional Authority, the Deputy Director of Consolidation disagreed with the two Authorities below. The Revisional Authority held that the certified copy of the Register of Deaths shows that the document is signed by Roopan Pradhan and Girija, Up-Pradhan. It has been remarked by the Deputy Director of Consolidation that the Pradhan in his testimony has said that entries in the Register of Deaths are required to be made by the Panchayat Secretary and that the said Register remains in his custody. It has been noticed that the certified copy is signed by the Pradhan and the Up-Pradhan alone and does not bear the signatures of the Secretary. The Revisional Authority has held the document to be of no worth, in the absence of the signatures of the Panchayat Secretary thereon. It has been held also that the document appears to be a certificate issued by the Pradhan, privately. The Revisional Authority has taken a very different view of the documentary and oral evidence, as also the other circumstances on record to hold that the certificate about Smt. Dauli's death issued by the Nagar Palika owned Ghat is reliable, where her date of death recorded as 14.11.1979 is

correct. The sale deed too has been found to be valid, entitling the second respondent to be recorded as *bhumidhar* over the land in dispute.

24. It has been argued by Sri Bipin Kumar Singh, learned Counsel for the petitioners that the Deputy Director of Consolidation has committed a manifest error of law in holding that the remand order dated 27.11.1978, passed in Appeal no.8 from the mutation order of the Assistant Consolidation Officer, was binding on the second respondent since it was not challenged and became final between parties. It is next argued that the date of death mentioned in the Register of Burning Ghat, relied upon by the Revisional Authority, would not prevail over the Register of Deaths or the Family Register maintained under the Uttar Pradesh Panchayat Raj (Maintenance of Family Registers) Rules, 1970. It is pointed out by the learned Counsel that these Rules have been framed by the Government in exercise of powers under Section 110(vii) of the Uttar Pradesh Panchayat Raj Act.

25. It is also argued that the entry in the record of the Burning Ghat is not a reliable document, intrinsically. Moreover, it was not proved by any oral evidence also. It is also urged that the second respondent did not appear before any of the Authorities below, including the Authority of first instance. Rather, a Power of Attorney Holder on his behalf, one Hari Nath hailing from a different village, to wit, Karimuddinpur testified before the Authority of first instance. According to the learned Counsel no weight can be attached to the oral evidence of Hari Nath, who has spoken hearsay. In support of his contention on this score, the learned Counsel for the petitioners has reposed faith in the decision of this Court in **Krishnapal and others vs. State of U.P. through District Magistrate, Banda and othes, 2010 (110) RD 210,** where it is held in paragraph 15 of the report thus:

"16. The second issue is with regard to the date of death of Sadashiv recorded as 25.11.1975 in the family register. A family register is a public record in terms of the Evidence Act inasmuch as the same is prepared under the statutory provisions of Section 15 (xxiii)(e) of U.P. Panchayat Raj Act read with Rule 2, Rule 67, Rule 142 to 144 of the U.P. Panchayat Raj Rules, 1947. The family register is prepared under the Uttar Pradesh Panchayat Raj (Maintenance of Family Registers) Rules, 1970. It is to be noted that Form (A) also records the date of death of a family member. There is yet another Form namely Form (D) which is for registering the date of birth and death. Both these Forms, therefore, record the date of death of a person and they are prescribed under the Rules. Needless to say that the rules are framed by the State Government and the registers prescribed for particular purposes are notified under the rules. Reference may be had to Section 110 (vii) of the 1947 Act for the said purpose."

26. It is next submitted that Sakhran, who is said to have lit the funeral pyre of Smt. Dauli on 14.11.1979, has misdescribed himself to be her brother-in-law *(Dewar)*. He is not related at all to Smt. Dauli. According to the learned Counsel for the petitioners, the Revisional Authority has conjectured to record a finding about Sakhran, that reference to him as "Dewar' is one going by a common practice in villages to refer to friends and co-sharers as relatives. It is also argued that the Deputy Director of Consolidation has held in error

that the petitioners having not sued for cancellation of the sale deed cannot assail it. He submits that the document being void requires no suit for cancellation and it is within the competence of the Consolidation Authorities to determine its validity.

27. Sri Hari Kesh Singh, learned Counsel for the second respondent on the other hand submits that a heavy burden lay upon the petitioners to prove their allegations, who seek to assail a registered conveyance on the ground of fraud by impersonification. This burden, according to the learned Counsel for the second respondent, has not at all been discharged. In support of his contention regarding a presumption in favour of the validity of a registered document, Sri Hari Kesh Singh has placed reliance on the decision of the Supreme Court in **Prem Singh and others vs. Birbal and others, (2006) 5 SCC 353**. He has called attention of the Court to paragraph 27 of the report in **Prem Singh** *(supra)*, where it is held:

"27. There is a presumption that a registered document is validly executed. A registered document, therefore, prima facie would be valid in law. The onus of proof, thus, would be on a person who leads evidence to rebut the presumption. In the instant case, Respondent 1 has not been able to rebut the said presumption."

28. It is next submitted by Sri Hari Kesh Singh, learned Counsel for the second respondent that the Deputy Director of Consolidation has ample authority to disturb those findings of facts recorded by the Authorities below where these are perverse in the sense that they go against the weight of evidence on record. He has relied upon the decision of their Lordships of the Supreme Court in **Sheo Nand and others vs. Deputy Director of Consolidation, Allahabad and others, (2000) 3 SCC 103**. He has drawn the attention of the Court to paragraph 21 of the report in **Sheo Nand** *(supra)*, where it is held:

"21. Normally, the Deputy Director, in exercise of his powers, is not expected to disturb the findings of fact recorded concurrently by the Consolidation Officer and the Settlement Officer (Consolidation), but where the findings are perverse, in the sense that they are not supported by the evidence brought on record by the parties or that they are against the weight of evidence, it would be the duty of the Deputy Director to scrutinise the whole case again so as to determine the correctness, legality or propriety of the orders passed by the authorities subordinate to him. In a case, like the present, where the entries in the revenue records are fictitious or forged or they were recorded in contravention of the statutory provisions contained in the U.P. Land Records Manual or other allied statutory provisions, the Deputy Director would have full power under Section 48 to reappraise or re-evaluate the evidence-on-record so as to finally determine the rights of the parties by excluding forged and fictitious revenue entries or entries not made in accordance with law."

29. Learned Counsel for the second respondent submits that there is no such manifest illegality or perversity about the Revisional Authority's approach, which may require interference by this Court.

30. It must be remarked here that this Court does not sit in Appeal over the judgment of the Deputy Director of Consolidation. The scope of interference is

reputed and limited to a secondary review. If it is proven that the judgment impugned suffers from an error apparent or it is manifestly illegal or proceeds to record conclusions on the basis of irrelevant evidence or ignores from consideration relevant evidence, or still more, draws one or more inferences from evidence decisive to the result that can be termed as perverse, this Court is entitled to interfere. It is equally true, that this Court sitting in its writ jurisdiction cannot convert itself to a Court of First Appeal and arrogate those functions to itself. In the opinion of this Court, one legitimate score and perhaps the only one, on the foot of which the impugned judgment could be successfully assailed, is the document which is a certified copy of the Register of Deaths, 1978 relating to village Dhananjaypur being excluded from consideration by the Deputy Director of Consolidation on ground that it does not qualify as a valid Register, maintained under the statute. The Deputy Director of Consolidation has excluded the certificate from consideration because it does not bear the signatures of the Panchayat Secretary. The document which is described as the Register of Deaths, 1978 relating to village Dhananjaypur, is in fact a Register maintained under statutory Rules. The relevant Rules are the Uttar Pradesh Panchayat Raj (Maintenance of Family Registers) Rules, 1970 (for short, the Rules). These Rules have been framed by the State Government in exercise of powers under Section 110 of the Uttar Pradesh Panchayat Raj Act, 1947.

31. To this Court, it appears that the document referred to as the Register of Death, 1978 is in fact a Family Register, maintained in Form-A appended to the Rules. The further reference to a Form-D, regarding dates of births and deaths, maintained under these Rules, referred to in **Krishnapal** *(supra)* has not been shown to this Court, on a production of the Rules. The Rules have just one Register in Form-A, called a Family Register. Be it as it may, the Family Register is also required to carry an entry about the date of death of the members of a family, who are natives of a village. This Court in **Krishnapal** *(supra)* has accorded much sanctity and weight to an entry in the Family Register, because it is maintained under the Rules framed under the U.P. Panchayat Raj Act. There can be no cavil about that proposition. What is important is that the entries in the Family Register are to be made by the Secretary of the Gram Panchayat, in accordance with Rule 4 of the Rules. Rule 4 reads thus:

"**4. Quarterly entries in the family register.-** At the beginning of each quarter commencing from April in each year, the Secretary of a Gram Sabha shall make necessary changes in the family register consequent upon births and deaths, if any, occurring in the previous quarter in each family. Such changes shall be laid before the next meeting of the Gram Panchayat for information."

32. The Deputy Director of Consolidation has recorded in the impugned order that the certified copy of the relevant extract of the Family Register shows that it has been signed by Roopan, Pradhan and Girija, Up-Pradhan, and that it nowhere bears the signature of the Panchayat Secretary. This being so, the Family Register, of which a certified copy of the extract has been filed relating to Smt. Dauli, does not conform to the requirement of Rule 4 of the Rules. It cannot be, therefore, characterized as a document maintained under the Rules. Rather, it has

to be disregarded as a document that does not carry the force of a Family Register, maintained under the Rules. In taking the view that the Deputy Director of Consolidation has done about the Family Register, this Court thinks that no error has been committed by excluding the said document from consideration. It was emphasized at some stage, during the most subtle facets of his submissions about the validity of the Family Register, by Sri Bipin Kumar Singh, that the finding of the Deputy Director of Consolidation is not very clear about the absence of the Secretary's signatures on the document. He urged that it appears that the Deputy Director of Consolidation is talking about the signatures on the certified copy and not the original. To the understanding of this Court, the finding is clear that the Family Register does not bear the Secretary's signature. Even if, there were some truth to this fine distinction, it was for the petitioners to cause the Family Register to be summoned at the relevant time before the Deputy Director of Consolidation, for a verification of this fact. But, they did not do so. Now, it is not open to the petitioners to canvass the said plea on the possible state of the original Family Register, once that document was not before the Deputy Director of Consolidation. Therefore, the Family Register in the considered opinion of this Court, must be held to be rightly excluded by the Deputy Director of Consolidation. It must also be remarked that this was an aspect which the two Authorities below did not at all advert to. The Deputy Director of Consolidation was, therefore, justified in taking the view that he did and no exception can be taken to it.

33. The Deputy Director of Consolidation has disbelieved the Family Register, for an added reason. He has recorded a finding that the petitioners, Roop Narain and Shobhey, were employed on the Cane Crusher of Roopan Pradhan, which makes him an interested witness. He has analysed parole evidence of witnesses, appreciating it in a way that is plausible. It is not for this Court to re-appreciate oral evidence of witnesses done by the Deputy Director of Consolidation, unless his conclusions be demonstrably perverse. In the considered opinion of this Court, his conclusions about the oral evidence are certainly not perverse. Rather, these are quite possible and plausible. The Deputy Director of Consolidation has believed the Cremation/ Death receipt from the Manikarnika Ghat, Varanasi, which shows the date of death of Smt. Dauli to be 14.11.1979. He has also analysed why in that receipt, Sakharan has been described as Smt. Dauli's brother-in-law *(Dewar)*. The reason that has been assigned by the Deputy Director of Consolidation appears to be based on sound logic. He has taken notice of the practice in villages of this part of the country, of loosely referring to other natives close to the family by identifying relations, such as Dewar, even though stricto sensu they are not related. It is not for this Court to re-appreciate these niceties of evidence which the Deputy Director of Consolidation has reasonably well done.

34. There is a remark by the Deputy Director of Consolidation that if Smt. Dauli were dead, no order could have been passed on her Appeal, that was rendered by the Settlement Officer of Consolidation, where she challenged the earliest order of mutation in favour of the petitioners. The Deputy Director has reasoned that if Smt. Dauli was dead, no order could have been made on her Appeal. This reasoning does not appear to be correct, because the order of the Settlement Officer of Consolidation,

dated 27.11.1978 leaves the question open about the date of Smt. Dauli's death, and a *fortiori*, the question, whether the person filing the Appeal was Smt. Dauli or someone else. The further remark of the Deputy Director that since this order was not challenged in Revision, it is effective *inter partes*, is also not correct. The issue about Smt. Dauli's death and the consequential validity of the sale deed have to be decided in the present proceedings, arising from objections under Section 12 of the Act. But, these remarks do not go to the root of the matter, because the Deputy Director has then said something more fundamental about the issue. He has said that Smt. Dauli took permission of the Settlement Officer of Consolidation to transfer the land in dispute, and, thereafter, executed a sale deed in favour of the second respondent. She filed an affidavit in Appeal no.8 from the order of mutation, where her thumb impression is there and also on the *Vakalatnama*. In the said affidavit, Smt. Dauli said that she is not dead, but alive. According to the Deputy Director of Consolidation, burden therefore, lay upon the petitioners to take steps to verify and prove that Smt. Dauli, who had appealed the mutation order and filed an affidavit, was in fact an imposter. It is also remarked by the Deputy Director that merely by dubbing someone as an imposter cannot prove that person to be, in fact, an imposter. It is also noticed by the Deputy Director that post-remand, in Appeal from the mutation order, Smt. Dauli filed her affidavit on 15.06.1979 affirming the fact of executing the sale deed in favour of respondent no.2.

35. It is trite to say that one who alleges fraud, must prove it. An allegation that a registered document has been executed by an imposter, if true, is fraud of the worst kind. This allegation against a registered document, about which there is a presumption of genuineness, cannot be made lightly. It is a very heavy burden to discharge. Impeaching a registered conveyance on the ground of fraud requires proof by the criminal standard; not just by preponderance of probability.

36. In this connection, reference may be made to the decision of the Supreme Court in Union of India **(UOI) vs. M/s. Chaturbhai M. Patel & Co., (1976) 1 SCC 747.** It has been held in **UOI vs. M/s. Chaturbhai M. Patel & Co.** *(supra)* thus:

"7. The High Court has carefully considered the various circumstances relied upon by the appellant and has held that they are not at all conclusive to prove the case of fraud. It is well settled that fraud like any other charge of a criminal offence whether made in civil or criminal proceedings, must be established beyond reasonable doubt: per Lord Atkin in *A.L.N. Narayanan Chettyar v. Official Assignee, High Court, Rangoon* [AIR 1941 PC 93 : 196 IC 404] . However suspicious may be the circumstances, however strange the coincidences, and however grave the doubt, suspicion alone can never tale the place of proof. In our normal life we are sometimes faced with unexplained phenomenon and strange coincidences, for, as it is said truth is stranger than fiction. In these circumstances, therefore, after going through the judgment of the High Court we are satisfied that the appellant has not been able to make out a case of fraud as found by the High Court. As such the High Court was fully justified in negativing the plea of fraud and in decreeing the suit of the plaintiff."

37. Again, the question as to burden of proof about the plea that a sale deed was liable to be cancelled on ground that it was

secured by putting forward an imposter, fell for consideration of this Court in **Iqbal Ahmad vs. Naimul, 2004(3) AWC 1974 (LB).** It was held by K. S. Rakhra, J.:

"9. So far as the plaintiff's averment that the sale deed was liable to be cancelled on the ground that it was obtained by putting forward some imposter in place of the plaintiff No. 1, here too burden of proof lay on the plaintiff and not on the defendant. The defendant was not asking for any relief and therefore, he was not under any obligation to prove the execution of the sale deed or to produce the original record before the Court. The plaintiff No. 1 or any of the witness could have been examined to prove that no such sale deed was executed and even necessary record could have been summoned from the sub-registrar's office for comparison of the thumb impression of plaintiff No. 1 with the thumb impression of the executor of the sale deed in question available in the sub-registrar's office. Had any such evidence been led by the plaintiff in support of their case, the burden would have shifted on the defendant. In the absence of any such evidence on record, issue could not be decided in favour of the plaintiff by drawing adverse inference on the ground that the defendant had not produced the original sale deed as desired by the plaintiff in the case."

38. The present case arises from objections under Section 12 of the Act, where the position of the petitioners, who assail the validity of the registered sale deed dated 18.07.1979, executed by Smt. Dauli in favour of the second respondent, is that of a plaintiff in a suit for cancellation on ground that the document is void, as one executed by an imposter. The petitioners had a wealth of opportunity to demonstrate that the second respondent's vendor was an imposter. They could do so in proceedings of Appeal no.8, decided by the Settlement Officer of Consolidation, from the order of mutation, earliest made in favour of the petitioners, or they could do so also at the pre-hearing stage of the objections under Section 12 of the Act. In both these proceedings, Smt. Dauli, who is castigated as an imposter by the petitioners, had filed her affidavit that she was Dauli and was alive. She had put her thumb impression and/ or signature on the affidavit or the *Vakalatnama*. At that stage, she could be summoned and cross-examined with reference to her allegations in the affidavit filed. This was not done by the petitioners. It is true that Smt. Dauli did not appear before any of the Authorities, but then she was never summoned by the petitioners. It was the petitioners' burden to secure the presence of Smt. Dauli and prove by the best evidence, then forthcoming, that she was an imposter. Nothing was done to this effect by the petitioners. The burden which, therefore, lies on a person who assails a registered conveyance as one executed by an imposter, has not been discharged by the petitioners, in the opinion of this Court. The burden which the petitioners had to discharge on a plea of this kind was required to be proved beyond reasonable doubt as held in **Union of India (UOI) vs. M/s. Chaturbhai M. Patel & Co.** *(supra)*. To the understanding of this Court, therefore, the petitioners have miserably failed to discharge their burden on this score. The impugned order passed by the Deputy Director of Consolidation cannot, therefore, be faulted.

39. In addition, it may be acknowledged that the jurisdiction of the Deputy Director of Consolidation to decide both questions of fact and law is very wide.

It was hedged in with some limitations prior to the amendment made to Section 48 of the Act, introduced vide U.P. Act no.3 of 2002, in the form of Explanation (3). Under the unamended law also, their Lordships of the Supreme Court approved the principle that where the findings are perverse or not supported by evidence, it would be the duty of the Deputy Director to examine the entire case. This was held in **Sheo Nand** *(supra)*, to which allusion has been made above. Now under the amended provisions of Section 48, very wide powers have been conferred on the Deputy Director to decide all questions of fact and law recorded by any subordinate Authority. He has also been conferred with the power to appreciate any oral or documentary evidence. Indeed, the enlarged powers under Section 48, conferred on the Deputy Director, vide U.P. Act no.3 of 2002, retrospectively w.e.f. November 10, 1980, make for a most non-conventional kind of revisional jurisdiction. But, the statute ordains it to be so. It is the duty of this Court to give full effect to the amended provisions of Section 48, read with Explanation (3). The amended provisions of Section 48 (as amended vide U.P. Act no.3 of 2002) read:

"In Section 48 of the principal Act, after explanation (2) the following explanation shall be inserted, namely:--

"Explanation (3).--The power under this section to examine the correctness, legality or propriety of any order includes the power to examine any finding, whether of fact or law, recorded by any subordinate authority, and also includes the power to re-appreciate any oral or documentary evidence."."

40. In view of the wide amplitude of powers exercised by the Deputy Director of Consolidation, no exception can be taken to the findings recorded by him on a plausible evaluation of the evidence on record - both documentary and oral.

41. In view of what has been held above, this Court finds no force in this writ petition. It fails and is, accordingly, **dismissed.**

42. All interim orders made are hereby vacated and all pending interim relief applications stand rejected.

43. There shall be no order as to costs.

(2020)09ILR A371
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.03.2020

BEFORE

THE HON'BLE AJAY BHANOT, J.

Matters Under Article 227 No. 1732 of 2020
(Civil)

Shivprasad ...Petitioner
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Petitioner:
Sri Yogesh Kumar Mishra

Counsel for the Opposite Party:
C.S.C.

A. Procedural Law The Indian Forest Act, 1927 - Sections 4, 6, 9, 11, 17, 20 - Service of notice - The Court find that the appellate court failed to consider any of the reasons cited by the petitioner in approaching the authority which was caused due to non service of notice to the petitioner or by posting at prominent place in the village. The disputed plot was not identified. The notification was also

not publicized by beat of drum. In absence of any publicity of notice, the petitioner was unaware about the proceedings under Section 4 of the Act of 1927. (Para 15)

B. These rights of the appellant, which are pending adjudication in appeal under the Indian Forest Act, 1927, cannot under any circumstance be defeated by issuance of notification dated 09.07.2016 under Section 20 of the Indian Forest Act, 1927. The proposition that the remedy of appeal, would stand extinguished upon publication of notification under Section 20 of the Act runs counter to the scheme of the Act, which zealously protects the rights of the forest people. The rights of the petitioner and forest people, protected under the Act, are too valuable, to be undermined in such manner which is contrary to the Act. (Para 23, 24)

This right of appeal is a substantive one and is in the nature of a vested right. The right of appeal cannot be fettered or taken away, unless diluted or abrogated by express provision or necessary implication in the statute. (para 25)

Writ Petition Allowed. (E-10)

List of cases cited: -

1. Hardayal Vs. D.J. & ors.. 1972 ALJ 649

2. Garikapati Veeraya Vs N. Subbiah Choudhry & ors. AIR 1957 SC 540 *(followed)*

3. Dilwar Singh Vs The Gram Samaj & ors. AIR 1973 All 411 *(followed)*

4. Gopi Singh & ors Vs. Deputy Director of Consolidation Bulandshahr & ors. 1967 ALJ 439 *(followed)*

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

1. The petitioner took out the proceedings under Section 9/11 of the Indian Forest Act, 1927 objecting to the declaration of the disputed land as "reserved forest" under Section 4 of the Indian Forest Act, 1927. The proceedings, registered in the year 2013 under Section 9/11 Indian Forest Act, 1927, registered as Misc. Case no. 1564 of 2013 (Shiv Prasad Vs Forest Department) before the Forest Settlement Officer, Obara, Sonebhadra, were rejected by order dated 28.06.2016. The petitioner carried the said order in appeal under Section 17 of the Indian Forest Act, 1927, registered as Misc. Civil Appeal No. 92 of 2016 (Shiv Prasad Vs. Forest Department) before the learned Additional District Judge, Anpara at Obara, District-Sonebhadra. The appeal was dismissed by order dated 22.03.2018.

2. The petitioner has assailed the order dated 28.06.2016 passed by the Forest Settlement Officer, Sonebhadra as well as the order dated 22.03.2018 passed by the learned appellate court in this petition.

3. Sri Yogesh Kumar Mishra, learned counsel for the petitioner submits that the authority of first instance and learned appellate court have erred in law by taking a hyper technical view in the matter of limitation where rights of most substantive nature are involved. Further, the impugned orders have misread the statute and the learned courts below acted contrary to law. He relies on the law laid down by this Court in the case of **Hardayal Vs. District Judge and others, reported at 1972 ALJ 649.**

4. Per contra, the learned Standing Counsel submits that the period of limitation for filing of objections had expired. The inordinate delay could not have been condoned. The objections of the petitioner were rightly rejected by the authorities below.

5. Heard learned counsel for the parties.

6. The Forest Settlement Officer in the judgment and order dated 28.06.2016 has set forth these reasons for rejecting the objections filed by the petitioner. The last date for submission of objections was 31.07.1987. The objections were tendered by the petitioner after an inordinate delay in the year 2013. The objections were found to be barred by limitation and vitiated by laches. Consequently, the objections were dismissed on grounds of delay and laches alone.

7. The learned appellate court made these findings of facts. The disputed lands are ancestral property of the petitioner. The appellant (plaintiff / petitioner) has been in possession over the disputed plots of land, since the time of his ancestors. The land was used for residential purposes as well for agricultural activities. The appellant (plaintiff / petitioner) was not aware of the notification proceedings, which caused in the delay in taking objections under the Indian Forest Act, 1927, before the competent authority. The learned appellate court noticed that the petitioner had tendered his objections, before the Forest Settlement Officer, Sonebhadra on 28.06.2016.

8. The notification under Section 20 of the Indian Forest Act, 1927 was published on 09.07.2016. The learned appellate court found that the appellant (plaintiff / petitioner) had registered his objections/case, prior to the publication of the gazette under Section 20 of the Indian Forest Act, 1927. However, by virtue of publication of the gazette, the land has already been declared as "reserved forest". The learned appellate court opined, that it did not possess the jurisdiction to amend, change or annul the notification. After land was declared as "reserved forest", the learned appellate court ceased to possess the jurisdiction to entertain the appeal. On this foot the appeal was dismissed.

9. At this stage, a consideration of the scheme of the Act and authorities in point would be apposite. Section 4 of the Indian Forest Act, 1927 contemplates a notification by the State Government to constitute the land as "reserved forest land". The provision speaks thus:

"4. Notification by State Government.-(1) Whenever it has been decided to constitute any land a reserved forest, the State Government shall issue a notification in the Official Gazette-

(a) declaring that it has been decided to constitute such land a reserved forest;

(b) specifying, as nearly as possible, the situation and limits of such land; and

(c) appointing an officer (hereinafter called "the Forest Settlement-officer") to inquire into and determine the existence, nature and extent of any rights alleged to exist in favour of any person in or over any land comprised within such limits or in or over any forest-produce, and to deal with the same as provided in this Chapter.

Explanation.-For the purpose of clause (b), it shall be sufficient to describe the limits of the forest by roads, rivers, ridges or other well-known or readily intelligible boundaries.

(2) The officer appointed under clause (c) of sub-section (1) shall ordinarily be a person not holding any forest-office except that of Forest Settlement-officer.

(3) Nothing in this section shall prevent the State Government from appointing any number of officers not

exceeding three, not more than one of whom shall be a person holding any forest-office except as aforesaid, to perform the duties of a Forest Settlement-officer under this Act."

10. Objections to such notification and claims of aggrieved persons are examined under Section 6 of the Act which is reproduced hereunder:

"6. Proclamation by Forest Settlement-officer.-When a notification has been issued under section 4, the Forest Settlement-officer shall publish in the local vernacular in every town and village in the neighbourhood of the land comprised therein, a proclamation-

(a) specifying, as nearly as possible, the situation and limits of the proposed forest;

(b) explaining the consequences which, as hereinafter provided, will ensue on the reservation of such forest; and

(c) fixing a period of not less than three months from the date of such proclamation, and requiring every person claiming any right mentioned in section 4 or section, 5 within such period either to present to the Forest Settlement-officer a written notice specifying or to appear before him and state, the nature of such right and the amount and particulars of the compensation (if any) claimed in respect thereof."

11. Section 9 protects the extinction of the rights of persons, who have instituted objections before the notification under Section 20 of the Act, is published. The provision being relevant to the controversy is reproduced hereunder:

"9. Extinction of rights.-Rights in respect of which no claim has been preferred under section 6, and of the existence of which no knowledge has been acquired by inquiry under section 7, shall be extinguished, unless before the notification under section 20 is published, the person claiming them satisfies the Forest Settlement-officer that he had sufficient cause for not prefer-ring such claim within the period fixed under section 6."

12. Section 17 of the Act provides for the remedy of appeal against the orders passed under Sections 11, 12, 15 an 16 of the Act.

"17. Appeal from order passed under section 11, section 12, section 15 or section 16.- Any person who has made a claim under this Act, or any Forest-officer or other person generally or specially empowered by the State Government in this behalf, may, within three months from the date of the order passed on such claim by the Forest Settlement-officer under section 11, section 12, section 15 or section 16, present an appeal from such order to such officer of the Revenue Department of rank not lower thanthat of a Collector, as the State Government may, by notification in the Official Gazette, appoint to hear appeals from such orders:

Provided that the State Government may establish a Court (hereinafter called the Forest Court) composed of three persons to be appointed by the State Government, and when the Forest Court has been so established, all such appeals shall be presented to it."

13. The proceedings attain finality after publication under section 20 of the Act which states so:

"20. Notification declaring forest reserved.-(1) When the following events have occurred, namely:-

(a) the period fixed under section 6 for preferring claims have elapsed and all claims (if any) made under that section or section 9 have been disposed of by the Forest Settlement-officer;

(b) if any such claims have been made, the period limited by section 17 for appealing from the orders passed on such claims has elapsed, and all appeals (if any) presented within such period have been disposed of by the appellate officer or Court; and

(c) all lands (if any) to be included in the proposed forest, which the Forest Settlement-officer has, under section 11, elected to acquire under the Land Acquisition Act, 1894 (1 of 1894), have become vested in the Government under section 16 of that Act, the State Government shall publish a notification in the Official Gazette, specifying definitely, according to boundary-marks erected or otherwise, the limits of the forest which is to be reserved, and declaring the same to be reserved from a date fixed by the notification.

(2) From the date so fixed such forest shall be deemed to be a reserved forest."

14. The narrative shall now be reinforced by authorities in point. This Court in **Hardayal (supra)** upon comprehensive consideration of the scheme of the Indian Forest Act, 1927, held that Section 6 of the Indian Forest Act, 1927 cannot be equated within a period of limitation fixed under the Limitation Act :

"6. Section 7 of the Act, casts a duty on the Forest Settlement Officer to investigate, enquire into, and find out the claims of every person as far as possible whether or not he has filed a claim within the period fixed in the proclamation issued under Section 6. This indicates that it is open to the Forest Settlement Officer to accept the claim to a right in the land whether or not the person concerned has preferred it within the period fixed in the proclamation. According to Section 9 of the Act, rights in respect of which no claim has been preferred under Section 6 and of the existence of which no knowledge has been acquired by the Enquiry Officer under Section 7, shall be extinguished unless before the notification under Section 20 is published, the person claiming them satisfies the Settlement Officer that he had sufficient cause for not preferring such claim within the period fixed under Section 6. This section clearly indicates that the Forest Settlement Officer retains the jurisdiction to enquire into and accept a claim to any right in the land sought to be included in the proposed reserved forest, right upto the time a notification under Section 20 is published. A claimant who could not approach the Forest Settlement Officer within the period fixed in the proclamation under Section 6 can still persuade him to look into their claims after satisfying him that he had sufficient cause for not preferring it within that period. Law nowhere requires that this satisfaction has to be recorded or that the claimant should explain his inability to prefer the claim earlier by means of a formal application praying for condonation of delay.

7. It is significant to note that the claim mentioned in Section 6 can be made either by way of a notice in writing or orally. Section 9 merely provides that if a claim is made beyond the period mentioned in the proclamation issued under Section 6 it can be entertained by the Forest Settlement Officer provided he is satisfied that there was sufficient cause for not preferring it within the period fixed in Section 6. There is no reason to think that

the claim at the stage of Section 9 can also not be made in either of the two ways. If the Settlement Officer can proceed to enquire into an oral claim, there is no reason to think that the Legislature contemplated that the explanation offered by the claimant for not preferring the claim within the period fixed under Section 6 should be given by means of a formal application for condoning the delay in preferring it. Provisions or Section 9 would be fully complied with if the claimant orally explains the reason for his not preferring the claim earlier and the Forest Settlement Officer entertains the claim after, being satisfied by that explanation. The law does not require that this satisfaction must be recorded in writing. Although it would be much better if in such cases, the Forest Settlement Officer makes some sort of record to indicate that he was so satisfied, but if no such record is made it would not necessarily mean that the claim has been entertained without the Forest Settlement Officer being satisfied that there was sufficient cause for not preferring it within the time fixed in the proclamation issued under Section 6 of the Act. Normally, in a case where such a claim has been entertained it should be presumed that an explanation for the delay was given by the claimant and the same was accepted by the Forest Settlement Officer."

15. The Forest Settlement Officer in the order dated 28.06.2016 has noticed the objection of the petitioner. The petitioner specifically objected that the forest department had not served the notice upon him, nor was any notice posted at prominent public places in the village. The disputed plots were never identified. The notification was also not publicized by beat of drum. In absence of publicity of the notice, the petitioner could derive no knowledge of the proceedings under Section 4 of the Indian Forest Act, 1927.

16. In the objections under Section 9/11 of the Indian Forest Act, 1927 before the Forest Settlement Officer, Sonebhadra the petitioner also categorically stated that he resides in a far flung and remote village. The order dated 28.06.2016 shows that the Forest Settlement Officer, Sonebhadra did not consider any of the reasons for the delay cited by the petitioner in approaching the authority. There is nothing in the record to establish that the reasons canvassed by the petitioner for the delay, were disputed with material facts and evidence.

17. The petitioner is a poor villager, residing in a far flung and remote village. By stating that adequate publicity was not given to the notification under Section 4, due to which he could not get knowledge of the same, he discharged his burden of proof. The burden thereafter lay upon the forest authorities, to dispute the reasons for delay with material facts and cogent evidence. The department on its part, merely took a vague ground before the Forest Settlement Officer, Sonebhadra, that the disputed land is under the management of the Forest Department. However, no credible documentary evidence has been tendered to establish the aforesaid fact. The manner and material to publicize the notification to reach poor villagers in remote areas was not brought in the record.

18. In the light of this narrative, this Court finds that the Forest Settlement Officer in its order dated 28.06.2016, erred in law by neglecting to consider the reasons taken by the petitioner for the delay caused in instituting the proceedings.

19. The learned appellate court while considering the issue of condonation of

delay, did not redeem the gross illegality committed by the Forest Settlement Officer. The learned appellate court also completely neglected to consider the grounds for the delay, in instituting the proceedings. Moreover, the learned appellate court also returned contradictory findings. The appellate court held that the appellant-petitioner was not a party in the earlier proceedings, but relied on the same to non suit the petitioner.

20. Upon perusal of the judgments of the court below and also the records of the case, this Court feels that the grounds for delay were sufficient and liable to be condoned. These grounds were not adequately contested by the authorities, in the proceedings before the courts below. In order to curtail litigation, this court deems it appropriate to condone the delay in the facts of this case. The trial court shall consider the matter without going into the issue of delay.

21. The second issue, which arises from the finding of the appellate court that it is divested of its jurisdiction, after the notification, shall now be considered.

22. The perusal of Section 17 of the Indian Forest Act, 1927 discloses that there is no fetter on the appellate powers as observed by the learned appellate court. The learned appellate court misdirected itself in law, by finding that the publication of a notification under Section 20 of the Indian Forest Act, 1927 would divest it of its appellate powers. The appeal was preferred much prior to the publication of the notification dated 09.07.2016, issued by the State Government under Section 20 of the Indian Forest Act, 1927.

23. The remedy of statutory appeal is a substantive remedy. Moreso, in this case where the rights of a section of the citizenry, which is residing in abject conditions in remote areas, and primarily surviving on agriculture or living off the land. This remedy of appeal cannot be rendered illusory, by a restrictive interpretation of the statute, as was done by the learned appellate court. The rights of the appellant, which are pending adjudication in appeal under the Indian Forest Act, 1927, cannot under any circumstance be defeated by issuance of notification under Section 20 of the Indian Forest Act, 1927. The proposition that the remedy of appeal, would stand extinguished upon publication of notification under Section 20 of the Indian Forest Act, 1927, runs counter to the scheme of the Act, which zealously protects the rights of the forest people.

24. The basic premise of the judgment of the learned appellate court, may be tested from other angles as well. A notification under Section 20 of the Indian Forest Act, 1927 during pendency of the proceedings before the Forest Settlement Officer, or before the learned appellate court cannot cause the extinction of the rights of the petitioner. There is no fault of the petitioner. The adjudicatory proceedings pending, either before the authority of the first instance, or the appellate authority, cannot be simply terminated or pre-empted by a notification under Section 20 of the Indian Forest Act, 1927. The rights of the petitioner and forest people, protected under the Act, are too valuable, to be undermined in such manner which is contrary to the Act.

25. There is good authority, which holds appeal to be a continuation of the suit, or proceedings of first instance. In an appeal the entire lis is brought before the appellate court. The appellate court can

interdict the findings of fact and law rendered by the trial court. The right of appeal is a substantive one and is in the nature of a vested right. The right of appeal cannot be fettered or taken away, unless diluted or abrogated by express provision or necessary implication in the statute. In this case no such limitation on the right of appeal exists.

26. The scope of right of appeal, was pronounced authoritatively by the Hon'ble Supreme Court in **Garikapati Veeraya Vs. N.Subbiah Choudhry and others, reported at AIR 1957 SC 540** by stating thus:

"From the decisions cited above the following principles clearly emerge:

(i) That the legal pursuit of a remedy, suit, appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding.

(ii) The right of appeal is not a mere matter of procedure but is a substantive right.

(1) A.I.R. 1954 Mad. 543.

(2) I.L.R. 1955 Bom. 530.

(3) A.I.R. 1955 Bom. 332; 57 Bom. L.R. 304.

(iii) The institution of the suit carries with it the implication that all rights of appeal then in force are preserved, to the parties thereto till the rest of the career of the suit.

(iv) The right of appeal is a vested right and such a right to enter the superior court accrues to the litigant and exists as on and from the date the lis commences and although it may be actually exercised when the adverse judgment is pronounced such right is to be governed by the law prevailing at the date of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of the filing of the appeal.

(v) This vested right of appeal can be taken away only by a subsequent enactment, if it so provides expressly or by necessary intendment and not otherwise."

27. This Court in **Dilwar Singh Vs. The Gram Samaj and others reported at AIR 1973 All 411** also defined the nature of right of appeal.

28. In **Dilawar Singh (supra)**, the Division bench of this Court recorded the tenure-holder (Smt. Tulsa) and had taken proceedings under the Consolidation of Holdings Act.

29. The Consolidation Officer upheld the claim of one Dilawar Singh (the applicant before this Court) while rejecting the case of the contesting parties. The contesting respondents preferred an appeal under the Consolidation of Holdings Act, which came to be allowed by the learned appellate court, namely, Settlement Officer (Consolidation). The order of the learned appellate court / Settlement Officer (Consolidation) was taken in revision on 12th December, 1963. Before the revision was filed, a notification under Section 52 of the Act bringing the consolidation operations to a close was issued on 7th December, 1963. The revision was dismissed on the foot that after notification under Section 52 of the Act, the revision could not be entertained.

30. The learned Division Bench in **Dilawar Singh (supra)** defined the breadth of rights of the parties in an appeal, second appeal or revision in these terms.

"A proceeding whether initiate ed through a suit or an application embraces

within its ambit all the rights available to a party by way of appeals, second appeals or revisions."

31. Thereafter, on high authority regarding the ambit of appellate rights the learned Division Bench in **Dilawar Singh (supra)** held thus:

"Applying this principle it has to be held that on the filing of a claim or objection before the Consolidation Officer, certain rights vested in a party to take the proceeding to the superior authorities. That right could not be taken away by a subsequent enactment unless it was expressly or by necessary implication so provided. There is nothing in Section 52 of the Act which either expressly or by necessary implication takes away that right."

32. A situation which is closer to the facts of this case had arisen before this Court in **Gopi Singh and others Vs. Deputy Director of Consolidation Bulandshahr and others,** reported at **1967 ALJ 439**. Even at the time the objections were on the foot before the authority of the first instance, namely, the Consolidation Officer, a notification under Section 52 of the Consolidation of Holdings Act, was published on 22nd May, 1965. The order passed by the Consolidation Officer was carried in appeal after the publication of the notification under Section 52 of the Act. The Deputy Director (Consolidation) in revision held that the appeal was not maintainable in view of the notification under Section 52 of the Consolidation of Holdings Act which pre-date the appeal.

33. In such factual backdrop this Court in **Gopi Singh (supra)** found the appeal to be maintainable despite prior publication of notification under Section 52 of the Consolidation Holdings Act bringing the consolidation proceedings to a final terminus by holding :

"The term 'proceedings' in Section 52 (2) has, in my opinion, been used in that comprehensive sense to include the entire series of proceedings commencing from the one which is initiated before the Consolidation Officer and including that taken in the appeal Court. When an appeal is instituted the proceeding which commenced in the trial Court continues. The appeal does not initiate a fresh proceeding. On the institution of the appeal the proceedings which have become dormant on the decision by the trial Court, revive and remain pending. The only difference being that it is now pending in a different Court, namely, the Court of appeal."

34. It was further observed:

"The word 'cases' in the phrase 'cases of writs filed under the Constitution', in Sub-section (2) will include orders passed by higher Courts of appeal including the Supreme Court. Thus, Sub-section (2) is designed to preserve and make effective orders passed by any one or more of the hierarchy of Courts established under the Act, irrespective of whether the proceeding was pending in any particular Court or in any Court subordinate thereto, on the date of issue of the notification in Sub-section (1)."

We are in agreement with the view taken in the aforesaid case."

35. These authorities apply to the facts of the case and shall govern the fate of the order of the learned appellate court.

36. The notification issued during the pendency of the appeal, did not divest the

learned appellate court of its jurisdiction to deal with the appeal on its merits. The learned appellate court erred in law by dismissing the appeal, on the foot that the jurisdiction of the learned appellate court ceased to exist, after the notification was issued by the State Government on 09.07.2016.

37. The order dated 28.06.2016 passed by the respondent No.2/Forest Settlement Officer, Sonebhadra as well as the order dated 22.03.2018 passed by the learned Additional District Judge, Anpara at Obara, District-Sonebhadra are arbitrary and illegal and liable to be set aside and are set aside.

38. The petition is allowed.

39. The matter is remitted to the Forest Settlement Officer, Sonebhadra for a fresh consideration in the light of the above said directions.

40. The possession of the petitioner having arazi No. 536 ka, Area 4-0-0 bigha situated in village- Parsoi, Pargana-Agori, Tehsil-Robertsganj, District-Sonebhadra, shall not be disturbed till a decision of the Forest Settlement Officer, Sonebhadra. The petitioner shall use the land only for agricultural, forestry and residential purposes till the aforesaid decision.

(2020)09ILR A380
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.07.2020

BEFORE

THE HON'BLE ALI ZAMIN, J.

Matters Under Article 227 No. 1944 of 2020
(Criminal)

Mohammad Ashfaq ...Petitioner
Versus
State of U.P. ...Respondent

Counsel for the Petitioner:
Sri Abhishek

Counsel for the Respondent:
G.A.

A. Article 227 - The petitioner's is the owner of the truck which was stolen and its engine was tampered. The application of the petitioner to release the vehicle was rejected on the ground that the FIR lodged by the police it is mentioned that the registration number, engine number, chasis number are illegible. The High Court observed that the courts below have not considered that chasis number mentioned in the FIR tallies with chasis number mentioned in registration certificate as well as both the courts below also have not considered that no fruitful purpose will be served if the vehicle is kept at the police station. (Paras 4,8)

Writ Petition Disposed of. (E-10)

List of Cases cited: -

1. Sundarbhai Ambalal Desai Vs St. of Guj. (2002) 10 SCC 283: 2003 (46) ACC 223 *(followed)*

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

1. Heard learned counsel for the petitioner and learned A.G.A. for the State and perused the material available on record.

2. This petition under Article 227 of the Constitution of India has been filed by the petitioner for setting aside the impugned orders dated 30.04.2019 and 19.02.2019, passed by learned Session Judge, Meerut in Revision No.91 of 2019 and Additional C.J.M., Court No.3, Meerut, in Case Crime No.0555 of 2018, u/s 411, 414, 420, 467, 468, 471 IPC, P.S. Kithor,

District Meerut, respectively, and release the vehicle being Truck No.U.P.57AT1208 of the petitioner seized in Case Crime No.0555 of 2018, u/s 411, 414, 420, 467, 468, 471 IPC, P.S. Kithor, District Meerut.

3. According to prosecution case, Truck No.U.P.57AT1208 was stolen and its engine number was tampered. It is also alleged that it was recovered from the side of a road in village Radhna in an unclaimed condition, regarding which, FIR Case Crime No.555 of 2019, u/s 411, 414, 420, 467, 468, 471 IPC has been registered at police station Kithor, District Meerut.

4. Learned counsel for the petitioner submits that the petitioner is the owner of Truck No.Truck No.U.P.57AT1208 and he had moved an application for release of the vehicle along with registration certificate but his application was rejected by Additional Chief Judicial Magistrate-III, Meerut on the ground that according to police report the vehicle was found unclaimed, regarding which, Case Crime No.0555 of 2019, u/s 411, 414, 420, 467, 471 IPC has been registered. After rejection of the release application he had filed Criminal Revision No.91 of 2019 (Mohammad Ashfaq vs. State of U.P) which too was rejected, considering that the said vehicle was recovered by the police on 30th September, 2018 from the side of a road in an unclaimed condition and being checked from the record of the Road Tax Office, registration number, chassis number and engine number were found tampered. Revisionist did not file any report for disappearance of the vehicle and after completion of investigation, charge-sheet has been filed in the Court. The said vehicle is a case property and case property will be produced before the Court at the time of evidence. Revisional court has opined that the vehicle cannot be released in favour of the revisionist. He also submits that in the FIR lodged by the police it has been mentioned that engine number is illegible and its chassis number is MAT466488D5C56890 which tallies with the chassis number mentioned in the registration certificate. He further submits that engine number and chassis number are verified by the registering authority at the time of registration. Lastly, he submits that in the intervening night of 29/30-9-2018, S.I. Shiv Dutt illegally had taken into custody the truck of the petitioner while parked on the side of road. Petitioner made a request to release the same as being registered owner of the vehicle and he also showed relevant papers then police made an illegal demand for release of the vehicle. On not conceding the illegal demand by stating that he will get released the vehicle from the court then police officer became annoyed, inimical and on his direction, the other police officer and constables destroyed and manipulated engine number of the petitioner's vehicle.

5. Per contra, learned A.G.A. has opposed the prayer and submits that in the order passed by Additional Chief Judicial Magistrate-III, Meerut, the report of Forensic Science has been considered in which it is mentioned that in addition to engine number and chassis number, other chassis number is visible, therefore, proper order has been passed and petitioner is not entitled for release of the said vehicle in his favour.

6. For deciding the instant case, it will be apt to refer the case of ***Sundarbhai Ambalal Desai v. State of Gujrat 2002(10) SCC 283: 2003 (46) ACC 223,*** in which, paras 18 and 21 of the judgment, Hon'ble Supreme Court has held as under :-

"18. In case where the vehicle is not claimed by the accused, owner, or the insurance company or by third person, then such vehicle may be ordered to be auctioned by the Court. If the said vehicle is insured with the insurance company then insurance company be informed by the Court to take possession of the vehicle which is not claimed by the owner or a third person. If Insurance company fails to take possession, the vehicles may be sold as per the direction of the Court. The Court would pass such order within a period of six months from the date of production of the said vehicle before the Court. In any case, before handing over possession of such vehicles, appropriate photographs of the said vehicle should be taken and detailed panchnama should be prepared.

21. However these powers are to be exercised by the concerned Magistrate. We hope and trust that the concerned Magistrate would take immediate action for seeing that powers under Section 451 Cr.P.C. are properly and promptly exercised and articles are not kept for a long time at the police station, in any case, for not more than fifteen days to one month. This object can also be achieved if there is proper supervision by the Registry of the concerned High Court in seeing that the rules framed by the High Court with regard to such articles are implemented properly."

7. Considering the submission of learned counsel the parties as well as the order passed by Additional Chief Judicial Magistrate-III, Meerut and learned Revisoinal Court's order, one thing is clear that no any other person has claimed the vehicle except the petitioner. In the FIR, chassis number of the vehicle has been mentioned which also tallies with the chassis number mentioned in the registration certificate. After registration of the FIR, expert opinion about the chassis number and engine number was obtained, in which report had been submitted to the aspect that apart from chassis number, other chassis number is also visible. If it was so as the expert report has been submitted then other chassis number also should have been disclosed in the FIR.

8. Both the courts below have not considered that chassis number mentioned in the FIR tallies with chassis number mentioned in registration certificate as well as both the courts below also have not considered that no fruitful purpose will be served if the vehicle is kept at the police station. Law laid down by Hon'ble Supreme Court in **Sundarbhai Ambalal Desai v. State of Gujrat** (supra) has a binding effect on both the courts below but both the courts below also have not considered the law laid-down by the Hon'ble Supreme Court in the above referred case.

9. In view of the above, the impugned orders are not proper, hence, not sustainable, consequently liable to set aside. Accordingly, the petition is allowed and the order dated 30.4.2019, passed by learned Sessions Judge, Meerut and order dated 19.02.2019, passed by A.C.J.M., Court No.3, Meerut, in Case Crime No.0555 of 2018, u/s 411, 414, 420, 467, 468, 471 IPC, P.S. Kithor, District Meerut, are hereby set aside.

10. Learned trial court is directed to release the said vehicle in favour of the petitioner on his furnishing a personal bond and two local sureties each of the like amount to the satisfaction of the court concerned with the condition that whenever it will be required the same shall be produced before the court.

11. With the aforesaid direction, this petition is, finally, disposed of.

12. A copy of this order be transmitted to the lower court for compliance.

(2020)09ILR A383
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.07.2020

BEFORE

THE HON'BLE AJAY BHANOT, J.

Matters Under Article 227 No. 2196 of 2020 (Civil)

Pawan Kumar Goyal ...Petitioner
Versus
Neetu ...Respondent

Counsel for the Petitioner:
Satya Prakash Shukla

Counsel for the Respondent:
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A. Hindu Marriage Act, 1955 - Section 13B - Guardianship and Wards Act, 1890 - Section 7/25 - Custody - maintainability of custody proceedings

The petitioner and respondent divorced mutually. The respondent voluntarily gave the custody of their minor child to the petitioner. Suddenly she had a change of heart and instituted proceedings for custody for her child. The trial court rejected the objection filed by the petitioner to the maintainability of custody proceedings on the ground that the welfare and best interests of a child cannot be bartered away by two parties, even in a consent agreement. The High Court did not find any perversity in the order passed by the trial court as the welfare of the child is the paramount concern of any court which can only be decided after a searching enquiry by the court. An enquiry of this nature requires exchange of pleadings and reception of evidence, and fulsome consideration of relevant issues by the learned trial court. (Paras 5, 8, 10, 11, 12)

Writ Petition disposed of. (E-10)

List of Cases cited: -

1. Mrs. Annie Besant Vs G. Narayaniah AIR 1914 PC 41

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

1. By the impugned order dated 14.01.2020 passed by the learned Principal Judge, Family Court, Hapur, the preliminary objection of the petitioner to the maintainability of the proceedings for custody of minor child Anni @ Awani, under Section 7/25 of the Guardianship and Wards Act, registered as Misc. Case No. 38 of 2019, Smt. Neetu Vs. Pawan, has been rejected.

2. The background facts are these.

3. The petitioner and the respondent had agreed to divorce, on mutually acceptable terms.

4. The learned Principal Judge, Family Court, Hapur, by judgment and decree dated 24.04.2019, allowed the application of the petitioner and the respondent for divorce by mutual consent, under Section 13 B of the Hindu Marriage Act.

5. One of the agreed terms of the divorce by mutual consent, was that the custody of the minor child Anni @ Awani, would be voluntarily made over by the respondent Neetu, to the petitioner Pawan Kumar Goyal. The custody of the minor child Anni @ Awani, was handed over voluntarily by the respondent Neetu, to her husband Pawan Kumar Goyal in court on 29.10.2018.

6. After the annulment of their marriage, the petitioner and the respondent

have been living separately. The minor child Anni @ Awani, has since been living with her father.

7. The respondent Neetu, apparently had a change of heart, at a later point in time. She took out proceedings for custody of her minor child, Anni @ Awani, under Section 7/25 of the Guardianship and Wards Act, registered as Misc. Case No. 38 of 2019, Neetu Vs Pawan, before the learned Principal Judge, Family Court, Hapur.

8. The petitioner contested the maintainability of the proceeding for custody, instituted at the behest of the respondent. The proceeding was in the teeth of the child custody clause, in the agreement between the parties, which formed the basis of their divorce by mutual consent. The respondent cannot now resile from the mutual agreement, acted upon by parties and sanctified by the decree of the court.

9. The learned trial court by impugned order dated 14.01.2020, set forth these findings.

10. The child is a minor. The welfare and the interests of the child are paramount. The mutual agreement between the two parties, whereby the respondent voluntarily and unconditionally made over the custody of the child to her father, namely, Pawan Kumar Goyal, cannot override the welfare and best interests of the child. The welfare and best interests of a child cannot be bartered away by two parties, even in a consent agreement; in case the court finds that such agreement does not subserve the best interests and welfare of the child. These facts have to be found at the trial. The court voided the agreement being in the teeth of Section 23 of the Indian Contract Act.

11. On this footing the objection of the petitioner to the maintainability of custody proceedings, was rejected by the impugned order.

12. Ancient and settled authority has it that, at all times the welfare of the child is the paramount concern of any court. To this end, courts endeavour to approve an environment conducive to a balanced growth, and well rounded development of the child. These considerations are decisive in any matter of child custody. Such issues can be decided only after a searching enquiry by the court. An enquiry of this nature requires exchange of pleadings and reception of evidence, and fulsome consideration of relevant issues by the learned trial court. At this stage, the proceedings in the trial court cannot be interdicted, to the detriment of the minor child.

13. There is no infirmity in the order passed by the learned trial court. In any case, efficacious remedy is available to the petitioner, in case he is aggrieved by any final order in the proceedings. Hence, this Court declines to interfere with the order passed by the learned trial court.

14. Faced with this at this stage, learned counsel for the petitioner Shri Satya Prakash Shukla does not press the relief sought in this petition and recasts the relief. He contends that admittedly the respondent had voluntarily and unconditionally, handed over custody of the child to the petitioner. She did not even ask for visitation rights. Her conduct speaks volumes to her lack of responsibility as a parent. Further the child has developed

strong bonds and affiliations in her current environment, created by consent of parties. Unravelling these bonds at this stage, would cause emotional distress to the child. He submits that petitioner may be permitted to raise these, and relevant other issues, before the learned trial court to establish that the paramount interests of the welfare of the child, will be subserved by remaining in the custody of her father.

15. In view of these submissions, and in the interests of the child, the following observations are made.

16. The court has to proceed very cautiously in the matter. It is an admitted case that the child has been staying with her father Pawan Kumar Goyal since, 2018.

17. Minds of infants are formative. Infants have heightened capacities to forge bonds of affection, which strengthen into deep intimacies with time. Courts have long recognized the deep sanctity of bonds and associations of infants, with their guardians (in this case the father), created over a period of time. The courts have also set their face against unwarranted disruptions in such bonds and associations. In **Mrs. Annie Besant vs G. Narayaniah, reported at AIR 1914 PC 41,** it was held:

"3. There is no difference in this respect between English and Hindu law. As in this country, so among the Hindus, the father is the natural guardian of his children during their minorities, but this guardianship is in the nature of a sacred lifetime substitute another person to be guardian in his place. He may, it is true, in the exercise of his discretion as guardian, entrust the custody and education of his children to another, but the authority he thus confers is essentially a revocable authority, and if the welfare of his children require it, he can, notwithstanding any contract to the contrary, take such custody and education once more into his own hands. If, however, the authority has been acted upon in such a way as, in the opinion of the Court exercising the jurisdiction of the Crown over infants, to create associations or give rise to expectations on the part of the infants which it would be undesirable in their interests to disturb or disappoint, such Court will interfere to prevent its revocation. [Lyonsv.Blenkin]"

18. The trial court will have to independently determine whether in light of facts and evidence before it, it would be wise and judicious to revoke the guardianship of the father, once such authority was granted unconditionally by the plaintiff and duly acted upon. However, the court shall at all times, bear in mind that the interests of the child and her welfare are paramount, and ahead of all other considerations.

19. While considering the best interests of the child, the court shall personally interact with the child, and also take the services of a child psychologist. However, at this stage, due to the COVID-19 pandemic, it will not be advisable to expose the child either to the environment of the courts, or to any other external and uncontrolled environment.

20. This issue shall only be decided after the court comes to a considered opinion, that the threat of COVID-19 pandemic have sufficiently receded, and the child can be exposed to an interaction with the court and the child psychologist, at a convenient and well sanitized place. The other aspects which the court may factor in, are the will and preferences of the child,

educational facilities, the opportunities available and the overall environment which is conducive to overall development of the child. The court may also consider any other factors, which it deems are relevant to determine the best interests of the child.

21. During the pendency of the suit proceedings, it is open to the respondent to file an application for interim visitation rights. In case such application is filed, it shall be considered at the earliest and on top priority by the learned trial court in accordance with law.

22. It is open to both parties to raise all issues on merits regarding the welfare of the child, before the learned trial court, and the same shall be considered by the learned trial court in accordance with law, and consistent with the observations made above.

23. The petition is disposed of finally.

(2020)09ILR A386
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.07.2020

BEFORE

THE HON'BLE GAUTAM CHOWDHARY, J.

Matters Under Article 227 No. 2230 of 2020 (Criminal)

Nitin Arora ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Madan Lal Rai

Counsel for the Opposite Parties:
G.A.

A. Criminal Law - Criminal Procedure Code, 1973 - Section 200, 202 - Indian Evidence Act, 1872- Section 101 - Burden of Proof - The petitioner asserts that the respondent along with his daughter took jewelry and left the matrimonial home to move to her father's house. But the lower court observes that the petitioner failed to disclose neither in the complaint nor in his statement the owner of those jewelry. Since the burden to prove the description of jewelry therefore he ought to have provided any list or receipt of jewelry which kept missing from his house. (Para 10)

B. Jurisdiction - the petitioner claims that when he went to her father's house at Preet Vihar, New Delhi he was ill-treated. The Hon'ble High Court appreciates the order of the lower court deciding not to intervene in the matter as it lies under the jurisdiction of the Delhi court and not Ghaziabad court. (Para 16)

Writ Petition Rejected. (E-10)

List of Cases cited: -

1. Vijay Dhanuka etc. Vs Najima Mamtaj etc. (2014) 14 SCC 638

(Delivered by Hon'ble Gautam Chowdhary, J.)

1— भारतीय संविधान के अनुच्छेद 227 के अन्तर्गत यह याचिका, परिवाद वाद सं0 5069 सन 2018, नितिन अरोड़ा वर्सेस सोनिया मल्होत्रा एण्ड अदर्स में अपर मुख्य न्यायिक मजिस्ट्रेट, कोर्ट नं0 3, गाजियाबाद द्वारा पारित तलबी आदेश दि0 29—7—2019, जिसके द्वारा परिवादी द्वारा प्रस्तुत परिवाद पर्याप्त साक्ष्य के अभाव में धारा 203 दं0प्र0सं0 के तहत निरस्त किया गया है एवं इसके विरूद्ध दायर क्रिमिनल रिवीजन नं0 325 सन 2019, नितिन अरोड़ा वर्सेस सोनिया मल्होत्रा एण्ड अदर्स में अपर जिला एवं सत्र न्यायाधीश, कोर्ट नं0 17, गाजियाबाद द्वारा पारित आदेश दि0 30—11—2019, जिसके द्वारा निगरानी निरस्त की गयी है, के विरूद्ध योजित की गयी है।

2— याची के विद्वान अधिवक्ता श्री मदन लाल राय एवं उ0 प्र0 राज्य की ओर से विद्वान

अपर शासकीय अधिवक्ता श्री प्रशांत कुमार के सहयोगी अधिवक्ता श्री पी0 के0शाही को सुना तथा पत्रावली का परिशीलन किया।

3— परिवाद पत्र के अनुसार वाद के तथ्य संक्षेप में इस प्रकार हैं कि परिवादी नितिन अरोड़ा का विवाह विपक्षी सं0 1 सोनिया मल्होत्रा के साथ दि0 4—2—2016 को गाजियाबाद में संपन्न हुआ तथा उनके पारिवारिक सम्बन्धों के निर्वहन से दि0 17—1—2017 को एक पुत्री का जन्म हुआ, परिवादी के अनुसार विवाह के पश्चात् उसने विपक्षी सं0 1 को समस्त सुख सुविधाएं उपलब्ध करायी थी एवं खुश रखने का हर सम्भव प्रयास किया, विपक्षी सं0 1 विवाह के पूर्व से ही आर0जी0 स्टोन अस्पताल प्रीत विहार दिल्ली में सीनियर स्टाफ नर्स के पद पर कार्य करती है, जहॉ से विपक्षी सं0 1 को रू0 20,000/— प्रतिमाह वेतन प्राप्त होता है, विपक्षी सं0 1 विवाह के उपरांत से ही परिवादी पर अपने मायके में रहने का दबाव बनाती थी और कहती थी कि परिवादी के वहॉ रहने पर वह अपनी नौकरी आसानी से करेगी तथा परिवादी की भी नौकरी लगवा देगी, परिवादी द्वारा ऐसा करने में असमर्थता जाहिर करने पर विपक्षी सं0 1 परिवादी से लड़ाई झगड़ा करती तथा झूठे मुकदमें में फॅसाने की धमकी देती थी। दि0 24—3—2017 को विपक्षी सं0 1 अपने पिता के साथ घर में रखे कीमती जेवर, रू0 37000/—नगद एवं कपड़े लेकर अपनी रिश्तेदारी में शादी का बहाना करके तीन दिन के लिए कहकर गयी तथा तब से वह वापस नहीं आयी, परिवादी ने उसे लाने का अनेकों प्रयास किया किन्तु वह नहीं आयी तथा अब वहॉ जाने पर वह परिवादी से दुर्व्यवहार करते हुए झूठे मुकदमें में फॅसाने व जान से मारने की धमकी देती है। परिवादी ने विपक्षी सं0 1 को रूपया व जेवर लेकर घर वापस आने हेतु अपने अधिवक्ता के माध्यम से नोटिस भेजवायी परन्तु नोटिस प्राप्त होने के उपरान्त भी वह वापस नहीं आयी, परिवादी इस संबंध में रिपोर्ट लिखाने थाना पर गया तो उसकी रिपोर्ट नहीं लिखी गयी, परिवादी द्वारा वरिष्ठ पुलिस अधीक्षक, गाजियाबाद को भी इस संबंध में प्रार्थना पत्र दिया गया, जिस पर कोई कार्यवाही नहीं हुयी तब परिवादी द्वारा न्यायालय के समक्ष यह परिवाद पत्र दाखिल किया गया।

4— परिवाद के समर्थन में परिवादी ने धारा 200 दं0प्र0सं0 के अन्तर्गत स्वयं को तथा धारा 202 दं0प्र0सं0 के अन्तर्गत साक्षीगण सुभाष चन्द्र व श्रीमती रानी अरोड़ा को परीक्षित कराया।

5— याची के विद्वान अधिवक्ता ने तर्क प्रस्तुत किया कि अपर मुख्य न्यायिक मजिस्ट्रेट द्वारा परिवाद निरस्त करने में तथ्यों पर ध्यान नहीं दिया गया तथा आदेश दि0 29—7—2019 विधि विरूद्ध ढंग से पारित किया गया है क्योंकि उनके द्वारा पत्रावली पर उपलब्ध साक्ष्य को ग्रहण न करके, साक्ष्य ग्रहण न करने वाले साक्ष्यों के आधार पर प्रश्नगत आदेश पारित किया है, इस प्रकार प्रश्नगत आदेश पारित करते समय न्यायिक मष्तिष्क का उपयोग नहीं किया गया है। उनका यह भी कथन है कि याची ने धारा 200 दं0प्र0सं0 के अन्तर्गत स्वयं को तथा धारा 202 दं0प्र0सं0 के अन्तर्गत साक्षीगण को परीक्षित कराया, किन्तु न्यायालय द्वारा उक्त समस्त तथ्यों की अनदेखी करते हुए प्रश्नगत निर्णय एवं आदेश पारित किया गया है।

याची के विद्वान अधिवक्ता ने यह भी तर्क प्रस्तुत किया कि विद्वान पुनरीक्षण न्यायालय ने भी उनके उपरोक्त कथनों की अनदेखी करते हुए अपने निर्णय दि0 30—11—2019 द्वारा, विद्वान अपर मुख्य न्यायिक मजिस्ट्रेट द्वारा पारित आदेश दि0 29—7—2019 की पुष्टि करते हुए पुनरीक्षण निरस्त करने में त्रुटि की है, इसलिए अवर न्यायालय द्वारा पारित दोनों प्रश्नगत निर्णयों को अपास्त किया जाय।

6— विद्वान अपर शासकीय अधिवक्ता ने तर्क प्रस्तुत किया कि विद्वान अपर मुख्य न्यायिक मजिस्ट्रेट द्वारा पत्रावली पर उपलब्ध समस्त प्रपत्रों का सम्यक रूपेण परिशीलन एवं विश्लेषण करने के उपरान्त सकारण विधि सम्मत आदेश पारित किया गया है, जिसके बारे में याची द्वारा संदर्भित आपत्ति निराधार है। उनका यह भी कथन है कि पुनरीक्षण न्यायालय द्वारा भी याची की समस्त आपत्तियों के दृष्टिगत पत्रावली पर उपलब्ध समस्त अभिलेखीय साक्ष्यों एवं अवर न्यायालय के प्रश्नगत निर्णय पर गंभीरतापूर्वक विचारोपरान्त दाण्डिक पुनरीक्षण निरस्त किया गया है। दोनों प्रश्नगत आदेश बिल्कुल सही ढंग से पारित किए गए हैं, उनमें कोई विधिक या क्षेत्राधिकार संबंधी त्रुटि नहीं है, यह याचिका बलहीन है और निरस्त किए जाने योग्य है।

7— मैंने उभय पक्ष के विद्वान अधिवक्ताओं के तर्को पर गंभीरतापूर्वक विचार किया तथा पत्रावली पर उपलब्ध समस्त अभिलेखय साक्ष्यों एवं उपरोक्त दोनों प्रश्नगत निर्णयों का परिशीलन किया।

8— आदेश दि0 29—7—2019 में विद्वान अपर मुख्य न्यायिक मजिस्ट्रेट द्वारा यह पाया गया

है कि परिवादी ने अपने बयान अन्तर्गत धारा 200 दं0प्र0सं0 में यह कथन किया है कि उसकी पत्नी शादी के अगले दिन से ही कहने लगी कि अलग मकान लेकर रहेंगे, दि0 23–3–2017 को वह उसकी पुत्री को लेकर अपने पिता के साथ जेवर व नगदी आदि लेकर चली गयी, यहॉ पर परिवादी ने न तो परिवाद पत्र में और न ही अपने बयान में यह स्पष्ट किया है कि उक्त जेवर किस व्यक्ति के स्वत्व के थे तथा यदि उक्त जेवर परिवादी द्वारा विपक्षी सं0 1 को न्यस्त कराया गया तो वह कब न्यस्त कराया गया। पत्रावली पर किसी भी सामान की सूची व उसे क्रय करने की कोई रसीद व स्वत्व का कागज भी परिवादी द्वारा दाखिल नहीं किया गया। जहॉ तक विपक्षी सं0 1 द्वारा परिवादी के साथ अभद्र व्यवहार किए जाने का प्रश्न है, इस बारे में परिवादी ने स्वयं अपने बयान में यह स्वीकार किया है कि जब वह अपनी पत्नी को लेने के लिए उसके घर पर गया था तब वहॉ पर विपक्षीगण ने उसके साथ अभद्र व्यवहार किया था, इस प्रकार परिवादी के साथ अभद्र व्यवहार प्रीत विहार नई दिल्ली में हुआ, जिसके सम्बन्ध में गाजियाबाद न्यायालय को कोई क्षेत्राधिकार नहीं है, इस प्रकार इन बिन्दुओं के आधार पर परिवादी का परिवाद धारा 203 दं0प्र0सं0 के अन्तर्गत निरस्त कर दिया गया।

9– परिवादी द्वारा इस निर्णय एवं आदेश से क्षुब्ध होकर, आपराधिक पुनरीक्षण सं0 325 सन 2019 दाखिल किया गया, जिसका निस्तारण विद्वान अपर जिला एवं सत्र न्यायाधीश, कोर्ट नं0 17, गाजियाबाद के निर्णय दि0 30–11–2019 द्वारा किया गया। परिवादी द्वारा उठायी गयी आपत्तियों के मद्देनजर विद्वान अपर जिला एवं सत्र न्यायाधीश न्यायालय द्वारा परिवाद सं0 5069/2018 तथा उसके समर्थन में लेखबद्ध धारा 200 एवं 202 दं0प्र0सं0 के बयानों, विपक्षी सं0 1 को प्रेषित नोटिस दिनांकित 14–8–2018 का परिशीलन किया, जिनमें कहीं भी यह नहीं पाया गया कि प्रश्नगत जेवर, नकदी एवं कीमती कपड़े परिवादी द्वारा विपक्षी सं0 1 को न्यस्त किये गये एवं उक्त वस्तुओं का वास्तविक स्वामी कौन है, यदि उक्त वस्तुओं का स्वामी परिवादी था तो उसे प्रमाणित करने की प्रारम्भिक एवं प्रथम दृष्टया जिम्मेदारी परिवादी की ही थी। परिवादी द्वारा ऐसा कोई साक्ष्य न तो विद्वान मजिस्ट्रेट के न्यायालय में और न ही पुनरीक्षण न्यायालय के समक्ष प्रस्तुत किया गया कि परिवाद पत्र में वर्णित गहने परिवादी के हैं, जहॉ तक परिवादी निनित अरोड़ा द्वारा स्वयं के गहने ले जाने का कथन किया गया है वहीं इसके विपरीत परिवादी के गवाह पी0डब्लू0–2 श्रीमती रानी अरोड़ा के बयान अन्तर्गत धारा 202 दं0प्र0सं0 में स्वयं के गहने ले जाने का तथ्य सामने आया है। इस सन्दर्भ में साक्षियों के बयान में विरोधाभाष है।

10– मैंने पत्रावली पर उपलब्ध दोनों अवर न्यायालयों के निर्णयों का गहनतापूर्वक परिशीलन किया। परिवादी के धारा 200 दं0प्र0सं0 के बयान में कहा गया है कि दि0 23–3–2017 को विपक्षी सं0 2 उसकी पुत्री को लेकर अपने पिता के साथ चली गई और वह अपने साथ जेवर भी लेकर गई थी। यहॉ पर परिवादी ने न तो परिवाद–पत्र में और न ही अपने उक्त बयान में यह स्पष्ट किया है कि उक्त जेवर किस व्यक्ति के स्वत्व के थे तथा पत्रावली पर किसी भी सामान की सूची व उसे क्रय करने की कोई रसीद व स्वत्व का कागज भी दाखिल नहीं है। जबकि यदि उक्त जेवर परिवादी के थे तो इसे साबित करने का भार भारतीय साक्ष्य अधिनियम की धारा 101 के अन्तर्गत परिवादी का ही है। इस संबंध में भारतीय साक्ष्य अधिनियम की धारा 101 निम्नवत है :–

''101– सबूत का भार – जो कोई न्यायालय से यह चाहता है कि वह ऐसे किसी विधिक अधिकार या दायित्व के बारे में निर्णय दे, जो उन तथ्यों के अस्तित्व पर निर्भर है, जिन्हें वह प्राख्यात करता है, उसे साबित करना होगा कि उन तथ्यों का अस्तित्व है।

जब कोई व्यक्ति किसी तथ्य का अस्तित्व साबित करने के लिए आबद्ध है, तब यह कहा जाता है कि उस व्यक्ति पर सबूत का भार है''

11– जहॉ तक विपक्षी द्वारा परिवादी के साथ अभद्र व्यवहार किए जाने का कथन किया गया है, इस संदर्भ में परिवादी ने अपने बयान में यह स्वीकार किया है कि जब वह अपनी पत्नी को लेने के लिए उसके घर प्रीत विहार नई दिल्ली गया था, तब वहॉ पर विपक्षीगण ने उसके साथ अभद्र व्यवहार किया। इस संबंध में अवर न्यायालय ने निर्णीत किया है कि चूँकि परिवादी के साथ अभद्र

व्यवहार प्रीत विहार नई दिल्ली में हुआ, जिसके सम्बन्ध में उनके न्यायालय को क्षेत्राधिकार नहीं है। इस संबंध में Vijay Dhanuka etc. Vs. Najima Mamtaj etc. 2014 ;14) SCC 638 में माननीय उच्चतम न्यायालय द्वारा प्रतिपादित विधि व्यवस्था निम्नवत हैः–

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

Provided that no such direction for investigation shall be made-

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

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

(2) In an inquiry under sub-section(1), the Magistrate may, if he thinks fit, take evidence of witness 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."

12– इस प्रकार विद्वान अपर मुख्य न्यायिक मजिस्ट्रेट, गाजियाबाद द्वारा परिवादी का परिवाद दं0प्र0सं0 की धारा 203 के अन्तर्गत निरस्त किया गया है। यहॉ पर दं0प्र0सं0 की धारा 203 भी उद्धृत किया जाना आवश्यक है, जो इस प्रकार है :–

"यदि परिवादी के और साक्षियों के शपथ पर किए गए कथन पर ;यदि कोई होद्ध, और धारा 202 के अधीन जांच या अन्वेषण के ;यदि कोई होद्ध परिणाम पर विचार करने के पश्चात्, मजिस्ट्रेट की यह राय है कि कार्यवाही करने के लिए पर्याप्त आधार नहीं है तो वह परिवाद को खारिज कर देगा और ऐसे प्रत्येक मामले में वह ऐसा करने के अपने कारणों को संक्षेप में अभिलिखित करेगा।"

13– मेरे विचार से विद्वान अपर मुख्य न्यायिक मजिस्ट्रेट, कोर्ट सं0 3, गाजियाबाद ने उपलब्ध साक्ष्य का भलीभांति विश्लेषण करते हुए विस्तृत एवं तर्क सम्मत आदेश पारित किया है। साक्षियों के बयान में महत्वपूर्ण विरोधाभाष यह है कि विपक्षी सं0 1 द्वारा ले जाए गए गहने किसके थे, विद्वान मजिस्ट्रेट न्यायालय द्वारा इसी आधार पर उपलब्ध साक्ष्य का विश्लेषण करते हुए संदर्भित प्रकरण में विपक्षीगण को तलब न करने का आधार पाया गया है, उक्त आधार तर्क सम्मत है।

14– जहॉ तक विद्वान मजिस्ट्रेट न्यायालय के आदेश में उन्हें वाद का क्षेत्राधिकार न होने के संबंध में कही गयी बात का प्रश्न है, इस संबंध में न्यायालय ने परिवादी के बयान अन्तर्गत धारा 200 दं0प्र0सं0 में पाया है कि परिवादी ने यह स्वीकार किया है कि जब वह अपनी पत्नी को लेने के लिए उसके घर पर गया तब वहॉ पर विपक्षीगण ने उसके साथ अभद्र व्यवहार किया, अतः परिवादी के साथ अभद्र व्यवहार प्रीत विहार नई दिल्ली में हुआ, जिसके सम्बन्ध में गाजियाबाद न्यायालय को क्षेत्राधिकार प्राप्त नहीं है। चूॅकि यह तथ्य स्वयं परिवादी के धारा 200 दं0प्र0सं0 के बयान में ही आया है, अतः इस बिन्दु पर विद्वान मजिस्ट्रेट न्यायालय द्वारा दिया गया निर्णय बिल्कुल सही है, इसमें कोई त्रुटि परिलक्षित नहीं होती है तथा इस बिन्दु पर दिए गए निर्णय की पुष्टि करने में विद्वान पुनरीक्षण न्यायालय द्वारा भी कोई त्रुटि नहीं की गयी है।

15– परिवादी द्वारा पुनरीक्षण न्यायालय में अपने तर्क के समर्थन में विधि व्यवस्था **मिस सोनिया गोविन्द गिडवानी प्रति स्टेट आफ यू0पी0 ;एच0सी0द्ध ए0सी0सी0 312, 2013 ;83द्ध, मै0**

जी0एच0सी0एल0 एम्पलाईज स्टोक ओपशन ट्रस्ट बनाम मै0 इण्डिया इनफोलाइन लि0 ए0आई0आर0 2013 ;सु0को0द्ध 1433 पर विश्वास व्यक्त किया गया है। पुनरीक्षण का निस्तारण करते समय पुनरीक्षण न्यायालय द्वारा तथा इस स्तर पर स्वयं मेरे द्वारा इन विधि व्यवस्थाओं का अवलोकन किया गया। मेरे विचार से परिवादी के परिवाद में उक्त प्रथम दृष्टया तथ्यों का अभाव है तथा उक्त विधि व्यवस्थाओं का लाभ परिवादी को नहीं प्रदान किया जा सकता।

16— परिवादी के बयान से स्पष्ट हो रहा है कि परिवादी के साथ अभद्र व्यवहार की घटना दिल्ली में घटित हुयी है, इसलिए गाजियाबाद न्यायालय को उक्त मामले को सुनने का क्षेत्राधिकार नहीं है। इस बारे में विद्वान अपर मुख्य न्यायिक मजिस्ट्रेट, गाजियाबाद का अभिमत बिल्कुल सही है तथा उपरिवर्णित दोनों आधारों पर विद्वान मजिस्ट्रेट द्वारा परिवादी का परिवाद धारा 203 दं0प्र0सं0 के अन्तर्गत निरस्त करने में कोई त्रुटि नहीं की गयी है।

17— पुनरीक्षण न्यायालय द्वारा भी परिवाद पत्र, परिवादी द्वारा विपक्षी सं0 1 को दी गयी नोटिस, परिवादी के धारा 200 दं0प्र0सं0 के अन्तर्गत दिए गए बयान, उसके साक्षियों के धारा 202 दं0प्र0सं0 के अन्तर्गत दिए गए बयान का परिशीलन करते हुए, विरोधाभाषी तथ्यों का उजागर अपने निर्णयों में किया है।

18— इस प्रकार दोनों अवर न्यायालयों द्वारा पारित उपरोक्त दोनों प्रश्नगत निर्णय एवं आदेश में किसी प्रकार की कोई त्रुटि परिलक्षित नहीं होती है, अपर मुख्य न्यायिक मजिस्ट्रेट, कोर्ट नं0 13, गाजियाबाद द्वारा पारित आदेश दि0 29—7—2019 एवं क्रिमिनल रिवीजन नं0 325 सन 2019, नितिन अरोड़ा वर्सेस सोनिया मल्होत्रा एण्ड अदर्स में अपर जिला एवं सत्र न्यायाधीश, कोर्ट नं0 17, गाजियाबाद द्वारा पारित निर्णय एवं आदेश दि0 30—11—2019 में हस्तक्षेप किए जाने का कोई औचित्य नहीं है इसलिए दोनों प्रश्नगत निर्णय एवं आदेशों की पुष्टि की जाती है तथा यह याचिका बलहीन होने के कारण निरस्त की जाती है।

19— अन्तरिम आदेश यदि कोई हो तो उसे समाप्त समझा जाय।

(2020)09ILR A390
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.02.2020

BEFORE

THE HON'BLE RAM KRISHNA GAUTAM, J.

Application U/S 482 No. 4496 of 2020

Mohit & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri A.Z. Khan

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

Criminal Law -Code of Criminal Procedure, 1973- Section 482- Present applicants are named accused persons - On the basis of the statement, recorded, under Section 161 of Cr.P.C., cognizance was taken for which there was, prima facie, sufficient evidence on record. Plea of alibi and other arguments regarding facts are to be seen by the Trial court. This Court, in exercise of inherent power, under Section 482 of Cr.P.C., is not expected to embark upon factual matrix because the same is to be gone into, during course of trial, by the Trial court.

Only prima facie case on the basis of evidence collected during investigation has to be seen at the stage of taking cognizance of the offences and disputed questions of fact cannot be looked into by the Court in the exercise of its inherent power under section 482 of the Cr.Pc.

Criminal Application rejected. (Para 5, 6, 9) (E-3)

Case Law relied upon/ Discussed: -.

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. 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. This Application, under Section 482 of Code of Criminal Procedure, 1973, has been filed by the Applicants, Mohit and Madan, with a prayer for setting aside summoning order, dated 19.4.2019, passed by Additional Sessions Judge, Saharanpur, in a proceeding related with Case Crime No.65 of 2017, and, thereby, entire criminal proceeding, under Sections 147, 148, 452, 506, 436, and 427 of IPC, read with Section 3(1) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, Police Station-Bargaon, District-Saharanpur.

2. Learned counsel for applicants argued that the applicant no.2, Madan, was not present on the spot of occurrence, rather, he was present somewhere else for which there is evidence on record. Occurrence took place, but, involvement of the present applicants was not there and this fact has been averred by each of the victim, by way of their affidavits, filed before the Investigating Officer, even then, chargesheet, for offences, as above, has been filed and cognizance over it has been taken by the Trial court. It is an abuse of process of law. Hence, for avoiding abuse of process of law, this Application, under Section 482 of Cr.P.C., has been filed, with above prayer.

3. Learned AGA, representing State of U.P., has vehemently opposed this Application.

4. A short counter affidavit has been filed by the learned AGA, wherein, there is mention, in the case diary, that those affidavits, referred to by learned counsel for applicants, mentioned and annexed in the case diary, were obtained through Dak Pad by the Circle Officer, concerned, and it shall be acted upon after its verification, but, there is no mention about their verification, rather, on the basis of statements, recorded, under Section 161 of Cr.P.C., chargesheet has been filed, wherein, cognizance has been taken.

5. First information report reveals that Case Crime No.65 of 2017 was got registered at Police Station Bargaon, District Saharanpur, on 6th May, 2017, upon a report of Ilam Singh against accused persons, namely, Pradeep, Raju, Arjun Pachal, Pankaj, Rejji, Mohit, Madan, Satvir, Mohan, Mohit, Jasvir and Nitu, for offences, punishable, under Sections 147, 148, 452, 506, 436 and 427 of IPC, read with Section 3(1) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, with accusation that those named persons, alongwith other several others, in furtherance of their common object of their unlawful assembly, committed this occurrence, wherein, the accused persons hurled abuses by name of caste, with intimidation, by firing gun shots, resulting in damage caused to shops etc. Present applicants are named accused persons in this case crime number.

Investigation, included recording of statement, under Section 161 of Cr.P.C, wherein contentions, made in the first information report, have been reiterated. Some affidavits have been filed, but they were mentioned to be taken on record in Case Diary, however, they were mentioned to be acted upon after their verification. But, lateron, they were not verified, hence, on the basis of the statement, recorded, under Section 161 of Cr.P.C., cognizance was taken for which there was, prima facie, there was sufficient evidence on record. Plea of alibi and other arguments regarding facts are to be seen by the Trial court.

6. Hence, under all above facts and circumstances, this Court, in exercise of inherent power, under Section 482 of Cr.P.C., is not expected to embark upon factual matrix because the same is to be gone into, during course of trial, by the Trial 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 judgment, in the case of **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 yet another judgment, in the case of **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 the case of **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 the case of **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 the case of **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".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, under Section 482 of Cr.P.C., merits dismissal and it stands **dismissed** accordingly. However, all the questions of fact may be raised before the Trial court, at appropriate stage, which, if raised, shall be considered and decided by the Trial court, in accordance with provisions of law and precedents on the issue/subject.

10. 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.**

11. For a period of 30 days from today, no coercive action shall be taken against the applicants.

12. In case, if the applicants do not appear before the Court below within the aforesaid period, coercive action shall be taken against them.

(2020)09ILR A393
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.09.2020

BEFORE

THE HON'BLE RAM KRISHNA GAUTAM, J.

Application U/S 482 No. 13635 of 2020

Rakesh Garg ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Farzana Jamal, Sanjeev Kumar Tyagi

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

Criminal Law - Code of Criminal Procedure, 1973- Section 245 – Rejection of application for discharge- Till disposal of application u/s 245 Cr.P.C. no additional evidence was there on the basis of which charge is to be framed by the trial court. Merely on the basis of sufficiency of evidence of summoning, there is summoning. After appearance of accused evidence u/s 244 Cr.P.C. is to be recorded, which is to be given by complainant and there will be an opportunity of cross-examination of witnesses and after this exercise, stage of framing of charge or discharge comes in light. Hence the Magistrate was with no additional evidence till passing of impugned order. Hence this application was rejected and it was with reason and as per law laid down by Apex Court for framing of charge. Meticulous analysis of facts and evidence is not to be done at the time of framing of charges as it may lead prejudice against fair trial- The evidence is to be seen at the time of framing of charge. But in the instant case the stage of framing of charge is not there.

It is only after the stage of Section 244 of the Cr.Pc that the Magistrate has the necessary evidence required for framing the Charge and therefore since in the present case that stage had not been reached the Magistrate did not have the additional evidence. Moreover, at the stage of framing the Charge, it is to be seen that only a prima facie case is made out and the court cannot appreciate the evidence meticulously at that stage.

Criminal Application rejected. (Para 5) (E-3)

Case law cited/ relied upon: -

1. Crl Appeal No. 2114 of 2017, arising out of S.L.P. (Crl.) No. 8279 of 2016, Nitya Dharmananda @ K. Lenin & anr. Vs Sri Gopal Sheelum Reddy also known as Nitya Bhaktananda & ors, connected with Criminal Appeal No. 2115 of 2017, arising out of S.L.P. (Crl.) No. 1176 of 2017, St. of Kar. Vs. Sri Gopal Sheelum Reddy also known as Nitya Bhaktananda.

2. Palwinder Singh Vs Balwinder Singh & ors.; (2008) 14 Supreme Court Cases 504

3. Amrawati & anr. Vs St. of U.P., 2004 (57) ALR 290

4. 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 and learned A.G.A. representing the State. Perused the records.

2. This application under Section 482 Cr.P.C. has been filed by applicant Rakesh Garg against State of U.P. and another, with prayer to quash order dated 28.2.2020 passed by Judicial Magistrate, Hawali, District Farrukhabad, in Complaint Case No. 132 of 2013 (old No. 390 of 2008), Mukhtyar Ahmad Taini Vs. Suresh Garg and others), u/s 323, 504, 506 I.P.C., P.S. Kotwali, District Farrukhabad.

3. Learned counsel for the applicant argued that the applicant is resident of Panipat, State of Haryana. He is under business transaction with complainant-O.P. No. 2, Mukhtar Ahmad Taini. A case u/s 406 I.P.C. was filed before a Court at Etawah. No such occurrence ever occurred nor it is probable that the applicant Rakesh Garg along with his son will come at Farrukhabad and will commit the offence punishable u/s 323, 504, 506 I.P.C. But under false implication this complaint was filed, wherein there is summoning, as above. The applicant came before this court in a proceeding u/s 482 No. 268 of 2009, Suresh Garg and another Vs. State of U.P. and another, and this court vide order dated 01.9.2017 gave an opportunity to the applicant to move discharge application before trial court. A discharge application u/s 245 Cr.P.C. was filed before the trial court with the contention made before this court in above proceeding u/s 482 Cr.P.C. as well as in the present proceeding, but the trial court without mentioning any reason and only writing contention of the applicant in its order, dismissed the above discharge application. It was an abuse of process of law. Not even the pin probability of plea of alibi of being in abroad in that period was taken into account by the trial court. Law laid down by Apex Court in Criminal Appeal No. 2114 of 2017, arising out of S.L.P. (Crl.) No. 8279 of 2016, Nitya Dharmananda @ K. Lenin & another Vs. Sri Gopal Sheelum Reddy also known as Nitya Bhaktananda and other, connected with Criminal Appeal No. 2115 of 2017, arising out of S.L.P. (Crl.) No. 1176 of 2017, State of Karnataka Vs. Sri Gopal Sheelum Reddy also known as Nitya Bhaktananda, has been pressed by learned counsel for applicant with a contention that no doubt at the time of framing of charge evidence collected by prosecution be taken into consideration, but even if the fact, which is material enough to belie the case of prosecution, is being brought at the time of framing of charge, then that fact also be taken into consideration by the trial court. Hence this application with above prayer.

4. Learned A.G.A. has vehemently opposed the application.

5. From the very perusal of the impugned order, it is apparent that in a

Complaint Case No. 390 of 2008 Magistrate examined complainant u/s 200 Cr.P.C. wherein it was specifically stated that Suresh Garg and Rakesh Garg were known to the complainant since 2006 and there had been business transaction in between. There was supply of goods with payment of same. Since 29.8.2006 to 21.5.2007 there was supply of goods worth Rs. 27-28 lacs and payment for the same were made then subsequently a supply for the value of Rs. 5,80,450/- was made, but it was not paid by them and when notice for demand was sent to the accused persons at their address of Haryana, it was not paid by them. This demand was persistently made through telephone and it was assured to be paid by them. Ultimately on 25.11.2007 the accused persons met with Mohd. Aslam Ansari and when money was demanded, they refused to make payment and ultimately Criminal Case was got lodged at Etawah. As a result of the same, when the complainant along with his brother Aslam was near N.A.K.P. College both of accused came there. They extended threat them with abuse. That is why a criminal case was lodged at Etawah. Subsequently both of the accused assaulted the complainant with threat of dire consequences. For this occurrence the complainant got himself medically examined at Dr. Lohiya Hospital and then reported to the police, but of no avail. Hence this complaint was filed. This contention of complainant recorded u/s 200 Cr.P.C. was corroborated by statements of Babbu Hussain and Iliyas Ansari recorded u/s 202 Cr.P.C. On the basis of this evidence, accused persons were summoned for the offences punishable u/s 323, 504, 506 I.P.C. Against this order proceeding u/s 482 Cr.P.C. was filed by the applicants, wherein order, as above, was passed and in compliance of that order, discharge application u/s 245 Cr.P.C. was moved before trial court. In this application specific averment was there that the applicant was not aware of Mukhtar Ahmad Taini in para 2 of application u/s 245(2) Cr.P.C., whereas it has been argued that complainant and accused were on the business transaction and they were aware to each other. Meaning thereby the very acquaintance of the complainant has been denied in the discharge application. Till disposal of application u/s 245 Cr.P.C. no additional evidence was there on the basis of which charge is to be framed by the trial court. Merely on the basis of sufficiency of evidence of summoning, there is summoning. After appearance of accused evidence u/s 244 Cr.P.C. is to be recorded, which is to be given by complainant and there will be an opportunity of cross-examination of witnesses and after this exercise, stage of framing of charge or discharge comes in light. Hence the Magistrate was with no additional evidence till passing of impugned order. Hence this application was rejected and it was with reason and as per law laid down by Apex Court for framing of charge. In the case of ***Palwinder Singh Vs. Balwinder Singh and others; (2008) 14 Supreme Court Cases 504*** Apex Court has specifically laid down that meticulous analysis of facts and evidence is not to be done at the time of framing of charges as it may lead prejudice against fair trial. Pre-trial acquittal is not expected. Rather the evidence is to be seen at the time of framing of charge. But in the instant case the stage of framing of charge is not there. Accordingly, there is no abuse of process of law. Hence this application merits dismissal.

6. Accordingly, application is dismissed.

7. However, in the interest of justice, it is provided that if the applicant appears

and surrenders before the court below within thirty days from today and apply for bail, then the bail application of the applicant 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 judgment passed by Hon'ble Apex Court reported in ***2009 (3) ADJ 322 (SC) Lal Kamlendra Pratap Singh Vs. State of U.P.***

8. For a period of thirty days from today or till the disposal of the application for grant of bail whichever is earlier, no coercive action shall be taken against the applicant.

9. However, in case, the applicant does not appear before the Court below within the aforesaid period, coercive action shall be taken against him.

(2020)09ILR A396
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.02.2020

BEFORE

THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE RAVI NATH TILHARI, J.

WRIT - C No. 4336 of 2020

Ram Prit & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Juned Alam

Counsel for the Respondents:
C.S.C.

Constitution of India – Article 300A - Land Acquisition Act, 1894 - Section 11 - Property - Land Acquisition - Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 - Award - Right to property - person whose land is acquired is entitled for grant of compensation - State cannot acquire the property and refuse to make payment of compensation (Para 14)

Land acquisition u/s 4 L.A. Act, 1894 dt 10.3.1978- SLAO notice dt. 9.12.1999 to tenure holders to complete formalities to receive compensation - Petitioners claimed they still in physical possession & no compensation paid to them - sought relief in writ petition that they may not be dispossessed & compensation be paid - *Held* - Petitioner's only entitled for compensation under the Act 1894 - Court declined to accept that possession not taken – Also held petitioners not entitled for compensation as per prevalent market value under the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, as acquisition had taken place long time back (Para 16)

Disposed off. (E-5)

List of case cited:-

1. Vidya Devi Vs St. of H.P., Civil Appeal No.3674 o 2009, decided on 4.12.2019

(Delivered by Hon'ble Ravi Nath Tilhari, J)

1. We have heard Sri Juned Alam, learned counsel for the petitioners and learned Standing Counsel for the State-respondents and with their consent this writ petition is being decided at this stage.

2. The petitioners claim themselves to be recorded tenure holders of Revenue Plot No.1/17, 1/18, 1/9(New numbers 46, 47 and 48) situated in village Bharwalia, Tappa Pakari Gangarani, pargana Sudhwa Jobani, at present in district Kaushambi (earlier in the undivided district Deoria). Being aggrieved from the proceeding

relating to acquisition of aforesaid land, which was made vide notification issued under Section 4 of Land Acquisition Act, 1894(for short 'the Act 1894') dated 10.3.1978 for the public purpose to establish Government Industrial Institute(for short 'the Institute') have filed present writ petition seeking the relief that they may not be dispossessed and the respondent-authorities be directed to pay compensation in lieu of the acquired land as per the Act, 1894 along with the interest from the date of notification till the date of taking possession on the prevalent market value within a specified period. The prayers made in the writ petition are reproduced as under:

"i) issue, a writ, order or direction in the nature of mandamus directing/restraining the respondents not to dispossess the petitioners from their land i.e. Old Plot No.1/19/1, 1/18, 1/17, New Plot No.46, 47 and 48 Hect. situated in Village Bharwaliya, Tappa Pakari Gangarani, Pargana Sidhuwa Jobjna, Tehsil Padrauna, District Kushi Nagar.

ii) issue, a writ, order or direction in the nature of mandamus commanding the respondents to pay the compensation of the land so acquired being Old Plot No.1/19/1, 1/18, 1/17, New Plot No.46, 47 and 48 Hect. situated in Village Bharwaliya, Tappa Pakari Gangarani, Pargana Sidhuwa Jobna, Tehsil Padrauna, District Kushi Nagar as per provision of the Land Acquisition Act, 1894 along with the interest from the date of notification ill date of taking possession at the prevalent market within the period so stipulated by this Hon'ble Court.

iii) issue any other writ, order or direction which this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.

(iv) Award cost of the writ petition to the petitioners."

3. The learned counsel for the petitioners has submitted that after the issuance of notification under Section 4 of the Act, 1894, a notice on Form-II was published by the Collector, Deoria relying upon the notice of Special Land Acquisition Officer, Deoria(for short 'SLAO') in Case No.2 of 1984, stating that the possession of acquired land had been taken on 06.01.1984 and hence the said land was to be mutated in the records in the name of Government Industrial Institute(for short 'the Institute'). The tenure holders whose land was acquired were also required by the SLAO, by notice dated 9.12.1999 to complete all the requisite formalities to receive compensation of their acquired land by appearing in person before concerned authority.

4. The petitioners have further stated that in the meantime the village came under the consolidation operations under the provisions of U.P. Consolidation of Holdings Act 1953 (for short 'the Act 1953'). The consolidation operation was finalized and the Consolidation Officer issued notification under Section 52 of the Act 1953. The Consolidation Officer, issued notice dated 6.8.2018 requiring the petitioners to appear on 10.8.2019 for making reference to the Deputy Director of Consolidation (DDC) for mutation of the name of the Institute in place of the name of the petitioners as the acquisition of the land had taken place under the Act 1894. In response, the petitioners filed their objection and thereafter reference was made to Deputy Director of Consolidation, which was allowed by order dated 29.8.1998 directing to record the name of Government Industrial Institute over the

acquired land. The petitioners have further submitted that the award of the acquired land was made under Section 11 of the Act, 1894 but they are still in physical possession over the acquired land and till date no physical possession had been taken nor any building was constructed over the acquired land.

5. From the record it is evident that earlier, the petitioners filed **Writ C No.40507 of 2018 (Ram Preet Vs. State of U.P. and 3 others), decided on 10.12.2018** for direction to the respondent-authorities to return the land of the petitioners or to direct them to pay compensation to the petitioners, as per the provisions of the "Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013". (for short "the Act 2013). This writ petition No.40507 of 2018 was dismissed by this Court with liberty to the petitioners to challenge the order 29.08.2018 passed by the Deputy Director of Consolidation, Kushinagar.

6. This Court held that the writ petition for direction to the respondent-authorities to return the land of the petitioners is misconceived. Likewise, if the acquisition had taken place long time back as it appeared from the reports submitted in connection with the consolidation proceedings, how could compensation be awarded under the Act, 2013. The appropriate course for the petitioners was to challenge the order passed in consolidation proceeding. This Court noticed that the petitioners had not challenged the notification, in respect of acquisition of the land. The order dated 10.12.2018 passed in Writ C No.40507 of 2018 is reproduced below:-

"The instant petition has been filed for a direction upon the respondent authorities to return the land of the petitioner or to direct the respondent authorities to pay compensation to the petitioners as per the provisions of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013.

From the record it appears that during the consolidation operations, a report was submitted by the Consolidation Officer by way of reference to the Deputy Director of Consolidation, Kushinagar to correct the records to make it in conformity with some earlier land acquisition notification. Pursuant to the report, the Deputy Director of Consolidation, Kushingar, by order dated 29.08.2018, accepted the reference and directed correction in the records accordingly.

The order of the Deputy Director of Consolidation, Kushingar has not been challenged by the petitioner. The petitioner has also not challenged any notification in respect of acquisition of the land.

Under the circumstances, the writ petition for a direction upon the respondent authorities to return the land of the petitioner is misconceived. Likewise, if the acquisition had taken place long time back as it appears from the reports submitted in connection with consolidation proceedings, how could compensation be awarded under the Act, 2013. The appropriate course for the petitioner is to challenge order passed in consolidation proceeding. The petition is, accordingly, dismissed with liberty to the petitioner to challenge the order dated 29.08.2018 passed by the Deputy Director of Consolidation, Kushinagar…"

7. Thereafter, the petitioners filed Writ B No.1180 of 2019 (Shrikant And Another vs State Of U.P. And 5 Others) challenging the order dated 10.8.2018 passed by Consolidation Officer, Padrauna,

Kushinagar and the order dated 29.8.2018 passed by Deputy Director of Consolidation, Kushinagar, as well as the notification dated 10.3.1978 by the Government of Uttar Pradesh. This writ petition was also dismissed on merits, holding that in Writ C No.40495 of 2018, no liberty was given to the petitioners to challenge the notification issued under the Land Acquisition Act, and even otherwise the notification issued under Section 4 of Land Acquisition Act, which was issued in the year 1978 could not be challenged in the writ petition and the petitioners have to challenge the said notification explaining laches by way of separate writ petition, which is cognizable by the Division Bench. This Court did not find any illegality or infirmity in the order dated 29.8.2018 passed by Deputy Deputy Director of Consolidation, accepting the reference, which was a consequential order, pursuant to the proceedings held under the Land Acquisition Act. The Writ petition was dismissed. However, petitioners were granted liberty to challenge the notification dated 10.3.1978 issued under Sections 4 and 6 of the Act, 1894 before the appropriate forum.

8. The judgment passed in Writ B No.1180 of 2019 dated 10.5.2019 is being reproduced as under:-

"Heard Sri Bisham Tiwari, learned counsel for the petitioners and learned Standing Counsel for the State.

Present writ petition has been filed challenging the order dated 10.8.2018 passed by Consolidation Officer, Padrauna, Kushinagar and the order dated 29.8.2018 passed by Deputy Director of Consolidation, Kushinagar as well as the notification dated 10.3.1978 issued by Government of Uttar Pradesh.

It reflects from the record that vide notification dated 10.3.1978 issued by the State Government, land of petitioners were acquired, during the consolidation operation, report was submitted by the Consolidation Officer on 10.8.2018 by way of reference to Deputy Director of Consolidation, Kushinagar to correct the record and make it inconformity with the notifications issued under Section 4 and 6 of the Land Acquisition Act.

Pursuant to the report of Consolidation Officer, reference was accepted vide impugned order dated 29.8.2018 and accordingly, the record was directed to be corrected. It is also on the record that petitioner filed Writ C No. 40495 of 2018 for issuance of writ of mandamus commanding the respondent authorities to return the land of petitioners or to direct the respondent authorities to pay compensation to the petitioners as per provisions of Right to Fair Compensation and Transparency and Resettlement Act, 2013. The said writ petition was dismissed with liberty to the petitioners to challenge the order dated 29.8.2018 passed by Deputy Director of Consolidation, Kushinagar. Thereafter, present writ petition has been filed by the petitioners challenging the order dated 10.8.2018 passed by the Consolidation Officer and order dated 29.8.2018 passed by Deputy Director of Consolidation as well as the notification dated 10.3.1978

Contention of learned counsel for the petitioner is that petitioners have no knowledge about the acquisition and therefore, reference has wrongly been accepted by Deputy Director of Consolidation vide impugned order dated 29.8.2018.

I have considered the submissions as raised by learned counsel for the petitioners and perused the record.

Record reveals that pursuant to the notification issued under Section 4 and 6 of the Land Acquisition Act in the year 1978, a report was submitted by the Consolidation Officer on 10.8.2018 to correct the record inconformity with the earlier land acquisition notification. Pursuant to the report, reference was accepted by Deputy Director of Consolidation vide impugned order dated 29.8.2018.

In Writ C No. 40495 of 2018, no liberty was given to the petitioner to challenge the notification issued under Land Acquisition Act, even otherwise the notification issued under Section 4 of Land Acquisition Act in the year 1978 cannot be challenged in the present writ petition. Petitioners have to challenge the said notification explaining laches by way of separate writ petition, which is cognizable by the Division Bench.

I do not find any illegality or infirmity in the order impugned herein dated 29.8.2018 passed by Deputy Deputy Director of Consolidation accepting the reference, which is a consequential order pursuant to the proceeding held under the Land Acquisition Act.

Writ petition lacks merit and is, accordingly, dismissed.

However, liberty is given to petitioners to challenge the notification dated 10.3.1978 issued under Section 4 and 6 of Land Acquisition Act before appropriate forum after explaining laches."

9. The petitioners in the present writ petition have stated in paragraph 22, that the notification issued under Section 4 of the Act 1894 cannot be challenged. They have also not challenged the said notification.

10. Now we proceed to consider the submission of the petitioners' counsel that the possession was not taken from the petitioners and as no physical possession was taken, the title of the petitioners did not extinguish over the acquired land. We are not inclined to accept the petitioners' this contention that possession was not taken as the same is contrary to the record i.e. Form-II which is Annexure-2 to the writ petition, and which specifically mentions that the possession of the acquired land was taken by he State and was delivered to the State Industrial Department on 6.1.1984. Only mutation in the name of Government property was required in the revenue record.

11. Once the award has been made under the Land Acquisition Act, 1894 and the possession taken by the Government, present writ petition for direction to the respondents not to dispossess the petitioners from the acquired land, is misconceived. Besides, for this prayer no.i) the present writ petition would not be maintainable as the petitioners in the earlier writ petition, Writ C No.40507 of 2018 had prayed for return of the land but writ petition was dismissed by this Court.

12. So far as the prayer for payment of compensation of the acquired land is concerned, the petitioners' Writ C No.40507 of 2018 was dismissed by this Court holding that the acquisition had taken long back and as such compensation could not be awarded under the Act 2013. In Writ C No.40507 of 2018 the prayer was for grant of compensation of the acquired land under the Act 2013. In view of the judgment dated 10.12.2018, the petitioners' second prayer to grant compensation of the acquired land, "at the prevalent market value", is nothing but the same prayer in substance, as was rejected in Writ C No.40507 of 2018. The present writ

petition for the same prayer cannot be entertained. The petitioners cannot be granted compensation under the Act 2013.

13. We, however, find that the petitioners' land was acquired way back in 1978 under the Land Acquisition Act, 1894 and under Section 11 of the said Act, compensation was awarded. Possession was also taken from the petitioners, which was delivered to State Industrial Department on 6.1.1984. Even notice dated 9.2.1999 was issued to the petitioners to receive compensation (Annexure-3) after completing the formalities, from Special Land Acquisition Officer, Deoria. The petitioners have stated that they have yet not been paid any compensation of their acquired land in pursuance of the award made under Section 11 of the Land Acquisition Act 1894.

14. If the petitioners have not been paid compensation yet, they are entitled for payment of compensation as no one can be deprived of his property save by the authority of law which is a right guaranteed under Article 300A of the Constitution of India. The Land Acquisition Act,1894, which deprives a person from his land makes provision for payment of compensation. The person whose land is acquired is entitled for grant of compensation. The State cannot acquire the property and refuse to make payment of compensation. Recently, in **Vidya Devi v. State of H.P., Civil Appeal No.3674 o 2009, decided on 4.12.2019**, Hon'ble Supreme Court has held that to hold property is a Constitutional right under Article 300-A of the Constitution of India. It is also a human right. The Right to hold property, therefore, cannot be taken away except under the provisions of the Statute. Paragraph 12 to 13 of Vidya Devi's case (supra) read as follows:-

"12. We have heard learned Counsel for the parties and perused the record.

12.1. The Appellant was forcibly expropriated of her property in 1967, when the right to property was a fundamental right guaranteed by Article 31 in Part III of the Constitution. Article 31 guaranteed the right to private property1, which could not be deprived without due process of law and upon just and fair compensation.

12.2. The right to property ceased to be a fundamental right by the Constitution (Forty Fourth Amendment) Act, 1978, however, it continued to be a human right2 in a welfare State, and a Constitutional right Under Article 300A of the Constitution. Article 300A provides that no person shall be deprived of his property save by authority of law. The State cannot dispossess a citizen of his property except in accordance with the procedure established by law. The obligation to pay compensation, though not expressly included in Article 300A, can be inferred in that Article.

12.3 To forcibly dispossess a person of his private property, without following due process of law, would be violative of a human right, as also the constitutional right Under Article 300A of the Constitution. Reliance is placed on the judgment in Hindustan Petroleum Corporation Ltd. v. Darius Shapur Chennai (2005) 7 SCC 627, wherein this Court held that:

6. ... Having regard to the provisions contained in Article 300-A of the Constitution, the State in exercise of its power of "eminent domain" may interfere with the right of property of a person by acquiring the same but the same must be for a public purpose and reasonable compensation therefor must be paid. (emphasis supplied)

12.4 In *N. Padmamma v. S. Ramakrishna Reddy* (2008) 15 SCC 517, this Court held that:

21. If the right of property is a human right as also a constitutional right, the same cannot be taken away except in accordance with law. Article 300-A of the Constitution protects such right. The provisions of the Act seeking to divest such right, keeping in view of the provisions of Article 300-A of the Constitution of India, must be strictly construed. (emphasis supplied)

12.5. In *Delhi Airtech Services Pvt. Ltd. and Ors. v. State of U.P. and Ors.*, (2011) 9 SCC 354, this Court recognized the right to property as a basic human right in the following words:

30. It is accepted in every jurisprudence and by different political thinkers that some amount of property right is an indispensable safeguard against tyranny and economic oppression of the Government. Jefferson was of the view that liberty cannot long subsist without the support of property. "Property must be secured, else liberty cannot subsist" was the opinion of John Adams. Indeed the view that property itself is the seed bed which must be conserved if other constitutional values are to flourish is the consensus among political thinkers and jurists. (emphasis supplied)

12.6 In *Jilubhai Nanbhai Khachar v. State of Gujarat* (1995) Supp. 1 SCC 596 this Court held as follows:

48. ...In other words, Article 300-A only limits the powers of the State that no person shall be deprived of his property save by authority of law. There has to be no deprivation without any sanction of law. Deprivation by any other mode is not acquisition or taking possession Under Article 300-A. In other words, if there is no law, there is no deprivation. (emphasis supplied)

12.7. In this case, the Appellant could not have been forcibly dispossessed of her property without any legal sanction, and without following due process of law, and depriving her payment of just compensation, being a fundamental right on the date of forcible dispossession in 1967.

12.8. The contention of the State that the Appellant or her predecessors had "orally" consented to the acquisition is completely baseless. We find complete lack of authority and legal sanction in compulsorily divesting the Appellant of her property by the State.

12.09. In a democratic polity governed by the Rule of law, the State could not have deprived a citizen of their property without the sanction of law. Reliance is placed on the judgment of this Court in *Tukaram Kana Joshi and Ors. v. M.I.D.C. and Ors.* (2013) 1 SCC 353 wherein it was held that the State must comply with the procedure for acquisition, requisition, or any other permissible statutory mode. The State being a welfare State governed by the Rule of law cannot arrogate to itself a status beyond what is provided by the Constitution.

12.10 This Court in State of Haryana v. Mukesh Kumar held that the right to property is now considered to be not only a constitutional or statutory right, but also a human right. Human rights have been considered in the realm of individual rights such as right to shelter, livelihood, health, employment, etc. Human rights have gained a multi-faceted dimension.

12.11. We are surprised by the plea taken by the State before the High Court, that since it has been in continuous possession of the land for over 42 years, it would tantamount to "adverse" possession.

The State being a welfare State, cannot be permitted to take the plea of adverse possession, which allows a trespasser i.e. a person guilty of a tort, or even a crime, to gain legal title over such property for over 12 years. The State cannot be permitted to perfect its title over the land by invoking the doctrine of adverse possession to grab the property of its own citizens, as has been done in the present case.

12.12. The contention advanced by the State of delay and laches of the Appellant in moving the Court is also liable to be rejected. Delay and laches cannot be raised in a case of a continuing cause of action, or if the circumstances shock the judicial conscience of the Court. Condonation of delay is a matter of judicial discretion, which must be exercised judiciously and reasonably in the facts and circumstances of a case. It will depend upon the breach of fundamental rights, and the remedy claimed, and when and how the delay arose. There is no period of limitation prescribed for the courts to exercise their constitutional jurisdiction to do substantial justice.

12.13. In a case where the demand for justice is so compelling, a constitutional Court would exercise its jurisdiction with a view to promote justice, and not defeat it.4

12.14. In *Tukaram Kana Joshi and Ors. v. M.I.D.C. and Ors.* (2013) 1 SCC 353, this Court while dealing with a similar fact situation, held as follows(SCC p.359, para 11)

"11.There are authorities which state that delay and laches extinguish the right to put forth a claim. Most of these authorities pertain to service jurisprudence, grant of compensation for a wrong done to them decades ago, recovery of statutory dues, claim for educational facilities and other categories of similar cases, etc. Though, it is true that there are a few authorities that lay down that delay and laches debar a citizen from seeking remedy, even if his fundamental right has been violated, Under Article 32 or 226 of the Constitution, the case at hand deals with a different scenario altogether. Functionaries of the State took over possession of the land belonging to the Appellants without any sanction of law. The Appellants had asked repeatedly for grant of the benefit of compensation. The State must either comply with the procedure laid down for acquisition, or requisition, or any other permissible statutory mode." (emphasis supplied)

13. In the present case, the Appellant being an illiterate person, who is a widow coming from a rural area has been deprived of her private property by the State without resorting to the procedure prescribed by law. The Appellant has been divested of her right to property without being paid any compensation whatsoever for over half a century. The cause of action in the present case is a continuing one, since the Appellant was compulsorily expropriated of her property in 1967 without legal sanction or following due process of law. The present case is one where the demand for justice is so compelling since the State has admitted that the land was taken over without initiating acquisition proceedings, or any procedure known to law. We exercise our extraordinary jurisdiction Under Articles 136 and 142 of the Constitution, and direct the State to pay compensation to the Appellant.

15. We are, therefore, of the considered view that the petitioners are entitled for payment of compensation of their acquired land in terms of the award

made under Section 11 of the Land Acquisition Act, 1894 and for payment of which notice dated 9.12.1999 was issued to the petitioners.

16. We make it clear that the petitioners are not entitled for payment of compensation as per prevalent market value of the acquired land under the provisions of the Act 2013 as Writ C No.40507 of 2018 for such prayer, was dismissed. However, dismissal of Writ C No.40507 of 2018 would not come in the way of grant of compensation to the petitioners under the Act 1894, under which award has been made inasmuch as in that writ petition this much was held that petitioners cannot be granted compensation under the Act 2013 as acquisition had taken place long time back. The petitioners are entitled for compensation under the Act 1894 and they cannot be deprived of payment of compensation, at all, although their land had been acquired. To uphold and enforce the petitioners' constitutional right to property guaranteed by Article 300-A of the Constitution of India, we provide and direct the respondents-1 to 5 that the petitioners shall be paid compensation of their acquired land under the Land Acquisition Act, 1894, for which award had been made and notice dated 9.12.1999 had also been issued to petitioners to receive compensation, if the same has yet not been made, within a period of three months from the date of production of certified copy of this judgment by the petitioners before respondents-1 to 5.

17. The writ petition is disposed of with the observations/directions made in this order/judgment.

18. No order as to costs.

(2020)09ILR A404
ORIGINAL JURISDICTION

CIVIL SIDE
DATED: ALLAHABAD 20.02.2020

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE AJIT KUMAR, J.

WRIT – C No. 5756 of 2020

Ramchandra Verma & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Nawal Kishore Mishra, Sri S.K. Tripathi

Counsel for the Respondents:
C.S.C., Sri Anand Kumar Pandey, Sri Satendra Pratap Singh

Civil Law -U.P. Municipalities Act (2 of 1916)–Section 287- Human dwelling/shop in dilapidated condition–Inspection-Advance Notice - Inspection in presence of its occupier with at least four hour's, advance notice must - Exceptional clause - U/s 263 (2)-Immediate action for the prevention of danger from ruinous buildings -power can be exercised without complying with provisions u/s 287 - but power u/s 263 is to be exercised sparingly only when there is imminent danger of the building falling causing loss to human life & property (Para 8, 10, 12)

Impugned notice cum order not contain any fact to show that building arrived at such a condition that needed exercise of power u/s 263 urgently - exceptional clause wrongly invoked **-** Order set aside. (Para 13, 14, 15)

Allowed. (E-5)

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

1. Heard Sri S.K.Tripathi, learned Advocate holding brief of Sri N.K.Mishra, learned counsel for the petitioners, Sri

A.K.Pandey, learned counsel for the respondent nos. 3,4 and 5 learned Standing Counsel for the State respondents and perused the record.

2. By means of present writ petition, the petitioners have assailed the order dated 27th January, 2020 passed to vacate the premises of the shop in question on the ground that it become 30 years' old and has reached to dilapidated condition.

3. Assailing the order impugned, it has been argued by learned counsel for the petitioners that on 27th January, 2020 notices were served upon the petitioners to which they had submitted a detailed reply on 07th February, 2020. However, same has remained in unheard and respondents have in a hurried manner proceeded to demolish the shops on the ground that the passage of the civil court building has to be cleared.

4. Sri Pandey, learned counsel for the respondent was directed to have instructions in the matter and he has placed instructions before the Court, which are taken on record.

5. From the instructions, it transpires that some inspection was carried out of the disputed shop on 16th January, 2020 and report was prepared on 17th January, 2020 which was forwarded to the authority concerned, namely, City Magistrate, Ballia. However, it appears that before getting order from City Magistrate in the matter, respondents have proceeded to pass impugned order. We have also noticed that earlier notice issued to the petitioners on 17.01.2020 and then report of inspection conducted on 16th January, 2020, were not supplied to the petitioner.

6. We have carefully gone though the provisions of U.P. Municipalities Act, 1916 which deal with such power of a municipality to enter into demolition of buildings that have arrived in a dilapidated condition. Sections 263 and 287 are relevant for the purpose and while power has been exercised under Municipalities Act, 1916, Section 263 provides procedure for the said purpose and 287 provides specifically that before arriving at a conclusion that building has arrived in a dilapidated condition, an inspection has to be carried out of the building and that too in the presence of the occupier.

7. For ready reference and better appreciation of the provisions and powers of the municipality in this regard, Section 287 is reproduced in its entirety:-

"287. Ordinary inspection. - (1) The President, the executive officer and, if authorised in this behalf by resolution, any other member, officer or servant of the [Municipality], may enter into or upon a building or land, with or without assistants or workmen, in order to make an inspection or survey or to execute a work which a [Municipality] is authorised by this Act, or by rules or bye-laws, to make a execute, or which it is necessary for a [Municipality], for any of the purposes or in pursuance of any of the provisions of this Act or of rules or bye-laws, to make or execute :

(2) Provided that, -

(a) except when it is in this Act or in rules or bye-laws otherwise expressly provided, no entry shall be made between sunset and sunrise; and

(b) except when it is in this Act or in rules or bye-laws otherwise expressly provided, no building which is used as a human dwelling shall be so entered, except with the consent of the occupier thereof, without going the said occupier not less than four hours previous written

notice of the intention to make such entry; and

(c) sufficient notice shall in every instance by given even when any premises may otherwise be entered without notice, to enable the inmates of an apartment appropriated for females to remove to some part of the premises where their privacy need not be disturbed; and

(d) due regard shall always be had to the social and religious usages of the occupants of the premises entered." (Emphasis added)

8. From a bare reading of clause (b) of Sub-Section 2 of Section 287, it is quite explicit that if inspection has to be carried out of a building that has human dwelling it has to be in presence of its occupier and that too with at least four hour's, advance notice.

9. In the present case it has not been disputed by the respondent authority that the petitioners are in occupation of the shop/building and, therefore, in our considered opinion the provision as contained under Section 287 is required to be complied with.

10. We are conscious of the fact that under Section 263 of the Uttar Pradesh Municipalities Act, 1916, power can be exercised without complying with provisions under Section 287 but that power is not only to be exercised sparingly but there has to be a case of imminent danger of the building falling.

11. The provisions as contained under Section 263 of the U.P. Municipalities Act, 1916 is reproduced hereunder:

"263. ***Power for the prevention of danger from ruinous buildings, unprotected wells, etc.*** *- (1) A [Municipality] may require by notice the owner or occupier of any land or building, -*

(a) to demolish or to repair in such manner as it deems necessary any building wall, bank or other structure, or anything, affixed thereto, or to remove any tree, belonging to such owner or in the possession of such occupier which appears to the [Municipality] to be in a ruinous condition or dangerous to persons or property; or

(b) to repair, protect or enclose, in such manner as it deems necessary, any well, tank reservoir, pool or excavation belonging to such owner or in the possession of such occupier, which appears to the [Municipality] to be dangerous by reason of its situation, want of repair or other such circumstances.

(2) Where it appears to the [Municipality] that immediate action is necessary for the purpose of preventing imminent danger to any person or property, it shall be the duty of the [Municipality] itself to take such immediate action, and in such case, notwithstanding the provisions of Section 287, it shall not be necessary for the [Municipality] to give notice, if it appears to the [Municipality] that the object of taking such immediate action would be defeated by the delay incurred in giving notice."

(Emphasis added)

12. From a bare reading of the provisions as quoted hereinabove, we can safely conclude that it clearly speaks of an emergent situation for there being an imminent danger from a ruinous building and for which giving time to the occupier will only contribute to the danger of such a building falling at any time causing loss to

human life and property. So sub section 2 of Section 263 carves out an exception to the mandatory provisions of Section 287 *(supra)* meaning thereby, building which is claimed to be in a dilapidated condition or in a ruinous condition, should be in such form that an exercise under Section 287 will be such a long drawn one that before such proceeding arrives at its logical end, the ruinous building will fall endangering life of the people and the property.

13. Applying the above provisions to the facts of this case as the order impugned herein is in purported exercise of power under Section 263 of the Act, we notice that neither the alleged notice cum order dated 27th January, 2020 nor, earlier notice issued in this regard contain any fact to give an impression that building had arrived at such a condition that municipality needed to exercise power under Section 263 urgently and, therefore, we are of the considered opinion that exceptional clause has wrongly been applied in the present case.

14. In such above view of the matter for non compliance of the provisions as contained under Section 287(2)(b), notice/order dated 27th January, 2020, cannot be sustained in law and the matter is required to be revisited by the authority concerned in consonance with principles of the natural justice and with due compliance of the provisions as contained under Section 287 of the U.P. Municipalities Act, 1916.

15. Accordingly, the orders passed in respect of respective petitioners dated 27th January, 2020 (filed as annexure 2 to the writ petition) are hereby quashed.

16. We further observe and direct that the authority, if desire to get the building demolished on the the ground that building has arrived in dilapidated condition, it shall follow the procedure prescribed for under Section 287 of the Act, 1916 by giving notice to the respective petitioners fixing a date to be present on the spot on the day of inspection . The inspection shall be carried out in the presence of the occupier and every occupier shall sign inspection memo. It is thereafter, notices for eviction shall be issued to the respective petitioners. Thus, if authority arrives at a conclusion that building has arrived in a dilapidated condition in the manner as observed hereinabove, an appropriate order shall be passed in the matter.

17. With the aforesaid liberty to the concerned respondent, the writ petition is allowed.

(2020)09ILR A407
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.02.2020

BEFORE

THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE PRAKASH PADIA, J.

WRIT – C No. 5857 of 2020

Praveen & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Hira Lal Singh (Kushwaha)

Counsel for the Respondents:
C.S.C., Sri Anjali Upadhya, Sri Ramendra Pratap Singh

A. Civil Law - Land Acquisition Act,1894- Section 4 & 6 – claim-entitlement to additional compensation and allotment of abadi plot-petitioners are not entitled to

the benefits claimed as the petitioners case is not covered by Full Bench Judgment in this regard-benefits were confined to those land holders whose writ petitions challenging the notifications had been dismissed earlier and to those who had not approached the court to challenge the notifications which were subject matter of challenge in the writ petitions decided along with the case of Gajraj Singh and Others.(Para 5 to 17)

B. Whatever compensation has to be given for acquisition of the land is provided under the Land Acquisition Act itself which is a self-contained code. Any G.O. providing for any further benefit not mentioned with the intention of Parliament as contained in the Land Acquisition Act. Hence, any such G.O. would be violative of the Land Acquisition Act and would hence be invalid. Such a G.O. will also violate Article 16 of the Constitution. (Para 16)

The petition is dismissed. (E-6)

List of Cases Cited: -

1. Gajraj & ors. Vs St. Of U.P. & ors. (2011) 11 ADJ 1

2. Smt. Rameshwari & 3 ors. Vs St. Of U.P. & 2 ors.,Writ C No. 18948 of 2017

3. Ramesh & ors. Vs St. Of U.P. & ors. (2019) 4 ADJ 225

4. Ravindra Kumar Vs D.M.,Agra & ors. (2005) 1 UPLBEC 118

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

1. Heard learned counsel for the petitioners, learned Standing Counsel for respondent Nos.1 and 2 and Sri Ramendra Pratap Singh, learned counsel for respondent No.3.

2. The petitioners have preferred the present writ petition with the following prayers:-

"a. issue a writ, order or direction in the nature of certiorari quashing the order dated 06.09.2019 passed by respondent no.3.

b. Issue a writ, order or direction in the nature of mandamus commanding the respondent no.3 to provide 10% developed land s well as 64.7% Additional Compensation in view of the full bench judgement Gajraj and others Versus State of U.P. and others in respect of the land acquired of the petitioner no.1 plot no.344 Khasra number No.699/2, 737/2, petitioner no.2 plot no.305 Khasra No.740, 622 petitioner no.3 plot no.8 Khasra No.621, petitioner no.4 to 10 Khasra No.670 village Surajpur, Pargana Dadri District Gautam Budh Nagar.

c. Issue any other writ order or direction which this Hon'ble Court may deem fit and proper under the facts and circumstances of the case.

d. Award the cost of the petition in favour of the petitioners."

3. Fact in brief as contained in the writ petition are that the petitioners are owners and Bhumidhar with transferable rights of their respective land situate in Village Surajpur, Pargana Dadri, District Gautambudh Nagar. The lands of the petitioners were acquired by the State Government by issueing a notification dated 13.9.1996 under Section 4 of the Land Acquisition Act, 1894 (hereinafter referred to as "the Act, 1894) which was followed by a notification dated 28.10.1996 issued under Section 6 of the Act, 1894.

4. It is stated in paragraph 5 of the writ petition that the lands were acquired on the basis of conception that the acquiring authority will provide 10% developed land to each and every petitioner in order to sustain their livelihood after the

acquisition of their entire lands. In this regard, learned counsel for the petitioners also placed reliance upon a resolution dated 22.11.1997 passed by the respondent authorities. It is further stated in the writ petition that subsequently the aforesaid resolution was revised and now, a resolution has been passed to provide 10% developed land to the farmers of NOIDA and 5% to the farmers of the Greater NOIDA.

5. A large number of writ petitions were filed before this Court challenging the notification issued by the respondent authority and ultimately, the aforesaid writ petitions were decided by full bench of this Court in the case of ***Gajraj and others Vs. State of U.P. and others*** reported in ***2011 (11) ADJ 1 (FB)*** It further revealed from perusal of the record that the petitioners had also earlier filed a writ petition before this Court being Writ C No.57766 of 2012 (Praveen and 9 others Vs. State of U.P. and 2 others). The said writ petition was finally disposed of by another co-ordinate Bench of this Court vide its judgement and order dated 9.2.2015. The order passed in the aforesaid case is quoted hereinbelow :-

"Petitioners have approached this Court seeking a writ of mandamus commanding the respondents to pay the additional compensation in respect of their land, which was subject matter of acquisition.

The land of the petitioners was acquired vide notification dated 13-09-1996 and 28-10-1996 issued under Section 4 & 6 of the Land Acquisition Act, 1894 respectively for planned industrial development by Greater Noida Industrial Development Authority.

Sri Ramendra Pratap Singh, learned counsel for the NOIDA Authority states that since the petitioners have already received compensation long back and there is inordinate delay and laches in filing the writ petition, therefore, the petitioners cannot be held for payment of any additional compensation and the writ petition is liable to be dismissed on the ground of laches.

The issue came up for consideration before a Full Bench of this Court in the case of Gajraj & others vs. State of U.P. & others, [2011(11) ADJ 1(FB)] and it has been answered in paragraph 481 as under :

"481. As noticed above, the land has been acquired of large number of villagers in different villages of Greater Noida and Noida. Some of the petitioners had earlier come to this Court and their writ petitions have been dismissed as noticed above upholding the notifications which judgments have become final between them. Some of the petitioners may not have come to the Court and have left themselves in the hand of the Authority and State under belief that the State and Authority shall do the best for them as per law. We cannot loose sight of the fact that the above farmers and agricultures/owners whose land has been acquired are equally affected by taking of their land. As far as consequence and effect of the acquisition it equally affects on all land losers. Thus land owners whose writ petitions have earlier been dismissed upholding the notifications may have grievances that the additional compensation which was a subsequent event granted by the Authority may also be extended to them and for the aforesaid, further spate of litigation may start in so far as payment of additional compensation is concerned. In the circumstances, we leave it to the Authority to take a decision as to whether the benefit of additional compensation shall also be extended to

those with regard to whom the notifications of acquisition have been upheld or those who have not filed any writ petitions. We leave this in the discretion of the Authority/State which may be exercised keeping in view the principles enshrined under Article 14 of the Constitution of India."

In view of above, the petitioners herein are entitled to be extended the same benefit as observed in the case of Gajraj (Supra) quoted above.

Writ petition accordingly stands disposed of in terms of the aforesaid observations made in the case of Gajraj (Supra). "

6. From perusal of the same, it is clear that directions were given by this Court to take a decision as to whether the benefit of additional compensation shall also be extended to the petitioners or not.

7. It appears from perusal of the record that pursuant to the directions given by this Court on 9.2.2015, an order dated 21.11.2015 was passed by the respondent No.3. The order dated 21.11.2015 is not brought on record by the petitioners for the reasons best known to them.

8. The order dated 21.11.2015 was again challenged by the petitioners before this Court by filing a writ petition before this Court being Writ C No.17258 of 2019 (Praveen and 8 others Vs. State of U.P. and 2 others). The aforesaid writ petition was finally allowed by another co-ordinate Bench of this Court vide its judgement and order dated 20.5.2019. The order dated 21.11.2015 was quashed only in view of the facts that no reasons were assigned for rejecting the claim of the petitioners. Pursuant to the order dated 20.05.2019 passed by this Court, now a decision has been taken by the Chief Executive Officer Greater NOIDA, Gautam Budh Nagar/respondent No.3 dated 6.9.2019 rejecting the claim of the petitioners. The petitioners have filed the present writ petition challenging the aforesaid order dated 06.09.2019 passed by the respondent No.3.

9. It is argued by learned counsel for the petitioners that the case of the petitioners is squarely covered by the Full Bench judgment of this Court passed in ***Gajraj and others (supra)*** and as such, the petitioners are entitled for 10% developed land as well as 64.7% additional compensation. It is further argued that in large number of writ petitions, similar relief was also granted in favour of the farmers similarly situate

10. It is an admitted position that the petitioners did not challenge the land acquisition proceedings. The writ petition is also silent as to whether the notifications under which the land of the petitioners was acquired, were under challenge in the bunch of writ petitions which were decided along with the case of ***Gajraj Singh and others (supra).***

11. Learned Standing Counsel appearing for the respondents no.1 and 2 and also the learned counsel for the Greater Noida have submitted that the benefit granted by the Full Bench in the case of Gajraj Singh and others would not be applicable to the case of the petitioners for the reason that the petitioners were neither parties in the writ petitions which had been decided along with the case of Gajraj Singh and others nor there is any assertion by the petitioners that the notifications under which their land had been acquired were subject matter of challenge in the case of

Gajraj Singh and others. Further more, it has been submitted that in terms of the direction contained in the Full Bench judgment, the Greater Noida had taken a decision not to allot the abadi plot to the extent of 10% to those land owners who had not approached the writ court and had not challenged the acquisition proceedings.

12. The question which thus falls for consideration is as to whether as per the directions in the case of ***Gajraj Singh and others (supra)***, the petitioners, who were neither parties in the writ petitions which had been decided along with the case of ***Gajraj Singh and others (supra)*** nor had their land been acquired under the notifications which were subject matter of challenge in the writ petitions decided by the Full Bench in the case of Gajraj Singh and others and connected matters, could claim entitlement to additional compensation and allotment of abadi plot to the extent of 10% of their acquired land.

13. In the case of ***Gajraj Singh and others (supra)***, the writ petitions challenging the notifications in respect of land acquisition proceedings with respect to tracts of land situate in different villages of Greater Noida and Noida were decided and the writ petitions were disposed of in terms of the following directions :-

"481. As noticed above, the land has been acquired of large number of villagers in different villages of Greater Noida and Noida. Some of the petitioners had earlier come to this Court and their writ petitions have been dismissed as noticed above upholding the notifications which judgments have become final between them. Some of the petitioners may not have come to the Court and have left themselves in the hand of the Authority and State under belief that the State and Authority shall do the best for them as per law. We cannot loose sight of the fact that the above farmers and agricultures/owners whose land has been acquired are equally affected by taking of their land. As far as consequence and effect of the acquisition it equally affects on all land losers. Thus land owners whose writ petitions have earlier been dismissed upholding the notifications may have grievances that the additional compensation which was a subsequent event granted by the Authority may also be extended to them and for the aforesaid, further spate of litigation may start in so far as payment of additional compensation is concerned. In the circumstances, we leave it to the Authority to take a decision as to whether the benefit of additional compensation shall also be extended to those with regard to whom the notifications of acquisition have been upheld or those who have not filed any writ petitions. We leave this in the discretion of the Authority/State which may be exercised keeping in view the principles enshrined under Article 14 of the Constitution of India.

482. In view of the foregoing conclusions we order as follows:

1. The Writ Petition No. 45933 of 2011, Writ Petition No. 47545 of 2011 relating to village Nithari, Writ Petition No. 47522 of 2011 relating to village Sadarpur, Writ Petition No. 45196 of 2011, Writ Petition No. 45208 of 2011, Writ Petition No. 45211 of 2011, Writ Petition No. 45213 of 2011, Writ Petition No. 45216 of 2011, Writ Petition No. 45223 of 2011, Writ Petition No. 45224 of 2011, Writ Petition No. 45226 of 2011, Writ Petition No. 45229 of 2011, Writ Petition No. 45230 of 2011, Writ Petition No. 45235 of 2011, Writ Petition No. 45238 of 2011, Writ Petition No. 45283 of 2011 relating to

village Khoda, Writ Petition No. 46764 of 2011, Writ Petition No. 46785 of 2011 relating to village Sultanpur, Writ Petition No. 46407 of 2011 relating to village Chaura Sadatpur and Writ Petition No. 46470 of 2011 relating to village Alaverdipur which have been filed with inordinate delay and laches are dismissed.

2. (i) The writ petitions of Group 40 (Village Devla) being Writ Petition No. 31126 of 2011, Writ Petition No. 59131 of 2009, Writ Petition No. 22800 of 2010, Writ Petition No. 37118 of 2011, Writ Petition No. 42812 of 2009, Writ Petition No. 50417 of 2009, Writ Petition No. 54424 of 2009, Writ Petition No. 54652 of 2009, Writ Petition No. 55650 of 2009, Writ Petition No. 57032 of 2009, Writ Petition No. 58318 of 2009, Writ Petition No. 22798 of 2010, Writ Petition No. 37784 of 2010, Writ Petition No. 37787 of 2010, Writ Petition No. 31124 of 2011, Writ Petition No. 31125 of 2011, Writ Petition No. 32234 of 2011, Writ Petition No. 32987 of 2011, Writ Petition No. 35648 of 2011, Writ Petition No. 38059 of 2011, Writ Petition No. 41339 of 2011, Writ Petition No. 47427 of 2011 and Writ Petition No. 47412 of 2011 are allowed and the notifications dated 26.5.2009 and 22.6.2009 and all consequential actions are quashed. The petitioners shall be entitled for restoration of their land subject to deposit of compensation which they had received under agreement/award before the authority/Collector.

2(ii) Writ petition No. 17725 of 2010 Omveer and others Vs. State of U.P. (Group 38) relating to village Yusufpur Chak Sahberi is allowed. Notifications dated 10.4.2006 and 6.9.2007 and all consequential actions are quashed. The petitioners shall be entitled for restoration of their land subject to return of compensation received by them under agreement/award to the Collector.

2(iii) Writ Petition No.47486 of 2011 (Rajee and others vs. State of U.P. and others) of Group-42 relating to village Asdullapur is allowed. The notification dated 27.1.2010 and 4.2.2010 as well as all subsequent proceedings are quashed. The petitioners shall be entitled to restoration of their land.

3. All other writ petitions except as mentioned above at (1) and (2) are disposed of with following directions:

(a) The petitioners shall be entitled for payment of additional compensation to the extent of same ratio (i.e. 64.70%) as paid for village Patwari in addition to the compensation received by them under 1997 Rules/award which payment shall be ensured by the Authority at an early date. It may be open for Authority to take a decision as to what proportion of additional compensation be asked to be paid by allottees. Those petitioners who have not yet been paid compensation may be paid the compensation as well as additional compensation as ordered above. The payment of additional compensation shall be without any prejudice to rights of land owners under section 18 of the Act, if any.

(b) All the petitioners shall be entitled for allotment of developed Abadi plot to the extent of 10% of their acquired land subject to maximum of 2500 square meters. We however, leave it open to the Authority in cases where allotment of abadi plot to the extent of 6% or 8% have already been made either to make allotment of the balance of the area or may compensate the land owners by payment of the amount equivalent to balance area as per average rate of allotment made of developed residential plots.

4.The Authority may also take a decision as to whether benefit of additional compensation and allotment of abadi plot to the extent of 10% be also given to;

(a) those land holders whose earlier writ petition challenging the notifications have been dismissed upholding the notifications; and

(b) those land holders who have not come to the Court, relating to the notifications which are subject matter of challenge in writ petitions mentioned at direction No.3.

5. The Greater NOIDA and its allottees are directed not to carry on development and not to implement the Master Plan 2021 till the observations and directions of the National Capital Regional Planning Board are incorporated in Master Plan 2021 to the satisfaction of the National Capital Regional Planning Board. We make it clear that this direction shall not be applicable in those cases where the development is being carried on in accordance with the earlier Master Plan of the Greater NOIDA duly approved by the National Capital Regional Planning Board.

6. We direct the Chief Secretary of the State to appoint officers not below the level of Principal Secretary (except the officers of Industrial Development Department who have dealt with the relevant files) to conduct a thorough inquiry regarding the acts of Greater Noida (a) in proceeding to implement Master Plan 2021 without approval of N.C.R.P. Board, (b) decisions taken to change the land use, (c) allotment made to the builders and (d) indiscriminate proposals for acquisition of land, and thereafter the State Government shall take appropriate action in the matter."

14. The question as to whether the benefit of the directions issued by the Full Bench in the case of **Gajraj Singh and others (supra)** for providing additional compensation to the extent of 64.70% and developed abadi plot to the extent of 10% of the land acquired was liable to be extended to such tenure holders also whose lands were not acquired in terms of the notifications which were under challenge in the case of **Gajraj Singh and others (supra)**, has also been considered by a coordinate Division Bench of this Court in the case of **Smt. Rameshwari and 3 others Vs. State of U.P. and 2 others** in **Writ C No.18948 of 2017** decided on 3.5.2017 and in terms of judgment dated 3.5.2017, it has been held as follows:-

"A perusal of the Full Bench judgement in the case of Gajraj Singh (Supra) goes to show that in order to save the acquisition proceedings, direction for payment of additional compensation and allotment of developed abadi plot was issued in peculiar facts and circumstances, particularly, the fact that extensive development had taken place even though the Full Bench found that opportunity to file objection under Section 5A Act had been wrongly denied to the tenure holders. However, the benefit extended to the land owners in lieu of saving the acquisition proceedings, even though the same were found to be illegal and liable to be quashed, was restricted to the acquisition proceedings challenged before it.

However, the question of extending the benefits of additional compensation and allotment of developed abadi plot to such land holders whose challenge to the land acquisition notification already stood dismissed or such land holders who did not approach this Court challenging the land acquisition notification though the said notifications were subject matter of challenge before the

Full Bench, was left open to be decided by the authority. As already noticed above, in pursuance of the aforesaid directions, the authority took a decision in its Board meeting for making payment of additional compensation to the extent of 64.7% to all land holders whether they had put challenge to the land acquisition notifications or not. However, in respect of allotment of abadi plot to the extent of 10%, the authority took a decision not to extend the benefit to such land holders who had not approached the writ court and had not questioned the acquisition proceedings.

In the case in hand, the petitioners' land was acquired by means of notification dated 09.09.1997. Equally admitted fact is that the petitioners accepted the award and did not come forward to challenge the land acquisition proceedings. Not only that, notification dated 9.9.2017 whereunder an area 1275-18-18 including Gata no. 582 area 6-5-13, 538 area 0-15-6, 609 area 1-2-12 and 615 area 9-10-10 of the petitioners situate at village Tugalpur was acquired was not subject of matter of challenge before the Full Bench.

In view of above facts and discussions, it is clear that the relief which was granted by the Full Bench in the case of Gajraj Singh (Supra) affirmed by the Hon'ble Apex Court in the case of Savitri Devi (Supra) cannot be made applicable to the acquisition proceedings which were not assailed and were not subject matter of adjudication before the Full Bench in the case of Gajraj Singh (Supra). Thus, we are of the considered opinion that the ratio dicendi of the Full Bench does not stand attracted in the case of the petitioners and they cannot claim parity with those tenure holders who were before the Full Bench in the case of Gajraj Singh (Supra). The petitioners are thus not entitled to the relief claimed in this petition. The impugned order therefore, does not suffer from any infirmity requiring any interference by this Court under Article 226 of the Constitution of India.

Writ petition fails and accordingly stands dismissed."

15. A similar view has been taken in a recent judgment of this Court in ***Ramesh and others Vs. State of U.P. and others*** reported in ***2019 (4) ADJ 225***, wherein it was stated as follows:-

"14.Moreover, the directions issued by the Full Bench in the case of Gajraj Singh and others under para 482 (4) in terms of which the Authority was to take a decision as to whether benefit of additional compensation and allotment of abadi plot to the extent of 10% was to be given, was confined to those land holders whose writ petitions challenging the notifications had been dismissed earlier and to those who had not approached the court to challenge the notifications which were subject matter of challenge in the writ petitions decided along with the case of Gajraj Singh and others. The directions under para 482 (4) were not in respect of those persons such as the petitioners in the present case whose land had been acquired in terms of notifications which were not subject matter of challenge in the case of Gajraj Singh and others and connected matters."

16. It is to be noted at this juncture that earlier also a Full Bench of this Court in the case of **Ravindra Kumar Vs. District Magistrate, Agra and others** reported in **2005 (1) UPLBEC 118** has held that land acquisition act is itself a self contained code. Any other provision providing for further benefit has not been

mentioned in the Land Acquisition Act. In that case the petitioner had claimed employment in the State Government over and above the compensation paid which the Court declined. The paragraph 22 of the aforesaid judgement is reproduced below hereinbelow :-

"22. There is no provision under the Land Acquisition Act under which the Circular dated 28.12.1974 could be issued. Whatever compensation has to be given for acquisition of the land is provided under the Land Acquisition Act itself which is a self-contained Code. Any G.O. providing for any further benefit not mentioned in the Land Acquisition Act would be inconsistent with the intention of Parliament as contained in the Land Acquisition Act. Hence any such GO. would be violative of the Land Acquisition Act and would hence be invalid. Such a G.O. will also violate Article 16 of the Constitution as already mentioned above."

17. In the facts and circumstances of the case, we are of the view that the petitioners are not entitled to the benefits claimed by them in the present writ petition. The case of the petitioners is not at all covered by the Full Bench judgement of **Gajraj Singh and others (supra).** After going through the entire facts and circumstances of the case as well as the law laid down by this Court, we are of the opinion that the order dated 06.9.2019 passed by the respondent no.3 is absolutely perfect and valid order and does not call for any interference by this Court specially under Article 226 of the Constitution of India. It is further clear on the facts as narrated above that the petitioners have neither any legal right nor any factual foundation to claim the relief of additional compensation as well as allotment of additional developed abadi land.

18. The writ petition is devoid of merit and it is accordingly dismissed.

(2020)09ILR A415
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.04.2020

BEFORE

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

WRIT – C No. 6532 of 2006
&
WRIT – C No. 15174 of 2012
&
WRIT – C No. 1877 of 2012
&
WRIT – C No. 1873 of 2012

Sri Mahesh & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Pankaj Dubey, Sri M.D. Singh Shekhar

Counsel for the Respondents:
C.S.C., Sri Mahesh Chandra Chaturvedi, Sri Pranjal Mehrotra, Sri R. Venkatramani, Sri S.K. Mishra, Sri Satish Chaturvedi, Usha Kiran, Sri Vimlendu Tripathi, Sri M.C. Chaturvedi, Sri Anurag Khanna

A. Civil Law - Land Acquisition Act (1 of 1894) - Section 4 - Acquisition of land - Challenge - Ground - land acquired for a private company but mandatory procedure of Chapter VII r.w. Rules 1963 not followed - *Held* - Land acquired at the instance of State Industrial Development Corporation Limited (UPSIDCL) which forwarded land to Ambuja Cement Ltd (R-5)- UPSIDCL, incorporated under Act as a State Government company-its objective to acquire land, allot land to entrepreneurs for promoting industrialization in State-R-5 set up industrial unit for contributing to Govt.

policy of consuming fly ash- acquisition not for benefit of private company - Part VII not applicable where acquisition made for a government company - Acquisition, proper (69, 70,71)

B. Civil Law -Land Acquisition Act (1 of 1894)-U.P.Land Acquisition (Determination of Compensation and Declaration of Award by Agreement) Rules, 1997 - Challenge to Acquisition of land - petitioners accepted enhanced compensation - without any demur and objection - Held - Petitioners barred from challenging acquisition (**Para 72)**

C. Civil Law - Land Acquisition Act (1 of 1894) - Challenge to Acquisition of land - Constitution of India Art. 226 - Unexplained inordinate delay & laches in filing writ petition-challenging acquisition notifications –after all steps taken in the acquisition proceedings have become final-Fatal - Court should be loath to quash the notifications-land owners may be non-suited on the ground of delay and laches, if the same remain unexplained

Notification U/s 6 r.w. S. 17 of Act, 1894 published on 18.08.2005 - Possession of land taken & handed over to UPSIDCL by Collector on 21.10.2005 - Mutation made in khatauni on 26.11.2005 - UPSIDCL allotted land to respondent-5 on 08.02.2006 - Respondent-5 commenced construction of industrial unit & commissioned its plant on 16.02.2010 - WP-1 filed on 30.01.2006 and rest in 2012 - in none of writ petitions, any reason for filing writ petitions belatedly have been explained - delay resulted in putting respondent-5 in such a situation where it cannot be put back (Para 75, 78, 89)

Dismissed (E-5)

List of Cases cited :-

1. Radheyshyam (Dead) thru LRs & ors. Vs St. of U.P. & ors. (2011) 5 SCC 553

2. Greater NOIDA Industrial Development Authority Vs Devendra Kumar & ors. 2011 (6) ADJ 480 (SC)

3. Pooran & ors. Vs St. of U. P. & ors. 2009 (10) ADJ 679

4. Shyam Nandan Prasad & ors. Vs St. of Bihar & ors. (1993) 4 SCC 255

5. Commissioner of Income Tax Gujrat Vs. Vadilal Lallubhai 1973 A.I.R. S.C. 1016

6. Mannalal Khetan & ors. Vs Kedar Nath Khetan (1997) 2 SCC 424

7. Falcon Tyres Ltd.,M/s Vs St. of Karnataka (2006) 6 SCC 530

8. Chaitram Verma & ors. Vs Land Acquisition Officer, Raipur & ors. AIR 1994 MP 74

9. R.L. Arora Vs St. of U.P. & ors. AIR 1964 S.C. 1230

10. M/s Asian Townsville Farms Ltd Vs St. of U.P. & ors. (Writ C No.47312 of 2000) 02.05.2016

11. New Delhi Municipal Council Vs Pan Singh & ors J.T.2007(4) SC 253

12. M/s Lipton India Ltd. & ors. Vs U.O.I., J.T. (1994) 6 SC 71

13. M.R. Gupta Vs Union of India & ors. (1995) 5 SCC 628

14. K.V. Rajalakshmiah Setty Vs. St. of Mysore AIR 1961 SC 993

15. St. of Orissa Vs. Pyari Mohan Samantaray & ors. AIR 1976 SC 2617

16. St. of Orissa & ors. Vs. Arun Kumar Patnaik & ors. (1976) 3 SCC 579

17. Shiv Dass Vs Union of India & ors. AIR 2007 SC 1330= 2007(1) Supreme 455

18. Chunvad Pandey Vs St. of U.P. & ors. 2008(4) ESC 2423.

19. Virender Chaudhary Vs Bharat Petroleum Corporation & Ors (2009) 1 SCC 297

20. S.S. Balu & ors. Vs St. of Kerala & ors. (2009) 2 SCC 479,

21. Yunus Vs St. of Maha & ors. (2009) 3 SCC 281

22. Aflatoon & ors. Vs Lieutenant Governor of Delhi & ors., AIR 1974, SC 2077

23. Kshama Sahkari Avas Samiti Ltd. Vs St. of U.P. & ors. 2007(1) AWC 327

24. Roopam Kumari Arya Vs St. of U.P. 2008(4) ADJ 686

25. Jagriti Sahkari Avas Samiti Ltd. Ghaziabad & anr. Vs State of U.P. & ors. Civil Misc. Writ Petition No. 3195 of 1989

26. Swaika Properties (P) Ltd. & anr. Vs St. of Raj & ors., (2008) 4 SCC 695

27. Banda Development Authority Vs Motilal Agarwal (2011) 5 SCC 394

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

1. Heard Sri Pankaj Dubey, learned counsel for petitioners, learned Standing Counsel for State-respondents and Sri Anurag Khanna, Senior Counsel assisted by Sri Pranjal Mehrotra, Advocate for respondent-4.

2. Writ Petition No.6532 of 2006 (hereinafter referred to as "WP-1") has been filed under Article 226 of Constitution of India by 22 petitioners led by Mahesh son of Harpal praying for issue of a writ of certiorari to quash Notification No.2954/77-4-2005-58 Bha/2005 dated 18.07.2005 published by State of U. P. under Section 4 (1) read with Section 17 (4) of Land Acquisition Act 1894 (hereinafter referred to as "Act, 1894") and Notification No.4650/77-4-2005-58/Bha/2005 dated 18.08.2005 making declaration under Section 6 of Act, 1894 for acquisition of 38.429 hectare of land (94.0039 acres) of various plots mentioned in the Schedule enclosed to the notification, situate in Village-Badpura and Dhoom Manikpur, Tehsil-Dadri, District-Gautambudh Nagar for planned industrial development in District-Gautambudh Nagar.

3. The land was proposed to be acquired for development, to be executed through Uttar Pradesh State Industrial Development Corporation Limited, Kanpur (hereinafter referred to as 'UPSIDCL').

4. It is said that petitioners filed objections before respondent-3 i.e. Additional District Magistrate (Land Acquisition), Gautambudh Nagar (hereinafter referred to as 'ADM(LA)') claiming compensation at the rate of Rs.850/- per square yard or to exclude petitioners' land from acquisition, but without giving any opportunity, respondent-3 by order dated 26.11.2005 expunged petitioners' names from respective khatauni and passed order for recording name of UPSIDCL in khatauni. Mutation has been given effect to in khatauni on 08.12.2005. Details of petitioners' land are as under :-

Sl. No.	Name of petitioner	Gata number	Area (in hectare)
1.	Mahesh	804	1.4540
2.	Chandrbhan	855	1.5380
3.	Ravindra	856	1.3520
4.	Charta	857	0.9440
5.	Vikram	858	0.3770
6.	Chande	859	0.1110

	r	(M)	
7.	Prakash	860 (M)	0.1110
8.	Sabhajeet	1195	0.2760
9.	Shree Ram	921	0.1430
10.	Triloki	963	1.5000
11.	Budhpal	983	0.3110
12.	Smt. Ramji	821	0.8140
13.	Sumitra	819	0.1290
14.	Tej Pal	979	0.9480
15.	Aap Singh	761	0.2120
16.	Krishna	753	0.2530
17.	Rakesh Kumar	799	1.1230
18.	Ashok Kumar	795	0.1540
19.	Member Singh	768	0.2630
20.	Bhagirath	17	0.5311
21.	Sita	29M, 199	0.3951, 0.2290
22.	Ram Kala	737	0.3980

5. Before passing order of mutation, no opportunity was given to petitioners and even copy of order was not communicated. Apparently, land has been acquired for UPSIDCL for carrying out planned industrial development, but as a matter of fact, entire land has been acquired for a private company namely M/s Ambuja Cement Limited, and therefore, in the garb of public purpose a land has been acquired for a private company, which is patently illegal. Petitioners are also being pressurized to accept compensation at the rate of Rs.180/- per square yard. When petitioners refused, respondents prevailed upon some Tenure Holders and fixed compensation at the rate of Rs.245/- per square yard. Petitioners' entire land has been acquired to give benefit to a private company, hence, it is arbitrary, illegal and violative of Articles 14, 21 and 300-A of Constitution of India. Notification was issued in only one newspaper i.e. Dainik Vartman Satta, which has no wide circulation. The authority for which land was sought to be acquired had to deposit 80 percent of compensation, but as per knowledge of petitioners, same has not been deposited. Petitioners are being threatened to vacate the land or they shall be forcefully evicted. The land of petitioners, in the garb of statutory acquisition, is being snatched so as to benefit a private company, hence, it is patently unconstitutional.

6. During pendency of writ petition an Application No.105094 of 2008 was filed for impleadment of M/s Gujarat Ambuja Cement as respondent-5, which was allowed and notice was issued to newly impleaded respondent-5 vide order dated 28.03.2014.

7. A supplementary affidavit dated 03.02.2014, sworn by Rajendra son of C. B. Singh on behalf of petitioners has been filed placing on record documents to support that land of farmers was acquired for a private company. Copy of letter dated 28.01.2005 issued by Special Secretary,

U.P. Government and addressed to Managing Director, UPSIDCL has been filed as Annexure-SA.1 wherein State Government has referred to a letter dated 30.12.2004 of one Puneet Saran of M/s Gujarat Ambuja Cement Limited requesting to make available 47.8930 hectare private land in village-Dhoom Manikpur and Badpura, Tehsil-Dadri and also 2.9753 hectare of Gram Sabha land for the purpose of M/s Gujarat Ambuja Cement Limited and directing that aforesaid land be acquired through UPSIDCL. State Government required UPSIDCL to send appropriate proposal for the said purpose. Another letter is dated 03.02.2005 whereby Government's decision has been communicated that land for the purpose of M/s Gujarat Ambuja Cement Ltd. shall be acquired through UPSIDCL. In compliance of aforesaid direction of State Government, UPSIDCL prepared documents and sent to government for examination thereof. State Government issued notification under Section 4/17 of Act, 1894. Next is the letter dated 19.04.2005 requesting to take steps for filing caveat in Court so as to contest and challenge the acquisition proceedings, if any, on the part of Land Owners. Said letter states that 108 land owners would be affected by proposed acquisition. Letter dated 28.09.2005 of Land Acquisition Officer (hereinafter referred to as "LAO") is for payment of publication bill to the Editor of newspaper concerned. Letter dated 22.10.2005 states that declaration under Section 6/17 of Act, 1894 vide Notification dated 18.08.2005 has been published and after giving notice to the Farmers under Section 9 (1) of Act, 1894, and distribution of 80 percent of estimated compensation, possession has to be obtained within 15 days and thereafter it shall be transferred to M/s Ambuja Cement Ltd. It, therefore, requested to get the land transferred to Executive Engineer of UPSIDCL at the earliest. Annexure-SA.6 is letter dated 29.11.2005 of M/s Ambuja Cement addressed to Sri Atul Gupta, Principal Secretary (Industries), U.P. Government stating that UPSIDCL has to take physical possession of land by initiating survey work i.e. fixing boundary of acquired land and then execute lease deed with Gujarat Ambuja Cement Limited and transfer possession of land to it. Hence, Government was requested to advise UPSIDCL to complete necessary formalities at the earliest. It also suggested a Consent Award under Section 11 of Act, 1894 by Collector, determining reasonable and amicable 'Consent Rate' with the Farmers. It also communicated that 15.01.2006 has been decided as 'Foundation Stone' laying date and commencement of actual work on the site. Aforesaid letter was communicated by Sri Atul Kumar Gupta, Secretary, Urban Development to District Magistrate, Ghaziabad by letter dated 22.12.2005.

8. On behalf of UPSIDCL i.e. respondent-4, a counter affidavit has been filed, sworn by Sri V. K. Singh, Assistant Manager (Legal), UPSIDCL. Publication of Notification dated 18.07.2005 under Section 4(1)/17 of Act, 1894 and declaration dated 18.08.2005 under Section 6/17 of Act, 1894, is admitted. However, it is said that such notifications were issued more than five months ago, therefore, petitioners are guilty of laches; acquired land has already been handed over by Collector to UPSIDCL on 21.10.2005; there are 192 farmers out of which only 22 have approached this Court and rest are satisfied with acquisition proceedings; notifications were published in two daily local newspapers i.e. "Dainik Pralayankar"

and "Vartman Satta" published on 22.07.2005 and on 27.07.2005 in "Mahamedha" and "Vartman Satta" and same were also published on the Village Panchayat Notice Boards and in the localities; So far as right of compensation is concerned, if the petitioners are aggrieved by determination made by ADM(LA), they have remedy under Section 18 of Act, 1894; The expunction of names in khatauni has been made after order dated 26.11.2005 passed by Authority concerned giving opportunity of hearing to all concerned parties in accordance with U.P. Land Acquisition Manual, 1987; If petitioners are aggrieved on account of mutation they have remedy under U. P. Land Revenue Code, 2006; UPSIDCL has been created for development of industries and for such purpose, i.e. establishment of unit of M/s Gujarat Ambuja Cement Ltd, land in question was acquired at the instance of UPSIDCL by State Government and procedure followed is perfectly valid and in accordance with law; acquisition of land is for public purpose i.e. planned industrial development in District-Gautambudh Nagar; allegations that land has not been acquired for public purpose is denied; allegations of pressurizing petitioners to accept compensation at the rate of Rs.180 per square yard is also denied; Market value of land in question came to be Rs.83.76 per square yard but to be more liberal to the Farmers, compensation was offered at the rate of Rs.245/- per square yard and thereafter with the consent, agreement under U. P. Karaar Niyamawali, 1997 (hereinafter referred to as "Niyamawali, 1997") has been executed.

9. Respondent-5 has also filed a separate counter affidavit stating that acquisition in question would fall under Section 3 (f)(iii) and (iv) of Act, 1894 and such acquisition is for public purpose; it is wholly irrelevant that after acquisition, acquired land is transferred to an individual or a private company; UPSIDCL is a Nodal Agency and determines areas of land which can be acquired for the purpose of industrial development; General process of determination and identification of land for a planned industrial development is distinct from piecemeal acquisition for private company; it is open to State Government to take recourse to Sections 4, 6 and 17 of Act, 1894 for acquisition of land; in the case in hand, there was a need felt for establishment of a cement company in the vicinity of National Thermal Power Corporation (hereinafter referred to as 'NTPC') with an aim and objective of consumption of fly ash for the purpose of manufacturing cement; the productive use and disposal of fly ash became a major environmental concern; it is in this context that State Government acted for acquisition of land for public purpose; after allocation of land to respondent-5 on 08.02.2006 it has already set up its cement plant and commenced production; Use of land is entirely in terms of need of company, plant machinery and future expansion; Majority of land owners have received compensation in terms of award; Respondent-5 has deposited entire premium demanded by UPSIDCL including compensation; Cement plant of respondent-5 commissioned on 16.02.2010 and in operation producing cement; as per Government of India's policy, Thermal Power Plants in India, which generates electricity by using coal, produces large quantity of fly ash (a waste material) which is hazardous substance for mankind and environment, hence they were required to use said fly ash in an effective manner; disposal and handling of fly ash is very difficult and needs to be disposed off in an

effective manner so as to prevent environmental hazards; Fly ash is generally thrown in rivers or open area causing water pollution and air pollution; for effective off-take of fly ash and for effective disposal, handling and utilization, cement factories were required to be established in the neighbourhood of Thermal Power Stations. Accordingly National Capital Power Station (hereinafter referred to as 'NCPS') situated in Dadri, District-Gautambudh Nagar which is one of the Power Station of NTPC, entered into an agreement dated 07.08.2004 with respondent-5 for effective disposal and utilization of fly ash produced in said Power Station; a contiguous location of a cement plant in the vicinity of Thermal Power Station was in public interest; in furtherance of aforesaid commitment and agreement executed with NCPS, respondent-5 in December 2004 submitted an application to Government of U.P. for allotment of a piece of land admeasuring 47.8930 hectares in the vicinity of plant of NTPC, Dadri; as per its investment programme in State of U.P., respondent-5 proposed to establish a cement manufacturing unit of 1.2 million ton per annum capacity; On the request of respondent-5, UPSIDCL, which is a unit of State of U.P. and established for industrial growth and development in State of U. P., allotted desired land to respondent-5 vide letter of allotment dated 08.02.2006 and total area of 38.043 hectares (94.0039 acres) of land has been allotted at the price Rs.275.62 per square meter with a basic tentative cost at the rate of Rs.10,48,55,828.60; A lease deed dated 18.08.2006 was executed between UPSIDCL and respondent-5 for a period of 90 years at a premium of Rs.14,06,30,596/- ; initially lease was at rent of Rs.2000/- per hectare per year for first 30 years. Rs.5000/- per hectare per year for next thirty years and after expiry of first 60 years, Rs.10,000/- per hectare per year; Respondent-5 after allotment of land in question has invested sum of Rs.291.55 crores for establishment of its factory; Initially compensation was determined as Rs.245/- per square yard, which has been enhanced later as Rs.314 per square yard, and, most farmers are accepting compensation under Niyamawali, 1997; Majority of petitioners have received compensation pursuant to agreement executed under Niyamawali, 1997; Land has been allotted to respondent-5 after completing all required formalities and in accordance with Rules; Respondent-5 is a bonafide person having infused huge amount for development i.e. establishment of an industrial unit; after establishment of a cement factory by respondent-5, other cement manufacturing companies have also established their units namely, Ultratech Cement etc; One of the petitions being Writ Petition No.38848 of 2008 filed in respect of acquisition in question itself challenging the amount of compensation on the ground that higher compensation was paid in the vicinity of land, has been dismissed by this Court vide judgment dated 05.08.2008.

10. In rejoinder affidavit filed by petitioners, in reply to the counter affidavit of respondent-4, it is stated that when a land is acquired for a private company, the enquiry contemplated under Rule 4 of Land Acquisition (Companies) Rules, 1963 (hereinafter referred to as "Rules, 1963") has to be held, otherwise entire proceedings are bad in law. Broadly the averments made in writ petition and supplementary affidavit are reiterated.

11. A personal affidavit has been filed by Principal Secretary, Industrial

Development pursuant to order dated 17.11.2016 passed by this Court stating that District Magistrate, Gautam Budh Nagar sent a proposal for acquisition of land, area 6.5619 hectare, in village-Badpura, area 31.410 hectare in village-Dhoom Manikpur Tehsil-Dadri, District-Gautam Budh Nagar vide letter dated 11.04.2005. The justification for aforesaid acquisition stated is that NTPC had installed a Power Plant at Dadri Tehsil which is producing very huge amount of fly ash and its storage and non disposal is causing serious environmental hazards; Fly ash is being used by Cement factories for producing cement by using modern techniques and in this way pollution due to fly ash can be avoided and controlled; the huge storage of fly ash at NTPC Plant has become serious environmental problem at Dadri and to tackle the same, NTPC has entered into an agreement with Cement company which is ready to go in production by December, 2005 and will consume 500 metric ton fly ash every day, which will subsequently increase to 1000 metric ton; Government of India, Ministry of Environment and Forest has also issued a notification providing that every construction within 100 kilometers of a Thermal Power Plant will be obliged to use fly ash for its manufacturing of construction material; Cement company namely M/s Ambuja Cement Ltd, respondent-5 which has entered into agreement with NTPC has requested District Magistrate, Gautam Budh Nagar to make available requisite land for establishment of Cement Company; State Government through its Industrial Department, vide letter dated 03.02.2005 has made UPSIDCL as a Nodal Body for acquisition of land for Cement Company and also required land for production unit, residential buildings and railway sidings and in view thereof it is very urgent to acquire land in two villages as noticed above, for UPSIDCL for planned industrial development in District-Gautam Budh Nagar.

12. Considering urgency it was requested that acquisition notification should be issued under Section 4 (1) read with Section 17 of Act, 1894. Aforesaid request was forwarded by Commissioner and Director, Land Acquisition vide letter dated 21.04.2005 to Industrial Department of State Government. Aforesaid proposal along with comments dated 25.05.2005 was forwarded to Bhumi Udyog Parishad. Thereafter, it was approved by Chief Minister on 14.06.2005 and it was approved as land for Ambuja Cement be acquired. Further proposal that land is to be acquired through UPSIDCL was approved by Chief Minister on 11.07.2005. UPSIDCL is governed by the provisions of U. P. Industrial Area Development Act, 1976 (hereinafter referred to as "Act, 1976"). Section 6 thereof provides functions of the authority as under :

"6. Functions of the Authority. - (1) The object of the Authority shall be to secure the planned development of the industrial development areas.

(2) Without prejudice to the generality of the objects of the Authority, the Authority shall perform the following functions-

(a) to acquire land in the industrial development area, by agreement or through proceedings under the Land Acquisition Act, 1894 for the purposes of this Act;

(b) to prepare a plan for the development of the industrial development area;

(c) to demarcate and develop sites for industrial, commercial and residential purposes according to the plan;

(d) to provide infra-structure for industrial, commercial and residential purposes;

(e) to provide amenities;

(f) to allocate arid transfer either by way of sale or lease or otherwise plots of land for industrial, commercial or residential purposes;

(g) to regulate the erection of buildings and setting up of industries; and

(h) to lay down the purpose for which a particular site or plot of land shall be used, namely, for industrial or commercial or residential purpose or any other specified purpose in such area.

6A. Power to authorize a person to provide infrastructure or amenities and collect tax or fee. - Notwithstanding anything to the contrary contained in any other provisions of this Act and subject to such terms and conditions as may be specified in the regulations, the Authority may, by agreement, authorize any person to provide or maintain or continue to provide or maintain any infrastructure or amenities under this Act and to collect taxes or fees, as the case may be, levied therefore." (emphasis added)

13. Thereafter notifications under Sections 4 (1) and 6 (1) of Act, 1894 were issued on 18.07.2005 and 18.08.2005 and entire action of respondents is consistent with provisions of Act, 1976 read with Act, 1894.

14. State Government by letter dated 10.05.2005 made following queries from District Magistrate, Gautam Budh Nagar :

''1. आयुक्त एवं निदेशक (भू.अ.) भूमि अध्याप्ति निदेशालय, राजस्व परिषद उ.प्र. लखनऊ के पत्र दिनांक 21.4.05 के पृष्ठांकन की अपेक्षानुसार 10 प्रतिशत अनुमानित प्रतिकर एवं 10 प्रतिशत अर्जन व्यय की धनराशि निर्धारित लेखा शीर्षक कमशः 8443–117 व 0029 में जमा करा कर चालान की प्रमाणित प्रति उपलब्ध करायी जाय।

2. प्रश्नगत भूमि अर्जन हेतु 10 प्रतिशत अनुमानित प्रतिकर व 10 प्रशित अर्जन व्यय हेतु जमा की गयी धनराशि का चालान जो निर्धारित लेखाशीर्ष के बजाय अन्य लेखाशीर्षक में जमा किया गया है, में उल्लिखित कुल धनराशि रू0 1,72,86,742.00 है, जब कि इस संबंध में दोनों ग्रामों के बारे में विशेष भूमि अध्याप्ति अधिकारी के प्रमाण पत्र व भूमि अध्याप्ति मैनुअल के पैरा–14 के परिशिष्ट–2 के अनुसार कलेक्टर के प्रमाण व आदेश में उल्लिखित धनराशि का योग भिन्न है तथा ग्राम बढ़पुरा के प्रकरण में अर्जन व्यय व प्रतिकर की धनराशि के योग में भी त्रुटि है। अतः इस संबंध में उपरोक्त बिन्दु संख्या–1 के अनुसार राजस्व परिषद द्वारा निर्धारित लेखाशीर्षक में धनाराशि जमा किये जाने कका चालान उपलब्ध कराते समय उक्त त्रुटि का भी निवारण किया जाय।

3. ग्राम बढ़पुरा के संबंध में प्रपत्र संख्या–17 में विज्ञप्ति के आलेख्य (हिन्दी) के अनुसूची के अन्तर्गत गाटा संख्या–24एम का क्षेत्रफल 0.2125 अंकित है, जबकि प्रपत्र संख्या–18 में विज्ञप्ति के आलेख्य (अंग्रेजी) के अनुसूची में के गाटा संख्या–24एम. का क्षेत्रफल 0.2185 अंकित है। अतः उक्त गाटा संख्या–24एम के वास्तविक क्षेत्रफल का उल्लेख करते हुए संशोधित व प्रमाणित अनुसूची शासन को उपलब्ध करायी जाय।''

"1. As required by way of the endorsement on the letter of the Commissioner and Director (Land Acquisition), Directorate of Land Acquisition, Revenue Board, Uttar Pradesh, Lucknow, a certified copy of the challan be made available by depositing the amount of 10 percent estimated compensation and 10 percent amount of acquisition cost under the prescribed account heads 8443-117 and 0029 respectively.

2. The total amount mentioned in the challan for the 10 percent estimated compensation and 10 percent acquisition cost for acquisition of the land in question comes to be Rs. 1,72,86,742.00, which has

been deposited in another account head instead of the prescribed account head; whereas, the total of amounts mentioned in the certificate of Special Land Acquisition Officer for both the villages and in the certificate and order of the Collector according to Para 14 of Appendix-2 of Land Acquisition Manual is different; and there is also an error in the total of acquisition cost and compensation in case of Village Badpura. Hence, in this connection, while making available the challan for deposit of amount under the account head prescribed by the Revenue Board as per the aforesaid point no. 1, the said error may also be corrected.

3. In Form 17 related to Village Badpura, the area of Gata No. 24M is mentioned as 0.2125 in the schedule of the notification (Hindi draft) , whereas, the area of Gata No. 24M is mentioned as 0.2185 in the schedule of the notification (English draft) in Form 18. Hence, a revised certified schedule be made available to the government by mentioning actual area of the said Gata No. 24M."

(English translation by Court)

15. Reply by District Magistrate, Gautam Budh Nagar was given by letter dated 18.05.2005 stating that 10 per cent advance and 10 per cent land acquisition expenses which come to total Rs.29,81,727/- has been deposited in District Treasury in respect of land proposed to be acquired in village-Badpura and village-Dhoom Manikpur. There is some modification in the area of land, hence, demand has been forwarded for deposit of advance and land acquisition expenses. State Government again vide letter dated 26.05.2005 required District Magistrate to submit documents showing that the amount has been deposited.

16. A supplementary affidavit dated 31.08.2017 has been filed in reply to averments made by respondents that petitioners have accepted enhanced compensation under U. P. Land Acquisition (Determination of Compensation and Declaration of Award by Agreement) Rules, 1997 (hereinafter referred to as "Karaar Niyamawali, 1997"). It is stated that at the time of filing writ petition, petitioners have not entered into any agreement under Karaar Niyamawali, 1997 and also not accepted any amount towards compensation. However, during pendency of writ petition, petitioners have signed agreements. The explanation given is that petitioners are poor farmers, uneducated and ignorant of intricacies of legal documents; the agreement signed by them is not conscious and free will document and these agreements are invalid in the eyes of law as petitioners have signed them without understanding their rights etc. It is further stated that be that as it may, since, acquisition itself is bad in law, said agreement would be of no consequence and for this purpose reliance has been placed on **Radheyshyam (Dead) through LRs and others vs. State of U.P. and others, (2011) 5 SCC 553; Greater NOIDA Industrial Development Authority vs. Devendra Kumar and others, 2011 (6) ADJ 480 (SC)** and this Court's judgment in **Pooran and others vs. State of U. P. and others, 2009 (10) ADJ 679**. In para 8 it is said that petitioners-9, 10, 11, 12, 15, 33 and 35 have not accepted compensation till date. In para 9 it is said that 40 per cent of acquired land is still vacant.

17. Reply affidavit has been filed on behalf of respondent-5 stating that during pendency of writ petition, petitioners voluntarily and knowingly have accepted initial compensation of Rs.245/- per square

yards and thereafter enhanced additional compensation of Rs.69/- per square yards. Thus, petitioners have received compensation at the rate of Rs.314/- per square yards without any demur and objection and also entered into an agreement under Karaar Niyamawali, 1997. Mere statement that agreements have been signed under pressure is not correct. In the receipts for payment of compensation, petitioners have undertaken that they have no objection to acquisition under consideration. Now the petitioners are barred from challenging acquisition at all. With regard to utilization of land, respondent-5, in paragraph 9 of reply affidavit, has given description of utilization of land as under :-

(i) Built up area = 122791.1 Sq. Yds.

(ii) Land for Green Belt = 150146.462 Sq. Yds.

(33 % as per norm of total land)

(i) Land set apart for Railway siding = 121055.725 sq. yds.

(ii) Truck Yard area = 60995.492 Sq. yds.

Total (38.0429 Hect.) 454989 Sq. Yds.

18. Facts stated above show that initially an agreement was entered into between NTPC and respondent-5 pursuant whereto respondent-5 had to establish an industrial unit in Tehsil-Dadri, District-Gautam Budh Nagar. It selected land in villages-Badpura and Dhoom Manikpur. Request was made to Collector to make available aforesaid land by acquisition. Recommendation was made by Collector for acquisition of land in favour of respondent-5 giving its reasons as we have already noticed, but in order to avoid procedure which was to be followed for acquisition of land for company, District Magistrate, Gautam Budh Nagar resorted to Government Order dated 03.02.2005 whereby UPSIDCL was made Nodal Body for acquiring land for companies and, therefore, colour was given to proposed acquisition proceedings as if land is being acquired for a Government company i.e. Instrumentality of State and not a private company. That is how procedure prescribed in Statute for acquisition of land for a private company was given a go bye.

19. Writ Petition **No.15174 of 2012** (hereinafter referred to as "**WP-2**") has been filed by 25 petitioners challenging acquisition notification dated 18.07.2005 issued under Section 4 of Act, 1894 and notification dated 18.08.2005 issued under Section 6 of said Act. Disputed land of petitioners are detailed as under :

Sl. No.	Plot Number	Area (in hectare)
1.	731	0.6190
2.	763	0.1050
3.	778	0.5320
4.	781	0.2810
5.	791	0.5550
6.	792	0.4880

20. Aforesaid land is situated in village-Dhoom Manikpur, Pargana and Tehsil-Dadri, District-Gautam Budh Nagar. Challenge is on the ground that right of petitioner to file objections and hearing under Section 5 (A) of Act, 1894 has been dispensed with by invoking urgency Clause under Section 17 (4) of Act, 1894 illegally as there was no urgency whatsoever and land was acquired for fulfilling political obligations/promise of private

persons/industries. In para 11 it is admitted that petitioners entered into agreements under Karaar Niyamawali, 1997 and accepted compensation. However, it is said that they had no option, since, respondents were in dominant position, hence, petitioners under compulsion entered into aforesaid agreement. Though various grounds are mentioned in writ petition, but learned counsel for petitioners has pressed his challenge to impugned notifications on the ground that land was acquired for a private company and the procedure laid down in Chapter VII read with Rules 1963 was not followed, which are mandatory.

21. We are not detailing the pleadings in counter and rejoinder affidavit, since, they are common as are involved in **WP-I**, which we have detailed hereinabove.

22. Writ Petition **No.1873 of 2012** (hereinafter referred to as "**WP-3**") has been filed by 44 petitioners challenging notifications dated 18.07.2005 (Annexure-1 to writ petition) and 18.08.2005 (Annexure-2 to writ petition) and it is founded on similar grounds and facts as are stated in WP-2. However, land in dispute in this writ petition is detailed as under :

Land siutate in Village-Badpura, Pargana-Dadri, District-Gautam Budh Nagar		
Sl. No.	Plot number	Area (in hectare)
1.	10 N	0.2566
2.	16	0.5286
3.	17	0.5311
4.	30M	0.1320
5.	78M	0.4979
6.	84	0.4033
7.	85	0.1391
Land situate in Village-Dhoom Manikpur, Pargana-Dadri, District-Gautam Budh Nagar		
8.	723	0.1500
9.	731	0.6190
10.	735	0.6010
11.	788	0.6790
12.	737	0.3980
13.	743	0.4680
14.	753	0.2530
15.	755	0.2350
16.	757	0.8530
17.	758	1.4830
18.	761	0.2120
19.	764	0.2130
20.	765	0.2120
21.	766	0.6725
22.	768	0.2630

23. Here also, in paragraph 11 it is admitted that petitioners have entered into agreement under Karaar Niyamawali, 1997 and have accepted compensation and explanation for the same is similar to that as given by petitioners in WP-2. Here also, we are not detailing the pleadings in counter and rejoinder affidavit, since, they are common as are involved in WP-I, which we have detailed hereinabove.

24. Writ Petition No.**1877 of 2012** (hereinafter referred to as **"WP-4"**) has been filed by 41 petitioners challenging notifications dated 18.07.2005 and it is founded on similar grounds and facts as are

stated in WP-2. However, land in dispute in this writ petition is detailed as under :

Land siutate in Village-Dhoom Manikpur, Pargana-Dadri, District-Gautam Budh Nagar		
Sl. No.	Plot number	Area (in hectare)
1.	775	1.0010
2.	787	0.4570
3.	800	0.2540
4.	801	0.2810
5.	802	0.3020
6.	855	1.5380
7.	857	0.9440
8.	977	0.2160
9.	978	0.2910
10.	978G	0.3410
11.	978Gh	0.2020
12.	980	0.1360
13.	983	0.3110
14.	987	0.1680

25. Here also, in paragraph 11 it is admitted that petitioners have entered into agreement under Karaar Niyamawali, 1997 and have accepted compensation and explanation for the same is similar to that as given by petitioners in WP-2. Here also, we are not detailing the pleadings in counter and rejoinder affidavit, since, they are common as are involved in WP-I, which we have detailed hereinabove.

26. The issues which have arisen in these writ petitions are :-

1. Whether acquisition was for a private company so as to attract procedure laid down in Part VII of Act, 1894 read with Company Rules?

2.Whether procedure of acquisition adopted by respondents rendered the acquisition valid or not?

3. Whether petitioners deserve to be non suited on account of delay?

4. What relief, if any, petitioners are entitled?

27. In this backdrop we will have to examine first "whether acquisition of land ex facie is valid or not?"

28. The provisions of the Act, 1894 as it existed prior to the 1984 amendment need to be noticed. Section 3 of Act, 1894 is a definition clause which defines various expressions. Section 3(f) was amended in U.P. by U.P. Act No.22 of 1954 w.e.f. 19.11.1954. Prior to amendments of Section 3 (f) by Act.68 of 1984 provided that "public purpose" included provisions for or in connection with sanitary improvements of any kind, including reclamation; laying out of village sites, townships or the extension, planned development or improvement of existing village sites or townships; settlement of land for agriculture with the weaker section of people etc. Section 4 provided that whenever it appears to the appropriate Government that the land in any locality is needed for any public purpose a notification to that effect shall be published. Section 6 provided that subject to provisions of Part VII of the Act, when appropriate Government is satisfied after considering the report, if any, made under section 5-A, Sub-section (2), that any particular land is needed for any public purpose or for a company, a declaration shall be made to that effect. Section 17 provided that in case of urgency, whenever appropriate Government so directs,

Collector, though no such award has been made, may, on the expiration of 15 days, from the publication of the notice mentioned in Sub-section (1) of section 9, take possession of any waste or arable land needed for public purposes or for a company. Section 39 provided that provisions of sections 6 to 37 shall not be put in force in order to acquire land for any company, unless the previous consent of the appropriate Government has been taken and unless the Company has executed the agreement.

29. Act, 1894 was amended by Act No.68 of 1984 (hereinafter referred to as "Amendment Act, 1984"). Amendment in Act, 1894 was necessitated for the object and purpose as specifically stated in the statements of object and reasons of Amendment Act, 1984. It is useful to quote the relevant portion of the statement of objects and reasons herein below:

"Prefatory Note- Statement of Objects and Reasons.- With the enormous expansion of the State's role in promoting public welfare and economic development since independence, acquisition of land for public purposes, industrialisation, building of institutions, etc., has become far more numerous than ever before. While this is inevitable, promotion of public purpose has to be balanced with the rights of the individual whose land is acquired, thereby often depriving him of his means of livelihood. Again, acquisition of land for private enterprises ought not to be placed on the same footing as acquisition for the State or for an enterprise under it. The individual and institutions who are unavoidably to be deprived of their property rights in land need to be adequately compensated for the loss keeping in view the sacrifice they have to make for the larger interests of the community. The pendency of acquisition proceedings for long periods often causes hardships to the affected parties and renders unrealistic the scale of compensation offered to them.

2. It is necessary, therefore, to restructure the legislative framework for acquisition of land so that it is more adequately informed by this objective of serving the interests of the community in harmony with the rights of the individual. Keeping the above objects in view and considering the recommendations of the Law Commission, the Land Acquisition Review Committee as well as the State Governments, institutions and individuals, proposals for amendment to the Land Acquisition Act, were formulated and a Bill for this purpose was introduced in the Lok Sabha on the 30th April, 1982. The same has not been passed by either House of Parliament. Since the introduction of the Bill, various other proposals for amendment of the Act have been received and they have also been considered in consultation with State Governments and other agencies. It is now proposed to include all these proposals in a fresh Bill after withdrawing the pending Bill. The main proposals for amendment are as follows:-

(i) The ***definition of "public purpose" as contained in the Act is proposed to be so amended as to include a longer illustrative list retaining, at the same time, the inclusive character of the definition.***

(ii) Acquisition of land for non-Government companies under the Act will henceforth be made in pursuance of Part VII of the Act in all cases.

(iii) ....."

The Legislature noticed that with the enormous expansion of the State's role

in promoting public welfare and economic development acquisition of land for public purpose has become far more numerous than ever before, which is inevitable but the same is to be balanced with the rights of the individual whose land is acquired, thereby often depriving him of his means of livelihood. It was further stated that acquisition of land for private enterprises ought not to be placed on the same footing as acquisition for the State or for an enterprise under it. One of the main proposals for amendment as noticed in the statement of objects and reasons was ".. acquisition of land for non- Government companies under the Act will henceforth be made in pursuance of Part VII of the Act in all cases"."
(emphasis added)

30. Consequently, amendments were made in sections 3(f), 4,6,17 and 39. Following is the tabular chart of unamended and amended provisions of the above sections:

Before 1984 Amendment	**After 1984 amendment**
3 (f) the expression "public purpose" includes the provision of village-sites in districts in which the appropriate Government shall have declared by notification in the Official Gazette that it is customary for the Government to make such provision; and	3 (f) the expression "public purpose" includes- (i) the provision of village-sites, or the extension, planned development or improvement of existing village-sites; (ii) the provision of land for town or rural planning; (iii) the provision of land for planned development of land from public funds in pursuance of any scheme or policy of Government and subsequent disposal thereof in whole or in part by lease, assignment or outright sale with the object of securing further development as planned; (iv) the provision of land for a corporation owned or controlled by the State; (v) the provision of land for residential purposes to the poor or landless or to persons residing in areas affected by natural calamities, or to persons displaced or affected by reason of the implementation of any scheme undertaken by Government, any local authority or a corporation owned or controlled by the State; (vi) the provision of land for carrying out any educational, housing, health or slum clearance scheme sponsored by Government or by any authority established by Government for carrying out any such

	scheme, or with the prior approval of the appropriate Government, by a local authority, or a society registered under the Societies Registration Act, 1860 (21 of 1860), or under any corresponding law for the time being in force in a state, or a co-operative society within the meaning of any law relating to co-operative societies for the time being in force in any State; (vii) the provision of land for any other scheme of development sponsored by Government or with the prior approval of the appropriate Government, by a local authority; (viii) the provision of any premises or building for locating a public office, **(but does not include acquisition of land for companies);**	for any public purpose, a notification to that effect shall be published in the Official Gazette, and the Collector shall cause public notice of the substance of such notification to be given at convenient places in the said locality.	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).
4 (1) Whenever it appears to the [appropriate Government] that land in any locality [is needed or] is likely to be needed	4 (1) Whenever it appears to the appropriate Government the land in any locality [is needed or] is likely to be needed for any	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	6. Declaration that land is required for a public purpose. - (1) Subject to the provision of Part VII of this Act, [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

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 (I) 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), published after the commencement of the Land Acquisition (Amendment and Validation) Ordinance, 1967 (1 of 1967), shall be made after the 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 (I) 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 (68 of 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 (68 of 1984), shall be made after the expiry of one year from the date of the publication of the notification:

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.

(2) [Every declaration] shall be published in the Official Gazette, and 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 of for a Company, as the case may be; and after making

such declaration, the [appropriate Government] may acquire the land in manner hereinafter appearing.		for any Railway Administration to acquire the immediate possession of any land for the maintenance of their traffic or for the purpose of making thereon a river-side or ghat station, or of providing convenient connection with or access to any such station, the Collector may, immediately after the publication of the notice mentioned in the sub-section (1) and with the previous sanction of the [appropriate Government], enter upon and take possession of such land, which shall thereupon [vest absolutely in the [Government]], free from all encumbrances: (3) In every case under either of the preceding sub-section the Collector shall at the time of taking possession offer to the persons interested	
17. Special powers in cases of urgency. - (1) In cases of urgency, whenever the [appropriate Government], so directs, the Collector, though no such award has been made, may, on the expiration of fifteen days from the publication of the notice mentioned in section 9, sub-section 1), take possession of any waste or arable land needed for public purposes or for a Company. Such land shall thereupon [vest absolutely in the [Government], free from all encumbrances. (2) Whenever, owing to any sudden change in the channel of any navigable river or other unforeseen emergency, it becomes necessary	17. Special powers in case of urgency. - (1) In cases of urgency whenever the appropriate Government, so directs, the Collector, though no such award has been made, may, on the expiration of fifteen days from the publication of the notice mentioned in section 9, sub-section 1). [take possession of any waste or arable land needed for a public purpose]. Such land shall thereupon vest absolutely in the Government, free from all encumbrances.		

compensation for the standing crops and trees (if any) on such land and for any other damage sustained by them caused by such sudden dispossession and not excepted in section 24; and, in case such offer is not accepted, the value of such crops and trees and the amount of such other damage shall be allowed for in awarding compensation for the land under the provisions herein contained. [(4) In the case of any land to which, in the opinion of the [appropriate Government], the provisions of sub-section (1) or sub-section (2) are applicable, the [appropriate Government] may direct that the provisions of section 5A shall not apply, and, if it does so direct, a declaration may be made under section 6 in respect of the land at any time after the	publication of the notification under section 4, sub-section (1)].
39. Previous consent of appropriate Government and execution of agreement necessary.- The provisions of sections 6 to 37 (both inclusive) and sections shall not be put in force in order to acquire land for any company, unless with the previous consent of the appropriate Government, nor unless the Company shall have executed the agreement hereinafter mentioned.	39. Previous consent of appropriate Government and execution of agreement necessary. - The provisions of sections 6 to 16 (both inclusive) and sections 18 to 37 (both inclusive)] shall not be put in force in order to acquire land for any company under this Part, unless with the previous consent of the appropriate Government, nor unless the Company shall have executed the agreement hereinafter mentioned.

31. Section 3 and Clause (e) and (f) is a definition clause and define 'Company' and "public purpose". Definition of "Company" is exhaustive but "public purpose" is an inclusive definition, which is expansive definition. However, an exclusionary definition have been added in section 3(f) by amendment "excluding acquisition of land for Companies". Section 3 (e) and (f) are reproduced as under :

"3.(e) the expression ***"Company"*** *means-*

(i) a company as defined in section 3 of the Companies Act, 1956 (1 of 1956), other than a Government company referred to in clause (cc);

(ii) a society registered under the Societies Registration Act, 1860 (21 of 1860), or under any corresponding law for the time being in force in a State, other than a society referred to in clause (cc);

(iii) a co-operative society within the meaning of any law relating to co-operative societies for the time being in force in any State, other than a co-operative society referred to in clause (cc)."

*"3.(f) the expression "**public purpose" includes provision for or in connection with-***

(i) sanitary improvements of any kind, including reclamation;

(ii) the laying out of village sites, townships or the extension, planned development or improvement of existing village-sites or townships;

(iii) the settlement of land for agriculture with the weaker section of the people; and

(iv) the provision of land for a corporation owned or controlled by the State;

(v) the provision of land for residential purposes to the poor or landless or to persons residing in areas affected by natural calamities, or to persons displaced or affected by reason of the implementation of any scheme undertaken by Government, any local authority or a corporation owned or controlled by the State;

*(vi) the **provision of land for carrying out any educational,** housing, **health** or slum clearance scheme sponsored by Government, or **by any authority established by Government for carrying out any such scheme,** or, **with the prior approval** of **the appropriate Government,** by a **local authority, or a society registered under the Societies Registration Act,** 1860 (21 of 1860), or under any corresponding law for the time being in force in a State, or a co-operative society within the meaning of any law relating to co-operative societies for the time being in force in any State;*

(vii) the provision of land for any other scheme of development sponsored by Government or, with the prior approval of the appropriate Government, by a local authority;

*(viii) the **provision of any premises or building for locating a public office,but does not include acquisition of land for companies."*** (As amended in U.P.)

32. Section 4 of Act 1894, permits acquisition of land under Part II if land is required for any 'public purpose' or for a 'company'. It reads as under :

"4. Publication of preliminary notification and power of officers thereupon. *-(1) Whenever it appears to the appropriate Government **or Collector** the **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, **except in the case of any land to which by virtue of a direction of the State Government under sub-section (4) of Section 17, the provisions of Section 5-A shall not apply,** 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.

Explanation.-In respect of any land in a regulated area as defined in the Uttar Pradesh (Regulation of Building Operations) Act, 1958, a notification under this sub-section may be issued in anticipation of the preparation and finalisation of a scheme for the planned development of the area in which the land is situated and notwithstanding anything contained in section 5-A, it shall be sufficient to specify in such notification that the land is needed or is likely to be needed for the planned development of that area without further specification of the particulars of the proposed development.

(2) Thereupon it shall be lawful for any officer, either generally or specially authorized by such Government ***or Collector*** *in this behalf, and for his servants and workmen,-*

to enter upon and survey and take levels of any land in such locality;

to dig or bore into the sub-soil;

to do all other acts necessary to ascertain whether the land is adapted for such purpose;

to set out the boundaries of the land proposed to be taken and the intended line of the work, if any, proposed to be made thereon;

to mark such levels, boundaries and line by placing marks and cutting trenches; and,

where otherwise the survey cannot be completed and the levels taken and the boundaries and line marked, to cut down and clear away any part of any standing crop, fence or jungle;

Provided that no person shall enter into any building or upon any enclosed court or garden attached to a dwelling house (unless with the consent of the occupier thereof) without previously giving such occupier at least seven days' notice in writing of his intention to do so." (As amended in U. P.)

33. The acquisition of land under Act, 1894 is contemplated for 'public purpose' and for 'companies'. For companies also acquisition is permissible for public good on the grounds which are also for public benefit as mentioned in section 40 of Act, 1894. Amendment in section 4 of Act, 1894 was made by adding after the words " any public purpose, the words " or for a company". Section 4 prior to amendment, had only used the expression "for any public purpose". There was reason and rational for using expression "for any public purpose" only. The rational was that all acquisitions were contemplated for public purpose and acquisition for company was also for limited public purposes permitted for acquisition for company. Sections 5, 5-A and 6 of Act, 1894 are in respect of payment for damage, hearing of objections and declaration that land is required for public purpose respectively and read as under :

"5. Payment for damage.*-The officer so authorized shall at the time of such entry pay or tender payment for all necessary damage to be done as aforesaid, and in case of dispute as to the sufficiency of the amount to paid or tendered, he shall at once refer the dispute to the decision of the Collector or other Chief Revenue Officer of the District, and such decision shall be final."*

"5-A. Hearing of objections.*-(1) Any person interested in any land which has been notified under Section 4, sub-section(1), as being needed or likely to be needed for a public purpose or for a company may,* ***within twenty one days*** *from*

the date of the publication of the notification, object to the acquisition of the land or of any land in the locality, as the case may be.

(2) 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.

(3) For the purposes of this section, a person shall be deemed to be interested in land who would be entitled to claim an interest in compensation if the land were acquired under this Act."

"6. ***Declaration that land is required for a public purpose.****-(1) Subject to the provisions of Part VII of this Act, when the appropriate Government is satisfied, after considering the report, if any, made under section 5-A, 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 authorised 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 5-A, 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 executed.

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.

(2) Every declaration shall be published in the Official Gazette, and in two daily newspapers circulated in the locality in which the land is situate 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 alnd in a manner hereinafter appearing."
(As amended in U.P.)

34. Supreme Court had laid down, while interpreting the provisions of Act, 1894 prior to the Amendment Act 1984, that acquisition for a company is also an acquisition for a limited public purpose in **(1993) 4 SCC 255 Shyam Nandan Prasad and Others Vs. State of Bihar & others** and in paragraph 21, it is said:

"21. Now here the distinction is made between a public purpose and a purpose for the company. The ***acquisition of land for a company is in substance for a public purpose as all those activities mentioned in Section 40 such as constructing dwelling houses and providing amenities for the benefits of workmen employed by it and construction of some work for public utility etc. serve the public purpose.*** *The acquisition for the company and the purpose for it, can well be investigated under Section 5-A or Section 40, necessarily after the notification under Section 4. Reference may usefully be made to Babu Barkya Thakur v. State of Bombay (now Maharashtra), AIR 1960 SC 1203. It was the conceded case before the High Court that there could be no acquisition for the respondent-Society without provisions of Sec. 40 of the Act being involved and complied with. In Babu Barkya's case supra too, this Court has taken the view that as provided in Section 39,* ***the machinery of the Land Acquisition Act beginning with Section 6 and ending with Sec. 37 shall not be put into operation unless two conditions precedent are fulfilled, namely, (i) the previous consent of the appropriate Government has been obtained and (ii) an agreement in terms of Section 41 has been executed by the Company. Such consent could be given if it was satisfied on the report of the enquiry envisaged by Section 5-A(2) or enquiry held under Section 40 itself that the purpose of the acquisition is for purposes as envisaged in Section 40.*** *In this state of law, the plea set up on behalf of the appellants that when their Society could not be treated either as a private or a Government company, was no company at all so as to remain bound to comply with Chapter VII of the Act, is of no substance.* ***The Society as a company is bound to satisfy the requirements of Section 40 before taking aid of Sections 6 to 37 of the Act to promote its needed acquisition."*** *(emphasis added)*

35. Thus, section 4 before amendment used expression "for any public purpose" only whereas in section 6 both the expressions "for public purpose" or "for company" were used. The amendments made by Amendment Act, 1984 clearly separated the acquisition "for public purpose" and acquisition "for company" from the stage of issue of notification under Section 4 itself.

36. For acquisition for a company, compliance of part VII as well as

compliance of Land Acquisition (Companies) Rules, 1963 (hereinafter referred to as "Rules, 1963") was made necessary.

37. Part VII deals with acquisition of land for companies. Section 39 provides for previous consent of appropriate government and execution of agreement mandatory. It reads as under :

*"39. Previous consent of appropriate Government and execution of agreement necessary.-**The provisions of sections 6 to 16 (both inclusive) and sections 18 to 37 (both inclusive) shall not be put in force in order to acquire land for any company, under this part, unless with the previous consent of the appropriate Government, nor unless the company shall have executed the agreement hereinafter mentioned."***

(emphasis added)

38. Consent contemplated by Section 39 is restricted by Section 40 and it is said that such consent shall not be given unless appropriate government is satisfied of certain aspects, Section 40, therefore, is reproduced hereinunder :

"40. Previous enquiry.-(1) Such consent shall not be given, unless the appropriate Government be satisfied,** either on the report of the Collector **under section 5-A, sub-section (2), or by an enquiry held as hereinafter provided,-

*(a) that the **purpose of the acquisition is to obtain land for the erection of dwelling-houses** for **workmen employed** by the company **or for the provision of amenities directly connected** therewith, or*

*(aa) that such **acquisition is needed for the construction of some building or work for a company which is engaged or is taking steps for engaging itself in any industry or work which is for a public purpose,** or*

(b) that such acquisition is needed for the construction of some work, and that such work is likely to prove useful to the public.

*(2) Such **enquiry shall be held by such officer and at such time and place as the appropriate Government shall appoint.***

(3) Such officer may summon and enforce the attendance of witnesses and compel the production of documents by the same means and, as far as possible, in the same manner as is provided by the Code of Civil Procedure, 1908 (5 of 1908) in the case of a Civil Court." (emphasis added)

39. Section 41 talks of agreement which is to be entered into with appropriate government and it reads as under :

*"41. **Agreement with appropriate Government-**If the appropriate Government is satisfied after considering the report, if any, of the Collector under Section 5-A, sub-section (2), or **on the report of the officer making an inquiry under section 40 that the proposed acquisition is for any of the purposes referred to in clause (a) or clause (aa) or clause (b) of sub-section (1) of section 40, it shall require the company to enter into an agreement with the appropriate Government, providing to the satisfaction of the appropriate Government for the following matter, namely :-***

(1) the payment to the appropriate Government of the cost of the acquisition;

(2) the transfer, on such payment, of the land to the Company;

(3) the term on which the land shall be held by the Company;

(4) where the acquisition is for the purpose of erecting dwelling-houses or the provision of amenities connected therewith, the time within which, the dwelling-houses or amenities shall be erected or provided;

(4-A) where the acquisition is for the construction of any building or work for a Company which is engaged or is taking steps for engaging itself in any industry or work which is for a public purpose, the time within which, and the conditions on which, the building or work shall be constructed or executed; and

(5) where the acquisition is for the construction of any other work, the time within which and the conditions on which the work shall be executed and maintained and the terms on which the public shall be entitled to use the work.

(emphasis added)

40. Section 42 requires publication of agreement. Section 43 talks of certain cases where Sections 39 to 42 with regard to agreement will not apply and it reads as under :

*"**43. Section 39 to 42 not to apply where Government bound by agreement to provide land for companies.**-The provisions of sections 39 to 42, both inclusive, shall not apply and the corresponding sections of the Land Acquisition Act, 1870 (10 of 1870), shall be deemed never to have applied, to the acquisition of land for any Railway or other company, for the purposes of which, under any agreement with such company, the Secretary of State for India in Council, the Secretary of State, the Central Government or any State Government is or was bound to provide land."*

41. Section 44A places certain restrictions on acquisition of land for private companies, other than government companies, and reads as under :

*"**44A. Restriction on transfer, etc.*** No Company for which any land is acquired under this Part shall be entitled to transfer the said land or any part thereof by sale, mortgage, gift, lease or otherwise except with the previous sanction of the appropriate Government."

42. Section 55 of Act, 1894 confers power upon appropriate government to make Rules and reads as under :

*"55. Power to make rules.-(1) The **appropriate Government shall have power to make rules consistent with this Act** for the guidance of officers in all matters connected with its enforcement, and may from time to time alter and add to the rules so made:*

*Provided that the **power to make rules for carrying out the purposes of Part VII of this Act shall be exercisable by the Central Government and such rules may be made for the guidance of the State Governments and the officers of the Central Government and of the State Governments:***

Provided further that every such rule made by the Central Government shall be laid as soon as may be after it is made, before each House of Parliament while it is in session for a total period of thirty days which may be comprised in one session or two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive

sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule:

Provided also that every such rule made by the State Government shall be laid, as soon as may be after it is made, before the State Legislature.

(2) The power to make, alter and add to rules under sub-section (1) shall be subject to the conditions of the rules being made, altered or added to after previous publication.

(3) All such rules, alterations and additions shall be published in the Official Gazette, and shall thereupon have the force of law."

43. In view of proviso to Section 55 (1) of Act, 1894, Central Government has framed Rules, 1963. Rule 3 thereof talks of Land Acquisition Committee (hereinafter referred to as "Committee") to be constituted by "appropriate government" by notification in Official Gazette and constitution of Committee described under Rules 3 (2) of Rules, 1963 and it reads as under :

"3(2) the Committee shall consist of-

(i) the Secretaries to the Government of the Departments of Revenue, Agriculture and Industries or such other officers of each of the said Departments as the appropriate Government may appoint.

(ii) such other members as the appropriate Government may appoint for such term as that Government may, by order, specify, and

(iii) the Secretary to the Department or any officer nominated by him dealing with the purposes for which the company proposes to acquire the land."

44. Rule 4 provides the manner in which appropriate government is to be satisfied before initiating acquisition proceedings and reads as under :

"4. ***Appropriate Government to be satisfied with regard to certain matters before initiating acquisition proceedings.-*** *(1) Whenever a* ***company makes an application to the appropriate Government for acquisition*** *of any land that* ***Government shall direct the Collector to submit a report to it on the following matters,*** *namely :--*

(i) that the company has made its best endeavour to find out lands in the locality suitable for the purpose of the acquisition;

(ii) that the company has made all reasonable efforts to get such lands by negotiation with the persons interested therein on payment of reasonable price and such efforts have failed;

(iii) that the land proposed to be acquired is suitable for the purpose;

(iv) that the area of land proposed to be acquired is not excessive;

(v) that the company is in a position to utilise the land expeditiously; and

(vi) where the land proposed to be acquired is good agricultural land, that no alternative suitable site can be found so as to avoid acquisition of that land.

(2) The ***Collector*** *shall, after* ***giving the company a reasonable opportunity,*** *to make* ***any representation in this behalf, hold an enquiry into the***

matters referred to in sub-rule (1) *and while holding such enquiry he shall :--*

(i) in any case where the land proposed to be acquired is agricultural land, consult the Senior Agricultural Officer of the District whether or not such land is good agriculture land;

(ii) determine, having regard to the provisions of Sections 23 and 24 of the Act, the approximate amount of compensation likely to be payable in respect of the land, which, in the opinion of the Collector, should be acquired for the company; and

(iii) ***ascertain whether the company offered a reasonable price*** *(not being less than the compensation so determined), to t****he persons interested in the land proposed to be acquired.***

Explanation.--For the purpose of this rule "good agricultural land" means any land which, considering the level of agricultural production and the crop pattern of the area in which it is situated, is of average or above average productivity and includes a garden or grove land.

(3) As soon as may be ***after holding the enquiry under sub-rule (2), the Collector shall submit a report to the appropriate*** *Government and a copy of the same be forwarded by that Government to the Committee.*

(4) ***No declaration shall be made*** *by the appropriate Government under Section 6 of the Act* ***unless****--*

(i) the ***appropriate Government has consulted the Committee and has considered the report submitted under this rule and the report, if any, submitted under section 5-A of the Act;*** *and*

(ii) the ***agreement under section 41 of the Act has been executed by the company."***

(emphasis added)

45. Rule 5 provides the matter to be provided in the agreement under Section 41 of Act, 1894 and reads as under :

*"****5. Matters to be provided in the agreement under Section 41.-*** *(1) The terms of the agreement referred to in section 41 of the Act shall include the following matters, namely :-*

(i) that the company shall not, except with the previous sanction of the appropriate Government, use the land for any purpose other than that for which it is acquired;

(ii) that the time within which the dwelling houses or amenities directly connected therewith shall be erected of provided or the building or work shall be constructed or executed shall not exceed three years from the date of transfer of the land to the company;

(iii) that where the appropriate Government is satisfied after such enquiry as it may deem necessary that the Company was prevented by reasons beyond its control from erecting, providing, constructing or executing dwelling houses or amenities or any building or work within the time specified in the agreement, the appropriate Government may extend the time of that purpose by a period not exceeding one year at a time so however that the total period of extension shall not exceed three years.

(iv) that if the company commits a breach of the conditions provided for in the agreement, the appropriate Government may make an order declaring the transfer of the land to the company as null and void whereupon the land shall revert back to the appropriate Government and directing that an amount not exceeding one-fourth of the amount paid by the company to the appropriate Government as the cost of acquisition under clause (1) of Section 41

of the Act shall be forfeited to the appropriate government as damages and the balance shall be refunded to the company, and the order so made shall be final and binding.

(v) that if the company utilises only a portion of the land for the purpose for which it was acquired and the appropriate Government is satisfied that the company can continue to utilise the portion of the land used by it even if the unutilised part thereof is resumed, the appropriate Government may make an order declaring the transfer of the land with respect of the unutilised portion thereof as null and void whereupon such unutilized portion shall revert back to the appropriate Government and directing that an amount not exceeding one-fourth of such portion of the amount paid by the company as cost of acquisition under clause (1) of Section 41 of the Act as is relatable to the unutilized portion shall be forfeited to the appropriate Government as damages and that balance of that portion shall be refunded to the company and that order so made shall, subject to the provisions of clause (vi), be final and binding.

(vi) that where there is any dispute with regard to the amount relatable to the unutilized portion of the land, such dispute shall be referred to the court within whose jurisdiction the land or any part thereof is situated and the decision of that court thereon shall be final.

(2) Where the company commits a breach of any of the terms of the agreement, the appropriate Government shall not make an order under clause(vi) or clause(v) of sub-rule (1), unless the company has been given opportunity of being heard in the matter.

(3) The appropriate Government shall consult the Committee before according any sanction under clause (i) of sub-rule (i) or extending the time under clause(iii) or making any order under clause(iv) or clause (v) of that sub-rule."

46. Rule 6 provides certain additional matters and reads as under :

*"**6. Additional matters which may be provided in the Agreement under Section 41-**(1) Without prejudice to the provisions of Rule 5, the terms of agreement referred to in section 41 of the Act may also include the following matters, namely ; that, before an award has been made under Section 11 of the Act, the company shall deposit with the Collector, free of interest, such amount being not more than two-thirds of the approximate amount of compensation payable in respect of the land as determined under clause (ii) of sub-rule (2) of Rule 4, and within such time as the Collector thinks fit, to specify in this behalf.*

(2) Where any amount has been deposited with the Collector under sub-rule (1), the Collector shall tender payment of the amount so deposited to the persons interested who, in the opinion of the Collector, are entitled to receive payment of compensation under sub-section (1) of section 31 of the Act and shall pay it to them, unless prevented by some one or more of the contingencies mentioned in sub-section (2) of Section 31 of the Act, subject to the following conditions, namely :--

(i) the execution of an agreement by each recipient that the amount received by him would be adjusted against the compensation finally awarded and that where the amount received by him exceeds the amount of the compensation finally awarded, the excess amount shall be recoverable from him as an arrears of land

revenue and that he shall not claim any interest under the provisions of the Act in respect of the amount received by him under this sub-rule; and

(ii) the execution of a bond by each recipient with or without security as the Collector may decide undertaking to indemnify the appropriate Government against any claim for compensation or payment thereof by any other person.

(3) If the amount deposited by the company under sub-rule (1) or any part thereof is not paid under sub-rule (2) the Collector shall, as soon as practicable, refund the same to the company."

47. Rule 9 makes special provision in relation to a company and reads as under :

*"**9. Special provision in relation to a company.**-Where an **application is made to the appropriate Government for acquisition of any land by a company,** other than a company owned or controlled by the Central Government or any State Government, **such acquisition shall ordinarily be made in accordance with the provisions of Part VII of the Act.***

*(2) Where the land is proposed to be acquired **for a company, other than company owned or controlled by the Central Government, the special power conferred on the appropriate Government under Section 17 of the Act shall not be exercisable unless it is satisfied that it is necessary to do so in public interest."** (emphasis added)*

48. We may now examine the purpose of inquiry under Rules, 1963 and Part VII.

49. The State having itself undertaken numerous welfare activities, acquisitions for public purpose by State are increasing day by day. The land available specially for agricultural, is limited, more strict inquiry and rigorous procedure has been envisaged and contemplated by 1984 Amendment. At this juncture, it is necessary to refer to Rules 4 and 5 of the Land Acquisition (Companies) Rules, 1963. Various requirements of Rule 4 indicate that normally, request of the company for acquisition is not to be accepted unless it has made best endeavour to find out the land, and made all reasonable efforts to get such lands by negotiation on payment of reasonable price; area of land proposed to be acquired is not excessive; and, if the land proposed to be acquired is a good agricultural land, no alternative suitable site is to be found. The inquiry under Rule 4 of Rules, 1963 is envisaged with the object that no agricultural land be acquired, if any suitable site can be found. The obligation to find suitable site has been placed on the Government which shall obtain a report from Collector on the above mentioned issues.

50. Another noticeable change which has been brought by Amendment Act, 1984 is the amendment in section 17. In unamended Section 17 in cases of urgency whenever appropriate Government so directs, Collector could have taken possession of any land needed for public purpose or for a company. After amendment, in Section 17, the words "or for a Company" have been deleted. Thus, for an acquisition for a company, Section 17 is no more available. Legislative intent is that for acquisition for 'company', urgency clause is not to be invoked. Legislature thus, does not treat acquisition for a company as an urgent acquisition. Statement of objects and reasons give clear Legislative intendment for interpreting amendments brought in sections 3(f), 4, 6 and 17.

51. The amendments in section 39 also re-enforces Legislative intendment that in an acquisition for a company section 17 is not available. Earlier Section 39 provided that provisions of sections 6 to 37 shall not be put in force in order to acquire the land for any company unless previous consent of appropriate Government is obtained and an agreement is executed. Section 17 was included in section 39. Thus, before amendment section 17 was permissible to be used, after previous consent of Government is obtained, and an agreement is executed, but, deletion of section 17 from section 39 makes the intention clear that Section 17 is not available for acquisition for a company.

52. In **1973 A.I.R. S.C. 1016 Commissioner of Income Tax Gujrat V. Vadilal Lallubhai etc.** Court laid down that in order to find out the legislative intent, it has to be find out what was the mischief that legislature wanted to remedy.

53. From the statement of object of Amendment Act, 1984 and the amendment brought in Act, 1894, it is apparent that legislature intended that acquisition for a company be no longer treated as acquisition for public purpose. For acquisition for a company more strict scrutiny and compliance of the Rules, 1963 and Part VII of Act, 1894 was made mandatory with clear intendment that acquisition for a company be not treated as acquisition for public purpose and land be acquired for company only when mandatory requirement of Part VII of Act, 1894 and Rules, 1963 are complied with. Due to above reason, Section 17 of Act, 1894 was made inapplicable for acquisition for companies as noted above.

54. Section 3(f) uses exclusionary clause in negative words. Negative words used in section 3(f) are clearly prohibitory and in no case, acquisition for a company has to be treated as an acquisition for public propose for purpose of Sections, 4,6 and 17. In **(1997) 2 SCC 424 Mannalal Khetan & others Vs. Kedar Nath Khetan,** Court laid down that when Statute prohibits acquisition for company to be treated as acquisition for public purpose, the same cannot be done indirectly.

55. Another authority relevant to be noticed for interpreting exclusionary clause is **(2006) 6 SCC 530 Falcon Tyres Ltd.,M/s Vs. State of Karnataka.** Therein agricultural produce was defined in section 2A(1) of Entry Tax Act. There was exclusionary definition in the definition clause. In second schedule Sub-section (3) of Section 6 provided that no tax shall be levied under the Act on the goods specified in second Schedule or its entry into a local area. Serial No. 2 of the second schedule specifies Agriculture produce including tea, coffee and cotton (whether ginned or unginned) as exempt from the entry tax. The argument was raised that tea and coffee is to be included in the agricultural produce by virtue of second schedule. Rejecting the submissions, in paragraphs 10 and 13, Court held :

"10. We do not find any substance in the submission of the learned counsel for the appellant that the semicolon after the word cotton does not mean that the first part of the Section is disjunctive from 'such produce' as has been subjected to any physical, chemical or other process. Section 2 (A) (1) is in two parts, it excludes two types of food from agricultural produce. According to us, the definition of the agriculture and horticulture produce does not say as to what would be included in the agriculture or horticulture produce,

in substance it includes all agriculture or horticulture produce but excludes, (1) tea, coffee, rubber, cashew, cardamom, pepper and cotton from the definition of the agriculture or horticulture produce though all these products as per dictionary meaning or in common parlance would be understood as agricultural produce and (2) "such produce as has been subject to any physical, chemical or other process for being made fit for consumption", meaning thereby that the agricultural produce other than what has been excluded, which has been subjected to any physical, chemical or other process for making it fit for consumption would also be excluded from the definition of the agriculture or horticulture produce except where such agricultural produce is merely cleaned, graded, sorted or dried. This is ***an exception created by the legislature. If the legislature intended to create exception for rubber also it could have done it but it chose not to do it. Simply because the legislature has included tea, coffee and cotton in the Second Schedule exempting it from payment of Entry Tax does not mean that all other agricultural produce items which have been excluded from the definition of the agricultural produce would stand included in the Second Schedule to the Act exempting them from payment of Entry Tax. This would be doing violation to the Act as well as acting contrary to the intent of the legislature."*** *(emphasis added)*

56. The above view of ours finds full support from Division Bench judgment of Madhya Pradesh High Court in **Chaitram Verma and others vs. Land Acquisition Officer, Raipur and others reported in A.I.R. 1994 Madhya Pradesh 74.** In above case Section 4 notification was issued for acquisition of land for "public purpose". The respondent-4 therein a company, made an application for making available land for construction of railway siding. Application of Section 17(1) was approved by Commissioner. The submission before High Court by land owners was to the effect that acquisition of their land is in colourable exercise of power under Act, 1894, inasmuch as, though the land is needed for respondent No.4 (a public limited company), notification under Section 4(1) and declaration under Section 6 of the Act mention the acquisition for public purpose with a view to avoid application of Chapter VII of the Act and to deny statutory benefits to the petitioners. Division Bench noticed the amendments made by Act No.68 of 1984 in Section 3 and said in paragraphs 11 and 12 of judgment as follows :-

11. ..... The last part of the definition i.e. "it does not include acquisition of land for Companies" is important and brings out the obvious fact that even though a "public purpose" may be served by acquiring land for companies, the expression "public purpose" as used in the Act does not include such acquisition. ***It is true that the definition is inclusive and therefore, it is possible to hold that it includes many other purposes, which would otherwise not be included within it. But the use of exclusionary sentence as the end would make the difference and indicate that except for acquisitions for companies which cannot be treated as acquisition for public purpose, all other purposes are included within it. It is, therefore, a case where the definition is both inclusive and exclusive, the exclusion being of a limited nature suggesting that other categories of acquisitions which are not excluded fall within the inclusive definition.*** *This method in relation to a*

definition clause is not natural and had received attention of the Supreme Court in Purshottam H. Judye v. V. B. Potdar, AIR 1966 SC 856 and Commr. of Income-tax, Gujarat v. Vidilal Lallubhai, AIR 1973 SC 1016. Under the circumstances whatever may be extent of purpose included within the definition of "public purpose", acquisition for company is excluded from it. Clearly therefore, ***an acquisition for a company is to be distinguished from acquisition for a public purpose, and an acquisition for a company even though serving public purpose, cannot, in the context of S. 3(i) of the Act, be accepted as an application for a public purpose.***

12. Legal position was different before the amendment of the definition in 1984 by Act No. 68 of 1984. The definition of "public purpose" in S. 3(f) of the Act before this amendment did not have any exclusionary clause and was inclusive. Similarly, S. 4(1) of the Act permitted issue of notification only for a "public purpose". It was therefore possible to then submit that if 'public purpose' is served by a company, there would be no illegality in the acquisition for a company on the basis of notification, mentioning acquisition for a public purpose. In this connection the decision of the Supreme Court in Barkya Thakur v. State of Bombay, AIR 1960 SC 1203, may be profitably read. The law declared by this decision has, however, become irrelevant because of the amendment not only of the definition of 'public purpose' in Section 3(f) but also Section 4(1) of the Act. Under the circumstances, the submission that the public purpose being served by the respondent No. 4, notification mentioning acquisition as for public purpose is legal, cannot be accepted."

(emphasis added)

57. Division Bench further held that provisions of Section 17(1) were not attracted in such acquisition. In the said case an agreement was also entered under Section 41 of Act, 1894 even before issuance of notification under Section 4. Court held that since authorities issuing notification under Section 4 knew about agreement under Section 41, therefore, acquisition mentioning "for public purpose" was held to be in colourable exercise of power. Court further held that Section 17 was inapplicable in such acquisition. It also held that there was no justification for invoking urgency clause under Section 17(1) even if Section 17(4) was applicable.

58. Learned Senior Advocate, appearing for respondent-4 submits that exclusionary clause in section 3(f) is not absolute. Elaborating this submission, he contends that in following three situations exclusionary clause should not be taken to be applicable:-

(i) A situation where the acquisition for the company comes in the main part of the definition of section 3(f).

(ii) If acquisition comes within a express provision excluding applicability of part VII of the Act.

(iii) Acquisition for a company in which public fund is infused by the Government. Reliance has been placed on second proviso to section 6 of the Act.

59. Thus, first situation where exclusionary clause shall not be applicable, as per learned counsel for respondents, is when purpose of the company is covered in the main definition of 'public purpose' given under section 3(f). The arguments is to be tested by referring to various express public purpose mentioned in section 3(f). Much emphasis has been laid down by

learned counsel for respondents on aforesaid.

60. The public purpose as envisaged in clause (vi) is for carrying out any educational, housing, health or slum clearance scheme sponsored by Government or by any authority established by Government for carrying out any such scheme, or, with the prior approval of the appropriate Government. However, the carrying out of above scheme is contemplated only by following:

(a) A local Authority

(b) A society registered under the Societies Registration Act, 1860

(c) A Cooperative Society within the meaning of any law relating to cooperative Society.

61. Confining the carrying out of scheme by above three categories clearly indicates that a 'company' is excluded even for carrying out such a scheme.

62. It is relevant to note the expression 'companies' has been defined in section 3(e). It begins with "...unless there is something repugnant in the subject or context ..." Thus, the expression "Company" wherever used in Act, 1894 shall have the meaning as given in section 3(e) unless there is something repugnant in the subject or context. In clause 3(f) (vi) when a 'registered society' and 'cooperative society' has been specifically included for carrying out such scheme, the exclusion of registered company under the Act, 1956 is for purpose and object. Section 3(f) (vi) thus, clearly contemplates that educational, housing, health or slum clearance scheme, although is a public purpose while carrying out any scheme sponsored by Government or any authority, but a registered company is excluded from said clause which has purpose and object. For this purpose, we may also look to Clause (vii) of Section 3(f). Clause (vii) provides that public purpose includes the provisions of land for any other scheme or development sponsored by Government or with the prior approval of the Government by a local authority. In a case where project has been sponsored by Government or by any local authority with the prior approval of Government, the position would be different. In any view of the matter the exclusionary clause shall take out acquisition for a company from a public purpose acquisition. The submission that acquisition for a public purpose, if it is covered by main definition of section 3(f), exclusionary clause excluding the acquisition of land for company shall not apply, cannot be accepted.

63. According to respondents, the second category which shall not be covered by exclusionary clause is the category which is expressly excluded from part VII. Learned Counsel has referred to section 44-B particularly. The submission that respondent-5 is a private company, the said private Company is expressly excluded by virtue of section 44-B hence acquisition for such company has necessarily to be made under part II. It is relevant to have a look at section 44-B of Act, 1894 which is quoted as below:

" Land not to be acquired under this Part except for certain purpose for private companies other than Government companies.

44B. Notwithstanding anything contained in this Act, no land shall be acquired under this Part, except for the purpose mentioned in clause (a) of sub-section (1) of section 40, for a private

company which is not a Government company.

Explanation: "Private company" and "Government company" shall have the meanings respectively assigned to them in the Companies Act, 1956 (1 of 1956)."

64. The submission of respondent No.2 is that for an acquisition for a private company for the purpose other than those mentioned in clause (a) of Sub-section (1) of Section 40 exclusionary clause shall not be applicable. Section 44-B and exclusionary clause contained in Section 3(f) are in consonance with each other. Section 44-B begins with the word "Notwithstanding anything contained in this Act". Thus, section 44B is couched in a negative prohibitory term. Section 44B provides that "...no land shall be acquired under this Part except for the purpose mentioned in clause (a) of Sub-section (1) of Section 40, for a private company.." Acquisition for a private company for purposes other than those mentioned in section 40(1)(a) is impermissible. Section 44B was added by Act No. 31 of 1962. The object clearly was to close door for private company praying for acquisition of land from the Government exercising its power of eminent domain for any purpose other than acquisition of land for erection of dwelling house for workmen employed by the company or for the provision of amenities directly connected therewith. The object and purpose of section 44B is clear and loud. Supreme Court had occasion to consider section 44B in **AIR 1964 S.C. 1230 R.L. Arora Vs. State of U.P. & others.** Therein amendments made in sections 40 and 41 of the Act by Act No. 31 of 1962 were under challenge. In the above context, a submission was made before the Apex Court that there is a discrimination between the 'public company' and 'private company'. It was contended that acquisition for a private company can be made only for the purpose as mentioned in section 40 (1)(a) whereas acquisition can be made for other company for purpose as mentioned in clause (aa) as inserted under section 40(1) by Amendment Act. Repealling the submissions, Court held that acquisition between a public company/Government company on one hand and a private company on the other hand has a reasonable nexus with the object sought to be achieved. It was held that intention of the Legislature is clear that private individual and private company could not have advantage of acquiring the land even though they may be intending to engage in some industry or work which may have a public purpose. Following was laid down in paragraph 17.

" 17. .....It is true that acquisition for the purpose of cl. (aa) can only be made for a Government company or a public company and cannot be made for a private company or an individual; but there is in our opinion a clear classification between a public company and a Government company on the one hand and a private company and an individual on the other, which has reasonable nexus with the objects to be achieved under the law. The intention of the legislature clearly is that private individuals and private companies which really consist of a few private individuals banded together should not have the advantage of acquiring land even though they may be intending to engage in some industry or work which may be for a public purpose inasmuch the enrichment consequent on such work goes to private individuals or to a group of them who have formed themselves into a private company. Public companies on the other hand are broad based and Government companies

are really in a sense no different from Government, though for convenience of administration a Government company may be formed, which thus becomes a separate legal entity. Thus in one case the acquisition results in private enrichment while in the other it is the public which gains in every way. Therefore a distinction in the matter of acquisition of land between public companies and Government companies on the one hand and private individuals and private companies on the other is in our opinion justified, considering the object behind cl. (aa) as introduced into the Act. The contention under this head must therefore also fail."

(emphasis added)

65. From above, it is clear that both the submissions i.e. firstly exclusionary clause in Section 3(f) shall not be attracted for those acquisition which are expressly excluded from part VII and secondly for a private company acquisition can be made for a public purpose disregarding the provisions of part VII, have to be rejected. We are of the clear view that in view of Section 44B, no acquisition for private company can be made for any purpose other than those mentioned in section 40(1)(a) i.e. for the erection of dwelling house for workmen employed by the company or for the provision of amenities directly connected therewith.

66. It is not disputed before us that Rule 4 of Rules, 1963 is mandatory and its compliance is also mandatory. Learned counsel for petitioners further contended that fact of this case are similar as were involved in Division Bench judgment of this Court in **Pooran and others vs State of U.P. (supra).** But, we find that there is a distinction between said judgment and facts of present case. The proposition of law with respect to applicability of Part VII is clear as we have already discussed in detail but 'when it will be applicable' and "whether facts of present case would attract the same or not", is the moot question.

67. In **Pooran and others vs State of U.P. (supra)** facts as emerge from judgment are as under :

(A) an application dated 19.1.2004 was submitted by Reliance Delhi Power Private Ltd. to Collector Ghaziabad as well as to Chief Secretary of the State of U.P. The Collector proceeded to inquire the proposal submitted by respondent no. 2. The proposal was submitted by respondent No. 2 with deposit of 10% of acquisition costs and 10% of estimated compensation (amount of Rs. 16 Crores). Acquisition proceedings were not initiated pursuant to any decision of State Government or any of it's Department.

(B) land measuring 2500 acres was identified and selected by Reliance Delhi Power Pvt. Ltd. and in the application submitted to the Collector, Ghaziabad, the name of seven villages were mentioned by company. The site was neither selected by the State Government or any of it's Departments or by Collector, Ghaziabad for acquisition.

(C) Collector Ghaziabad after conducting necessary inquiry sent the proposal for acquisition to Director Land Acquisition Directorate Board of Revenue U.P. Lucknow. In the letter dated 24.1.2004 it was stated that proposal for land acquisition has been received from Reliance Delhi Power Pvt. Ltd. for acquisition of land with regard to 735.45 acres of land of village Kakarma Pargana Dasna, Tahsil Hapur. It was further stated that Reliance Delhi Power Pvt Ltd

deposited the required 10% acquisition cost and 10% of estimated compensation in the specified head. The separate letters dated 24.1.2004 were forwarded by Collector Ghaziabad with regard to seven villages along with plot numbers and area sought to be acquired. A proposed notification under section 4(1) also invoking the urgency provisions of Sub-section (1) of Section 17 and Sub-section (4) of section 17 was submitted. After receipt of the letter by Collector, Ghaziabad, Director Land Acquisition examined the proposal and forwarded it by letter dated 28.1.2004 to Principal Secretary, Energy, State of U.P. Lucknow. Separate letters dated 28.1.2004 were issued for different villages in question. In the letter dated 28.1.2004 it was specifically mentioned that Reliance Delhi Power Private Limited is a private Company hence taking into consideration Land Acquisition (Companies) Rules, 1963 and Part VII and Part III Sections 38 to 55 of the Land Acquisition Act and after getting the agreement executed, notification under section 4(1)/17 be issued. Collector thus completed the entire proceedings and forwarded the proposal of the company for acquisition of land for a company after following procedure provided in parts VII and VIII of Act, 1894.

(D) the proposal received from the Director Land Acquisition vide letter dated 28.1.2004 was examined by the Department of Energy Government of U.P. and it was decided to obtain recommendation of Bhumi Udyog Parishad. Accordingly, Bhumi Udyog Parishad submitted a note through Principal Secretary, Niyojan on 31.1.2004 that Reliance Delhi Power Pvt. Ltd. being a private company, keeping into consideration part VII of the Land Acquisition Act as amended according to the provisions of Sections 38 to 44-B proceedings be undertaken after taking approval from the Department of Revenue and Law. The recommendations were duly approved by the Chief Minister on 31.1.2004. The Secretary, Revenue submitted a note that before issuance of section 4(1)/17 notification agreement be executed as required by paragraph 14 of the Land Acquisition Manual and the entire cost of acquisition shall necessary be got deposited. Subsequently although it was earlier recommended that notification under section 4(1)/17 be issued after execution of agreement as required under section 41 but it was decided to issue notification under section 4(1) by invoking Section 17 and agreement be executed thereafter. After publication of notification under section 4(1)/17, the draft of the agreement as contemplated under Section 41 of the Act was approved by Hon'ble the Chief Minister on 19.2.2004 and thereafter it was executed. Under section 41, the entire cost of acquisition was to be born by the company and the State was not to bear any cost of acquisition.

(E) the land acquisition proceedings were not initiated under any project/scheme submitted by Energy Department or any other Department of the State nor the acquisition in question was to result into any project of the State rather the agreement stipulated transfer of land in favour of the respondent No. 2.

(F) the decision to bear 60% costs of acquisition was taken after amendments in power policy was approved on 8.6.2004 and accordingly, the State support agreement was executed on 16.6.2004.

68. If we compare the facts of above case, we find the facts of the case in hand as under :

(I) Government of India formulated a policy for use of fly ash produced by Thermal Power Plants in India creating ecological hazards and to clear the same it was proposed that same be utilized in a cement plant. It, therefore, offered several concessions, incentives and relaxation to such cement factories which establish their units for production of cement by using fly ash as raw material in prescribed ratio.

(II) NTPC has one of its Power Station in District-Gautam Budh Nagar and for consumption of its fly ash, respondent-5 decided to establish a cement unit near aforesaid Power Station of NTPC in District-Gautam Budh Nagar. An agreement, therefore, for supply of fly ash was executed between NTPC and respondent-5 on 07.08.2004 for effective disposal and utilization of fly ash produced in aforesaid Power Station to establish a Cement Factory in the vicinity of said Power Station on 30.12.2004. Respondent-5 requested State of U.P. to allot a piece of land admeasuring 47.8930 hectare in the vicinity of Thermal Power Station of NTPC at Dadri. Since, respondent-5 proposed to establish a cement unit manufacturing 1.2 million tonne per annum capacity, State Government decided that land should be acquired by UPSIDCL, since it was a body constituted by State of U.P. for industrial development of small industries in State of U.P. Consequently, State Government required UPSIDCL to sent appropriate proposal for acquisition of land in village-Dhoom Manikpur and Badpura, Tehsil-Dadri.

(III) On 03.02.2005, State Government communicated its decision that land shall be acquired by UPSIDCL and thereafter in furtherance of its objective it shall be transferred to respondent-5.

(IV) Commissioner and Director, Land Acquisition vide acquisition letter dated 21.04.2005 forwarded request for acquisition of land to Industry Department of State Government.

(V) Aforesaid proposal along with comments dated 25.05.2005 was forwarded to Bhumi Udyog Parishad.

(VI) Chief Minister approved the proposal on 14.06.2005.

(VII) On request of UPSIDCL a proposal was forwarded by Collector to State Government and thereafter on 18.07.2005, notification under Section 4 (1) read with Section 17 of Act, 1894 was published. Thereafter, notification under Section 6 read with Section 17 of Act, 1894 was published by notification dated 18.08.2005. Possession of land was taken by Collector and on 21.10.2005 it handed over the same to UPSIDCL. Mutation was made in khatauni pursuant to revenue authorities' order dated 26.11.2005. Compensation has been paid to land owners admittedly at the rate of Rs.340 per square year under Karaar Niyamawali, 1997.

(VIII) UPSIDCL allotted desired land to respondent-5 vide allotment letter dated 08.02.2006 allotting 38.043 hectares of land. Respondent-5 commenced construction of industrial unit by laying its foundation stone on 15.01.2006.

(IX) Lease deed dated 18.08.2006 was executed between UPSIDCL and respondent-5 for a period of 90 years. Respondent-5 has commissioned its plant on 16.02.2010.

69. Above facts show that in **Pooran and others vs State of U.P. (supra)** on the request of a private company State received almost entire cost of land from the private company and thereafter, acquired land and handed over the same. In the present case, land has been acquired at the instance of UPSIDCL, which is a government body,

and it is UPSIDCL, which has forwarded land to respondent-5. Moreover, here is a case where industrial unit has been set up by respondent-5 at Gautam Budh Nagar for manufacturing of cement, despite the fact that raw material is not available within nearby area of District-Gautam Budh Nagar, but for the reason of contributing to Government of India's policy of consuming fly ash, so as to help ecology and reduce hazardous substance, which is causing pollution in the area.

70. With respect to UPSIDCL, we may place on record that it was incorporated under Act, 1956 on 29.03.1961 as a State Government company only owned by it. The objective and purpose was to acquire and develop land for the purposes of promoting industrialization in State of U.P. UPSIDCL got the land acquired through State of U.P. for developing industrial area, allot land to entrepreneurs and received premium and lease rent etc., in instalments from such entrepreneurs.

71. Therefore, the discussions we have made with respect to Part VII, is not applicable where acquisition is made for a government company and it makes the entire difference in the facts of present case than what were involved in **Pooran and others vs State of U.P. (supra).** In the present case, it thus cannot be said that land has not been validly acquired, since, procedure laid down in Chapter VII read with Rules, 1963 has not been followed, and therefore, acquisition is bad. This contention is wholly misconceived and is, accordingly, rejected.

72. Moreover, in this case we find that all the petitioners except one have entered into agreements under Niyamawali, 1997 after receiving compensation to their satisfaction. That being so, it is now not open to petitioners to challenge acquisition in question and this ground alone is sufficient to non-suit petitioners.

73. In **M/s Asian Townsville Farms Ltd Vs State of U. P. and others (Writ C No.47312 of 2000)** decided on **02.05.2016**, while considering Niyamawali, 1997, this Court in paras 13 and 14 has held as under :

"13. Moreover, it may also be relevant to notice that in para 23 of counter affidavit filed on behalf of State of U.P. and Collector it has been said that before taking possession, notices were served upon land owners in accordance with U.P. Land Acquisition (Determination of Compensation and Declaration of Award by Agreement) Rules, 1997 (hereinafter referred to as "Rules, 1997") and after payment of eighty per cent compensation to land owners, possession was taken. Para 23 of counter affidavit is reproduced as under:

"23. यह कि याचिका के प्रस्तर 21 में वर्णित कथन स्वीकार नहीं हैं। क्योंकि अर्जन से प्रभावित भूस्वामियों को कब्जा लेने से पूर्व करार नियमावली 1997 में निहित व्यवस्था के अन्तर्गत नोटिस संख्या 1 व 2 भेजकर 80 प्रतिशत प्रतिकर प्राप्त करने हेतु सूचित किया गया उसके उपरान्त कब्जा प्राप्त किया गया। याची कृषकां द्वारा करार नियमावली के अन्तर्गत करार की कार्यवाही पूर्ण कर 80 प्रतिशत प्राप्त किया गया है।"

"23. That the averment made in para 21 of the petition is not acceptable inasmuch as the landowners affected by the acquisition proceedings were, prior to possession being taken, served with Notice Nos 1 and 2, as required under provisions of the Agreement Rules 1997, calling upon them to collect 80% compensation and only thereafter possession was taken. The petitioner farmers have received 80%

amount after completing the agreement formalities under the Agreement Rules."

(English Translation by Court)

14. We do not find that averments made in counter affidavit have been controverted by petitioner by filing any rejoinder affidavit as none is available on record. The averments, therefore are un-rebutted. That being so, when erstwhile owners have also received substantial compensation under agreement, there is no scope to challenge acquisition of land in dispute by petitioner, who is subsequent purchaser, through sale-deeds dated 11.10.1999."

74. In view of above, petitioner cannot be allowed to challenge acquisition notifications once compensation has been accepted after entering into agreements under Niyamawali, 1997.

75. Now we may come to another part of the matter. WP-1 has been filed in 2006 and rest connected petitions have been filed in 2012. Acquisition notifications were issued on 18.07.2005 and 18.08.2005 under Sections 4 and 6 of Act, 1894 respectively. Initially, respondent-5 was not made party in writ petition filed in 2006 and in fact, it was impleaded by filing impleadment application in 2008 only, which was allowed vide order dated 28.03.2014 and thereafter it was impleaded. Prior thereto respondent-5 was not a party in WP-1 and in remaining three petitions, respondent-5 is still not a party. In the matter of land acquisition, it has been held time and again that delay in challenging the acquisition notifications may be fatal and land owners may be non-suited on the ground of delay and laches, if the same remain unexplained and in none of writ petitions, any reason for filing writ petitions belatedly have been explained. Even, WP-1 was filed on 30.01.2006 and rest in 2012.

76. Delay and laches constitute substantial reason for disentitling relief in equitable jurisdiction under Article 226 of the Constitution of India. In **New Delhi Municipal Council Vs. Pan Singh and others J.T.2007(4) SC 253**, Court observed that after a long time the writ petition should not have been entertained even if the petitioners are similarly situated and discretionary jurisdiction may not be exercised in favour of those who approached the Court after a long time. It was held that delay and laches were relevant factors for exercise of equitable jurisdiction. In **M/S Lipton India Ltd. And others vs. Union of India and others, J.T. 1994(6) SC 71** and **M.R. Gupta Vs. Union of India and others 1995(5) SCC 628** it was held that though there was no period of limitation provided for filing a petition under Article 226 of Constitution of India, ordinarily a writ petition should be filed within reasonable time. In **K.V. Rajalakshmiah Setty Vs. State of Mysore, AIR 1961 SC 993**, it was said that representation would not be adequate explanation to take care of delay.

77. Same view was reiterated in **State of Orissa Vs. Pyari Mohan Samantaray and others AIR 1976 SC 2617** and **State of Orissa and others Vs. Arun Kumar Patnaik and others 1976(3) SCC 579** and the said view has also been followed in **Shiv Dass Vs. Union of India and others AIR 2007 SC 1330= 2007(1) Supreme 455** and **New Delhi Municipal Council (supra).** The aforesaid authorities have also been followed by this Court in **Chunvad Pandey Vs. State of U.P. and others, 2008(4) ESC 2423**. This has been followed in **Virender Chaudhary Vs. Bharat**

Petroleum Corporation & Ors., 2009(1) SCC 297. In **S.S. Balu and another Vs. State of Kerala and others, 2009(2) SCC 479**, Court held that it is well settled principle of law that delay defeats equity. It is now a trite law that where the writ petitioners approaches the High Court after a long delay, reliefs prayed for may be denied to them on account of delay and laches irrespective of the fact that they are similarly situated to other candidates who have got the benefit. In Yunus Vs. State of Maharashtra and others, 2009(3) SCC 281 the Court referred to the observations of Sir Barnesdelay Peacock in **Lindsay Petroleum Company Vs. Prosper Armstrong Hurde etc. (1874) 5 PC 239** and held as under:

"Now the doctrine of laches in Courts of Equity is not an arbitrary or technical doctrine. Where it would be practically unjust to give a remedy either because the party has, by his conduct done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. . . . . Two circumstances always important in such cases are, the length of the delay and the nature of the acts done during the interval which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy."

78. In our view, cause of delay has resulted in this case in putting respondent-5 in such a situation where it cannot be put back. Writ petition was filed when the possession of land was taken by Collector and handed over to UPSIDCL and thereafter UPSIDCL handed over the same to respondent-5 in February 2006 itself, which commenced its construction work by laying foundation stone. The work continued for almost three years. In 2000 application was filed and when it was pending, respondent-5 already completed its unit and commissioned it in 2010.

79. In these facts and circumstances of the case, in our view, even delay will be taken to be fatal in present case. Considering question of delay, a Constitutional Bench in **Aflatoon and others Versus Lieutenant Governor of Delhi and others, AIR 1974, SC 2077**, Court said that:

"A valid notification under Section 4 is a sine qua non for initiation of proceedings for acquisition of property. To have sat on the fence and allowed Government to complete acquisition proceedings on the basis that notification under Section 4 and the declaration under Section 6 were valid and then to attack the notification on grounds which were available to land owners at the time when the notification was published, would be putting a premium on dilatory tactics. The writ petitions are liable to be dismissed on the ground of laches and delay on the part of the petitioners."

80. In **Kshama Sahkari Avas Samiti Ltd. Versus State of U.P. and others 2007(1) AWC 327**, a Division Bench also in para 22 of judgement observed as under:

"No doubt the correctness of such a notification can be examined while testing the validity of the declaration issued under Section 6 of the Act. But it is

sometimes too late in the day to challenge the same as once a declaration under Section 6 of the Act is issued after invoking urgency provisions, the Collector is entitled and do takes over the possession of the acquired land on the expiry of fifteen days of the notice under Section 9 of the Act. Thus, vesting the land in State free from all encumbrances as even taking of symbolic possession is sufficient to vest the land in the State. Once vesting gets completed, it becomes next to impossible to divest the land to the original owners/tenure holders. Moreover, the Apex Court has repeatedly held that the delay in challenging the notification for acquisition is fatal and if the land acquisition proceedings stood finalized, interference by the Court is not called far. Therefore, the notification issued under Section 17(4) of the Act is open to challenge independently even before the issuance of the declaration under Section 6 of the Act where prima facie, there is no material before the authorities to record subjective satisfaction about urgency."

81. Similar is the view taken recently by a Division Bench of this Court in **Roopam Kumari Arya versus State of U.P., 2008(4) ADJ 686.**

82. Again this question was considered by a Division Bench of this Court in which one of us (Justice Sudhir Agarwal) was a Member, in **Civil Misc. Writ Petition No. 3195 of 1989 (Jagriti Sahkari Avas Samiti Ltd. Ghaziabad & another Versus State of U.P. & others)** wherein in para 36, this Court said:

"Now coming to the objection raised by the respondents for non-suiting the petitioners on the ground of delay and laches, we are of the view that the argument is not without any substance. Notification under Section 4 was issued on 10.3.1988 stating that the land is required urgently and therefore it is necessary to dispense with inquiry under Section 5-A to eliminate delay likely to be caused thereby. It was always open to the petitioners to challenge the said notification on the ground that the said decision is without there being any material and formation of the opinion is without any substance. However, the petitioners chose not to challenge the same at that stage. Thereafter the notification under Section 6 was published in the gazette dated 8.7.1988 but the same was also not challenged. It was only when the notice under Section 9 was issued to the petitioners on 19.1.1989 that the present writ petition was filed on 16.2.1989 after getting it reported on 15.2.1989. As held by a Division Bench of this Court in Brij Bhushan Goswami (supra), petitioners are guilty of delay and laches and the petition deserves to be dismissed on this ground also."

83. Delay and laches constitute substantial reason for disentitling relief in equitable jurisdiction under Article 226 of the Constitution of India.

84. In **New Delhi Municipal Council Vs. Pan Singh and others J.T.2007(4) SC 253**, Supreme Court observed that after a long time writ petition should not have been entertained even if the petitioners are similarly situated and discretionary jurisdiction may not be exercised in favour of those who approached the Court after a long time. It was held that delay and laches were relevant factors for exercise of equitable jurisdiction.

85. In **M/S Lipton India Ltd. And others vs. Union of India and others, J.T.**

1994(6) SC 71 and M.R. Gupta Vs. Union of India and others 1995(5) SCC 628 it was held that though there was no period of limitation provided for filing a petition under Article 226 of Constitution of India, ordinarily a writ petition should be filed within reasonable time. In **K.V. Rajalakshmiah Setty Vs. State of Mysore, AIR 1961 SC 993**, it was said that representation would not be adequate explanation to take care of delay. Same view was reiterated in **State of Orissa Vs. Pyari Mohan Samantaray and others AIR 1976 SC 2617 and State of Orissa and others Vs. Arun Kumar Patnaik and others 1976(3) SCC 579** and the said view has also been followed in **Shiv Dass Vs. Union of India and others AIR 2007 SC 1330= 2007(1) Supreme 455 and New Delhi Municipal Council (supra).** The aforesaid authorities of Supreme Court has also been followed by this Court in **Chunvad Pandey Vs. State of U.P. and others, 2008(4) ESC 2423.** This has been followed in **Virender Chaudhary Vs. Bharat Petroleum Corporation & Ors., 2009(1) SCC 297. In S.S. Balu and another Vs. State of Kerala and others, 2009(2) SCC 479** Supreme Court held that it is well settled principle of law that delay defeats equity.

86. It is now a trite law that where the writ petitioners approaches the High Court after a long delay, reliefs prayed for may be denied to them on account of delay and laches irrespective of the fact that they are similarly situated to other candidates who have got the benefit. In **Yunus Vs. State of Maharashtra and others, 2009(3) SCC 281**, Court referred to the observations of **Sir Barnesdelay Peacock in Lindsay Petroleum Company Vs. Prosper Armstrong Hurde etc. (1874) 5 PC 239** and held as under:

"Now the doctrine of laches in Courts of Equity is not an arbitrary or technical doctrine. Where it would be practically unjust to give a remedy either because the party has, by his conduct done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. . . . . Two circumstances always important in such cases are, the length of the delay and the nature of the acts done during the interval which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy."

87. In **Swaika Properties (P) Ltd. & Anr. Vs. State of Rajasthan & Ors, (2008) 4 SCC 695**, Court held in paras 16, 17 and 18 that:

"16. This Court has repeatedly held that a writ petition challenging the notification for acquisition of land, if filed after the possession having been taken, is not maintainable. In ***Municipal Corpn. of Greater Bombay v. Industrial Development Investment Co. (P) Ltd.(1996) 11 SCC 501 where K. Ramaswamy, J.*** *speaking for a Bench consisting of His Lordship and S.B. Majmudar, J. held : (SCC p.520,para 29)*

"29. It is thus well-settled law that when there is inordinate delay in filing the writ petition and when all steps taken in the acquisition proceedings have become final, the Court should be loath to quash the notifications. The High Court has, no doubt, discretionary powers under Article

226 of the Constitution to quash the notification under Section 4 (1) and declaration under Section 6. But it should be exercised taking all relevant factors into pragmatic consideration. When the award was passed and possession was taken, the Court should not have exercised its power to quash the award which is a material factor to be taken into consideration before exercising the power under Article 226. The fact that no third party rights were created in the case is hardly a ground for interference. The Division Bench of the High Court was not right in interfering with the discretion exercised by the learned Single Judge dismissing the writ petition on the ground of laches."

In the concurring judgment, S.B. Majmudar, J. held as under: ***(Industrial Development Investment case (1996) 11 SCC 501 SCC pp 522-23, para 35)***

"35..... Such a belated writ petition, therefore, was rightly rejected by the learned Single Judge on the ground of gross delay and laches. The respondent-writ petitioners can be said to have waived their objections to the acquisition on the ground of extinction of public purpose by their own inaction, lethargy and indolent conduct. The Division Bench of the High Court had taken the view that because of their inaction no vested rights of third parties are created. That finding is obviously incorrect for the simple reason that because of the indolent conduct of the writ petitioners land got acquired, award was passed, compensation was handed over to various claimants including the landlord. Reference applications came to be filed for larger compensation by claimants including writ petitioners themselves. The acquired land got vested in the State Government and the Municipal Corporation free from all encumbrances as enjoined by Section 16 of the Land Acquisition Act. Thus right to get more compensation got vested in diverse claimants by passing of the award, as well as vested right was created in favour of the Bombay Municipal Corporation by virtue of the vesting of the land in the State Government for being handed over to the Corporation. All these events could not be wished away by observing that no third party rights were created by them. The writ petition came to be filed after all these events had taken place. Such a writ petition was clearly stillborn due to gross delay and laches."

17. Similarly, in ***State of Rajasthan v. D.R. Laxmi, (1996) 6 SCC 445*** *following the decision of this Court in* ***Municipal Corporation of Greater Bombay (1996) 11 SCC 501*** *it was held : (D.R. Laxmi case, (1996) 6 SCC 445 SCC p 452, para 9)*

"9.... When the award was passed and possession was taken, the Court should not have exercised its power to quash the award which is a material factor to be taken into consideration before exercising the power under Article 226. The fact that no third party rights were created in the case, is hardly a ground for interference. The Division Bench of the High Court was not right in interfering with the discretion exercised by the learned Single Judge dismissing the writ petition on the ground of laches."

18. To the similar effect is the judgment of this Court in ***Municipal Council, Ahmednagar v. Shah Hyder Beig (2000) 2 SCC 48*** *wherein this Court, following the decision of this Court in* ***C.Padma v. Dy. Secy. To the Govt of T.N. (1997) 2 SCC 627*** *held :* ***(Shah Hyder case (2000) 2 SCC 48,*** *SCC p.55,para 17)*

"17.In any event, after the award is passed no writ petition can be filed challenging the acquisition notice or

against any proceeding thereunder. This has been the consistent view taken by this Court and in one of the recent cases (C.Padma v. Dy. Secy. To the Govt of T.N. (1997) 2 SCC 627) …."

88. In **Banda Development Authority Vs. Motilal Agarwal (2011) 5 SCC 394** this Court held in paras 17, 18, 19, 20, 21, 22, 23,24 and 25 that:

"17.It is true that no limitation has been prescribed for filing a petition under Article 226 of the Constitution but one of the several rules of self imposed restraint evolved by the superior courts is that the High Court will not entertain petitions filed after long lapse of time because that may adversely affect the settled/crystallized rights of the parties. If the writ petition is filed beyond the period of limitation prescribed for filing a civil suit for similar cause, the High Court will treat the delay unreasonable and decline to entertain the grievance of the petitioner on merits.

18. In ***State of Madhya Pradesh v. Bhailal Bhai, AIR 1964 SC 1006,*** *the Constitution Bench considered the effect of delay in filing writ petition under Article 226 of the Constitution and held: (AIR pp 1011-12 paras 17 and 21)*

"17....It has been made clear more than once that the power to give relief under Article 226 is a discretionary power. This is specially true in the case of power to issue writs in the nature of mandamus. Among the several matters which the High Courts rightly take into consideration in the exercise of that discretion is the delay made by the aggrieved party in seeking this special remedy and what excuse there is for it.....It is not easy nor is it desirable to lay down any rule for universal application. It may however be stated as a general rule that if there has been unreasonable delay the court ought not ordinarily to lend its aid to a party by this extraordinary remedy of mandamus.

21.....Learned counsel is right in his submission that the provisions of the Limitation Act do not as such apply to the granting of relief under Article 226. It appears to us however that the maximum period fixed by the legislature as the time within which the relief by a suit in a Civil Court must be brought may ordinarily be taken to be a reasonable standard by which delay in seeking remedy under Article 226 can be measured. This Court may consider the delay unreasonable even if it is less than the period of limitation prescribed for a civil action for the remedy but where the delay is more than this period, it will almost always be proper for the court to hold that it is unreasonable."

19. In matters involving challenge to the acquisition of land for public purpose, this Court has consistently held that delay in filing the writ petition should be viewed seriously and relief denied to the petitioner if he fails to offer plausible explanation for the delay. The Court has also held that the delay of even few years would be fatal to the cause of the petitioner, if the acquired land has been partly or wholly utilised for the public purpose.

20. In ***Ajodhya Bhagat v. State of Bihar (1974) 2 SCC 501,*** *this Court approved dismissal by the High Court of the writ petition filed by the appellant for quashing the acquisition of his land and observed: (SCC p.506,para 23)*

"23. The High Court held that the appellants were guilty of delay and laches. The High Court relied on two important facts. First, that there was delivery of possession. The appellants alleged that it was a paper transaction. The High Court

rightly rejected that contention. Secondly, the High Court said that the Trust invested several lakhs of rupees for the construction of roads and material for development purposes. The appellants were in full knowledge of the same. The appellants did not take any steps. The High Court rightly said that to allow this type of challenge to an acquisition of large block of land piecemeal by the owners of some of the plots in succession would not be proper. If this type of challenge is encouraged the various owners of small plots will come up with writ petitions and hold up the acquisition proceedings for more than a generation. The High Court rightly exercised discretion against the appellants. We do not see any reason to take a contrary view to the discretion exercised by the High Court."

21. In ***State of Rajasthan v. D.R.Laxmi (1996) 6 SCC 445,*** *this Court referred to Administrative Law H.W.R. Wade (7th Ed.) at pages 342-43 and observed: (SCC p.453, para 10)*

"10. The order or action, if ultra vires the power, becomes void and it does not confer any right. But the action need not necessarily be set at naught in all events. Though the order may be void, if the party does not approach the Court within reasonable time, which is always a question of fact and have the order invalidated or acquiesced or waived, the discretion of the Court has to be exercised in a reasonable manner. When the discretion has been conferred on the Court, the Court may in appropriate case decline to grant the relief, even if it holds that the order was void. The net result is that extraordinary jurisdiction of the Court may not be exercised in such circumstances."

22. In ***Girdharan Prasad Missir v. State of Bihar (1980) 2 SCC 83,*** *the delay of 17 months was considered as a good ground for declining relief to the petitioner.*

In ***Municipal Corpn. of Greater Bombay v. Industrial Development Investment Co. (P) Ltd. (1996) 11 SCC 501,*** this Court held: (SCC p 452, para 9)

"9. ....It is thus well-settled law that when there is inordinate delay in filing the writ petition and when all steps taken in the acquisition proceedings have become final, the Court should be loath to quash the notifications. The High Court has, no doubt, discretionary powers under Article 226 of the Constitution to quash the notification under Section 4 (1) and declaration under Section 6. But it should be exercised taking all relevant factors into pragmatic consideration. When the award was passed and possession was taken, the Court should not have exercised its power to quash the award which is a material factor to be taken into consideration before exercising the power under Articloe 226. The fact that no third party rights were created in the case is hardly a ground for interference. The Division Bench of the High Court was not right in interfering with the discretion exercised by the learned Single Judge dismissing the writ petition on the ground of laches."

23. In ***Urban Improvement Trust v. Bheru Lal (2002) 7 SCC 712,*** *this Court reversed the order of the Rajasthan High Court and held that the writ petition filed for quashing of acquisition of land for a residential scheme framed by the appellant-Urban Improvement Trust was liable to be dismissed on the ground that the same was filed after two years.*

24. In ***Ganpatibai v. State of M.P. (2006) 7 SCC 508,*** *the delay of 5 years was considered unreasonable and the order passed by the High Court refusing to entertain the writ petition was confirmed. In that case also the petitioner had initially*

filed suit challenging the acquisition of land. The suit was dismissed in 2001. Thereafter, the writ petition was filed. This Court referred to an earlier judgment in ***State of Bihar v. Dhirendra Kumar (1995) 4 SCC 229 and observed: (Ganpatibai v. State of M.P. (2006) 7 SCC 508, SCC p.510, para 9)***

"9. In ***State of Bihar v. Dhirendra Kumar (1995) 4 SCC 229*** *this Court had observed that civil suit was not maintainable and the remedy to question notification under Section 4 and the declaration under Section 6 of the Act was by filing a writ petition. Even thereafter the appellant, as noted above, pursued the suit in the civil court. The stand that five years after the filing of the suit, the decision was rendered does not in any way help the appellant. Even after the decision of this Court, the appellant continued to prosecute the suit till 2001, when the decision of this Court in 1995 had held that suit was not maintainable."*

25. In **Swaran Lata v. State of Haryana (2010) 4 SCC 532,** the dismissal of writ petition filed after seven years of the publication of declaration and five years of the award passed by the Collector was upheld by the Court and it was observed: (SCC p.535 para 11)

"11. In the instant case, it is not the case of the petitioners that they had not been aware of the acquisition proceedings as the only ground taken in the writ petition has been that substance of the notification under Section 4 and declaration under Section 6 of the 1894 Act had been published in the newspapers having no wide circulation. Even if the submission made by the petitioners is accepted, it cannot be presumed that they could not be aware of the acquisition proceedings for the reason that a very huge chunk of land belonging to a large number of tenure-holders had been notified for acquisition. Therefore, it should have been the talk of the town. Thus, it cannot be presumed that the petitioners could not have knowledge of the acquisition proceedings."

89. From the above mentioned judgments, it is clear that there is a consistent view that in case there is an inordinate delay in approaching the Court and when all steps taken in the acquisition proceedings have become final, the Court should be loath to quash the proceedings.

90. The facts discussed above show that petitioners in this case are also guilty of undue delay and laches creating an irreversible situation, and delay and laches being wholly unexplained, this is another ground non-suiting the petitioners.

91. In the circumstances, we do not find any merit in these writ petitions. Dismissed accordingly.

92. Interim orders, if any, stands vacated in all writ petitions.

(2020)09ILR A460
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.03.2020

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE RAJIV MISRA, J.

WRIT - C No. 7785 of 2020

M/S Cummins Technologies India Private Limited, Pune ...Petitioner
Versus
Micro & Small Enterprises Facilitation Council,Kanpur & Ors. ...Respondents

Counsel for the Petitioner:

Sri Aditya Singh Parihar, Sri Himanshu Kapoor, Sri Prateek Dhanda

Counsel for the Respondents:
C.S.C.

A. Civil Law - Arbitration and Conciliation Act,1996 - Section 80 & Micro Small and Medium Enterprises Development Act,2006-Section 18-Section 80 of Act,1996 will not exclude MASEF Council to act as Arbitrator-it will be contrary to section 18(3) & 18(4) of MSMED Act,2006-MASEF Council having acted as Conciliator u/s 18(2) is not barred from working as Arbitral Tribunal to arbitrate the dispute u/s 18(3)-Since jurisdiction of MASEF Council has been given overriding effect by virtue of Section 18(4) and Section 24 which have to be given complete swing in the area covered by the same. (Para 1 to 63)

B. Civil Law - Arbitration and Conciliation Act,1996 - Section 80 - Incorporates a salutary principle that a 'Conciliator' cannot act also as an Arbitrator when a specific declaration has been made u/s 18(4) that MASEF Council shall have jurisdiction to act as an Arbitrator. (Para 59 ,60)

The petition is dismissed. (E-6)

List of cases cited: -

1. Gujarat St.Petronet Ltd. Vs Micro & Small Enterprises Facilitation Council & ors.,AIR (2018) Bom.265

2. M/s Steel Authority of India Ltd.& anr.,AIR (2012) Bom. 178

3. Principal Chief Engineer Vs M/s Manibhai & Brothers, Ist App. No. 637 of 2016

4. Paper & Board Convertors. Vs U.P. St. Micro & Small Enterprise,W.P. No. 24343 of 2014

5. Pal Mohan Electronics Pvt. Ltd. Vs The Secy.,Deptt. Of Small Scale Industries & ors.,(2019) 5 Kar.LJ 72

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

1. Petitioner, M/s Cummins Technologies India Private Limited, has filed present writ petition under Article 226 of Constitution of India with a prayer to issue a writ of Mandamus commanding respondent-1, i.e., Micro and Small Enterprises Facilitation Council, Directorate of Industries, Kanpur (hereinafter referred to as "MASEF Council") to adjudicate and pass necessary orders on petitioner's application dated 7.2.2020 filed under Section 16 of Arbitration and Conciliation Act, 1996 (hereinafter referred to as "Act, 1996") and refer Claim Petition No. 14 of 2018, raising dispute between petitioner and respondent-3, i.e., M/s Roots Cooling System Pvt. Ltd. to an Institution, Centre or Arbitrator for Arbitration under Act, 1996. In the alternative, petitioner has also prayed that this Court should declare that respondent-1, i.e., MASEF Council has no jurisdiction to entertain Claim Petition No. 14 of 2018, raising a dispute between petitioner and respondent-3 in terms of Section 80 of Act, 1996.

2. Facts in brief, as pleaded in writ petition, are, that, petitioner is a Company incorporated under Companies Act, 1956 (hereinafter referred to as "Act, 1956"), validly existing and continuing under Provisions of Companies Act, 2013 (hereinafter referred to as "Act, 2013"). Petitioner is a Subsidiary Company and its Holding Company is "M/s Cummins Inc".

3. Cummins Inc which is an American Fortune 500 Company, has its Headquarter at Columbus, Indiana, United States. Holding Company is engaged in designs, manufactures, and distribution of Engines, Filtration and Power Generation products. It has its presence approximately in 190 countries and territories through a network of more than 600 Companies. It also own independent distribution through approximately 6,000 dealers.

4. The present writ petition has been filed by M/s Cummins Technologies India Private Limited through Mr. Zoheb Hasan, an Authorized Representative in terms of Letter of Authority dated February 25, 2020.

5. Respondent-1 is Micro and Small Enterprises Facilitation Council, Directorate of Industries, Kanpur, which is an executive arm of respondent-2, engaged in discharging functions entrusted to it under Micro, Small and Medium Enterprises Development Act, 2006 (hereinafter referred to as "MSMED Act, 2006"). It acts for implementation of Government Policies for all round development of industries in State of U.P.

6. Respondent-2 is State of U.P. through Chief Secretary, Department of MSMED and Export Promotion, responsible for economic development of State of Uttar Pradesh.

7. Respondent-3 preferred an application under Section 18 of MSMED Act, 2006 before respondent-1 seeking recovery of Rs. 84,80,577/- (Principal amount Rs.40,61,228 + interest Rs.44,19,349), claiming it, a dispute between parties as contemplated under Chapter V of MSMED Act, 2006. Earlier thereto, Conciliation proceedings were initiated, which remained unsuccessful. Petitioner also moved an application under Section 16 of Act, 1996 on 7.2.2020, praying that respondent-1 should refer the dispute between parties to any Institution/Arbitrator or Centre providing alternate dispute resolution services for Arbitration on account of lack of jurisdiction with respondent-1 to act as an Arbitrator for resolving the dispute between parties in the light of Section 80 of Act, 1996, which has not been adjudicated upon by respondent-1 on the last date of hearing i.e. 17.02.2020, despite the fact that jurisdiction issue goes to the root of the matter and was expressly pressed by petitioner on 17.02.2020. Respondent-1 even did not issue notice and call for reply from respondent-3, thereby acting in complete derogation of the mandate of Section 16 of Act, 1996.

8. The case set up by petitioner is that after respondent-1 has attempted to conciliate between parties, it cannot act as an 'Arbitrator' for adjudication of the dispute. Reliance is placed on Section 18 of MSMED Act, 2006 and Section 80 of Act, 1996.

9. The short question up for consideration is, "whether respondent-1 can adjudicate the dispute between parties as an 'Arbitrator' or it has no such jurisdiction?"

10. Record shows that M/S Cummins Technologies India Private Limited is a private Company incorporated under Act, 1956. It is registered as a Small Enterprise under provisions of MSMED Act, 2006 with Director of Companies, Noida, Gautam Budha Nagar, Uttar Pradesh and allotted Entrepreneur No. 09/010/12/03128 dated 29.09.2009. It is also registered with

District Industries Centre, Noida, U.P., Gautam Budha Nagar (hereinafter referred to as "DIC"), under Small Scale Industy vide Registration No.20/78/3597/PMT/SSI/12 dated 08.12.2004. Recently under new scheme of the State Government, respondent-3 is registered as "Udyog Aadhaar" vide Registration No.UAN-UP28B0011387 dated 02.12.2017.

11. Respondent-3 was awarded a work supply contract for "Supply & Installation of Ventilation System" for QSK project at District Satara (State of Maharashtra), as per requirement of M/S Cummins Technologies India Private Limited, SEZ Unit, Plot No. B3-1, Village Surwadi Nandal, Talphaltan, District Satara (State of Maharashtra). Respondent-3 was given multiples orders for supply and services. The cost of basic work was Rs. 407.62 Lacs (i.e. Supply Rs. 380.49 Lacs and Services Rs.27.13 Lacs) (Excluding Duty and Taxes), in view of work orders dated 10.12.2012, 23.09.2013 and 15.01.2016 as amended from time to time. Respondent-3 supplied all the materials and executed job within time. It claimed to have violated no condition of Work Order. Time to time invoices were raised but a sum of Rs. 40,61,227.55/- has remained outstanding, besides interest thereon. Claiming Rs.40,61.227.55 as principal amount and Rs.44,19,349/- towards interest, respondent-3 filed an Application/Claim Petition under Section 18 of MSMED Act, 2006, dated 09.02.2018 before respondent-1 claiming that petitioner is liable to pay the aforesaid claim under Sections 16 and 17 of MSMED Act, 2006 and claim is maintainable before respondent-1 since buyer is located within India as per Section 18(4) of MSMED Act, 2006.

12. Respondent-1 after receiving claim, issued notice to petitioner requiring it to submit reply. By order dated 27.02.2018 it also called upon parties for settlement. Consequently, notices were issued by respondent-1 vide letter dated 05.04.2018 to parties to appear on 17.04.2018 for settlement. Respondent-1 on 17.04.2018 passed following order:

"उक्त सन्दर्भ आज दिनांक 17–04–2018 को कौंसिल के समक्ष सुलह हेतु प्रस्तुत किया गया। आवेदक पक्ष की ओर से श्री रामजीवन, अधिकृत प्रतिनिधि एवं विपक्षी की ओ से श्री हिमांशु कपूर, अपने वकालतनामा के साथ उपस्थित। पक्षकारों द्वारा अवगत कराया गया कि उनके मध्य सुलह समझौते की वार्ता चल रही है।

कांउसिल द्वारा पक्षकारों को **सन्दर्भ सुलह समझौते से निस्तारित किये जाने वास्ते 30 दिन के समय प्रदान किया गया । पक्षकारों को आदेशित किया जाता है कि वे सन्दर्भ में बकाया भुगतान का विवाद निर्धारित समय से आपसी सुलह से करते हुए काउन्सिल को अवगत कराना सुनिश्चित करें।** अन्यथा पक्षकारों के मध्य सुलह समझौता न होने दृष्टिगत आर्बिट्रेशन एण्ड कन्सीलियेशन एक्ट–1996 की धारा 76 के प्राविधानानुसार सन्दर्भ में चल रही सुलह की कार्यवाही स्वतः समाप्त मानी जायेगी। **पक्षकारों द्वारा सन्दर्भ सुलह से निस्तारित न किये जाने की स्थिति में सन्दर्भ आगामी बैठक में आर्बिट्रेशन से निस्तारित किये जाने हेतु सूचीबद्ध किया जाये।** इस आदेश की प्रमाणित प्रति पक्षकारों को ई–मेल/ स्पीड पोस्ट से प्रेषित की जाये।"
(Emphasis added)

13. On 29.08.2018, a notice was issued to petitioner by respondent-1 directing it to make payment within 15 days from date of receipt of notice, failing which reference/petition filed by respondent-3 shall be registered. The parties could not settle the matter, hence vide order dated 16.09.2019 respondent-1 directed petitioner to file objection/written statement, so that matter may be decided on

merits as per provisions of MSMED Act, 2006.

14. Petitioner filed its objection/reply dated 19.10.2019. It also filed an application/petition dated 01.02.2020, requesting respondent-1 to refer the dispute to any Institution/Arbitrator or Centre providing alternate dispute resolution services in terms of Section 18(3) of MSMED Act, 2006 observing that since MASEF Council itself has conducted conciliation proceedings, it is prohibited from acting as Arbitrator by virtue of Section 80 of Act, 1996. It is this application, on which no order has been passed by respondent-1, hence present writ petition has been filed stating that respondent-1 is disqualified to proceed to adjudicate dispute as an 'Arbitrator' and instead it has to refer dispute to another body.

15. Heard Sri Himanshu Kapoor and Sri Prateek Dhanda, Advocates, appearing for petitioner and learned Standing Counsel representing respondent no.2.

16. The question raised before this Court is "whether MASEF Council can act as 'Arbitrator' for adjudication of dispute between the parties or it is obliged to refer the matter to another body and cannot decide on its own ?"

17. A pure legal question has been raised, therefore, with the consent of counsel for petitioner and learned Standing Counsel appearing for respondent-2, we proceed to decide writ petition finally at the stage of admission.

18. For promoting and developing and also enhancing competitiveness of Micro, Small and Medium Enterprises, since there was no statutory provisions dealing with the problem in detail; MSMED Act, 2006 was enacted by Parliament and came into force on 02.10.2006.

19. The Statement of Object and Reasons show that "Small Scale Industry" was defined by Notification issued under 11(b) of Industries Development and Regulation Act, 1951 (hereinafter referred to as "IDR Act, 1951"). Section 29-B of IDR Act, 1951 provided for notifying reservation of items for excluding manufacture in Small Scale Industry Sector. Besides above, there existed no legal framework to deal with the Small Scale Industry Sector, which played major role in the economic of the Country. Time to time need for a comprehensive Central enactment to provide an appropriate legal framework in the sector to facilitate its growth and development was felt necessary, particularly, when in many other Countries, similar Statutes were already framed.

20. Keeping with the pace of globalization and showing due concern for the development of Small and Medium Enterprises, MSMED Act, 2006 was enacted with an intention to provide Statutory definition of "Small Enterprises and Medium Enterprises"; for establishment of a National Small and Medium Enterprise Board, High Level Forum consisting Stake Holders for participative revenue and making recommendations on the policies and programmes for development of Small and Medium Enterprises; for classification of Small and Medium Enterprises on the basis of investment in planned machinery or equipment and establishment of an Advisory Committee to recommend in the related matter; empower Central Govt. to notify programmes, guidelines or instructions for facilitating promotion and development and enhancing competitiveness of Small and Medium Enterprises; to empower State Govt. to

specify by notification that provision of Labour Laws specified in Clause 9(2) will not apply to Small and Medium Enterprise employing up to 50 employees with a view to facilitate upgradation of Small Enterprises into Medium Enterprises; make provisions for ensuring timely smooth flow of credit to Small and Medium Enterprises to minimize the instances of sickness amongst the industries and enhance competitiveness of such Enterprises in accordance with guidelines or instructions of Reserve Bank of India (hereinafter referred to as "RBI"); empowers Central and State Governments to notify preference policies in respect of procurement of goods and service products of profits by Small Enterprises by the Ministry/Department and public sector enterprises; empower Central Govt. to create fund or funds for facilitating promotion and development and enhancing competitiveness of Small Enterprises and Medium Enterprises; to prescribe harmonious example of stream line procedures for inspection of Small and Medium Enterprises under Labour Laws enumerated in Clause-15 having regard to the need of permitting self registration or self certification by such enterprise; prescribe for maintenance of records and filing of return of Small and Medium Enterprises with a view to reduce multiplicity of even overlapping type return be filed; and further improvement in interest of delayed payments to Small Scale Ancillary undertaking Act, 1993 and making that enactment part of proposed legislature and to repeal that enactment.

21. The term "Board" has been defined in Section 2(c) of MSMED Act, 2006 and it reads as under :-

*(c)"**Board**" means the National Board for Micro, Small and Medium Enterprises established under section 3;*

22. Other relevant terms defined in Section 2 are, 'Buyer', 'Enterprise', 'Medium Enterprise', 'Micro Enterprise', 'Small Enterprise' and 'Supplier' and the relevant provisions of MSMED of Act, 2006 defining above terms in clauses (d), (e), (g), (h), (m), and (n) read as under:-

*(d) "**Buyer**" means whoever buys any goods or receives any services from a supplier for consideration;*

*(e) "**Enterprise**" means an industrial undertaking or a business concern or any other establishment, by whatever name called, engaged in the manufacture or production of goods, in any manner, pertaining to any industry pacified in the First Schedule to the Industries (Development and Regulation) Act/ 1951 or engaged in providing or rendering of any service or services;*

*(g) "**Medium Enterprise**" means an enterprise classified1aS such under sub-clause (ii) of clause (a) or sub-clause (iii) of clause (b) of sub-section (1) of section 7;*

*(h) "**Micro Enterprise**" means an enterprise classified as such under sub-clause (1) of clause (a) or sub-clause (1) of clause (b) of sub-section (1) of section 7;*

*(m) "**Small Enterprise**" means an enterprise classified as such under sub-clause (it) of clause (a) or sub-clause (ii) of clause (b) of sub-section (1) of section 7;*

*(n) "**Supplier**" means a micro or small enterprise, which has filed a memorandum with the authority referred to in sub-section (1) of section 8, and includes,*

23. Section 3 provides for establishment of Board by Central Government by Notification known as "National Board for Micro, Small and Medium Enterprises" (hereinafter referred to as "NBMSME"). Head office of the Board is to be at Delhi. Constitution of the Board is provided in Section 3(3), which we are skipping for the time being.

24. Functions of the Board are provided in Section 5, which reads as under:-

*"**5. Functions of Board** - The Board shall, subject to the general directions of the Central Government, perform all or any of the following functions, namely:-*

(a) examine the factors affecting the promotion and development of micro, small and medium enterprises and review the policies and programmes of the Central Government in regard to facilitating the promotion and development and enhancing the competitiveness of such enterprises and the impact thereof on such enterprises;

(b) make recommendations on matters referred to in clause (a) or on any other matter referred to it by the Central Government which, in the opinion of that Government, is necessary or expedient for facilitating the promotion and development and enhancing the competitiveness of the micro, small and medium enterprises; and

(c) advise the Central Government on the use of the Fund or Funds constituted under section 12."

25. With regard to delayed payment of Micro and Small Enterprises, Chapter 5 contains Sections 15 to 25, imposing an obligation upon Buyer to pay. It also provide an adjudicatory forum in case of a dispute between Buyer and Supplier.

26. Section 15 deals with liability of buyer to make payment; Section 16 provides the date from which rate of interest is payable; Section 17 makes the buyer liable to pay amount with interest for any goods or services rendered by Supplier and Section 18 deals with 'Reference' a dispute for adjudication to MASEF Council.

27. Section 18 is relevant in the present writ petition and is reproduced as under:

"18. Reference to Micro and Small Enterprises Facilitation Council -

(1) **Reference :** ***Notwithstanding anything contained in any other law for the time being in force****, any Party to a dispute may, with regard to* ***any amount due. under section -17, make a reference to the Micro and Small Enterprises Facilitation Council.***

(2) **Conciliation :** *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 Ill of that Act.***

(3) **Arbitration** *:* ***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 (26 of 1996) shall then apply to the dispute* ***as if the arbitration was in pursuance of an arbitration agreement referred to in sub-section (1) of section 7 of that Act.***

(4) ***Notwithstanding anything contained in any other law for the time being in force,*** *the Micro and Small Enterprises Facilitation Council or the centre providing alternate dispute*

*resolution services **shall have jurisdiction to act as an Arbitrator or Conciliator under this section in a dispute between the supplier located within its jurisdiction and a buyer located anywhere in India.***

(5) Every reference made under this section shall be decided within a period of ninety days from the date of making such a reference." (Emphasis added)

28. Composition of MASEF Council is provided in Section 21 of MSMED Act, 2006. The aforesaid Council is to be established by State Government by Notification as provided in Section 20. Both Sections 20 and 21 read as under:

***"20. Establishment of Micro and Small Enterprises Facilitation Council** - The State Government shall, by notification, establish one or more Micro and Small Enterprises Facilitation Councils, at such places, exercising such jurisdiction and for such areas, as may be specified in the notification."*

***"21. Composition of Micro and Small Enterprises Facilitation Council** - (1) The Micro and Small Enterprises Facilitation Council shall consist of not less than three but not more than five members to be appointed from amongst the following categories, namely:-*

(i) Director of Industries, by whatever name called, or any other officer not below the rank of such Director, in the Department of the State Government having administrative control of the small scale industries or, as the case may be, micro, small and medium enterprises; and

(ii) one or more office-bearers or representatives of associations of micro or small industry or enterprises in the State; and

(iii) one or more representatives of banks and financial institutions lending to micro or small enterprises; or ·

(iv) one or more persons having special knowledge in the field of industry, finance, law, trade or commerce.

(2) The person appointed under clause (i) of sub-section (1) shall be the Chairperson of the Micro and Small Enterprises Facilitation Council.

(3) The composition of the Micro and Small Enterprises Facilitation Council, the manner of filling vacancies of its members and the procedure to be followed in the discharge of their functions by the members shall be such as may be prescribed by the State Government."

29. Section 24 says that Sections 15 to 23 shall have effect notwithstanding anything contained in any other law for the time being in force and this provision is also of utmost importance in this petition, hence reproduced as under:-

***"24. Overriding effect** - The,provisions of sections 15 to 23 **shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force."** (Emphasis added)*

30. Act, 1996 was enacted to consolidate and amend the laws relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards as also to define the law relating to conciliation and for matters connected therewith or incidental thereto. The Scheme of Act shows that it has four Parts; i.e. Part-I dealing with Arbitration; Part-II dealing with Enforcement of Certain Foreign Awards; Part-III Conciliation and Part-IV having Supplementary Provisions.

31. Part-I is further divided in ten Chapters, while Part-II has two Chapters and Part-III and IV have no Chapters separately.

32. Part-I, Chapter-I has Sections 2 to 6; Chapter-II has Sections 7 to 9; Chapter-III contains Sections 10 to 15; Chapter-IV has Sections 16 and 17; Chapter-V has Sections 18 to 27; Chapter-VI deals with Sections 28 to 33; Chapter-VII has single Section, i.e., 34; Chapter-VIII deals with Sections 35 and 36; Chapter-IX has single Section 37 and Chapter-X has within its ambit Sections 38 to 43. Similarly, Part-II Chapter-I deals with Sections 44 to 52 and Chapter-II deals with Sections 53 to 60. Part-III deals with Sections 61 to 81 and Part-IV deals with Sections 82 to 86. There are three Schedules appended to Act, 1996. The First Schedule deals with "Convention on the Recognition and Enforcement of Foreign Arbitral Awards". The Second Schedule deals with "Protocol on Arbitrations Clauses" and Third Schedule deals with "Convention of the Execution of Foreign Arbitral Awards". Further details of Act, 1996, we propose to consider at later stage whenever it would be appropriate.

33. Now reverting back to MSMED Act, 2006, we propose to deal with Section 18 threadbare to find out the scope and ambit of aforesaid provision and the extent to which provisions of Act, 1996 have been made applicable thereto or are superseded by MSMED Act, 2006 due to *"non-obstante"* clause contained in Section 18(1) and (4) as also Section 24.

34. Interestingly, we find that there are two sub-sections in Section 18 which commences with *non-obstante* clause.

35. First of all Sub-section (1) of Section 18 commences with *non-obstante* clause. It says that irrespective of anything contained in any other law for the time being in force, any party to a dispute with regard to any amount due under Section 17 can make a Reference to MASEF Council. It confers a right upon a party, who is entitled to claim certain amount under Section 17, which is not being paid by other party, who is liable to pay, to raise dispute by making a Reference to MASEF Council. The right under Section 17 talks of right of Supplier to claim payment in respect of goods supplied and services rendered and also lays a corresponding obligation upon buyer that he is liable to pay such amount as due, to Supplier along with interest which is to be computed as per Section 16 of MSMED Act, 2006. This right of making a Reference has been given an overriding effect on any contrary available law.

36. When a Reference is made under sub-section (1) of Section 18; then sub-section-(2) provides procedure, which shall be followed by MASEF Council. Sub-section (2) of Section 18 of MSMED Act, 2006 shows that Council either shall itself proceed with the Reference by conducting 'Conciliation' in the matter or seek assistance of any Institution or Centre providing alternate dispute resolution services. Where such assistance is sought by MASEF Council from any Institution or Centre, it shall make a 'Reference' to such Institution or Centre for conducting Conciliation.

37. Therefore, sub-section (2) of Section 18 leaves it open to discretion of MASEF Council to either itself proceed on the Reference by first conducting Conciliation or refer the matter to an Institution or Centre providing alternate dispute resolution services to conduct

Conciliation. In either case, Reference made under sub-section (1) shall first proceed for conciliation and when such Conciliation is proceeded, for the purpose of procedure, Sections 65 to 81 of Act, 1996 shall apply as if conciliation was initiated under Part-III of Act, 1996. As we have already said, Part-III of Act, 1996 deals with 'Conciliation'. It takes into its ambit Sections 61 to 81. For the purpose of sub-section (2), entire Part-III has not been made applicable and it is only Sections 65 to 81, which have been made applicable by virtue of sub-section (2) of Section 18 of MSMED Act, 2006. The obvious reason is that these provisions deal with the procedure for Conciliation after application for Conciliation is made and Conciliators are appointed under Act, 1996. This procedure has been applied by conciliation which is to be made under Section 18(2) of MSMED Act, 2006. This is called legislation by Reference. Sections 65 to 81 of Act, 1996 have been made applicable for conciliation under Section 18(2) of MSMED Act, 2006 by making provision of Act, 1996 applicable by legislative reforms.

38. Section 61 of Part-III of Act, 1996 deals with the "Application and scope" of Part-III. It says that save as otherwise provided by any law for the time being in force and unless the parties have otherwise agreed, Part-III shall apply to conciliation of disputes arising out of legal relationship, whether contractual or not and to all proceedings relating thereto. Sub-section (2) further says that if under some other law for the time being in force certain disputes are not to be submitted to conciliation then Part-III shall not be applicable. Part-III in general, on its own has application subject to any other law and also to the extent, parties have not agreed otherwise. It saves the procedure, otherwise provided, under any law or by parties by mutual agreement and subject to that only, Part-III of Act, 1996 is applicable in general. For the purpose of Section 18(3) of MSMED Act, 2006, however, Section 61 has not been applied, therefore, the subsequent procedure of Part III is not to be read for the purpose of Section 18(3) of MSMED Act, 2006.

39. Section 62 deals with Commencement of conciliation proceedings and provides that the party initiating conciliation shall send to the other party a written invitation to conciliate under Part-III, briefly identifying the subject of the dispute. As per sub-section (2) Conciliation proceedings shall commence when the other party accepts in writing the invitation to conciliate. If other party refuses or rejects invitation, there will be no conciliation proceedings. Sub-section (4) deals with situation where other party fails to submit reply either way. In such a case, after thirty days from the date on which invitation was sent by one party, it shall have an election either to treat failure of reply as "rejection of invitation' and if he so elects, information shall be given to other party. Then Section 63 deals with number of conciliators providing that one conciliator is mandatory but if the parties so agree there may be 2 or 3 conciliators. Section 64 deals with appointment of 'Conciliators'. These provisions of Act, 1996 have also not been made applicable for conciliation under Section 18(2) of MSMED Act, 2006.

40. Sections 61 to 64 have not been made applicable to the Conciliation proceedings as contemplated in Section 18(2) of MSMED Act, 2006 for the reason that when a Reference is made, MASEF Council shall proceed with the conciliation

either itself or refer the matter to an Institution or Centre and therefore, stage up to appointment of 'Conciliator' is already covered by Section 18 sub-sections (1) and (2). That is why, only further procedure provided under Sections 65 to 81 has been made applicable for Conciliation under Section 18(2) of MSMED Act, 2006. Sections 65 o 81 have been made applicable by Section 18(2) of MSMED Act, 2006 with respect to Conciliation as contemplated under sub-section (2) and not for arbitration contemplated by sub-section (3). Therefore, applicability of Sections 65 to 81 will be confined only to the Conciliation proceedings under Section 18(3) and not beyond that.

41. Sub-section (3) will come into operation when Conciliation initiated under sub-section (2) remains unsuccessful and stands terminated without any settlement between the parties. Meaning thereby, when parties fail to reach to a settlement in the Conciliation proceedings under sub-section (2) the conciliation proceedings shall stand terminated. Then next stage of arbitration will arise. For this purpose, sub-section (3) provides the method that arbitration can be taken up by MASEF Council itself or it may refer it to any Institution or Centre providing alternate dispute resolution services. Here also we find that sub-section (3) of Section 18 of MSMED Act, 2006 empowers MASEF Council to itself act as an 'Arbitrator' to take up the arbitration and adjudicate or it may refer the same to be adjudicated by any Institution or Centre providing alternate dispute resolution services.

42. For such arbitration, whether taken up by Council itself or referred to any Institution or Centre, for the purpose of procedure, the entire Act, 1996 has been made applicable as if arbitration was pursuant to an arbitration agreement referred to in Section 7 of Act, 1996. Sub-section (4) re-enforces and makes the authority to enter upon the arbitration. Sub-section (3) is made mandatory by providing that notwithstanding anything provided in any other law otherwise, MASEF Council itself or Centre or Institution providing alternate dispute resolution services shall have jurisdiction to act as an 'Arbitrator' or 'Conciliator' under Section 18 in a dispute between 'Supplier' located within its jurisdiction and a 'Buyer' located anywhere in India, Therefore in the contingencies referred to in sub-section 4 of Section 18 of MSMED Act, 2006, jurisdiction to act as arbitrator has been conferred upon Council as well as an Institution, as the case may be. This provision prevails over any otherwise provision in any other law. The only condition to attract sub-section (4) is that Supplier is located within the jurisdiction of the Council or the Institution or Centre, which enter upon the dispute as an Arbitrator and Buyer is located in India.

43. Even otherwise, by virtue of Section 61 of Act, 1996 the provisions of Part-III would be applicable so long as otherwise it is not provided by any other law or parties have decided or agreed and therefore, the provisions of Part-III will not prevail over otherwise provisions of MSMED Act, 2006 and, on the contrary, will have to sub-serve and surrender to the provisions of MSMED Act, 2006.

44. In the present case, it is not in dispute that respondent-3 is Supplier and he is located in the jurisdiction of MASEF Council and petitioner, the Buyer, is located in State of Maharashtra, satisfying the requirement of sub-section (4) of Section-18 so as to make it applicable in case in hand.

45. Both sub-sections 3 and 4 of Section 18 of MSMED Act, 2006, when read together, even otherwise, make it abundantly clear and mandatory that MASEF Council, if itself has entered into dispute as an Arbitrator, it shall have jurisdiction to do so and if it refers the matter to any Institution or Centre that will also have jurisdiction irrespective of otherwise law provided in any other Statute and that will also override Section 80 of Act, 1996.

46. Moreover, Section 80 of Act, 1996 by virtue of Section 61 of said Act, cannot override provisions of MSMED Act, 2006 and therefore, it cannot be said that Section 80 of Act, 1996 will exclude MASEF Council to act as Arbitrator, since it has been Conciliator in the dispute and arbitration therefore cannot be proceeded by it. This argument in fact suppresses and goes contrary to what has been specifically provided in Section 18(3) and (4) of MSMED Act, 2006.

47. When read conjointly Section 24 is further clarificatory and fortifies what we have said earlier. Again it provides that Sections 15 to 23 of MSMED Act, 2006 shall have effect over any otherwise law. This is an overall overriding effect given by Section 24 to Section 18 of MSMED Act, 2006 and in that view of matter Section 18 of MSMED Act, 2006 cannot be read so as to render subordinate to Section 80 of Act, 1996. The counsel for petitioner advancing argument otherwise, in our view, is not correct and the same is accordingly rejected.

48. Now we proceed to consider the authorities relied by counsel for petitioner in support of his submissions.

49. The first is a Division Bench judgment of Bombay High Court in **Gujarat State Petronet Ltd. Vs. Micro and Small Enterprises Facilitation Council and others, AIR 2018 Bom. 265.** Therein M/s Gujarat State Petronet Ltd. (hereinafter referred to as "GSPL") floated a tender for supply, installation, construction, testing, commissioning and development of Fire Fighting System at its gas receiving station in June, 2007. Several bidders including respondent-3 participated in the tender process and upon evaluation of bids, respondent-3 was declared successful bidder. Work Order/Purchase Order was issued. After completion of work, there arose a dispute regarding completion of work, quality of work and payment of money. Respondent-3 approached MASEF Council by making a Reference under Section 18(1) of Act, 2006 seeking payment of Rs.36,60,054.64/-. GSPL filed its reply raising an objection that MASEF Council has no jurisdiction to try and entertain Reference in view of Arbitration Agreement in the Purchase Order. MASEF Council by order dated 29.04.2015 terminated Conciliation proceedings under Section 18(2) and decided itself to entertain Arbitration, entering into dispute as an Arbitrator. This order was challenged in the writ petition and jurisdiction of MASEF Council to entertain dispute as an 'Arbitrator' was challenged.

50. The writ petition was pressed by GSPL relying on a Division Bench decision Nagpur Bench of Bombay High Court in **M/s Steel Authority of India Ltd. And another Vs. The Micro, Small Enterprise Facilitation Council and another, AIR 2012 Bombay 178**. Arbitration by MASEF Council was supported by respondent-3 relying on Section 18(3) and a decision of Gujarat High Court in **First Appeal No. 637 of 2016 (Principal Chief Engineer**

Vs. M/s Manibhai and Brothers) decided on 5th July, 2017.

51. Considering rival submissions, Bombay High Court in **Gujarat State Petronet Ltd. (Supra)** held that MSMED Act, 2006 contains special provision for providing delayed payment to such 'Enterprises'. A special procedure for recovery of amount due towards supply of goods and services rendered thereto has been laid down. It further observed that MSMED Act, 2006 does not contemplate arbitration through an 'Arbitrator' appointed by the parties but provides for special forum in the form of MASEF Council or under aegis of any Institution or a Centre providing alternate dispute resolution services as referred by MASEF Council. Section 19 of MSMED Act, 2006 which mandates pre-deposit of 75% of awarded mount, ensures recovery of dues and thus safeguards the interest of all Micro, Small and Medium Enterprises. Act, 1996 do not contains such similar provisions. MSMED Act, 2006 is a special enactment, enacted with an object of facilitating promotion and development and enhancing, competitiveness of Micro, Small and Medium Enterprises, which do not command significant bargaining power. The MSMED Act, 2006 provides for institutional arbitration. Having said so, Court further said:

"...we are of the view that the provisions of ***Sections 15 to 23 of the Act will have an overriding effect, notwithstanding anything inconsistent in any other law or the arbitration agreement as defined under Section 7 of the Arbitration Act, 1996.*** *Thus, nothwithstanding the provisions of the Arbitration Act, 1996 and the existence of an arbitration agreement, any party can make a reference to MASEFC with regard to the amount due under Section 17, and* ***such council*** *or the institution or centre identified by it,* ***will have jurisdiction to arbitrate such dispute"****. (Emphasis added)*

52. On this aspect Division Bench of Bombay High Court found that a Division Bench of Gujarat High Court in **M/s Manibhai and others (supra)**, has followed a Division Bench judgment of this Court i.e. Allahabad High Court in the case of **Paper and Board Convertors Vs. U.P. State Micro and Small Enterprise (Writ Petition No. 24343 of 2014) decided on 29th April, 2014**, and that has been affirmed by Supreme Court while dismissing appeal on 5.7.2017 from judgment of Gujarat High Court Hence it followed the proposition laid down by Gujarat High Court and this Court on this aspect.

53. Thereafter it proceeded to consider separately. The question, whether MASEF Council having acted as 'Conciliator' can further act as an 'Arbitrator' under Section 18(3). Answering the same, it has held that in view of Section 80 of Act, 1996 it cannot be done. Paragraphs 20 and 21 reads as follows:

20. It is thus, evident that sub-section (2) and sub-section (3) of the MSMED Act vests jurisdiction in the Council to act as conciliator as well as arbitrator. The question is in view of the provisions of Section 80 of the Arbitration Act, 1996, the Council which has conducted the conciliation proceedings is prohibited from acting as arbitrator. As stated earlier, certain provisions of Arbitration Act, 1996 including Section 80 are specifically made applicable to

conciliation proceedings contemplated by Section 18(2) of the MSMED Act. Whereas provisions of Arbitration At, 1996, in its entirety, are made applicable to the arbitration and conciliation proceedings contemplated by sub-section (3) of Section 18 of the MSMED Act.

21.A harmonious reading of these provisions clearly indicate that Section 80 of the Arbitration Act, 1996 is applicable to conciliation as well as arbitration proceedings under sub-sections (2) and (3) of Section 18 of the MSMED Act. Section 80 of the Arbitration At, 1996 reads thus:

"80. Role of conciliator in other proceedings

Unless otherwise agreed by the parties-

(a) the conciliator shall not act as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceeding in respect of a dispute that is the subject of the conciliation proceedings; and

(b) the conciliator shall not be presented by the parties as a witness in any arbitral or judicial proceedings"

54. To us, the two parts of the judgment of Bombay High Court in **Gujarat State Petronet Ltd. (Supra)** are contradictory. We find ourselves with great respect in disagreement to the aforesaid view taken by Bombay High Court in paragraphs 20 and 21 of the judgment for the reason that Sections 65 to 81 have been applied by Reference under Section 18(2) to conciliation but under sub-Section (3) entire Act, 1996 has been applied, which includes Section 61 of Act, 1996 also. Simultaneously, sub-section (4) of Section 18 very specifically states that notwithstanding anything provided otherwise, MASEF Council shall have jurisdiction to arbitrate when the 'Supplier' is located within its local jurisdiction and 'Buyer' is within India and in such a case when a declaratory and mandatory provision is provided in sub-section (4), Section 80 of Act, 1996 could not have been given overriding effect so as to denude MASEF Council its authority to act as Arbitrator. We accordingly hold and find ourselves unable to be persuaded by the aforesaid Division Bench decision of Bombay High Court.

55. Then there is a Single Judge judgment of Karnataka High Court in **Pal Mohan Electronics Pvt. Ltd. Vs. The Secretary, Department of Small Scale Industries and others, 2019 (5) Kar.LJ. 72**. Therein M/s Pal Mohan Electronics Pvt. Ltd. (hereinafter referred to as "PMEPL") was engaged in the business of electronics. Maharashtra State Electricity Distribution Co. Ltd. (hereinafter referred to as "MSEDCL"), invited bids for supply, installation, connection and commission of GSM and GPRS Modems for HT Consumers' Meters, LT Consumers' Metes and Feeder Meters. M/s PMEPL made its bid and was successful. It was issued Purchase Order dated 28.3.2011. It was subsequently modified on multiple occasions. Ultimately MSEDCL terminated the contract with petitioner alleging certain lapses in the working of the Modem. Reference was made under Section 18(1) of MSMED Act, 2006 to MASEF Council. Council did enter into dispute for conciliation and when it failed, proceeded to act as 'Arbitrator'. This was objected by PMEPL. The Court formulated following question for adjudication:

"Whether Facilitation Council, having conducted conciliation proceedings under section 18(2) of the Act could itself

conduct arbitration proceedings under section 18(3) of the Act."

56. Following the same reason as given by Bombay High Court in **Gujarat State Petronet Ltd. Vs. Micro and Small Enterprises Facilitation Council and others (supra)** the learned Single Judge of Karnataka High Court observed that Section 80 of Act, 1996 must be read with Section 18(3) of MSMED Act, 2006. Paragraph-13 of judgment reads as under:

"13. Therefore, the question is whether the restriction under section 80 of the Arbitration Act would apply to the Facilitation Council. The provisions of section 18 (3) of the MSMED Act is categorical that the Arbitration Act shall apply to a dispute taken up for arbitration after the failure of the conciliation as if such arbitration was in pursuance of an arbitration agreement referred to in subsection (1) of section 7 of the Arbitration Act inasmuch as it says that the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall then apply to the dispute as if the arbitration was in pursuance of an arbitration agreement referred to in sub-section (1) of section 7 of that Act. The MSMED Act not only provides for an arbitration even though there may not be an agreement for referring the dispute between a "buyer" and a "supplier" to an arbitration, but also stipulates that the provisions of the Arbitration Act shall apply to such arbitration. There is nothing in the provisions of section 18 (3) of the MSMED Act to indicate that any particular provision of the Arbitration Act is intended to be exclude to an arbitration provided for under section 18 (3) of the Act."

57. We find that learned Single Judge, while considering Section 18(3) of MSMED Act, 2006 vis-a-vis Section 80 of Act, 1996 has not at all adverted to Section 18(4) of MSMED Act, 2006.

58. Next question considered was, should any exclusion be read because of Section 24 of MSMED Act, 2006 and it was answered by observing as under:

"It is obvious from a plain reading of the provisions of section 24 of the MSMED Act that overriding effect is given to the provisions of sections 15 to 23 thereof wherever any law is inconsistent with the provisions thereof. Indeed, the objective of the provisions of Chapter - V of the Act, which includes provisions of section 15 to 23, is to provide for an expedited and efficacious closure of a dispute, either by conciliation or by arbitration. But, from this alone should it be inferred that a Facilitation Council could act both as a Conciliator and Arbitrator, merely because Section 18(3) of the MSMED Act stipulates that the Facilitation Council could take up the dispute for arbitration if the conciliation proceedings fail and a contrary intent is not obvious from the plain reading of the provisions of section 18 (3) of the Act."

59. Karnataka High Court in fact followed the judgment of Bombay High Court in **Gujarat State Petronet Ltd. Vs. Micro and Small Enterprises Facilitation Council and others (supra)** and Gujarat High Court in **Principal Chief Engineer Vs. M/s Manibhai and Brothers (supra)**. We find that in para-15, learned Single Judge has observed that Section 80 of Act, 1996 incorporates a salutary principle that a 'Conciliator' cannot act also as an Arbitrator and this salutary principle cannot be whittled down or excluded by inferring a contrary intent in the provisions of Section 18(3) and applying Section 24. Unfortunately, when we enquired, are not shown any such alleged salutary principle which could have been given an overriding

effect over express statutory provision providing otherwise. Further, we also find that Section 18(4) has been completely overlooked and no reason has been given by referring to Section 18(4) as to why MASEF Council cannot act as Arbitrator, when a specific declaration has been made that it shall have jurisdiction to act an Arbitrator. For application of Section 18(4) to that extent, there is no such condition provided. In our view, therefore, aforesaid Single Judge judgment will not help petitioners and we record our respectful disagreement with the aforesaid authority of the learned Single Judge of Karnataka High Court.

60. We inquired from learned counsel for petitioner as to where such alleged salutary principles that a Conciliator cannot act as an arbitrator is laid down but he could place nothing before us except Section 80 of Act, 1996. Having gone through Section 80, we find that even prohibition therein that Conciliator shall not act as an Arbitrator or as Representative or Counsel of the party in any arbitration or judicial proceedings is not absolute proposition but it permits parties to have an agreement otherwise. What actually is contemplated therein is that when a Conciliator has formed a particular opinion but parties did not agree to such opinion, in order to avoid any scope of bias on the part of such conciliator, he should not be an arbitrator when such a dispute proceeds for arbitration. This is also clear from the fact that prohibition is also that such Conciliator shall not act as representative or counsel of one of the party when the matter is taken in judicial proceedings. We further find that this principle was recognized in Article 18 of United Nations Commission on International Trade Law (hereinafter referred to as "UNCITRAL"); adopted UNCITRAL Model Law on international commercial arbitration practice. It was adopted in 1985. From the preamble of Act, 1996 we find that the aforesaid Model Law as also Conciliations Rules which were adopted by UNCITRAL in 1980, have been broadly taken into consideration in enactment of Act, 1996. What we feel is that the above prohibition recognized in Section 80 is consistent with one of the well known principle of natural justice that no person shall be Judge in his own cause, of which the element of absence of bias or prejudice is one of the integral aspects. The aforesaid principle cannot be given a pedestal so as to override a mandatory provision made by Legislature, that too, by giving it an overriding effect, and, in our view, Court must endeavour to adhere and uphold the clear and specific provision instead of finding out certain principle which has not been preserved by Legislature. Validity of Section 18(3) and (4) of MSMED Act, 2006 is not under challenge before us. Therefore the provision has to be read, interpreted and followed as it is.

61. There is one more aspect. Normally an Arbitral Tribunal consists of sole Arbitrator or two Arbitrators with or without an Umpire. In such a case, there may be an element of personal prejudice or bias on the part of such persons constituting Arbitral Tribunal, if one of them or all of them have also acted as Conciliator. However, that is not the position in respect of a Reference made under Section18 (1) of MSMED Act, 2006 since MASEF Council is a statutory body. Section 21 of MSMED Act, 2006 provides that such Conciliator shall have members not less than three but not more than five. The composition of Council is also given in Section 21(1) (i) to (iv) and it includes Director of Industries or

any other officer not below the rank of such Director, in the Department of State Government; Office Bearer or Representatives of Association of Micro or Small Industries or Enterprises; Representatives of Banks and Financial Institutions lending to micro or small enterprises. The persons mentioned in Clause (iv) of Section 21(1) may be brought in Council in the alternative of Representative of Banks and financial institutions lending to Micro and Small Enterprises, if it is found necessary to include persons having special knowledge in the field of industry, finance, law, trade or commerce. Director is Chairperson of MASEF Council. Therefore, the statutory body like MASEF Council does not suffer the element of personal prejudice or bias as is available in the case of individual persons constituting Arbitral Tribunal. It may be that persons constituting MASEF Council at the time of conciliation may not be the same when the said Conciliator took up the matter for arbitration. Therefore, central idea beyond the embargo created by Section 80(1) available in case of individuals constituting Arbitral Tribunal is absent in the matter covered by Section 18 of MSMED Act, 2006 since here, the Council, which is permitted to act as Conciliator as well as Arbitrator is a statutory body having not less than there persons but upto five persons and, therefore, the element of personal bias, prejudice is absent in such a case.

62. Even otherwise, as we have already discussed, Section 80 itself permits an otherwise agreement between the parties. Meaning thereby the embargo that Conciliator shall not be Arbitral Tribunal is not absolute. That being so, the mandatory and overriding effect contained in Section 18(3) and 18(4) and Section 24 of MSMED Act, 2006 cannot be whittled down by referring to a salutary principle though, in our view, no such salutary principle having force of law to the extent that a legislative provision must be read as sub-serving is recognized or available.

63. In view of above discussion, we are clearly of the view that MASEF Council having acted as Conciliator is not barred from working as Arbitral Tribunal to arbitrate the dispute under Section 18(3) and such jurisdiction of MASEF Council has been given overriding effect by virtue of Section 18(4) and Section 24 which have to be given complete swing in the area covered by same. The argument, therefore, advanced otherwise by learned counsel for petitioner is hereby rejected. The question, formulated above, is answered against petitioner and we hold that MASEF Council is not prohibited from working as Arbitrator itself for adjudication of dispute between the parties and it is not obliged to refer the matter to any other body.

64. No other point has been argued.

65. The writ petition lacks merits. Dismissed, accordingly.

(2020)09ILR A476
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.03.2020

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE AJIT KUMAR, J.

WRIT - C No. 7811 of 2008

Mukesh Kumar ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Arvind Agrawal, Sri Manoj Kumar Yadav

Counsel for the Respondents:
A.S.G.I., Sri Vikas Budhwar, Sri R.D. Singh

A. Constitution of India,1950-Article 226-challenge to- petitioner candidature rejection for the allotment of retail outlet dealership-petitioner being a defence personnel claims benefits of reservation for the allotment of retail outlet – the petitioner is not covered under Clause 4(d) as he is physically fit and active in service-the claimant shall himself must have gone disabled while in service to render him incapable to continue as such or personnel must have died of injury to make dependents eligible as the case may be, to get benefit under clause 4. (Para 3 to 10)

The petition is dismissed. (E-6)

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

1. Sri R.D. Singh, Advocate has filed vakalatnama on behalf of Union of India-respondent no. 1 which is taken on record.

2. Heard Sri Manoj Kumar Yadav, Advocate holding brief of Sri Arvind Agrawal, learned counsel for the petitioner, Sri Vikas Budhwar, learned counsel appearing on behalf of the respondent-corporation, Sri R.D. Singh, learned counsel for the respondent no. 1 and perused the record.

3. By means of this writ petition under article 226 of the constitution, the petitioner has challenged the order dated 19th of December, 2019 whereby the petitioner's candidature has been rejected for the allotment of retail outlet dealership in respect of the location advertized on the ground that *"the applicant is not meeting the specific eligibility criteria under the advertised category. Despite affording opportunities, the applicant could not furnish documents with respect to CC-I category".*

4. Learned counsel for the petitioner has argued that as per the brochure and the relevant clauses, the petitioner falls in the category of defence personnel and, therefore, he is entitled for the benefit of reservation for the allotment of retail outlet dealership and the stand taken by the respondents is incorrect. He has also drawn our attention towards the affidavit that he had filed before the Competent Authority of the Oil Company in which he has stated that he is working in Para Military Force and as soon as he is awarded dealership, he will resign from his service.

5. *Per Contra*, it has been argued by Sri Budhwar, counsel appearing on behalf of the Oil Company that the reservation for the defence personnel prescribed under the brochure has come to be defined under the provisions contained in Clause-4-C and D which runs as under:-

"4 (c). **Defence Personnel (DEF)**

Defence Personnel means personnel of armed forces (vis. Army, Navy, Air Force) and will cover:

(i) Widows/dependents of those members of Armed Forces who died in war or in harness due to attributable causes;

(ii) Ex-service men who are war disabled/disabled in peace due to attributable causes;

(iii) Able bodied Ex-service men.

Candidate applying under this category covered under (i) & (ii) above would be required to submit as and when advised by Oil Company, the Eligibility Certificate in original, issued from

Directorate General of Resettlement (DGR), Ministry of Defence, Government of India sponsoring the candidate for the RO Dealership for which he/she has applied. Certificate of eligibility issued for one RO Dealership is not valid for another RO Dealership and therefore a candidate can be considered to be eligible only if he/she has been sponsored for the particular location with reference to current advertisement.

Candidate applying under this Category covered under (iii) above should submit copy of Discharge Order or Pension Order."

6. He further submits that the petitioner is a personnel of Para Military Force, therefore, he comes under category 'D' which defines the government servant including the Para Military Force and Public Sector personnel in the following manner:

"4 (d) **Government (including PMP) and Public Sector Personnel**

The personnel serving in different Departments of Central/State Governments and Public Sector undertakings or Central/State Government, who are incapacitated or disabled while performing their duties will be eligible under this category. In case of death, while performing duties, their widows/dependants will be eligible under this category.

Applicants under this category would be required to submit as and when advised by Oil Company, a copy of relevant certificate from the concerned Organization/Government Department signed by the Head of the Officer or an Officer not below the rank of Under Secretary to the Government-Appendix VIII."

7. He argued that on the basis of Clause (d), the petitioner since continues to be a personnel in active service of Para Military Force and is physically fit, therefore, the petitioner is not covered under the definition prescribed for vide Clause 'd'.

8. We have carefully gone through the provisions as quoted hereinabvoe and a bare reading of Clause 'd' clearly shows that a person has to be either incapacitated or disabled while performing his duty to become eligible to get reservation under this category. We have, therefore, also considered the aspect of benefit of dependents in a judgement passed in the case of Hariom Verma & another vs. Hindustan Petroleum Corporation Limited & 2 others in Writ-C No. 1153 of 2020 decided on 14th January, 2020 in which in concluding part, we have held thus:-

"From the perusal of the aforesaid Clause, it is clearly revealed that the person who has got physically incapacitated during the course of employment can be put/brought in reserved category as prescribed for in Clause 2-A but so far as dependents are concerned, they are eligible to obtain benefit under the reserved Clause provided that person who suffered fatal injuries had died during the course of employment.

We made a pointed query to the learned counsel for the petitioner as to whether he questions/guidelines and whether the order impugned can be said to be suffering from any legal error, he could not give any satisfactory answer. We, therefore, do not find any manifest error in the order impugned that may warrant interference.

The writ petition fails and is, accordingly, dismissed. "

9. In view of the above, therefore, in both the cases of personnel himself or dependents, the claimant shall himself must have gone disabled while in service to render him incapable to continue as such or personnel must have died of injury to make dependents eligible as the case may be, to get benefit under the clause 4.

10. We, accordingly, do not find any merit in the submissions advanced by learned counsel for the petitioner and also we do not find any manifest error in the order impugned warranting any interference in exercise of our jurisdiction under article 226 of the constitution. The writ petition fails and is, accordingly, dismissed.

(2020)09ILR A479
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.03.2020

BEFORE

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

WRIT – C No. 8010 of 2020

M/s KDP Grand Savanna Apartment Owners Asso., Ghaziabad ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ashutosh Gupta, Sri Amarish Chandra Tiwari

Counsel for the Respondents:
C.S.C., Sri Krishna Agrawal

Electricity Act - Tariff - Association of Owners of Apartments (AOA) obtained single point electric connection for entire group of society - AOA charging higher fixed charges from ultimate consumers i.e. Flat Owners than what it was paying to Supplier (PVVNL) - *Held* - Builder or AOA neither can frame their own tariff nor can charge the flat owners on a rate higher than what is prescribed in the Tariff approved by UPERC for the area concerned (Para 8)

Dismissed (E-5)

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

1. This writ petition under Article 226 of the Constitution of India has been directed against order dated 31.01.2020 passed by "Electricity Ombudsman", U. P. Electricity Regulatory Commission, Vibhuti Khand, Gomti Nagar, Lucknow, respondent-5 in Representation No.79 of 2008 (Sri Ved Prakash Pandey and two others v. Sri Dharmendra Kumar and others) and order dated 04.02.2019 passed by Electricity Consumer Grievance Redressal Forum, Meerut *(hereinafter referred to as 'ECGRF')* in Complaint Case No.70 of 2018 (Sri Jay Narayan Tyagi and others vs. Sri Rajkumar Tyagi and another).

2. Petitioner is an Association of Owners of Apartment of a High Rise Building having residential Apartments etc and is registered as Apartments Owners Association *(hereinafter referred to as "AOA")* under provisions of Societies Registration Act, 1860 *(hereinafter referred to as "Act, 1860").* Apartments were developed by M/s KDP Infrastructure Private Limited (hereinafter referred to as "Apartments' Promoter/Builder") and after completion and sale of flats and registration of AOA, maintenance of 12 towers out of 15 have been handed over to Petitioner's Association. As 3 towers are still not complete, thus we are not concerned with the same.

3. Apartments' Promoter/Builder obtained single point electric connection of the contracted load of 5000 Kilowatt *(hereinafter referred to as 'KW')* for entire group of society but has released only 1000 KW load to Petitioner's Association. Respondent no.3 i.e. Electricity supplier namely Paschimanchal Vidyut Vitram Nigam Limited *(hereinafter referred to as 'PVVNL')* is issuing a common bill since it is a single point electricity connection.

4. System of giving electric connection to Apartments is that after single point bulk load connection, separate electricity connections have been given to all Apartments installing internal meters for each apartment. These internal meters are prepaid meters and amount is charged earlier by Apartments' Promoter/Builder and now by petitioners in respect of flats of 12 towers which have become part of their Association. Apartments are in four categories i.e. 825 square feet, 1125 square feet, 1250 square feet and 1550 square feet. Smaller apartments of 825 square feet and 1125 square feet are allowed 3 KW load while remaining two larger categories are allowed 5 KW load. Tariff has been framed by PVVNL with approval of U. P. Electricity Regulatory Commission *(hereinafter referred to as 'UPERC')* under provisions of Indian Electricity Act, 2003 *(hereinafter referred to as 'Act, 2003')* for the year 2019-20 in which Fixed Charge for bulk load supply at single point are determined at Rs.110 per KW per month.

5. In some cases, AOA was charging higher fixed charges from Flat Owners than what it was paying to Supplier. This issue was raised by certain Flat Owners in Complaint Case No.70 of 2018 (Shri Jai Narayan Tyagi and others v. Raj Kumar Tyagi, Chairman and another) before ECGRF. Application was allowed by ECGRF vide order dated 04.02.2019 and following directions were issued :

"परिवादी का परिवाद संख्या-१ के विरुद्ध स्वीकार किया जाता है और विपक्षी संख्या १ को निम्न आदेश दिए जाते है :-

१. अपार्टमेंट में रहने वाले फ्लैट स्वामियो से फिक्स्ड चार्ज के मद में वही धनराशि वसूली जाएगी जो धनराशि विपक्षी संख्या -१ द्वारा फिक्स्ड चार्ज के मद में विपक्षी संख्या -२ विद्युत् विभाग को भुगतान की जा रही है | इस धनराशि पर अधिकतम ५ प्रतिशत अतिरिक्त सरचार्ज विपक्षी संख्या-१ फ्लैट स्वामियो से वसूल सकता है, इससे अधिक नहीं|

२. विपक्षी संख्या-१ द्वारा ०३ माह के भीतर आवश्यक औपचारिकताए पूर्ण करने के उपरांत नामांतरण परिवर्तन हेतु प्रार्थना पत्र विपक्षी संख्या-२ विद्युत् विभाग के यहाँ दिया जायेगा जिसमे विपक्षी संख्या-२ विद्युत् विभाग द्वारा पूर्ण सहयोग प्रदान किया जायेगा|

३. विपक्षी संख्या-१ द्वारा फ्लैट स्वामियो को उनके द्वारा उपयोग की गई विद्युत् के सम्बन्ध में व्यक्तिगत उपयोग और सामान्य उपयोग दोनो के सम्बन्ध में अलग- अलग बिल जारी किये जायेंगे

४. विपक्षी संख्या-१ द्वारा फ्लैट स्वामियो को नियमित रूप से विद्युत् बिल जारी किये जायेंगे|

५. विक्षी संख्या-१ द्वारा विद्युत् बिल के सम्बन्ध में रखे गए अकाउंट का प्रत्येक वर्ष चार्टेड अकाउंटेंट से परिक्षण कराया जायेगा और परीक्षित अकाउंट को प्रत्येक वित्तीय वर्ष की समाप्ति के तीन माह के भीतर उपभोक्ता को अवलोकनार्थ प्रस्तुत किया जायेगा|

६. विपक्षी संख्या-२ उपरोक्त अनुतोषो का अनुपालन अपने स्तर से विपक्षी

संख्या-१ द्वारा कराना सुनिश्चित करे और अनुपालन आख्या एक माह के भीतर फोरम को भेजी जाये|

७. ए०ओ०ए० द्वारा उपभोक्ताओं से वसूली धनराशि तथा लाईसेंसी को भुगतान की गयी धनराशि की गणना प्रत्येक छः माह में करके उपभोक्ताओं को उपलब्ध कराया जायेगा |"

6. Aforesaid order of ECGRF was challenged by petitioner before Electricity Ombudsman, Lucknow in Representation No.79 of 2019 but the same was rejected vide order dated 31.01.2020 and order of ECGRF passed on 04.02.2019 was confirmed.

7. Now both these orders have been challenged by petitioner before this Court on the ground that Tariff framed by Electricity Supplier with approval of UPERC cannot govern the charges leviable by petitioner i.e. AOA from ultimate consumers i.e. Flat Owners and Fixed Charge paid to electricity supplied by PVVNL cannot be a guiding factor.

8. In our view, this submission is thoroughly misconceived. Petitioner is not holding any license of distribution of electricity to anyone. It is an Association of individual Flat Owners and modus operandi of supply of electricity is that Distribution Licensee i.e. PVVNL gives a single point supply to one set of Flat Owners through either Builder i.e. Promoter of flats or where Resident Welfare Association i.e. Flat Owners Association have been formed, to them. Payment to Electricity Department is made by Apartment Promotor/ Builder or AOA, as the case may be, but individually supply to Flat Owners is given by them and charges paid to PVVNL stand collected proportionately as per individual meter readings of flats from flat owners. Builder or AOA neither can frame their own tariff nor can charge the flat owners on a rate higher than what is prescribed in the Tariff approved by UPERC for the area concerned. The basis of charges of individual owners is tariff of Distribution License since in respective area, no other individual having no license can distribute electricity to anyone and charge in the manner it likes. Therefore, contention of petitioner that Fixed Charge rates prescribed in Tariff cannot be a guiding factor for realization of electricity charges from Flat Owners by petitioner is thoroughly misconceived and illegal.

9. We find no manifest error in the impugned orders assailed in this writ petition.

10. Writ petition lacks merit and is dismissed accordingly.

(2020)09ILR A481
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.04.2020

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE RAJIV MISRA, J.

WRIT – C No. 8038 of 2020

TBEA (India) Transformer Pvt. Ltd., Gujarat ...Petitioner

Versus

U.P. Micro & Small Entp. Facilitation Council Kanpur Nagar & Anr. ..Respondents

Counsel for the Petitioner:
Sri Sarvanand Pandey, Sri Alexander Iqbal, Sri Akshay Saprey

Counsel for the Respondents:

A. Civil Law - Arbitration and Conciliation Act,1996 - Section 80 & Micro Small and Medium Enterprises Development Act,2006-Section 18-Section 80 of

Act,1996 will not exclude MASEF Council to act as Arbitrator-it will be contrary to section 18(3) & 18(4) of MSMED Act,2006-MASEF Council having acted as Conciliator u/s 18(2) is not barred from working as Arbitral Tribunal to arbitrate the dispute u/s 18(3)-Since jurisdiction of MASEF Council has been given overriding effect by virtue of Section 18(4) and Section 24 which have to be given complete swing in the area covered by the same.(Para 11 to 45)

The Petition is dismissed. (E-6)

List of Cases cited: -

1. Swastik Gases Pvt. Ltd. Vs IOC (2013) 9 SCC 32

2. Indus Mobile Distribution Pvt. Ltd. Vs Datawind Innovation Pvt. Ltd. & ors. (2017) 7 SCCd 678

3. M/s Steel Authority of India Ltd. & anr. Vs Micro,Small Enterprises Facilitation Council,Nagpur AIR (2012) Bob.178.

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

1. Heard Sri Akshay Saprey, holding brief of Mr. Sarvanand Pandey, learned counsel for petitioner and perused the record.

2. This writ petition under Article 226 of Constitution of India has been filed by petitioner, TBEA (India) Transformer Private Limited having its registered Office at Revenue Survey No.745-Lot 3, TBEA Green Energy Park, N.H.-8, Village-Miyagam Karjan Vadodara, Gujarat (hereinafter referred to as 'petitioner') with a prayer to issue a writ of certiorari to quash order dated 23.12.2019 passed by respondent-1 i.e. U.P. Micro and Small Enterprises Facilitation Council (hereinafter referred to as "MASEF Council") having its Office at Udyog Bhawan, Kanpur Nagar and also to issue a writ of mandamus to call for record of Claim Petition No. 216 of 2019 on the ground that parties have agreed to settle their dispute through arbitration under the provisions of Arbitration and Conciliation Act, 1996 (hereinafter referred to as "Act, 1996") and Council has no jurisdiction to proceed with arbitration.

3. Facts in brief giving rise to this petition are that petitioner is a Private Limited Company incorporated under Companies Act, 2013 (hereinafter referred to as "Act, 2013"). It is engaged in the business of design, manufacture as well as service of Transformers and Reactors. Respondent-1 is a body established by Government of State of U.P. under Section 20 of Micro Small and Medium Enterprises Development Act, 2006 (hereinafter referred to as "MSMED Act, 2006"). Respondent-2, M/S Osama Engineering Works having its registered office at 96B DAUD Nagar Naini, Prayagraj is also a Private Limited Company incorporated under Companies Act, 1956 (hereinafter referred to as "Act, 1956") and continued to function under Act, 2013 being an existing company. It is also allegedly registered as Micro Enterprise under MSMED Act, 2006 and engaged in the business of manufacture of Transformer tanks, Yoke clamp, RTCC panels and Marshaling box etc.

4. For supply of certain work components of Transformer being manufactured by respondent-2, a letter of intent was issued by petitioner vide E-Mail dated 16.10.2018. Respondent-2 was to supply 42 Transformer Tanks as per above letter of intent. The delivery was to be made by 05.12.2018. Respondent-2 committed default in supply of goods and thus committed breach of contract. Even

the items supplied were not of requisite specifications or quality. Consequently, petitioner issued a cancellation order dated 21.12.2018 and terminated purchase order. Respondent-2 instead of realizing its mistake, issued a legal notice dated 12.03.2019 upon petitioner requiring it to pay Rs. 4,79,009.70 along with interest which was computed to Rs. 4,10,803/-. Petitioner submitted his reply dated 20.04.2019 to the aforesaid notice disputing claim of respondent-2.

5. Thereafter, respondent-2 moved an application/representation dated 26.07.2019 before MASEF Council stating that petitioner is liable to pay in respect of goods supplied by respondent-2 in terms of provisions of MSMED Act, 2006 and since payment has been delayed, therefore application under Section 18(1) is being filed by Supplier to direct petitioner to pay to pay Rs. 4,79,009/- and interest thereon.

6. The claim of respondent-2 was contested by petitioner by submitting reply dated 04.11.2019 stating that entire claim was false and in fact petitioner himself has suffered huge loss which are to be liquidated by respondent-2 and required respondent-2 to withdraw its claim which is based on erroneous presentation of facts. Reply was submitted by petitioner after receiving notice from respondent-1 for conciliation under Section 18(1) but after receiving reply of petitioner, respondent-1 concluded that parties have failed to conciliate the matter and thereafter by impugned order it has directed to proceed for arbitration.

7. Petitioner pleaded before respondent-1 that since there is an arbitration clause in the agreement and parties themselves have resolved to refer the matter to arbitration to the person nominated by petitioner, respondent-1 has no jurisdiction to proceed under Section 18 but that issue has not been decided, hence present writ petition.

8. It is not disputed before us that there is an arbitration clause, i.e., Clause-10 in the purchase order whereby dispute, if any, was to be referred to an Arbitrator appointed by petitioner, but respondent-2 did not avail the aforesaid remedy and moved application under Section 18(1) before respondent-1.

9. Learned counsel for petitioner submitted that once parties have agreed to have their dispute, if any, resolved through an arbitration, respondent-1 in such a case will have no jurisdiction to enter into a dispute either for conciliation or for arbitration and Section 18 shall not prevail over agreement between the parties whereby parties have mutually chosen a Forum for settlement of their dispute. Hence respondent-1 has proceeded illegally and failing to decide this objection of petitioner has committed manifest error.

10. However, we find no force in the submission.

11. In our view, remedy under Section 18 read with Section 24 of MSMED Act, 2006 has been given overriding effect over any other law enforced for the time being in force. The arbitration clause, if any, in the agreement between the parties will not prevail over the provisions of Section 18 and respondent-1 is well within its jurisdiction.

12. We hereby formulate the question, which is to be adjudicated by us, as under:

"Whether MASEF Council can act as 'Arbitrator' for adjudication of dispute between the parties or must direct parties to relegate remedy of arbitration

settled between them in an agreement and Section 18(3) read with Sub-section (4) will have to sub-serve to such private agreement of the parties?"

13. For promoting, developing and also enhancing competitiveness of Micro, Small and Medium Enterprises, MSMED Act, 2006 was enacted by Parliament and came into force on 02.10.2006.

14. The Statement of Object and Reasons show that "Small Scale Industry" was defined by Notification issued under 11(b) of Industries Development and Regulation Act, 1951 (hereinafter referred to as "IDR Act, 1951"). Section 29-B of IDR Act, 1951 provided for notifying reservation of items for excluding manufacture in Small Scale Industry Sector. Besides above, there existed no legal framework to deal with the Small Scale Industry Sector, which played major role in the economy of the Country. Time to time need for a comprehensive Central enactment to provide an appropriate legal framework in the sector to facilitate its growth and development was felt necessary, particularly, when in many other Countries, similar Statutes were already framed.

15. Keeping with the pace of globalization and showing due concern for the development of Small and Medium Enterprises, MSMED Act, 2006 was enacted with an intention to provide Statutory definition of "Small Enterprises and Medium Enterprises"; for establishment of a National Small and Medium Enterprise Board, High Level Forum consisting Stake Holders for participative revenue and making recommendations on the policies and programmes for development of Small and Medium Enterprises; for classification of Small and Medium Enterprises on the basis of investment in plant machinery or equipment and establishment of an Advisory Committee to recommend in the related matter; empower Central Govt. to notify programmes, guidelines or instructions for facilitating promotion and development and enhancing competitiveness of Small and Medium Enterprises; to empower State Govt. to specify by notification that provision of Labour Laws specified in Clause 9(2) will not apply to Small and Medium Enterprise employing up to 50 employees with a view to facilitate upgradation of Small Enterprises into Medium Enterprises; make provisions for ensuring timely smooth flow of credit to Small and Medium Enterprises to minimize the instances of sickness amongst the industries and enhance competitiveness of such Enterprises in accordance with guidelines or instructions of Reserve Bank of India (hereinafter referred to as "RBI"); empowers Central and State Governments to notify preference policies in respect of procurement of goods and service products of profits by Small Enterprises by the Ministry/Department and public sector enterprises; empower Central Govt. to create fund or funds for facilitating promotion and development and enhancing competitiveness of Small Enterprises and Medium Enterprises; to prescribe harmonious example of stream line procedures for inspection of Small and Medium Enterprises under Labour Laws enumerated in Clause-15 having regard to the need of permitting self registration or self certification by such enterprise; prescribe for maintenance of records and filing of return of Small and Medium Enterprises with a view to reduce multiplicity of even overlapping type return be filed; and further improvement in

interest of delayed payments to Small Scale Ancillary undertaking Act, 1993 and making that enactment part of proposed legislature and to repeal that enactment.

16. The term "Board" has been defined in Section 2(c) of MSMED Act, 2006 and it reads as under :-

*(c)"**Board"** means the National Board for Micro, Small and Medium Enterprises established under section 3;*

17. Other relevant terms defined in Section 2 are, 'Buyer', 'Enterprise', 'Medium Enterprise', 'Micro Enterprise', 'Small Enterprise' and 'Supplier' and the relevant provisions of MSMED of Act, 2006 defining above terms in clauses (d), (e), (g), (h), (m), and (n) read as under:-

*(d) "**Buyer"** means whoever buys any goods or receives any services from a supplier for consideration;*

*(e) "**Enterprise"** means an industrial undertaking or a business concern or any other establishment, by whatever name called, engaged in the manufacture or production of goods, in any manner, pertaining to any industry pacified in the First Schedule to the Industries (Development and Regulation) Act/ 1951 or engaged in providing or rendering of any service or services;*

*(g) "**Medium Enterprise"** means an enterprise classified1aS such under sub-clause (ii) of clause (a) or sub-clause (iii) of clause (b) of sub-section (1) of section 7;*

*(h) "**Micro Enterprise"** means an enterprise classified as such under sub-clause (1) of clause (a) or sub-clause (1) of clause (b) of sub-section (1) of section 7;*

(m) "Small Enterprise" means an enterprise classified as such under sub-clause (it) of clause (a) or sub-clause (ii) of clause (b) of sub-section (1) of section 7;

*(n) "**Supplier"** means a micro or small enterprise, which has filed a memorandum with the authority referred to in sub-section (1) of section 8, and includes,*

18. Section 3 provides for establishment of Board by Central Government by Notification known as "National Board for Micro, Small and Medium Enterprises" (hereinafter referred to as "NBMSME"). Head office of the Board is to be at Delhi. Constitution of the Board is provided in Section 3(3), which we are skipping for the time being.

19. Functions of the Board are provided in Section 5, which reads as under:-

*"**5. Functions of Board** - The Board shall, subject to the general directions of the Central Government, perform all or any of the following functions, namely:-*

(a) examine the factors affecting the promotion and development of micro, small and medium enterprises and review the policies and programmes of the Central Government in regard to facilitating the promotion and development and enhancing the competitiveness of such enterprises and the impact thereof on such enterprises;

(b) make recommendations on matters referred to in clause (a) or on any other matter referred to it by the Central Government which, in the opinion of that Government, is necessary or expedient for facilitating the promotion and development and enhancing the competitiveness of the micro, small and medium enterprises; and

(c) advise the Central Government on the use of the Fund or Funds constituted under section 12."

20. With regard to delayed payment of Micro and Small Enterprises, Chapter 5 contains Sections 15 to 25, imposing an obligation upon Buyer to pay. It also provides an adjudicatory forum in case of a dispute between Buyer and Supplier.

21. Section 15 deals with liability of buyer to make payment; Section 16 provides the date from which rate of interest shall be payable; Section 17 makes the buyer liable to pay amount with interest for any goods or services rendered by Supplier and Section 18 deals with 'Reference' a dispute for adjudication to MASEF Council.

22. Section 18 is relevant for the controversy in present writ petition and is reproduced as under:

"18. Reference to Micro and Small Enterprises Facilitation Council -

(1) **Reference** ***: Notwithstanding anything contained in any other law for the time being in force,*** *any Party to a dispute may, with regard to* ***any amount due. under section -17, make a reference to the Micro and Small Enterprises Facilitation Council.***

(2) **Conciliation** *: 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 Ill of that Act.***

(3) Arbitration : 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 (26 of 1996) shall then apply to the dispute ***as if the arbitration was in pursuance of an arbitration agreement referred to in sub-section (1) of section 7 of that Act.***

(4) ***Notwithstanding anything contained in any other law for the time being in force,*** *the Micro and Small Enterprises Facilitation Council or the centre providing alternate dispute resolution services* ***shall have jurisdiction to act as an Arbitrator or Conciliator under this section in a dispute between the supplier located within its jurisdiction and a buyer located anywhere in India.***

(5) Every reference made under this section shall be decided within a period of ninety days from the date of making such a reference." (Emphasis added)

23. Composition of MASEF Council is provided in Section 21 of MSMED Act, 2006. The aforesaid Council is to be established by State Government by Notification as provided in Section 20. Both Sections 20 and 21 read as under:

"20. Establishment of Micro and Small Enterprises Facilitation Council - *The State Government shall, by notification, establish one or more Micro and Small Enterprises Facilitation Councils, at such places, exercising such*

jurisdiction and for such areas, as may be specified in the notification."

"21. Composition of Micro and Small Enterprises Facilitation Council - *(1) The Micro and Small Enterprises Facilitation Council shall consist of not less than three but not more than five members to be appointed from amongst the following categories, namely:-*

(i) Director of Industries, by whatever name called, or any other officer not below the rank of such Director, in the Department of the State Government having administrative control of the small scale industries or, as the case may be, micro, small and medium enterprises; and

(ii) one or more office-bearers or representatives of associations of micro or small industry or enterprises in the State; and

(iii) one or more representatives of banks and financial institutions lending to micro or small enterprises; or ·

(iv) one or more persons having special knowledge in the field of industry, finance, law, trade or commerce.

(2) The person appointed under clause (i) of sub-section (1) shall be the Chairperson of the Micro and Small Enterprises Facilitation Council.

(3) The composition of the Micro and Small Enterprises Facilitation Council, the manner of filling vacancies of its members and the procedure to be followed in the discharge of their functions by the members shall be such as may be prescribed by the State Government."

24. Section 24 says that Sections 15 to 23 shall have effect notwithstanding anything contained in any other law for the time being in force and this provision is also of utmost importance in this petition, hence reproduced as under:-

"24. Overriding effect - *The,provisions of sections 15 to 23* ***shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force."*** *(Emphasis added)*

25. Act, 1996 was enacted to consolidate and amend the laws relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards as also to define the law relating to conciliation and for matters connected therewith or incidental thereto. The Scheme of Act shows that it has four Parts; i.e. Part-I dealing with Arbitration; Part-II dealing with Enforcement of Certain Foreign Awards; Part-III Conciliation and Part-IV having Supplementary Provisions.

26. Part-I is further divided in ten Chapters, while Part-II has two Chapters and Part-III and IV have no Chapters separately.

27. Part-I, Chapter-I has Sections 2 to 6; Chapter-II has Sections 7 to 9; Chapter-III contains Sections 10 to 15; Chapter-IV has Sections 16 and 17; Chapter-V has Sections 18 to 27; Chapter-VI deals with Sections 28 to 33; Chapter-VII has single Section, i.e., 34; Chapter-VIII deals with Sections 35 and 36; Chapter-IX has single Section 37 and Chapter-X has within its ambit Sections 38 to 43. Similarly, Part-II Chapter-I deals with Sections 44 to 52 and Chapter-II deals with Sections 53 to 60. Part-III deals with Sections 61 to 81 and Part-IV deals with Sections 82 to 86. There are three Schedules appended to Act, 1996. The First Schedule deals with "Convention on the Recognition and Enforcement of Foreign Arbitral Awards". The Second Schedule deals with "Protocol on Arbitrations Clauses" and Third Schedule

deals with "Convention of the Execution of Foreign Arbitral Awards". Further details of Act, 1996, we propose to consider at later stage whenever it would be appropriate.

28. Now reverting back to MSMED Act, 2006, we propose to deal with Section 18 threadbare to find out the scope and ambit of aforesaid provision and the extent to which provisions of Act, 1996 have been made applicable thereto or are superseded by MSMED Act, 2006 due to *"non-obstante"* clause contained in Section 18(1) and (4) as also Section 24.

29. Interestingly, we find that there are two sub-sections in Section 18 which commence with *non-obstante* clause.

30. First of all Sub-section (1) of Section 18 begins with *non-obstante* clause. It says that irrespective of anything contained in any other law for the time being in force, any party to a dispute with regard to any amount due under Section 17 can make a Reference to MASEF Council. It confers a right upon a party, who is entitled to claim certain amount under Section 17, which is not being paid by other party, who is liable to pay, to raise dispute by making a Reference to MASEF Council. The right under Section 17 talks of right of Supplier to claim payment in respect of goods supplied and services rendered and also lays a corresponding obligation upon buyer that he is liable to pay such amount as due, to Supplier along with interest which is to be computed as per Section 16 of MSMED Act, 2006. This right of making a Reference has been given an overriding effect on any contrary available law.

31. When a Reference is made under sub-section (1) of Section 18; then sub-section-(2) provides procedure, which shall be followed by MASEF Council. Sub-section (2) of Section 18 of MSMED Act, 2006 shows that Council either shall itself proceed with the Reference by conducting 'Conciliation' in the matter or seek assistance of any Institution or Centre providing alternate dispute resolution services. Where such assistance is sought by MASEF Council from any Institution or Centre, it shall make a 'Reference' to such Institution or Centre for conducting Conciliation.

32. Therefore, sub-section (2) of Section 18 leaves it open to discretion of MASEF Council to either itself proceed on the Reference by first conducting Conciliation or refer the matter to an Institution or Centre providing alternate dispute resolution services to conduct Conciliation. In either case, Reference made under sub-section (1) shall first proceed for conciliation and when such Conciliation is proceeded, for the purpose of procedure, Sections 65 to 81 of Act, 1996 shall apply as if conciliation was initiated under Part-III of Act, 1996. As we have already said, Part-III of Act, 1996 deals with 'Conciliation'. It takes into its ambit Sections 61 to 81. For the purpose of sub-section (2), entire Part-III has not been made applicable and it is only Sections 65 to 81, which have been made applicable by virtue of sub-section (2) of Section 18 of MSMED Act, 2006. The obvious reason is that these provisions deal with the procedure for Conciliation after application for Conciliation is made and Conciliators are appointed under Act, 1996. This procedure has been applied by conciliation which is to be made under Section 18(2) of MSMED Act, 2006. This is called legislation by Reference. Sections 65 to 81 of Act, 1996 have been made applicable for

conciliation under Section 18(2) of MSMED Act, 2006 by making provision of Act, 1996 applicable by legislative reforms.

33. Section 61 of Part-III of Act, 1996 deals with "Application and scope" of Part-III. It says that save as otherwise provided by any law for the time being in force and unless the parties have otherwise agreed, Part-III shall apply to conciliation of disputes arising out of legal relationship, whether contractual or not and to all proceedings relating thereto. Sub-section (2) further says that if under some other law for the time being in force certain disputes are not to be submitted to conciliation then Part-III shall not be applicable. Part-III in general, on its own has application subject to any other law and also to the extent, parties have not agreed otherwise. It saves the procedure, otherwise provided, under any law or by parties by mutual agreement and subject to that only, Part-III of Act, 1996 is applicable in general. For the purpose of Section 18(3) of MSMED Act, 2006, however, Section 61 has not been applied, therefore, the subsequent procedure of Part III is not to be read for the purpose of Section 18(3) of MSMED Act, 2006.

34. Section 62 deals with Commencement of conciliation proceedings and provides that the party initiating conciliation shall send to the other party a written invitation to conciliate under Part-III, briefly identifying the subject of dispute. As per sub-section (2) Conciliation proceedings shall commence when the other party accepts in writing the invitation to conciliate. If other party refuses or rejects invitation, there will be no conciliation proceedings. Sub-section (4) deals with situation where other party fails to submit reply either way. In such a case, after thirty days from the date on which invitation was sent by one party, it shall have an election either to treat failure of reply as "rejection of invitation' and if he so elects, information shall be given to other party. Then Section 63 deals with number of conciliators providing that one conciliator is mandatory but if the parties so agree there may be 2 or 3 conciliators. Section 64 deals with appointment of 'Conciliators'. These provisions of Act, 1996 have also not been made applicable for conciliation under Section 18(2) of MSMED Act, 2006.

35. Sections 61 to 64 have not been made applicable to the Conciliation proceedings as contemplated in Section 18(2) of MSMED Act, 2006 for the reason that when a Reference is made, MASEF Council shall proceed with the conciliation either itself or refer the matter to an Institution or Centre and therefore, stage up to appointment of 'Conciliator' is already covered by Section 18 sub-sections (1) and (2). That is why, only further procedure provided under Sections 65 to 81 has been made applicable for Conciliation under Section 18(2) of MSMED Act, 2006. Sections 65 o 81 have been made applicable by Section 18(2) of MSMED Act, 2006 with respect to Conciliation as contemplated under sub-section (2) and not for arbitration contemplated by sub-section (3). Therefore, applicability of Sections 65 to 81 will be confined only to the Conciliation proceedings under Section 18(3) and not beyond that.

36. Sub-section (3) will come into operation when Conciliation initiated under sub-section (2) remains unsuccessful and stands terminated without any settlement between the parties. Meaning thereby, when parties fail to reach a settlement in

Conciliation proceedings under sub-section (2) the conciliation proceedings shall stand terminated. It is thereafter that the next stage of arbitration will arise. For this purpose, sub-section (3) provides that arbitration can be taken up by MASEF Council itself or it may refer it to any Institution or Centre providing alternate dispute resolution services. Here also we find that sub-section (3) of Section 18 of MSMED Act, 2006 empowers MASEF Council to itself act as an 'Arbitrator' to take up the arbitration and adjudicate or it may refer the same to be adjudicated by any Institution or Centre providing alternate dispute resolution services.

37. For such arbitration, whether taken up by Council itself or referred to any Institution or Centre, for the purpose of procedure, the entire Act, 1996 has been made applicable as if arbitration was pursuant to an arbitration agreement referred to in Section 7 of Act, 1996. Sub-section (4) re-enforces and makes the authority to enter upon arbitration. Sub-section (3) is made mandatory by providing that notwithstanding anything provided in any other law otherwise, MASEF Council itself or Centre or Institution providing alternate dispute resolution services shall have jurisdiction to act as an 'Arbitrator' or 'Conciliator' under Section 18 in a dispute between 'Supplier' located within its jurisdiction and a 'Buyer' located anywhere in India, Therefore in the contingencies referred to in sub-section 4 of Section 18 of MSMED Act, 2006, jurisdiction to act as arbitrator has been conferred upon Council as well as an Institution, as the case may be. This provision prevails over any otherwise provision in any other law. The only condition to attract sub-section (4) is that Supplier is located within the jurisdiction of the Council or the Institution or Centre, which enter upon the dispute as an Arbitrator and Buyer is located in India.

38. Even otherwise, by virtue of Section 61 of Act, 1996 the provisions of Part-III would be applicable so long as otherwise it is not provided by any other law or parties have decided or agreed and therefore, the provisions of Part-III will not prevail over otherwise provisions of MSMED Act, 2006 and, on the contrary, will have to sub-serve and surrender to the provisions of MSMED Act, 2006.

39. In the present case, it is not in dispute that respondent-2 is Supplier and he is located in the jurisdiction of MASEF Council and petitioner, the Buyer, is located in State of Gujarat, satisfying the requirement of sub-section (4) of Section-18 so as to make it applicable in case in hand.

40. Both sub-sections 3 and 4 of Section 18 of MSMED Act, 2006, when read together, even otherwise, make it abundantly clear and mandatory that MASEF Council, if itself has entered into dispute as an Arbitrator, it shall have jurisdiction to do so and if it refers the matter to any Institution or Centre that will also have jurisdiction irrespective of otherwise law provided in any other Statute and that will also override Section 80 of Act, 1996.

41. Moreover, Section 80 of Act, 1996 by virtue of Section 61 of said Act, cannot override provisions of MSMED Act, 2006 and therefore, it cannot be said that Section 80 of Act, 1996 will exclude MASEF Council to act as Arbitrator, since it has been Conciliator in the dispute and arbitration therefore cannot be proceeded by it. This argument in fact suppresses and

goes contrary to what has been specifically provided in Section 18(3) and (4) of MSMED Act, 2006.

42. When read conjointly Section 24 is further clarificatory and fortifies what we have said earlier. Again it provides that Sections 15 to 23 of MSMED Act, 2006 shall have effect over any otherwise law. This is an overall overriding effect given by Section 24 to Section 18 of MSMED Act, 2006 and in that view of matter Section 18 of MSMED Act, 2006 cannot be read so as to render subordinate to Section 80 of Act, 1996. The counsel for petitioner advancing argument otherwise, in our view, is not correct and the same is accordingly rejected.

43. Learned counsel for petitioner has placed reliance on Supreme Court's judgment in **Swastik Gases Private Limited Vs. Indian Oil Corporation (2013) 9 SCC 32** and **Indus Mobile Distribution Private Limited Vs. Datawind Innovations Private Limited and others (2017) 7 SCC 678** but having gone through the aforesaid judgments carefully, we find no application of the same to the dispute involved in the present matter. The provisions of MSMED Act, 2006 were not at all involved in both the aforesaid authorities, therefore, the general provisions of Act, 1996 read with C.P.C. have been examined which have no application to the present case. Both the judgments, therefore, do not help the petitioner in any manner.

44. Learned counsel for petitioner also placed reliance on a Division Bench judgment of Bombay High Court delivered by Hon'ble S.A. Bobde, J. (as His Lordship then was) in **M/s Steel Authority of India Limited and another Vs. Micro, Small Enterprises Facilitation Council, Nagpur AIR 2012 Bob. 178**. Having gone through the same, we find that therein Section 18 is applicable only when there is delay in payment in respect to supply made or service rendered by Supplier but if there is any other dispute, Section 18 is not applicable and the matter will be covered by arbitration clause, if any, existing in agreement between the parties. This judgment also does not help the petitioner for the reason that in the present case, respondent-2 delayed payment and no other dispute has been raised, therefore, dispute raised in the present case is squarely covered by Section 18(1) read with Section 17 of MSMED Act, 2006 and hence the aforesaid authority also does not help the petitioner in any manner.

45. In view of above discussion, we are clearly of the view that MASEF Council having acted as Conciliator is not barred from working as Arbitral Tribunal to arbitrate the dispute under Section 18(3) and such jurisdiction of MASEF Council has been given overriding effect by virtue of Section 18(4) and Section 24 which have to be given complete swing in the area covered by same. The argument, therefore, advanced otherwise by learned counsel for petitioner is hereby rejected. The question, formulated above, is answered against petitioner and we hold that MASEF Council is not prohibited from working as Arbitrator itself for adjudication of dispute between the parties and it is not obliged to refer the matter to any other body.

46. No other point has been argued.

47. The writ petition lacks merits. Dismissed, accordingly.

(2020)09ILR A492
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.03.2020

BEFORE

THE HON'BLE GOVIND MATHUR, C.J.
THE HON'BLE AJIT KUMAR, J.

WRIT – C No. 8874 of 2020

Narayan Verma & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Agnihotri Kumar Tripathi

Counsel for the Respondents:
C.S.C., Sri Ram Bhahadur Singh

A. Uttar Pradesh Kshettra Samitis and Zila Parishads Work Rules,1984 - Rule 18,19,21-challenge to –Government Order regarding all the contractors. with any of the government departments in participation of tender process-while rule 18,1984 does not permit a contractor not registered to participate in tender process and to have work of district panchayat on contract-while Rule 18 prescribes procedure for registration of contractors. - it nowhere mentions that only approved contractors. shall be entitled to have work-however, rule 18 says approved contractor is require to deposit a definite sum for executing the work of district panchayat but that does not mean other contractors. shall not eligible-Moreso, Rule 19 provides for affixing notice inviting tenders at several places-it shows that other contractors. may aware of the works available on contract and may participate therein-intention of the Rule framing Authority was not to create monopoly in grant of work on contract-finding arrived by Division Bench is apparently in ignorance of the other relevant provisions of the Rules,1984. (Para 1 to 19)

The Petition is dismissed. (E-6)

List of Cases cited: -

1. Ashok Kumar Singh & ors. Vs St. Of U.P. & ors., W.P. No. 6025 of 2020

(Delivered by Hon'ble Govind Mathur, C.J. & Hon'ble Ajit Kumar, J.)

1. Challenge in this petition for writ is given to the direction of the Government of Uttar Pradesh circulated under a letter dated 16th August, 2019 to the effect that all the contractors registered with any of the government department shall entitled to participate in tender process relating to any work pertaining to the district panchayat. The decision aforesaid was taken with an object to have a better and broader choice of contractors to undertake civil works available with district panchayats.

2. The argument advanced by learned counsel appearing on behalf of the petitioners is that the Uttar Pradesh Kshettra Samitis and Zila Parishads Works Rules, 1984 *(hereinafter referred to as the Rules of 1984)* does not permit a contractor not registered as per Rule 18 of the Rules of 1984 to participate in tender process and to have work of district panchayat on contract.

3. It is stated that a Division Bench of this Court at Lucknow in ***Ashok Kumar Singh & others Vs. State of U.P. and others (Writ Petition (MB) No.6025 of 2020)*** has already adjudicated the issue and declared the decision impugned illegal. The relevant part of the judgment aforesaid reads as follows:-

"The Government Order dated 16.08.2019 has been issued in ignorance of

the Rule 18 of the Rules of 1984. For ready reference, Rule 18 is quoted hereunder:-

18. ***Register of approved contractors.*** *- A register of approved contractors shall be maintained in Form No.W-1 in the office of the Parishad or Kshettra Samiti. Contractors shall be approved by inviting applications through advertisement in the local newspapers and after verifying the anticidents of the applicants and obtaining the approval of the Sarvajanik Nirman Samiti or Karya Karini, as the case may be. Every contractor approved for execution of the works of a Parishad or a Kshettra Samiti shall be required to deposit a sum of Rs.100 as Registration fee before his name is brought on the register of approved contractors.*

As per Rule 18 of the Rules of 1984, a register of approved contractors shall be maintained in Form W-1 in the office of Panchayat or Kshettra Panchayat. The contractors shall be approved by inviting applications through advertisement. The approved contractor would be for execution of the works of Panchayats. Every contractor needs to deposit a sum of Rs.100, as registration fee.

The Government Order dated 16.8.2019 has been passed in ignorance of the aforesaid though for the object sought to be achieved but it cannot be de hors the statutory rules. A government order can supplement statutory provisions but cannot supplant.

The Government Order has been made applicable on Panchayat while the Irrigation Department as well as the Public Works Department have not permitted any registered contractor of Panchayat to participate in their tender, as has been seen by this Court in similar writ petitions.

In any case, the Government Order dated 16.08.2019 cannot be allowed to stand contrary to Rule 18 of the Rules of 1984 and accordingly to that extent, it is set aside and to be specific on the issue, para no.1 to allow participation of the Contractor registered with the Irrigation Department/Public Works Department/Rural Engineering Department apart from others Governments Department in the tender floated by the Panchayat is set aside.

The tenders impugned herein permit participation of those contractors not registered with the Panchayat. It cannot be accepted and accordingly to that extent, terms of tender would not be enforced.

The participation in the impugned tenders herein would be only of those registered with the Panchayat/Kshettra Panchayat under Rule 18 of the Rules of 1984 till it is not suitably amended."

4. While meeting with the argument advanced, learned Standing Counsel states that in ***Ashok Kumar Singh (supra)*** the Division Bench did not examine complete scheme of the Rules of 1984. Hence, arrived at an erroneous conclusion. It is asserted that the Rules of 1984 no where restricts the contractors registered with other government department from participating in tender process initiated for the works relating to district panchayats, and also not makes it necessary for the district panchayats to avail services of the contractors registered as per Rule 18 of the Rules of 1984 only.

5. Heard learned counsels and examined the entire scheme of the Rules of 1984.

6. Exercising powers under sub-section (I) of Section 237 of the Uttar Pradesh Kshettra Samitis and Zila

Parishad's Act, 1961, the Governor of Uttar Pradesh enacted the Rules to prescribe a complete process to initiate, allocate and accomplish the works related to district panchayats.

7. The Rule 2 of the Rules prescribes the definition of "Abhiyanta" and "Mukhya Adhikari". As per clause (iii) of Rule 2 other terms used but not defined in the Rules shall have the meaning assigned to them in Rule 2 of the Uttar Pradesh Zila Parishad's and Kshettra Samitis (Budget and General Accounts) Rules, 1965.

8. Rule 18 of the Rules pertains to registration of approved contractors. For ready reference, Rule 18 is quoted below:-

"18. ***Register of approved contractors.*** *- A register of approved contractors shall be maintained in Form No.W-1 in the office of the Parishad or Kshettra Samiti. Contractors shall be approved by inviting applications through advertisement in the local newspapers and after verifying the anticidents of the applicants and obtaining the approval of the Sarvajanik Nirman Samiti or Karya Karini, as the case may be. Every contractor approved for execution of the works of a Parishad or a Kshettra Samiti shall be required to deposit a sum of Rs.100 as Registration fee before his name is brought on the register of approved contractors.*

9. Rule 19 of the Rules of 1984 provides a procedure for inviting tenders relating to execution of a work of district panchayat. The Rule 19 aforesaid reads as follows:-

"19. Inviting of tenders. *- No contract for the execution of a work estimated to cost more than Rs.5,000/- shall be given until sealed tenders for the tract, accompanied by earnest money to the amount fixed by proper authority, have been invited by public notice, which should be published by insertion in one or more local newspapers as the Mukhya Adhikari or Khand Vikas Adhikari, as the case may be, thinks fit and by pasting copies thereof at conspicuous places* ***at the office of the Parishad or Kshettra Samiti, the Collector's Office, the court of the District Judge, or the court of every Additional District Judge, and Munsif whether the court of district is not situate, the headquarter of every tehsil, local offices of the Public Works Department (B and R), Irrigation Department and Local Self-Government Engineering Department. (Emphasis is given by us)***

10. Rule 21 of the Rules of 1984 pertains to public notice and procedure relating to tenders. For executing Rule 21, Form W-2 is provided in the Rules and recitals of that pertains to "contractors" and not to the "approved contractors".

11. It would also be appropriate to state that in entire Rules no provision is made to disclose eligibilities or ineligibilities for contractors.

12. In ***Ashok Kumar Singh and others (supra)*** a Division Bench of this Court by relying upon the language of Rule 18 arrived at the conclusion that the work pertaining to district panchayats is available only to the approved contractors and not to the contractors of other departments.

13. On going through Rule 18 of the Rules of 1984, it is apparent that the same prescribes a procedure for registration of contractors. It no where mentions that only

the contractors registered or are termed as approved contractors shall be entitled to have work contracts for district panchayats.

14. True it is, as per Rule 18 approved contractor is require to deposit a definite sum for executing the work of district panchayat but that does not mean that the other contractors registered or approved by other departments shall not be eligible to participate in the process of tender.

15. At the same time, Rule 19 of the Rules of 1984 while providing procedure for inviting tenders puts an embargo upon the authority inviting tenders to affix notice inviting tenders at several places including the local office of the Public Works Department (B and R), Irrigation Department, and Local Self-Government Engineering Department. The purpose of affixing notice inviting tenders at these places indicates that the contractors registered with the departments aforesaid may also be aware of the works available on contract and may participate therein. Otherwise there would have been no need to affix the notice at the local offices of other technical and Engineering departments.

16. Rule 21 pertains to public notice and procedure relating to tenders and that no where restricts the grant of work contracts of panchayat department only to the approved contractors referred in Rule 18.

17. At this stage, it would also be relevant to state that Rule 2 of the Rules no where defines the term "approved contractors" as referred in Rule 18 of the Rules of 1984.

18. By force of clause (iii), the terms used but not defined in the Rules shall have the meaning assigned to them in Rule 2 of the Rules of 1965. On going through the Rules aforesaid we noticed that the term approved contractor is not defined therein too. In absence of the definition of the term aforesaid, the amplitude of it cannot be extended to cause discrimination among the contractors placed on registered roll of government departments and further to restrict the choice of Panchayat Raj institutions to limited sphere. It is always desirable to have a broad and better choice with a view to achieve and attain better quality of work. A statute is required to be interpreted in the fashion that allows it to be workable at its optimum and also in consonance to the thrust of the complete enactment. The position would have been different, if any restriction would have been given in the Rules of 1984 or by specific assertion the "approved contractor" would have been defined in such a manner to create monopoly in grant of work on contract. In entirety, we have to interpret Rule 18 and the term "Approved Contractor" to satisfy thrust of the Rules. As such, a conjoint reading of Rules 18 and 19 of the Rules of 1984 and by taking care of other provisions we have to see the intention of the Rule framing authority. For the reasons already given, we are having no doubt that the Rule framing authority was not intending to confine the work contracts of the district panchayats only to the approved contractors or registered contractors under Rule 18.

19. The Division in the case of ***Ashok Kumar Singh (supra)*** did not examined complete scheme of the Rules and just relied upon Rule 18. The finding arrived by Division Bench is apparently in ignorance of the other relevant provisions of the Rules of 1984. No doubt the court while deciding the case aforesaid was known to the statute

applicable but did not chose to appreciate its relevance in entirety, as such the finding arrived is *in-curia*. Hence, we are not abide by the same.

20. For the reasons given by us, the petition for writ is having no merit. Hence, dismissed.

(2020)09ILR A496
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.09.2020

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE JAYANT BANERJI, J.

WRIT – C No. 13313 of 2020
&
WRIT – C No. 12843 of 2020
&
WRIT – C No. 13284 of 2020
&
WRIT – C No. 12629 of 2020

Kanikram & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Anoop Kumar

Counsel for the Respondents:
C.S.C., Sri Diptiman Singh, Sri Kartikeya Saran, Sri M.D. Singh 'Shekhar'

A. Civil Law - U.P. Sugarcane (Regualtion of Supply and Purchase) Act, 1953-Section 17 & U.P. Sugarcane (Regualtion of Supply and Purchase) Rules, 1954-Rule 45 maintainibility of-petitioners aggrieved due to non-discharge of legal burden imposed upon the respondents under the Act 1953-a person denied or deprived of something to which one is legally entitled in order to make one "a person aggrieved"-such person shall have the locus standi to maintain the writ petition under Article 226 of the Constitution.(Para 23)

B. Non-payment of sugarcane supplied to Sugar Mill-petitioners have a legal right u/s 17 of the Act 1953 to get payment of sugarcane supplied to the Sugar Mill immediately and in any case within 15 days without interest- The Cane Commissioner failed to ensure enforcement of the provisions of Section 17(4) of the Act,1953-even after issuance of recovery certificate, neither sugar mill nor cane commissioner ensured the payment to the petitioners as per provision of the Act-the occupier of the factory did not make adequate provisions, duly evinced by the records of the factory, prior to purchase of cane-inexplicable delay in issuance of certificate by the Cane Commissioner shows indulgence with the sugar mill-indulgence indicates neglect of the authorities towards the fundamental rights of the distraught farmers-concerned authorities failed to discharge their statutory obligation.(Para 25 to 35)

The petition is allowed. (E-6)

List of Cases cited: -

1. Akram Khan & anr. Vs St. Of U.P. & 3 ors., WRIT C No. 38324 of 2019

2. Vishambhar Dayal & 5 ors. Vs St. Of U.P. & 5 ors.,WRIT C No. 41791 of 2019

3. Ram Chand & 8 ors. Vs St. Of U.P. & 4 ors., WRIT C No. 7166 of 2020

4. Swami Nath & 24 ors. Vs St. Of U.P. & 4 ors., WRIT C No. 12762 of 2020

5. Anand Agro Chemical India Ltd. Vs Suresh Chandra & ors.,(2014) 3 SCC 631

6. Hari Shanker Vs Cane Commr.(2004) ALL LJ 3322

7. Bar Council of Mah. Vs M.V. Dabholkar & ors. (1975) 2 SCC 702

8. Ghulam Qadir Vs Spl. Tribunal & ors.,(2002) 1 SCC 33,Para 38

9. Bajaj Hindustan Ltd. Vs St. Of U.P. & ors., CMWP No. 1853 of 2009

(Delivered by Hon'ble Surya Prakash Kesarwani, J.)

1. Heard Sri Anoop Kumar, learned counsel for the petitioners in WRIT - C No. - 13313 of 2020, Sri Ram Karan, learned counsel for the petitioners in WRIT - C Nos. - 12843 of 2020, 13284 of 2020 and 12629 of 2020, and also heard Sri J.N. Maurya, learned Chief Standing Counsel alongwith Sri Bipin Bihari Pandey, learned standing counsel for the State - respondents, Sri Kartikeya Saran, learned counsel for the Cooperative Cane Society and Sri M.D. Singh "Shekhar", learned Senior Advocate assisted by Sri Diptiman Singh, and Sri Vinayak Mithal, learned counsel for the respondent - Bajaj Hindustan Sugar Ltd. (Unit - Rudhauli, District – Basti).

2. With the consent of learned counsels for the parties, WRIT - C No. - 13313 of 2020 is treated the leading writ petition and facts thereof are being noted.

3. Today, the State - respondents, the respondent - Cane Society and the respondent - Sugar Mill have filed short counter affidavits all dated 08.9.2020 in WRIT - C No. - 13313 of 2020. The respondent no.5 has additionally filed a first supplementary affidavit dated 10.09.2020 in short counter affidavit. All these affidavits are taken on record.

Facts

4. The petitioners are cane growers. They are members of the respondent Cooperative Cane Society. Their sugar cane growing area was reserved for supply of sugarcane to the respondent - Sugar Mill. They supplied sugarcane to the respondent - Sugar Mill for the crushing season 2019-20 (01.10.2019 to 31.03.2020). According to the respondent - Sugar Mill, the crushing was carried on upto 23.03.2020. As per details submitted by the respondent no.2 (Cane Commissioner) alongwith the counter affidavit, 28086 farmers supplied sugarcane to the respondent Sugar Mill but the respondent Sugar Mill has made payment whether in full or in part, only to 7,639 cane growers for the period of supply till 01.01.2020. Thus 20,447 cane growers have not been paid even a single penny by the respondent Sugar Mill. Although some correspondence was made by the respondent Cane Cooperative Society with the respondent no.2 Cane Commissioner but no action was taken by the Cane Commissioner and he simply issued 3 letters dated 04.02.2020, 19.5.2020 and 13.07.2020 to the respondent Sugar Mill requesting to ensure hundred percent payment of sugarcane price to the cane growers. As per last letter of the Cane Commissioner dated 13.07.2020 the sugarcane purchase payable amount by the respondent Sugar Mill was Rs.132.5194 crores against which it made payment of only Rs.18.6035 crores and thus there remains arrears of Rs.113.9159 crores. The respondents - Sugar Mill has made payment of only 14.04% percent out of the total sugarcane supply amount. When this court passed an order on 03.09.2020 only then the respondent no.2 Cane Commissioner issued a recovery certificate dated 07.09.2020 reflecting total arrears of Rs.103.1057 crorers towards sugarcane price and interest payable by the respondent Sugar Mill to cane growers.

5. Section 17 of the U.P. Sugarcane (Regulation of Supply and Purchase) Act 1953 (hereinafter referred to as "the Act 1953") provides for payment of sugarcane by the Sugar Mill to cane growers within 14 days and for delayed payment an interest @ 12 % is also payable. The provisions of **Section 17 of the Act 1953 and Rule 45 of the U.P. Sugarcane (Regulation of Supply and Purchase) Rules, 1954** (hereinafter referred to as "the Rules 1954") are reproduced below:-

*"**Section 17. Payment of cane price. -** (1) The occupier of a factory shall make such provision for speedy payment of the price of cane purchased by him as may be prescribed].*

*(2) **Upon the delivery of cane the occupier of a factory shall be liable to pay immediately the price of the cane** so supplied, together with all other sums connected therewith,*

*(3) **Where the person liable under sub-section (2) is in default in making the payment of the price for a period exceeding fifteen days from the date of delivering,** he shall also pay interest at a rate of 7-1/2 per cent per annum from the said date of delivering, but the Cane Commissioner may, in any case, direct, with the approval of the State Government, that no interest shall be paid or be paid at such reduced rate as he may fix:*

*[Provided that in relation to default in payment of price of cane purchased after the commencement of this proviso, for the figure '7-1/2 the '**figure 12'** shall be deemed substituted.]*

*(4) **The Cane Commissioner shall forward to the Collector a certificate under his signature** specifying the amount of arrears on account of the price of cane plus interest, if any, due from the occupier **and the Collector, in receipt of such certificate, shall proceed to recover from such occupier the amount specified therein as if it were an arrear of land revenue.***

(5)(a) Without prejudice to the provisions of the foregoing sub-sections, where the owner or any other person having control over the affairs of the factory or any other person competent in that behalf enters into an agreement with a bank under which bank agrees to give advance to him ["on the security of sugar or ethanol (directly produced from the sugarcane juice or B-Heavy molasses)"] produced or to be produced in the factory, the said owner or other person shall provide in such agreement that a [percentage determined by such authority and in such manner as may be prescribed] of the total amount of advance shall be set apart and be available only for repayment to cane-growers or their co-operative societies on account of the price of sugarcane purchased or to be purchased for the factory during the current crushing season from those cane-growers or from or through those societies, and interest thereon and, such societies commission in respect thereof.

(b) Every such owner or other person as aforesaid shall send a copy of every such agreement to the Collector within a week from the date on which it is entered into].

***Rule 45** : Payments for cane shall be made only to the cane grower or his representative duly authorized by him in writing to receive payment or to a cane growers' Co-operative Society :*

*[**Provided that the payment to the members of cane growers' Co-operative society may be made by the factory with the mutual agreement between the factory and the society.** This*

remuneration to the factory for the payment to the members of a cane growers' Co-operative Society shall be determined by the Cane Commissioner :

Provided further that all arrears of cane price shall be remitted to the cane growers' Co-operative Society concerned within fifteen days of the close of the factory]."

6. Briefly on the facts and legal provisions as noted above, the petitioners have filed the present writ petition praying for a direction in the nature of mandamus to the Cane Commissioner to direct the respondent no.5 sugar mill to pay the entire cane price with interest for the crushing season 2019 - 2020 and also to direct the respondent no.2 to consider the applications of the petitioners which is submitted in May 2020. The petitioners have also prayed that any other or further orders as this Court may deem fit and proper under the facts and circumstances of the case, may be issued.

Submissions on behalf of the petitioners

7. Learned counsel for the petitioners submits as under:-

(i) The purchase and supply of sugarcane is regulated by the provisions of the Act 1953 and the Rules 1954. The petitioners' area was reserved for the respondent no.5. Accordingly, the respondent no.5 supplied the sugarcane to the respondent no.5 with clear stipulation under the Act 1953 that the respondent No.5 shall make the payment within 14 days and the delay in payment shall carry interest @ 12%. But despite various reminders and persuasion by the petitioners neither Cane Cooperative Society has taken any interest to ensure payment of sugarcane dues of the petitioners nor the respondent Cane Commissioner nor the State Government took any interest to ensure that the petitioners (poor farmers) may get sale consideration of their sugarcane supplied to the respondent no.5 Sugar Mill.

(ii) The respondents are acting in connivance with each other, with the result that the petitioners are not getting price of their sugarcane supplied to the respondent no.5 under the provisions of the Act 1953 and the Rules 1954.

(iii) The conduct of the respondents is not only violative of provisions of Section 17 of the Act 1953 and the Rule 45 of the Rules 1954 but is also violative of fundamental rights of the petitioners guaranteed under Part III of the Constitution of India.

Submissions on behalf of the State respondents

8. (i) Sri J.N. Maurya, learned Chief Standing Counsel, submits that the respondent no.2 has disclosed entire details in paragraphs 6, 7 and 8 of the short counter affidavit which indicates that the respondent no.5 has committed serious lapses in making payment of sugarcane to cane growers and consequently, the respondent no.2 has issued a recovery certificate dated 07.09.2020. The recovery could not yet be made.

(ii) The recovery certificate issued by the respondent no.2 shall be enforced by the Collector and the entire dues shall be recovered from the respondent no.5.

(iii) The respondent No.5 has not made any payment to cane growers for supplies after 02.01.2020.

Submissions on behalf of the respondent No.4 (Cane Cooperative Society

9. Learned counsel for the respondent no.4 has submitted as under:

(i) The respondent no.4 has written to the respondent no.5 for payment of cane dues and interest but the respondent no.5 has not made any payment. **The payment of sugarcane price is made directly by the respondent no.5 to the cane growers through ESCROW account** (which is a joint account of the respondent no.5 - Sugar Mill and the District Cane Officer). An intimation is sent to the respondent Cane Cooperative Society when the payment is made. The respondent Cane Cooperative Society gets commission only when the payment is made to cane growers but due to conduct of respondent no.5 the respondent No.4 is not getting commission.

(ii) The respondent no.5 is not making payment of commission to the respondent no.4 under Rule 49 of the Rules 1954 and thus has defaulted even in payment of Commission.

(iii) The respondent no.4 has apprised the Cane Commissioner through notice dated 13.07.2020 (addressed to the respondent no.5 and a copy to the Cane Commissioner) regarding non payment of cane price to growers but no action has been taken.

(iv) There is no allegation by the petitioners against the respondent no.4 Cane Cooperative Society for any lapses on its part regarding non payment of cane dues by the respondent no.5 to the cane growers.

Submissions on behalf of the respondent No.5 Sugar Mill

10. Sri M.D. Singh 'Shekhar', learned Senior Advocate, has submitted as under:-

(i) The writ petitions are not maintainable at the instance of individual cane growers who have no individual right to approach the Court for payment of sugarcane price/dues. Reliance is placed upon the orders dated 28.11.2019 in **WRIT - C No. - 38324 of 2019 (Akram Khan and another Vs. State Of U.P. and 03 Others)** (para 6 and 22), order dated 03.01.2020 in **WRIT - C No. - 41791 of 2019 (Vishambhar Dayal And 5 Others Vs. State Of U P And 5 Others),** order dated 03.03.2020 in **WRIT - C No. -7166 of 2020 (Ram Chand And 8 Others Vs. State Of U.P. And 4 Others),** and order dated 31.8.2020 in **WRIT - C No. -12762 of 2020 (Swami Nath And 24 Others Vs. State Of U.P. And 4 Others).**

(ii) The prayer nos. 1 and 2 can not be granted to the petitioners in view of the judgments and orders of this Court referred above.

(iii) The Deputy Cane Commissioner wrote a letter dated 24.8.2020 to the respondent no.5 pursuant to a letter of the Cane Commissioner dated 20.08.2020 for submitting plan for payment of cane dues and in response thereto the respondent no.5 has submitted a plan for payment of cane dues of the farmers to the tune of 97 crores, till February 2021 (excluding interest). **Since the respondent no.5 has already submitted a plan for making payment of sugarcane dues of the crushing season 2019 - 20 by February 2021, therefore, there is no occasion for this Court to issue any direction for payment of recovery of cane dues of the petitioners/cane growers.**

(iv) The respondent no.5 has made payment on 08.9.2020 for sugarcane purchased till 02.01.2020 and part payment of sugarcane purchased on 03.01.2020. The Sugar Mill stopped crushing since 23.03.2020. Therefore, the respondent no.5 is making effort for payment.

(v) Since recovery certificate has already been issued by the respondent no.2 against the respondent no.5, therefore, the writ petition has become infructuous.

(vi) If the respondent no.5 makes the payment then it may face financial crisis and may be forced to close the Sugar Mill.

11. The submissions made by learned counsels for the parties as aforenoted give rise to the following **Questions for determination** in these writ petitions:-

(i) Whether petitioners/cane growers have *locus standi* to maintain writ writ petition under Article 226 of the Constitution of India for payment of their cane dues in terms of the provisions of Section 17 of the Act 1953 read with Rule 45 of the Rules 1954 ?

(ii) Whether on issuance of Recovery Certificate dated 07.09. 2020 by the respondent no.2 against the respondent no.5 for recovery of cane price and interest, the writ petitions have become infructuous. ?

(iii) Whether the respondent no.5 even being bound by the provisions of Section 17 of the Act 1953 and Rules 44 and 45 of the Rules 1954, can withhold or delay the payment of sugarcane supplied by the petitioners/cane growers on the ground that it has submitted a schedule of payment to the Cane Commissioner to pay the sugarcane dues (except interest) by February 2021, and whether the Cane Commissioner and authorities have acted in due discharge of their duties?

Discussion and Findings
Question No. (I)

12. It is undisputed that the petitioners' sugar cane growing area was reserved for supply of sugar cane to the respondent no.5 under Section 15 of the Act 1953 and accordingly the petitioners supplied their sugar cane to the respondent no.5. As per short counter affidavit of the respondent no.2, 28086 farmers supplied sugarcane to the respondent No.5 - Sugar Mill but the respondent has made payment whether in full or in part, only to 7,639 cane growers for the period of supply till 01.01.2020. Thus, 20,447 cane growers have not been paid even a single penny by the respondent No.5 against the supply of sugarcane. The petitioners cane-growers have stated in para 12 of the writ petition that they have no other source of livelihood and are totally dependent on the sale price of sugarcane. In paragraphs 9 to 14 the petitioners have stated that under the Act, 1953 and the Rules 1954, the respondents' Sugar Mill is bound to pay the sugarcane price immediately and if it is not paid within 15 days of the date of supply then interest also become due and payable to cane-growers. It has also been stated that the entire actions of the respondents regarding non payment of cane dues, are illegal, arbitrary and violative of Article 14 of the Constitution of India.

13. In paragraph 6 of the short counter affidavit, the respondent No.2 has stated as under:-

"6. That in the crushing season 2019-2020, Bajaj Hindustan Sugar Ltd. Unit-Rudhauli, District Basti (respondent no.5)(hereinafter referred to as the sugar mill) had purchased total 42.23 lakhs quintal of sugarcane from the cane growers amounting to Rs.13,251.94 lakhs. The sugar mill has paid only Rs.3,778.56 lakhs to the farmers/cane growers towards the cane price and Rs.9,473.38 is due and payable to the farmers/cane growers.

Since, there was delay in payment of cane price to the farmers/cane growers by the sugar mill, an interest of Rs.644.89 lakhs has been imposed on the outstanding cane price under Section 17(3) of the U.P. Sugarcane (Regulation Supply and Purchase) Act, 1953 (hereinafter referred to as U.P. Act No.24 of 1953). ***It is relevant to submit here that in the crushing season 2019-20, total 28086 cane growers have supplied sugarcane to the sugar mills out of which only 7,639 cane growers have been paid cane price (fully or partially) and the remaining 20,447 farmers/cane growers have not been paid their cane price.*** *Copy of chart showing the details of payments of cane price to the farmers/cane growers by the sugar mill is being annexed herewith and is marked as Annexure No.SCA-1 to this short counter affidavit."*

14. It has been stated in paragraphs 10 and 11 of the short counter affidavit of the respondent no.2 that payment of sugar cane price is made by the sugar mill to the farmers (cane-growers) under ESCROW Account Scheme and the outstanding cane price dues of the farmers of the cane-growers is paid into their bank account through RTGS/NEFT.

15. The facts as stated in the short counter affidavit and briefly mentioned above have not been disputed by the respondent no.5 in its short counter affidavit. Thus, the facts stated in paragraph 6 of the short counter affidavit of the respondent no.2 that a sum of Rs.94.7338 crores towards cane price and interest Rs.6.4489 crores is payable to farmers (cane growers) under Section 17 of the Act 1952, is undisputed.

16. As per provisions of **Section 17(1)/(2)** upon the delivery of cane the occupier of a factory **shall be liable to pay immediately** the price of the cane so supplied, together with all other sums connected therewith. As per Section 17(3) of the Act **where a person liable under sub-section (2) is in default in making the payment of the price** for a period exceeding fifteen days from the date of delivery, **he shall also pay interest at the rate of 12% per annum.** Sub - Section 4 mandates that the Cane Commissioner shall forward to the Collector a certificate under his signature specifying the amount of arrears on account of the price of cane plus interest, if any, due from the occupier and the Collector, in receipt of such certificate, shall proceed to recover from such occupier the amount specified therein as if it were an arrear of land revenue. Rule 45 of the Rules 1954 specifically mandates that the **payments for cane shall be made only to the cane growers** or his representative duly authorized by him in writing to receive payment or to a cane growers' Co-operative Society. The second proviso to Rule 45 provides that all arrears of cane price shall be remitted to the cane growers' Co-operative Society concerned within fifteen days of the close of the factory.

17. It has been stated by the respondent no.2 in his short counter affidavit that payment of cane price is made to the cane-growers throw ESCROW Account and the payment is directly remitted to farmers of the cane growers through RTGS/NEFT. **Thus, it is clear that under the Act, 1953 and the Rules 1954 the petitioners have supplied sugar cane to the respondent no.5 and they are entitled to receive payment immediately as per provisions of Section 17 of the Act, 1953.**

18. **The rights of the petitioners for immediate payment of sugar cane**

supplied to the respondent no.5 emerges from the provisions of Section 17 (1)/(2) of the Act 1953 and in case of none payment beyond 15 days of the delivery of sugarcane, the respondent no.2 Cane Commissioner is under a statutory obligation to issue a recovery certificate and forward it to the Collector for recovery of cane dues from the Sugar Mill. **Thus, right to receive payment of sugar cane price and interest, if any, is a statutory right of cane-growers/farmers under Section 17 of the Act** who supplied sugarcane to the respondent no.5 as per reservation order issued by the competent authority under the Act 1953.

19. In the case of **Anand Agro Chemical India Ltd. Vs. Suresh Chandra & Ors. 2014 (3) SCC 631** (paragraphs 2, 3, 4, 8, 9, 10, 11, 12, 13, 14) Hon'ble Supreme Court while considering the provisions of Section 17 of the Act 1953 held as under:-

"2. The facts in nutshell are as follows. ***Respondents 1 to 3 supplied sugarcane to the sugar mill of the appellant in the year 2007-08, for which the appellant has not paid the price in spite of several representations made by the respondents 1 to 3 herein. This led to the filing of a Writ Petition in Writ-C no.14936 of 2013 by respondents 1 to 3 seeking for issuance of the Writ of Mandamus directing the appellant herein to release the sugarcane price to them. The Division Bench of the High Court after hearing both the sides directed the District Magistrate, Hathras to take immediate action against the Directors and occupiers of the appellant sugar mill against whom several orders have been passed under the U.P. Sugarcane (Regulation and Supply) Act, 1913 and it further observed in the order that the District Magistrate may in exercise of his powers cause arrest of the Directors and occupiers of the sugar mill to recover the dues and in the event of such arrest, they will not be released until they have paid the entire amount due against them.***

3.The appellant sugar mill aggrieved by the said order preferred a ***Special Leave Petition in SLP(C) no.16633 of 2013 and this Court by order dated 1.5.2013 dismissed the petition by observing thus :-***

"2. We have heard Shri Sanjay Parikh, learned counsel for the appellant and perused the record.

3. A reading of the order under challenge shows that the appellant has not paid Rs.16.12 crores to the farmers for the crushing year 2005-06 to 2009-10, which includes the price of sugarcane, the cane development commission and the interest. It is also borne out from the record that vide letter dated 24.11.2012, the Director of the appellant had assured the Cane Commissioner that the company will pay Rs.160 lacs as the price of the cane within two weeks and an amount of Rs.700 lacs in installments, the first of which will be paid on 15.01.2013, but the company did not fulfill its assurance.

4. In the above backdrop, it is not possible to find any fault with the direction given by the Division Bench of the High Court and there is absolutely no justification for this Court's interference with the impugned order.

The special leave petition is accordingly dismissed.....…"

*4. T****hereafter, the appellant-sugar mill filed an application in the pending Writ Petition in the High Court of Judicature at Allahabad seeking for stay of arrest of the Directors*** *pursuant to the order dated 26.4.2013 and the Division Bench of the High Court after hearing both*

sides and after referring to the earlier orders held that no modification/vacation of the order dated 26.4.2013 is required and, accordingly, rejected the prayer of stay of arrest. Challenging the said order the appellant-sugar mill has preferred the present appeal.

8. Section 17 of the U.P. Sugarcane (Regulation of Supply and Purchase) Act, 1953 stipulates that the occupier of the sugar - factory shall make speedy payment of cane price and in the event of default, sub-Section (4) stipulates that the Cane Commissioner shall forward to the Collector a certificate specifying the amount of arrears of the cane price due from the occupier and the Collector shall proceed to recover the said amount from such occupier as if it were an arrear of land revenue. Section 170 of the Uttar Pradesh Revenue Code, 2006 prescribes the process for recovery of arrears of land revenue, wherein it is mentioned that it may be recovered by anyone or more of the processes mentioned therein which includes by arrest and detention of the defaulter and attachment and sale of his movable property.

9. The Division Bench of the Allahabad High Court in its order dated 26.4.2013 has directed the District Magistrate, Hathras, namely, the Collector to take immediate action against the Directors and occupiers of the appellant-sugar mill against whom several orders have been passed under the U.P. Sugarcane (Regulation and Supply) Act, 1913 and this Court has confirmed the said order. The Division Bench in the present application considered the plea of the appellant for the stay of arrest and after hearing both sides rejected the said plea by the impugned order and we find no error in it.

10. ***We say so, firstly,*** *because the order dated 26.4.2013 passed by the Division Bench of the Allahabad High Court directing the District Magistrate to take immediate action against the Directors of the sugar mill has already been affirmed by this Court in appeal. The question whether or not one of the Directors who is said to be 65 years old could be arrested as a defaulter and committed to prison under Section 171 of the Uttar Pradesh Revenue Code, 2006, could and indeed ought to have been raised by the appellants either before the High Court or before this Court in appeal preferred against the order passed by the High Court. No such contention was, however, urged at that stage.*

11. ***Secondly****, because the company and its Directors have not made their promises good by paying even the amounts which they had offered to pay. A plain reading of order dated 1.5.2013 passed by this Court in Anand Agro Chemical India Ltd. Vs. Suresh Chandra SLP (C) No.16633 of 2013 extracted above would show that the company and its Directors had assured the Commissioner that they would pay Rs.160 lacs towards price of sugarcane within two weeks besides an amount of Rs.700 lacs to be paid in installments, the first of which installment was to be paid on 15.5.2013. No such payment was, however, made by the company and its Directors. That apart, the statement made at the bar on 7.10.2013 by Dr. Rajeev Dhawan, learned senior counsel, for the appellant that the Directors would pay Rs.4.55 crores is also sought to be withdrawn on the ground that the same was made under a mistake. It is evident that the company and its Directors have been despite promises made on their behalf committing breach of such assurances on one pretext or the other.*

12. ***Thirdly****, because t****here is nothing before us to suggest that the company and its Directors are incapable***

of raising funds for liquidating the outstanding liability towards dues payable to the farmers. Simply because the sugar factory has been attached, is no reason for us to assume that the company or its Directors are in any financial distress thereby disabling them from making the payments recoverable from them. *The fact situation in the present case is, therefore, completely different from that in Jolly George Varghese case (1980) 2 SCC 360 relied upon by Mr. Ram Jethmalani.*

13. In the light of the above, we see no compelling reason for us to interfere with the order passed by the High Court in exercise of our extraordinary jurisdiction. We regret to say that the amounts due to the farmers towards price of the sugarcane and incidentals remains to be paid to them for several years in the past thereby accumulating huge liability against the company. That is not a happy situation nor can repeated invocation of the process of law by the appellant be a remedy for it.

14. The appeal is devoid of merit and is accordingly dismissed."

20. Thus, in the case of **Anand Agro Chemical India Ltd. (supra)** Hon'ble Supreme Court clearly held that Section 17 of the Act 1953 stipulates that the occupier of the sugar - factory shall make speedy payment of cane price and in the event of default, sub-Section (4) stipulates that the Cane Commissioner shall forward to the Collector a certificate specifying the amount of arrears of the cane price due from the occupier and the Collector shall proceed to recover the said amount from such occupier as if it were an arrear of land revenue.

21. The aforesaid judgment in the case of **Anand Agro Chemical India Ltd. (supra)** arose from the judgment of this Court dated 31.07.2013 in Writ Petition No.14936 of 2013 which was filed by cane-growers and was entertained by this Court.

22. In the case of **Hari Shanker Vs. Cane Commissioner 2004 ALL LJ 3322 (All - D.B.)** this Court considered the plight of poor farmers/cane growers and observed as under :

"Before parting it must be mentioned that it is deeply regrettable that economically strong sugar mills resort to such hyper technical arguments for defeating just claims of poor cultivators, by questioning the jurisdiction of empowered authorities, or the right of the poor cultivators to prefer the claim, or by raising artificial pleas of violation of natural justice. Very often the co-operative society which receives commission from the factory sides with the powerful sugar mill, leaving its poor farmer members high and dry."

23. The petitioners are aggrieved due to non discharge of legal burden imposed upon the respondents including the respondent no.5, under the Act 1953. In the case of **Bar Council of Maharashtra Vs. M.V. Dabholkar and others 1975 (2) SCC 702 (para 28)** a Constitution Bench of Hon'ble Supreme Court considered the meaning of the words **"person aggrieved"** and held that the meaning of the words "a person aggrieved" *may vary according to the context of the statute. One of the meanings is that a person will be held to be aggrieved by a decision if that decision is materially adverse to him.* ***Normally, one is required to establish that one has been denied or deprived of something to which one is legally entitled in order to make one "a person aggrieved".*** Again a person is aggrieved if a legal burden is imposed on

him. **Thus, in the light of the discussion made above, the petitioners are "aggrieved persons"**

24. The rights under Article 226 of the Constitution of India can be enforced only by an "aggrieved person" except in cases where the writ prayed is for habeas corpus or quo-warranto. Another exception in the general rule is filing of a writ petition in public interest. **The existence of legal right of the petitioners which is alleged to have been violated, is the foundation for invoking the jurisdiction of the High Court under Article 226 of the Constitution of India.** If a person approaching the Court can satisfy that the impugned action is likely to affect adversely his right which is shown to be having source in some statutory provisions, the writ petition filed by such person shall be maintainable and such person shall have the *locus standi* to maintain the writ petition. Similar view has been taken by Hon'ble Supreme Court in the case of **Ghulam Qadir Vs. Special Tribunal and others (2002) 1 SCC 33 (Para 38).**

25. We have found that the petitioners have a legal right under Section 17 of the Act 1953 to get payment of sugarcane supplied to the respondent no.5 immediately and in any case within 15 days without interest. The respondent No.2 has failed to ensure enforcement of the provisions of sub Section 4 of Section 17 of the Act 1953 until this Court passed an order dated 03.09.2020. Even after issuance of recovery certificate, neither recovery of long over due payment under Section 17 of the Act has been made by the respondent no.5 to the petitioners nor the respondent no.2 could ensure the payment to the petitioners as per provisions of the Act and the Rules. Under the circumstances, the submissions of learned Senior Advocate appearing for the respondent no.5 that the petitioners have no *locus standi* or the writ petition is not maintainable, is wholly devoid of merit and, therefore, it can not be accepted. The petitioners have legally protected and judicially enforceable subsisting right to ask for mandamus for payment under Section 17 of the Act, 1953. Similar writ petition No.14936 of 2013 decided on 31.07.2013 was entertained by this Court and the judgment was affirmed by Hon'ble Supreme Court in the case of Anand Agro Chemical India Ltd. (supra). Consequently, we hold that the petitioners have *locus standi* and the writ petitions are maintainable.

Question Nos. ii & iii

26. As per own case of the respondent no.5 and the stand taken by the respondent no.2 in their short counter affidavit, no payment to cane growers/petitioners for sugarcane supply/delivery after 02.01.2020, has been made by the respondent no.5. It is also admitted to the parties that the respondent no.5 received supply of sugarcane from 28086 farmers but made payment whether in full or in part only to 7,639 cane-growers for the period of supply till 01.01.2020. Thus, 20447 cane-growers have not been paid any amount by the respondent no.5 against supply of sugarcane. As per provisions of Section 17(1)/(2) of the Act 1953 payments were required to be made immediately to cane-growers and delay in payment beyond 14 days of supply/delivery, attracts interest @ 12% payable to farmers/cane-growers. Sub-Section 4 of Section 17 of the Act casts a statutory duty upon the respondent no.2 Cane Commissioner to issue and forward a recovery certificate to the Collector for recovery of sugarcane dues of the cane-

growers/farmers, as arrears of land revenue. The payment was due and payable by the respondent no.5 to the petitioners even before the start of lock down period due to COVID 19 Pandemic. It has not been disputed by the respondents that the petitioners cane-growers earned their livelihood and maintain their families from the consideration received on supply of sugarcane to Sugar Mil/respondent No.5.

27. Thus, non payment of sugarcane price by the respondent no.5 and delay/laches by the respondent no.2 in issuing recovery certificate against the respondent no.5, clearly indicates breach of provisions of Sub-Sections 1, 2 and 3 of Section 17 by the respondent no.5 and sub-Section 4 of Section 17 by the respondent no.2. The respondent no.5, who is giant manufacturer in the field of sugar and its by-products; has not taken even Cash Credit Limit (CCL) from any Bank. No material has been placed on record of the writ petition that the respondent no.5 Sugar Mill or its directors or occupier are unable to pay sugar cane dues to the petitioners/cane-growers or they have no resources to pay the sugar cane dues. Under the circumstances, mere issuance of recovery certificate by the respondent no.2 on 07.09.2020 does not give a ground to the respondent no.5 to say that writ petition has become infructuous due to issuance of recovery certificate. Unless the cane dues pursuant to recovery certificate are recovered, the rights of the petitioners under Section 17 of the Act 1953 shall not be satisfied. No material has been placed by the respondent No.1 or 2 that any action pursuant to the recovery certificate dated 07.09.2020 has been taken by the Collector, Basti. Under the circumstances, it can not be said that the writ petition has become infructuous.

28. The provisions of Section 17 of the Act 1953 provide for the speedy payment of price of cane purchased by the occupier of a factory and the consequences for non-payment, the procedure for recovery and connected matters. Sub-section (1) of Section 17 imposes a statutory duty on the occupier of the factory to make such provisions of speedy payment of the price of cane purchased by him as may be prescribed. A statutory mandate is cast upon the occupier by the factory fixing his liability to pay immediately the price of cane so supplied together with sums connected therewith. In default of making the immediate payment of the price of cane for a period exceeding fifteen days from the date of delivering, payment of interest has also been prescribed subject to the Cane Commissioner in any case directing, with the approval of the State Government, that no interest be paid or paid at such reduced rates as he may fix. In sub-section (4) of Section 17 of the Act 1953, the Cane Commissioner is enjoined to forward to the Collector a certificate under his signatures specifying the amount of arrears on account of price of cane plus interest, if any, due from the occupier and the Collector, in turn, is enjoined to proceed to recover from the occupier, the amount specified in such certificate as if it were an arrear of land revenue.

29. Chapter 9 of Rules 1954 provides for payment to be made for the purchase of cane. Rule 44 provides for payment of price of cane on the basis of the recorded weight of cane at the purchasing centre. Rule 45 provides for payment of cane price to be made only to the cane-grower or his representatives duly authorised or to cane-grower Co-operative Societies.

30. The provisions of Section 17, thus, cast an onerous duty on the occupier

of a factory to make prior provision for speedy payment of the price of cane purchased by him. The provisions of such payment has to be reflected in the records of the factory.

31. Though a plan has been submitted by the respondent no.5 before the authorities concerned with regard to payment of the price of cane purchased by the occupier, it certainly is not supported by any document evincing the financial status of the factory. The provisions of Section 17 of the Act 1953 do not contemplate purchase of cane by the occupier even where the occupier is not in position to make payment of the price of cane. It is incumbent that the occupier make adequate provisions, duly evinced by the records of the factory, prior to purchase of cane. The only leeway permissible to an occupier under the provisions of Section 17 with regard to payment of the price of cane purchased is the period of fifteen days from the date of delivery of cane. Immediately after fifteen days, the liability for payment of interest is imposed. In the present case, admittedly, the cane dues have not been paid after 2.1.2020. It was the bounded duty of the Cane Commissioner to proceed to issue a certificate for recovering the amount of arrears on account of price of cane plus interest in the event of default by the occupier. In the present case, there is inexplicable delay in issuance of certificate by the Cane Commissioner under sub-section (4) of Section 17 of Act 1953 where, admittedly, the factory had stopped crushing on 23.3.2020. The indulgence granted by the Cane Commissioner to the respondent no.5 in this regard is at the cost of the struggling farmers whose livelihood and lives are at stake. The aforesaid indulgence indicates a deleterious neglect by the authorities having the effect of compromising the fundamental rights of the distraught farmers.

32. Merely because the respondent no.5 has submitted a schedule of payment to the Cane Commissioner to pay sugarcane dues (without interest) by February 2021, shall not protect the respondent no.5 from the consequences arising from the provisions of Section 17 of the Act. In other words the provisions of sub-sections 1, 2, 3 and 4 of Section 17 of the Act are in operation and shall continue to operate till respondent no.5 makes the payments of outstanding amount of sugar cane supplies or it is recovered from him pursuant to the recovery certificate dated 07.09.2020 forwarded by the respondent no.2 to the Collector.

33. Facts of the present case as aforenoted also leads to an irresistible conclusion that the respondent no.2 and other authorities under the Act have failed to discharge their statutory obligation.

34. The judgments of this Court relied by learned counsel for the respondent No.5 are distinguishable on facts of the present case. The judgment dated 17.09.2014 in **CMWP. No.1853 of 2009 Bajaj Hindustan Ltd. Vs. State of U.P. and others**, is with respect to quashing of demand notices to realise purchase tax on purchase of sugar cane. The judgment in the case of **Akram Khan and another (supra)** involved controversy with regard to sugar cane purchase centre. In the cae of **Vishambhar Dayal and 5 others (supra)** the petitioners sought direction to the authorities to ensure supply of sugar cane slips to them to supply sugar cane to the Dhampur Sugar Mills whereas cultivation was attached to some other sugar mill in accordance with Section 15 of the Act,

1953. In the case of **Ram Chand and 8 others (supra)** the question of maintainability of the writ petition was not raised and the court simply granted liberty to approach Cane Commissioner for recovery of dues. The judgment of Hon'ble Supreme Court in the case of **Anand Agro Chemical India Ltd. (supra)** was also not brought to the notice of the Court. The writ petition in the case of **Swami Nath and 24 others (supra)** was disposed off with the consent of learned counsels for the parties. Thus, the judgments relied by learned counsel for the respondent No.5 are of no help to the respondent No.5.

35. For all the reasons aforestated, all the **writ petitions are allowed** with the direction to the respondent Nos. 1 & 2 to ensure that the Collector concerned shall recover the amount of recovery certificate dated 07.09.2020, in accordance with law, within two months from today after adjusting the amount, if any paid by the respondent No.5. The District Magistrate, Basti, may also take action against the Directors and occupiers of the respondent No.5 including their arrest to recover the dues, as was also directed by this Court and affirmed by Hon'ble Supreme Court in **Anand Agro Chemical India Ltd. (supra).**

36. The concerned authority/official shall verify the authenticity of the computerized copy of this order from the official website of High Court, Allahabad and shall act accordingly without waiting for submission of a certified copy of this order.

(2020)09ILR A509

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 07.09.2020

BEFORE

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

WRIT – C No. 13395 of 2020

M/S Yogendra Kumar, Mathura ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ramawtar Rao, Sri Mahabir Yadav

Counsel for the Respondents:
C.S.C.

A. Civil Law - Stamp Act,1899 - Article 57(b) Schedule 1B-tender of petitioner accepted-respondent issued a letter of acceptance with a clause that total security along with stamp duty should be deposited within 10 days-petitioner wrote to respondent to pay stamp duty as per Article 57(b) Schedule 1 B of the Stamp Act-no work order was passed for a period of 8 months-securtiy deposit in question treating as 'mortgage deed' the respondents can charge stamp duty on such securities as per Article 57(b) Schedule 1 B of the Stamp Act.(Para 1 to 9) (E-6)

List of Cases cited:-

1. M/s Strong Construction Vs St. of U.P. & ors., W.P. No. 35096 of 2004

2. M/s Kishan Traders Vs St. of U.P. & 2 ors., W.P.No. 52385 of 2015

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

1. Heard learned counsel for the petitioners and learned Standing Counsel for the State.

2. The skeletal facts are that a tender was invited by the respondents to repair different roads in District Mathura. The

amount of the said work is not mentioned deliberately to avoid complications. The tender of the petitioner was accepted. The respondent issued a letter of acceptance with a clause that total security along with stamp duty should be deposited within ten days. The petitioner wrote to the respondents that he is supposed to pay stamp duty as per Article 57 (b) Schedule 1 B of the Stamp Act and for a period of eight months, no work order was passed.

3. It is in these circumstances, that the matter assume importance as such the demand would have been made by the Executive Engineers of each District as this issue had arisen before this Court before one and a half decades but it appears that the authorities concerned have not shown that the said decision is binding on them as a similar issue came before this Court before three years and the judgment was struck down as it was beyond the jurisdiction of the authorities to demand the stamp duty beyond Article 57 (b) Schedule 1 B of the Stamp Act.

4. With these factual data, this writ petition is taken up for disposal today as it is covered by the decision of this Court and further waste of time during this pandemic of COVID 19 would cause loss to the public and Exchequer.

5. Despite the decisions of this Court way back in the year 2005 in the case of **M/s Strong Construction vs. State of U.P. and others** (Civil Misc. Writ Petition No.35096 of 2004) decided on 22.3.2005 by the Division Bench of this Court and the recent oral order of this Court in Writ C No.52385 of 2015 **(M/s Kishan Traders Vs. State of U.P. and 2 others)** dated 18.7.2017, it appears that the authorities have demanded from the petitioner what is known as stamp duty.

6. It is not the question whether the amount is only Rs.16,670/-. It will have lot of further repercussions as submitted by the learned counsel for the petitioner as letter of acceptance was subjective.

7. Though the petition is belated, this Court has not been made aware whether the contract has already been executed or not. No such averments are made and for 9 months what is the progress is not known.

8. As far as demand of stamp duty is concerned, it is covered by the decision of the Division Bench of this Court in case of **M/s Kishan Traders (Supra)**. The High Court in Case of **M/s Strong Construction (Supra)** had issued a writ of mandamus way back in the year 2005 which read as follows :

"We also issue a writ of Mandamus commanding the respondents not to compel the Petitioners and similarly situate persons, whether they have filed writ petition or not, to pay Stamp Duty on security deposit in question treating as 'mortgage deed' and further to charge Stamp Duty on such 'securities' as provided under Article 57 (b) Schedule 1 B of the Stamp Act."

9. In that view of the matter, the order demanding stamp duty is quashed. The petitioner would be liable to pay the stamp duty as per Article 57 (b) Schedule 1 B of the Stamp Act. The petitioner shall be substituted by subsequent demand which shall be raised.

In view of the above, this writ petition is allowed.

10. A copy of this order be sent to the Secretary, P.W.D., U.P. who shall issue a circular to the said effect so that persons do not have to approach the Court.

(2020)09ILR A511
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.09.2020

BEFORE

THE HON'BLE SHASHI KANT GUPTA, J.
THE HON'BLE PIYUSH AGRAWAL, J.

WRIT – C No. 13665 of 2020

Smt. Tripti Rani ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Atiqur Rahman Siddiqui, Sri Rakesh Pande, Vishakha Pande

Counsel for the Respondents:
C.S.C., Sri D.C. Mathur

Counsel for the Caveator:
Sri Kharag Singh, Sri Brij Kumar Saroj

(A) Civil Law - Uttar Pradesh Kshetra Panchayat & Zila Panchayat Act, 1961 - Section 15 - motion of non-confidence - Disaster Management Act -Democracy - system of government in which a country's political leaders are chosen by the people in regular, free, and fair elections - people have a choice between different candidates and parties who want the power to govern - people are sovereign - highest authority and government is based on the will of the people - Elected representatives at the national and local levels must listen to the people and be responsive to their needs - voters have right to elect their representatives and also criticize and replace them if they do not perform well. (Para - 11)

Petitioner is the Pramukh of the Kotwali Kshetra Panchayat - assumed charge of Pramukh on 29.07.2019 - no confidence motion, as per section 15 of the Uttar Pradesh Kshetra Panchayat & Zila Panchayat Act, 1961 - District Magistrate issued a notice dated 21.08.2020 convening a meeting for consideration of the motion of no confidence on 15.09.2020. (Para-1,2)

HELD:- Under no circumstance can the will of the people be permitted to be frustrated. In a democratic set up where right to govern depends on the will of the people, the person who has lost the majority cannot be permitted to hold office. If a representative no longer enjoys the confidence of the people, elected representatives have a right to remove him and he cannot be permitted to remain in power even for a second and has to be immediately replaced by a newly elected representative. (Para - 12)

Petition dismissed. (E-7)

(Delivered by Hon'ble Shashi Kant Gupta, J. & Hon'ble Piyush Agrawal, J.)

1. This writ petition has been filed, inter alia, for the following reliefs;

i. Issue a writ, order or direction in the nature of certiorari quashing the impugned order/notice dated 21.08.2020 (Annexure No. 3 to the writ petition) passed by Collector, Bijnor.

ii. Issue a writ, order or direction in the nature of mandamus directing the respondent no. 1 to initiate appropriate against the District Magistrate/Collector, Bijnor for violation of mandatory instructions issued under the Disaster Management Act, 2005.

2. The petitioner is the Pramukh of the Kotwali Kshetra Panchayat, Bijnor. The petitioner assumed the charge of Pramukh on 29.07.2019. On 21.08.2020, a no confidence motion, as per section 15 of the Uttar Pradesh Kshetra Panchayat & Zila Panchayat Act, 1961 (hereinafter referred to as, 'the Act of 1961'), was made in accordance with the procedure laid down under the Act of 1961.

3. In pursuance of the no confidence motion, the District Magistrate, Bijnor issued a notice dated 21.08.2020 convening a meeting for consideration of the motion of no confidence on 15.09.2020 at 11.00 a.m. at the Kotwali Kshetra Panchayat Office. In view of the aforesaid notice of the District Magistrate, Bijnor, a meeting for consideration of no confidence motion is to be held at 11.00 a.m. on 15.09.2020.

4. It is contended by the learned counsel for the petitioner that since there are about 185 Members in the Kotwali Kshetra Panchayat, District - Bijnor, they exceed the number of persons permitted under the Guidelines for Phased Re-opening (Unlock-4) issued by the Ministry of Home Affairs, Government of India on 29.08.2020. It was further submitted that in view of the aforesaid Guidelines, the proposed meeting for consideration of no confidence motion cannot be convened on 15.09.2020 since it would be in violation of the provisions of the Disaster Management Act.

5. Per contra, learned counsel for the respondents submitted that convening the meeting for the purposes of consideration of no confidence motion cannot be said to be a political function and in order to buttress the submission, he has further stated that sessions of Parliament have also been convened during this period of the pandemic. Similarly, amid the pandemic, Rajasthan Assembly, having more than 200 Members, was also convened for considering a no confidence motion. As such, there is no legal impediment in convening such a meeting.

6. Learned counsel has also brought to the notice of this Court that number of exams have also been held during the period of COVID-19 where a large number of students appeared in the examinations. Thus, the contention of the learned counsel for the respondents is that there is no prohibition to hold such statutory meeting for consideration of a no confidence motion. It is further submitted that a meeting can be held by adhering to the safety norms as stipulated by the Government.

7. Heard Shri Rakesh Pandey, learned Senior Counsel, assisted by Shri Atiqur Rahman Siddiqui, learned counsel for the petitioner; Shri D.C. Mathur, learned counsel for the respondent nos. 4 & 5; Shri Amit Manohar Sahay, learned standing counsel for the State - respondents and Shri Kharag Singh and Shri Brij Kumar Saroj, learned counsel for the caveator - Jasram Singh and perused the record.

8. It is true that the Central Government has issued the Guidelines for Phased Re-opening (Unlock-4) and in clause 1(iii) thereof, it has been mentioned that social/ academic/ sports/ entertainment/ cultural/ religious/ political functions and other congregations with a ceiling of 100 persons will be permitted with effect from 21st September, 2020, with mandatory wearing of face masks, social distancing, provision for thermal scanning and hand wash or sanitizers.

9. During the COVID-19 pandemic, everybody has to act with utmost caution so that the spread of infection may be curtailed as much as possible.

10. The Act of 1961 provides for local self-governance where the people of Gaon Sabhas have been given the right to manage their own affairs and perform governmental function through a democratic process,

under which they have been given the right to elect a Pradhan and remove him by passing a motion of no confidence. Election and removal by a motion of no-confidence are two important aspects in democratic set-up for which the Act of 1961 has made ample provisions.

11. Democracy is a system of government in which a country's political leaders are chosen by the people in regular, free, and fair elections. In a democracy, people have a choice between different candidates and parties who want the power to govern. The people are sovereign. They are the highest authority and government is based on the will of the people. Elected representatives at the national and local levels must listen to the people and be responsive to their needs. Thus, the voters have right to elect their representatives and also criticize and replace them if they do not perform well.

12. In view of the above inherent political philosophy and principle, the provision for bringing a no confidence motion for removing the representatives, has been introduced in the present Act of 1961. The Will of people is supreme. It cannot be lightly interfered with. Under no circumstance can the will of the people be permitted to be frustrated. In a democratic set up where right to govern depends on the will of the people, the person who has lost the majority cannot be permitted to hold office. If a representative no longer enjoys the confidence of the people, elected representatives have a right to remove him and he cannot be permitted to remain in power even for a second and has to be immediately replaced by a newly elected representative.

13. Therefore, considering the facts & circumstances of the case, we direct the District Magistrate, Bijnor to ensure all the protocols applicable for social and physical distancing are adhered to. The sitting arrangements be made in such a manner so that it may adhere to the prescribed norms. The District Magistrate, Bijnor may also explore the possibility of seating the Members of the Kotwali Kshetra Panchayat in two or three separate rooms, a big hall or in open space. The Authority concerned may also explore the possibility of holding a virtual session, with the help of modern technological tools.

14. The District Magistrate or his representative, who would be present on the spot, will be the best person to understand the ground reality for holding the proposed no confidence motion in the best possible manner, and we hope and trust he would ensure that all the protocols, as prescribed under the guidelines and norms issued by the State and Central Governments and the observations made hereinabove, would be followed.

15. At a time, when the State is reeling from a monstrous pandemic, it is imperative that detailed modalities for holding statutory meetings of local bodies, including those for considering "No Confidence Motions', are put in place and implemented. Accordingly, we direct the State Government to consider framing detailed Guidelines in this regard, expeditiously, if possible, within a period of three weeks from today. A copy of this order be sent to the Chief Secretary for its necessary compliance.

16. In view of the aforesaid discussions, we do not see any justification to interfere in the matter. The writ petition lacks merit and it is hereby dismissed.

(2020)09ILR A514
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.09.2019

BEFORE

THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE PRAKASH PADIA, J.

WRIT – C No. 17483 of 2017

Nripendra Kumar Dhusia ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Santosh Kumar Singh

Counsel for the Respondents:
A.S.G.I., Smt. Archana Singh, Sri Pramod Kumar Pandey, Ms. Manjina Singh

Constitution of India – Article 226 - Misleading, false & twisted facts in writ petition - Effect - Not entitled for any relief - under Article 226, over and above, a Court of Law, High Court is also a Court of Equity - Party must place all facts before the Court without any reservation - If there is suppression of material facts or twisted facts are placed - Writ Court may refuse to entertain petition and dismiss it without entering into merits of the matter (Para 34)

Petitioner made false statement in writ petition that he made registered complaint dated 30.03.2017 to respondent no. 3 - In fact no such complaint/representation was made by the petitioner till the filing of the writ petition - Statutory representation submitted only on 27.4.2017 - *Held* - Since petitioner not approached with clean hand hence not entitled for any relief (Para 33)

Dismissed. (E-5)

Listed of Cases cited:-

1. Moody Vs Cox [(1917) 2 Ch 71 : (1916- 17) All ER Rep 548 (CA)]

2. R v.Kensington Income Tax Commissioners [(1917) 1 KB 486 : 86 LJ KB 257 : 116 LT 136]

3. Arunima Baruah Vs Union of India (2007) 6 SCC 120

4. Prestige Lights Ltd. Vs S.B.I. (2007) 8 SCC 449

5. Udyami Evam Khadi Gramodyog Welfare Sanstha Vs St. of U.P. (2008) 1 SCC 560

6. Dalip Singh Vs St. of U.P. & ors. (2010) 2 SCC 114

7. Amar Singh Vs Union of India & ors. (2011) 7 SCC 69

8. Kishore Samrite Vs St. of U.P. & ors. (2013) 2 SCC 398

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

1. Personal affidavit of the petitioner filed today in the Court is taken on record.

2. Heard learned counsel for the petitioner.

3. The office of learned Additional Solicitor General of India has accepted notice on behalf of the respondent no.1. Ms. Manjina Singh, learned counsel, holding brief of Smt. Archana Singh appears for the respondents no.2 and 3.

4. Notice need not to be issued to respondent no. 4 in view of the order which is proposed to be passed today.

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

"I. Issue a writ, order or direction in the nature of Mandamus commanding and directing the respondent no.3 not give

any effect to the draw of lot/bidding process taken place on 29.03.2017 for allotment of Kishan Sewa Kendra Village Retail Out-let dealership at MDR-167 (Chitbaragaon to Ghazipur Road), Block Sohaon, District Ballia only.

II. Issue a writ, order or direction in the nature of Mandamus commanding and directing the respondent no.3 to get hold inquiry on the complaint/representation dated 30.03.2017 submitted by the petitioner personally and take appropriate decision for fresh draw of lot/bidding process only in respect of MDR-167 (Chitbaragaon to Ghazipur Road) Block Sohaon, Tehsil Ballia Sadar, District Ballia.

III. Issue a writ, order or direction in the nature of Mandamus commanding and directing the respondent no.3 not permit to respondent no.4 for any auction if such draw of lot/bidding of process given in favour of the respondent no.4 at M.D.R.-167 (Chitbaragaon to Ghazipur Road) Block Sohaon, Tehsil Ballia Sadar, District Ballia."

6. The facts in brief as contained in the writ petition are that the respondent Indian Oil Corporation Ltd. published an advertisement on 17.10.2014 for appointment of large number of dealers for opening of Kishan Sewa Kendra Village Retail Out let dealership in the State of U.P. At serial number 145 of the aforesaid advertisement the location was mentioned as MDR-167, (Chitbara Gaon to Ghazipur Road) at Firozpur Block Sohaon, Tehsil Ballia Sadar, District Ballia. The location in question is reserved for schedule caste category candidates.

7. For the purpose of establishment of Kishan Sewa Kendra one of the necessary condition was for the applicants to provide land for establishment of the retail outlet. The land proposed to be provided by the applicants are of two types namely Group 1 type (own land) or Group 2 type (firm).

8. The petitioner has applied for the location in question providing land under Group A category. It is contended that all the necessary papers and documents were duly submitted by the petitioner along-with his application form. It is further contended that after the application form was submitted by the petitioner the respondent no.3/Senior Divisional Retail Sales Manager, Indian Oil Corporation Limited (MD), Varanasi Divisional Office, District Varanasi issued a letter to the petitioner on 31.7.2016 asking certain more details/documents. It is stated that the informations were duly provided by the petitioner in the office of the respondent no.3 well within time and all the deficiencies were removed by him.

9. The petitioner received another letter dated 30.12.2016 by which he was directed that the Land Evaluation Committee (LEC) will visit site of land and as such he was requested to be present on the site along-with photo identity card on 18.1.2017. The Land Evaluation Committee inspected the land offered by the petitioner as well as respondent no.4 on 18.1.2017 and submitted its report to the Corporation. It is stated in paragraph 13 of the writ petition that the land offered by the respondent no.4 was not appropriate for establishment of Kishan Sewa Kendra as such the application submitted by the respondent no.4 was liable to be rejected. It is further contended that for the location in question only two applicants were found suitable namely petitioner and respondent no.4 and since the land offered by the respondent no.4 was not upto mark it is

only the petitioner, who was entitled for consideration of his case for the location in question.

10. A letter dated 7.3.2017 was issued by the respondents Corporation permitting the petitioner to participate in the draw of lot/bidding, which was scheduled to be held on 29.3.2017. The identical information was also given by the Corporation to the respondent no.4. The draw of lots/bidding for the location in question was held on 29.3.2017 in which the respondent no.4 was found to be selected. Large number of allegations were made in the writ petition against the respondent no.4 specially in respect of the land provided by him for the location in question. Raising his grievances a representation was submitted by the petitioner addressed to the respondent no.3/Senior Divisional Retail Sales Manager, Indian Oil Corporation Limited (MD), Varanasi Divisional Office, District Varanasi, on 30.3.2017, copy of which is appended as annexure 7 to the writ petition.

11. It is further argued that inspite of the fact that the aforesaid representation was submitted by the petitioner no orders were passed on the same by the respondent Corporation. Being aggrieved against the selection of respondent no.4 the petitioner has preferred the present writ petition.

12. When the matter was taken up as fresh on 25.4.2017 following order was passed by another Coordinate Bench of this Courts :-

"On the matter being taken up today, Smt. Archana Singh, Advocate, on the basis of instructions in question that have been so received dated 21.04.2017, made a categorical statement before us that till date the Indian Oil Corporation has not received any representation from Shri Nripendra Kumar Dhusia in reference to the subject location.

The record in question reflects that specially the averments that have been mentioned in paragraph 24 of the Writ Petition wherein petitioner has proceeded to make statement to the effect that after it has come to the knowledge of petitioner that large scale illegality, irregularity as well as fraud and concealment has been made by respondent no.4, immediately he has approached respondent no.3 i.e. Senior Divisional Retail Sales Manager, Indian Oil Corporation Limited (MD) Varanasi, Divisional Office N.H.-31 Babatpur Road, P.O. Harhua, District Varanasi and complaint has been made.

Once before us a categorical stand has been taken that false statement of fact has been mentioned and no such complaint has been received in the office of respondent no.3, in view of this, we take serious note of the matter and we proceed to ask Shri Nripendra Kumar Dhusia as to under what circumstances, he has proceeded to make statement of fact in paragraph 24 of the Writ Petition and at what point of time he has proceeded to send/deliver the said appeal in the office of respondent no.3.

Confronted with this situation, counsel for the petitioner has requested that the matter be taken up on Monday next i.e. .01.05.2017 so that an affidavit can come before us.

Request made is accepted.

*List this matter on 01.05.2017 so that counsel for the petitioner is in a position to file an affidavit as has been requested and in case we find that fal*se statement of fact has been made in the matter, action can be taken against petitioner."

13. In response to the same a personal affidavit was filed by the petitioner. In the personal affidavit filed by the petitioner it is stated that the registered complaint submitted by the petitioner was neither returned back nor taken on record by the respondent Corporation. Along-with supplementary affidavit the photo copy of the complaint dated 30.3.2017 was appended as annexure 2. It appears from perusal of the annexure 2 to the personal affidavit that the said complaint was received in the office of the respondent no.3 on 27.4.2017.

14. In paragraph 24 of the writ petition, the following averments were made by the petitioner :-

"That the petitioner after came in knowledge about the illegality, irregularity as well as fraud and concealment playing by respondent no.4 immediately approached before respondent no.3 through written complaint/representation dated 30.03.2017 to the respondent no.3 along with sale deed and Khatauni showing the name of Smt. Soniya co-owner become only after L.E.C. Report."

15. After the order dated 25.4.2017 passed by Coordinate Bench of this Court in the present writ petition it appears that the aforesaid application was sought to be served by the petitioner in the office of respondent no.3 on 27.4.2017, which is clear from the perusal of annexure 2 to the personal affidavit. Apart from the same a bank draft of Rs.1,000/- which was required to be submitted along-with the complaint dated 27.4.2017 accompanied the same. From perusal of the same, it is clear that no complaint whatsoever has been submitted by the petitioner on 30.3.2017 as stated by him in paragraph 24 of the writ petition.

16. From perusal of the facts as narrated above, it is clear that absolutely wrong averment has been made by the petitioner while filing the present writ petition. In paragraph 24 of the writ petition it is stated by the petitioner that after the petitioner came to know about the fraud and concealment by the respondent-corporation authorities he immediately approached before respondent no.3 through written complaint/representation dated 30.3.2017.

17. The brochure issued by the oil companies namely Indian Oil, Bharat Petroleum and Hindustan Petroleum contain provisions governing the selections of Dealers for Regular & Rural Retail Outlets. Clause 17 of the brochure clause is about the grievance redressal system, the same is quoted hereinbelow :-

"17. GRIEVANCE REDRESSAL SYSTEM

Any complaint should be accompanied by a fee of Rs. 1000/-, only in the form of demand draft of schedule bank, in favour of the Oil Company. Any complaint received without this fee will not be entertained. The complaint received against the selection including eligibility will be disposed off as under:-

(i) Complaints received before or after draw of lots/bidding process along with requisite fee of Rs. 1000/-, will be kept in record and investigation carried out after 30 days of Draw of Lots/bidding process only in following cases:-

. General complaints with verifiable facts

. Complaints against selected candidate

(ii) Any complaint received after 30 days from the date of draw of lots/bidding process will not be entertained.

(iii) Anonymous complaints without verifiable facts will not be investigated.

(iv) On receipt of a complaint, the complainant would be asked to submit details of allegation with a view to prima facie substantiate the allegations along with supporting documents, if any. While seeking documents and details, the complainant will be advised that if during the investigations, complaint is found to be false and/or without substance, the Corporation reserves the right to take action against the complainant as provided under the law and fee forfeited.

(v) In case a complaint is received against an applicant, who has not been selected in draw of lots/bidding process, the same will be kept in abeyance. In case the LOI against selected candidate is cancelled and the applicant against whom the complaint was received gets selected in the next draw or on account of bidding process, the complaint will only then be investigated.

(vi) If the complaint is not required to be investigated the fee received will be refunded to the complainant informing that the complaint has not been investigated since the candidate against whom the complaint has been made has not been selected. The fee will be refunded after issuance of LOA to the selected candidate.

(vii) Corporation will examine response of the complainant and if it is found that the complaint does not have specific and verifiable allegations, the same will be filed and complaint fee will be forfeited.

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(viii) If a decision is taken to investigate the complaint, decision on the complaint will be taken as under and intimated to the complainant:-

a) ***Complaints not substantiated:***

In case the complaint is not substantiated it will be filed and complaint fee will be forfeited.

b) ***Established Complaints:***

In case of established complaint, suitable action would be taken and complaint fee collected will be refunded."

18. It reveals from perusal of the facts as narrated in the supplementary affidavit filed by the petitioner that no such complaint has been made by the petitioner before the respondent authorities on 30.3.2017. In view of the fact, petitioner has not approached this Court with clean hand hence he is not entitled for any relief as claimed by him in the present writ petition.

19. Law in this connection is well settled that he who seeks equity must do equity, he who comes into equity must come with clean hands.

20. It is settled law that a court of equity refuses relief to a plaintiff whose conduct in regard to the subject-matter of the litigation has been improper.

21. In the case of ***Moody v. Cox [(1917) 2 Ch 71 : (1916-17) All ER Rep 548 (CA)]*** it was held:

"When one asks on what principle this is supposed to be based, one receives in answer the maxim that anyone coming to equity must come with clean hands. I think the expression clean hands is used more often in the textbooks than it is in the judgments, though it is occasionally used in the judgments, but I was very much surprised to hear that when a contract, obtained by the giving of a bribe, had been affirmed by the person who had a primary

right to affirm it, not being an illegal contract, the courts of equity could be so scrupulous that they would refuse any relief not connected at all with the bribe. I was glad to find that it was not the case, because I think it is quite clear that the passage in Dering v. Earl of Winchelsea [(1787) 1 Cox Eq Cas 318: 2 Bos & P 270], which has been referred to, shows that equity will not apply the principle about clean hands unless the depravity, the dirt in question on the hand, has an immediate and necessary relation to the equity sued for."

22. In the case of ***R v.. Kensington Income Tax Commissioners, [(1917) 1 KB 486 : 86 LJ KB 257 : 116 LT 136]***, it was held that :-

"35. It is well settled that a prerogative remedy is not a matter of course. In exercising extraordinary power, therefore, a Writ Court will indeed bear in mind the conduct of the party who is invoking such jurisdiction. If the applicant does not disclose full facts or suppresses relevant materials or is otherwise guilty of misleading the Court, the Court may dismiss the action without adjudicating the matter. The rule has been evolved in larger public interest to deter unscrupulous litigants from abusing the process of Court by deceiving it. The very basis of the writ jurisdiction rests in disclosure of true, complete and correct facts. If the material facts are not candidly stated or are suppressed or are distorted, the very functioning of the writ courts would become impossible."

23. In the case of ***Halsbury's Laws of England, 4th Edn., Vol. 16, pp. 874- 76***, the law is stated in the following terms:

"1303. He who seeks equity must do equity.--In granting relief peculiar to its own jurisdiction a court of equity acts upon the rule that he who seeks equity must do equity. By this it is not meant that the court can impose arbitrary conditions upon a plaintiff simply because he stands in that position on the record. The rule means that a man who comes to seek the aid of a court of equity to enforce a claim must be prepared to submit in such proceedings to any directions which the known principles of a court of equity may make it proper to give; he must do justice as to the matters in respect of which the assistance of equity is asked. In a court of law it is otherwise: when the plaintiff is found to be entitled tojudgment, the law must take its course; no terms can be imposed.

**** 1305. He who comes into equity must come with clean hands.--A court of equity refuses relief to a plaintiff whose conduct in regard to the subject-matter of the litigation has been improper. This was formerly expressed by the maxim ,,he who has committed iniquity shall not have equity", and relief was refused where a transaction was based on the plaintiff's fraud or misrepresentation, or where the plaintiff sought to enforce a security improperly obtained, or where he claimed a remedy for a breach of trust which he had himself procured and whereby he had obtained money. Later it was said that the plaintiff in equity must come with perfect propriety of conduct, or with clean hands. In application of the principle a person will not be allowed to assert his title to property which he has dealt with so as to defeat his creditors or evade tax, for he may not maintain an action by setting up his own fraudulent design.*

The maxim does not, however, mean that equity strikes at depravity in a general way; the cleanliness required is to be judged in relation to the relief sought, and the conduct complained of must have

an immediate and necessary relation to the equity sued for; it must be depravity in a legal as well as in a moral sense. Thus, fraud on the part of a minor deprives him of his right to equitable relief notwithstanding his disability. Where the transaction is itself unlawful it is not necessary to have recourse to this principle. In equity, just as at law, no suit lies in general in respect of an illegal transaction, but this is on the ground of its illegality, not by reason of the plaintiff's demerits."

(See also Snell's Equity, 13th Edn., pp. 30-32 and Jai Narain Parasrampuria v. Pushpa Devi Saraf [(2006) 7 SCC 756] .)

24. In the case of ***Spry on Equitable Remedies, 4th Edn., p. 5***, referring to ***Moody v. Cox [(1917) 2 Ch 71 : (1916-17) All ER Rep 548 (CA)] and Meyers v. Casey[(1913) 17 CLR 90]*** it is stated:

"... that the absence of clean hands is of no account „unless the depravity, the dirt in question on the hand, has an immediate and necessary relation to the equity sued for". When such exceptions or qualifications are examined it becomes clear that the maxim that predicates a requirement of clean hands cannot properly be regarded as setting out a rule that is either precise or capable of satisfactory operation."

25. Although the aforementioned statement of law was made in connection with a suit for specific performance of contract, the same may have a bearing in determining a case of this nature also.

26. In the said treatise, it was also stated at pp. 170-71:

"In these cases, however, it is necessary that the failure to disclose the matters in question, and the consequent error or misapprehension of the defendant, should be such that performance of his obligations would bring about substantial hardship or unfairness that outweighs matters tending in favour of specific performance. Thus, the failure of the plaintiff to explain a matter of fact, or even, in some circumstances, to correct a misunderstanding of law, may incline the court to take a somewhat altered view of considerations of hardship, and this will be the case, especially where it appears that at the relevant times the plaintiff knew of the ignorance or misapprehension of the defendant but nonetheless did not take steps to provide information or to correct the material error, or a fortiori, where he put the defendant off his guard or hurried him into making a decision without proper enquiry."

27. In the case of ***Arunima Baruah Vs. Union of India*** reported in ***2007 (6) SCC 120*** it was held by the Supreme Court that :-

"12. It is trite law that so as to enable the court to refuse to exercise its discretionary jurisdiction suppression must be of material fact. What would be a material fact, suppression whereof would disentitle the appellant to obtain a discretionary relief, would depend upon the facts and circumstances of each case. Material fact would mean material for the purpose of determination of the lis, the logical corollary whereof would be that whether the same was material for grant or denial of the relief. If the fact suppressed is not material for determination of the lis between the parties, the court may not refuse to exercise its discretionary jurisdiction. It is also trite that a person invoking the discretionary jurisdiction of

the court cannot be allowed to approach it with a pair of dirty hands. But even if the said dirt is removed and the hands become clean, whether the relief would still be denied is the question."

28. Certain more observations in this regard has been made by the Supreme Court in the case of ***Prestige Lights Ltd. V. State Bank of India***, reported in ***(2007) 8 SCC 449***, the Hon'ble Supreme Court held in para 35 as under:-

"35. It is well settled that a prerogative remedy is not a matter of course. In exercising extraordinary power, therefore, a writ court will indeed bear in mind the conduct of the party who is invoking such jurisdiction. If the applicant does not disclose full facts or suppresses relevant materials or is otherwise guilty of misleading the court, the court may dismiss the action without adjudicating the matter. The rule has been evolved in larger public interest to deter unscrupulous litigants from abusing the process of court by deceiving it. The very basis of the writ jurisdiction rests in disclosure of true, complete and correct facts. If the material facts are not candidly stated or are suppressed or are distorted, the very functioning of the writ courts would become impossible."

29. In the case of ***Udyami Evam Khadi Gramodyog Welfare Sanstha V. State of Uttar Pradesh, (2008) 1 SCC 560***, the Hon'ble Supreme Court held as under in para 16:-

"16. A writ remedy is an equitable one. A person approaching a superior court must come with a pair of clean hands. It not only should not suppress any material fact, but also should not take recourse to the legal proceedings over and over again which amounts to abuse of the process of law. In Advocate General, State of Bihar V. M.P.Khair Industries this Court was of the opinion that such a repeated filing of writ petitions amounts to criminal contempt."

30. Apart from the same, in the case of ***Dalip Singh Vs. State of U.P. and others*** reported in ***(2010) 2 SCC 114***, this Court has given this concept a new dimension which has a far reaching effect. We, therefore, repeat those principles here again:

"For many centuries Indian society cherished two basic values of life i.e. "satya"(truth) and "ahimsa (non-violence), Mahavir, Gautam Budha and Mahatma Gandhi guided the people to ingrain these values in their daily life. Truth constituted an integral part of the justice-delivery system which was in vogue in the pre- independence era and the people used to feel proud to tell truth in the courts irrespective of the consequences. However, post-Independence period has seen drastic changes in our value system. The materialism has overshadowed the old ethos and the quest for personal gain has become so intense that those involved in litigation do not hesitate to take shelter of falsehood, misrepresentation and suppression of facts in the court proceedings.

In the last 40 years, a new creed of litigants has cropped up. Those who belong to this creed do not have any respect for truth. They shamelessly resort to falsehood and unethical means for achieving their goals. In order to meet the challenge posed by this new creed of litigants, the courts have, from time to time, evolved new rules and it is now well

established that a litigant, who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final."

31. In the case of ***Amar Singh vs. Union of India & Others*** reported in ***2011(7) SCC 69***, on the aspect of a litigant approaching the court, with unclean hands, at, paragraphs 53 to 57, and at, paragraph 59, which is quoted hereinbelow :-

"53. Courts have, over the centuries, frowned upon litigants who, with intent to deceive and mislead the courts, initiated proceedings without full disclosure of facts. Courts held that such litigants have come with "unclean hands" and are not entitled to be heard on the merits of their case.

54. In Dalglish v. Jarvie {2 Mac. & G. 231,238}, the Court, speaking through Lord Langdale and Rolfe B., laid down:

"It is the duty of a party asking for an injunction to bring under the notice of the Court all facts material to the determination of his right to that injunction; and it is no excuse for him to say that he was not aware of the importance of any fact which he has omitted to bring forward."

55. In Castelli v. Cook {1849 (7) Hare, 89,94}, Vice Chancellor Wigram, formulated the same principles as follows:

"A plaintiff applying ex parte comes under a contract with the Court that he will state the whole case fully and fairly to the Court. If he fails to do that, and the Court finds, when the other party applies to dissolve the injunction, that any material fact has been suppressed or not properly brought forward, the plaintiff is told that the Court will not decide on the merits, and that, as has broken faith with the Court, the injunction must go."

56. In the case of Republic of Peru v. Dreyfus Brothers & Company {55 L.T. 802,803}, Justice Kay reminded us of the same position by holding:

"...If there is an important misstatement, speaking for myself, I have never hesitated, and never shall hesitate until the rule is altered, to discharge the order at once, so as to impress upon all persons who are suitors in this Court the importance of dealing in good faith with the Court when ex parte applications are made."

57. In one of the most celebrated cases upholding this principle, in the Court of Appeal in R. V. Kensington Income Tax Commissioner {1917 (1) K.B. 486} Lord Justice Scrutton formulated as under:

"and it has been for many years the rule of the Court, and one which it is of the greatest importance to maintain, that when an applicant comes to the Court to obtain relief on an ex parte statement he should make a full and fair disclosure of all the material facts- facts, now law. He must not misstate the law if he can help it - the court is supposed to know the law. But it knows nothing about the facts, and the applicant must state fully and fairly the facts, and the penalty by which the Court enforces that obligation is that if it finds out that the facts have been fully and fairly stated to it, the Court will set aside any action which it has taken on the faith of the imperfect statement."

59. The aforesaid requirement of coming to Court with clean hands has been repeatedly reiterated by this Court in a large number of cases. Some of which may be noted, they are: Hari Narain v. Badri Das- AIR 1963 SC 1558, Welcome Hotel and others v. State of A.P. and others - (1983) 4 SCC 575, G. Narayanaswamy

Reddy (Dead) by LRs. And another v. Government of Karnatka and another - JT 1991(3) SC 12: (1991) 3 SCC 261, S.P. Chengalvaraya Naidu (Dead) by LRs. v. Jagannath (Dead) by LRs. and others - JT 1993 (6) SC 331: (1994) 1 SCC 1, A.V.

Papayya Sastry and others v. Government of A.P. and others - JT 2007 (4) SC 186: (2007) 4 SCC 221, Prestige Lights Limited v. SBI - JT 2007(10) SC 218: (2007) 8 SCC 449, Sunil Poddar and others v. Union Bank of India - JT 2008(1) SC 308: (2008) 2 SCC 326, K.D.Sharma v. SAIL and others - JT 2008 (8) SC 57: (2008) 12 SCC 481, G. Jayashree and others v. Bhagwandas S. Patel and others - JT 2009(2) SC 71 : (2009) 3 SCC 141,Dalip Singh v. State of U.P. and others - JT 2009 (15) SC 201: (2010) 2 SCC 114."

32. In the case of ***Kishore Samrite vs. State of U.P. & Others*** reported in ***2013(2) SCC 398***, at paragraphs 32 to 36, the Hon'ble Supreme Court held as follows:

"32. With the passage of time, it has been realised that people used to feel proud to tell the truth in the Courts, irrespective of the consequences but that practice no longer proves true, in all cases. The Court does not sit simply as an umpire in a contest between two parties and declare at the end of the combat as to who has won and who has lost but it has a legal duty of its own, independent of parties, to take active role in the proceedings and reach at the truth, which is the foundation of administration of justice. Therefore, the truth should become the ideal to inspire the courts to pursue. This can be achieved by statutorily mandating the Courts to become active seekers of truth. To enable the courts to ward off unjustified interference in their working, those who indulge in immoral acts like perjury, prevarication and motivated falsehood, must be appropriately dealt with. The parties must state forthwith sufficient factual details to the extent that it reduces the ability to put forward false and exaggerated claims and a litigant must approach the Court with clean hands. It is the bounden duty of the Court to ensure that dishonesty and any attempt to surpass the legal process must be effectively curbed and the Court must ensure that there is no wrongful, unauthorised or unjust gain to anyone as a result of abuse of the process of the Court. One way to curb this tendency is to impose realistic or punitive costs.

33. The party not approaching the Court with clean hands would be liable to be non-suited and such party, who has also succeeded in polluting the stream of justice by making patently false statements, cannot claim relief, especially underArticle 136of the Constitution. While approaching the court, a litigant must state correct facts and come with clean hands. Where such statement of facts is based on some information, the source of such information must also be disclosed. Totally misconceived petition amounts to abuse of the process of the court and such a litigant is not required to be dealt with lightly, as a petition containing misleading and inaccurate statement, if filed, to achieve an ulterior purpose amounts to abuse of the process of the court. A litigant is bound to make full and true disclosure of facts. (Refer : Tilokchand H.B. Motichand & Ors. v. Munshi & Anr. [1969 (1) SCC 110]; A. Shanmugam v. Ariya Kshatriya Rajakula Vamsathu Madalaya Nandhavana Paripalanai Sangam & Anr. [(2012) 6 SCC 430];Chandra Shashi v. Anil Kumar Verma [(1995) SCC 1 421]; Abhyudya Sanstha v. Union of India & Ors. [(2011) 6 SCC 145]; State of Madhya Pradesh v. Narmada Bachao Andolan & Anr. [(2011) 7 SCC 639];Kalyaneshwari v. Union of India & Anr. [(2011) 3 SCC 287)].

34. The person seeking equity must do equity. It is not just the clean hands, but also clean mind, clean heart and clean objective that are the equi-fundamentals of judicious litigation. The legal maxim jure naturae aequum est neminem cum alterius detrimento et injuria fieri locupletiorem, which means that it is a law of nature that one should not be enriched by the loss or injury to another, is the percept for Courts. Wide jurisdiction of the court should not become a source of abuse of the process of law by the disgruntled litigant. Careful exercise is also necessary to ensure that the litigation is genuine, not motivated by extraneous considerations and imposes an obligation upon the litigant to disclose the true facts and approach the court with clean hands.

35. No litigant can play hide and seek with the courts or adopt pick and choose. True facts ought to be disclosed as the Court knows law, but not facts. One, who does not come with candid facts and clean breast cannot hold a writ of the court with soiled hands. Suppression or concealment of material facts is impermissible to a litigant or even as a technique of advocacy. In such cases, the Court is duty bound to discharge rule nisi and such applicant is required to be dealt with for contempt of court for abusing the process of the court. {K.D. Sharma v. Steel Authority of India Ltd. & Ors. [(2008) 12 SCC 481]."

33. From perusal of the facts as narrated in the writ petition specially in paragraph 24 of the writ petition in which the petitioner has stated that he has already made a representation before the respondents authorities but from perusal of the supplementary affidavit filed by him it is clear that no representation was made by the petitioner till the time of the filing of the writ petition. Statutory representation was submitted by him for the first time on 27.4.2017, copy of which is appended as annexure no.2 to the personal affidavit, which was submitted by him within the statutory period of 30 days but since wrong facts have been stated by the petitioner in the writ petition he is not entitled for any relief specially under Article 226 of the Constitution of India.

34. The High Court is exercising discretionary and extraordinary jurisdiction under Article 226 of the Constitution. Over and above, a Court of Law is also a Court of Equity. It is, therefore, of utmost necessity that when a party approaches a High Court, he must place all the facts before the Court without any reservation. If there is suppression of material facts on the part of the petitioner or twisted facts have been placed before the Court, the Writ Court may refuse to entertain the petition and dismiss it without entering into merits of the matter.

35. Accordingly, we are of the opinion that the present writ petition is devoid of merit and the same is liable to be dismissed.

36. In view of the same, present writ petition is dismissed with cost.

(2020)09ILR A524
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.06.2020

BEFORE

THE HON'BLE RAVI NATH TILHARI, J.

WRIT – C No. 17599 of 2006

U.P. State Road Transport Corporation, Jhansi ...Petitioner

Versus

Devendra Kumar Verma & Ors.

...Respondents

Counsel for the Petitioner:

Sri Rahul Anand Gaur, Sri J.N. Singh, Sri Nishant Mehrotra, Sri Sheo Ram Singh

Counsel for the Respondents:

C.S.C., Sri G.K. Srivastava, Sri Ranjeet Kumar Misra, Sri Ajai Kumar Tiwari(S.C.)

(A) Labour Law - U.P. Industrial Disputes Act, 1947 - Section 6-E - Conditions of service, etc. to remain unchanged in certain circumstances during the pendency of proceedings - Section 6-F - Special provision for adjudication as to whether the conditions of services, etc. changed during the pendency of proceedings .

Court proceeded to hear the matter as it is pending since 2006 - Respondent no.1 engaged as conductor - chargesheeted and a preliminary inquiry held for the alleged misconduct - caught red handed carrying 13 passengers in bus No. UGO-9890 without tickets - found guilty of misconduct - departmental appeal filed by respondent no. 1 - partly allowed - modifying the order of punishment of removal to stoppage of two years' increments without affecting his future services - respondent no. 1 raised Industrial Dispute before the Labour Court. (Para-3)

HELD:- No rider can be put to the proviso of Section 6-E(2) so far as the conditions mentioned therein are concerned for the employer to comply with. The proviso which imposes conditions for performance of certain act, those conditions are to be fulfilled by the employer, before he can take action as contemplated under Sub-section (2) of Section 6-E of the Act, 1947. (Para - 24)

Petition dismissed. (E-7)

List of cases cited: -

1. J.K. Industries Ltd. & ors. Vs Chief Inspector of Factories and Boilers & ors. (1996) 6 SCC 665

2. Casio India Company Pvt. Ltd. Vs St. of Har. (2016) 6 SCC 209

(Delivered by Hon'ble Ravi Nath Tilhari, J.)

1. Heard Sri Sheo Ram Singh, learned counsel for petitioner and Sri Ajai Kumar Tiwari, learned Standing Counsel. No one appeared for private respondents to argue the matter even in the revised list. The Court proceeded to hear the matter as it is pending since 2006. After hearing the learned Counsel for the petitioner and the learned Standing counsel, judgment was reserved.

2. The petitioner has challenged the Award dated 23.9.2005 passed by Presiding Officer, Labour Court-II U.P. Kanpur/Respondent No. 2 in Misc. Dispute No. 40 of 2001, under Section 6-F of the U.P. Industrial Disputes Act, 1947 (hereinafter referred to as 'the Act 1947'). By the said award, the order bearing no. 8025 dated 26.12.2000 passed by U.P. State Road Transport Corporation, Jhansi area office Tehsil Road, Jhansi through Regional Manager/ Respondent No. 3 and the appellate order dated 23.4.2001 removing the respondent no. 1 from services, have been declared illegal and the petitioner-corporation was directed to restore the services of respondent no. 1 (now deceased and substituted by his heirs and legal representatives as respondent nos. 1/1 to 1/4), giving continuity in service with all consequential benefits, including payment of full salary and other allowances. The rest part of the order dated 26.12.2000, whereby salary/wages of suspension period was denied and recovery of the amount of loss of tickets to the tune of Rs. 30734.70/-, was directed, was maintained by the Labour Court.

3. Briefly stated facts of the case are that the respondent no. 1, Devendra Kumar

Verma was engaged as conductor and was posted at Rath Depot in Jhansi Region, Jhansi. He was chargesheeted and a preliminary inquiry was held for the alleged misconduct dated 23.9.1995, i.e. he was caught red handed carrying 13 passengers in bus No. UGO-9890 without tickets. Vide order dated 25.9.1998 he was found guilty of misconduct. The departmental appeal filed by respondent no. 1 was partly allowed vide order dated 26.3.1999 modifying the order of punishment of removal to stoppage of two years' increments without affecting his future services. The respondent no. 1 raised Industrial Dispute before the Labour Court, Kanpur being Adjudication Case No. 47/2001.

4. The respondent no. 1 is alleged to have committed serious misconduct on dated 13.6.1999, 17.6.1999 and 18.6.1999. He was chargesheeted for various charges vide order dated 23.8.1999. In the Departmental Inquiry, the Inquiry Officer submitted the inquiry report and returned the finding that all charges were proved. The punishing authority after affording opportunity of hearing passed the order of punishment of removal from services on 26.12.2000. The departmental appeal was dismissed vide order dated 23.4.2001.

5. The respondent no. 1 raised Industrial Dispute before the Labour Court, being Misc. Adjudication Case No. 40/2001 under Section 6-F of the U.P. Industrial Disputes Act, 1947, challenging the order dated 26.12.2000 and the appellate order dated 23.4.2001, inter-alia, on the ground that with respect to the order dated 26.12.2000, the petitioner-corporation did not seek permission from the Labour Court although the first dispute being adjudication case No. 47 of 2001 was pending before the Labour Court.

6. The petitioner-corporation filed reply stating that the pending dispute in Misc. Dispute No. 47 of 2001 was not connected with the new dispute and as such the provisions of Section 6-E of the Act 1947 were not applicable nor attracted. The charges against the respondent no. 1, were grievous in nature and he was guilty of cheating and embezzlement.

7. The Labour Court passed an Award dated 22.9.2005 in favour of respondent no. 1 holding the order dated 26.12.2000 and appellate order dated 23.4.2001 as illegal and directed the reinstatement of respondent no. 1 in service with continuity of service and directed the payment of entire salary, allowances and other benefits with effect from 20.12.2000. However, Labour Court maintained the part of order by which the salary for suspension period was forfeited and the recovery of loss of tickets from the respondent no. 1 was directed, was maintained.

8. Sri Sheo Ram Singh, learned counsel for the petitioner-corporation has submitted that Section 6-E (2) of U.P. Industrial Disputes Act, 1947 was not attracted and the Labour Court acted illegally in granting protection/benefit of Section 6-E (2) of the Act,1947 to the respondent no. 1 as well as in awarding the claim, in favour of respondent no. 1. He has submitted that the dispute pending in Adjudication Case No. 47 of 2001 was different than the dispute in the present Adjudication Case No. 40 of 2001 and as such Section 6-E (2) of the Act was not attracted.

9. Learned counsel for the petitioner has next submitted that the respondent no. 1 did not raise this plea of Section 6-E (2) of the Act, 1947, in the Departmental Appeal and as such it was not open for him to raise this plea before the Labour Court

for the first time. The impugned Award, as such, deserves to be quashed, in his submission.

10. Learned Standing Counsel has supported the Award of the Labour Court on the ground the order has been passed. He has submitted that Section 6-E (2) of the Act, 1947 was attracted and as the petitioner did not comply with the same, there is no illegality in the Award passed by the Labour Court, which Award does not call for any interference by this Court in the exercise of writ jurisdiction.

11. I have considered the submissions of the learned counsel for the petitioner and the learned standing counsel and have perused the material on record.

12. The short point involved in this case is whether Section 6-E (2) of the Act, 1947, is attracted to the present case or not.

13. It is appropriate to reproduce Section 6-E of the U.P. Industrial Disputes Act, 1947 as under:

[6E. Conditions of service, etc. to remain unchanged in certain circumstances during the pendency of proceedings. *- (1) During the pendency of any conciliation proceeding before a Conciliation Officer or a Board or of any proceeding before a Labour Court or Tribunal in respect of an industrial dispute, no employer shall, -*

(a) in regard to any matter connected with the dispute, alter, to the prejudice of the workmen concerned in such dispute, the conditions of service applicable to them immediately before the commencement of such proceeding, or

(b) for any misconduct connected with the dispute, discharge or punish, whether by dismissal or otherwise any workman concerned in such dispute save with the express permission in writing of the authority before which the proceeding is pending.

(2) During the pendency of any such proceeding in respect of an industrial dispute, the employer may, in accordance with the standing orders applicable to a workman concerned in such dispute, -

(a) alter, in regard to any matter not connected with the dispute, the conditions of service applicable to that workman immediately before the commencement of such proceeding, or

(b) for any misconduct not connected with the dispute, discharge or punish, whether by dismissal or otherwise :

Provided that no such workman shall be discharged or dismissed, unless he has been paid wages for one month and an application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer.

(3) Notwithstanding anything contained in sub-section (2) no employer shall during the pendency of any such proceeding in respect of an industrial dispute, take any action against any protected workman concerned in such dispute, -

(a) by altering, to the prejudice of such protected workman, the conditions of service applicable to him immediately before the commencement of such proceeding, or

(b) by discharging or punishing, whether by dismissal or otherwise, such protected workman,

such with the express permission in writing of the authority before which the proceeding is pending.

Explanation. - For the purposes of this sub-section, a 'protected workman'

in relation to an establishment, means a workman who, being an officer of a registered trade union connected with the establishment, is recognized as such in accordance with rules made in this behalf.

(4) In every establishment, the number of workmen to be recognized as protected workmen for the purposes of sub-section (3) shall not exceed one per cent of the total number of workmen employed therein subject to a minimum number of five protected workmen and a maximum number of one hundred protected workmen and for the aforesaid purpose, the State Government may make rules providing for the distribution of such protected workmen among various trade unions, if any, connected with the establishment and the manner in which they may be chosen and recognized as protected workmen.

(5) Where an employer makes an application to a Board, Labour Court or Tribunal under the proviso to sub-section (2) for approval of the action taken by him, the authority concerned shall, without delay, hear such application and pass, as expeditiously as possible, such order in relation thereto as it deems fit.]

14. A bare perusal of Section 6-E(1) of the Act, 1947 shows that during pendency of any conciliation proceeding before a Conciliation Officer or a Board or of any proceeding before a Labour Court or Tribunal in respect of an industrial dispute, no employer shall, (a) in regard to any matter connected with the dispute, alter, to the prejudice of the workmen concerned in such dispute, the conditions of service applicable to them immediately before the commencement of such proceeding, or (b) for any misconduct connected with the dispute, discharge or punish, whether by dismissal or otherwise any workman concerned in such dispute save with the express permission in writing of the authority before which the proceeding is pending. This sub-section (1) relates to the matter or dispute which is pending before Conciliation Officer or Board or Labour Court or Tribunal i.e. the same dispute and no such action as under Clauses (a), (b) can be taken without the express permission in writing of the authority before whom the proceeding is pending.

15. Perusal of Section 6-E(2) shows that during pendency of any 'such proceeding' in respect of an industrial dispute, the employer may, in accordance with the standing orders applicable to a workman concerned in such dispute, (a) alter, in regard to any matter not connected with the dispute, the conditions of service applicable to that workman immediately before the commencement of such proceeding, or (b) for any misconduct not connected with the dispute, discharge or punish, whether by dismissal or otherwise. This is subject to the proviso, which provides that no such workman shall be discharged or dismissed, unless he has been paid wages for one month and an application has been made by the employer to the authority before which the proceeding is pending, for approval of the action taken by the employer.

16. 'Such proceedings' in Section 6-E(2) refers to pendency of any conciliation proceeding, before a conciliation officer or a Board or any proceeding before Labour Court or Tribunal in respect of industrial dispute as has been mentioned in sub-section 1 of Section 6-E.

17. Thus as per Section 6-E (2), notwithstanding the pendency of any proceeding in respect of an industrial dispute before the Labour Court or the

Tribunal etc., for any act of misconduct, which is not connected with the pending dispute, the workman can still be discharged or dismissed or punishment may be imposed by the employer but two conditions are to be complied with as provided under the proviso. First, that the workman has to be paid one month's wages and second, the employer has to file an application before the authority concerned before whom the proceedings with respect to first dispute are pending for approval of the action of the employer.

18. Admittedly, in the present case any such application as referred to in the proviso was not made by the employer seeking approval of its action/order with respect to respondent no. 1. The submission of learned counsel for the petitioner that if the dispute is not connected with the previous dispute, Section 6-E (2) of the Act, 1947 is not attracted, on the face of the statutory provision, is misconceived and cannot sustained.

19. The next submission of learned counsel for the petitioner that as respondent no. 1 did not raise the plea of the employer not filing the application as provided in the proviso of Section 6-E (2), in the departmental appeal, filed against the order of punishment dated 26.12.2000, he could not take this plea before the Labour Court, also deserves rejection being misconceived.

20. There is no prohibition or restriction in Section 6-E (2), proviso, of the Act, 1947 that plea of non-compliance of the proviso cannot be raised before the Labour Court, if such plea had not been taken in the departmental appeal. No such restriction can be imposed or placed, when the provision is very specific and clear and is for the welfare of the employee/workman. If the contention of the petitioner's counsel is accepted then this Court would be re-writing the proviso or placing another proviso to Section 6-E (2), which is not the function of the Court.

21. In the case of **J.K. Industries Ltd. And others vs. Chief Inspector of Factories and Boilers and others (1996) 6 SCC 665**, the Hon'ble Supreme Court has held that a proviso to a provision in a statute has several functions and while interpreting a provision of the statute, the Court is required to carefully scrutinize and find out the real subject of the proviso appended to that provision. A proviso is normally used to remove special cases from the general enactment and provide for them specifically. A proviso qualifies the generality of the main enactment by providing an exception and taking out from the main proviso, portion, which, but for the proviso would be a part of the main provision. A proviso should not be read as if providing something by way of addition to the main provision which is foreign to the main provision itself.

22. It is relevant to reproduce Paragraph Nos. 33 to 36 of the case of J.K. Industries Ltd. And others (supra) as under:

33. A proviso to a provision in a statute has several functions and while interpreting a provision of the statute, the Court is required to carefully scrutinise and find out the real object of the proviso appended to that provision. It is not a proper rule of interpretation of a proviso that the enacting part or the main part of the Section be construed first without reference to the proviso and if the same if found to be ambiguous only then recourse may be had to examine the proviso as has been canvassed before us. On the other

hand an accepted rule of interpretation is that a Section and the proviso thereto must be construed as a whole each portion throwing light, if need be, on the rest. A proviso is normally used to remove special cases from the general enactment and provide for them specially.

34. A proviso qualifies the generality of the main enactment by providing an exception and taking out from the main provision, a portion, which, but for them proviso would be a part of the main provision. A proviso must, therefore, be considered in relation to the principal matter to which it stands as a proviso. A proviso should not be read as if providing something by way of addition to the main provision which is foreign to the main provision itself.

35. Indeed, in some cases, a proviso, may be an exception to the main provision though it cannot be inconsistent with what is expressed in the main provision and if it is so, it would be ultra-vires of the main provision and struck down. As a general rule in construing an enactment containing a proviso, it is proper to construe the provisions together without making either of them redundant or otiose. Even where the enacting part is clear, it is desirable to make an effort to give meaning to the proviso with a view to justify its necessary.

36. While dealing with proper function of a proviso, this Court in The Commissioner of Income-Tax, Mysore & Ors. vs. The Indo Mercantile Bank Ltd. & Ors. MANU/SC/0070/1959 : [1959]36ITR1(SC) opined:

The proper function of a proviso is that it qualifies the generality of the main 10 enactment by providing an exception and taking out as it were, from the main enactment, a portion which, but for the proviso would fall within the main enactment. Ordinarily it is foreign to the proper function of a proviso to read it as providing something by way of an addendum or dealing with a subject which is foreign to the main enactment.

23. In case of **Casio India Company Pvt. Ltd. Vs. State of Haryana 2016(6) SCC 209**, Hon'ble Supreme Court has held that: proviso can serve various purposes. Generally, it is in the nature of an exception. The proviso should not be normally construed as nullifying the enactment or as taking away completely a right conferred. It is relevant to reproduce Paragraph Nos. 22 & 23 as under:

"22.It needs no special emphasis to mention that provisos can serve various purposes. The normal function is to qualify something enacted therein but for the said proviso would fall within the purview of the enactment. It is in the nature of exception. [See : Kedarnath Jute Manufacturing Co. Ltd v. Commercial Tax Officer[12]]. Hidayatullah, J. (as his Lordship then was) in Shah Bhojraj Kuverji Oil Mills and Ginning Factory v. Subhsh Chandra Yograj Sinha[13] had observed that a proviso is generally added to an enactment to qualify or create an exception to what is in the enactment, and the proviso is not interpreted as stating a general rule. Further, except for instances dealt with in the proviso, the same should not be used for interpreting the main provision/enactment, so as to exclude something by implication. It is by nature of an addendum or dealing with a subject matter which is foreign to the main enactment. (See : CIT, Mysore etc. v Indo Mercantile Bank Ltd[14]). Proviso should not be normally construed as nullifying the enactment or as taking away completely a right conferred.

23. Read in this manner, we do not think the proviso should be given a greater or more significant role in interpretation of the main part of the notification, except as carving out an exception. It means and implies that the requirement of the proviso should be satisfied i.e. manufacturing dealer should not have charged the tax. The proviso would not scuttle or negate the main provision by holding that the first transaction by the eligible manufacturing dealer in the course by way of inter-state sale would be exempt but if the inter-state sale is made by trader/purchaser, the same would not be exempt. That will not be the correct understanding of the proviso. Giving over due and extended implied interpretation to the proviso in the notification will nullify and unreasonably restrict the general and plain words of the main notification. Such construction is not warranted."

24. In view of the aforesaid judgments, this Court is of the considered view that no rider can be put to the proviso of Section 6-E(2) so far as the conditions mentioned therein are concerned for the employer to comply with. The proviso which imposes conditions for performance of certain act, those conditions are to be fulfilled by the employer, before he can take action as contemplated under Sub-section (2) of Section 6-E of the Act, 1947.

25. No other point has been pressed by the learned counsel for the petitioner.

26. Thus considered, the writ petition deserves to be **dismissed**.

27. The respondent no. 1, in whose favour the award was passed has died and has been substituted by his legal representatives as respondent nos. 1/1 to 1/4. As such the monetary benefits under the Award deserves to be given to the respondent nos. 1/1 to 1/4, if not already paid to the deceased respondent. It is ordered accordingly.

28. The writ petition lacks merits and is hereby dismissed. No orders as to costs.

(2020)09ILR A531
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.02.2020

BEFORE

THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE RAVI NATH TILHARI, J.

WRIT – C No. 22248 of 2019
connected with
WRIT – C No. 19215 of 2019
connected with
WRIT – C No. 25323 of 2019
connected with
WRIT – C No. 23046 of 2019

Sita Ram & Ors. ...Petitioners
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioners:
Sri Shashi Nandan, Sri Balendra Deo Mishra

Counsel for the Respondents:
C.S.C., Sri Neeraj Dube

Civil Law - National Highways Act, 1956 - Section 3G (1) - Awards - Review of award - Permissibility - No provision under National Highways Act, for review of Award once passed & attained finality - Only limited provision for correction of clerical /arithmetical mistakes or errors arising therein u/s 33 of Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013

Award granted compensation to the petitioners @ of Rs. 5500/- sq. metre - subsequently

competent authority reviewed its original awards & granted compensation @ of Rs. 780/- per sq. metre - *Held* - competent authority in the garb of correcting clerical/arithmetical mistake actually passed a fresh award after reviewing the original awards, which is not permissible - correction made, goes to the very root of the matter & has the effect of reducing the quantum of compensation awarded to a great extent – Award set aside – liberty to avail u/s 3G (5) of the Act, 1956 (Para 17,21, 22,23,24)

Allowed (E-5)

List of cases cited:-

1. Naresh Kumar & ors. Vs Government (NCT of Delhi) (2019) 9 SCC 416

2. Raj Kumar Soni & anr. Vs St. of U.P. & anr. (2007) 10 SCC 635

3. A.V. Papayya Sastry & ors. Vs Govt. of A.P. & ors. Appeal (Civil) No. 5097-5099 of 2004

4.Yashwant Sinha & ors. Vs. CBI thru its Director & Anr. passed by the Apex Court in Review Petition (Crl.) No. 46 of 2019 in Writ Petition (Crl.) No. 298 of 2018

(Delivered by Hon'ble Bala Krishna Narayana, J.
& Hon'ble Ravi Nath Tilhari, J.)

(By the Court)

1. Heard Sri Shashi Nandan, Senior Advocate assisted by Sri Balendra Deo Misra, learned counsel for the petitioners, learned Standing Counsel for the respondent nos. 2 and 3 and Sri Neeraj Dube, learned counsel for the respondent no. 4. None appears on behalf of the respondent no. 1.

2. Pleadings between the parties have been exchanged and with the consent of the learned counsel for the parties, we are disposing of this writ petition finally at the admission stage in accordance with the High Court Rules.

3. The facts of this case may be stated briefly hereinbelow :-

The petitioners in WRIT - C No. - 22248 of 2019, claim themselves to be the recorded owners of following plots namely :- Plot nos. 1730/0.0384, 1071/0.0042 sq. metre (owned by petitioner no. 1), plot no. 1732/288 sq. metre (owned by petitioner nos. 2, 3 & 4), plot nos. 1077/0.0795, 1742/0.0114 sq. metre (owned by petitioner nos. 5, 6, 7 and 8), plot no. 1106/0.0231, 1104/0.0209 sq. metre (owned by petitioner no. 10), plot no. 1822/0.0504 sq. metre (owned by petitioner no. 11), plot no. 1650/0.0172 sq. metre (owned by petitioner no. 12), plot no. 1322/0.0129 sq. metre (owned by petitioner nos. 13 and 14), plot no. 1722/0.0200 sq. metre (owned by petitioner nos. 15, 16 and 43), plot no. 1721/0.0230 sq. metre (owned by petitioner nos. 17, 18, 19, 20, 21, 22, 23, 24, 25 and 41), plot nos. 1150/0.0216, 1158/0.0042, 1154/0.0060, 1152/0.0480 sq. metre (owned by petitioner nos. 26 and 27), plot no. 1120/0.0335, 1095/0.0363 sq. metre (owned by petitioner nos. 28, 29, 30 and 40), plot no. 1107/0.0027 sq. metre (owned by petitioner no. 31), plot no. 1028/0.1106 sq. metre (owned by petitioner nos. 32, 34 and 36), plot no. 1027/0.0868 sq. metre (owned by petitioner no. 37), plot no. 1034/0.0780 sq. metre (owned by petitioner no. 39), plot no. 1043/0.1232 sq. metre (owned by petitioner nos. 46 and 47), plot no. 1136/2118/0.0178 sq. metre (owned by petitioner no. 45).

4. The petitioner in connected WRIT - C No. - 19215 of 2019, claims herself to be

the recorded owner of Gata No. 1121 area 320 sq. metre.

5. The petitioners in connected WRIT - C No. - 25323 of 2019 claim themselves to be the recorded owners of plot nos. 364, 357, 416, 371, 296A, 295, 423, 370, 358, 426, 293, 418, 366, 340, 369 and 342.

6. The petitioners in connected WRIT - C No. - 23046 of 2019 claim themselves to be the recorded owners of plot nos. 1934/0.0672 sq. metre, 1942/0.0159 sq. metre, 1939/0.0190 sq. metre, 2151/0.0384 sq. metre, 2153/0.0576 sq. metre, 1979/0.0203 sq. metre, 2310/0.0168 sq. metre, 1887/0.0112 sq. metre, 1781M/0.0624 sq. metre, 1985/0.0168 sq. metre, 1863/0.0768 sq. metre, 2311/0.0224 sq. metre, 2163/0.0480 sq. metre, 1885/0.0230 sq. metre, 2164/0.0264 sq. metre, 2317/0.0110 sq. metre, 2313/0.0288 sq. metre, 1739/0.0568 sq. metre, 1936/0.0578 sq. metre, 1989/0.0192 sq. metre, 1935/0.1102 sq. metre, 1862/0.0559 sq. metre, 2151/0.0384 sq. metre, 1863/0.0768 sq. metre, 2153/0.0576 sq. metre, 1796/0.0182 sq. metre, 1945/0.0130 sq. metre, 1792/0.0684 sq. metre, 2309/0.0270 sq. metre, 1862/0.0559 sq. metre, 2319/0.0091 sq. metre, 2320/0.0123 sq. metre and 2321/0.0091 sq. metre

7. The plots of the aforesaid petitioners which are situated in villages- Kakora, Nauria Karaiti and Kasia, Tehsil- Sirathu, District- Kaushambi were required by the respondents for the purpose of widening National Highway Road in Chakeri-Allahabad Section. Awards were made u/s 3G (1) of National Highways Act, 1956 (hereinafter referred to as the 'Act') by the competent authority on 18.01.2018 (in WRIT - C Nos. - 22248 of 2019 and 19215 of 2019), on 20.04.2017 (in WRIT - C No. - 25323 of 2019) and on 20.10.2017 (in WRIT - C No. - 23046 of 2019) granting compensation to the petitioners in lieu of acquisition of their land at the rate of Rs. 5500/- sq. metre. There is nothing on record indicating that the award passed by the competent authority u/s 3G (1) of the Act was challenged by the respondents by filing any application before the arbitrator u/s 3G (5) of the Act. However, a fresh award was made by the competent authority u/s 3G (1) of the Act on 15.05.2018 (Annexure No. 5 to WRIT - C No. - 25323 of 2019, Annexure No. 6 to WRIT - C Nos. - 22248 of 2019 and 23046 of 2019 and Annexure No. 9 to WRIT - C No. 19215 of 2019) by which the competent authority reviewed its original awards and granted compensation at the rate of Rs. 60,00,000/- per hectare or Rs. 780/- per sq. metre.

8. It is contended by Sri Shashi Nandan, Senior Advocate appearing for the petitioners that there being no power of review conferred upon the competent authority under the Act, the fresh award passed by the competent authority by which the rate of compensation was reduced from Rs. 5,500/- per sq. metre to Rs. 780/- per sq. metre, is wholly without jurisdiction and cannot be sustained. He further submitted that Section 33 of Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (hereinafter referred to as the 'Act of 2013'), limited provisions whereof relating to determination of compensation have been made applicable to the proceedings under the Act, empowers the Collector to correct any clerical or arithmetical mistakes in awards or errors arising therein either on his own motion or on the application of any person interested or local authority.

9. In support of the aforesaid contention, Sri Shashi Nandan, learned counsel for the petitioners has placed reliance upon **Naresh Kumar and others Vs. Government (NCT of Delhi)** reported in **(2019) 9 Supreme Court Cases 416.**

10. Per contra, Sri Neeraj Dube, learned counsel appearing for the respondent no. 4 strenuously urged before us that by the impugned award, the competent authority has not reviewed its original awards but has merely ordered correction of certain clerical mistakes in the original awards. He further submitted that since the petitioners' land was agricultural, the competent authority, while passing the original awards, had manifestly erred in awarding compensation at the rate of per sq. metre whereas it was required to determine compensation at the rate of per hectare and at the most, it can be said that the procedural mistake had been corrected by passing the impugned order.

11. In support of the aforesaid contention, he has placed reliance upon **Raj Kumar Soni and Another Vs. State of U.P. And Another** reported in **(2007) 10 Supreme Court Cases 635, A.V. Papayya Sastry & Ors. Vs. Government of A.P. & Ors.** passed by the Apex Court in Appeal (Civil) No. 5097-5099 of 2004 and **Yashwant Sinha & Ors. Vs. Central Bureau of Investigation through its Director & Anr.** passed by the Apex Court in Review Petition (Crl.) No. 46 of 2019 in Writ Petition (Crl.) No. 298 of 2018.

12. Learned Standing Counsel appearing for the respondent nos. 2 and 3 also adopted the submissions made by Sri Neeraj Dube, learned counsel for the respondent no. 4.

13. We have heard learned counsel for the parties and perused the material brought on record as well as the law reports cited before us.

14. In order to appreciate the respective submissions of the learned counsel for the parties, it would be useful to extract following provisions of Section 3G of the Act and Section 33 of Act of 2013 :-

Section 3G of The National Highways Act, 1956

1[3G. Determination of amount payable as compensation.--

(1) Where any land is acquired under this Act, there shall be paid an amount which shall be determined by an order of the competent authority.

(2) Where the right of user or any right in the nature of an easement on, any land is acquired under this Act, there shall be paid an amount to the owner and any other person whose right of enjoyment in that land has been affected in any manner whatsoever by reason of such acquisition an amount calculated at ten per cent. of the amount determined under sub-section (1), for that land.

(3) Before proceeding to determine the amount under sub-section (1) or sub-section (2), the competent authority shall give a public notice published in two local newspapers, one of which will be in a vernacular language inviting claims from all persons interested in the land to be acquired.

(4) Such notice shall state the particulars of the land and shall require all persons interested in such land to appear in person or by an agent or by a legal practitioner referred to in sub-section (2) of section 3C, before the competent authority, at a time and place and to state the nature of their respective interest in such land.

(5) If the amount determined by the competent authority under sub-section (1) or sub-section (2) is not acceptable to either of the parties, the amount shall, on an application by either of the parties, be determined by the arbitrator to be appointed by the Central Government.

(6) Subject to the provisions of this Act, the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply to every arbitration under this Act.

(7) The competent authority or the arbitrator while determining the amount under sub-section (1) or sub-section (5), as the case may be, shall take into consideration--

(a) the market value of the land on the date of publication of the notification under section 3A;

(b) the damage, if any, sustained by the person interested at the time of taking possession of the land, by reason of the severing of such land from other land;

(c) the damage, if any, sustained by the person interested at the time of taking possession of the land, by reason of the acquisition injuriously affecting his other immovable property in any manner, or his earnings;

(d) if, in consequences of the acquisition of the land, the person interested is compelled to change his residence or place of business, the reasonable expenses, if any, incidental to such change.]

Section 33 of The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013

33. Corrections to awards by Collector.-(1) The Collector may at any time, but not later than six months from the date of award or where he has been required under the provisions of this Act to make a reference to the Authority under section 64, before the making of such reference, by order, correct any clerical or arithmetical mistakes in either of the awards or errors arising therein either on his own motion or on the application of any person interested or local authority:

Provided that no correction which is likely to affect prejudicially any person shall be made unless such person has been given a reasonable opportunity of making representation in the matter.

(2) The Collector shall give immediate notice of any correction made in the award so corrected to all the persons interested.

(3) Where any excess amount is proved to have been paid to any person as a result of the correction made under sub-section (1), the excess amount so paid shall be liable to be refunded and in the case of any default or refusal to pay, the same may be recovered, as prescribed by the appropriate Government.

15. Even the most superficial reading of the aforesaid provisions indicate that where compensation awarded u/s 3G (1) or (2) of the Act is not acceptable to either of the parties, the amount of compensation on an application by either of the parties will be determined by the arbitrator to be appointed by the Central Government and subject to the provisions of the Act, the provisions of Arbitration and Conciliation Act, 1996 shall apply to every arbitration proceeding under the Act. Sub-section (7) of Section 3G of the Act enumerates the principles which the competent authority or the arbitrator while determining the compensation u/s sub-section (1) or sub-section (5) of Section 3G shall take into consideration.

16. Sri Neeraj Dube, learned counsel for the respondent no. 4 has failed to bring to our attention any provision under the Act conferring power of review on the competent authority. His reliance placed on Section 33 of Act of 2013 is wholly misconceived. Under Section 33 of Act of 2013, the only power given to the Collector is to correct clerical and arithmetical errors in the award either *suo motu* or on an application by either of the parties.

17. Having very carefully gone through the original awards and the fresh award, we find that the competent authority has in the garb of correcting clerical/arithmetical mistake, has actually passed a fresh award after reviewing the original awards. The correction made, goes to the very root of the matter and has the effect of reducing the quantum of compensation awarded to the petitioners to a great extent. In our opinion, if the awards passed by the competent authority were not acceptable to respondent no. 4, the remedy available to him was to file an application u/s 3G (5) of the Act.

18. The extent to which a review of award after it has attained finality is permissible, was considered in great detail by the Apex Court in the case of **Naresh Kumar (supra)** and the Apex Court in paragraph 8 and 9 of the said judgement held as hereunder :-

8. There is no provision under the Land Acquisition Act, 1894 for review of the Award once passed under Section 11 of the Act and had attained finality. The only provision is for correction of clerical errors in the Award which is provided for under Section 13A of the Act, which was inserted with effect from 24.09.1984. The relevant Section 13A of the Act reads as under:

13A. <u>Correction of clerical errors, etc.</u> - (1) The Collector may, at any time but not later than six months from the date of the award, or where he has been required under section 18 to make a reference to the Court, before the making of such reference, by order, correct any clerical or arithmetical mistakes in the award or errors arising therein either on his own motion or on the application of any person interested or a local authority:

Provided that no correction which is likely to affect prejudicially any person shall be made unless such person has been given a reasonable opportunity of making a representation in the matter.

(2) The Collector shall give immediate notice of any correction made in the award to all the persons interested.

(3) Where any excess amount is proved to have been paid to any person as a result of the correction made under sub-section (1), the excess amount so paid shall be liable to be refunded and in the case of any default or refusal to pay, the same may be recovered as an arrear of land revenue. (emphasis supplied)

9. A bare reading of the said Section 13A would make it clear that the same is not a provision for Review of the Award but only for correction of clerical or arithmetical mistakes in the Award. It is further provided in the sub-section (1) of Section 13A that the said correction can be made at any time, but not later than six months from the date of award. In the present case, the Land Acquisition Collector has actually not made any correction of clerical or arithmetical mistake, but has in fact reviewed the Award dated 01.10.2003 by its Review Award no.16/03-04 dated 14.07.2004, which was

also clearly passed beyond such period of six months.

19. There is no material difference between Section 13A of the Land Acquisition Act, 1894 (hereinafter referred to as the Act of 1894) and Section 33 of the Act of 2013. Section 33 of the Act of 2013, in our opinion, is in pari materia of Section 13A of the Act of 1894 and hence, the principles propounded by the Apex Court in the case of **Naresh Kumar (supra)** while examining the scope of Section 33 of the Act of 2013 shall squarely govern the exercise of power by a Collector or the competent authority u/s 33 of Act of 2013. The three judgements which have been relied upon by the learned counsel for the respondent no. 4 in support of his contention that the competent authority under the facts and circumstances of the case was fully justified in reviewing its original awards, are of no assistance to him.

20. In none of the cases relied upon by the learned counsel for the respondent no. 4, the scope of power of correcting a clerical/arithmetical mistake in an order, was examined.

21. Although learned counsel for the respondent no. 4 has argued that by the impugned award, the original awards have been corrected but the reading of the two awards tells an entirely different story. There is not even a whisper in the impugned award to the effect that any correction was made in the original awards and in fact the competent authority in the garb of making clerical/arithmetical correction in the original awards, has passed a fresh award which is not permissible under the law.

22. The impugned award having been passed by the competent authority without any jurisdiction, cannot be sustained and are liable to be quashed.

23. The writ petitions succeed and are accordingly **allowed**. The impugned awards dated 15.05.2018 (Annexure No. 5 to WRIT - C No. - 25323 of 2019, Annexure No. 6 to WRIT - C Nos. - 22248 of 2019 and 23046 of 2019 and Annexure No. 9 to WRIT - C No. 19215 of 2019), is hereby set-aside.

24. However, liberty is given to the respondent no. 4 to pursue the remedy available to him u/s 3G (5) of the Act. The arbitrator shall decide the application, if any, moved by the respondent no. 4 before him without being influenced by the observations made hereinabove.

25. Needless to say that status quo with regard to the possession of the plots in question shall be maintained till the arbitration proceedings are finalized.

(2020)09ILR A537
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.02.2020

BEFORE

THE HON'BLE PANKAJ BHATIA, J.

WRIT – C No. 23232 of 2007

The Institute of the Franciscan Clarist Sisters of the Most Blessed Sacrament ...Petitioner

Versus

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

Counsel for the Petitioner:
Sri M.K. Gupta, Sri Jaideep Bedi, Sri J. Nagar, Sri Pratik J. Nagar, Smt. Supriya Pratik Nagar

Counsel for the Respondents:

C.S.C.

A. Civil Law - Indian Stamp Act,1899 – Section 47-A (3) & U.P. Stamp (Valuation of Property) Rules 1997,-Rule 3(1) (A)-application-deficiency of stamp duty-agriculture land was purchased-no declaration u/s 143 U.P.Z.A. & L.R. Act converting the land use from agriculture to non-agriculture land had been passed-there is no rule which authorises the Collector to determine the valuation beyond the mandate of Rule 3 (1) (A) solely on the ground that in future the same may be used for non-agricultural purpose-no material before the Collector to form a "reason to believe"-"reason to believe" can not be equated to a "reason to suspect"-impugned orders are bad in law-mandatory deposit for preferring an appeal shall be refunded to petitioner with interest @8% per annum.(Para 1 to 35)

B. Section 47-A (3) of the Stamp Act confers the power on the Collector to take steps for examining the instruments for the purpose of satisfying himself as to correctness of the market value of the property, which is the subject matter of the instrument and if after such examination he has reason to believe that the market value of such property has not been truly set forth, in such instrument, he may determine the market value and the duty payable thereon. (Para 29)

C. Rules 1997 in exercise of powers u/s 27, 47-A and 75 of the Act, which provide for the manner in which the valuation of a property is to be determined. Rule 3 of the said Rules describes lands of following four natures, being agricultural land, non-agricultural land, grove and garden and buildings and the manner of valuation of each of the category of land is clearly specified in the said Rules. (Para 27)

The petition is allowed. (E-6)

List of cases cited: -

1. St. Of U.P. Vs Ambrish Tandon & anr.,(2012) SCC, Vol. 5, Pg 566

2. Surendra Singh & anr. Vs St. Of U.P. & ors.,(2009) ADJ, Vol. 2, Pg 560

3. Rajesh Pandey Vs St. Of U.P. & ors., (2011) ADJ, Vol. 4, Pg 801

4. Maya Foods & Vanaspati Ltd. Vs Chief Controlling Revenue Authority; (1998) AWC, Vol. 4, Pg 636

5. Ratna Shanker Dwivedi Vs St. Of U.P. & ors..; (2012) ADJ,Vol. 5, Pg 414

6. Dukhi Vs St. Of U.P. & ors.; (2013) ADJ, Vol.6, Pg 622

7. Smt. Munni Devi Vs Chief Controlling Revenue Authority & ors.; (2013) ADJ, Vol. 8, Pg 425

8. Varun Gopal Vs St. Of U.P. & ors.; (2015) ADJ, Vol. 2, Pg 311

9. Sumati Nath Jain Vs St. Of U.P. & anr.; (2016) ADJ, Vol. 2 Pg 533

10. Ashwani Kumar Vs St. Of U.P. & ors.; (2017) ADJ, Vol. 2, Pg 661

11. Reena Gupta Vs St. Of U.P. & ors.; (2020) ADJ, Vol. 2, Pg 162

12. Rajendra Kumar Vs St. Of U.P. & ors., (2011) 3, ADJ Pg 888

13. Sarvodaya Babu Uddeshiya Vikas Samiti Vs Commr. Kanpur Div. & ors.; (2014) 1, ADJ Pg 415

14. M/s Prosperous Buildcon Pvt. Ltd. Vs St. Of U.P. & ors.

15. Smt. Vijaya Jain Vs St. Of U.P. & ors.; (2015) 9 ADJ 503

16. Smt. Pushpa Sareen Vs St. Of U.P.,(2015) 3 ADJ 136

17. Smt. Vijay Kumar & anr. Vs Commr., Meerut Div.,Meerut & anr.;(2008) 3 AWC 2997

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

1. The petitioner, a society registered under the Societies Registration Act

purchased a property by means of a sale deed dated 29.10.1998, whereby agricultural plots no. 774, 775, 784, 785, 786, 787, 789 and 790 admeasuring 9 Bigha, 12 Biswa from a Co-operative Society for a total sale consideration of Rs. 25 Lakhs. The said land being agricultural land, the stamp duty was paid in terms of the Property Valuation Rules, valuing the property at Rs. 66,36,000/-, which was the prescribed rate by the Collector, Agra being Rs. 30 Lakhs per hectare for agricultural lands and consequently, the stamp duty was paid thereupon.

2. A notice was served upon the petitioners in exercise of powers under Section 47-A of the Stamp Act proposing to redetermine the stamp duty. The petitioner-society filed its objections specifying therein that the land in question was an agricultural land and the entire area in the vicinity was undeveloped and thus for the purposes of valuation, the property was valued on the rates specified for agricultural properties and thus requested that show cause notice be dropped. An affidavit was also filed by the petitioner-society specifically stating therein that no declaration under Section 143 of the U.P. Z.A. & L.R. Act was made in respect of the property in question.

3. In support of the contentions of the petitioner-society, a copy of the revenue records as well as the map of the village showing that the village is not even connected to any road and the property was surrounded by agricultural plots was filed and evidence in the form of a sale deed dated 3.11.1999 in respect of the land in the same village, was also filed, wherein stamp duty was charged at the rate of Rs. 30,000,00/- per hectare and in proceedings arising out of the said sale deed, an order had been passed in case no. 1223 of 1999 by the respondent no. 2 himself holding that there were no deficiency in the stamp duty. The petitioner has also filed herein a Government Order dated 13th August, 1999, in which directions have been issued directing that the future use of the property should not be the basis for computation of the stamp duty.

4. Despite the said objections, the respondent no. 2 vide his order dated 28.1.2003 passed an order holding that there was deficiency of stamp duty of Rs. 19,90,200/- and further a sum of Rs. 50,000/- was imposed as penalty. Thus, the petitioners were directed to pay a total amount of Rs. 20,40,200/-.

5. A perusal of the said order reveals that the deficiency in stamp duty was imposed on the ground that the land in question has been sold by a Co-operative Housing Society and the purpose of the society is not to sell lands for agricultural purposes and further that the purchaser is a Christian Institution and as per the terms of the sale deed, the intention is to construct an Educational Institution thereupon and as such it was not possible to accept that an agriculture activity can be carried out over the property in question. It was also observed that on an inspection of the property in question, it was clear that no development had been carried out over the property in question and the property was being used for agricultural purposes. However, proceeded to hold that the stamp duty should be calculated for residential accommodations and on that basis proceeded to assess the deficiency of stamp duty, as recorded above.

6. Aggrieved against the said order, the petitioner preferred an appeal, in which

as an interim measure, an interim order was passed on 8.4.2003 directing the petitioner to deposit 1/3rd of the disputed amount and the balance was stayed during the pendency of the appeal.

7. Ultimately vide order dated 12.1.2007, the appeal was dismissed on merits affirming the order passed by respondent no. 2, on the grounds on which the earlier order was passed.

8. Challenging the said two orders being order dated 28.1.2003 as well as the order dated 12.1.2007, the present writ petition has been filed.

9. I have heard Sri J .Nagar, Senior Advocate assisted by Sri Pratik J. Nagar, counsel for petitioner and Standing Counsel for the State-respondents.

10. Sri Nagar has assailed the said orders on the ground that there was no material on record to initiate proceedings under Section 47-A (4) of the Act, as the market value given in the instrument was same what was prescribed by Rule 3 of the U.P. Stamp (Valuation of Property) Rules, framed under the Act. He further submits that the orders suffer from error as the very basis of the order is the future use of the property, completely overlooking the fact that on the date of the purchase, the property in question was a purely agricultural property. He further submits that in respect of a similar plot in the same village, the respondent no. 2 had passed an order accepting the stamp paid on the valuation of Rs. 30 Lakhs per Hectare. He further argues that in respect of the land in question, no declaration under Section 143 of the U.P. Z.A. & L.R. Act had been made and there was no evidence on record to come to the conclusion that on the date of the execution of sale deed, the property was not agricultural in nature. He further argues that even in terms of the report furnished before the respondent no. 2, it was clear that the property was agricultural in nature and was being used for agricultural purpose only. His next contention is that the order was passed ignoring the Government Order dated 16.8.1989 as well as the judgments of this Court and thus prays that the impugned orders be set aside.

11. He has placed reliance on the following judgments of the Apex Court as well as this Court:-

1. State of Uttar Pradesh v. Ambrish Tandon and Another; 2012 Supreme Court Cases, Volume 5, Page 566.

2. Surendra Singh and Another v. State of U.P. and Others; 2009 Allahabad Daily Judgments, Volume 2, Page 560.

3. Rajesh Pandey v. State of U.P. and Others; 2011 Allahabad Daily Judgments, Volume 4, Page 801.

4. Maya Foods and Vanaspati Ltd. v. Chief controlling Revenue Auhtority; 1998 Allahabad Weekly Cases, Volume 4, Page 636.

5. Ratna Shanker Dwivedi v. State of U.P. and Others; 2012 Allahabad Daily Judgments, Volume 5, Page 414.

6. Dukhi v. State of U.P. and Others; 2013 Allahabad Daily Judgments, Volume 6, Page 622.

7. Smt. Munni Devi v. Chief Controlling Revenue Authority and Others; 2013 Allahabad Daily Judgments, Volume 8, Page 425.

8. Varun Gopal v. State of U.P. and Others; 2015 Allahabad Daily Judgments, Volume 2, Page 311.

9. Sumati Nath Jain v. State of U.P. and Another; 2016 Allahabad Daily Judgments, Volume 2, Page 533.

10. Ashwani Kumar v. State of U.P. and Others; 2017 Allahabad Daily Judgments, Volume 2, Page 661.

11. Reena Gupta v. State of U.P. and Others; 2020 Allahabad Daily Judgments, Volume 2, Page 162.

12. 2011 (3) Allahabad Daily Judgments, 888.

13. 2014 (1) Allahabad Daily Judgments, 415.

12. The State has filed its counter affidavit denying the allegations in the writ petition, however with regard to the specific case of the petitioner that in respect of a sale deed dated 3.11.1999 pertaining to similar land in the same village, an order had been passed holding that the instrument sufficiently stamped at the rate of Rs. 30 Lakhs per Hectare. Following are the relevant pleadings, para 19 of the writ petition is quoted hereinbelow:-

"That the petitioner filed certified copy of the sale deed dated 3.11.99 with respect to the land of the same Village and also the order of Additional District Magistrate (Finance and Revenue) dated 14.8.2000 in proceedings under Section 47-A of the Stamp Act being Case No. 1223 of 1999 to demonstrate that the sale deed dated 3.11.99 was held to be sufficiently stamped at the rate of Rs. 30 Lacs per hectare. The valuation of the land which is subject matter of the instrument in question in the instant appeal was also valued at the same rate for purpose of payment of stamp duty, though, in fact, it was purchased for much lessor price. Respondent No. 2 committed a manifest error of law in not taking into consideration the same exemplar filed by the petitioner herein."

13. In paragraph 13 of the counter affidavit, reply of para 19 of the writ petition has been given, which is quoted hereinbelow:-

"That the contents of para 19 and 20 of the writ petition are irrelevant for the present controversy of market value with regards to the impugned sale deed. The petitioner cannot escape from the liability of payment of stamp duty on the grounds of some incorrect order passed earlier."

14. The Standing Counsel, on the basis of the pleadings on record, submits that the writ petition is liable to be dismissed, as there is no error in the order passed. In reply to the averments made in para 10 of the writ petition that the order in respect of sale deed dated 3.11.1999, the order of the respondent no. 2 was brought on record. The reply given in para 8 of the counter affidavit is that an incorrect order cannot be made basis for passing subsequent orders.

15. In view of the pleadings exchanged and the arguments advanced at the bar, the sole question to be decided is whether, a property which is agricultural and has not been declared as non-agricultural under Section 143 of the U.P. Z.A. & L.R. Act can be valued at non-agricultural rates only on the ground that in future the same may be used for non-agricultural purposes.

16. Referring to the judgments cited by Sri Nagar, the first case being **State of Uttar Pradesh Vs. Amrish Tandon and Another (Supra)**, the Supreme Court in view of the fact of the case recorded as under:-

"The impugned order of the High Court shows that it was not seriously

disputed about the nature and user of the building, namely, residential purpose on the date of the purchase. Merely because the property is being used for commercial purpose at the later point of time may not be a relevant criterion for assessing the value for the purpose of stamp duty. The nature of user is relatable to the date of purchase and it is relevant for the purpose of calculation of stamp duty. Though the matter could have been considered by the Appellate Authority in view of our reasoning that there was no serious objection and in fact the said alternative remedy was not agitated seriously and in view of the factual details based on which the High Court has quashed the order dated 27.09.2004 passed by the Additional District Collector, we are not inclined to interfere at this juncture."

17. The next case cited is **Surendra Singh (Supra)**, wherein this Court held as under:-

"8. In M/s Maya Food and Vanaspati Ltd. Co. v. Chief Controlling Revenue Authority (Board of Revenue) Allahabad, 1990 (90) RD 57, the Court held that the market value of the land could not be determined with reference to the use of the land to which the buyer intends to put in use. The Court held that a buyer may intend to establish an industrial undertaking thereon and that another buyer may intend to use it for agricultural purposes and a third person may intend to dedicate it for charitable purposes and that these different intentions of individual buyers may affect the price of each of them would be willing to pay for the property but the market value would not depend upon what each individual would offer for the property in question and that the market value would be that which a general buyer would offer and what the owner reasonably accepts for that property, the court held that in determining the market value, the potential of the land as on the date of sale alone could be taken into account in determining the market value and that the potential value of the land that could be put in use in future could not to be taken into consideration.

13. None of the authorities below besides the report of the Sub-registrar has referred any other material in support of their orders. In Ram Khelawan @ Bachha v. State of U.P. through Collector, Hamirpur and another, 2005 (98) RD 511, it has been held that the report of the Tehsildar may be a relevant factor for initiation of the proceedings under Section 4-A of the Act, but it cannot be relied upon to pass an order under the aforesaid section. In other words, the said report cannot form itself basis of the order passed under Section 47-A of the Act. In the case of Vijai Kumar v. Commissioner, Meerut Division, Meerut, ***2008(7) ADJ 293*** *(para 17), the ambit and scope of Section 47-A of the Act has been considered with some depth. Taking into consideration the Division Bench judgment of this Court in Kaka Singh v. Additional Collector and District Magistrate (Finance and Revenue), 1986 ALJ 49; Kishore Chandra Agrawal v. State of U.P. and others, 2008 (104) RD 253 and various other cases it has been held that under Section 4-A (3) of the Act, the burden lay upon the Collector to prove that the market value is more than minimum as prescribed by the Collector under the Rules. The report of the Sub-registrar and Tehsildar itself is not sufficient to discharge that burden.*

14. Viewed as above, it is, thus, evident that the report of the Sub-registrar could not legally form basis of the impugned order. There is no material in

possession of the respondents to show that on the date of the execution of the sale deed, the land in dispute was not agricultural land. The laying of foundation subsequent to the sale deed is of little consequence so far as it relates to the determination of the payment of stamp duty under Section 47-A of the Act is concerned. Additionally, the learned counsel for the petitioners submits that still the land in dispute is being used for agricultural purposes. In this connection, he has placed reliance upon the extract of Khasra of 1414 Fasli. In the said Khasra it is mentioned that cattle fodder has been sown on the spot. However, in the Khasra under heading category in column 18 of the said Khasra the entry is "Abadi/Shamil Jot". The use of words "Sha Ja' have been explained by the counsel for the parties as "Shamil Jot" which means joint cultivation. At this stage, the learned Standing Counsel submits that entry of " Abadi" reflects that the property in dispute is not agricultural property. Along with the counter affidavit the revenue extract (Khasra) of 1412 Fasli which corresponds to the year 2007 has been annexed. From this Khasra it is evident that crop of Urd was sown in Kharif season in the land in question. However, there is an entry of "Abadi/Shamil Jot" under the column 18. The said document does not relate to the date of the execution of the sale deed nor appears to have been filed before the authorities below and as such is liable to the ignored. Besides above, the fact that the crop was sown and factum of joint cultivation mentioned in the said document are also liable to be taken into consideration and cannot be ignored. The fact remains that there is no cogent or convincing material on the record to show that the land on the date of execution of the sale deed was other than the agricultural land, at least."

18. The next case cited is **Rajesh Pandey (Supra)**, the same related to valuation of the constructions. The said judgment has no applicability to the facts of the present case.

19. Coming to the next judgment in the case of **Maya Foods and Vanaspati Ltd. (Supra)**, this Court recorded as under:-

"20. I have reproduced paragraph 5 of the impugned order dated 14.11.94 for a certain purpose. Learned Chief Controlling Revenue authority has observed that the land was purchased for an industrial purpose and the Collector is not arbitrary in deciding the price of the land on the basis of the proposed usage. This proposition is legally incorrect. The market Value of the land cannot be determined with reference to the use of the land to which buyer intends to put it. One buyer may intend to establish an industrial undertaking thereon, another may intend to use it for agricultural purpose and a third person may intend to dedicate it for charitable purposes like leaving it open as pasture ground or a cremation ground or a playground. These different Intentions may affect the price that each of them may be willing to pay for the property and such prices have wide variations but the market value is not what each such individual may offer for the property. The market value is what a general buyer may offer and what the owner may reasonably expect. In determining the market value, the potential of the land as on the date of sale alone can be taken into account and not what potential it may have in the distant future."

20. The next judgment is in the case of **Ratna Shanar Dwivedi (Supra)**, wherein this Court considering the similar controversy recorded as under:-

"16. Rule 7 of 1997 Rules while providing for determination of market

value nowhere refers to either minimum value fixed under Rule 4 or 5 of 1997 Rules or provides that the market value shall be determined by the Collector which must be in all cases higher than the value set forth in the instrument by the parties concerned. The question as to how and what manner market value would have to be determined by the Collector has been discussed in detail and various aspects have been considered by this Court in Ram Khelawan (Supra). Thus, the Collector is under a statutory obligation before holding that an instrument does not set forth correct market value, to determine as to what is the market value of the property in question. The contention as raised by learned Standing Counsel that immediate potential user of the land is relevant for the purpose of determining market value, cannot be disputed but that is one of the relevant consideration and can not be the sole basis for holding that the value of the property as set forth in the instrument is not correct and it must be higher than that. Learned Standing Counsel also failed to point out as to which kind of land has no potential at all for user as residential purposes in future. The nature and character of land can always be changed subject to its use by its inhabitants in future. Hence future potential of the land for residential user by itself would not be a sole determinative factor for determining market value though, of course, it may be one of the relevant consideration for the same. The Collector however has to examine all relevant aspects in the matter and thereafter to find out what is the correct market value of the property in question. He cannot proceed merely by saying that since the land is adjacent to Abadi, therefore, it must be valued at the rate of residential land and duty must be charged accordingly.

17. In Aniruddha Kumar and Ashwini Kumar Vs. Chief Controlling Revenue Authority U.P. Alld. and another 2000(3) AWC 2587 this Court has clearly laid down that where in respect of agricultural land there is no declaration under Section 143 of the U.P. Z.A.and LR Act its nature would not change and its market value for the purposes of payment of stamp duty would be determined on the basis of the agricultural character of the land not on the future potentiality.

18. In M/s. Maya Food and Vanaspati Ltd. Co. Vs. Chief Controlling Revenue Authority (Board of Revenue) Allahabad, 1990 (90) RD 57 this Court has held that market value of the land for the purposes of payment of stamp duty can not be determined with reference to its future use or the intended use to which it is likely to be put by the purchaser.

19. In view of the aforesaid legal position and the facts and circumstances of the case, as the land in dispute is of agricultural nature, in the absence of any declaration under Section 143 of the U.P. Z.A. and LR Act coupled with the fact that its potential use is of no relevance, the authorities below has manifestly erred in law in treating it to be an abadi land and applying the circle rate prescribed for abadi land for the area."

21. The next judgment is in the case of **Dukhi (Supra)**, wherein this Court was confronted with the similar issue pertaining to future potential as being a factor for determining the market value of the land for the purpose of stamp duty. This Court considered the entire gamut of judgments and placing reliance in the case of **Maya Foods**, recorded as under:-

"19. The Division Bench of this court in 2004 (5) AWC 3952, Rakesh

Chandra Mittal and others Vs. State of U.P. and another has held that it is well settled principle that market value of the property has to be determined with reference to the date on which the document is executed. The Division Bench while holding the above proposition has noticed that land therein was being used for agricultural purpose at the time of purchase and after long time of purchase of the land, a small machine for extracting peppermint oil over a very small part of the land was installed. It has held that any subsequent improvement or change in the nature or user of the land , which may result into enhancement of the market value of the property is not to be taken into account and it is only the value of the property on the date of execution of the document that is to be considered for the purpose of determination of proper stamp duty payable on the instrument.

20. In view of the above discussion, proposition of law as as laid down in the case of M/s Maya Foods and Vanaspati Ltd., Allahabad (Supra) relied upon by this court is the settled law and squarely applies in the facts of the present case. Accordingly reasoning given by the authorities below on the question of imposition of stamp duty on future potential value is unsustainable. The orders passed by both the authorities i.e. respondents no 2 and 3 are hereby set aside."

22. The next judgment is in the case of **Smt. Munni Devi (Supra)**, wherein this Court recorded as under:-

"7. The petitioner in paragraph 3 of the writ petition has categorically stated that the land purchased by him was agricultural land. No reply to this paragraph has been made by the respondents in their counter affidavit.

8. In paragraph 4 of the writ petition, the petitioner has categorically stated that after the purchase of the land his name was mutated as a bhumidhar in the khatauni, which fact is admitted by the respondents in paragraph 3 of the counter affidavit.

9. In the light of the aforesaid, the valuation, if any, has to be calculated on the basis of the land revenue and not on the basis of the circle rate or on the basis of the potential value of the land."

23. The next judgment in the case of **Varun Gopal (Supra)** deal with a similar issue and the Court after considering the entire line of judgments recorded as under:-

"24. The sine qua non for invoking provisions of Section 47-A(3) of the Act is that the Collector had reason to believe, that the value had not been properly set forth in the instrument as per market value of the property. Once the instrument is registered and the stamp duty as prescribed by the Collector was paid, the burden to prove that the market value was more than the minimum prescribed by the Collector under the rules, was upon the Collector. The report of the sub-Registrar or Tehsildar was not sufficient to discharge that burden. (Vijay Kumar v. Commissioner, Meerut Division, ***2008(7) ADJ 293)***

32. In the facts of the case, it is admitted that the property is agricultural property and is being used for agricultural purpose, the property adjoining the property is also agricultural property. The basis of the Collector concluding that the property is undervalued is the spot inspection report, stating that the adjoining agricultural property is being plotted for residential purpose. The exemplars (sale deeds) referred to have not been discussed,

nor does it show they are comparable with the property in question. The property on which plotting is taking place is agricultural land and not abadi. It is not the case of the State that the land in and around the property in question has become abadi primarily. The minimum value fixed by the Collector is Rs. 55 lacs per hectare for agricultural land whereas the Collector has determined the market value at Rs. 210 lac per hectare i.e. four times over and above the minimum value fixed under the Rules, which on the face of it appears to be irrational. The 'belief' must not be arbitrary or purely subjective satisfaction, belief must have rational connection or relevant bearing to the formation of the belief/opinion."

24. The next judgment is in the case of **Sumati Nath Jain (Supra)**, wherein this Court while hearing an intra-court appeal arising out of a writ petition, filed challenging a show cause notice issued on the basis of a unsubstantiated assumption that the property is situate in NOIDA and in future it may be put to non-agricultural use, the Division Bench of this Court hold as under:-

"15. It is apparent that the notice on the basis of which proceedings were initiated against the appellant suffered from the same fundamental flaws and defects as were noticed by the Bench in Smt. Vijaya Jain. We may also note that the requirements of a valid show cause notice were lucidly explained by the Supreme Court in Oryx Fisheries (P) Ltd. Vs. Union of India in the following terms: -

"27. It is no doubt true that at the stage of show cause, the person proceeded against must be told the charges against him so that he can take his defense and prove his innocence. It is obvious that at that stage the authority issuing the charge-sheet, cannot, instead of telling him the charges, confront him with definite conclusions of his alleged guilt. If that is done, as has been done in this instant case, the entire proceeding initiated by the show cause notice gets vitiated by unfairness and bias and the subsequent proceedings become an idle ceremony.

31. It is of course true that the show cause notice cannot be read hypertechnically and it is well settled that it is to be read reasonably. But one thing is clear that while reading a show cause notice the person who is subject to it must get an impression that he will get an effective opportunity to rebut the allegations contained in the show cause notice and prove his innocence. If on a reasonable reading of a show cause notice a person of ordinary prudence gets the feeling that his reply to the show cause notice will be an empty ceremony and he will merely knock his head against the impregnable wall of prejudged opinion, such a show cause notice does not commence a fair procedure…"

16. We find in the facts of the present case that not only was there a complete non disclosure of the relevant material to which the appellant could respond to establish his innocence, the notice itself was couched in tenor and language which would have led any person to face the specter of what the Supreme Court described as the "impregnable wall of prejudged opinion".

INVOCATION OF SECTION 47A

17. Section 47A (3) as a plain reading of the provision would indicate comes into operation if the Collector has before him material which may lead him to believe that the market value of the property comprised in an instrument has not been truthfully disclosed. In the present case the Collector

proceeded in the matter solely on the basis of the report of the Sub Registrar dated 7 February 2012. This report doubted the valuation of the property on the ground that in the area abutting it, various residential houses had come up and that Greater NOIDA had become a development hub. Bearing in mind the location of the plot and its likely use, the Sub Registrar opined, it would be inappropriate to value the property at agricultural rates. We find that the very bedrock upon which the opinion of the Sub Registrar based his report was faulty and could not have consequently formed the basis for further action under section 47A (3).

18. We may note that on the date of execution of the instrument the land was admittedly recorded as agricultural. In fact the Khasra of the property remained unchanged throughout and continued to represent the land as recorded for agricultural purposes. The respondents were in our opinion wholly unjustified in initiating proceedings based on an unsubstantiated assumption that the property in future was likely to be put to non-agricultural use.

19. The perceived or presumed use to which a buyer may put the property in the future can never be the basis for adjudging its value or determining the stamp duty payable. The Act, we may note is a fiscal statute. The taxable event with which it concerns itself is the execution of an instrument which is chargeable to duty. The levy under the statute gets attracted the moment an instrument is executed. These propositions clearly flow from a plain reading of the definition of the words "chargeable", "executed" and "instrument" as carried in the Act. In the case of an instrument which creates rights in respect of property and upon which duty is payable on the market value of the property comprised therein, since the tax liability gets fastened immediately upon execution it must necessarily be quantified on the date of execution. The levy of tax or its quantum cannot be left to depend upon hypothetical or imponderable facets or factors. The value of the property comprised in an instrument has to be adjudged bearing in mind its character and potentiality as on the date of execution of the instrument. For all the aforesaid reasons we fail to find the existence of the essential jurisdictional facts which may have warranted the invocation of the powers conferred by section 47A (3). We are therefore of the firm opinion that the initiation of proceedings as well as the impugned order based upon a presumed future use of the property for residential purposes was wholly without jurisdiction and clearly unsustainable. Dealing with this aspect of the matter and after noticing the consistent line of precedent on the subject the Division Bench in Smt Vijaya Jain observed: -

"This Court on more than one occasion has held that the market value of the land is not liable to be determined with reference to the use to which a buyer intends to put it in future. The market value of the property is to be determined with reference to its character on the date of execution of the instrument and its potentiality as on that date.

xxx xxx xxx

The above principles of law enunciated in the aforementioned judgments have been consistently followed by this Court. We however find that the order of the Collector relies upon no evidence which would support imposition of residential rates on a property which was stated to be agricultural on the date of execution of the instrument."

25. The other judgments in the case of **Ashwani Kumar (Supra), ; Rajendra**

Kumar v. State of U.P. and Others [2011(3) ADJ 888]; Sarvoday Babu Uddeshiya Vikas Samiti v. Commissioner, Kanpur Division and Others: [2014(1) ADJ 415] deal with similar issues and as such are not being reproduced for the sake of brevity.

26. This Court in Writ-C No. 57052 of 2010 (Reena Gupta v. State of U.P. and Others) had the occasion to deal with a similar issue and the writ petition was allowed by means of a judgment dated 18.1.2020 relying upon another judgment of this Court in the case of **M/s Properous Buildcon Pvt. Ltd. v. State of U.P. and others**, wherein it was held as under:-

*"This Court while considering the similar question in the case of **M/s Prosperous Buildcon Pvt. Ltd. v. State of U.P. and others**, recorded as under:-*

*"A Division Bench of this Court in **2015 (9) ADJ 503, Smt. Vijaya Jain vs. State of U.P. and Others** has held in paragraphs 20 and 23 which read as under:*

"20. Having extracted the relevant statutory provisions above, the following principles emerge therefrom. Sub-section (1) (a) of Section 47-A of the Act empowers the registering officer to call upon the person who has presented an instrument for registration to pay deficit stamp duty. This power is exercisable by the registering officer immediately after presentation of an instrument and before accepting it for registration and taking any action under Section 52 of the Act. This power is liable to be exercised in a situation where the market value of the property as set forth in the instrument is less than even the minimum value fixed by the Collector in accordance with the rules made under the Act. In distinction to the above, the power under sub-section (3) of Section 47-A is exercised by the Collector either suo motu or on a reference from any Court or from the Commissioner of Stamps or an Additional Commissioner of Stamps, Deputy Commissioner of Stamps, an Assistant Commissioner of Stamps or any officer authorized in that behalf by the State Government. This power confers jurisdiction and authority on the Collector to call for and examine any instrument for the purpose of satisfying himself as to the correctness of the market value of the property which forms the subject matter of the instrument and if upon such examination, he has reason to believe that the market value of such property has not been truly set forth in such instrument, he may proceed to determine the market value of such property and the duty payable thereon. The first distinguishing feature of sub section (3) is that it is available to be exercised even after the instrument has been registered. Secondly the Collector proceeds under sub section (3) upon finding that the "market value" of the property has not been truly set forth in the instrument as distinct from the "minimum value fixed by the Collector in accordance with the rules made under the Act" which is the benchmark for initiation of action under sub section (1).

23. From the provisions extracted above, it is apparent that the Collector proceeds under sub section (3) of Section 47-A read with rule 7 when he has reason to believe that the market value of the property comprised in the instrument has not been truly set forth and that in the opinion of the Collector, circumstances exist warranting him to undertake the enquiry contemplated under rule 7. What we however find from the notice dated 09 September 2013 is that the Collector has proceeded to record, albeit prima facie,

that the instrument in question has been insufficiently stamped to the extent of Rs.8,89,000/-. The notice apart from referring to a note dated 20 May 2013, received from the Assistant Inspector General of Registration neither carries nor discloses any basis upon which the Collector came to the prima facie conclusion that the appellant was liable to pay Rs. 8,89,000/ as deficit stamp duty. In our opinion a notice of this nature must necessarily disclose to the person concerned the basis and the reasons upon which the Collector has come to form an opinion that the market value of the property has not been truly set forth. In the absence of a disclosure of even rudimentary details on the basis of which the Collector came to form this opinion, the person concerned has no inkling of the case that he has to meet. A notice in order to be legally valid and be in compliance with the principles of natural justice must necessarily disclose, though not in great detail, the case and the basis on which action is proposed to be taken against the person concerned. Not only this and as is evident from a bare reading of rule 7, at the stage of issuance of notice, the Collector has to proceed on the basis of material which may tend to indicate that the market value of the property has not been truly and faithfully disclosed in the instrument. The stage of computation of market value comes only after the provisions of sub rules (2) (3) and (4) of rule 7 come into play. At the stage of issuance of notices, the Collector calls upon the person concerned to show cause "as to why the market value of the property.... be not determined by him".

There is another aspect of the matter, which ought not to go un-mentioned, namely, the notice under Section 47-A (2) of the Act, 1899 refers to the potential value of the land as being more than the rates prescribed by the Collector for residential land. It is not denied by the authorities that the land in question was agricultural land but the authorities have proceeded for determining the stamp duty on a presumption that the said land has a potential of future user for residential purposes because the Village Shahpur Bamhaita, Pargana Dasna, District Ghaziabad has been declared as Hi-tech City and Integrated City. The Supreme Court and this Court have time and again held that the potential user of the property cannot be the determining factor for computing its market value or the consequent stamp duty payable thereon.

In ***(2012) 5 SCC 566, State of U.P. Vs. Ambrish Tandon and others,*** *the Supreme Court has held that merely because the property is being used for commercial purposes at the later point of time may not be a relevant criterian for assessing the value for the purpose of the nature of user is relatable to the date of purchase and it is relevant for the purpose of calculation of stamp duty.*

The judgment of the Supreme Court in the case of ***Ambrish Tandon (supra)*** *has been followed by the Full Bench of this Court reported in* ***2015 (3) ADJ 136 (Smt. Pushpa Sareen Vs. State of U.P.)*** *wherein the Full Bench has also held that the nature of the user is relatabe to the date of purchase which is relevant for the purposes of computing the stamp duty. Where however the potential of the land can be assessed on the date of execution of the instrument itself by referring to exemplar or comparable sale instances that is clearly a circumstances which is relevant and germane to determine the true market value. Paragraph 27 of the said judgement reads as under:*

"27.The fact that the land was put to a particular use, say for instance a

commercial purpose at a later point in time, may not be a relevant criterion for deciding the value for the purpose of stamp duty, as held by the Supreme Court in State of U.P. and others vs. 23 Ambrish Tandon and another, 2012 (5) SCC 566. This is because the nature of the user is relatable to the date of purchase which is relevant for the purpose of computing the stamp duty. Where, however, the potential of the land can be assessed on the date of the execution of the instrument itself, that is clearly a circumstance which is relevant and germane to the determination of the true market value. At the same time, the exercise before the Collector has to be based on adequate material and cannot be a matter of hypothesis or surmise. The Collector must have material on the record to the effect that there has been a change of use or other contemporaneous sale deeds in respect of the adjacent areas that would have a bearing on the market value of the property which is under consideration. The Collector, therefore, would be within jurisdiction in referring to exemplars or comparable sale instances which have a bearing on the true market value of the property which is required to be assessed. If the sale instances are comparable, they would also reflect the potentiality of the land which would be taken into consideration in a price agreed upon between a vendor and a purchaser."

A Division Bench of this Court in ***2016 (2) ADJ 533 (DB) Sumati Nath Jain Vs. State of U.P. and another*** *has held in paragraphs 18 and 19 as under:*

"18. We may note that on the date of execution of the instrument the land was admittedly recorded as agricultural. In fact the Khasra of the property remained unchanged throughout and continued to represent the land as recorded for agricultural purposes. The respondents were in our opinion wholly unjustified in initiating proceedings based on an unsubstantiated assumption that the property in future was likely to be put to non-agricultural use.

19. The perceived or presumed use to which a buyer may put the property in the future can never be the basis for adjudging its value or determining the stamp duty payable. The Act, we may note is a fiscal statute. The taxable event with which it concerns itself is the execution of an instrument which is chargeable to duty. The levy under the statute gets attracted the moment an instrument is executed. These propositions clearly flow from a plain reading of the definition of the words "chargeable", "executed" and "instrument" as carried in the Act. In the case of an instrument which creates rights in respect of property and upon which duty is payable on the market value of the property comprised therein, since the tax liability gets fastened immediately upon execution it must necessarily be quantified on the date of execution. The levy of tax or its quantum cannot be left to depend upon hypothetical or imponderable facets or factors. The value of the property comprised in an instrument has to be adjudged bearing in mind its character and potentiality as on the date of execution of the instrument. For all the aforesaid reasons we fail to find the existence of the essential jurisdictional facts which may have warranted the invocation of the powers conferred by section 47A (3). We are therefore of the firm opinion that the initiation of proceedings as well as the impugned order based upon a presumed future use of the property for residential purposes was wholly without jurisdiction and clearly unsustainable. Dealing with this aspect of the matter and after noticing the consistent line of precedent on the subject the

Division Bench in Smt Vijaya Jain observed: -

"This Court on more than one occasion has held that the market value of the land is not liable to be determined with reference to the use to which a buyer intends to put it in future. The market value of the property is to be determined with reference to its character on the date of execution of the instrument and its potentiality as on that date.

xxx xxx xxx

The above principles of law enunciated in the aforementioned judgments have been consistently followed by this Court. We however find that the order of the Collector relies upon no evidence which would support imposition of residential rates on a property which was stated to be agricultural on the date of execution of the instrument."

27. The line of the judgments, as referred to above, make it clear that the consistent view of this Court has been that the future potential of the land in question cannot form the basis for determining the valuation of the property for the purposes of levy of stamp duty. The State Government has framed specific Rules known as Uttar Pradesh Stamp (Valuation of Property) Rules 1997 in exercise of powers under Sections 27, 47-A and Section 75 of the Indian Stamp Act, which provide for the manner in which the valuation of a property is to be determined. Rule 3 of the said Rules describes lands of following four natures, being agricultural land, non-agricultural land, grove and garden and buildings and the manner of valuation of each of the category of land is clearly specified in the said Rules.

28. A perusal of Rule 3 makes it clear that in respect of an agricultural land, the necessary disclosures that are required to be made are specified in Clause-A of Rule 3 (1), which was admittedly done by the petitioner in the present case. It is also admitted and also established by the observations made in the impugned order that at the time of inspection also that the property was being used for agricultural purposes and thus the only manner in which the property could be valued was as specified in Rule 3 (1) (A) of the Stamp Valuation Rules. There is no Rule, which authorises the Collector to determine the valuation beyond the mandate of Rule 3 (1) (A) solely on the ground that in future the same may be used for non-agricultural purposes.

29. The other relevant aspect of the present case is the interpretation of Section 47-A (3) of the Indian Stamp Act. Section 47-A (3) confers the power on the Collector to take steps for examining the instruments for the purpose of satisfying himself as to correctness of the market value of the property, which is subject matter of the instrument and if after such examination he has "reasons to believe" that the market value of such property has not been truly set forth, in such instrument, he may determine the market value and the duty payable thereon. The procedure for determining the duty is under Section 47-A (4), thus in terms of the plain reading of Section 47-A (3), the Collector can take steps only in the following circumstances:-

(a). Sou Motu

(b). A reference from any Court or from the Commissioner of Stamps or an Additional Commissioner of Stamps or a Deputy Commissioner of Stamps or an Assistant Collector of Stamps or any other authorised Officer by the State Government.

and; he should have "reasons to believe" that the market value has not been truly set forth in such instrument.

30. Thus, the power can be exercised only when the Collector on the basis of material before him either sou motu or in a reference comes to a conclusion that he has "reasons to believe".

31. In the present case, the instrument of the land disclosed that the land was being used for agriculture purposes only, no declaration under Section 143 converting the land use from agricultural to non-agricultural land had been passed, in a similar case, he had himself held in respect of an agricultural land that there was no deficiency in the stamp duty and thus in the present case, there was no material before the Collector to form a "reason to believe" and thus the entire initiation of proceedings was without the authority of law.

32. The said principle was also elaborately dealt by this Court in the case of ***Smt. Vijay Kumar and Another v. Commissioner, Meerut Division, Meerut and Another; 2008(3) AWC 2997,*** wherein this Court while interpreting the words "reason to believe" relying upon the judgments of the Supreme Court and similar words used in different Acts had held that although the power conferred under Section 47-A (3) are wide but are not plenary and cannot be exercised without there being material before the Collector to form a "reason to believe". A reason to suspect cannot be equated as "reason to believe", the belief which the Collector has to have prior to exercise of power under Section 47-A (3) should be in good faith and not merely a pretence and there should be some material which can lead to formation of such belief.

33. Thus, on the basis of the judgments of this Court, and placing reliance on Rule 3 (1) (A) of Stamp Valuation Rules, the only conclusion which can be drawn is that the orders passed and impugned in the present writ petition are wholly against the provisions of law and in the teeth of the judgments of this Court as well as in the teeth of the Stamp Valuation Rules. The orders impugned are further bad in law, as they do not even take into consideration the exemplar cited in the form of order dated 14.8.2000 passed in respect of a similarly situated property in the same village, in which a conveyance was executed on 3.11.1999. Thus, the orders impugned are perverse on that count also.

34. In view of the findings recorded above, the impugned order dated 12.1.2007 and order dated 28.1.2003 are set aside. The amount deposited by the petitioner as a mandatory deposit for preferring an appeal and in terms of the order dated 16.5.2007 shall be refunded to the petitioner along with interest thereupon at the rate 8% per annum within a period of three months from the date of filing an application by the petitioner before the respondent no. 2.

35. The writ petition is allowed in terms of the said order.

(2020)09ILR A552
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.02.2020

BEFORE

THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE SHAMIM AHMED, J.

WRIT - C No. 23928 of 2019

M/s S.S. Brothers & Company ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Rakesh Nath Tripathi, Sri Ashok Nath Tripathi, Sri Gopal Krishna

Counsel for the Respondents:
C.S.C.

A. Civil Law - U.P. Mines Minerals (Concession) Rules, 1963 - Rules 58 - non-payment of royalty / lease amount - consequences - Rule 58 r/w Clause 19(3) of G.O. Dt 14.08.2017 - forfeiture of security money - No provision for forfeiture of security money deposited by the lessee - only provides realization of amount as arrears of the land revenue along with the interest prescribed but does – *Held* - Security amount deposited by the lessee liable to be adjusted towards the dues/liability fixed (Para 20)

B. Civil Law - U.P. Mines Minerals (Concession) Rules, 1963 - Rules 58, 60 - non-payment of royalty rent & contravention of conditions of lease- Blacklisting - Show Cause Notice - Essential Contents of show cause notice - statement of imputations, alleged breaches & defaults committed by notice - nature of action proposed to be taken against him - purpose to make noticee understand case set up against him which he has to meet & provide adequate and meaningful opportunity to show cause against the same (Para 21)

Allowed. (E-5)

List of Cases cited: -

1. Gorkha Security Services Vs Government (NCT of Delhi) & ors. (2014) 9 SCC 105

2. Erusian Equipment & Chemicals Ltd. Vs St. of W.B. (1975) 1 SCC 70

3. Raghunath Thakur Vs St. of Bihar (1989) 1 SCC 229

4. M/s Mahabir Auto Stores & ors. Vs Indian Oil Corporation Ltd (1990) 3 SCC 752

(Delivered by Hon'ble Shamim Ahmed, J)

1. The present writ petition has been filed by the petitioner with the following prayer:-

(I) Issue any writ, direction or order in the nature of certiorari quashing the impugned orders dated 21.06.2019 passed by respondent no.2/District Magistrate, Prayagraj (Annexure No.18).

(II) Issue any writ, direction or order in the nature of writ of mandamus commanding the respondents to refund the lease money and stamp duty of petitioner.

(III) Issue any writ, direction or order in the nature of writ of mandamus commanding 21.06.2019 passed by respondent no.2/District Magistrate, Prayagraj (Annexure No.18).

(IV) Command the respondent nos.2 & 3 decide representations of the petitioner dated 26.05.2018, 21.06.2018, 16.10.2018, 18.12.2018, 12.02.2019 and 15.05.2019 (Annexure nos.8, 9, 10, 11 and 13).

(V) Issue any writ, direction or order in the nature of writ of mandamus commanding the respondents to grant three months time.

(VI) Issue any writ, direction or order in the nature of writ of mandamus commanding the respondents.

(VII) Pass any other writ, direction or order, as this Hon'ble Court may deem fit and proper under the circumstances of this case.

(VIII) Award cost to the petitioners from the respondents.

2. Heard Sri Ashok Nath Tripathi, learned counsel for the petitioner and Smt. Archana Singh, learned Additional Chief Standing Counsel representing all the respondents.

3. Facts in brief as contained in the writ petition are that as per New

Government Policy-2017, a Government order for settlement of lease under Chapter-IV by e-tender/e-auction dated 14.8.2017 was issued and the Uttar Pradesh Miner Minerals (Concession) (43 amendment) Rules, 2017 (hereinafter referred to as "the Amended Rules, 2017") framed thereunder. Mining leases were to be granted as per the procedure prescribed under the statutory Rules and the Government Order dated 14.8.2017. In pursuance of the same, an advertisement notice dated 01.12.2017 was issued by the District Magistrate, Prayagraj-respondent no.2 for settlement of mining leases of sand and morrum under the Amended Rules, 2017 in the District Prayagraj for several mining blocks by e-tendering.

4. The petitioner after completing necessary formalities, submitted an application for the grant of mining lease for mining area in village- Kachra and Mishrpur Nagarvar, in Tehsil Bara, District Prayagraj, river Yamuna, measuring eight hectares for a quantity of 1,60,000/- cubic meters per year. In this regard, the petitioner has given a bid of Rs.295/- per cubic meter against the reserve price of Rs.65/- which being the highest. The same was duly accepted by the District Magistrate, Prayagraj/resondent no.2 vide order dated 02.01.2018 and thereafter, a letter of intent dated 03.1.2018 was issued to the petitioner. After issuance of aforesaid letter of intent, he had deposited requisite amount namely security money and first installment of the annual lease amount. Subsequently, a lease deed was executed and registered in favour of the petitioner on 08.05.2018 for a period of five years, i.e., from 08.05.2018 to 07.05.2023.

5. It is contended in paragraph 19 and 46 of the Writ Petition that after demarcation, when the petitioner entered in his mining area, he found most of the area submerged and only a small portion of the area was dry in which small quantity of sand was available for mining. In this regard, he also approached the Senior Mining officer Prayagraj/District Magistrate, Prayagraj and who informed the petitioner that after rainy season, the situation will improve and the entire mining area will be available for mining.

6. In this regard, the petitioner also moved several representations before the Senior Mine Officer, Prayagraj to get the spot inspection of the area allocated to the petitioner to verify that area of the petitioner is submerged and to cancel the lease deed and refund the amount deposited by him. It is further contended that after expiry of the rainy season, the petitioner went to his mining area to start mining operation but he found that the situation is the same and only about 25% of the mining area is available for mining. In this background, the petitioner again submitted a representation dated 16.10.2018 and 18.12.2018 addressed to the District Magistrate/Senior Mines Officer, Prayagraj with a request to either issue another letter of intent for mining in respect of some other dry area suitable for mining having same quantity of sand and area in lieu of aforesaid mining lease area in favour of the petitioner or cancel the tender (lease of the petitioner) and refund the entire money deposited by the petitioner copy of the representation dated 16.10.2018 and 18.12.2018 is annexed as Annexure-10 & 11 to the writ petition.

7. It is further contended in paragraph 26 of the writ petition that surprisingly, instead of taking any action on the representation of the petitioner and making

the entire area available to the petitioner for carrying out mining operation, the Senior Mines Officer, Prayagraj (respondent no.4) issued demand notice on 26.04.2019 demanding installments of lease amount without addressing the issue of the petitioner regarding non-availability of the complete mining area allotted to the petitioner.

8. It is further contended that respondent no.2/District Magistrate, Prayagraj without inspecting the spot and without considering the representation of the petitioner and giving any show-cause notice or opportunity of personal hearing, passed the impugned order dated 21.06.2019 cancelling the lease of the petitioner forfeiting the security amount and blacklisting the petitioner for a period of two years in exercise of power conferred under Rules 58 and 60 of the U.P. Mines Minerals (Concession) Rules, 1963 (hereinafter referred to as the Rules, 1963) on the ground of non deposition of the installment of the lease amount treating the same as the breach of the lease conditions and rules.

9. It is contended by Sri Ashok Nath Tripathi, learned learned counsel for the petitioner that the order impugned passed by the respondent No.3 is arbitrary, unjust, illegal and is against the Rule 58 of U.P. Minor Mineral (Concession) Rules, 1963 (hereinafter referred to as the Rules 1963) and also against the provisions of Clause 19(3) of the Government Order dated 14.08.2017 which does not permit the forfeiture of the security money deposited by the lessee/petitioner and only provides for the realization of the said amount as arrears of land revenue along with the interest prescribed and the same is liable to be set aside by this Hon'ble Court due to the following reason:-

(i) No opportunity of personal hearing was given to the petitioner before passing the order impugned by which not only the lease of the petitioner was cancelled but also security amount was forfeited.

(ii) The show cause notice was issued to the petitioner by Senior Mines Officer but the order impugned has been passed by the District Magistrate.

(iii) Nothing has been stated in the show cause notice regarding blacklisting of the petitioner but by the impugned order, the petitioner was also blacklisted for two years without giving any opportunity of hearing as such the order of blacklisting the petitioner is in complete violation of principles of natural justice.

(iv) The impugned order has been passed in violation of the Rule 58 of the Rules, 1963 wherein it has been provided that if the lessee will not pay the royalty or dead rent then after giving the notice, the lease shall be determined and the said amount shall be realized as arrears of land revenue along with interest prescribed under sub-rule (2), as such while passing the order under Rule 58 of the Rules, 1963 for cancelling the lease deed, security amount deposited by lessee could not be forfeited. The impugned order is also in violation of the Clause 19(3) of the Government Order dated 14.08.2017 which does not provide forfeiture of the security amount on the ground of non deposition of the lease amount.

10. Learned counsel for the petitioner further contended that identical issue was already decided by this Court in Writ-C No.24217 of 2019 (M/S Kamal Kumar Shukla Vs. State of U.P. and 2 Others), vide judgment and order dated 25.07.2019.

11. On the other hand, it is contended by Smt.. Archana Singh, learned Additional

Chief Standing Counsel, that since terms and conditions contained in the lease deed were violated by the petitioner, therefore, the action was rightly taken by the respondent no.2. It is further contended by her that the order impugned in the present writ petition is absolutely perfect and valid order does not warrant any interference specially under Article 226 of the Constitution of India.

12. Heard learned counsel for the parties and perused the record. With the consent of learned counsel for the parties, this writ petition is disposed of finally at the admission stage itself.

13. The petitioner has assailed the order dated 21.06.2019 passed by respondent no.2/District Magistrate, Prayagraj by which reply submitted by the petitioner was rejected and the lease deed was cancelled and an order was passed directing the petitioner to deposit a sum of Rs.4,83,80,000/- towards installments of lease amount for first and second year apart from Rs.12,03,600/- towards T.C.S. and Rs.60,18,000/- as contribution to District Mineral Foundation Trust. It was further ordered that otherwise the same will be realized as per the provisions of the Land Revenue Act. Apart from the same, the petitioner was also blacklisted for a period of two years.

14. From perusal of the record it is clear that before passing the impugned order no opportunity of hearing was given to the petitioner. It is also clear from perusal of the record that notices were issued by the Senior Mines Officer but the impugned order was passed by the respondent no.2, i.e. District Magistrate Prayagraj. Apart from the same, it is also clear that although nothing is contained in the show cause notice regarding factum of blacklisting of the petitioner or forfeiting the security amount but while passing the order impugned, the petitioner was blacklisted for a period of two years and the security amount deposited by him was also forfeited.

15. The order impugned is in three parts:-

(i) recovery against the petitioner and cancelling the lease deed.

(ii) blacklisting of the petitioner for two years.

(iii) Forfeiting the security amount deposited by the petitioner.

16. Insofar as the first part is concerned, it is clear from the record that the notices were issued to the petitioner by the Senior Mines Officer, Prayagraj but the order was passed by District Magistrate Prayagraj, in this view of the matter, we are of the opinion that the order passed by the District Magistrate Prayagraj is in complete in violation of principles of natural justice.

17. Insofar as the blacklisting of the petitioner and regarding forfeiting the security amount deposited by the petitioner is concerned, from perusal of the impugned order, we find that the respondents have proceeded on the basis of a show cause notice. Nothing has been stated in the show cause notice regarding blacklisting of the petitioner nor anything has been stated regarding forfeiting the security money deposited by the petitioner. Learned Standing Counsel has not been able to refute this fact on record. In our opinion, the issue which was not raised even in the show cause notice, therefore, could not be made the basis for blacklisting of the petitioner and forfeiting the security money deposited by the petitioner.

18. In our view, as per Rule 58 of the Rules, 1963 and Clause 19(3) of the Government Order dated 14.08.2017 which clearly says that if the lessee will not pay the royalty or dead rent then after giving the notice the lease shall be determined and the said amount shall be realized as arrears of land revenue along with interest prescribed under sub-rule (2), as such while passing the order under Rule 58 of the Rules 1963 for cancellation of lease deed, security amount deposited by the lessee/petitioner could not be forfeited. In this regard, Rule 58 of the Rules 1963 is being quoted below :-

58. Consequences of non payment of royalty rent or other dues;

(1) The State Government or any officer authorized by it in this behalf may determine the mining lease after serving a notice on the lessee to pay within thirty days of the receipt of the notice any amount due or dead rent under the lease including the royalty due to the State Government if it was not paid within fifteen days next after the date fixed for such payment. This right shall be in addition to and without prejudice to the right of the State Government to realize such dues form the lessee as arrears of land revenue.

(2) Without prejudice to the provisions of these rules, simple interest at the rate of 18 per cent per annum may be charged on any rent, royalty, demarcation fee and any other dues under these rules, due to the State Government after the expiry of the period of notice under sub-rule (1).

19. Similarly as per the Government Order dated 14.08.2017 the consequence of non deposit of the lease amount/royalty in time by the lessee has been clearly provided in Clause 19(3) of which clearly says that if the lease amount will be not deposited by the lessee within time then same shall be recovered along with the interest as provided under the Rules 1963 and the forfeiture of the security money has not been permitted in the said Government Order on the ground of non deposition the lease amount.

20. It is further observed that in the impugned order, the District Magistrate, Prayagraj has treated the non deposit of the royalty / lease amount in time as violation of the condition of the lease deed and rule by the petitioner which is absolutely baseless as consequences of the non deposition of the lease amount/royalty in time has been provided under Rule 58 of the Rules 1963 and Clause 19(3) of the Government Order dated 14.08.2017 **which does not permit the forfeiture of the security money deposited by the lessee/petitioner and only provided the realization of the said amount as arrears of the land revenue along with the interest prescribed.** Security amount deposited by the petitioner was liable to be adjusted towards the dues/liability fixed upon the petitioner after the cancellation of the lease deed vide order dated 21.06.2019.

21. The central issue, however, pertains to the requirement of stating the action which is proposed to be taken. The fundamental purpose behind the serving of show cause notice is to make the noticee understand the precise case set up against him which he has to meet. This would require the statement of imputations detailing out the alleged breaches and defaults he has committed, so that he gets an opportunity to rebut the same. Another requirement, according to us, is the nature of action which is proposed to be taken for such a breach. That should also be stated so

that the notice is able to point out that proposed action is not warranted in the given case, even if the defaults/ breaches complained of are not satisfactorily explained. When it comes to black listing, this requirement becomes all the more imperative, having regard to the fact that it is harshest possible action. In the case of ***Gorkha Security Services Vs. Government (NCT of Delhi) and others (2014) 9 SCC 105,*** the Supreme Court was pleased to hold that it is incumbent on the part of the department to state in show cause notice that the competent authority intended to impose such a penalty of blacklisting, so as to provide adequate and meaningful opportunity to show cause against the same. Relevant paragraph namely paragraph 27 of the aforesaid judgement is quoted below:-

"27. We are, therefore, of the opinion that it was incumbent on the part of the Department to state in the show cause notice that the competent authority intended to impose such a penalty of blacklisting, so as to provide adequate and meaningful opportunity to the appellant to show cause against the same. However, we may also add that even if it is not mentioned specifically but from the reading of the show cause notice, it can be clearly inferred that such an action was proposed, that would fulfill this requirement. In the present case, however, reading of the show cause notice does not suggest that notice could find out that such an action could also be taken. We say so for the reasons that are recorded hereinafter."

22. In the case of ***Erusian Equipment & Chemicals Ltd. Vs. State of West Bengal (1975) 1 SCC 70***, it was held by the Supreme Court that blacklisting has the affect of preventing a person from the privilege and advantage of name into relationship with the Government for purpose of aim. It was held by the Supreme Court in the aforesaid case that the fundamentals of fair play require that a person concerned should be given an opportunity to represent his case. Paragraphs 12 and 20 of the said judgment is quoted below :-

"12. Under Article 298 of the Constitution the executive power of the Union and the State shall extend to the carrying on of any trade and to the acquisition, holding and disposal of property and the making of contracts for any purpose. The State can carry on executive function by making a law or without making a law. The exercise of such powers and functions in trade by the State is subject to Part III of the Constitution. Article 14 speaks of equality before the law and equal protection of the laws. Equality of opportunity should apply to matters of public contracts. The State has the right to trade. The State has there the duty to observe equality. An ordinary individual can choose not to deal with any person. The Government cannot choose to exclude persons by discrimination. The order of blacklisting has the effect of depriving a person of equality of opportunity in the matter of public contract. A person who is on the approved list is unable to enter into advantageous relations with the Government because of the order of blacklisting. A person who has been dealing with the Government in the matter of sale and purchase of materials has a legitimate interest or expectation. When the State acts to the prejudice of a person it has to be supported by legality.

20. Blacklisting has the effect of preventing a person from the privilege and advantage of entering into lawful

relationship with the Government for purposes of gains. The fact that a disability is created by the order of blacklisting indicates that the relevant authority is to have an objective satisfaction. Fundamentals of fair play require that the person concerned should be given an opportunity to represent his case before he is put on the blacklist."

23. Again in the case of ***Raghunath Thakur Vs. State of Bihar [(1989) 1 SCC 229]*** the aforesaid principles was reiterated in the following manner: (SCC p. 230, para 4).

"4. ..... But it is an implied principle of the rule of law that any order having civil consequence should be passed only after following the principles of natural justice. It has to be realised that blacklisting any person in respect of business ventures has civil consequence for the future business of the person concerned in any event. Even if the rules do not express so, it is an elementary principle of natural justice that parties affected by any order should have right of being heard and making representations against the order. In that view of the matter, the last portion of the order insofar as it directs blacklisting of the appellant in respect of future contracts, cannot be sustained in law.....…"

20. Thus, there is no dispute about the requirement of serving show-cause notice. We may also hasten to add that once the show-cause notice is given and opportunity to reply to the show-cause notice is afforded, it is not even necessary to give an oral hearing. The High Court has rightly repudiated the appellant's attempt in finding foul with the impugned order on this ground. Such a contention was specifically repelled in Patel Engg. [Patel Engg. Ltd. v. Union of India, (2012) 11 SCC 257 : (2013) 1 SCC (Civ) 445]."

24. In the case of ***M/s Mahabir Auto Stores & Ors. Vs. Indian Oil Corporation Ltd. (1990) 3 SCC 752*** it was held by the Supreme Court that arbitrariness and discrimination in every matter is subject to judicial review. Paragraph 11 of the aforesaid judgement is quoted below :-

"It is well settled that every action of the State or an instrumentality of the State in exercise of its executive power, must be informed by reason. In appropriate cases, actions uninformed by reason may be questioned as arbitrary in proceedings under Article 226 or Article 32 of the Constitution. Reliance in this connection may be placed on the observations of this Court in M/s Radha Krishna Agarwal & Ors. v. State of Bihar & Ors., [1977] 3 SCC 457.1t appears to us, at the outset, that in the facts and circumstances of the case, the respondent-company IOC is an organ of the State or an instrumentality of the State as contemplated under Article 12 of the Constitution. The State acts in its executive power under Article 298 of the Constitution in entering or not entering in contracts with individual par- ties. Article 14 of the Constitution would be applicable to those exercises of power. Therefore, the action of State organ under Article 14 can be checked. M/s Radha Krishna Agarwal v. State of Bihar, (supra) at p. 462, but Article 14 of the Constitution cannot and has not been construed as a charter for judicial review of State action after the contract has been entered into, to call upon the State to account for its actions in its manifold activities by stating reasons for such actions. In a situation of this nature

certain activities of the respondent company which constituted State under Article 12 of the Constitution may be in certain circumstances subject to Article 14 of the Constitution in entering or not entering into contracts and must be reasonable and taken only upon lawful and relevant consideration, it depends upon facts and circumstances of a particular transaction whether heating is necessary and reasons have to be stated. In case any right conferred on the citizens which is sought to be interfered, such action is subject to Article 14 of the Constitution, and must be reasonable and can be taken only upon lawful and relevant grounds of public interest. Where there is arbitrariness in State action of this type of entering or not entering into contracts, Article 14 springs up and judicial review strikes such an action down. Every action of the(1975) 1 SCC 70. State executive authority must be subject to rule of law and must be informed by reason. So, whatever be the activity of the public authority, in such monopoly or semi-monopoly dealings, it should meet the test of Article 14 of the Constitution. If a Governmental action even in the matters of entering or not entering into contracts, fails to satisfy the test of reasonableness, the same would be unrea- sonable. In this connection reference may be made to ***E.P. Royappa v. State of Tamil Nadu & Anr., [1974] 4 SCC 3; Maneka Gandhi v. Union of India & Anr., [1976] 1 SCC 248; Ajay Hasia & Ors. v. Khalid Mujib Sehravardi & Ors., [1981] 1 SCC 722; R.D. Shetry v. International Airport Authority of India & Ors., [1979] 3 SCC 1 and also Dwarkadas Marlaria and sons v. Board of Trustees of the Port of Bombay, [1989] 3 SCC 293.*** *It appears to us that rule of reason and rule against arbitrariness and discrimination, rules of fair play and natural justice are part of the rule of law applicable in situation or action by State instrumentality in dealing with citizens in a situation like the present one. Even though the rights of the citizens are in the nature of contractual rights, the manner, the method and motive of a decision of entering or not entering into a contract, are subject to judicial review on the touchstone of relevance and reasonableness, fair play, natural justice, equality and non-discrimination in the type of the transactions and nature of the dealing as in the present case."*

25. In view of the law laid down by the Hon'ble Apex Court and the case narrated by the learned counsel for the petitioner, we consider it fit to interfere in the impugned order on the ground that there is a complete violation to follow due process of law and the impugned order was passed in violation of the principles of natural justice, therefore, the impugned order dated 21.06.2019 passed by respondent no.2-District Magistrate, Prayagraj is not sustainable in the eyes of law and is liable to be quashed.

26. We, accordingly, **quash** the impugned order dated 21.06.2019 passed by respondent no.2-District Magistrate, Prayagraj and **allow** the present writ petition. We further clarify that in case the respondents do choose to initiate fresh proceedings against the petitioner, we leave it open to them to do so subject to the observation that the proceedings if initiated shall be undertaken in accordance with law and the observations appearing herein above after affording opportunity of personal hearing to the petitioner.

(2020)09ILR A561
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.09.2019

BEFORE

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

WRIT – C No. 27693 of 2019

M/s Chakor Cold Storage,District Firozabad & Ors. ...Petitioners
Versus
District Consumer Dispute Redressal Forum, District Firozabad & Ors. ...Respondents

Counsel for the Petitioners:
Sri Adarsh Kumar

Counsel for the Respondents:
C.S.C.

A. Civil Law - Uttar Pradesh Regulation Cold Storage Act,1976 - Section 24 & Consumer Protection Act,1986 - Section 15-challenge to –jurisdiction of District consumer Forum-U.P. Act 1976 will not override the provisions of Central Act,1986-both the remedies are available to Farmer-right to claim damages and compensation has been conferred upon aggrieved person under both statutes-it is open to person concerned to elect the forum where he wants to have his right adjudicated. (Para 1 to 15)

The petition is dismissed. (E-6)

List of Cases cited: -

1. GM Telecom Vs M. Krishnan & anr.,(2009) 8 SCC 481

2. Bihar School Examination Board Vs Suresh Prasad Sinha, (2009) 8 SCC 483

3. M/s Behari Colds (P) Ltd. Vs St. Consumer Disputes Redressal Commission & ors., W.P. No. 557 (MS) of 2009

4. Chairman, Thiruvalluvar Transport Corporation Vs Consumer Protection Council, AIR (1995) SC 1384

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

1. This writ petition has been filed assailing an order dated 6th July 2019 passed by District Consumer Forum, Firozabad (hereinafter referred to as "DCF") holding that it has jurisdiction to entertain claim of a "Farmer" whose crop (potatoes in the present case) kept for storage in the petitioners' cold storage had damaged and he is claiming compensation.

2. Though order passed by DCF is appellable under Section 15 of Consumer Protection Act, 1986 (hereinafter referred to as "Central Act, 1986") before "State Commission" but learned counsel for petitioners submits that he has challenged the very jurisdiction, thus alternative remedy would not bar this writ petition.

3. Since a pure question of law has been raised, with the consent of parties, we proceed to hear and decide this matter without relegating petitioner to avail statutory alternative remedy and also considering the fact that learned Standing Counsel has not opted and requested for time to file any counter affidavit but has requested this Court to decide this matter at this very stage.

4. Contention of the petitioners is that they are running a cold storage, namely, M/s Chakor Cold Storage situate at Saipuri Road Aroon, Police Station, Sirsa Ganj, District Firozabad under a licence obtained under Uttar Pradesh Regulation Cold Storages Act, 1976 (hereinafter referred to as 'U.P. Act, 1976') and if there is any

damage to the crop stored by "Farmer" in the said cold storage, remedy of compensation has been provided under Section 24 of U.P. Act, 1976 by raising a dispute before "Licensing Authority" and, thereafter, a further remedy is provided before a "Tribunal" constituted under Section 35. U.P. Act 1976 is a special Act, therefore, it is contended that DCF under Central Act, 1986 has no jurisdiction. Reliance in this regard is placed on Supreme Court's Judgement in **General Manager Telecom Vs. M. Krishnan and another, 2009 (8) SCC 481.** It is also argued that service of storage of crop in cold storage for its protection is not included in the definition of "service" under Section 2 (o) and "Farmer" is not a "Consumer" as defined under Section 2(d) of Central Act, 1986, therefore, D.C.F. in the present case has no jurisdiction. In support of above, reliance is placed on Supreme Court's Judgment in **Bihar School Examination Board vs Suresh Prasad Sinha, 2009 (8) SCC 483.**

5. Learned Standing Counsel submitted that U.P. Act, 1976, which is a Provincial enactment, has not been given any Presidential assent, hence cannot override provisions of Central Act, 1986, which is a Parliamentary enactment. He submits that cold storage renders service of storage of crop and charge fee, therefore, a 'Farmer' whose crop is stored in cold storage is a "Consumer", to him, petitioner is rendering a service. If any deficiency in service is found, "Consumer", i.e., Farmer has remedy of claiming damages of compensation under Central Act, 1986 and mere fact that a Provincial enactment i.e., U.P. Act, 1976 is also available, will not denude jurisdiction to DCF under Central Act, 1986.

6. We have heard learned counsel for parties and perused the record. U.P. Act 1976 was enacted to provide for licensing supervision and control of cold storages in State of U.P. and for matters connected therewith. Statement of objects and reasons clearly provides that Provincial Legislature marked development in cold storage industries in last the decade prior to 1976 which had shown establishment of large number of cold storages in private sector across the State of U.P., particularly in and around the areas which have abundance growth of potato crop. To ensure efficient maintenance of cold storages and to remove hardship to Agricultural Producers, proper control and regulation of the cold storage business was considered necessary in public interest. U.P. Act, 1976 received assent of the Governor on April 16, 1976, published in U.P. Gazette (Extraordinary) dated 19th April 1976 and has been given effect from September 20, 1975.

7. Section 2(c) defines "cold storage"; Section 2(d) defines "Hirer"; Section 2(e) defines "licence"; and, Section 2(f) defines "licensee", which are quoted hereinbelow:-

"(c) "cold storage" means an enclosed chamber insulated and mechanically cooled by refrigeration machinery to provide refrigerated condition to agricultural produce stored therein, but does not include refrigerated cabinets and chilling plants having a capacity of less than 100 cubic metres;

(d) "hirer" means a person who on payment hires space in a cold storage for storing agricultural produce;

(e) "licence" means a licence granted under this Act;

(f) "licensee" means any person to whom a licence is granted under this Act;"

8. Section 5 of U.P. Act, 1976 imposes a restriction upon any person to

carry on business of storing any agricultural produce in cold storage except under and in accordance with the terms and conditions of licence granted under U.P. Act, 1976. Section 6 talks of the procedure for grant of licence and Section 7 provides for terms and renewal of licence. Chapter IV which contains Sections 12 to 28 deals with rights and duties of licensee. Section 12 says that licensee shall take care of such cold storage as a man of ordinary prudence would take of his own goods under similar circumstances and objections. Section 24 talks of compensation for loss, destruction etc. of the goods stored in cold storage which reads as under:-

"24. compensation for loss, destruction, etc.- Except as otherwise provided in this Act the ***licensee shall be liable to pay to the hirer compensation for every loss, destruction, damage, deterioration or non-delivery of the goods stored in his cold storage cause by the negligence, misconduct or default on the part of such licensee."***

9. Section 25 of U.P. Act, 1976 says that a dispute with regard to compensation under Section 24 shall be referred to Licensing Officer, who shall decide the matter and his order shall be final and if appeal is filed, subject to result of appeal.

10. Appeal against order of Licensing Officer is provided under Section 36. Section 43 gives overriding power to provisions of U.P. Act, 1976, which reads as under:-

"43. Effect of Acts and Rules etc. inconsistent with other enactments and instruments.- The provision of this Act or any rule made thereunder ***shall have effect notwithstanding anything inconsistent therewith contained in any enactument other than this Act, or in any contract, or in any other instruments having effect by virtue of any enactment other than this Act."***

11. Admittedly, Central Act, 1986 was not in existence when U.P. Act, 1976 was enacted. Moreover, U.P. Act, 1976 is a Provincial enactment and has not received assent of President while Central Act, 1986 is a Parliamentary enactment. The effect of Section 43 of U.P. Act, 1976, therefore, in view of provisions contained in Article 224 will not override the provisions of Central Act, 1986. The provisions of Central Act, 1986 are wider, provided a more deeper judicial scrutiny of a dispute with regard to deficiency of service and, therefore, at the best it can be said that both the remedies were available to Farmer and where more than one remedy are available, the incumbent is entitled his right to of election and avail any of such remedies. It cannot be said that DCF has no jurisdiction in the matter.

12. We have to examine the matter in the light of Article 254 of the Constitution of India and also the fact as to which statute can be said to be special statute.

13. U.P. Act, 1976 is an Act to govern and control matters relating to cold storages. The issue with regard to deficiency in service and reimbursement of a Farmer due to any loss by cold storages committing deficiency in service is an incidental matter covered by U.P. Act, 1976. However, Central Act, 1986 is basically to take care of a Consumer who has made with a deficiency of service and his right to claim damages/ compensation of adequate amount which has to be determined by a statutory adjudicatory

forum which is a complete hierarchy at District level, State level, Central level and upto Supreme Court. Therefore, on the later aspect, i.e., deficiency in service and adjudicatory forum U.P. Act, 1976 is not a special Act but Central Act, 1986 is an special Act and shall override.

14. Learned counsel for petitioners placed reliance on a Single Judge judgment of this Court of Lucknow Bench in **Writ Petition No. 557 (MS) of 2009 (M/s Behari Colds (P) Ltd. vs. State Consumer Disputes Redressal Commission and others),** decided on 21.08.2009 wherein it is held that if two remedies are available the incumbent cannot avail both of them.

15. We find that learned Single Judge has misconstrued the Supreme Court's judgment in **Chairman, Thiruvalluvar Transport Corporation vs. Consumer Protection Council, AIR 1995 SC 1384** and, therefore, aforesaid judgment cannot be said to be correct. When a specific right is created in a statute and the same statute provides an adjudicatory forum also, the aggrieved person may claim such right before forum under the same statute and not elsewhere but here right to claim damages and compensation has been conferred upon aggrieved person or the Farmer, as the case may be, under both statutes, i.e., U.P. Act, 1976 and Central Act, 1986, therefore, the right to claim damages was conferred by both statutes and forums for adjudication was also provided therein, hence it is open to person concerned to elect the forum where he wants to have his right adjudicated.

16. We, therefore, find no error in the order passed by District Consumer Forum on the ground of jurisdiction. Writ petition lacks merit. Dismissed accordingly.

(2020)09ILR A564
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.05.2020

BEFORE

THE HON'BLE B. AMIT STHALEKAR, J.
THE HON'BLE PIYUSH AGRAWAL, J.

WRIT – C No. 27848 of 2018
connected with
WRIT – C No. 27876 of 2018
&
WRIT – C No. 20101 of 2018
&
WRIT – C No. 27873 of 2018
&
WRIT – C No. 1947 of 2020
&
WRIT – C No. 27846 of 2018

Shamshad Ali & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Shailesh Upadhyay, Sri Manu Khare, Sri Rishi Kant Rai, Sri Vijay Pratap Singh

Counsel for the Respondents:
C.S.C., Sri Kaushlendra Nath Singh, Sri Raghvendra Dwivedi

(A) Civil Law -Land Acquisition Act, 1894 - Section 4-notification, Section 6-declaration, Section 11-compensation-Section 18-reference, Section 20-Cognizance of cases by lok Adalats-section 28-A-Re-determination of the amount of compensation on the basis of the award of the Court-Legal Services Authority Act, 1987 -Section 21-Award of Lok Adalat- impugned order set aside.

land of the petitioners - covered by the notification under Section 4 of the Land Acquistion Act, 1894 - an award under Section 11 of the Act was published on 28.11.1984 fixing Rs. 20/- per square yard as compensation for the land acquired - reference made under

Section 18 of the Act, 1894 - compromise and settlement between the parties - claim of the petitioners rejected by the Additional District magistrate (land acquisition) - ground - not filed a reference under Section 18 of the Act, 1894 - award was only between the parties before the Lok Adalat or before the court under Section 18 of the Act, 1894 - reasoning given by the Additional District magistrate (land acquisition) - absolutely illegal and arbitrary and against the statutory mandate of Section 28A of the Act, 1894. (Para-47,48)

HELD: - The petitioners would be entitled for payment of compensation as determined in the Award of the Lok Adalat dated 12.03.2016. Addl. District Magistrate (Land Acquisition)/Special Land Acquisition Officer, is directed to pass fresh order on the application of the petitioners dated 12.5.2016. (Para-48)

Petition allowed. (E-7)

List of Cases cited:-

1. ITI Ltd. Vs Siemens Public Communications Network Ltd., (2002) 5 SCC 510

2. P.T. Thomas Vs Thomes Job, (2002) 6 SCC 478

3. Pradeep Kumar Vs St. of U.P. & ors., First Appeal No. 522 of 2009

4. St. of Punj. Vs Jalauar Singh, (2018) 2 SCC 660

5. Vasudave & ors. Vs The Commissioner and Secretary Government Revenue Department & ors. ,ILR 2007 KAR 4533

6. Garhwal Mandal Vikas Nigam Ltd. Vs Krishna Travel Agency, (2008) 6 SCC 741

7. Northern Coal Fields, Singrauli Vs Aluminium Industries Ltd., Kundara (Kerala)., 2013 6 ADJ 104

8. Kunwar Singh Saini Vs High Court of Delhi , (2012) 4 SCC 307

9. St. of Punj. & anr. Vs Jalaur Singh & anr., (2008) 2 SCC 660

10. Surendra Singh & ors. Vs Deo Muni Singh & ors., Civil Writ jurisdiction case no. 13375 of 2011

11. Dheer Singh & ors. Vs St. of U.P. & ors., Civil Miscellaneous Writ Petition no. 5899 of 2017

12. Bhagti (Smt.) deceased through her legal heirs Jagdish Ram Sharma Vs St. of Har., (1997) 4 SCC 473

13. UOI & anr. Vs Pradeep Kumari & ors., AIR 1995 SC 2259

14. Babua Ram & ors. vs St. of U.P. & anr., (1995) 2 SCC 689

15. Writ petition (C) no. 611 of 2017 (Smt. Kamla Tomar Vs St. of U.P. & ors.)

16. Writ Petition (C) No. 7218 of 2019 (Tezpal Singh & ors. Vs St. of U.P. & ors.)

(Delivered by Hon'ble B. Amit Sthalekar, J.)

1. Heard Sri Manu Khare, Sri Shailesh Upadhyay as well as Sri Vijay Pratap Singh, learned counsel for the petitioners and Sri Suresh Singh, learned Additional Chief Standing Counsel, Sri Kaushalendra Nath Singh as well as Sri Raghvendra Dwivedi, learned counsel for the respondents.

2. These bunch of writ petitions are being decided by this common judgment and order as they involve identical question of facts and law, as agreed by the learned counsel for the parties.

3. We take up the leading case being ***Writ Petition No. 27848 of 2018 (Shamshad Ali and another Vs. State of U.P. and others).*** Briefly stated the facts of the case are that the father of the petitioners is said to be the recorded tenure holder of Plot No. 197 area 0-7-0, plot no.198 area 0-

9-0, total area 0-16-0 situate in village Aliwardipur/Alabadirpur, Pargana and Tehsil Dadri, district Gautam Budh Nagar. It is stated that by notification dated 22.3.1983 issued under section 4 of the Land Acquisition Act, 1894 (hereinafter referred to as the Act, 1894) the said plots were notified for acquisition alongwith certain other plots in village Aliwardipur/Alabadirpur, Pargana and Tehsil Dadri, District Gautam Budh Nagar. Thereafter a declaration was made on 23.3.1983 under section 6 of the Act, 1894 with respect of these lands. The Award was published on 28.11.1984 fixing compensation payable for the land acquired at Rs.20/- per sq. yard. It is stated that one Fateh Mohammad who was the recorded tenure holder of Plot No. 180 Ka area 1-9-0 situate in village Aliwardipur/Alabadirpur, Pargana and Tehsil Dadri being not satisfied with the Award preferred a reference under section 18 of Act, 1894 before the Collector/Special Land Acquisition Officer. This reference was proceeded as LAR No. 06 of 2002 (Fateh Mohd. Vs. State of U.P.). It is also stated that LAR No. 6 of 2002 was thereafter referred to Lok Adalat presided by Addl. District and Sessions Judge/FTC No. 2, Gautam Budh Nagar constituted under the provisions of Legal Services Authority Act, 1987 (hereinafter referred to as the Act, 1987). Learned Addl. District Judge by his order dated 12.3.2016 allowed the said reference on the basis of a compromise between the parties alongwith other references being LAR No. 7 of 2002, LAR No. 8 of 2002 and LAR No. 9 of 2002 and the compensation was enhanced and fixed at Rs. 297.50/- per sq. yard on the ground that the High Court while deciding the first appeal with respect to the said village had enhanced the compensation to Rs.297.50/- per sq. yard. When the petitioners came to know about the order of the Lok Adalat, they moved an application under section 28-A of the Act, 1894 before the A.D.M. (Land Acquisition)/Special Land Acquisition Officer, Gautam Budh Nagar as heirs of the previous tenure holders Niaz Mohd., Shah Mohd. and Buniyad Ali. It is also stated that the Addl. District Judge (Land Acquisition)/Special Land Acquisition Officer, Gautam Budh Nagar delayed consideration of the application of the petitioners, therefore, the petitioners left with no other option approached the High Court by filing Civil Misc. Writ Petition No. 4368 of 2018 (Shamshad Ali and another Vs. State of UI.P. And others). This writ petition was disposed of by the High Court by its order dated 1.2.2018 with a direction to the competent authority to take a decision on the application of the petitioners in accordance with law and in accordance with the direction contained in the judgement of a Division Bench of the High Court in Writ Petition (C) No. 38674 of 2017 (Satyapal Singh and 21 others Vs. State of U.P. and others) decided on 21.9.2017. Order of the learned Single Judge of the High Court dated 01.02.2018 reads as under:-

"The petitioners claim to have filed an application under Section 28-A of the Land Acquisition Act, 1894 (hereinafter referred to as the 'Act') for re-determination of the compensation on the basis of the award made by the Reference Court in regard to the same notification issued under Section 4(1) of the Act and the declaration made under Section 6(1) of the Act. The grievance is that till date the application has not been decided.

The application which has been filed under Section 28-A of the Act has to be decided in terms of the conditions set out under Section 28-A of the Act which

have also been elaborately dealt by a Division Bench of this Court in ***Writ C-No.38674 of 2017 (Satyapal Singh & 21 Ors., Vs. State of U.P. & 3 Ors.,)*** *decided on 21 September 2017.*

Learned Standing Counsel appears for respondent Nos. 1, 2 and 4. Sri Kaushalendra Nath Singh, appears for respondent No.3. Learned counsel for the respondents state that the application shall be decided in accordance with law at an early date.

This petition is, accordingly, disposed of with a direction to the Competent Authority to take a decision on the application filed by the petitioners after hearing the parties concerned in accordance with law and in accordance with the directions contained in ***Satyapal Singh & 21 Ors,.****"*

4. It is in pursuance of the order of the High Court dated 1.2.2018 that the respondents have proceeded to pass the impugned order dated 19.5.2018, Annexure-10 to the writ petition.

5. The contention of the petitioners is that the A.D.M., Land Acquisition/Special Land Acquisition Officer, respondent no. 4 has held that the writ petition no. 4368 of 2018 was filed by Shamshad Ali and another who have not preferred any reference under section 18 of the Act, 1894 and since the reference under section 18 was only between the parties therein, therefore, the order passed in that reference would not be applicable in the case of the petitioners.

6. Shri Manu Khare, learned counsel for the petitioners referring to the provisions of Section 21 of the Act, 1987 submits that section 21 of the Act, 1987 provides that every award of the Lok Adalat shall be deemed to be a decree of a civil court. Section 21 of the Act, 1987 reads as under:

*"**21. Award of Lok Adalat.**--(1) Every award of the Lok Adalat shall be deemed to be a decree of a civil court or, as the case may be, an order of any other court and where a compromise or settlement has been arrived at, by a Lok Adalat in a case referred to it under sub-section (1) of section 20, the court-fee paid in such case shall be refunded in the manner provided under the Court Fees Act, 1870 (7 of 1870).*

(2) Every award made by a Lok Adalat shall be final and binding on all the parties to the dispute, and no appeal shall lie to any court against the award."

7. He next referred to the provisions of Section 28-A of the Act, 1894 and submits that where there is an award under Part III, and the court allows to the applicant any amount of compensation in excess of the amount awarded by the Collector under section 11 of the Act, 1894, the persons interested in all the other land covered by the same notification under section 4(1) of the Act, 1894 and who are also aggrieved by the award of the Collector may, notwithstanding that they had not made an application to the Collector under section 18 of the Act, 1894, by written application to the Collector within three months from the date of the award of the Court require that the amount of compensation payable to them may be re-determined on the basis of the amount of compensation awarded by the court. Section 28-A of the Act, 1894 reads as under:

"***28A. Re-determination of the amount of compensation on the basis of***

the award of the Court.--*(1) Where in an award under this Part, the Court allows to the applicant any amount of compensation in excess of the amount awarded by the Collector under section 11, the persons interested in all the other land covered by the same notification under section 4, sub-section (1) and who are also aggrieved by the award of the Collector may, notwithstanding that they had not made any application to the Collector under section 18, by written application to the Collector within three months from the date of the award of the Court require that the amount of compensation payable to them may be re-determined on the basis of the amount of compensation awarded by the Court:*

Provided that in computing the period of three months within which an application to the Collector shall be made under this sub-section, the day on which the award was pronounced and the time requisite for obtaining a copy of the award shall be excluded.

(2) The Collector shall, on receipt of an application under sub-section (1), conduct an inquiry after giving notice to all the persons interested and giving them a reasonable opportunity of being heard, and make an award determining the amount of compensation payable to the applicants.

(3) Any person who had not accepted the award under sub-section (2) may, by writted application to the Collector, require that the matter be referred by the Collector for the determination of the Court and the provisions of sections 18 to 28 shall, so far as may be, apply to such reference as they apply to a reference under section 18."

8. Shri Manu Khare, learned counsel, therefore, submitted that since the reference under section 18 of the Act, 1894 filed by the other tenure holders being LAR No. 6 of 2002, LAR. No. 7 of 2002, LAR No. 8 of 2002 and LAR No. 9 of 2002 having been referred to the Lok Adalat and decided therein by the Addl. District Judge/FTC No. 2, Gautambudh Nagar under the Act, 1987 by Award dated 12.3.2016 on the basis of a compromise arrived at between the parties therein and the compensation having been enhanced to Rs.297.50/- sq. yard, such order of the Lok Adalat would be deemed to be a decree of the civil court under section 21 of the Act, 1987, and the petitioners herein, therefore, would be entitled to the same compensation of Rs.297.50/- per sq. yard for the same village, covered by the same land acquisition notification under section 4 and 6 of the Act, 1894 in terms of the provisions of section 28-A of the Act, 1894.

9. Shri Suresh Singh, learned Addl. Chief Standing Counsel appearing on behalf of the respondents no. 1, 2 and 4, on the other hand, submitted that the decision of the Lok Adalat dated 12.3.2016 was based upon a compromise between the parties to the references being LAR No. 6/2002, LAR No. 7/2002, LAR No. 8/2002 and LAR No. 9/2002 and it was on the basis of such compromise that the compensation payable to the applicants therein had been enhanced from Rs.20/- per sq. yard as given in the award dated 28.11.1984 to Rs.297.50/- per sq. yard. He submitted that since the present petitioners had not preferred any reference under section 18 of the Act, 1894 against the award dated 28.11.1984 therefore, they cannot be said to be parties to the compromise Award of 12.3.2016 of the Lok Adalat which was passed in the LARs No. 6/2002, 7/2002, 8/2002 and 9/2002.

10. Shri Kaushlendra Nath Singh, learned counsel appearing for the respondent no. 3 adopted the submissions

of the learned Addl. Chief Standing Counsel and further submitted that the Award dated 12.3.2016 was an order passed by the Lok Adalat and not by a civil court. He further submitted that the Award of 12.3.2016 was passed on the basis of a compromise entered into between the parties to the references which was referred to the Lok Adalat by the Civil Court before whom the reference under section 18 of the Act, 1894 had been filed and therefore, such an order cannot be said to be a decree of the civil court and, therefore, the provisions of section 28-A of the Act, 1894 would have no application in the present case.

11. Shri Manu Khare, learned counsel for the petitioners, at the outset submitted that admittedly the petitioners had not filed any reference under section 18 of the Act, 1894 but on that basis alone they cannot be denied the benefit of the Award of the Lok Adalat since the Award dated 12.3.2016 was passed by the Lok Adalat on the matter being referred by the civil court to the Lok Adalat in the references LAR No. 6/2002, 7/2002, 8/2002 and 9/2002 filed under section 18 of the Act, 1894 before the civil court. The submission is that section 21 of the Act, 1987 itself ordains that every award of the Lok Adalat shall be deemed to be a decree of a civil court and where a compromise or settlement has been arrived at by a Lok Adalat in a case referred to it under section 20(1) of the Act, 1987, the court fee paid in such cases shall be refunded in the manner provided in the Court Fees Act, 1870.

12. Shri Manu Khare, learned counsel submitted that the question in the present case is not one of refund of court fees but one where the present petitioners are relying upon an Award of the Lok Adalat on the reference under section 18 of the Act, 1894 being transferred to it under the provisions of Section 20(1) of the Act, 1987. Shri Manu Khare further submitted that Section 22 of the Act, 1987 itself provides that Lok Adalat for the purposes of holding any determination under the Act shall have the same powers as are vested in a civil court under the Code of Civil Procedure and sub-section (3) of Section 22 of the Act, 1987 provides that all proceedings before a Lok Adalat shall be deemed to be judicial proceedings within the meaning of Section 193, 219 and 228 of the Indian Penal Code and every Lok Adalat shall be deemed to be a civil court for the purposes of Section 195 chapter XXVI of the Code of Criminal Procedure, 1973. The submission, therefore, is that the Act of 1987 itself deems the Lok Adalat to be a civil court and an award passed by it to be a decree of a civil court and, therefore, even if the petitioners have not preferred any reference under section 18 of the Act, 1894, they, by virtue of mandate of Section 28-A of the Act, 1894 being interested in all other land covered by the same notification under section 4(1) and being aggrieved by the award of the Collector would be entitled to the amount of compensation as determined by the court.

13. Shri Manu Khare, learned counsel submits that since the Lok Adalat has been vested with the powers of a civil court and its award shall be deemed to be a decree of a civil court, such decree/award passed on 12.3.2016 cannot be ignored by the respondent no. 4 as it would amount to ousting the jurisdiction of the civil court. He further submits that the jurisdiction of a civil court can be ousted only by legislation and not by any administrative order. Reliance has been placed upon a judgement of the Supreme Court reported in ***(2002) 5***

SCC 510 (ITI Ltd. Vs. Siemens Public Communications Network Ltd.), the relevant paragraphs 11, 12 and 13 of the said judgement read as under:

"11. It has been held by this Court in more than one case that the jurisdiction of the civil court to which a right to decide a lis between the parties has been conferred can only be taken by a statute in specific terms and such exclusion of right cannot be easily inferred because there is always a strong presumption that the civil courts have the jurisdiction to decide all questions of civil nature, therefore, if at all there has to be an inference the same should be in favour of the jurisdiction of the court rather than the exclusion of such jurisdiction and there being no such exclusion of the Code in specific terms except to the extent stated inSection 37(2), we cannot draw an inference that merely because the Act has not provided the CPC to be applicable, by inference it should be held that the Code is inapplicable. This general principle apart, this issue is now settled by the judgment of a 3-Judge Bench of this Court in the case ofBhatia International v. Bulk Trading S.A. and Anr. in C.A. No. 6527/2001 -- decided on 13.3.2002 where in while dealing with a similar argument arising out of the present Act, this Court held :

"While examining a particular provision of a statute to find out whether the jurisdiction of a Court is ousted or not, the principle of universal application is that ordinarily the jurisdiction may not be ousted unless the very statutory provision explicitly indicates or even by inferential conclusion the Court arrives at the same when such a conclusion is the only conclusion."

12. In the said view of the matter, we are in respectful agreement with the view expressed by this Court in the case of Nirma Ltd. (supra) and reject the argument of Mr. Parasaran on this question.

13. We also do not find much force in the argument of learned counsel for the appellant based on Section 5of the Act. It is to be noted that it is under this Part, namely, Part I of the Act thatSection 37(1)of the Act is found, which provides for an appeal to a civil court. The term 'Court' referred to in the said provision is defined underSection 2(e)of the Act. From the said definition, it is clear that the appeal is not to any designated person but to a civil court. In such a situation, the proceedings before such court will have to be controlled by the provisions of the Code, therefore, the remedy by way of a revision under Section 115 of the Code will not amount to a judicial intervention not provided for by Part I of the Act. To put it in other words, when the Act underSection 37provided for an appeal to the civil court and the application of Code not having been expressly barred, the revisional jurisdiction of the High Court gets attracted. If that be so, the bar underSection 5will not be attracted because conferment of appellate power on the civil court in Part I of the Act attracts the provisions of the Code also."

14. Learned counsel for the petitioners also submitted that even if an award of the Lok Adalat is not on the basis of a conflict between the parties on merit but is based upon a compromise, nevertheless, it would be equal to and at par with a decree on compromise and will have the same binding effect and it is equivalent to a decree executable to end the litigation among the parties.

15. We may refer to the observations of the Supreme Court in paragraph 16 of the judgment in the case of ***P.T. Thomas***

Vs. Thomes Job, (2002) 6 SCC 478, particularly paragraphs 24, 25, 26, 27 of the said judgment wherein the Supreme Court has held that the award of the Lok Adalat is final and permanent which is equivalent to a decree executable bringing and end to the litigation among the parties. Relevant paragraphs 16, 17, 18, 19, 20, 21, 24, 25, 26 and 27 of the said judgment read as under:

"16. In our opinion, the award of the Lok Adalat is fictionally deemed to be decree of court and therefore the courts have all the powers in relation thereto as it has in relation to a decree passed by itself. This, in our opinion, includes the powers to extend time in appropriate cases. In our opinion, the award passed by the Lok Adalat is the decision of the court itself though arrived at by the simpler method of conciliation instead of the process of arguments in court. The effect is the same. In this connection, the High Court has failed to note that by the award what is put an end to is the appeal in the District Court and thereby the litigations between brothers forever. The view taken by the High Court, in our view, will totally defeat the object and purposes of theLegal Services Authorities Actand render the decision of the Lok Adalat meaningless.

17. Section 21of the Legal Services Authorities Act, 1987 reads as follows :-

"21. Award of Lok Adalat.- *(1) Every award of the Lok Adalat shall be deemed to be a decree of a Civil Court or, as the case may be, an order of any other Court and where a compromise or settlement has been arrived at, by a Lok Adalat in a case referred on it under sub-section (1) of Sec.20, the court fee paid in such cases shall be refunded; in the manner provided under theCourt Fees Act, 1870 (7 of 1870).*

(2) Every award made by a Lok Adalat shall be final and binding on all the parties to the dispute, and no appeal shall lie to any Court against the award.

Section 22reads thus :-

"22. Powers of Lok Adalats.- *(1) The Lok Adalat shall, for the purposes of holding any determination under this Act, have the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit in respect of the following matters, namely :*

(a) the summoning and enforcing the attendance of any witness and examining him on oath;

(b) the discovery and production of any document ;

(c) the reception of evidence on affidavits ;

(d) the requisitioning of any public record or document or copy of such record or document from any Court or Office; and

(e) such other matters as may be prescribed.

(2) Without prejudice to the generality of the powers contained in sub-section (1), every Lok Adalat shall have the requisite powers to specify its own procedure for the determination of any dispute coming before it.

(3) All Proceedings before a Lok Adalat shall be deemed to be judicial proceedings within the meaning of Secs. 193, 219 and 228of the Indian Penal Code(45 of 1860) and every Lok Adalat shall be deemed to be a Civil Court for the purpose of Sec. 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2) of 1974).

18. What is Lok Adalat?

"The 'Lok Adalat' is an old form of adjudicating system prevailed in ancient India and it's validity has not been taken away even in the modern days too. The word 'Lok Adalat' means 'People Court'. This system is based on Gandhian Principles. It is one of the components of ADR system. As the Indian Courts are over burdened with the backlog of cases and the regular Courts are to decide the cases involve a lengthy, expensive and tedious procedure. The Court takes years together to settle even petty cases. Lok Adalat , therefore provides alternative resolution or devise for expedious and inexpensive justice.

In Lok Adalat proceedings there are no victors and vanquished and, thus, no rancour.

Experiment of 'Lok Adalat' as an alternate mode of dispute settlement has come to be accepted in India, as a viable, economic, efficient and informal one.

LOK ADALAT is another alternative to JUDICIAL JUSTICE. This is a recent strategy for delivering informal, cheap and expeditious justice to the common man by way of settling disputes, which are pending in Courts and also those, which have not yet reached Courts by negotiation, conciliation and by adopting persuasive, common sense and human approach to the problems of the disputants, with the assistance of specially trained and experienced Members of a Team of Conciliators."

19. Benefits Under Lok Adalat

1. There is no court fee and if court fee is already paid the amount will be refunded if the dispute is settled at Lok Adalat according to the rules.

2. The basic features of Lok Adalat are the procedural flexibility and speedy trial of the disputes. There is no strict application of procedural laws like Civil Procedure Code and Evidence Act while assessing the claim by Lok Adalat.

3. The parties to the dispute can directly interact with the Judge through their Counsel which is not possible in regular Courts of law.

4. The award by the Lok Adalat is binding on the parties and it has the status of a decree of a Civil Court and it is non-appealable which does not causes the delay in the settlement of disputes finally.

In view of above facilities provided by "the Act" Lok Adalats are boon to the litigating public they can get their disputes settled fast and free of cost amicably.

Award of Lok Adalat

20. The Lok Adalat shall proceed and dispose the cases and arrive at a compromise or settlement by following the legal principles, equity and natural justice. Ultimately the Lok Adalat passes an award, and every such award shall be deemed to be a decree of Civil Court or as the case may be which is final.

Award of Lok Adalat shall be final

21. The Lok Adalat will passes the award with the consent of the parties, therefore there is no need either to reconsider or review the matter again and again, as the award passed by the Lok Adalat shall be final. Even as under Section 96(3) of C.P.C. that "no appeal shall lie from a decree passed by the Court with the consent of the parties". The award of the Lok Adalat is an order by the Lok Adalat under the consent of the parties, and it shall be deemed to be a decree of the Civil Court, therefore an appeal shall not lie from the award of the Lok Adalat as under Section 96(3) C.P.C.

22. In Punjab National Bank vs. Lakshmichand Rai reported in AIR 2000

Madhya Pradesh 301, the High Court held that

"The provision of the Act shall prevail in the matter of filing an appeal and an appeal would not lie under the provisions of Section 96 C.P.C. Lok Adalat is conducted under an independent enactment and once the award is made by Lok Adalat the right of appeal shall be governed by the provisions of theLegal Services Authorities Actwhen it has been specifically barred under Provisions ofSection 21(2), no appeal can be filed against the award under Sec.96 C.P.C."

The Court further stated that:

"14. It may incidentally be further seen that eventhe Codeof Civil Procedure does not provide for an appeal underSection 96(3)against a consent decree. The Code of Civil Procedure also intends that once a consent decree is passed by Civil Court finality is attached to it. Such finality cannot be permitted to be destroyed, particularly under theLegal Services Authorities Act, as it would amount to defeat the very aim and object of the Act with which it has been enacted, hence, we hold that the appeal filed is not maintainable.

23. The High Court of Andhra Pradesh held that, inBoard of Trustees of the Port of Visakhapatnam vs. Presiding Officer, Permanent, Lok Adalat-cum-Secretary, District Legal Services Authority, Visakhapatnam and anotherreported in 2000(5) ALT 577, " The award is enforceable as a decree and it is final. In all fours, the endeavour is only to see that the disputes are narrowed down and make the final settlement so that the parties are not again driven to further litigation or any dispute. Though the award of a Lok Adalat is not a result of a contest on merits just as a regular suit by a Court on a regular suit by a Court on a regular trial, however, it is as equal and on par with a decree on compromise and will have the same binding effect and conclusive just as the decree passed on the compromises cannot be challenged in a regular appeal, the award of the Lok Adalat being akin to the same, cannot be challenged by any regular remedies available under law including invokingArticle 226of the Constitution of India challenging the correctness of the award on any ground. Judicial review cannot be invoked in such awards especially on the grounds as raised in this writ petition.

24. The award of Lok Adalat is final and permanent which is equivalent to a decree executable, and the same is an ending to the litigation among parties.

25. In Sailendra Narayan Bhanja Deo vs. The State of Orissa, AIR 1956 SC 346, the Constitution Bench held as follows:

A Judgment by consent or default is as effective an estoppel between the parties as a judgment whereby the court exercises its mind on a contested case. (South American and Mexican Co.,ex p Bank of England, (1895) 1 Ch.37 & In re & Kinch v. Walcott, 1929 AC 482)

"In South American and Mexican Co., ex p Bank of England, In re (1895) 1 Ch 37), it has been held that a judgment by consent or default is as effective an estoppel between the parties as a judgment whereby the Court exercises its mind on a contested case. Upholding the judgment of Vaughan Williams,J Lord Herschell said (Ch page 50) :-

"The truth is, a judgment by consent is intended to put a stop to litigation between the parties just as much as is a judgment which results from the decision of the Court after the matter has been fought out to the end. And I think it would be very mischievous if one were not

to give a fair and reasonable interpretation to such judgments, and were to allow questions that were really involved in the action to be fought over again in a subsequent action."

To the like effect are the following observations of the Judicial Committee in 'Kinch v. Walvott', 1929 AC 482 at p.493:-

"First of all their Lordships are clear that in relation to this plea of estoppel it is of no advantage to the appellant that the order in the libel action which is said to raise it was a consent order. For such a purpose an order by consent , not discharged by mutual agreement, and remaining unreduced , is as effective as an order of the Court made otherwise than by consent and not discharged on appeal."

26. The same principle has been followed by the High Courts in India in a number of reported decisions. Reference need only be made to the cases of 'Secy. Of State v. Ateendranath Das', 63 Cal 550 at p. 558 (E) ; - ' Bhaishanker v. Moraji', 36 Bom 283 (F) and 'Raja Kumara Venkata Perumal Raja Bahadur', v. Thatha Ramasamy Chetty', 35 Mad 75 (G). In the Calcutta case after referring to the English decisions the High Court observed as follows :

"On this authority it becomes absolutely clear that the consent order is as effective as an order passed on contest, not only with reference to the conclusion arrived at in the previous suit but also with regard to every step in the process of reasoning on which the said conclusion is founded. When we say "every step in the reasoning" we mean the findings on the essential facts on which the judgment or the ultimate conclusion was founded. In other words the finding which it was necessary to arrive at for the purpose of sustaining the judgment in the particular case will operate as estoppel by judgment."

27. The Civil Procedure Code contains the following provisions: Order 23 Rule 3 provides for compromise of suit -- where it is proved to the satisfaction of the Court that a suit has been adjusted wholly in part by any lawful agreement or compromise, written and signed by the parties. The Court after satisfying itself about the settlement, it can convert the settlement into a judgment decree."

16. Shri Manu Khare, learned counsel has also placed reliance upon a Division Bench judgement of this court passed in a bunch of first appeals decided on 21.4.2016, the leading case being ***First Appeal No. 522 of 2009 (Pradeep Kumar Vs. State of U.P. and others***. The relevant paragraphs 32, 33, 35, 36, 37, 38 and 39 read as under:

"32. In the facts of this case the only distinguishing feature pointing out is that the land of the same village Makanpur which was acquired under Notification dated 12.9.1986 was for planned development of Ghaziabad Development Authority while the land of the same village Makanpur acquired under Notification dated 15.3.1988 is for planned Industrial Development Authority for NOIDA, no other special reasons have been disclosed to us for not providing the same compensation as determined by the Court in the case of ***Ghaziabad Development Authority (supra)*** *to the appellants.*

33. Another reason for the same conclusion flows from the intent of Section 28-A of the Land Acquition Act, 1894 which reads as follows:

"28A. Re-determination of the amount of compensation on the basis of the award of the court:

(1) Where in an award under this Part, the court allows to the applicant any amount of compensation in excess of the amount awarded by the Collector under section II, the persons interested in all the other land.covered by the same notification under section 4, sub-section (I) and who are also aggrieved by the award of the Collector may, notwithstanding that they had not made an application to the Collector under section 18, by written application to the Collector within Ihree months from the date of the award of the court require that the amount of compensation payable to them may be re-determined on the basis of the amount of compensation awarded by the court;

Provided that in computing the period of three months within which an application to the Collector shall be made under Ihis sub-seclion, the day on which the award was pronounced and the time requisite for obtaining a copy of the award shall be ex.cluded.

(2) The Collector shall, on receipt of an application under sub-section (I), conduct an inquiry after giving notice to all the persons interested and giving them a reasonbble opportunity of being heard and make an award determining the amount of compensation payable to the applicants.

(3) Any person who has not accepted the award under sub-section (2) may, by written application to the Collector, require that the matter be referred by the Collector for the determination of the court and the provisions of sections 18 to 28 shall, so far as may be, apply to such reference as they apply to a reference under section 18."

34. From a simple reading of the said section, it is apparently clear that a farmer, who had not filed any application against the award of Special Land Acquisition Officer for making a reference under Section 18 of the Act, becomes entitled to grant of compensation at the higher rate, if the Court awards higher compensation in respect of the land covered by the same notification to the other tenure holders. The farmer is only required to make an application to the Collector for re-determination of his compensation in terms of the order of the Court.

35. At the very outset, it may be recorded that we are not holding that Section 28A of Act 1894 is attracted in the facts of the case. What we are recording is that from a reading of Section 28A of Act 1894 what flows is that even in absence of exemplars and other evidence, higher compensation can be allowed to a tenure holder only on the plea that the 'Court' has enhanced the compensation for others whose land was acquired under the same notification.

36. 'Court' as referred under Section 28-A of Act 1894, would necessarily include the first appellate court, namely, the High Court as the appeal under Section 54 of Act 1894 is only a continuation of original proceedings. 'Court' has been defined under Section 3 (d) of the Land Acquisition Act, 1894 as follows:-

"3(d) the expression "Court" means a principal Civil Court of original jurisdiction, unless the [appropriate Government] has appointed (as it is hereby empowered to do) a special judicial officer within any specified local limits to perform functions of the Court under this Act;"

37. In our opinion, therefore what follows is that the orders passed by the Court including the first appellate court i.e. High Court, in the matter of determination of rate of compensation in respect of land covered by a particular notification, would be a relevant consideration to be taken into

account for determining as to what would be the fair and just compensation for similarly situated tenure holders, whose lands has been acquired under the same notifications or notifications issued thereafter qua the same village/area.

38. Strictly speaking Section 28A of Act 1894 is applicable in respect of land covered by same notification but if the land of the same village/area is acquired under a subsequent notifications then the rate of compensation cannot be any less than the rate determined by the Court for the land covered by first notification unless some special reasons exist.

39. The rate to be provided in such cases if not higher, must be the same as determined by the 'Court' in respect of the land covered by the earlier notification provided always that the land covered by subsequent notification is situate in the same village/area and there are no special reasons to provide a lesser compensation."

17. In that case there were two land acquisition notifications for the same village Makanpur in which land was first acquired under notification dated 12.9.1986 for the development of Gautam Budh Nagar Authority whereas under the second notification dated 15.3.1988 the land of the same village Makanpur was acquired for planned industrial development authority for NOIDA. The division bench of this court observed that no special reasons have been disclosed for not providing the same compensation as determined by the court in the case of the GDA Vs. Kashi Ram First Appeal No. 910 of 2000 and therefore in paragraph 38 (quoted above) the Division Bench of the High Court has held that Section 28-A of the Act, 1894 strictly speaking is applicable in respect of the land covered by the same notification but if the land of the same village/area is acquired under a subsequent notification then the rate of compensation cannot be any less than the rate determined by the court for the land covered by the first notification unless some special reason exists. We may hasten to add that in the present case there is only one land acquisition notification.

18. The Learned Counsel for the Petitioners in support of their submission have relied upon a judgment of the Supreme Court in ***(2018) 2 SCC 660 State of Punjab Vs. Jalauar Singh*** particularly paragraph 12 thereof which reads as under:-

"12. It is true that where an award is made by Lok Adalat in terms of a settlement arrived at between the parties, (which is duly signed by parties and annexed to the award of the Lok Adalat), it becomes final and binding on the parties to the settlement and becomes executable as if it is a decree of a civil court, and no appeal lies against it to any court. If any party wants to challenge such an award based on settlement, it can be done only by filing a petition under Article 226 and/or Article 227 of the Constitution, that too on very limited grounds. But where no compromise or settlement is signed by the parties and the order of the Lok Adalat does not refer to any settlement, but directs the respondent to either make payment if it agrees to the order, or approach the High Court for disposal of appeal on merits, if it does not agree, is not an award of the Lok Adalat. The question of challenging such an order in a petition under Article 227 does not arise. As already noticed, in such a situation, the High Court ought to have heard and disposed of the appeal on merits."

19. The Supreme Court has left no doubt that where an award is made by the Lok Adalat in terms of a settlement arrived

at between the parties which is duly signed by the parties it becomes official and binding on the parties to the settlement and becomes executable as if it is a decree of a civil court and no appeal lies against such award before any court. Such an award based on settlement can be challenged by a party aggrieved by such award only by filing a petition under Article 226 and /or Article 227 of the Constitution and that too on very limited grounds.

20. In the present bunch of writ petitions, it is not the case of the respondents that the award of the Lok Adalat was not based upon a consensus and settlement arrived at between the parties before the Lok Adalat, the respondents being one of the parties to said award nor is it the case of the respondents that, that award of 12.03.2016 was put to challenge by the said respondents before any superior forum. In such circumstances, the award of the Lok Adalat being deemed a decree of a civil court and having become final, the petitioners herein would be entitled to claim the benefit thereof by invoking the provisions of Section 28A of the Land Acquisition Act, 1894 and it is not open to the respondents to raise the plea, at this stage in the present bunch of writ petitions that the award of the Lok Adalat dated 12.03.2016 was questionable or that it was not based on consensus and settlement between the parties therein and that the Lok Adalat was not a court of competent jurisdiction particularly, when the award of 12.03.2016 was based on a reference made by a court of competent jurisdiction hearing references LAR nos. 6 of 2002, 7 of 2002, 8 of 2002 and 9 of 2002 to the Lok Adalat.

21. The petitioners have also placed reliance upon a judgment of a learned Single Judge of the Karnataka High Court, ***ILR 2007 KAR 4533 Vasudave and Others Vs. The Commissioner and Secretary Government Revenue Department and Others.*** Paragraph 11 therein reads as under:-

"11. Insofar as Section 28-A of the LA Act is concerned, the principle underlining the said provision is, if a land owner who has not sought for any reference to a civil court seeking higher compensation, should not be denied the benefit of higher compensation if a reference court or the appellate court were to pay higher compensation to a landlord who is similarly placed. Therefore, the Parliament in its wisdom thought of introducing Section 28-A in order to see that innocent, illiterate and ignorant landlords who are not fully aware of the rights given to them under law are not denied the benefit of the law. This provision is in consonance with equality clause enshrined in our Constitution under Article 14. Therefore, by introducing Section 28-A of the Land Acquisition Act, what was intended was to extend the benefit of payment of higher compensation even to those landlords who had not sought for a reference, provided they filed an application within 30 days from the date of judgment and award of the reference court. When that being the intention of the Parliament, when an award is passed by a Lok Adalat by consent, the said award falls within the order under Section 28-A of the L.A. Act passed by the Court and therefore the landlords are entitled to the benefit of higher compensation as per the award passed by the Lok Adalat. The approach of the trial Court is wholly erroneous, contrary to law and cannot be sustained."

22. Shri Suresh Singh, learned Addl. Chief Standing Counsel by way of rebuttal

submitted that the Lok Adalat itself is not a court and since if on a reference made to a Lok Adalat by a court no award could be made as the parties may not arrive on a compromise or settlement, the Lok Adalat shall advise the parties to seek remedy in a court and where the record of the case is returned to a court, such court shall proceed to deal with such case from the stage which was reached before such reference so made. The learned counsel has referred to the provisions of Section 20 of the Act, 1987, which read as under:

*"**20. Cognizance of Cases by Lok Adalats**-(1) Where in any case referred to in clause (i) of sub-section (5) of Section 19-(i)*

(i) (a) The parties thereof agree; or

(b) One of the parties thereof makes an application to the court, for referring the case to the Lok Adalat forsettlement and if such court is prima facie satisfied that there are chances of such settlementor

(ii) The court is satisfied that the matter is an appropriate one to be taken cognizance of by the Lok Adalat, the court shall refer the case to the Lok Adalat:

Provided that no case shall be referred to the Lok Adalat undersub-clause (b) of clause (i) or clause (ii) by such court except after giving a reasonable opportunity of being heardto the parties.

(2) Notwithstanding anything contained in any other law for the time being in force, the Authority or Committeeorganising the Lok Adalat under sub-section (1) of Section 19 may, on receipt of an application from any,one of the parties to any matter referred to in clause (ii) of sub-section (5) of Section 19 that such matter needs to bedetermined by a Lok Adalat, refer such matter to the Lok Adalat, for determination; Provided that no mattershall be referredto the Lok Adalat except after giving a reasonable opportunity of being heard to the other party.

(3)Where any case is referred to a Lok Adalat under sub-section (1) or wherea reference has been made to it under sub-section (2), the Lok Adalatshall proceed to dispose of the case or matter and arrive at a compromiseor settlement between the parties.

(4)Every Lok Adalat shall, while determining any reference before it underthis Act, act with utmost expedition to arrive at a compromise or settlementbetween the parties and shall be guided by the principles of justiceequity, fair play and other legal principles.

(5) Where no award is made by the Lok Adalat on the ground that no compromise or settlement could be arrived atbetweenthe parties,the record of the case shall be returned by it to the court, from which the reference has beenreceived undersub-section (1) fordisposal in accordance with law.

(6) Where no award is made by the Lok Adalat on the ground that no compromise or settlement could be arrived atbetweenthe parties,in a matter referred to in sub-section (2), that Lok Adalat shall advice the parties to seek remedyin a court.

(7) Where the record of the case is returned under sub-section (5) to the court, such court shall proceed to deal suchreferenceunder sub-section (1).

23. The learned Addl. Chief Standing Counsel referring to the provisions of sub section (6) and (7) of Section 20 of the Act, 1987 submits that where no award can be made by the Lok Adalat the matter has to be referred to the court from which the reference was made.

24. The learned Addl. C.S.C. further referred to the provisions of Section 3(d) of the Act, 1894 which defines 'court' under the Act to mean a principal civil court of original jurisdiction unless the appropriate court has appointed a special judicial officer within any specified local limits to perform the functions of the court under the Act and submits that the 'court' only means the principal court of original jurisdiction or a special judicial officer empowered to perform the functions of the court appointed by the appropriate government. The submission is that since the Lok Adalat is not a 'court' therefore the award of the Lok Adalat based upon a compromise arrived between the parties to such reference cannot be deemed to be a decree of a civil court. The learned Addl. C.S.C has further referred to part III of the Land Acquisition Act and submits that reference under section 18 of the Act, 1894 therein means reference to a 'court' as defined under section 3(d) of the Act 1894 but in the present case the references preferred by other persons being reference No. 6/2002, 7/2002, 8/2002 which was pending before the court under section 18 of the Act, 1894 was referred to the Lok Adalat on the request of the parties and it was therein that a compromise had been arrived at between the parties to that reference which was decided by the Lok Adalat through an award dated 12.3.2016 and not by the court under section 18 of the Act, 1894 on a reference made to it and therefore the award made by the Lok Adalat cannot be deemed to be a decree of a civil court. He therefore submits that such award of the Lok Adalat not being a decree of a civil court the petitioners herein cannot claim the benefit of such award by invoking the provisions of Section 28-A of the Act, 1894. Learned Addl. C.S.C. further submits that under section 28-A (3) of the Act, 1894 any person who has not accepted the award under sub section (2) may by a written application to the Collector require that the matter be referred by the Collector for the determination of the court and the provisions of Section 18 to 28 shall apply to such reference as they apply to a reference under section 18 of the Act, 1894.

25. The submission of Shri Kaushlendra Singh, learned counsel for the respondent is that the petitioners in the present case have not submitted any application to the Collector for referring the matter for determination of the court and therefore they cannot claim the same benefits and enhanced compensation under the award dated 12.3.2016.

26. If we examine the facts of the case it will be noticed that when the petitioners herein had applied to the Collector-respondent no.4 for granting them the benefits under Section 28A of the Act, 1894 with reference to the award of the Lok Adalat dated 12.3.2016 enhancing the amount of compensation from Rs.20/- per square yard to Rs. 297/- per square yard as stated in paragraph 10 of the writ petition and which has not been disputed by the respondents in their respective counter affidavits. In the counter affidavit filed on behalf of the respondents 1, 2 and 4, the averments of paragraph 10 of the writ petition, have been stated to be matter of record and therefore, call for no comments and in the counter affidavit filed on behalf of the respondent no.3 in paragraph 6 thereof it is stated that the averments of paragraph 10 are matter of record and therefore, need no specific reply. In this view of the matter, the submission of the learned counsel for the respondents that the petitioners have not submitted any application to the Collector for referring the

matter for determination of the court is contrary to their own admitted facts is therefore, rejected.

27. We may also note here that sub section (3) of Section 28A refers to a person who has not accepted the award under sub-section (2) of Section 28A of the Act, 1894 and therefore, gives such person an option to make an application in writing to the Collector to refer the matter to the court for determination of the court. In the present case, the impugned order dated 19.05.2018, Annexure-10 to the writ petition cannot be said to be an award of the ADM, LAO, Gautam Budh Nagar nor is it an award of the Lok Adalat and therefore, the question of the petitioners herein again applying to the Collector to refer the matter for determination by a court does not arise. Besides in the present bunch of writ petitions, the petitioners were seeking the benefit of the Award of the Lok Adalat dated 12.03.2016 under the provisions of Section 28A of the Act, 1894 and had, therefore, submitted their applications dated 12.05.2016.

28. The learned Chief Standing counsel next submitted that the "court' as defined in Section 3(d) of the Land Acquisition Act, 1894 is the principal civil court of original jurisdiction unless the appropriate government has appointed a special judicial officer to perform the functions of the court under the Act, 1894, therefore, the Lok Adalat not being a court, the award of the Lok Adalat under Section 21 of the Act, 1987 would not be binding upon the respondents so far as the present petitioners are concerned and would not entitle them to the benefits of the award dated 12.03.2016. Reliance has been placed on the judgment of the Supreme Court in the case of **(2008) 6 SCC 741 Garhwal Mandal Vikas Nigam Ltd. Vs. Krishna Travel Agency**, particularly paragraph 9 thereof which reads as under:-

"9. There is another facet of the problem. The party will be deprived of the right to file an appeal under section 37(I)(b) of the Arbitration and Conciliation Act. This means that a valuable right of appeal will be lost. Therefore, in the scheme of things, the submission of the learned counsel cannot be accepted. Taking this argument to a further logical conclusion, when the appointment is made by the High Court under section 11(6) of the Arbitration and Conciliation Act, then in that case, in every appointment made by the High Court in exercise of its power under section 11(6), the High Court will become the Principal Civil Court of Original Jurisdiction, as defined in Section 2(1(e) of the 1996 Act. That is certainly not the intention of the legislature. Once an arbitrator is appointed then the appropriate forum for filing the award and for challenging the same, will be the Principal Civil Court of Original Jurisdiction. Thus, the parties will have the right to move under Section 34 of the 1996 Act and to appeal under Section 37 of the 1996 Act. Therefore, in the scheme of things, if appointment is made by the High Court or by this Court, the Principal Civil Court of Original Jurisdiction remains the same as contemplated under Section 2(1)(e) of the 1996 Act."

29. In our opinion, the said judgment has no application to the facts of the present case. That was a case under the Arbitration and Conciliation Act, 1996 dealing with an application for appointment of an arbitrator under Section 11(6) of the Act, 1996 and there the Supreme Court had appointed a Senior Advocate as Arbitrator

who gave his award which was filed before the District Judge, Dehradun and an application under Section 34 of the Act, 1996 was filed for setting aside that award and in the meantime, I.A. Nos. 1 and 2 were filed before the Supreme Court on the premise that the Supreme Court alone had the jurisdiction to dispose of the objections since the arbitrator had been appointed by it. The Supreme Court rejected the submissions and held that if the argument is accepted, then in all such cases where an appointment is made by a High Court, of an arbitrator, under exercise of powers under Section 11(6) of the Act, 1996, the High Court would become the principal civil court of original jurisdiction which was not the intention of the legislature. In our opinion, the said judgment has absolutely no application to the facts of the present case as in the present case, the petitioners are seeking the benefit of an award of the Lok Adalat dated 12.3.2016 on a reference under section 18 of the Act, 1894 being referred to it by that court and the benefit of that award is being claimed under Section 28A of the Act, 1894 under which an award of the Lok Adalat is deemed to be a decree of a civil court and Section 28A gives a right to any person who has not accepted the Award to claim same benefit as under the award.

30. The learned counsel for the respondents have also relied upon a Division Bench judgment of this Court in ***2013 6 ADJ 104, Northern Coal Fields, Singrauli Vs Aluminium Industries Ltd., Kundara (Kerala).*** That was also a case under the Arbitration and Conciliation Act, 1996 which has no application to the facts of the present case.

31. The next judgement referred is a judgment of the learned Single Judge of this Court in Arbitration Application under Section 11, no. 32 of 2012 decided on 31.5.2012 wherein the court had referred to the judgment of Krishna Travel Agency (supra) and therefore, the same has no application to the facts of the present case.

32. Reliance has also been placed on the judgment of the Supreme Court in ***(2012) 4 SCC 307, Kunwar Singh Saini Vs High Court of Delhi***, particularly paragraphs 22 and 23 thereof and the submission is that conferment of jurisdiction is a legislative function and if the court passed an order or decree having no jurisdiction over the matter it would amount to a nullity and such a decree/award would be inexecutable once the forum is found to have no jurisdiction. The submission is that when the Act creates a right or obligation and enforces the performance therein in a specified manner that performance cannot be enforced in any other manner. Paragraphs 22 and 23 of the judgment read as under:-

"22. There can be no dispute regarding the settled legal proposition that conferment of jurisdiction is a legislative function and it can neither be conferred with the consent of the parties nor by a superior court, and if the court passes order/decree having no jurisdiction over the matter, it would amount to a nullity as the matter goes to the roots of the cause. Such an issue can be raised at any belated stage of the proceedings including in appeal or execution. The finding of a court or tribunal becomes irrelevant and unenforceable/inexecutable once the forum is found to have no jurisdiction. Acquiescence of a party equally should not be permitted to defeat the legislative animation. The court cannot derive jurisdiction apart from the statute.

23. When a statute gives a right and provides a forum for adjudication of rights, remedy has to be sought only under the provisions of that Act. When an Act creates a right or obligation and enforces the performance thereof in a specified manner, "that performance cannot be enforced in any other manner". Thus for enforcement of a right/obligation under a statute, the only remedy available to the person aggrieved is to get adjudication of rights under the said Act."

33. In our opinion, this judgment also does not help the respondents and has no application to the facts of the present case for the reason, that the award of the Lok Adalat dated 12.03.2016 was based upon a compromise arrived at between the parties before it, the State respondents being one of the parties and it was based on a reference made to the Lok Adalat by the court hearing the references under Section 18 of the Land Acquisition Act, 1894 and by virtue of Section 21 of the Legal Services Authority Act, 1987 such award of the Lok Adalat shall be deemed to be a decree of the civil court and by virtue of Section 28A of the Land Acquistion Act, 1894, the petitioners herein would have a right to claim the benefit of such an award/decree dated 12.03.2016 even if, they had not filed their own references so long as their land was governed by the same notification under Section 4 of the Act, 1894 and in the same village and area as the persons covered by the decision of the Lok Adalat.

34. The learned counsel for the respondents next referred to the judgment of the Supreme Court in ***(2008) 2 SCC 660, State of Punjab and another Vs Jalaur Singh and others***, particularly paragraphs 8, 9 and 10 which read as under:-

"8. It is evident from the said provisions that Lok Adalats have no adjudicatory or judicial functions. Their functions relate purely to conciliation. A Lok Adalat determines a reference on the basis of a compromise or settlement between the parties at its instance, and put its seal of confirmation by making an award in terms of the compromise or settlement. When the Lok Adalat is not able to arrive at a settlement or compromise, no award is made and the case record is returned to the court from which the reference was received, for disposal in accordance with law. No Lok Adalat has the power to "hear" parties to adjudicate cases as a court does. It discusses the subject matter with the parties and persuades them to arrive at a just settlement. In their conciliatory role, the Lok Adalats are guided by principles of justice, equity, fair play. When the LSA Act refers to 'determination' by the Lok Adalat and 'award' by the Lok Adalat, the said Act does not contemplate nor require an adjudicatory judicial determination, but a non-adjudicatory determination based on a compromise or settlement, arrived at by the parties, with guidance and assistance from the Lok Adalat. The 'award' of the Lok Adalat does not mean any independent verdict or opinion arrived at by any decision making process. The making of the award is merely an administrative act of incorporating the terms of settlement or compromise agreed by parties in the presence of the Lok Adalat, in the form of an executable order under the signature and seal of the Lok Adalat.

9. But we find that many sitting or retired Judges, while participating in Lok Adalats as members, tend to conduct Lok Adalats like courts, by hearing parties, and imposing their views as to what is just and equitable, on the parties. Sometimes they

get carried away and proceed to pass orders on merits, as in this case, even though there is no consensus or settlement. Such acts, instead of fostering alternative dispute resolution through Lok Adalats, will drive the litigants away from Lok Adalats. Lok Adalats should resist their temptation to play the part of Judges and constantly strive to function as conciliators. The endeavour and effort of the Lok Adalats should be to guide and persuade the parties, with reference to principles of justice, equity and fair play to compromise and settle the dispute by explaining the pros and cons, strength and weaknesses, advantages and disadvantages of their respective claims."

10. The order of the Lok Adalat in this case (extracted above), shows that it assumed a judicial role, heard parties, ignored the absence of consensus, and increased the compensation to an extent it considered just and reasonable, by a reasoned order which is adjudicatory in nature. It arrogated to itself the appellate powers of the High Court and 'allowed' the appeal and 'directed' the respondents in the appeal to pay the enhanced compensation of Rs.62,200/- within two months. The order of the Lok Adalat was not passed by consent of parties or in pursuance of any compromise or settlement between the parties, is evident from its observation that "if the parties object to the proposed order they may move the High Court within two months for disposal of the appeal on merits according to law". Such an order is not an award of the Lok Adalat. Being contrary to law and beyond the power and jurisdiction of the Lok Adalat, it is void in the eye of law. Such orders which "impose" the views of the Lok Adalats on the parties, whatever be the good intention behind them, bring a bad name to Lok Adalats and legal services."

35. The submission of the learned counsel for the respondents is that when the Legal Services Authority Act refers to determination by the Lok Adalat and award of the Lok Adalat, the said Act does not admittedly require an adjudicatory determination but non-adjudicatory determination passed on a compromise and settlement arrived at by the parties with guidance and assistance from the Lok Adalat.

36. In paragraph 9, the Supreme Court has observed that sometimes the members of the Lok Adalat get carried away and proceed to pass orders on merits even though there is no consensus or settlement as was the case in the case of Jalour Singh (Supra) as noted by the court in paragraph 10 of the judgment. That is not the factual position in the case of the present petitioners.

37. The learned Chief Standing Counsel has also referred to a judgment of a learned Single Judge of the Patna High Court dated 24.02.2012 passed in ***Civil Writ jurisdiction case no. 13375 of 2011 (Surendra Singh and others Vs Deo Muni Singh and others).*** In that case, the learned Single Judge has held that the Lok Adalat does not fall within the definition of court under the Legal Services Authority Act, 1987 and therefore, has no inherent jurisdiction to decide an issue of fraud. In our opinion, the said judgment has absolutely no application to the facts of the present case since it is nobody's case that any fraud was exercised by any of the parties on the Lok Adalat to obtain the award dated 12.03.2016.

38. Reliance has been placed by the respondents upon a judgment of this Court in ***Civil Miscellaneous Writ Petition no.***

5899 of 2017 (Dheer Singh and others Vs State of U.P. and others). In our opinion the said judgment has no application to the facts of the present case as in that case, the application under Section 28A of the Act, 1894 had been filed by the petitioners therein claiming re-determination of compensation on the basis of the judgment rendered by the High Court in first appeal on 3rd, December, 2014 and not on the basis of the award made by the reference court. The Division Bench of the High Court held that an application under Section 28A cannot be filed for re-determination of compensation by treating the award as one made by the High Court in the first appeals or by the Supreme Court and the High Court held that 'court' referred to in Section 3(d) of the Act, 1894 means that principal civil court of original jurisdiction and not the High Court or the Supreme Court. In the present case, the award of the Lok Adalat on which reliance has been placed by the petitioners herein was passed by the Lok Adalat on a reference made to it by the court hearing a bunch of references under Section 18 of the Land Acquisition Act, 1894 and, therefore, the award of the Lok Adalat would be deemed to be a decree of a civil court under Section 21 of the Legal Services Authority Act, 1987 and the petitioners would have right to claim benefit of the said award by invoking the provisions of Section 28A of the Act, 1894.

39. The next judgment relied on by the respondents is ***(1997) 4 SCC 473, Bhagti (Smt.) deceased through her legal heirs Jagdish Ram Sharma Vs State of Haryana.*** That was also a case where the benefit under Section 28A(1) of the Act, 1894 was being claimed with reference to an order made by the High Court, and the Supreme Court held that Section 28A(1) has no application where a right to re-determination of compensation is based upon an order of the High Court. The said judgment has no application to the facts of the present case.

40. The respondents have next relied upon ***AIR 1995 SC 2259, Union of India and another Vs Pradeep Kumari and others.*** In that case, the Supreme Court held that the cause of action for moving the application for re-determination of compensation under Section 28A arises from the award on the basis of which re-determination of compensation is sought and the limitation for moving the application under Section 28A will begin to run only from the date of the award on the basis of which re-determination of compensation is sought. In the present case, we may note that the application under Secftion 28A was filed by the present petitioners being successors of the previous recorded tenure holders on 12.05.2016 seeking benefit of the award of the Lok Adalat dated 12.03.2016 i.e. within three months from the date of the award of the court. The court here is with reference to the Lok Adalat whose award by virtue of Section 21 of the Act, 1987 is deemed to be a decree of a civil court and therefore, the same has been filed within the time frame as provided in Section 28A(1) of the Act, 1894. The judgment in the case of Pradeep Kumar(supra), therefore, has no application to the facts of the present case.

41. We may at this stage also note that the respondents have nowhere taken the plea that applications of the petitioners under section 28A of the Act, 1894 was filed beyond the period of limitation of three months as provided in Section 28A(1) of the Act, 1894, nor have they disputed the date of filing of the applications by the petitioners under Section 28A of the Act.

42. Reliance has next been placed by the respondents on the judgment of the Supreme Court in ***(1995) 2 SCC 689 Babua Ram and others vs State of U.P. and another.*** In our opinion, the said judgment also has no application to the facts of the present case. Respondents have also relied upon a Division Bench judgment of this Court in ***Writ petition (C) no. 611 of 2017 (Smt. Kamla Tomar Vs State of U.P. and others)*** decided on 23.01.2017 which again is on the question of limitation and has no application to the facts of the present case.

43. The next case relied upon by the respondents is a Division Bench judgment of this Court in ***Writ Petition (C) No. 7218 of 2019 (Tezpal Singh & others Vs. State of U.P. & Others)*** decided on 08.03.2019, which is also on the question of limitation, and, therefore, has no application to facts of the present case.

44. We may, at this stage, refer to the provisions of Section 19 of the legal Services Authority Act, 1987 which reads as under:-

*"**Section 19 - Organization of Lok Adalats.**--(1) Every State Authority or District Authority or the Supreme Court Legal Services Committee or every High Court Legal Services Committee or, as the case may be, Taluk Legal Services Committee may organise Lok Adalats at such intervals and places and for exercising such jurisdiction and for such areas as it thinks fit.*

(2) Every Lok Adalat organised for an area shall consist of such number of :-

(a) Serving or retired judicial officers and

(b) Other persons,of the area as may be specified by the State Authority or the District Authority or the Supreme Court Legal Services Committee or the High Court Legal Services Committee, or as the case may be, the Taluk Legal Services Committee, organising such Lok Adalats.

(3) The experience and qualifications of other persons referred to in clause (b) of sub-section (2) for Lok Adalats organised by the Supreme Court Legal Services Committee shall be such as may be prescribed by the Central Government in consultation with the Chief Justice of India.

(4) The experience and qualifications of other persons referred to in clause (b) of sub-section (2) for Lok Adalats other than referred to in sub-section (3) shall be such as may be prescribed by the State Government in consultation with the Chief Justice of the High Court.

(5) A Lok Adalat shall have jurisdiction to determine and to arrive at a compromise or settlement between the parties to a dispute in respect of :-

(i) Any case pending before; or

(ii) Any matter which is falling within the jurisdiction of, and is not brought before, any court for which the Lok Adalat is organised.

Provided that the Lok Adalat shall have no jurisdiction in respect of any case or matter relating to an offence not compoundable under any law.

45. Section 20 of the Act, 1987 has already been quoted above. Sub-section (1) of Section 20 provides for reference of any case to the Lok Adalat, if the parties thereof agree or one of the parties thereof, in a case agrees and makes an application to the court for referring the case to the Lok Adalat for settlement and if the court is satisfied that there are chances of settlement, the court shall refer the case to

the Lok Adalat. Sub-section (3) of Section 20 provides that the Lok Adalat in a case referred to it shall proceed to dispose of the case or matter and arrive at a compromise or settlement between the parties. In the present case, it is not the case of the respondents that there was no valid case referred for adjudication by the Lok Adalat for adjudicating LARs No. 6 of 2002, 7 of 2002, 8 of 2002 and 9 of 2002. It is also not the case of the respondents that they were not party to such references to the Lok Adalat and it is also not the case of the respondents that the award dated 12.03.2016 was passed by the Lok Adalat becoming a victim of a fraud. The respondents were party to the Land Acquisition references under Section 18 of the Act, 1894 which were referred to the Lok Adalat and on which award dated 12.03.2016 was passed. Such an award of the Lok Adalat shall by virtue of provision Section 21 of the Act, 1987 be deemed to be a decree of a civil court. It is the admitted case of the petitioners herein that they had not filed their own references under Section 18 of the Act, 1894 against the original Land Acquisition award under Section 11 of the Act, 1894 published on 28.11.1984. The petitioners, therefore, as soon as, the award was made by the Lok Adalat on 12.03.2016, moved an application under Section 28A of the Act, 1984 on 12.05.2016 seeking the benefits of enhanced compensation under the award of 12.03.2016. The application of the petitioners was therefore, within time.

46. Section 28A of the Act, 1894 provides for re-determination of the amount of compensation on the basis of the award of the court to persons interested in all the other land covered by the same notification under Section 4 sub-section (1) of the Act, 1894 and who are also aggrieved by the award of the Collector notwithstanding that they had not made an application to the Collector under Section 18 of the Act, 1894 and claim re-determination on the basis of the amount of the compensation awarded by the court. It is not disputed by the respondents that the lands of the petitioners are situated in village Aliwardipur/Alahbadripur, Pargana and Tehsil Dadri, then District Ghaziabad now District Gautam Budh Nagar, which was notified under Section 4 sub section (1) of the Land Acquisition Act, 1894 dated 23/03.1983. The averments of paragraph 3 of the writ petition have not been denied in paragraph 4 of the counter affidavit filed on behalf of the respondents 1,2 and 4 and in paragraph 4 of the counter affidavit filed on behalf of the respondent no.3. The averments of paragraph 3 of the writ petition are stated to be matter of record. Likewise, the averments of paragraph 4, 5 and 6 of the writ petition have been replied in paragraph 5 of the counter affidavit of the respondents no.1, 2 and 4 as well, calling for no comments being matter of record. Likewise, in the counter affidavit of respondent no.3 the averments of paragraphs 4, 5 and 6 of the writ petition have been stated in paragraph 4 of the affidavit to be matter of record.

47. Thus, there is absolutely no dispute that the land of the present petitioners was covered by the notification under Section 4 of the Land Acquistion Act, 1894 relating to Village Aliwardipur/Alahbadripur, Pargana and Tensil Dadri, District Gautam Budh Nagar in respect of which an award under Section 11 of the Act was published on 28.11.1984 fixing Rs. 20/- per square yard as compensation for the land acquired and which on a reference made under Section 18 of the Act, 1894, by the affected persons

other than the petitioners herein culminated in an award of the Lok Adalat dated 12.03.2016 based upon a compromise and settlement between the parties, the respondents being one of the parties, in such view of the matter in our considered opinion, the present petitioners cannot be denied the benefit of provisions of Section 28A of the Act, 1894 and they cannot be denied the benefit of the award dated 12.03.2016.

48. The claim of the petitioners has been rejected by the respondent no. 4 by the impugned order dated 19.05.2018 on the ground that they had not filed a reference under Section 18 of the Act, 1894 and that the award of 12.03.2016 was only between the parties before the Lok Adalat or before the court under Section 18 of the Act, 1894. The reasoning given by the respondent no. 4 is absolutely illegal and arbitrary and against the statutory mandate of Section 28A of the Act, 1894 and in view of our discussion herein above, the impugned order dated 19.5.2018 deserves to be set aside and is accordingly set aside. The writ petition succeeds and is **allowed** and we hold that the petitioners would be entitled for payment of compensation as determined in the Award of the Lok Adalat dated 12.03.2016. The respondent no. 4-Addl. District Magistrate (Land Acquisition)/Special Land Acquisition Officer, District Gautam Budh Nagar is directed to pass fresh order on the application of the petitioners dated 12.5.2016 in the light of our observations made herein above within a period of three months from the date of receipt of the certified copy of this order.

49. The claim of the petitioners of ***Writ Petition No. 27876 of 2018 (Yunus and others Vs. State of U.P. and others)*** is that their father was recorded tenure holder of plot nos. 206 area 0-10-0, plot no. 207 area 0-19-0, plot no. 209-M area 0-19-0, plot no. 208 area 2-10-0, plot no. 210 area 0-22-0 total area 6-0-0 situated in village Aliwardipur/Alabadirpur Pargana and Tehsil Dadri. The said plots have also been notified for acquisition under section 4 of the Act, 1894 on 22.3.1983. The award was published on 28.11.1984 fixing Rs.20/- per sq. yard as compensation for the land acquired. One Fateh Mohd., who was a recorded tenure holder of Plot No. 180 Ka area 1-9-0 situated in the same village being affected by the award dated 28.11.1984, preferred a reference under section 18 of the Act, 1894 before the Collector/Special Land Acquisition Officer being LAR No. 6 of 2002. Subsequently, the said LAR was produced before the Lok Adalat i.e. Addl. District and Sessions Judge/F.T.C. No. 2 Gautam Budh Nagar and the same was allowed on 12.3.2016 on the basis of a compromise between the parties alongwith other references enhancing the compensation to Rs.297.50/- per sq. yard. Though the petitioners have not preferred any reference but on coming to know about the said award, they have moved an application on 13.5.2016 under section 28-A of the Act, 1894 before the respondent no. 4 within time. The said application of the petitioners has been rejected by the respondent no. 4 by the impugned order dated 19.5.2018. In view of the fact that identical questions of fact and law are involved in this writ petition also, the impugned order dated 19.5.2018 is set aside and the writ petition is **allowed** in the light of the discussion and direction given in the leading writ petition no. 27848 of 2018. The respondent no. 4-Addl. District Magistrate (Land Acquisition)/Special Land Acquisition Officer, District Gautam Budh Nagar is

directed to pass fresh order on the application of the petitioners dated 13.5.2016 in the light of our observations made herein above within a period of three months from the date of receipt of the certified copy of this order.

50. The claim of the petitioners of ***Writ Petition No. 20101 of 2018 (Khushi Mohammad and another vs. State of U.P. and others)*** is that their father was recorded tenure holder of ½ part of plot Nos. 183M area 0.14-0, plot no. 184M area 0-0-0, plot no. 192 area 0-3-61/3 and plot no. 193 area 4-5-62/3 total area 5-7-62/3 situated in village Aliwardipur/Alabadirpur Pargana and Tehsil Dadri. The said plots have also been notified for acquisition under section 4 of the Act, 1894 on 22.3.1983. The award was published on 28.11.1984 fixing Rs.20/- per sq. yard as compensation for the land acquired. One Fateh Mohd., who was a recorded tenure holder of Plot No. 180 Ka area 1-9-0 situated in the same village being affected by the award dated 28.11.1984, preferred a reference under section 18 of the Act, 1894 before the Collector/Special Land Acquisition Officer being LAR No. 6 of 2002. Subsequently, the said LAR was produced before the Lok Adalat i.e. Addl. District and Sessions Judge/F.T.C. No. 2 Gautam Budh Nagar and the same was allowed on 12.3.2016 on the basis of a compromise between the parties alongwith other references enhancing the compensation to Rs.297.50/- per sq. yard. Though the petitioners have not preferred any reference but on coming to know about the said award, they have moved an application on 17.5.2016 under section 28-A of the Act, 1894 before the respondent no. 4 within time. The said application of the petitioners has been rejected by the respondent no. 4 by the impugned order dated 19.5.2018. In view of the fact, that identical questions of fact and law are involved in this writ petition also, the impugned order dated 19.5.2018 is set aside and the writ petition is **allowed** in the light of the discussion and direction given in the leading writ petition no. 27848 of 2018. The respondent no. 4-Addl. District Magistrate (Land Acquisition)/Special Land Acquisition Officer, District Gautam Budh Nagar is directed to pass fresh order on the application of the petitioners dated 17.5.2016 in the light of our observations made herein above within a period of three months from the date of receipt of the certified copy of this order.

51. The claim of the petitioner of ***Writ Petition No. 27873 of 2018 (Imamuddin Vs. State of U.P and others)*** is that his father was recorded tenure holder of plot no. 185 area 0-10-0 situated in village Aliwardipur/Alabadirpur Pargana and Tehsil Dadri. The said plots have also been notified for acquisition under section 4 of the Act, 1894 on 22.3.1983. The award was published on 28.11.1984 fixing Rs.20/- per sq. yard as compensation for the land acquired. One Fateh Mohd., who was a recorded tenure holder of Plot No. 180 Ka area 1-9-0 situated in the same village being affected by the award dated 28.11.1984, preferred a reference under section 18 of the Act, 1894 before the Collector/Special Land Acquisition Officer being LAR No. 6 of 2002. Subsequently, the said LAR was produced before the Lok Adalat i.e. Addl. District and Sessions Judge/F.T.C. No. 2 Gautam Budh Nagar and the same was allowed on 12.3.2016 on the basis of a compromise between the parties alongwith other references enhancing the compensation to Rs.297.50/- per sq. yard. Though the petitioners have not preferred any reference but on coming

to know about the said award, they have moved an application on 12.5.2016 under section 28-A of the Act, 1894 before the respondent no. 4 within time. The said application of the petitioners has been rejected by the respondent no. 4 by the impugned order dated 19.5.2018. In view of the fact that identical questions of fact and law are involved in this writ petition also, the impugned order dated 19.5.2018 is set aside and the writ petition is **allowed** in the light of the discussion and direction given in the leading writ petition no. 27848 of 2018. The respondent no. 4-Addl. District Magistrate (Land Acquisition)/Special Land Acquisition Officer, District Gautam Budh Nagar is directed to pass fresh order on the application of the petitioner dated 12.5.2016 in the light of our observations made herein above within a period of three months from the date of receipt of the certified copy of this order.

52. The claim of the petitioners of **W.P. No. 1947 of 2020 (Yunus and others Vs. State of U.P. and others)** is that they are the recorded bhumidhar in possession of 1/3 share in Gata No. 190 area 2-18-0 situated in village Aliwardipur/Alabadirpur Pargana and Tehsil Dadri. The said plots have also been notified for acquisition under section 4 of the Act, 1894 on 22.3.1983. The award was published on 28.11.1984 fixing Rs.20/- per sq. yard as compensation for the land acquired. One Fateh Mohd., who was a recorded tenure holder of Plot No. 180 Ka area 1-9-0 situated in the same village being affected by the award dated 28.11.1984, preferred a reference under section 18 of the Act, 1894 before the Collector/Special Land Acquisition Officer being LAR No. 6 of 2002. Subsequently, the said LAR was produced before the Lok Adalat i.e. Addl. District and Sessions Judge/F.T.C. No. 2 Gautam Budh Nagar and the same was allowed on 12.3.2016 on the basis of a compromise between the parties alongwith other references enhancing the compensation to Rs.297.50/- per sq. yard. Though the petitioners have not preferred any reference but on coming to know about the said award, they have moved an application on 2.6.2016 under section 28-A of the Act, 1894 before the respondent no. 4 within time. The said application of the petitioners has been rejected by the respondent no. 4 by the impugned order dated 3.9.2019. In view of the fact that identical questions of fact and law are involved in this writ petition also, the impugned order dated 03.09.2019 is set aside and the writ petition is **allowed** in the light of the discussion and direction given in the leading writ petition no. 27848 of 2018. The respondent no. 2-Addl. District Magistrate (Land Acquisition)/Special Land Acquisition Officer, District Gautam Budh Nagar is directed to pass fresh order on the application of the petitioners dated 2.6.2016 in the light of our observations made herein above within a period of three months from the date of receipt of the certified copy of this order.

53. The claim of the petitioners of **W.P. No. 27846 of 2018 (Ayub and others Vs. State of U.P. and others)** is that their fathers were recorded tenure holders of Plot Nos. 194 area 0-5-, plot no. 195 area 1-12-0, plot no. 196 area 3-8-0 total area 5-5-0 situated in village Aliwardipur/Alabadirpur Pargana and Tehsil Dadri. The said plots have also been notified for acquisition under section 4 of the Act, 1894 on 22.3.1983. The award was published on 28.11.1984 fixing Rs.20/- per sq. yard as compensation for the land acquired. One Fateh Mohd., who was a

recorded tenure holder of Plot No. 180 Ka area 1-9-0 situated in the same village being affected by the award dated 28.11.1984, preferred a reference under section 18 of the Act, 1894 before the Collector/Special Land Acquisition Officer being LAR No. 6 of 2002. Subsequently, the said LAR was produced before the Lok Adalat i.e. Addl. District and Sessions Judge/F.T.C. No. 2 Gautam Budh Nagar and the same was allowed on 12.3.2016 on the basis of a compromise between the parties alongwith other references enhancing the compensation to Rs.297.50/- per sq. yard. Though the petitioners have not preferred any reference but on coming to know about the said award, they have moved an application on 12.5.2016 under section 28-A of the Act, 1894 before the respondent no. 4 within time. The said application of the petitioners has been rejected by the respondent no. 4 by the impugned order dated 19.5.2018. In view of the fact that identical questions of fact and law are involved in this writ petition also, the impugned order dated 19.5.2018 is set aside and the writ petition is **allowed** in the light of the discussion and direction given in the leading writ petition no. 27848 of 2018. The respondent no. 4-Addl. District Magistrate (Land Acquisition)/Special Land Acquisition Officer, District Gautam Budh Nagar is directed to pass fresh order on the application of the petitioners dated 12.5.2016 in the light of our observations made herein above within a period of three months from the date of receipt of the certified copy of this order.

54. There shall be no order as to costs.

(2020)09ILR A590

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 25.02.2020

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.

WRIT – C No. 28560 of 2019

C/M Thakur Biri Singh Inter College Tundla, Firozabad & Anr. ...Petitioners

Versus

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

Counsel for the Petitioners:

Sri Nitinjay Pandey, Sri Gajendra Pratap

Counsel for the Respondents:

C.S.C., Sri Hemendra Kumar, Sri Naresh Chandra Tripathi

(A) Civil Law-U.P. High Schools And Intermediate Colleges (Payment Of Salaries Of Teachers And Other Employees) Act-1971-Section 5(1) - Procedure for payment of salary in the case of certain institutions - Societies Registration Act, 1860 U.P. - Section 25(2) - Intermediate Education Act, 1921 - Even in the absence of any challenge the Inspector retains the jurisdiction to exercise her authority under Section 5(1) of the Act of 1971 if a difficulty in law arises in payment of salary - Inspector can exercise power under Section 5(1) of the Act of 1971 if a serious dispute has arisen regarding constitution of the committee of management.(Para -34,35)

District Inspector of Schools - invoked authority under Section 5(1) of the U.P. High Schools And Intermediate Colleges (Payment Of Salaries Of Teachers And Other Employees) Act, 1971 - pass an order of single operation - ground - petitioner management stood recognized by the Inspector on 17.10.2018 - which is not challenged by anyone, and as there is no difficulty in payment of salary to the teachers and employees of the institution - invocation of authority under Section 5(1) of the Act of 1971 to pass an order of single operation is wholly arbitrary and unsustainable in law.(Para-1)

HELD:- The exercise of power by the Inspector, in the facts of the present case to pass an order of single operation of accounts is clearly justified and is in consonance with the law laid down by this Court. (Para-36)

Petition dismissed. (E-7)

List of cases cited: -

1. Dharampal Satyapal Ltd. Vs Deputy Commissioner of Central Excise, Gauhati & ors., (2015) 8 SCC 519

2. Committee of Management, Gandhi Smarak Inter College, Agra Vs District Inspector of Schools, Agra, 2001 (2) UPLBEC 1347

3. Committee of Management, Pt. Jawahar Lal Nehru Inter College, Bansgaon Vs Deputy Director of Education, Gorakhpur Region, Gorakhpur & ors., (2005) 1 UPLBEC 85

4. Committee of Management Vs District Inspector of Schools & ors., 1978 AWC 124

5. Jaswant Singh Vs District Inspector of Schools & ors., 1980 ALJ 124 : 1980 UPLBEC 43 (DB)

6. Committee of Management, Sri Gandhi Mahavidyalaya Vs District Inspector of Schools, Ballia & ors., 1981 Education Cases 100 : 1981 UPLBEC 328

7. Committee of Management of Sarvodaya Inter College Vs Deputy Director of Education, Vth Region, Varanasi & ors., 1982 UPLBEC 31

8. Committee of Management of Shri Nehru Intermediate College, Rohi, Varanasi & anr. Vs District Inspector of Schools, Varanasi & anr. , (1990) 1 UPLBEC 339

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

1. This writ petition is directed against an order passed by the District Inspector of Schools, Firozabad, dated 26th June, 2019, whereby petitioner's application, filed pursuant to orders passed by this Court in Writ Petition No. 16904 of 2019, has been rejected and the previous order passed by the Inspector on 29th March, 2019 is maintained. The previous order of Inspector, dated 29th March, 2019, holds that in view of the order passed by this Court on 23rd January, 2019, in Special Appeal No. 215 of 2018, the continuance of petitioner committee pursuant to elections held on 30th September, 2018 has become impermissible in law and, consequently the Inspector has invoked her authority under Section 5(1) of the U.P. High Schools And Intermediate Colleges (Payment Of Salaries Of Teachers And Other Employees) Act, 1971 to pass an order of single operation. This order is assailed primarily on the ground that the petitioner management stood recognized by the Inspector on 17.10.2018, which is not challenged by anyone, and as there is no difficulty in payment of salary to the teachers and employees of the institution, as such, the invocation of authority under Section 5(1) of the Act of 1971 to pass an order of single operation is wholly arbitrary and unsustainable in law.

2. Before adverting to the legal proposition urged on behalf of the petitioner, it would be necessary to refer to the basic facts of the present case in the context of which the aforesaid dispute has arisen. There exists a society known as 'Thakur Biri Singh Educational Society, Tundla Firozabad, registered under the provisions of the Societies Registration Act, 1860 (hereinafter referred to as the 'society'). The society is running an Intermediate College namely 'Thakur Biri Singh Inter College' at Firozabad which is recognized under the provisions of the U.P. Intermediate Education Act, 1921 (hereinafter referred to as the 'institution').

The teaching and non-teaching staff of this institution is receiving salary from the State funds by virtue of the provisions contained in the U.P. High Schools And Intermediate Colleges (Payment Of Salaries Of Teachers And Other Employees) Act, 1971 (hereinafter referred to as the Act of 1971). The educational institution is being managed in accordance with its recognized scheme of administration. The bye-laws of the society, as also the scheme of administration of the institution are contained in Annexures 1 & 2 to the writ petition in respect of which no dispute exists. The scheme of administration contains a definition clause wherein the society is defined in clause 2(8), as under:-

"{8} सोसाइटी का तात्पर्य ठा0 बीडी सिंह शिक्षा समिति टूण्डला आगरा नाम रजिस्टर्ड सोसायटी से है।"

3. Clause 5 of the scheme of administration provides for constitution of a managing committee. Sub-clause (2) of Clause 5 clearly provides that election of office-bearer will be made from the members of the society. Clause 5 (2) of the scheme of administration is reproduced hereinafter:-

"5-समिति का संगठन-

(2) समिति के सभी सदस्य पदेन सदस्यों को छोड़कर अवैतनिक होंगे। इनका चुनाव सोसायटी के सदस्यों मे से होगा।"

4. It appears that dispute arose in the past, from time to time, regarding valid election of the office-bearers of society and a bunch of writ petitions, in that regard, came to be disposed of by this Court on 2.2.2018. Claim of membership of petitioner no. 2 also fell for consideration before this Court. Following observations of this Court, made in that regard are relevant and are accordingly reproduced hereinafter:-

"In this backdrop, the Court has proceeded to have a glance of order dated 17.05.1990 and 25.07.2002 passed by the Deputy Registrar as well as order dated 19.05.2012 passed by Prescribed Authority by which it is clearly reflected that at the relevant point of time the society in question was time barred since as per the bye laws, the election ought to have been held within three years period as admittedly the last valid election was held on 18.01.1987 and as such, directives have been issued to conduct the election in terms of Section 25(2) of the Act. Perusal of the order dated 19.05.2012 would also reflect that a clear cut finding has been recorded by the Prescribed Authority that the dispute with regard to the membership was very much there and the same was required to be decided by Deputy Registrar before holding the election of Committee of Management of Society.

Record in question clearly reflects that it was the consistent case of petitioners that at no point of time any such exercise had been carried out and it appears that at the relevant point of time, while passing the order dated 13.05.2016, in absence of the said exercise, **the Deputy Registrar had erroneously accepted the claim of Surendra Singh Nauhar and as such, the same cannot be accepted.**

It is a trite law that once the term of the Society is over, then the Assistant Registrar has got the power to hold the election under section 25 (2) of the Act and in the present case also, vide order dated 17.05.1990 and 25.07.2002 passed by the Deputy Registrar as well as order dated 19.05.2012 passed by Prescribed Authority, the election was sought to be conducted in

terms of Section 25(2) of the Act after finalizing the issue with regard to the electoral roll. Even it has also been argued before this Court that the contesting respondent namely Surendra Singh Nauhar is ceased to have been member of the Society since he has been convicted by Trial Court vide order dated 08.06.2012 in Case no.787/1997 (State vs. Surendra Singh and another) under Sections 147, 323, 353, 322 IPC, P.S. Tundla, District Firozabad and as such, the election set up by him is unsustainable as per the bye laws."

5. After referring to various judicial pronouncements on the subject, this Court went on to direct as under:-

"In view of the above, once the Society was time barred and there were rival claims as well as membership dispute, then before holding the election, the membership was required to be decided by the Deputy Registrar and as such, the said view of the Deputy Registrar cannot sustain in the eyes of law in the light of order dated 17.05.1990 as well as order dated 25.07.2002 and as such, the order impugned in the present Writ Petition dated 03.09.2013 as well orders impugned in connected writ petitions dated 24.06.2015, 13.05.2016 cannot sustain and the same are set aside.

At this stage, without adverting such issue of membership as the same would be dealt with by the competent authority at the appropriate time and after careful consideration of the facts and circumstances of the present Writ Petition as well as in the connected writ petitions, this Court is of the considered opinion that the election may be held as early as possible and the same are to be ensured as per the directives issued by this Court vide order dated 28.01.2014, which provides as under:-

(a) The Assistant Registrar shall nominate an Officer as Election Officer to hold the election;

(b) The Election Officer shall call list of the members from all the rival groups within two weeks from the date of the appointment as Election Officer;

(c) On the basis of the list, supplied by the rival group, he will publish the tentative electoral roll and will call the objection to the tentative electoral roll;

(d) After receiving the objections, the Election Officer shall decide the objection by the brief reasons and finalize the electoral roll within six weeks from the date of receiving the objections;

(e) On the basis of the electoral roll the election shall be held within four weeks;

(f) Any party aggrieved by the election will be at liberty to adopt the remedy available under law.

Accordingly, the Writ Petition no. 54882 of 2013, Writ Petition no. 54860 of 2013, Writ Petition no. 41630 of 2015, Writ Petition no. 55419 of 2015, Writ Petition no. 25839 of 2016, Writ Petition no. 32104 of 2016, Writ Petition no. 38093 of 2016, are allowed and Writ Petition no. 38804 of 2016 is dismissed."

6. It is on record that petitioner committee of management conducted its election on 30th September, 2018 and the signatures of petitioner no. 2 (Surendra Singh Nauhwar) was attested for a term of four years (term of elected committee, as per scheme of administration, is four years) i.e. upto 26.9.2022. The order of Inspector dated 17.10.2018, recognizing the election of managing committee dated 30.9.2018 in which Surendra Singh Nauhwar got elected as the manager is not challenged.

7. The judgment of this Court, dated 2.2.2018 came to be challenged before a division bench of this Court in Special Appeal No. 215 of 2018 alongwith connected appeals. The special appeals have been disposed of vide following orders passed on 23.1.2019:-

"It is also evident from the record right from 1992 after the elections of 18.1.1987 more than a dozen of writ petitions relating to the election disputes of the Society have been preferred by either of the parties time and again.

It is settled that the Deputy Registrar is not empowered to deal with validity of the elections of the Society and the same if any, has to be left to be decided upon by the Prescribed authority in a summary manner. This is implicit vide Sub-section 1 of Section 25 of the Act. At the same time Sub-section 2 provides that where the office bearers of the Society are no longer entitled to continue in office or the elections of the office bearers have not been held within time specified, the Registrar may call a meeting of the general body of the Society for electing the office bearers.

In view of the above provisions, learned Single Judge is justified in holding that the Deputy Registrar by the order dated 3.9.2013 could not have decided about the dispute of the elections of the office bearers of the Society and ought to have referred it to the prescribed authority, if necessary.

There is also no dispute that previously all elections of the office bearers of the Society were held at the interval of five years uptil 2012 even though it is admitted that the terms of the office bearers of the Society is three years w.e.f. 21.3.1980. **Therefore, all the elections were apparently held after the expiry of the term of the office bearers of the Society in contravention of Section 25 (2) of the Act which mandates the Registrar/Deputy Registrar to hold elections if the elections are not held within time.**

In this context, it is relevant to refer to Sub-section 3 of section 25 of the Act as well which provides that no other meeting shall be called for the purposes of election by any authority or person claiming to be office bearers of the Society where a meeting is called by the Registrar in exercise of powers under Sub-section 2 of Section 25 of the Act. **Thus, as in the present case there is already an order of the Deputy Registrar dated 17.5.1990 passed under Section 25 (2) of the Act for the purposes of holding the elections of the office bearers of the Society, no other person or authority could have held any other meeting for the purposes of election. Therefore, the said order not having been set aside, the Deputy Registrar is well within its power to hold the meeting of the Society for electing its office bearers.**

In view of the aforesaid facts and circumstances, specially looking to the long drawn litigation so as to bring the Society on rails, we are of the opinion that to cut short all controversies, the directions given by the writ Court by the impugned order dated 2.2.2018 ought to be upheld and the Registrar/Assistant Registrar be permitted to proceed with-holding the elections of the office bearers of the Society in accordance with law keeping in view the directives of the Court. It goes without saying that if he is unable to finalize the list of members or the electoral roll in a summary manner or if his decision is not acceptable, the dispute of membership can be got resolved by taking recourse to the proceedings before the civil court.

All the appeals stand disposed of accordingly."

8. The division bench judgment was challenged before the Apex Court also in Special Leave to Appeal No. 7511 of 2019 but it was got dismissed as withdrawn on 5.4.2019, vide following orders:-

"Learned Senior Counsel appearing for the petitioners seeks permission to withdraw this petition with liberty to file review petition before the High Court.

Permission, as sought for, is granted.

Accordingly, the special leave petition is dismissed as withdrawn with the aforesaid liberty.

Needless to state that in case the petitioners fail before the High Court, they are permitted to approach this Court once over again challenging the main order as well as the order passed in the review petition."

9. The Deputy Registrar, Firms, Societies & Chits accordingly finalized the electoral college in order to hold elections under Section 25(2) of the Societies Registration Act, 1860. List of twelve members, who had participated in the last undisputed elections, dated 17.1.1987 came to be finalized on 7.3.2019. This order dated 7.3.2019 then came to be challenged before this Court in Writ Petition No. 9813 of 2019 which got disposed of vide following orders passed on 15th March, 2019:-

"Heard Sri Nitinjay Pandey, learned counsel for the petitioners, Sri Narendra Chandra Tripathi and Sri Arun Kumar Singh, learned counsel have entered appearance on behalf of the members who have been held valid by the order of the Deputy Registrar dated 07.03.2019 and learned Standing Counsel for the State respondents.

The order dated 07.03.2019 has declared the list of valid members. The validity of this list of members is not disputed.

The contention of learned counsel for the petitioners is that the various other members including 11 persons who claimed to be the valid members have not been made part of the list of members. The order dated 07.03.2019 is bad to that extent.

After some arguments, learned counsel for both the parties agree that a post decisional hearing in the instant case would subserve the ends of justice.

No useful purpose would be served by keeping the petition pending. With consent of the parties, the writ petition is being finally disposed of.

It is well settled that the principles of natural justice are not cast in any strait jacket formula. The requirements of natural justice are adapted to the facts of the case to subserve the ends of justice. In the evolution of the law of natural justice, the Hon'ble Supreme Court has applied the concept of post decisional hearing in appropriate cases. In the case of Dharampal Satyapal Limited Vs. Deputy Commissioner of Central Excise, Gauhati and others, reported at (2015) 8 SCC 519, the Hon'ble Supreme Court held thus:

"38. But that is not the end of the matter. While the law on the principle of audi alteram partem has progressed in the manner mentioned above, at the same time, the Courts have also repeatedly remarked that the principles of natural justice are very flexible principles. They cannot be applied in any straight-jacket formula. It all depends upon the kind of functions performed and to the extent to which a person is likely to be affected. For this reason, certain exceptions to the aforesaid principles have been invoked under certain

circumstances. For example, the Courts have held that it would be sufficient to allow a person to make a representation and oral hearing may not be necessary in all cases, though in some matters, depending upon the nature of the case, not only full-fledged oral hearing but even cross-examination of witnesses is treated as necessary concomitant of the principles of natural justice. Likewise, in service matters relating to major punishment by way of disciplinary action, the requirement is very strict and full-fledged opportunity is envisaged under the statutory rules as well. On the other hand, in those cases where there is an admission of charge, even when no such formal inquiry is held, the punishment based on such admission is upheld. It is for this reason, in certain circumstances, even post-decisional hearing is held to be permissible. Further, the Courts have held that under certain circumstances principles of natural justice may even be excluded by reason of diverse factors like time, place, the apprehended danger and so on."

In view of the facts of the case and position of law laid down by the Hon'ble Supreme Court, a post decisional hearing would subserve the interest of justice. Matter is remitted to the respondent no. 2, Deputy Registrar, Firms, Societies and Chits, Agra Region, Agra.

A writ of mandamus is issued commanding the the respondent no. 2, Deputy Registrar, Firms, Societies and Chits, Agra Region, Agra to execute the following directions:

I. The petitioners shall submit all the documents and pleadings in regard to the validity of their membership on 25.03.2019.

II. The members of the societies whose membership have been held valid by the Deputy Registrar,Firms, Societies and Chits, Agra Region, Agra shall be served copies of the documents and pleadings being relied upon by the petitioners.

III. The members who have been held to be valid members by the order of Deputy Registrar dated 07.03.2019, shall file their objections to the pleadings and documents of the petitioners on 27.03.2019.

IV. The Deputy Registrar shall hear the parties on 29.03.2019.

V. The Deputy Registrar shall pass a final order on 02.04.2019.

VI. The claim of the petitioners shall be decided by a reasoned and speaking order in accordance with law.

It is clarified that this Court has not interfered the order dated 07.03.2019 passed by the Deputy Registrar, Firms, Societies and Chits, Agra Region, Agra and any further action taken in pursuance thereof. The same shall abide by the decision taken by the Deputy Registrar, Firms, Societies and Chits, Agra Region, Agra in compliance of the order passed by this Court.

The writ petition is disposed of finally."

10. A subsequent writ petition filed before this Court being Writ Petition No. 12689 of 2019, challenging the same order of Deputy Registrar, dated 7.3.2019, has also been disposed of vide following orders passed on 12.4.2019:-

"Considering the facts and circumstances of the case, with the consent of learned counsel for the parties, this petition is disposed of with a direction to Election Officer to proceed with the election proceeding and after declaration of result of election, at the time of recognition under Section 4(1) of the Societies Registration Act, 1860, petitioners is

permitted to file their objection before Assistant Registrar (Firms, Societies & Chits), Agra and if any such objection is filed by the petitioners, the Assistant Registrar (Firms, Societies & Chits), Agra shall consider the same and decide strictly in accordance with law expeditiously, preferably within a period of one month from the date of receipt of proposal of recognition of election."

11. Another Writ Petition No. 24465 of 2019 also came to be filed challenging the order dated 7.3.2019, which too got disposed of vide following orders passed on 13.8.2019:-

"In view of the facts of the case and position of law laid down by the Hon'ble Supreme Court, a post decisional hearing would subserve the interest of justice. Matter is remitted to the respondent no. 2, Deputy Registrar, Firms, Societies and Chits, Agra Region, Agra.

A writ of mandamus is issued commanding the the respondent no. 2, Deputy Registrar, Firms, Societies and Chits, Agra Region, Agra to execute the following directions:

I. The petitioners shall submit all the documents and pleadings in regard to the validity of their membership on 25.08.2019.

II. The members of the societies whose membership have been held valid by the Deputy Registrar, Firms, Societies and Chits, Agra Region, Agra shall be served copies of the documents and pleadings being relied upon by the petitioners.

III. The members who have been held to be valid members by the order of Deputy Registrar, Firms, Societies and Chits, Agra Region, Agra, dated 07.03.2019, shall file their objections to the pleadings and documents of the petitioners on 27.08.2019.

IV. Other members of the society, who are desirous of submitting or tendering their objections along with supporting documentation, shall also be given an opportunity of hearing.

V. The pleadings/documents, shall be exchanged interse the parties, and their respective adversaries before the hearing. Finding in this regard shall be recorded by the Deputy Registrar, Firms, Societies and Chits, Agra Region, Agra, in the proceeding book.

VI. The Deputy Registrar, Firms, Societies and Chits, Agra Region, Agra, shall hear the parties on 28.09.2019.

VII. The Deputy Registrar, Firms, Societies and Chits, Agra Region, Agra, shall pass a final order within two weeks from 28.09.2019.

VIII. The claim of the petitioners shall be decided by a reasoned and speaking order in accordance with law after hearing all concerned parties who are before this court and who may like to tender their submissions.

It is clarified that this Court has not interfered the order dated 07.03.2019 passed by the Deputy Registrar, Firms, Societies and Chits, Agra Region, Agra and any further action taken in pursuance thereof. The same shall abide by the decision taken by the Deputy Registrar, Firms, Societies and Chits, Agra Region, Agra in compliance of the order passed by this Court.

The writ petition is disposed of finally."

12. It is worth noticing that this Court in its judgment dated 2.2.2018, has specifically disapproved the order of Deputy Registrar, 13.5.2016, whereby the claim of membership of petitioner no. 2 was accepted. The judgment of this Court dated 2.2.2018, has attained finality upto

the Apex Court. The claim of membership of petitioner no. 2 since is seriously doubted by this Court and his name otherwise did not figure in the list of 12 members finalized by the Deputy Registrar, as such the Inspector appear to have raised doubts upon the continuance of petitioner no. 2 as manager since a member of society alone could be elected as manager in terms of the scheme of administration. The District Inspector of Schools, consequently proceeded to pass an order dated 29th March, 2019 holding that the election dated 30th September, 2018, which stood recognized earlier on 17.10.2018, and the signatures of the petitioner no. 2 were attested was impermissible as it would be in teeth of the division bench judgment of this Court.

13. This apparently was done as under the scheme of administration the office-bearers of the committee of management of institution can be elected only from amongst the members of the society and as petitioner no. 2 was not found to be the member of the society, he could not be elected as the manager. For such purposes the Inspector invoked her jurisdiction under section 5(1) of the Act of 1971.

14. Order of Inspector dated 29th March, 2019 came to be challenged before this Court on the ground that no opportunity of hearing was given to the petitioner before passing it. The writ petition has been allowed vide following orders passed on 29th March, 2019:-

"Heard learned counsel for the petitioners, learned Standing Counsel for respondent nos. 1 to 3 and Sri N.C. Tripathi, learned counsel for newly impleaded respondent nos. 4 to 6.

Learned counsel for the petitioners has assailed the impugned order dated 29.03.2019 passed by District Inspector of Schools, Firozabad-respondent no. 2 basically on the ground that this order has been passed without providing opportunity of hearing to the petitioner ignoring this fact that prior to passing of order, committee of management of petitioners' institution was duly approved, therefore, it is required on the part of respondent no. 2 to provide opportunity of hearing prior to passing the order impugned.

Sri N.C. Tripathi, learned counsel for respondent nos. 4 to 6 has raised several facts, but could not dispute this fact that opportunity of hearing has not been granted. Learned Standing Counsel has also not disputed this fact.

Considering the facts and circumstances of the case, impugned order dated 29.03.2019 passed by District Inspector of Schools, Firozabad-respondent no. 2 is hereby quashed and the matter is remanded back to respondent no. 2 to pass fresh order, maximum within a period of 30 days from the date of production of certified copy of the order after providing opportunity of hearing to the petitioner as well as newly impleaded respondent nos. 4 to 6.

Accordingly, this petition is allowed.

No order as to costs."

15. It is thereafter that the Inspector has passed the order impugned reiterating her earlier order dated 29th March, 2019. The reasoning assigned in the order is that Deputy Registrar, Firms, Societies & Chits has finalized the list of members of society on 7.3.2019 and the name of petitioner no. 2 does not figure amongst the twelve members recognized by the Deputy Registrar. It has, therefore, been observed that the elections of petitioner committee

held on 30th September, 2018 with the participation of 111 members was wholly impermissible in view of the order passed in Special Appeal No. 215 of 2018 and petitioner no. 2 cannot be recognized as the manager. Consequently, petitioner's application dated 20.6.2019 has been rejected.

16. The Deputy Registrar, Firms, Societies & Chits has proceeded to redetermine the list of members vide his order dated 6th November, 2019 by accepting claim of membership of even those also who were enrolled after expiry of the term of undisputed elections i.e. 1990. This order is challenged in Writ Petition No. 37643 of 2019 and the order of the Deputy Registrar, dated 6.11.2019, has been stayed vide following order passed on 21.11.2019:-

"Shri Ashish Srivastava, learned counsel for the respondents states that he has filed Caveat Application on behalf of one of the member of the Society and his Caveat has not been reported by the Stamp Reporter.

Shri Ashish Srivastava, learned counsel for the respondents is directed to file Impleadment Application as the members of the Society has not been impleaded as a party.

Put up this matter again on 5.12.2019 as fresh.

Till the next date of listing, effect and operation of the impugned order dated 6.11.2019 passed by Deputy Registrar, Firms Societies & Chits, Agra, respondent No.2 shall remain stayed."

17. Subsequently, following orders have been passed in Writ Petition No. 37643 of 2019 on 28.1.2020, which is reproduced hereinafter:-

"An order passed by the Deputy Registrar, Firms Societies and Chits, Agra dated 06.11.2019 determining the Electoral College is assailed in this petition. It is contended that the determination made is absolutely in teeth of an earlier adjudication made by this Court in a bunch of writ petitions decided on 02.02.2018 with leading Writ Petition No. 54882 of 2013 as also the order passed in Special Appeal on 23.01.2019 with leading Special Appeals being Special Appeal No. 215 of 2018. It is contended that this Court in the aforesaid adjudication has clearly accepted the position that last undisputed elections of the Society were conducted in the year 1987 and because the term of society was three years which had exhausted/ outlift its tenure as such the Deputy Registrar had intervened under Section 25(2) of the Societies Registration Act,1860 vide his order dated 17.05.1990. The order passed by Deputy Registrar dated 17.05.1990 has already been upheld. The Division Bench has observed that once that be so no other faction would have the right to hold any subsequent election or to act as validly elected committee of management and to enroll new members. It is contended that the Deputy Registrar in his previous order dated 07.03.2019 had rightly restricted the membership of persons enrolled up till 17.01.1990 and that any subsequent acceptance of claim of membership based upon enrollment made after 07.01.1990 would clearly go contrary to the orders passed by this Court in special appeal.

Matter requires consideration.

The respondents are already represented through Sri Anoop Trivedi, learned Senior counsel assisted by Sri Vibhu Rai, Advocate. Application for intervention has also been filed by Sri N. C. Tripathi, learned counsel for respondents in the connected matter. It will be open for all

the parties to file their affidavits within two weeks. Rejoinder affidavit, if any, may be filed within three days.

Let this matter be listed on 27.02.2020.

Interim order granted earlier shall continue, till the next date of listing. Persons who have filed the impleadment application would also be heard as interveners under Chapter 22, Rule 5-A of the Rules of the Court. It will be open for them also to file a counter affidavit within the same period."

18. Aggrieved by the order of Inspector, dated 26.6.2019, the petitioner is before this Court.

19. Sri Gajendra Pratap, learned Senior Counsel for the petitioner states that the primary purpose for passing an order of single operation under Section 5(1) of the Act of 1971 is to facilitate regular payment of salary to the teaching and non-teaching staff of the institution and as there was no default by the petitioner in that respect, the order of Inspector is wholly without jurisdiction. It is also urged that the elections held on 30th September, 2018 since has already been recognized on 17.10.2018, and no challenge to it is made before any forum, therefore, there was otherwise no occasion or justification for the Inspector to pass the order impugned. Learned Senior Counsel for the petitioner has placed reliance upon a judgment of this Court in Committee of Management, Gandhi Smarak Inter College, Agra Vs. District Inspector of Schools, Agra reported in 2001 (2) UPLBEC 1347. Reliance is placed upon paragraph 9 of the judgment, which reads as under:-

"9. Section 5 of the Salaries Act lays down the grounds on which an order of single operation of account can be passed. The Government Order dated 19.12.2000 provides that an order of single operation of accounts could be passed by the DIOS on the recommendations of the committee. The second proviso to Section 5(1) of the Salaries Act clearly provides that where a difficulty has arisen in disbursement of salaries of the staff of the institution due to any default of the management, an order of single operation of account can be passed by the DIOS. In paragraph 18 of the writ petition, it has been stated that there is no dispute regarding management and there was no default on the part of the management in respect of payment of salary to teachers and other employees of the institution. Section 5(1) does not provide that for the delay on the part of the DIOS or the regional committee in recognising the newly elected management, an order of single operation of account could be passed. The impugned order passed by DIOS on 3.4.2001 does not mention that the regional committee on the ground of delay had made a recommendation to the DIOS for passing an order of single operation of accounts. The power under Section 5(1) can be exercised sparingly and for reasons mentioned in the section as it is an infringement of right of an elected body to manage the affairs of the institution. Any infringement of right cannot be accepted as valid exercise of power. Therefore, in absence of any recommendation of the regional committee or existence of condition precedent for exercise of power, the order passed by the DIOS is arbitrary and illegal being contrary to the provisions of Section 5(1) of the Salaries Act and the Government Order dated 19.12.2000. It cannot be upheld."

20. Per contra, Sri N.C. Tripathi appearing for the respondents submits that petitioner no. 2 claims his induction as member of the society much after 1990,

and in view of the settled legal proposition that a member could be enrolled by a legally constituted committee of management of society, any induction of member after 1991 would be impermissible. The continuance of petitioner no. 2 as recognized manager is alleged to be impermissible and in teeth of the orders passed by the division bench in Special Appeal No. 215 of 2018. Reliance is placed upon paragraphs 7, 8, 9 & 12 of a full bench judgment of this Court in Committee of Management, Pt. Jawahar Lal Nehru Inter College, Bansgaon Vs. Deputy Director of Education, Gorakhpur Region, Gorakhpur and others, reported in (2005) 1 UPLBEC 85, which reads as under:-

"7. In order to consider these questions, it is necessary to go into the background in which Section 16-A was inserted in the Act. Every recognized institution is to be managed by a Committee of Management elected in accordance with a 'Scheme of Administration approved by the Deputy Director of Education. Such a Committe of Management is required to discharge various statutory functions under the Act including the payment of salaries, appointments of adhoc teachers, determination of seniority etc. The District Inspector of Schools has to exercise various statutory functions in collaboration with such Committee of Management under the Act and the U.P. High School and Intermediate Colleges (Payment of Salaries of Teachers and other Employees Act, 1971 (in short the U.P. Act of 1971). It is, therefore necessary to find out as to which of the elected Committee of Management is in actual control of the affairs of the Institution. Where the elections arc not disputed, the District Inspector of Schools is required to attest the signatures of the Principal and the Manager for the purposes of carrying out statutory functions and for maintenance of accounts. Where however there is a dispute regarding the elections, and the control over the Institution the District Inspector of Schools is required to satisfy himself as to who, according to him, is the validly elected Committee of Management.

8. In Committee of Management v. District Inspector of Schools and others, 1978 AWC 124, a Division Bench held that the mere raising of a dispute did not absolve the District Inspector of Schools from his duty, to find out on administrative level as to who are the real office bearers of the College. In order to perform statutory functions under the U.P. Act of 1921 and the U.P. Act of 1971, it is the duty of the District Inspector of Schools to satisfy himself as to who, according to him, are validly elected office bearers of the Institution. In Jaswant Singh v. District Inspector of Schools and others, 1980 ALJ 124 : 1980 UPLBEC 43 (DB), another Division Bench held that neither U.P. Act of 1921, nor U.P: Act of 1971, makes a provision for deciding the dispute raised by rival Committees of Management, in regard to the validity of elections in which they claim to be elected, and considerable time and expenditure is involved in getting the adjudication from a Civil Court, consequent upon the Deputy Director of Education recognizing one of the rival contenders as a duly constituted Committee of Management. Further since the experience of the Court had shown that the rate of litigation on this score is fairly high, the Court recommended that some Tribunal may be constituted to decide such disputes as has- been referred in the case.

9. The Act was consequently amended by Intermediate Education

(Amend- ment) Act, 1980 (U.P. Act No. 1 of 1981). The relevant portion of the statement and object and purpose for inserting Section 16-A is quoted as below :

"Since the cases of mis-Management in the institutions are increasing fast, which obviously affects the teaching work in such institutions, it has been decided to amend the provisions relating to 'Scheme of Administration' and appointment of Authorised Controller, with a view to make effective provisions for proper Management of such institutions."

12. In Committee of Management, Sri Gandhi Mahavidyalaya v. District Inspector of Schools, Ballia and others, 1981 Education Cases 100 : 1981 UPLBEC 328, the Division Bench held that the enquiries are to be made, to first ascertain as to whether the meeting to hold the election has been held in accordance with the requirement of the Scheme of Administration and any other relevant provision in this behalf applicable to the affairs of the society which runs the institution. It is true that the District Inspector of Schools is not expected to write a detailed judgment as, if he was a Court of law, but nevertheless as observed in Jaswant Singh's case, his order must indicate that he has applied his mind to the controversy involved before him."

21. It is in the above background that the legality of the order of single operation, passed by the Inspector, needs to be examined.

22. In order to appreciate the submissions advanced it would be appropriate to reproduce Section 5(1) of the Act of 1971, which reads as under:-

"5. Procedure for payment of salary in the case of certain institutions. - (1) The management of every institution shall, for the purpose of disbursement of salaries to its teachers and employees, open [in a Scheduled Bank or a Cooperative Bank] a separate account to be opened jointly by a representative of the management and by the Inspector or such other officer as may be authorised in that behalf :

Provided that after the account is opened, the Inspector may, if he is, subject to any rules made under this Act, satisfied that it is expedient in the public interest so to do, instruct the bank that the account shall be operated by the representative as the management alone, and may at any time revoke such instruction :

Provided further that in the case referred to in the provision to subsection (2), or where a difficulty arises in the disbursement of salaries due to any default of the management, the Inspector may instruct the Bank that the account shall be operated only by himself or by such other officer as may be authorised by him in that behalf and may at any time revoke such instruction."

23. Management in the Act of 1971 is defined in sub-section (d) of Section 2 in following terms:-

"2(d) *"Management"* in relation to any institution, means the Committee of Management constituted in accordance with the scheme of administration, if any, and includes the Manager or other person vested with the Authority to manage and conduct the affairs of the institution;"

24. The Act of 1971 has been enacted by the State legislature to regulate the payment of salaries to teachers and other employees of High School and Intermediate Colleges receiving aid out of

the State funds and to provide for matters connected therewith. The High School and Intermediate Colleges are to be such Institutions which are recognized under the U.P. Intermediate Education Act, 1921 and are also receiving maintenance grant from the State Government. It is for the purposes of payment of salary to the teachers and other employees of such Institution that an account has to be opened in a Scheduled or Cooperative Bank. This account is to be jointly operated by a representative of management and the Inspector or such other officer as may be authorised in that behalf. However, the first proviso to Section 5(1) permits the Inspector, if he is satisfied that it is expedient in public interest so to do, instruct the bank that the account shall be operated by the representative of management alone and, at any time may revoke such instruction. The second proviso contemplates that in the event referred to in sub-section (2) of Section 5 of the Act of 1971 or where a difficulty arises in the disbursement of salaries due to any default of the management the Inspector may instruct that the account shall be operated only by himself or by such other officer as may be authorised by him in that behalf and may, at any time revoke such instruction.

25. The purpose of attesting signatures under the Act of 1971 is to ensure disbursement of salaries to the teachers and employees of the educational institution through the recognized management. The purpose of recognition to be granted to the management has been noticed by the full bench of this Court in Committee of Management, Pt. Jawahar Lal Nehru Inter College, Bansgaon (supra) in paragraph 11, which is reproduced hereinafter:-

"11. The nature of power in the Deputy Director of Education under Section 16-A(7) of U.P. Act of 1921, has been subject matter of consideration on several decisions of this Court. In Committee of Management of Sarvodaya Inter College v. Deputy Director of Education, Vth Region, Varanasi and others, 1982 UPLBEC 31, a Division Bench of this Court held that the. forum now provided by Section 16-A(7) is only a substitute for that which were being decided by the District Inspector of Schools under Section 5 of the Payment of Wages Act, 1971. **This Court has held in a number of cases, that for the purposes of enabling himself to pay the salaries to the teachers on the bills submitted by a Manager, it was necessary for the District Inspector of Schools to recognize him and to decide the dispute relating to his right.** Such a decision was, of course, summary in nature and was subject to the decision of a Civil Court. As there were serious doubts about the desirability of the District Inspector of Schools, being conferred such a power, by U.P. Act No. 1 of 1981, a new forum was created. By Section 16-A(7) the Deputy Director of Education was conferred the power to decide the dispute. This only brings about the change of forum. The Deputy Director of Education is not an Appellate Authority over the District Inspector of Schools in respect of cases earlier decided by the District Inspector of Schools. The power of the Deputy Director of Education is the same as used to be exercised by the District Inspector of Schools."

26. Since salary to teaching and non-teaching staff has to be disbursed pursuant to bills presented under the signatures of the manager and he also signs on the cheque, it is imperative that the Inspector authorises only such representative of the management which is constituted in

accordance with the scheme of management. In addition to the functions assigned to a management in the Act of 1971, there are other responsibilities entrusted upon the management by virtue of provisions contained in the U.P. Intermediate Education Act, 1921. The Act of 1921, therefore, contemplates that a scheme of administration shall exist for every institution recognized under the Act of 1921. The scheme of administration shall, amongst other matters provide for the constitution of a committee of management which is vested with the authority to manage and conduct the affairs of the Institution. The requirement of having such scheme of administration and also the particulars which it must contain are specified in Section 16-A of the Act of 1921. Sub-section (6) of Section 16-A mandates that every recognized institution shall be managed in accordance with the scheme of administration provided for in Sub-sections (1) to (6) thereof. Amendment has been made in the Act of 1921 to incorporate Section 16-CC and Section 16-CCC vide U.P. Act No. 1 of 1981. Third Schedule has also been added vide the same amending Act laying down principles on which approval to a scheme of administration shall be accorded. One of the factors specified in the Schedule is to provide for periodical elections. The scheme of administration is also required to be approved by the Deputy Director of Education.

27. The object of enumerating need to have a scheme of administration and for a committee of management to be constituted as per it is to ensure that the body entrusted with the task of management functions in a democratic manner and the officials of the State interact only with a body duly elected in accordance with the approved scheme of administration. It is in this context that the term recognition needs to be understood for the committee of management of the Institution concerned. There is otherwise no specific provision in the Act of 1921 for grant of recognition.

28. At this stage it would be relevant to take note of the statutory scheme contained in the Act of 1921 for the purposes of settling any dispute which may arise in constituting the committee of management as per the scheme of administration. Section 16A(7) of the Act of 1921 contemplates that wherever there is a dispute with respect to management of an Institution the persons found by the Regional Deputy Director of Education, upon such enquiry as is deemed fit to be in actual control of its affairs may, for purposes of this Act, be recognised to constitute the Committee of Management of such institution. By a government order the authority for such summary adjudication has now been vested in the Regional Level Committee.

29. A dispute of office-bearer ordinarily would not be examined by the Inspector since the forum in that regard, even for a summary adjudication, is before the Deputy Director of Education by virtue of Section 16-A(7) or the Regional Level Committee constituted under the Government Order dated 19.12.2000. The Inspector only attests the signature of the recognized manager under Section 5(1) of the Act of 1971 for the purposes of payment of salary. The Inspector however retains the jurisdiction to see as to whether the person claiming to be the manager of committee of management represents the committee of management constituted in accordance with the scheme of administration.

30. In the facts of the present case it is not in issue that signatures of petitioner no.2 as the manager were attested by the Inspector on 17.10.2018 and the order in that regard is not under challenge. It is also not a case where there exists any actual difficulty in payment of salary to teachers and other employees of the institution. The question is as to whether in such circumstances the Inspector would be justified in directing payment of salary to be released under an order of single operation?

31. The difficulty which may arise in payment of salary to be released to the teachers and other employees can be of two kinds. In a given case difficulty may arise in payment of salary due to default on part of the management in submitting salary bills. Difficulty may also arise in law in releasing salary if it is found by the Inspector that the person whose signatures are attested for payment of salary is not the manager of the committee constituted as per the scheme of administration. The present case falls in the second category inasmuch as a difficulty in law has arisen in payment of salary to be released under the signatures of petitioner no. 2.

32. A conjoint reading of Section 5(1) of the Act of 1971 read with Section 2(d) of the said Act makes it explicit that the Inspector will permit only such person to represent the management for operating the bank accounts which has been constituted in accordance with the approved scheme of administration.

33. It has already been noticed that as per the approved scheme of administration only a member of society can be elected as an office bearer of the managing committee. A dispute had arisen as to whether petitioner no. 2 is the member of society. The dispute in that regard has been resolved by this Court vide judgment dated 2.2.2018 wherein the order accepting claim of membership of petitioner no. 2 has been disapproved. The judgment dated 2.2.2018 however was subjudice before this Court in a bunch of special appeals when the signatures of petitioner no. 2 got recognized as the manager. The issue pending in special appeal has subsequently been resolved with dismissal of special appeal no. 215 of 2018. The observation of this Court doubting membership of petitioner no. 2 has been affirmed. A categorical view is taken that only such persons would be taken as members who were enrolled pursuant to last admitted election of the year 1987 term whereof expired in 1990. Only 12 persons have been found to be the members validly enrolled till then which does not include the name of petitioner no. 2. The membership of petitioner no. 2 is of a subsequent date. When petitioner no. 2 is not found to be a member of the parent society there would be no question of his being validly elected as an office bearer of the managing committee of the institution. The claim of election of petitioner no. 2 as the manager, therefore, is found to be prima facie inconsistent with the scheme of administration. The continuance of petitioner no. 2 as the manager apparently is found to be in teeth of the adjudication made by this Court in special appeal no. 215 of 2018. A difficulty in law does arise in payment of salary if petitioner no. 2 is allowed to act as manager contrary to the scheme of administration.

34. If the facts of the present case are analyzed in light of the law settled, it is apparent that petitioner no. 2, even prima facie, cannot claim to be the elected

manager. A serious cloud on the membership of petitioner no. 2 having arisen on account of adjudication made by the division bench in Special Appeal No. 215 of 2018, the Inspector would clearly be entitled to exercise her powers under Section 5 to pass an order of single operation. Mere fact that none has challenged the attestation of signature therefore would not be a valid ground to deny authority to the Inspector to invoke her powers under Section 5(1) of the Act of 1971. Even in the absence of any challenge the Inspector retains the jurisdiction to exercise her authority under Section 5(1) of the Act of 1971 if a difficulty in law arises in payment of salary as is noticed above in the facts of the present case.

35. A division bench of this Court in Committee of Management of Shri Nehru Intermediate College, Rohi, Varanasi and another Vs. District Inspector of Schools, Varanasi and another reported in (1990) 1 UPLBEC 339 has clearly acknowledged that Inspector can exercise power under Section 5(1) of the Act of 1971 if a serious dispute has arisen regarding constitution of the committee of management. Paragraphs 3 to 6 of the aforesaid judgment is reproduced hereinafter:-

"3. Learned counsel for the petitioners contends that in view of the fact that Smt. Durga Devi was also the Manager of previous Committee of Management elected in 1984 and the further fact that her signatures had already been attested by the District Inspector of Schools, as result of which salary of the teachers and employees for the month of December, 1987 had been disbursed without any problem in pursuance of the bills submitted by her in January, 1988 no difficulty can be said to have arisen in regard to the disbursement of the salaries in the future so as to warrant action under Section 5(1) of the aforesaid Act.

4. We are unable to agree. Two-fold difficulties have been pointed out by the District Inspector of Schools in his order: First that a dispute has arisen with regard to the management of the institution on account of two rival groups claiming to be validly elected Committee of Management which has already been referred for determination of the Deputy Director of Education under Section 16-A(7) of the U.P. Intermediate Education Act and Second: that at present there is no recognised Manager of the Institution. In our opinion both these grounds furnish valid justification for an action under Section 5(1) of the Act. The attestation on which the petitioner is relying was the attestation done by the District Inspector of Schools while Smt. Durga Devi was acting as the Manager of the previous Committee of Management which was elected in 1984. On the basis of that attestation, the District Inspector of Schools could obviously not proceed to disburse the salary of the teacher and employees even after having come to know that fresh election for the Constitution of the Committee of Management had admittedly taken place. The attestation of the signatures of the Manager is an indirect recognition by the District Inspector of Schools of the Management for the purpose of disbursement of the salaries. Consequently, the attestation of the signatures of Smt. Durga Devi while she was acting as the Manager of the previously elected Committee of Management could not legally be availed of in relation to the new management.

5. In our opinion, a dispute having admittedly arisen with regard to the constitution of the Committee of

Management and the same having been referred for determination of the Deputy Director of Education under Section 16-A(7) and at present there being no recognised Manager, the District Inspector of Schools rightly considered the present to be a fit case for invoking powers under Section 5(1) of the Act.

6. There is no merit in this petition and the same is dismissed."

36. In view of the deliberations and discussion aforesaid, this Court finds that the exercise of power by the Inspector, in the facts of the present case to pass an order of single operation of accounts is clearly justified and is in consonance with the law laid down by this Court. The challenge laid to the order passed by the District Inspector of Schools, Firozabad, dated 26th June, 2019 fails and the writ petition, accordingly, is dismissed. No order as to costs.

(2020)09ILR A607
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.05.2020

BEFORE

THE HON'BLE PANKAJ MITHAL, J.
THE HON'BLE VIPIN CHANDRA DIXIT, J.

WRIT - C No. 28968 of 2018
with
WRIT – C No. 68724 of 2015
with
WRIT – C No. 45929 of 2016
&
other connected cases

M/s Shakuntla Educational & Welfare Society, New Delhi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ashish Kumar

Counsel for the Respondents:
C.S.C., Sri Aditya Bhusan Singhal

(A) Civil Law - Societies Registration Act,1860 - Indian Trusts Act,1854 - Land Acquisition Act,1894 - Section 5A ,Section 17,Section 18,Section 54 - U.P. Urban Planning and Development Act,1973- Section 41 - The Transfer of property Act,182 - Section 105- Any Government Order which provide for any further benefit not mentioned in the Act would be inconsistent with the intention of the parliament -such a Government Order would be invalid - violative of Article 16 of the Constitution - it has to be ignored by the authorities - exercise of equitable jurisdiction is an ornament of the courts of law and cannot be exercised by the government - equity always follows the law - cannot override the statutory provisions - where statutory provisions exist for the assessment and determination of the compensation for the acquired land - compensation has to be awarded accordingly and cannot be awarded by adjusting the equities. (Para-63,68,69,70,71)

Petitioner is an educational society registered under the Societies Act - challenges the action of the State of U.P. and the Yamuna Expressway Industries Development Authority (Y.E.I.D.A.) - for quashing of the demand of additional amount in respect of the land leased out to it - resolution of the Board of Y.E.I.D.A. dated 15.09.2014 - Government Order dated 29.08.2014 whereby the aforesaid demand was permitted and was allowed to be recovered from the allottees - petitioner sought a direction that the State as well as Y.E.I.D.A. be restrained from demanding any additional amount over and above the one mentioned in the lease deed. (Para-1,3)

HELD:- The impugned Government Order dated 29.08.2014 is declared to be illegal and without jurisdiction and consequently all demands raised on its basis are quashed. (Para-119)

Petitions allowed. (E-7)

List of cases cited: -

1. Gajraj Singh & ors. Vs St. of U.P. & ors., 2011(11)ADJ 1(FB)

2. Savitri Devi Vs St. of U.P. & ors., (2015) 7 SCC 21

3. Mange @ Mange Ram Vs St. of U.P. & ors.,(2016) 8 ADJ79(DB)

4. Khatoon & ors. Vs St. of U.P. & ors.,(2018) 1 UPLBEC 340

5. Rajeshwari & 3 ors. Vs St.of U.P. & two ors., Writ -C No. 18948 of 2017

6. Ramesh & ors. Vs St. of U.P. & ors., 2019(4) ADJ 225

7. Delhi Administration (Now NCT of Delhi) Vs Manohar LAl, AIR 2002 SC 3088

8. Ravindra Kumar Vs D.M., Agra & ors., (2005) 1 UPLBEC 118

9. Madamanchi Ramappa & anr. Vs Muthalpur Bojjappa, AIR 1963 SC 1633

10. Ahmedabad Municipal Corporation Vs Virendra Kumar Jayantibhai Patel, AIR 1997 SC 3002

11. Soora Ram Pratap Reddy Vs District Collector, Ranga Reddy & ors. , (2008) 9 SCC 552

12. Express News paper (P) Ltd. Vs U.O.I., (1986) 1 SCC 133

13. Bondu Ramaswamy & ors., Vs Banglore Development Authority & ors., (2010) 7 SCC 129

14. D.D.A. Vs Sukhbir Singh, (2016) 16 SCC 258

(Delivered by Hon'ble Pankaj Mithal, J.
& Hon'ble Vipin Chandra Dixit, J.)

1. All the above writ petitions are based upon similar and identical facts and challenges the action of the State of U.P. and the Y.E.I.D.A.1 regarding demand of extra amount from the petitioners in respect of plots of land leased out to all of them separately and independently.

2. The Writ Petition No. 28968 of 2018 of M/s Shakuntla Educational and Welfare Society is taken as the lead case to which counsel for the parties have consented during the course of the arguments. Accordingly, we narrate below only the facts in relation to the said writ petition and proceeds to refer the petitioner therein as the sole petitioner.

3. The petitioner is an educational society registered under the Societies Act2. It had invoked the extraordinary jurisdiction of the High Court for the quashing of the demand of additional amount in respect of the land leased out to it, the resolution of the Board of Y.E.I.D.A. dated 15.09.2014 and the Government Order dated 29.08.2014 whereby the aforesaid demand was permitted and was allowed to be recovered from the allottees. The petitioner has also sought a direction that the State as well as Y.E.I.D.A. be restrained from demanding any additional amount over and above the one mentioned in the lease deed.

4. In order to appreciate the controversy and the issues arising in the above petition(s), we consider it appropriate to narrate the facts in brief which have led to the impugned demand, passing of the resolution by the Board of Y.E.I.D.A. and the issuance of the Government Order dated 29.08.2014.

5. A vast area of land was acquired by the State of U.P. in district Gautam Budh Nagar for public purpose for the benefit of

Y.E.I.D.A. After the acquisition was completed, Y.E.I.D.A. invited applications for the allotment of plots of land of 25 to 250 acres in the area developed by it. In response to the notice inviting applications for such allotment, the petitioner applied for allotment of 50 acres of the land within the institutional area for establishing a University.

6. The petitioner was informed vide letter dated 14.09.2009 that a plot of 50 acres has been reserved for it. Subsequently, a letter of allotment dated 10.12.2009 was issued to the petitioner allotting plot No.2 in sector 7-A having an area of 50 acres equivalent to 202350 sq. meters.

7. The aforesaid allotment letter in unequivocal terms provided that the premium of the land allotted is Rs.1055/- per sq. meters and the petitioner has to pay E.D.C.3 @ Rs.574/- per sq. meters.

8. It also mentioned that as the petitioner had deposited 10% of the premium amount the balance 90% shall be payable in monthly installments as specified in the chart contained therein.

9. The allotment order categorically stated that the lease deed shall be executed and the possession of the land shall be handed over after completion of the acquisition proceedings, though the land is in possession of Y.E.I.D.A.

10. On the basis of the aforesaid reservation and allotment letters, lease deed of the land was executed in favour of the petitioner on 22.01.2010 for a period of 90 years after the petitioner had substantially complied with the terms and conditions of the allotment and had deposited the necessary amounts. The lease deed in addition to the amounts payable by the petitioner as mentioned in the allotment letter further provided for the payment of 2.5% of the total premium of the plot per year as annual lease rent. The lease deed was very specific and reiterated that the premium amount was Rs.1055/- per sq. meter and E.D.C. as Rs.574/- per sq. meter as was mentioned in the allotment letter.

11. At the time of possession when the land was surveyed and measured it was found that the aforesaid plot allotted to the petitioner had an excess area of about 2 acres. This excess land was also leased out to the petitioner on the same terms and conditions and a supplementary lease deed in respect thereof was executed on 07.04.2010.

12. In the lease deed the petitioner was described as a Society under the Trust Act4 instead of under the Societies Act and as such a corrigendum deed was executed on 23.08.2010 providing that the petitioner is a Society registered under the Societies Act and not under the Trust Act.

13. The petitioner was given possession of the aforesaid land and on it a University known as Galgotia University was developed which establishes that the acquisition proceedings in respect thereof stood completed.

14. It may not be out of context to mention here that at one stage Y.E.I.D.A. came out with a policy and gave option to the petitioner to deposit the entire premium amount in lump-sum rather than in installments subject to certain rebate.

15. Accordingly, the lump-sum amount was worked out by the Y.E.I.D.A.

and the same was paid by the petitioner with the understanding that in case due to any clerical error or miscalculation of the lump-sum amount if any demand arises in future the petitioner would pay the same. In this regard an undertaking of the petitioner on affidavit was taken on 07.06.2012. The said undertaking was only in respect of the lump-sum premium amount and had nothing to do with the demand of any additional amount of the premium.

16. It so happened that in respect of acquisition of land for the benefit of NOIDA and Greater NOIDA a very large number of writ petitions were filed challenging the acquisition on various grounds inter alia that there was no urgency for acquiring the land and that the enquiry contemplated under Section 5A of the L.A. Act5 was incorrectly dispensed with.

17. All the said petitions came to be decided vide judgement and order dated 21.10.2011 passed in the leading case of Gajraj 6. The Full Bench of the Court though found that the urgency clause was illegally invoked and the farmers were unnecessarily denied opportunity to object to the acquisition but in view of the fact that the land had been developed and third party rights have accrued considered it appropriate to save the acquisition. Accordingly, on equity allowed payment of additional compensation of 64.7% plus some other benefits to certain class of farmers. The said benefits were not extended to all the farmers. It was not granted in all the writ petitions and most of them were dismissed after the court noticed that there was no equity in favour of the farmers or the petitioners therein.

18. The aforesaid additional compensation of 64.7% was permitted to be paid in view of the fact that in respect of one of the villages i.e. Patwari, the NOIDA itself had entered into negotiations with the farmers and had extended the benefit of additional compensation at the above rate over and above the compensation awarded.

19. The aforesaid judgement and order of the Full Court of the High Court was approved by the Supreme Court in the case Savitri Devi7 on the concession of the parties, but it was observed that as the additional amount granted by the Full Bench was under the special and peculiar facts and circumstances of the case, the same should not be treated as a precedent.

20. It may be noteworthy that the acquisition of the land which was allotted to the petitioner was completed earlier and even the lease deed in favour of the petitioner was executed in the year 2010 much before the judgement of Gajraj and Savitri Devi have come into existence.

21. Since the farmers whose lands were acquired for NOIDA and Greater NOIDA were allowed to receive 64.7% additional amount, it appears that there was some unrest amongst the farmers whose land was acquired for the Y.E.I.D.A. The Chief Executive Officer of Y.E.I.D.A. in such a situation wrote a letter dated 10.04.2013 to the State Government requesting to hold meetings with the farmers and to pacify them. The State Government acting upon the said letter instructed the Commissioner, Meerut Division, Meerut vide letter dated 10.04.2013 to take necessary action and to hold meetings with the farmers.

22. The Commissioner held meeting with the various groups of farmers in association with the concerned District

Magistrates and on 16.07.2013 submitted a report to the State Government recommending for constituting a high level committee.

23. The State Government accordingly, vide office memo dated 03.09.2013 constituted a high level committee under the Chairmanship of Sri Rajendra Chaudhary, Minister of Prison, State of U.P. with the Commissioners and the District Magistrates as it members for resolving the issue with the farmers. The said committee submitted it recommendations to the State Government inter alia recommending for the payment of 64.7% additional amount as "no litigation incentive" to the farmers and for its reimbursement from the allottees in the appropriate proportion. It further provided that the costing of the land remaining for the allotment be done accordingly keeping in mind the above benefits also.

24. The State Government accepted the aforesaid recommendations of the Committee and issued a Government Order dated 29.08.2014 inter alia mentioning that looking to the agitation of the farmers and the legal complications, it is necessary for an out of court settlement with the farmers by offering 64.7% additional amount provided they withdraw their petitions challenging the acquisition proceedings and undertakes not to institute any litigation and create any hindrance in the development work of the Y.E.I.D.A.

25. Thus, Government directed for the payment of 64.7% additional amount to the farmers and to recover it from the allottees making it clear that the burden of this additional amount would be borne by the Y.E.I.D.A. from its own sources and the Government would not provide any financial aid in that regard.

26. It would be relevant at this juncture alone to point out that there is no material on record to establish that there was any challenge to the acquisition proceedings of the land acquired for the benefit of Y.E.I.D.A. The Government Order probably proceeds on the incorrect assumption that some litigation challenging the acquisition is pending so as to issue the direction for payment of aforesaid additional amount subject to the farmers withdrawing their petitions challenging the acquisition.

27. The aforesaid Government Order was placed before the Board meeting of Y.E.I.D.A. on 15.09.2014 at item No.151/4 and the same was approved in the fifty-first meeting of the Board on the said date itself.

28. It is in pursuant to the above that demand notices initially on 15.12.2014 and then on 09.02.2018 were issued to the petitioner demanding additional premium @ Rs.600/- per sq. meters for the land allotted and leased out, totaling to Rs.12,14,10,000/- and directing the petitioner to pay the same in four installments as specified therein.

29. It is in the aforesaid background that the petitioner has preferred this writ petition for the quashing of the demand notice dated 15.12.2014, Board resolution dated 15.09.2014 and the Government Order dated 29.08.2014.

30. We have heard S/Sri Sunil Gupta, Navin Sinha and Anurag Khanna, all the Senior Counsel for the petitioners in various writ petitions. Sri Ajit Singh, Additional Advocate General, assisted by Sri J.N. Maurya, on behalf of the State of U.P. and Sri Ravikant & Sri M.C. Chaturvedi both Senior Counsel assisted by

Sri Aditya Bhushan Singhal for the Y.E.I.D.A. were heard in opposition.

31. The primary contention on behalf of the petitioner is that the decision in the case of Gajraj and others is not applicable in respect of acquisition of land for Y.E.I.D.A. as it was in relation to the acquisition of land for NOIDA and Greater NOIDA only. The said decision is subsequent to the completion of the acquisition proceedings in respect of land acquired for Y.E.I.D.A. and finalisation of the contract of lease of the petitioner with Y.E.I.D.A.

32. The Government could not have directed for extending any additional benefit to the farmers in respect of the land acquired for Y.E.I.D.A. on the basis of the decision of Gajraj. At least, the burden to realise this additional amount could not have been shifted upon the allottees. The Government was concerned only with the demand of the farmers and in considering the same is not justified in putting the burden to satisfy the said demand upon the allottees. Y.E.I.D.A. cannot legally realise any amount over and above that was mentioned in the allotment letter or the lease deed which brings about a binding contract between the parties.

33. Sri Ajit Singh, on behalf of the State placed reliance upon the short-counter affidavit filed by the State in Writ Petition No.52310 of 2017 and submitted that as the decision of the Supreme Court in Savitri Devi's case had come later on, the decision of Gajraj was taken as the precedent in accepting the recommendations of the high level committee and in issuing Government Order dated 29.08.2014.

34. The aforesaid Government Order is neither illegal nor arbitrary and is binding upon all concerned. Since dispute arises out of a concluded contract the petitioners have a remedy of a civil suit before the Civil Court.

35. Sri Ravikant, Senior Counsel supplemented the defence arguments by contending that by demanding additional amount as per the aforesaid Government Order, the concluded contract which had come into existence between the parties, had not been disturbed rather the Government has exercised its power of eminent domain in issuing the above Government Order so as to enhance the compensation payable to the farmers. Since the enhancement of compensation has been done in exercise of powers of eminent domain the petitioners who are making huge profits from the land allotted to them are equally responsible to share the burden.

36. The aforesaid Government Order is a policy decision and is binding upon all concerned in view of Section 41 of the Urban Planning Act.8

37. There is no illegality or any arbitrariness in the policy decision taken by the Government keeping in mind the agitation of the farmers which may otherwise would have the effect of killing the acquisition as a whole.

38. There is actually no change in the premium amount mentioned in the lease deeds and the demand is only to meet out the additional burden of extra payment due to exercise of powers of eminent domain.

39. Sri M.C. Chaturvedi, Senior Counsel submitted that the petitioners have an alternative remedy under Section 41(3) of the Urban Planning Act and that several writ petitions of similar nature have been

disposed of by the Court relegating the petitioners to the said remedy.

40. The petitioners if aggrieved, may institute a civil suit and the writ petitions are not maintainable.

41. Having noted the brief facts and the respective submissions of the parties, we begin with the effect and impact of the decision in the case of Gajraj.

42. The impugned Government Order, resolution of the Board and the demand for additional compensation have been issued, passed and raised basically on account of the decision in the case of Gajraj directing in equity to pay farmers additional compensation over and above that was admissible to them under the provisions of the L.A. Act. It must be remembered that the directions in the Gajraj's case were issued in the peculiar facts and circumstances of the case so as to save the acquisition which otherwise was not legally tenable. The said decision was in respect of the acquisition of land in Noida and Greater Noida and the petitioners who were before the court. It was not mandated to be applied in respect of other acquisitions of land viz. that of Y.E.I.D.A. covered by separate notifications and to persons who were not present before the court.

43. Thus, one of the questions which falls for our consideration is whether the directions in the case of Gajraj are applicable to the farmers or villagers whose land were acquired for Y.E.I.D.A.; who were not even parties in the writ petitions decided along with Gajraj and who had their land acquired under the different notifications other than which were the subject matter of challenge in those petitions so as to entitle them for additional benefit of 64.7% as has been granted to the farmers therein.

44. In order to address the above question it is important to consider the directions of the Gajraj's case and to find out upon whom they apply.

45. In the case of **Gajraj**, the writ petitions challenging the notifications of land acquisition proceedings of land situate in different villages of Greater Noida and Noida which were acquired for those two Authorities were decided and were disposed of in terms of the following directions :-

"481. As noticed above, the land has been acquired of large number of villagers in different villages of Greater Noida and Noida. Some of the petitioners had earlier come to this Court and their writ petitions have been dismissed as noticed above upholding the notifications which judgments have become final between them. Some of the petitioners may not have come to the Court and have left themselves in the hand of the Authority and State under belief that the State and Authority shall do the best for them as per law. We cannot loose sight of the fact that the above farmers and agriculturers/owners whose land has been acquired are equally affected by taking of their land. As far as consequence and effect of the acquisition it equally affects on all land losers. Thus land owners whose writ petitions have earlier been dismissed upholding the notifications may have grievances that the additional compensation which was a subsequent event granted by the Authority may also be extended to them and for the aforesaid, further spate of litigation may start in so far as payment of additional compensation

is concerned. In the circumstances, we leave it to the Authority to take a decision as to whether the benefit of additional compensation shall also be extended to those with regard to whom the notifications of acquisition have been upheld or those who have not filed any writ petitions. We leave this in the discretion of the Authority/State which may be exercised keeping in view the principles enshrined under Article 14 of the Constitution of India.

"482. In view of the foregoing conclusions we order as follows:

1. The Writ Petitions..... ……

..... ……

which have been filed with inordinate delay and laches are dismissed.

2. (i) The writ petitions..... ……

..... ……

are allowed and the notifications dated 26.5.2009 and 22.6.2009 and all consequential actions are quashed. The petitioners shall be entitled for restoration of their land subject to deposit of compensation which they had received under agreement/award before the authority/Collector.

2(ii) Writ petition .....relating to village Yusufpur Chak Sahberi is allowed. Notifications dated 10.4.2006 and 6.9.2007 and all consequential actions are quashed. The petitioners shall be entitled for restoration of their land subject to return of compensation received by them under agreement/award to the Collector.

2(iii) Writ Petition..... relating to village Asdullapur is allowed. The notification dated 27.1.2010 and 4.2.2010 as well as all subsequent proceedings are quashed. The petitioners shall be entitled to restoration of their land.

3. All other writ petitions except as mentioned above at (1) and (2) are disposed of with following directions:

(a) The petitioners shall be entitled for payment of additional compensation to the extent of same ratio (i.e. 64.70%) as paid for village Patwari in addition to the compensation received by them under 1997 Rules/award which payment shall be ensured by the Authority at an early date. It may be open for Authority to take a decision as to what proportion of additional compensation be asked to be paid by allottees. Those petitioners who have not yet been paid compensation may be paid the compensation as well as additional compensation as ordered above. The payment of additional compensation shall be without any prejudice to rights of land owners under section 18 of the Act, if any.

(b) All the petitioners shall be entitled for allotment of developed Abadi plot to the extent of 10% of their acquired land subject to maximum of 2500 square meters. We however, leave it open to the Authority in cases where allotment of abadi plot to the extent of 6% or 8% have already been made either to make allotment of the balance of the area or may compensate the land owners by payment of the amount equivalent to balance area as per average rate of allotment made of developed residential plots.

4.The Authority may also take a decision as to whether benefit of additional compensation and allotment of abadi plot to the extent of 10% be also given to;

(a) those land holders whose earlier writ petition challenging the notifications have been dismissed upholding the notifications; and

(b) those land holders who have not come to the Court, relating to the notifications which are subject matter of challenge in writ petitions mentioned at direction No.3.

5.....

6.....

46. The above directions explicitly permits only a few categories of the petitioners mentioned in sub-paragraph 3(a) of paragraph 482 of the decision in Gajraj's case to be entitled to additional compensation to the extent of 64.7% in addition to the compensation already received by them and some other benefits and to no others.

47. It may be pertinent to note that there was no direction for grant of payment of additional compensation or for conferment of other benefits by the Authority in respect of those persons whose land had not been acquired in terms of notifications which were subject matter of challenge in the case of Gajraj and connected bunch of writ petitions. There was no specific direction that the additional compensation so directed to be paid is recoverable from the allottees rather the matter was left to be decided by State or the Authority concern in accordance with law.

48. The judgment in the case of Gajraj was challenged before the Supreme Court in the case of **Savitri Devi**. One of the argument of the authorities was that the award of additional compensation by the High Court is against the statute. The Apex Court though agreeing with the above submission but on account of the concession of the counsel for the parties, left the decision of the High Court undisturbed taking notice of the facts of the case that the High Court was faced with a peculiar situation where, on one hand, invocation of urgency provisions under Section 17 of the L. A. Act and dispensing with the right to file objections under Section 5 - A of the L. A. Act were both illegal and on the other hand, there was a situation where because of delay in challenging the acquisitions by the landowners, development had taken place in the villages and in most of the cases, third party rights had been created.

49. The Supreme Court in the case of Savitri Devi clearly observed that directions in Gajraj were issued by the High Court in the peculiar circumstances of the case and therefore would not form a precedent for future cases. The relevant extracts from the judgment in the case of Savitri Devi are reproduced herein below:-

"44. We have also to keep in mind another important feature. Many residents of Patwari village had entered into agreement with the authorities agreeing to accept enhanced compensation @ 64.7%. This additional compensation was, however, agreed to be paid by the authorities only in respect of landowners of Patwari village. The High Court has bound the authorities with the said agreement by applying the same to all the land owners thereby benefiting them with 64.7% additional compensation. There could have been argument that the authorities cannot be fastened with this additional compensation, more particularly, when

machinery for determination for just and fair compensation is provided under the Land Acquisition Act and the land owners had, in fact, invoked the said machinery by seeking reference Under Section 18 thereof. Likewise, the scheme for allotment of land to the land owners provides for 5% and 6% developed land in Noida and Greater Noida respectively. As against that, the High Court has enhanced the said entitlement to 10%. Again, we find that it could be an arguable case as to whether High Court could grant additional land contrary to the policy. Notwithstanding the same, the Noida authority have now accepted this part of the High Court judgment after the dismissal of the appeals filed by the Noida authority, and a statement to that effect was made by Mr. Rao.

45. .....…

46. Thus, we have a scenario where, on the one hand, invocation of urgency provisions under Section 17 of the Act and dispensing with the right to file objection under Section 5A of the Act, is found to be illegal. On the other hand, we have a situation where because of delay in challenging these acquisitions by the landowners, developments have taken place in these villages and in most of the cases, third party rights have been created. Faced with this situation, the High Court going by the spirit behind the judgment of this Court in Bondu Ramaswamy came out with the solution which is equitable to both sides. We are, thus, of the view that the High Court considered the ground realities of the matter and arrived at a more practical and workable solution by adequately compensating the land owners in the form of compensation as well as allotment of developed Abadi land at a higher rate i.e. 10% of the land acquired of each of the landowners against the eligibility and to (sic under) the policy to the extent of 5% and 6% of Noida and Greater Noida land respectively.

47. Insofar as allegation of some of the Appellants that their abadi land was acquired, we find that this allegation is specifically denied disputing its correctness. There is specific averment made by the NOIDA Authority at so many places that village abadi land was not acquired. It is mentioned that abadi area is what was found in the survey conducted prior to Section 4 Notification and not what is alleged or that which is far away from the dense village abadi. It is also mentioned that as a consequence of the acquisition, the Authority spends crores and crores of rupees in developing the infrastructure such as road, drainage, sewer, electric and water lines etc. in the unacquired portion of the village abadi. During the course of hearing, Chart No. 2 in respect of each village of Greater Noida was handed over for the consideration of this Court, wherein the amount spent by the Authority on the development, including village development (which is the unacquired village abadi), has been given in Column No. 4 thereof. It has been the consistent stand of the NOIDA Authority that prior to the issuance of Section 4 Notification under the Land Acquisition Act, 1894, survey was conducted and the abadi found in that survey was not acquired. In fact, affidavits in this respect have also been filed not only in this Court but also in the High Court. We have mentioned that there has been a long gap between acquisition of the land and filing of the writ petitions in the High Court by these Appellants challenging the acquisition. If they have undertaken some construction during this period they cannot be allowed to take advantage thereof. Therefore, it is difficult to accept the

argument of the Appellants based on parity with three villages in respect of which the High Court has given relief by quashing the acquisition.

48. To sum up, 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 landowners to claim higher compensation under the machinery provided in the Land Acquisition Act wherein the matter would be examined on the basis of the evidence produced to arrive at just and fair market value.

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. We may record that some of the Appellants had tried to point out certain clerical mistakes pertaining to their specific cases. For example, it was argued by one Appellant that his land falls in a village in Noida but wrongly included in Greater Noida. These Appellants, for getting such clerical mistakes rectified, can always approach the High Court.

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."

50. Thus, from the above directions and observations, it is quite implicit that judgment in Gajraj was rendered in the peculiar facts & circumstances of that case and is not a binding precedent. The award of 64.7% additional compensation over and above admissible under the L.A. Act is not by way of any legal principle but only for adjusting the equities. It at the same time gave no direction for grant of additional compensation to those persons whose land was not covered by the notifications of acquisition under challenge in those bunch of petitions. The directions therein were not in rem and were not meant to be applied to notifications issued for acquiring land elsewhere or in respect of acquisition for Y.E.I.D.A. or to persons who were not party to the proceedings before the court in any form.

51. The submission that the Supreme Court decision in **Savitri Devi** had come later on by which time a conscious decision was already taken by the Government and the Board to follow the directions of Gajraj and therefore the observation in **Savitri Devi** that the directions in Gajraj would not be treated as precedent does not affect the decision of the Government/Board is bereft of any merit. The directions given in Gajraj could not have been applied in the present case concerning acquisition of land for the benefit of Y.E.I.D.A. for two specific reasons. First, it was not a judgement in rem. It was not applicable to other acquisitions such as for Y.E.I.D.A. which were not the subject matter of challenge in Gajraj. Secondly, the directions issued in

Gajraj were not in the nature of binding precedent from day one. The mere specific declaration subsequently that the directions are not by way of precedent would not mean those directions had the binding precedent earlier and ceased to be binding later on. If the directions are not binding precedents they happen to be so from the inception irrespective of the declaration by the court subsequently. The declaration in Savitri that directions in Gajraj are not binding makes the directions non-applicable from day one irrespective of the date of the decision of Savitri's case. Even, assuming that the decision to hold those directions as not binding may have come subsequently nonetheless it cannot be applied to the acquisition of land for Y.I.E.D.A. due to first reason mentioned above. This apart even the decision in Gajraj's case make it abundantly clear that the directions have to be applied in a limited manner as aforesaid therein. It no where directed to grant additional benefit of compensation to persons whose acquisition of land was not the subject matter of the bunch petitions along with Gajraj.

52. In **Mange @ Mange Ram**9, the petitioners therein claimed the same relief as was granted in Gajraj and upheld in Savitri Devi. The claim raised therein was turned down by the court recording that the benefit granted by Gajraj cannot be extended to the petitioners therein though they may be similarly situated as the Authority had not taken a decision to extend all the benefits of Gajraj to every similarly situate person. It was held that all benefits of Gajraj cannot be extended to the petitioners therein, even though they may be similarly situated and their land had been acquired under the same notification.

53. The aforesaid decision in Mange @ Mange Ram was subjected to challenge before the Supreme Court in **Khatoon & Others**10. The Supreme Court held that the petitioners therein have no legal right to claim all benefits of Gajraj. The L.A. Act does not provide for grant of such reliefs when the State has already paid the statutory compensation. The reliefs in Gajraj were granted by the High Court by exercising extraordinary jurisdiction under Article 226 of the Constitution in the light of the peculiar facts and circumstances of the case. They were confined only to the land owners, who had filed their petitions. The Supreme Court in Savitri Devi case has already held that the directions given in Gajraj are not to be treated as precedent for being adopted in other cases in future and they be treated as confined to the case of Gajraj only. Thus, the view taken by the High Court in Mange Ram was approved and the petitions were dismissed.

54. The question of admissibility of the benefit of the directions contained in the Gajraj for providing additional compensation of 64.70% and other benefits came up for consideration before a coordinate Division Bench of this court in the case of **Rajeshwari and 3 others**11 decided on 03.05.2017 and it was held that the relief which was granted in Gajraj's case and as affirmed by the Supreme Court in **Savitri Devi** can not be made applicable to the acquisition proceedings which were not assailed and were not the subject matter of adjudication before the Full Bench. The directions of the Full Bench of Gajraj do not stand attracted in the case of persons whose lands were not acquired in terms of the notifications under challenge in the case of Gajraj.

55. A similar view was taken in a recent case by another Division Bench in **Ramesh and others**12 and it was held that the directions of the Gajraj case were not in

respect of those persons whose lands were acquired under different notifications other than which were under challenge in the case of Gajraj.

56. The judgment and order of Gajraj as repeatedly observed has been rendered in the peculiar facts and circumstances of that case in equity alone without laying down any principle of law. It is well settled that mere direction in a judgment without laying down any principle of law is not a precedent having any binding effect.13

57. Accordingly, in our opinion the equitable directions for payment of additional compensation as contained in the case of Gajraj were not meant to be applied to other land acquisition proceedings other than for Noida or Greater Noida, particularly for the land acquired for Y.E.I.D.A. by separate and different notifications.

58. The next question which arises for our consideration is whether the State Government or the Board of Y.E.I.D.A. were justified in granting the benefit of additional compensation of 64.7% to the farmers whose land was acquired for Y.E.I.D.A. on the basis of the directions contained in the Gajraj's case by issuing the Government Order dated 29.08.2014. In short the issue is about the validity of the aforesaid Government Order.

59. We have already discussed and opined that the directions for additional compensation given in Gajraj's case were not of general application and were meant to be applied in limited cases as described therein i.e. in respect of acquisition of land of Noida and Greater Noida that too in respect of those persons only who were covered under sub-paragraph 3(a) of paragraph 482 of the aforesaid judgement.

60. The notifications to acquire the land for Y.E.I.D.A. was totally independent to the acquisition proceedings which were subject matter in Gajraj and the farmers whose land were acquired for Y.E.I.D.A. were not even parties before the High Court in the aforesaid cases and as such the directions given therein for payment of additional compensation as already held were not applicable for extending any benefit to the farmers whose land was acquired for Y.E.I.D.A. Therefore, the issuance of the Government Order and its acceptance by Y.E.I.D.A. is patently illegal as the very basis for its issuance is faulty.

61. It is tirite to mention here that the L.A. Act provides for a complete machinery and mechanism for the determination of the compensation admissible and payable to the farmers/land owners whose land is acquired and therefore, no additional benefit over and above what is prescribed under law can be extended to farmers/the land owners.

62. It is important to note that the L.A. Act is a self-contained code and provides the procedure to be followed for acquisition of the land as well as for the assessment of its market value for the purposes of payment of just and fair compensation to the land owners. In addition to the market value it also provides for payment of 30% solatium, 12% additional compensation and interest @ 9% and 15%. A person not satisfied by the compensation so determined and offered has a right to seek reference under Section 18 of the L.A. Act and a further appeal under Section 54 of the L.A. Act before the High Court for getting it enhanced. Therefore, the Act ensures payment of fair and reasonable compensation to all the land holders. The Act however, does not provide

for payment of any thing over and above the amount of compensation as mentioned above or for granting any other benefit to the land holders. Thus, in the absence of any statutory provision no land owner is entitle to any additional benefit on account of the acquisition of his land much less additional compensation as has been offered under the Government Order and accepted by Y.E.I.D.A.

63. The question as to whether any claim for additional benefit can be raised as a matter of right over and above the compensation admissible and payable under the L.A. Act was the subject of consideration before a Full Bench of this court in the case of **Ravindra Kumar**14. In the said case it was held that whatever compensation has to be given is provided under the L.A. Act itself which is a self-contained code. Any Government Order which provide for any further benefit not mentioned in the Act would be inconsistent with the intention of the parliament and hence such a Government Order would be invalid and violative of Article 16 of the Constitution and accordingly it has to be ignored by the authorities.

64. In view of the above discussion, the Government Order dated 29.08.2014 which provide for additional compensation of 64.70% to the farmers is violative of the provisions of the L.A. Act and is invalid.

65. Once the aforesaid Government Order is ignored, the resolution of Y.E.I.D.A. passed in its meeting on 15.09.2014 accepting the same becomes meaningless.

66. An ancillary argument which arises is that the government in equity can provide for the payment of higher compensation and that there is no illegality in making such higher payment.

67. The submission may appear to be a little attractive that the government may in order to adjust equities, provide for payment of compensation higher than the amount prescribed under law but the question is whether the government is possessed with such equitable jurisdiction.

68. The exercise of equitable jurisdiction is an ornament of the courts of law and cannot be exercised by the government. If the government is permitted to exercise the same, it may result in a chaotic conditions and the government would start picking and choosing cases so as to grant relief in equity in complete violation of the law leaving the field open for nepotism.

69. The State Government in issuing any Government Order has to act strictly in accordance with law or statutory provisions. It cannot act arbitrarily or in an unfair manner in breach of specific provisions of law.

70. The equitable relief can only be granted by the courts specially the High Courts in exercise of their extra ordinary jurisdiction if at all the facts and circumstances of the case so permits but not by the Government by issuing a Government Order. The Government in issuing the above Government Order cannot be allowed to usurp the jurisdiction of the courts which otherwise is not vested with the Government. In view of this also the impugned Government Order cannot be sustained and has to be ignored.

71. It is pertinent to mention here that equity always follows the law. It cannot override the statutory provisions, therefore, where statutory provisions exist for the assessment and determination of the compensation for the acquired land, the compensation has to be awarded

accordingly and cannot be awarded by adjusting the equities.

72. The courts administer justice according to law. Equity and fair play therefore, must yield to clear and express provisions of law.15

73. It must also be remembered that it is not permissible to bend law for adjusting equity.16

74. In nutshell, the courts ought not to be guided by humanitarian considerations, sympathy & compassion in the matter of dispensation of justice as it would amount to altering, amending or re-writing the statutory provisions. The equity considerations are not applicable in case of clear statutory provisions and the courts are not supposed to pass orders contrary to law.

75. The above principles apply with much greater force to the State Government that, in fact, has no authority to exercise equity jurisdiction.

76. In view of the aforesaid facts and circumstances, the issuance of the Government Order dated 29.08.2014 is not only illegal and against the statutory provision but is also without jurisdiction.

77. Now we take the next step and come to the issue of exercise of power of "eminent domain" by the State Government in extending the benefit of additional compensation to the farmers and in directing the financial burden so arising to be realised from the allottees.

78. The power of "eminent domain" is exercisable by the government to take away the private property of a citizen specially land for public use subject to payment of reasonable compensation.

79. According to Black's Law Dictionary Eighth Edition the inherent power of the government to take over privately owned property amounts to exercise of power of "eminent domain".

80. In view of the meaning of "eminent domain" as given above it is a power which is exerciseable for the purposes of taking possession of the private property for public use subject to payment of reasonable compensation. The case at hand is not one of exercising the aforesaid power inasmuch as here the property of the farmers has been taken away not in exercise of "eminent domain" but in exercise of the provisions of the L.A. Act subject to payment of compensation as provided therein.

81. The aforesaid power of "eminent domain" may be an incident of sovereignty or an offspring of political necessity but it cannot be exercised where specific provisions exist for acquiring private land for public purpose.

82. The expression "eminent domain" as explained in **Soora Ram Pratap Reddy**17 cuts no ice in favour of Y.E.I.D.A. It only says that "eminent domain" is an inherent political right or power of a Sovereign State to take private property for public use without the consent of the owner upon payment of compensation. There is no denial to the above legal proposition but the fact remains here the property of the petitioner is not being taken rather the private properties of the villagers have already been taken over and the controversy is only with regard to recovering of the additional compensation payable to the farmers from the petitioner who happens to be the subsequent owner of the property. This recovering or realisation of any part of the compensation from the

petitioner is not within the ambit of exercise of power of "eminent domain".

83. Accordingly, we are of the opinion that the grant of additional compensation and its realisation from the petitioner or the allottees cannot be associated with the exercise of power of "eminent domain".

84. The next argument is that the government order dated 29.08.2014 had been issued as matter of public policy and therefore, the court need not interfere with the same.

85. True it is that ordinarily in the matter of public policy the courts keep their hands away and do not intervene with the policy decision.

86. Nonetheless, the policy has to be tested on the anvil of Articles 14 and 16 of the Constitution of India. If it is found to be unfair, arbitrary or unreasonable, the courts can exercise its power of judicial review so as to interfere with it.

87. Even in **Express News paper** 18 it has been observed that writ petition challenging the executive action inter alia on the ground of violation of Articles 14 & 19 of the Constitution is maintainable and it is only in respect of civil rights flowing from the contract that it was held that the same can be decided in civil proceedings.

88. The decision in **Bondu Ramaswamy**19 cited to canvass that the Supreme Court therein had also directed the B.D.A.20 to give option to landowners to accept allotment of 15% of land acquired in lieu of compensation etc. is of no use as the said directions were also issued to avoid hardship to B.D.A. in case of salvage of acquisition. The observations of the court were to have a re-look to the policy of the Government in the matter of payment of compensation for the acquired land. The observation of the Supreme Court were followed and the L.A. Act has been replaced by the New Act.

89. Similarly, the observation of the Supreme Court in Delhi Development Authority21that the amount usually offered by way an award of Collector under the L.A. Act is way below the market value, does not mean that that the landholders can be allowed extra amount in addition to the amount determined by the court by an executive fiat or by a policy decision.

90. The aforesaid Government Order dated 29.08.2014 is in two parts. First part confers additional benefits to the farmers which otherwise are not available to them in law. The second part permits the Y.E.I.D.A. to realise this additional financial burden on account of payment of additional compensation to the farmers from the allottees.

91. As far as the first part of the aforesaid Government Order and the policy of the government in that regard for payment of additional compensation to the farmers, there may not be any dispute to enable the court to exercise judicial review. The government is free to adopt any policy which is fair and reasonable for payment of higher compensation, without offending the rights of third parties or the other stake holders.

92. The petitioner is only aggrieved by the second part of the government order or the policy of the government in permitting realisation of the additional amount of compensation so payable from the allottees inasmuch as it amounts to

reopening of the terms and conditions of the lease deed which is final and binding upon the parties.

93. Any rights, on the basis of a concluded or final contract or lease, which have been crystallized in favour of any party cannot be taken away by framing a policy on some later date. A policy so framed would be prospective in nature and cannot affect the contracts already finalised. Any such policy which is unilaterally framed disturbing the rights which have accrued to a party would clearly be violative of Articles 14 and 16 of the Constitution.

94. Lease is one of the modes of transfer of the property as per the T.P. Act22. It is defined under Section 105 of the T.P. Act as under:-

"A lease of immoveable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.

Lessor, lessee, premium and rent defined.--The transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, share, service or other thing to be so rendered is called the rent."

95. A simple reading of the above definition of the lease would indicate that it is a transfer of property for a specified time or in perpetuity on consideration which may be in shape of lease rent and premium amount. The consideration mentioned in the instrument of sale or lease is a solemn amount and cannot be subjected to any change or alteration subsequent to the execution and registration of the lease deed.

96. In other words, a sale consideration agreed upon and mentioned in the lease deed is beyond any change unless agreed upon by both parties and a proper instrument in this regard is executed between them.

97. The issuance of the impugned demand amounts to increasing the premium or the consideration mentioned in the lease deed which is not permissible in law unless there is a conscious act of parties to the lease to agree and change the same by entering into an instrument in accordance with law. This amount of premium or sale consideration is not liable to change without the consent of the parties or in a unilateral manner.

98. There is nothing on record which may establish that the parties have ever entered into any negotiation and agreed for the change/alteration of the premium or the consideration mentioned in the lease deed. No document in this regard has been executed and got registered.

99. It is trite to mention here that a lease deed is required to be registered both under the provisions of T.P. Act and under the Registration Act. The amount of premium or the sale consideration mentioned therein as such is not liable to any change otherwise than by execution another registered instrument.

100. Our attention has been drawn to Clause G of part V of the lease deed dated 22.01.2010. The aforesaid Clause reads as under:-

"The Chief Executive Officer or the lessor resources the right to make such additions and alterations or modifications in these terms and conditions as may be considered just and expedient."

101. On the basis of the aforesaid Clause it has been canvassed that the Y.E.I.D.A. or its Chief Executive Officer is fully empowered to increase or decrease the premium amount mentioned in the lease deed.

102. The submission on the face of it has no merit. The language of the said Clause clearly shows that the Chief Executive Officer or the Y.E.I.D.A. reserves the right to make additions, alterations and modifications in "**these terms and conditions**" and not the premium amount or the consideration.

103. The word "**these**' used therein is of great significance. It qualifies the terms and conditions mentioned in part V of the lease deed which do not pertain to the premium amount or the consideration. Even otherwise the reference to the terms and conditions which are subject to alteration, modification and addition is to the general terms regarding the term of the lease, the mode of payment and the penalty clause etc but does not refer to the consideration part of the lease mentioned in the lease deed. The consideration part is contained in part-1 of the lease deed which is independent to the terms and conditions of the lease which have been provided in part-III, IV and V of the lease deed.

104. In view of above, in our opinion the right to modify, alter or add any terms and conditions of the lease does not permit change in the consideration or the premium amount.

105. It may be important to mention here that in the event Y.E.I.D.A. feels that the consideration / premium in the lease deed was low or inadequately and deserves to be increased the proper remedy for it was to increase the same by the mutual consent of the parties by executing a proper registered document or by filing a civil suit for the revocation/cancellation of the lease deed on the ground of inadequate consideration.

106. The Y.E.I.D.A. not having availed either of the two remedies cannot unilaterally be permitted to enhance the consideration/premium amount mentioned in the lease deed.

107. A feeble attempt has been made to assert that the directions of the government are binding upon the Y.E.I.D.A. and therefore, if it had demanded extra amount from the petitioner on the directions of the government it had not committed any illegality.

108. Admittedly, Y.E.I.D.A. is an "authority' constituted under Section 3 of the Industrial Development Act23 and one of its functions as enumerated under Section 6 of the said Act is to allocate and transfer either by way of sale or lease or otherwise plots of land for industrial, commercial or residential purposes. It is in furtherance of its above proclaimed activities that the petitioner has been leased out the land in question.

109. There may not be any quarrel that according to the provisions of Section 41 of the Urban Planning Act, Authority is bound carry out directions of the State Government which are issued from time to time for the efficient administration of the Act i.e. Urban Planning Act. In view of the

above, the authority is obliged to carry out the directions of the State Government subject to the conditions that the directions are in accordance with law. If however, the directions are ex facie illegal or held to be illegal by any competent court of law, it is not incumbent upon the Authority to follow those directions. Since the directions of the State Government as contained in the Government Order dated 29.08.2014 have been held to be illegal rather the Government Order itself has been found to be without jurisdiction, the Y.E.I.D.A. is not bound by the directions of the State Government contained therein.

110. This take us to the last limb of the argument that the writ petition is not maintainable in view of the alternate remedy available to the petitioner under Section 41(3) of the Urban Act24 or for the reason that it could have filed a civil suit.

111. Section 41(3) of the Urban Act reads as under:-

"The State Government may, at any time, either on its own motion or on application made to it in this behalf, call for the records of any case disposed of or order passed by the [Authority or the Chairman) for the purpose of satisfying itself as to the legality or propriety of any order passed or direction issued and may pass such order or issue such direction in relation thereto as it may think fit:

Provided that the State Government shall not pass an order prejudicial to any person without affording such person a reasonable opportunity of being heard."

112. The aforesaid provision provides for a revision against the order passed by the Authority or the Chairman to adjudge the legality or the propriety of any direction issued by them.

113. In the case at hand no order of the Authority or the Chairman has been impugned in the present petition.

114. The petition apart from actions of the Y.E.I.D.A. consequent to the government order assails the Government Order itself. The challenge is virtually to the government order which is not reviseable. The actions based on the said government order are only consequential in nature and cannot exist independently. The validity of the Government Order can not be adjudicated upon by the Government itself.

115. Therefore, so called remedy of revision is simply illusory in nature and sham.

116. Moreover, we do not find any order passed by the Y.E.I.D.A. or its Chairman which may have been questioned in this petition rather it is only a demand notice issued by the Special Executive Officer, who is neither the Chairman or the Authority that has been challenged. Therefore, the plea of alternative remedy is of no avail.

117. This apart as the issues raised in this petition are all of legal nature and are not dependent upon any disputed facts, we see no good reason to relegate the petitioner to alternate remedy instead of answering the questions on the judicial side.

118. In the end, we conclude as under:-

(i) The decision in the case of Gajraj as approved by Savitri Devi is not a judgement in rem which could have been applied to proceedings for acquiring the land under different notifications or for Y.E.I.D.A.;

(ii) the issuance of the Government Order dated 29.08.2014 and its acceptance by Y.E.I.D.A. is patently illegal. It is violative of the provisions of the L.A. Act and is otherwise without jurisdiction as no such Government Order is liable to be issued in equity by the Government and that the policy behind it is unfair, unreasonable and arbitrary which is in violation of the provisions of the T.P. Act; and

(iii) the aforesaid Government Order dated 29.08.2014 as such is held to be invalid and liable to be ignored. Consequentially, all actions and demands of the Y.E.I.D.A. based upon it are held to be illegal.

119. In view of above facts and circumstances, the impugned Government Order dated 29.08.2014 is declared to be illegal and without jurisdiction and consequently all demands raised on its basis are quashed.

120. The Writ Petitions are **allowed** with no orders as to costs.

(2020)09ILR A626
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.11.2019

BEFORE

THE HON'BLE PANKAJ MITHAL, J.
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

WRIT – C No. 30544 of 2019

Vishnu Kumar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ankit Agarwal

Counsel for the Respondents:
C.S.C.

(A) Civil Law - Essential Commodities Act, 1955 - Section 3/7 - Indian Penal Code, 1860 - Section 420 - Motor Spirit and High Speed Diesel (Regulation of Supply, Distribution and Prevention of Malpractices) Order, 2005 - Clause 4 - Restriction on marketing of motor spirit and high speed diesel - Clause 6-A - Limited purpose of direct sale of bio-diesel blending with high speed diesel - Clause 7 - Power of search and seizure - Clause 8 - Sampling of Product and testing - Clause 9 - Power of Central Government to issue directions - Clause 10 - Overriding effect .

Petitioner running retail outlet - no permission in terms of Clause 6-A of the Control Order - guidelines contained in the Government Order dated 27.10.2016 not followed - retail outlet of the petitioner inspected - found that stocks contained in the underground tank adulterated with kerosene oil - F.I.R. lodged against the petitioner under Section 420 IPC read with Section 3/7 Essential Commodities Act, 1955 - bio-diesel retail centre of the petitioner sealed - provisions of the MS-HSD Order, 2005 as amended by the Amendment Order 2017 and guidelines under the Government Order dated 27.10.2016 contravened - powers of search and seizure exercised by the respondent authorities as per the provisions of Clause 7 of the MS-HSD Order, 2005 cannot be faulted with - direction to the respondent to open the seal of the retail centre of the petitioner and not to interfere in its functioning. (Para - 5,38,40)

HELD: - Quashing of the sealing order and opening of the seal of the underground tank of the retail unit of the petitioner cannot be granted at this stage. (Para - 41)

Petition dismissed. (E-7)

List of Cases cited: -

1. Indian Oil Corporation Limited Vs U.O.I., (2013) 2 CHN 662

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

1. Counter affidavit filed on behalf of the third respondent by the learned

Additional Chief Standing Counsel is taken on record.

2. Counsel for the petitioner waives his right to file a rejoinder affidavit.

3. As jointly agreed by counsel for the parties the writ petition is taken up for disposal as per the Rules of the Court.

4. Heard Sri Ankit Agarwal, learned counsel for the petitioner and Sri Pranav Ojha, learned Additional Chief Standing Counsel appearing for the State respondents.

5. The present petition has been filed seeking quashing of a sealing order which is stated to be undated and in pursuance of which the bio-diesel retail centre of the petitioner has been sealed. A further prayer has been made for a direction to the respondent to open the seal of the retail centre of the petitioner and not to interfere in its functioning.

6. The facts as pleaded in the writ petition are that the petitioner is engaged in the business of retail sale of bio-diesel since the year 2017 and since bio-diesel is not a petroleum product no clearance of any sort is required for its storage and handling. It has been stated that the officials of the District Supply Office, Aligarh are continuously harassing the petitioner and an F.I.R. was maliciously lodged on 31.08.2019 under Section 420 IPC read with Section 3/7 Essential Commodities Act, 1955 at P.S. Gonda, District Aligarh and thereafter the respondents have proceeded to illegally seal the bio-diesel pump of the petitioner. It is submitted that no copy of the sealing order has been supplied to the petitioner and the entire proceedings are in gross violation of the principles of natural justice and are legally unsustainable.

7. A supplementary affidavit has also been filed by the petitioner reiterating the assertion that bio-diesel is not a petroleum product and no clearance is required for its storage and handling; however, reliance is sought to be placed on the provisions contained under the Motor Spirit and High Speed Diesel (Regulation of Supply, Distribution and Prevention of Malpractices) Order, 20051 to contend that the search and seizure operations carried out by the respondent authorities at the retail outlet of the petitioner are contrary to the provisions contained under Clause 7 of the aforesaid Order.

8. Per contra, learned Additional Chief Standing Counsel appearing for the State respondents placed reliance upon the counter affidavit filed on behalf of the respondent no. 3 to contend that the petitioner was operating the retail outlet without any valid licence or permission for storage and sale of diesel/motor spirit/bio-diesel. The assertion made by the petitioner that no licence is necessary for storage and sale of bio-diesel has been denied. It has been stated that as per the provisions contained under the MS-HSD Order, 2005, as amended in terms of the Amendment Order of the year 2017, Clause 6-A has been inserted and in terms thereof the sale of bio-diesel has also been brought under its purview. Further reliance has been drawn to a Government Order dated 27.10.2016 containing certain guidelines with regard to grant of No Objection for the purposes of sale/purchase and storage of bio-diesel. It has been submitted that the aforementioned Government Order though was issued in the context of grant of approval to a particular applicant but the

said Government Order was thereafter circulated by the State Government vide D.O. Letter dated 13.04.2017 to all District Magistrates/District Supply Officers in the State of Uttar Pradesh for taking appropriate action pursuant thereto. Accordingly, it is submitted that the guidelines contained in the Government Order dated 27.10.2016 are applicable with regard to the grant of No Objection/approval for sale/purchase and storage of bio-diesel in the State of Uttar Pradesh.

9. Learned counsel appearing for the State respondents further submits that the petitioner was running the retail outlet without necessary permission and upon an inspection made by the Supply Inspector several irregularities were noticed and accordingly an F.I.R. was lodged against the petitioner on 31.08.2019. As regards the sealing of the retail outlet it is submitted that the same was done after due information to the petitioner and a copy of the sealing order dated 29.08.2019 has also been placed on record as annexure C.A.3 to the counter affidavit which discloses that during an inspection made by the authorities on 29.08.2019 the papers with regard to the sale and storage could not be produced and accordingly the under ground tank of the retail outlet was sealed.

10. Rival submissions fall for consideration.

11. The Essential Commodities Act, 1955 was enacted in the interests of the general public, for the control of the production, supply and distribution of, and trade and commerce, in certain commodities.

12. In terms of Section 3 of the aforesaid Act, the Central Government is empowered to control the production, supply, distribution, etc., of essential commodities and in its terms if the Central Government is of the opinion that it is necessary or expedient so to do for maintaining or increasing supplies of any essential commodity or for securing their equitable distribution and availability at fair prices or for securing any essential commodity for the defence of India or the efficient conduct of military operations, it may, by order, provide for regulating or prohibiting the production, supply and distribution thereof and trade and commerce therein. The order to be made in exercise of powers under Section 3 may interalia provide for regulating by licenses, permits or otherwise the storage, transport, distribution, disposal, acquisition, use or consumption of, any essential commodity. Section 7 provides for the penalties if any person contravenes any order made under Section 3.

13. In exercise of power conferred by Section 3 of the Essential Commodities Act, 1955 the Central Government notified the MS-HSD Order, 2005 by means of a notification dated 19th December, 2005 in supersession of the earlier Control Order of 1998.

14. The expressions "high speed diesel" and "motor spirit" which are sought to be regulated in terms of the MS-HSD Order, 2005 have been defined as follows :-

"2.(e)"High Speed Diesel" means any hydrocarbon oil, excluding mineral colza oil and turpentine substitute, which meets the requirements of Bureau of Indian Standards Specification Number IS-1460.

(g)"Motor Spirit" means any hydrocarbon oil, excluding crude mineral oil, which meets the requirements of

Bureau of Indian Standards Specification Number IS-2796;

15. The definitions of certain other expressions as defined under the MS-HSD Order, 2005, which would be relevant for the purposes of controversy involved in the present case,are being extracted below :-

"2(k) "product" means motor spirit and high speed diesel;

2(p) "unauthorized purchase" means purchase of the product from sources other than those authorized by the oil companies;

2(q) "unauthorized sale" means sale of product by a dealer or consumer to another dealer or consumer or to any other person in contravention of the directive issued for the purpose by the State Government or the oil companies or in contravention of any provision of this order;

2(r) "unauthorized possession" means keeping of motor spirit or high speed diesel or any petroleum product or its mixture, in contravention of the provisions of this order, under the control of dealer or any other person without valid sales documents issued by the concerned oil company."

16. As to what would constitute malpractices, has also been specified in the following terms :-

"2 (f) "Malpractices" shall include the following acts of omission and commission in respect of motor spirit and high speed diesel-

(i) adulteration
(ii) pilferage
(iii) stock variation
(iv) unauthorized exchange
(v) unauthorized purchase
(vi) unauthorized sale
(vii) unauthorized Possession
(viii) overcharging
(ix) sale of off-specification product; and
(x) short delivery;

(f1) "marker" means a chemical substance approved by the Central Government from time to time for blending in kerosene and other petroleum products with the objective of preventing their diversion or adulteration of motor spirit or high speed diesel;"

17. The product supply and transportation is dealt within the Clause 3(1) of the Order of 2005. Clause 3(4) of the Order of 2005 provides no person other than the dealer or Oil Company shall be engaged in the business of selling product. Clause 3(5) provides no person shall sell or agree to sell any petroleum product or its mixture other than motor spirit or high speed diesel or any other fuel authorized by the Central Government in any form, under any name, brand or nomenclature, which can be and is meant to be used as fuel in any type of automobile vehicles fitted with spark ignition engines or compression ignition engines. The relevant provisions are extracted below:-

"Clause 3(4): No person other than the dealer or oil company shall be engaged in the business of selling product;

Clause 3(5): provides no person shall sell or agree to sell any petroleum product or its mixture other than motor spirit or high speed diesel or any other fuel authorized by the Central Government in any form, under any name, brand or nomenclature, which can be and is meant to be used as fuel in any type of automobile vehicles fitted with spark ignition engines or compression ignition engines."

18. Clause 3(6) provides no dealer, transporter, consumer or any other person shall indulge in any manner in any one or more of the malpractices. The expression "malpractices" has been defined in Clause 2(f) as including the following acts of omission and commission in respect of motor spirit and high speed diesel namely adulteration, pilferage, unauthorized exchange, unauthorized purchase, unauthorized sale, unauthorized possession, over-charging, sale of off specification product and short delivery. Clause 3(7) provides that the delivery or sale of motor spirit and high-speed diesel shall be made by a dealer of oil company only from authorised retail pump outlet. Clause 5 deals with grant of authorization to market motor spirit and high speed diesel. Authorization has to be issued on an application to be submitted to the Central Government in the prescribed form.

19. Clause 4 of the MS-HSD Order, 2005 provides for a restriction on marketing of motor spirit and high speed diesel and the same is in the following terms :-

"4. Restriction on marketing of motor spirit and high speed diesel :- No person, other than those authorised by the Central Government, shall market and sell motor spirit or high speed diesel to consumers or dealers."

20. Clause 6 of the order of 2005 enables the Central Government to issue an order to make it mandatory to supply motor spirit and high speed diesel blended with a specified quantity of anhydrous ethanol and/or bio-diesel in the whole or any part of the territory of a State or whole of the territory of Union of India.

21. The provision with regard to grant of permission by the Central Government for sale of bio-diesel (B-100) for a limited purpose as a blend with high speed diesel to bulk consumers in accordance with the standards specified by Bureau of Indian Standards, was provided for by insertion of Clause 6-A in the MS-HSD Order, 2005 in terms of Notification No. G.S.R. 621 (E), dated August 10, 2015 published in the Gazette on the same date. Clause 6-A as inserted in terms of the aforesaid notification dated 10th August, 2015 is being reproduced below:-

"6-A. Limited purpose of direct sale of bio-diesel blending with high speed diesel - (1) The Central Government may permit the sale of bio-diesel (B-100) for blending with high speed diesel to bulk consumers, in accordance with the standards specified by Bureau of Indian Standards, Namely -

(i) the Railways;

(ii) the State Transport Undertaking; and

(iii) other bulk consumers having minimum requirement of bio-diesel for their own consumption by a tank truck load supply which shall not be less than twelve thousand litres.

(2) For the purposes of clause (1), " oil company" means the Indian Oil Corporation Limited, the Hindustan Petroleum Corporation Limited, the Bharat Petroleum Corporation Limited, any private bio-diesel manufacturers, the authorised dealers of such oil companies and Joint Ventures of Public Sector Oil Marketing Companies authorised by the Central Government."

22. The power of search and seizure has been provided for in terms of Clause 7 of the MS-HSD Order, 2005 and in its terms the officer authorised is empowered interalia to take sample of the product and

seize any of the stocks of the product and the vehicle or receptacle or any other conveyance used or suspected to be used for carrying such stocks. In terms of Clause 8 it is provided that the authorised officer under Clause 7 is to take sample of the product and thereafter to forward the same for laboratory analysis mentioned under Schedule III of the MS-HSD Order, 2005 or to any other such laboratory which may be notified for the purpose. The laboratory thereafter is required to furnish its report to the authorised officer within 20 days of receipt of sample whereupon the authorised officer would be required to communicate the result to the dealer concerned. For ease of reference the provisions contained under Clause 7 and Clause 8 of the MS-HSD Order, 2005 are being extracted below:-

"7. Power of search and seizure.--(1) Any Gazetted Officer of the Central Government or a State Government or any police officer not below the rank of Deputy Superintendent of Police duly authorised, by general or special order of the Central government or a State Government, as the case may be, or any officer of the oil company, not below the rank of sales officer, may, with a view to securing compliance with the provisions of this order, or for the purpose of satisfying himself that this order or any order made thereunder has been complied with or there is reason to believe that all or any of the provisions of this order have been and are being or are about to be contravened,--

(a) enter and search any place or premises of a dealer, transporter, consumer or any other person who is an employee or agent of such dealer or transporter or consumer;

(b) stop and search any person or vehicle or receptacle used or intended to be used for movement of the product;

(c) take samples of the product and seize any of the stocks of the product and the vehicle or receptacle or any other conveyance used or suspected to be used for carrying such stocks and thereafter take or authorise the taking of all measures necessary for securing the production of stocks or items so seized before the Collector or District Magistrate having jurisdiction under the provisions of the Essential Commodities Act, 1955 and for their safe custody pending such production;

(d) inspect, seize and remove with, such aid or assistance as may be necessary, books, registers, any other records or document of the dealer, transporter, consumer or any other person suspected to be an employee or agent of the dealer, transporter or consumer;

(2) While exercising the power of seizure provided under sub-clauses (c) and ((d) above, the authorised officer shall record in writing the reasons for doing so and a copy of such recording shall be provided to the dealer, transporter, consumer or any other concerned person, as the case may be.

(3) The provisions of Section 100 of the Code of Criminal Procedure, 1973 (2 of 1974), relating to search and seizure shall, as far as may be, apply to searches and seizure under this order.

8. Sampling of Product and testing.--(1-A) The authorized officer under clause 7 shall draw the sample from the tank, nozzle, vehicle or receptacle, as the case may be, in the test kit and test the product with the aid of test kit, to check whether the product contains any traces of marker. If such traces are found in the product, the authorized officer shall record the same in triplicate which shall be jointly signed by him and the dealer or transporter or concerned person or his representative, as the case may be, and give one copy of

such recording to the dealer or transporter or concerned person or his representative and another copy to the oil company concerned, as the case may be."

(1) The authorized officer under Clause 7 shall draw the sample from the tank, nozzle, vehicle or receptacle as the case may be, in clean aluminum containers, to check whether density and other parameters of the product conform to the requirement of Bureau of Indian Standard Specification Numbers IS 2796 and IS 1460 for motor spirit and high speed diesel respectively. Where samples are drawn from retail outlet, the relevant tank-truck sample retained by the dealer as per Clause 3(b) would also be collected for laboratory analysis.

(2) The authorized officer shall take and seal six samples of 1 litre each of the motor spirit or three samples of 1 litre each of the high speed diesel. Two samples of motor spirit or one of high speed diesel would be given to the dealer or transporter or concerned person under acknowledgment with instruction to preserve the sample in his safe custody till the testing or investigations are completed. Two samples of motor spirit or one of the high speed diesel shall be kept by the concerned oil company or department and the remaining two samples of Motor Spirit or one of High Speed Diesel would be used for laboratory analysis.

(3) The sample label shall be jointly signed by the authorised officer who has drawn the sample, and the dealer or transporter or concerned person or his representative and the sample label shall contain information as regards the product, name of retail outlet, quantity of sample, date, name of the authorized officer, name of the dealer or transporter or concerned person or his representative;

(4) The authorised officer shall forward the sample of the product taken within ten days to any of the laboratories mentioned in Schedule III or to any other such laboratory when it may be notified by the Government in the Official Gazette for this purpose, for analysing with a view to checking whether the density and other parameters of the product conform to the requirements of Bureau of Indian Standard Specification Numbers IS 2796 and IS 1460 for motor spirit and high speed diesel respectively.

(5) The laboratories mentioned in sub-clause (4) shall furnish the test report to the authorised officer within twenty days of receipt of sample at the laboratory."

23. The Central Government through its Ministry of Petrol and Natural Gas subsequently issued a notification dated 29.06.2017 in terms of G.S.R. 728(E), in exercise of powers conferred by Section 3 of the Essential Commodities Act, 1955 to further amend the MS-HSD Order, 2005, and in its terms Clause 6A has been substituted. For ready reference G.S.R. 728(E) as notified on 29.06.2017 is being extracted below:-

"MINISTRY OF PETROLEUM AND NATURAL GAS
NOTIFICATION
New Delhi, the 29th June, 2017

G.S.R. 728(E),--In exercise of the powers conferred by section 3 of the Essential Commodities Act, 1955, (10 of 1955), the Central Government hereby makes the following Order further to amend the Motor Spirit and High Speed Diesel (Regulation of Supply, Distribution and Prevention of Malpractices) Order, 2005, namely:--

1. (1) This Order may be called the Motor Spirit and High Speed Diesel

(Regulation of Supply, Distribution and Prevention of Malpractices) Amendment Order, 2017.

(2) It shall come into force on the date of its publication in the Official Gazette.

2. In the Motor Spirit and High Speed Diesel (Regulation of Supply, Distribution and Prevention of Malpractices) Order, 2005, for clause 6A, the following clause shall be substituted, namely :--

"6A(1) The Central Government may permit the direct sale of bio-diesel (B-100) for blending with high speed diesel to all consumers, in accordance with the specified blending limits and the standards specified by the Bureau of Indian Standards.

(2) The owner of every outlet selling bio-diesel (B-100) shall prominently display at the place of business the permissible limits specified by the manufacturers of vehicles and the standards specified by the Bureau of Indian Standards for blending of bio-diesel (B-100) for use of consumers in their vehicles.

Explanation.--For the purpose of this clause, oil company means the Indian Oil Corporation Limited, the Hindustan Petroleum Corporation Limited, the Bharat Petroleum Corporation Limited, any private bio-diesel manufacturers, the authorized dealer of such oil companies and joint vehicles of public sector oil marketing companies authorised by the Central Government."

[F. No. P-11013/1/2015-Dist.]

ASHUTOSH JINDAL, Jt. Secy.

Note : The principal Order was published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i) vide number G.S.R. 729(E), dated the 19th December, 2005 and subsequently amended vide number G.S.R.18(E), dated the 12th January, 2007, number G.S.R.1(E), dated the 1st January, 2009, number G.S.R.352(E) dated the 6th May, 2014 and number G.S.R. 621(E) dated the 10th August, 2015"

24. Clause 6A(1) of the MS-HSD Order, 2005 as amended in terms of the Amendment Order, 2017 empowers the Central Government to grant permission for direct sale of bio-diesel (B-100) for blending with high speed diesel to all consumers in accordance with the specified blending limits and the standards specified by the Bureau of Indian Standards. In terms of sub-clause (2) of Clause 6A the owner of every outlet selling bio-diesel is required to prominently display at the place of business the permissible limits specified by the manufacturers of vehicles and the standards specified by the Bureau of Indian Standards for blending of bio-diesel (B-100) for use of consumers. The Explanation appended to Clause 6-A provides that the expression "oil company" for the purposes of Clause 6-A would include any private bio-diesel manufacturer also.

25. It therefore follows that the direct sale of bio-diesel (B-100) for blending with high speed diesel is permissible as per terms of Clause 6-A (as amended in terms of G.S.R 728(E), notified on 29th June, 2017), after grant of permission by the Central Government. The Explanation appended to Clause 6-A provides that for the purposes of this Clause the expression "oil company" would include any private bio-diesel manufacturer also.

26. It may also be taken note of that as per the terms of Clause 9 of the MS-HSD Order, 2005 the Central Government has been empowered to issue directions to any dealer, transporter, consumer or any

other person regarding storage, sale transportation and disposal of motor spirit or high speed diesel and upon issuance of such directions, the dealer, transporter or consumer shall be bound to comply the same. Clause 10 of the MS-HSD Order, 2005 contains a non-obstante clause and gives an overriding effect to the provisions of the Control Order. For ease of reference, Clause 9 and Clause 10 are being extracted below:-

"**9. Power of Central Government to issue directions** - The Central Government may, from time to time, by a general or special order issue to any dealer, transporter or consumer or any other person, such directions as it considers necessary regarding storage, sale transportation and disposal of motor spirit or high speed diesel and upon the issue of such directions, such dealer, transporter or consumer shall be bound to comply therewith.

10. Overriding effect - The provisions of this order shall have overriding effect notwithstanding anything to the contrary contained in any order made by a State Government or by an officer of such State Government before the commencement of this order except as respects anything done or omitted to be done thereunder before such commencement."

27. It is therefore seen that the direct sale of bio-diesel is permissible in terms of Clause 6-A of the MS-HSD Order, 2005 for blending with high speed diesel and as per the terms specified therein would be subject to the regulatory conditions provided for under the MS-HSD Order, 2005. The powers of search and seizure would accordingly be available to the authorised officers with a view to securing compliance of the provisions of the Control Order 2005 or where there is reason to believe that any of the provisions of the control order have been, are being or are about to be contravened.

28. In the case at hand it is admitted position that the petitioner has not obtained any permission for the purposes of running the retail outlet for sale of bio-diesel. In fact the petitioner has sought to assert that no such permission is required for the purpose. The contention raised by the State authorities in their counter affidavit that the provisions contained under the Control Order 2005 as amended in terms of the Amendment Order of the year 2017, more particularly the provisions contained under Clause 6-A, having been contravened, has not been controverted by the petitioner.

29. The petitioner has in his supplementary affidavit himself sought to place reliance upon the MS-HSD Order, 2005 so as to contend that the provisions with regard to search and seizure under its Clause 7 were not followed. The applicability of the provisions of the MS-HSD Order 2005 to the retail outlet being run by the petitioner has therefore not been disputed by him.

30. It is not disputed that upon information received by the authorities with regard to certain malpractices the retail outlet was inspected and it was found that the stocks contained in the under ground tank were being adulterated with kerosene oil and accordingly an F.I.R. dated 31.08.2019 was lodged against the petitioner under Section 420 IPC read with Section 3/7 Essential Commodities Act, 1955, wherein it has been stated that the provisions of the MS-HSD Order, 2005 as amended by the Amendment Order 2017

and also the guidelines under the Government Order dated 27.10.2016 had been contravened.

31. The averments in this regard as contained in the counter affidavit dated 27.11.2019 filed on behalf of the respondent no. 3, which have not been controverted by the petitioner, are being extracted below :-

"3. On 29.08.2019 on the directions of Sub-Divisional Magistrate Iglas the Supply Inspector Iglas Aligarh along with police of police station Gonda raided the premises of the petitioner and found that a pick-up Van bearing Registration No. U.P. 81 C.T. 3508 was parked there and contained 220 liters of diesel and 9 empty plastic drums were kept near the underground tank. By using dip-rod the underground tank contained 19919 liters Petroleum. The stock register was not made available and as such the actual variation in stock could not be ascertain. Three samples of petroleum products kept in the drum were taken and put on see and same were sent to the laboratory. The workers of the firm present could not explain about installation of the pump and sale and purchased of the petroleum products and told that the papers are with the owner. The raiding team waited for long time but neither the owner appeared nor sent the documents relating to the aforesaid filing station and thereafter in violation of Govt. order No. 454/29-07-2016 Bio-diesel (1)/2016 dated 27.10.2016 the firm of the petitioner was sealed so that there may be no further misuse of Petroleum product.

5. In fact the petitioner has no license for storage and sale of diesel/motor spirit/bio-diesel. It is also denied that no license is necessary for storage and sale of bio-diesel, in fact motor spirit and high speed diesel (Supply Distribution) (Apurti, Vitran ka Viniyam Aur Kadacharo ke Rogdham), 2005 (Amended Order 2017) Section 6A (1)(2) Bio-diesel has also been included under Essential Commodities Act. The photo stat copy of the said Govt. order is being filed as **Annexure No. C.A.1** to this counter affidavit and thereafter the Govt. order dated 27.10.2016 regarding purchased and sale of bio-diesel and its storage is being filed as **Annexure No.C.A.2** to this counter affidavit."

32. The conditions specified under the Government Order dated 27.10.2016 for the purposes of grant of No Objection for the sale/purchase and storage of bio-diesel, are as follows :-

"1–बायोडीजल के क्रय–विक्रय एवं भण्डारण स्थान को सार्वजनिक रूप से घोषित किया जायेगा, जिसकी अनुमति जनपद स्तर पर संबंधित जिलाधिकारी द्वारा दी जायेगी।

2– बायोडीजल संबंधी स्टाक व बिक्री रजिस्टर बनाया जायेगा, जिसे सक्षम अधिकारी के निरीक्षण के समय अनिवार्यतः प्रस्तुत किया जायेगा।

3– बायोडीजल की प्राप्ति का स्रोत घोषित किया जायेगा, जिससे किसी प्रकार की कोई अनियमितता न होने पाये।

4– बायोडीजल क्रय–विक्रय एवं भण्डारण के संबंध में विस्फोटक विभाग का लाईसेन्स प्राप्त करना अनिवार्य होगा।

5– आबकारी विभाग, अग्निशमन विभाग एवं वन विभाग (यदि कार्य स्थल वन के आस–पास हो) का अनापति प्रमाण पत्र अवश्य प्राप्त करना होगा।

6– बायोडीजल के क्रय–विक्रय हेतु कैश मेमो का उपयोग किया जायेगा, जिससे किसी प्रकार की अनियमितता न होने पाये।"

33. The guidelines referred to in the Government Order dated 27th October, 2016 with regard to the grant of No Objection Certificate for the purposes of

sale/purchase and storage of bio-diesel which have been circulated by the State Government to all the District Magistrates/District Supply Officers in the State of Uttar Pradesh in terms of D.O. Letter dated 13th April, 2017, have also admittedly not been followed.

34. In furtherance of the amendment made to the MS-HSD Order, 2005 by Gazette Notification No. G.S.R. 728(E) dated 29th June, 2017 in terms whereof Clause 6A (1) empowers the Central Government to grant permission for direct sale of bio-diesel (B-100) for blending with high speed diesel to all consumers, the Central Government, has issued a Gazette Notification dated 30.04.2019 notifying **"Guidelines for sale of Biodiesel for blending with high speed diesel for transportation purposes-2019."** The Gazette Notification dated 30th April, 2019 containing the aforementioned Guidelines is being reproduced below :-

"MINISTRY OF PETROLEUM AND NATURAL GAS
NOTIFICATION

New Delhi, the 30th April, 2019

F.No.P-13039(18)/1/2018-CC(P-26825).--Ministry of Petroleum & Natural Gas has issued Gazette notification No. GSR 728 (E) on 29th June 2017 for amending the Motor Spirit and High Speed Diesel (Regulation of Supply, Distribution and Prevention of Malpractices) Order dated 19th December 2005. Clause 6 (A) 1 of the amended order states that the Central Government may permit the direct sale of Biodiesel (B100) for blending with high speed diesel to all consumers, in accordance with the specified blending limits and the standards specified by the Bureau of Indian Standards.

2. In pursuance of the above, the Central Government hereby notifies the following guidelines for sale of Biodiesel

for blending with high speed diesel for transportation purposes.

3. (i) These guidelines may be called the "Guidelines for sale of Biodiesel for blending with high speed diesel for transportation purposes-2019."

(ii) The above guidelines shall extend to the whole of India.

(iii) The guidelines contained herein will come into force from the date of their publication in the Gazette and remain in force until further orders.

4. The text of the guidelines is annexed.

"Guidelines for sale of Biodiesel for blending with high speed diesel for transportation purposes-2019"

(i). Application for permission for retail sale of Biodiesel (B-100) through an outlet by an entity shall be made to the Food and Civil Supplies Department/any other Department authorised for the same by the State/UT Government of the concerned State/UT, where the Retail Outlet is to be set up.

(ii). The permission will be granted exclusively for sale of biodiesel (B-100) only and not for any mixture thereof of whatever percentage.

(iii). Permission for setting up the retail outlet for sale of biodiesel would be subject to the Registration/Approvals/No Objection Certificates as per Annexure from the respective Central/State/UT/Local Government/Authorities in which the retail outlet is located and other concerned authorities mentioned therein.

(iv). This permission will be displayed prominently at the point of sale of Biodiesel.

(v). Biodiesel to be sold in pursuance of aforesaid permission should

be indigenously produced and not imported.

(vi). Separate boards in English/Hindi and Vernacular language of the region should be prominently displayed at the biodiesel retail outlet displaying the percentage of Biodiesel allowed to be blended with diesel in the customer's automobile tank. Also, there should be clear warning displayed at the biodiesel retail outlet (with above board) that usage of biodiesel with percentage exceeding the prescribed percentage can cause damage to the engine.

(vii). Owner/Operator shall maintain the material balance along with supplier details. The biodiesel retail outlet owner/operator shall make available the same at the retail outlet at all times for inspection by any authority authorised for the purpose either by the concerned State/UT Government and /or Central Government.

(viii). Biodiesel retail outlet owner/operator shall retain samples of at least last three supplies received by them from their suppliers for inspection and/ or testing by any authority authorised for the purpose, as above.

(ix). The biodiesel retail outlet owner/operator shall maintain a permanent record of each and every sale of biodiesel made by it in a register which would be updated on a daily basis and be available for inspection at all times. Additionally issuing of bill (in duplicate) for each sale, clearly showing vehicle number and customer name/contact number giving details of quantity sold, rate charged and date and time of sale would be mandatory. (One copy for customer and one for Retail Outlet record.)

(x). State Government authorities shall have the power to carry out regular inspections of the retail outlets selling biodiesel to ensure that the biodiesel is being made available to the customer in the right quality and quantity, and is not being sold as a standalone fuel for transportation purposes. In case of any sample failure of Biodiesel (B100) being sold, State/ District Administration shall proceed with administrative action on the analogy of the Marketing Discipline Guidelines (MDG) for retails Outlets selling MS (Petrol) and HSD (High Speed Diesel).

(xi). All volume and safety distance norms applicable for Class B Petroleum Products shall be applicable for pumps selling Biodiesel as it is meant for blending with High Speed Diesel which is a Class B Petroleum Product.

(xii). To ensure that the Retail Outlets of Biodiesel are selling only Biodiesel conforming to BIS Standards and not mixture of Biodiesel and Diesel or only Diesel,anti-adulteration cells of Public Sector Oil Marketing Companies along with State Government officials are empowered to inspect, search and seize unauthorized and unscrupulous Biodiesel manufacturing plants, the storage and distribution units and Retails Outlets.

(xiii). Mobile labs of Oil Industry will also have the jurisdiction to cover retail outlets selling Biodiesel,manufacturing plants, storage and distribution network of Biodiesel.

(xiv). To avoid entry of unscrupulous biodiesel suppliers,a suitable registration system for biodiesel manufactures, suppliers and sellers will be devised at the State/UT Level. Further, State/UT Governments shall maintain a register of all Retail Outlets selling Biodiesel in their respective State/UT

(xv). Any other conditions, which the State/UT Government may deem appropriate for sale of biodiesel as per the prevailing conditions in their respective State/UTs may also be included.

(xvi). State/UT Governments would designate an Appellate Authority to redress complaints related to denial of permission for sale of biodiesel to an applicant.

(xvii). Any clarifications in respect of these guidelines shall be made by the Central Government.

[F.No. P-13039(18)/1/2018-CC (P-26825)]

SANDEEP POUNDRIK, Jt. Secy."

35. In terms of the aforementioned Guidelines 2019, a procedure is prescribed for submission of an application for permission of retail sale of bio-diesel to the Food and Civil Supplies Department/any other Department authorised for the purpose by the State Government of the concerned State where the retail outlet is to be set up. The permission for setting up the retail outlet is to be subject to the Registration/Approvals/No Objection Certificates from the respective State authorities in which the retail outlet is located and other concerned authorities. The guidelines provide for maintenance of permanent records, regular inspections by the State Government authorities and also prescribed norms for the said purpose. The State authorities have been empowered in terms of the guidelines to carry out regular inspections of the retail outlets.

36. It may also be taken note of that the Guidelines, 2019 notified by the Central Government in terms of Notification No. F.No.P-13039(18)/1/2018-CC(P-26825) dated 30th April, 2019 provide for making an application for permission of retail sale of bio-diesel to the Food and Civil Supplies Department/any other Department authorised for the purpose by the State Government where the retail outlet is to be set up. The Guidelines also empower the State Government authorities to carry out regular inspections of the retail outlets selling bio-diesel to ensure that the bio-diesel is being made available to the customer in the right quality and quantity and in case of any sample failure of the bio-diesel being sold the State/District Administration is to proceed with administrative action on the analogy of the Marketing Discipline Guidelines for retail outlets selling MS (Petrol) and HSD (High Speed Diesel).

37. The regulatory norms in respect of sale of bio-diesel in the context of the provisions contained under the MS-HSD Order, 2005 came up for consideration in the case of **Indian Oil Corporation Limited Vs. Union of India**2, wherein upon a petition filed by various oil companies by way of Public Interest Litigation, the provisions contained under the MS-HSD Order, 2005 and also guidelines laid down in the bio-diesel policy were taken note of and the writ petition was allowed with a direction to the State authorities to ensure that the provisions contained under the MS-HSD Order, 2005 are strictly observed by all concerned and that no violation of the said provisions takes place. The relevant observations made in the judgment are as follows :-

"15. Before dilating the various submissions raised by the learned counsel for the parties it is necessary to consider the various provisions contained in the Order of 2005. The Order of 2005 has been issued by the Ministry of Petroleum & Natural Gas on 19th December, 2005 in exercise of the powers conferred by section 3 of the Essential Commodities Act, 1955 and in suppression of Motor Spirit and High

Speed Diesel (Regulation of Supply, Distribution and Prevention of Malpractices) Order, 1988. It extends to the whole of India and came into force on the date of its publication in the Official Gazette.

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23. It is apparent that Clause 3(5) provides in unequivocal term that no person shall sell or agree to sell any petroleum product or its mixture other than motor spirit or high speed diesel or any other fuel authorised by the Central Government in any form, under any name, brand or nomenclature, which can be and is meant to be used as fuel in any type of automobile vehicles fitted with spark ignition engines or compression ignition engines. It is not disputed that buses run by CTC are type of automobile vehicles fitted with spark ignition engines or compression ignition engines as defined in Clause 3(5). Thus the sale made to the CTC by the respondent No. 6 was clearly in violation of the Control Order of 2005 and is punishable under section 7 read with section 3 of the Essential Commodities Act. It is not disputed on fact that 80% of the petroleum product was mixed with 20% of bio-diesel for the purpose of sale to CTC and selling of such mixture of petroleum product meaning thereby mixture of motor spirit and high speed diesel with any other products other than motor spirit and high speed diesel or other fuel is not permissible unless it is authorised by the Central Government, particularly when it can be for the use and is meant to be used as fuel in any type of automobile vehicles. Such mixture could not have been sold to CTC for running vehicles.

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28. In case any impermissible mixing as contemplated in Clause 3(5) of the Order of 2005 has been done or any other malpractices envisaged in the definition of malpractices in Clause 2(f) of the Order of 2005 has been committed, let appropriate action be taken in accordance with law.

29. Thus, we have no hesitation to allow the writ petition to the aforesaid extent and we hold that purchase made by CTC was illegal and violative of the provisions of the Order of 2005 read with sections 7 and 3 of the Essential Commodities Act. Since supply has already been stopped with effect from 2009 as stated at the Bar, no sale or any other transaction can be made by the respondent No. 6 which may be violative of the provisions contained in the Control Order of 2005. We also direct that let appropriate action be taken for violation of the order in accordance with law as expeditiously as possible.

30. Authorities of the Government of West Bengal are also directed to ensure that provisions contained in the Control Order of 2005 are strictly observed by all concerned and no violation takes place in the State of West Bengal."

38. The position which therefore emerges in the present case is that the petitioner was running the retail outlet without the requisite permission in terms of Clause 6-A of the Control Order and also without following the guidelines contained in the Government Order dated 27.10.2016 and also the subsequent Guidelines-2019, and criminal proceedings have been initiated with the lodging an F.I.R. dated 31.08.2019 which has been registered under Section 420 IPC read with Section 3/7 Essential Commodities Act, 1955 with regard to the adulteration and other malpractices and contravention of the terms of the Control Order 2005.

39. It is also seen that the direct sale of bio-diesel is permissible in terms of

Clause 6-A of the MS-HSD Order, 2005 for blending with high speed diesel and as per the terms specified therein the same would be subject to the regulatory conditions provided for under the MS-HSD Order, 2005. The powers of search and seizure were accordingly be available to the authorised officers with a view to securing compliance of the provisions of the Control Order 2005 or where there is reason to believe that any of the provisions of the control order have been, are being or are about to be contravened.

40. The retail outlet of the petitioner was inspected and it was found that the stocks contained in the under ground tank were being adulterated with kerosene oil and accordingly an F.I.R. dated 31.08.2019 was lodged against the petitioner under Section 420 IPC read with Section 3/7 Essential Commodities Act, 1955, wherein it has been stated that the provisions of the MS-HSD Order, 2005 as amended by the Amendment Order 2017 and also the guidelines under the Government Order dated 27.10.2016 had been contravened. Accordingly the powers of search and seizure exercised by the respondent authorities as per the provisions of Clause 7 of the MS-HSD Order, 2005 cannot be faulted with.

41. As a consequence the reliefs as sought in the present writ petition with regard to quashing of the sealing order and opening of the seal of the under ground tank of the retail unit of the petitioner cannot be granted at this stage. The writ petition thus fails and is accordingly dismissed.

42. We may, however, take note that as per the provisions contained under Clause 8 of the MS-HSD Order, 2005 the sample of the product is required to be forwarded within ten days to any of the laboratories mentioned in Schedule III or to any other such laboratory which may have been notified by the Government in the Official Gazette. The laboratories as specified for the purpose are required to furnish the test report to the authorised officer within twenty days of receipt of sample at the laboratory and the authorised officer is thereafter required to communicate the test result to the dealer and also the oil company within five days of receipt of test results from the laboratory for appropriate action.

43. The aforementioned provisions as prescribed in Clause 8 of the MS-HSD Order, 2005 are to be followed and in case the proceedings with regard to forwarding of the sample of the product, obtaining the test result and communicating the same to the dealer/petitioner, have not been concluded by the respondent authorities, the same would be concluded, expeditiously, preferably within a period of six weeks from the date of presentation of a certified copy of this order.

(2020)09ILR A640
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.09.2019

BEFORE

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

WRIT – C No. 30717 of 2019

Purvanchal Vidyut Vitran Nigam Limited, Lucknow & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:

Sri Kapil Dev Singh Rathore

Counsel for the Respondents:
C.S.C.

(A) Civil Law - Electricity Act, 2003 - Section 126 - Assessment - unauthorized use of electricity , Section 127 - Appeal to appellate authority - U.P. Electricity Regulatory Commission (Consumer Grievance Redressal Forum and Electricity Ombudsman) Regulations, 2007 - U.P. Electricity Code, 2005 - Clause 5.6 - defective meter - procedure when a meter is suspected to be defective - no ascertainment or adjudication by authorities concerned that meter was actually running slow - Hence, authorities had no power to make any assessment.

Respondent no.3 - commercial electric connection - inspection carried out at the premises of Consumer - Petitioner 2, on the basis of MRI report, proposed assessment under Section 126 of Electricity Act, 2003 - show cause notice informing Respondent-3 that meter was found running slow by 33% - an assessment of Rs. 96,302/- is proposed where against Respondent No.3 may submit objection, if any, within 15 days. (Para -23)

HELD:- Unless the fact that meter was defective and running slow by 33% is ascertained in accordance with procedure prescribed in Clause 5.6 of Code, 2005, no further assessment could have been made. Moreso assessment could not have been made for unauthorised use of electricity since it was a case of alleged slow running of meter. (Para - 24)

Petition dismissed (E-7)

List of Cases cited: -

1. Southern Electricity Supply Company of Orisa Ltd. (SOUTHCO) Vs Sri Sita Ram Rice Mill, (2012) 2 SCC 108

2. Smt. Amrawati Devi Vs Purvanchal Vidyut Vitran Nigam Limited & anr. 2009(2) AWC 1189 Executive Engineer

3. Southern Electricity Supply Co. of Orissa Ltd. & anr. Vs Sri Seetaram Rice Mill, (2012) 2 SCC 108

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

1. This writ petition under Article 226 of the Constitution of India has been filed by Purvanchal Vidyut Vitran Nigam Ltd. through its Managing Director (hereinafter refererred to as "PVVNL') and its Executive Engineer, Electricity Urban Distribution Division, Gorakhpur (hereinafter referred to as "EE, EUDD, Gorakhpur") assailing order dated 28th August, 2018 passed by Electricity Consumer Grievance Redressal Forum, Gorakhpur (hereinafter referred to as "ECGRF') rejecting petitioner's application for recall of order dated 16.6.2017, passed ex-parte by Respondent 2. Petitioners have also challenged the order dated 5.6.2007 passed by Respondent 2, ECGRF originally whereby on the complaint of Respondent 3, Respondent 2 has held that petitioners have illegally recovered Rs. 96,320/- from Respondent 3 and is bound to refund same and has consequently issued direction for refund of said amount along with interest at the rate 6% per annum.

2. Facts in brief giving rise to present writ petition are that M/s Navya Motors situated at Mohalla Nausad, Sadar Gorakhpur has a commercial electric connection with contracted load of 20 kilowatt bearing SC No. 5360049295. Rate schedule for that purpose of computation of electricity consumption charges payable by consumer i.e. Respondent 3 is governed by Tariff, LMV2. For recording quantum of consumption of electricity, electronic computerized meter No. UPU20183 was installed at premises of Respondent 3 i.e. Consumer.

3. On 21.1.2017 an inspection was carried out at the premisses of Consumer by E.E.,EUDD, Gorakhpur pursuant to Chief Engineer (Distribution) Gorakhpur's (hereinafter referred to C.E.(D), Gorakhpur) letter dated 20.1.2017. Inspecting authority checked meter No. UPU20183 and found current and voltage of all three faces in meter, correct.

4. Thereafter again on 30.1.2017 checking was made and current and voltage on all three phases of meter was found correct. A report was submitted by EE,EUDD, Gorakhpur on 30.1.2017 to this effect but he also added that in the MRI report of meter, current without volts was shown for 24 times between 29th June, 2015 to 6th May, 2016. In this regard, MRI report was also appended to letter dated 30.1.2017. Despite the fact that no defect was found in the meter as such, EE,EUDD, Gorakhpur i.e. Petitioner 2, on the basis of MRI report, proposed assessment under Section 126 of Electricity Act, 2003 (hereinafter after referred to as "Act 2003') and sent a show cause notice dated 4th February, 2017 informing Respondent-3 that meter was found running slow by 33%, therefore, an assessment of Rs. 96,302/- is proposed where against Respondent No.3 may submit objection, if any, within 15 days.

5. The Assessment- sheet, which is placed on record at page 61, shows that assessment was made for the period of June, 2015 to June 2016. Aforesaid amount was deposited by Respondent-3 but then he submitted a complaint dated 22nd February, 2017 to ECGRF alleging that under threat of disconnection, Respondent-3 was compelled to deposit Rs. 96320/- though no defect in meter was found during checking, made twice, therefore, aforesaid amount be directed to be refunded.

6. Petitioners, it appears, despite notice issued by ECGRF, did not submit response. Hence Respondent-2 decided the matter exparte vide order dated 6.5.2017 and directed refund of Rs. 96,320/- to Consumer. Petitioners filed recall/review application which has been rejected by order dated 28.8.2018.

7. Learned counsel for petitioners contended that MRI data shows defect of "Current without Volts' and Current Terminal shorting on different occasions, hence petitioners were entitled to make assessment under Section 126 of Act, 2003 as it amounts to "unauthorized use of electricity". MRI report being computerized record is conclusive material to prove that electricity meter has been tempered and same could not have been ignored unless "Consumer' shows positively that said data is unreliable. He contended that Consumer was using electricity beyond sanctioned load and thus it was within ambit of the term "unauthorized use of electricity" and in such a case respondent-2 had no jurisdiction, since matter could have been examined only by statutory forum provided under section 126 and 127 of Act, 2003. Reliance is placed on **Supreme Court judgment in Southern Electricity Supply Company of Orisa Ltd. (SOUTHCO) and another Vs. Sri Sita Ram Rice Mill, 2012 (2) SCC 108**. He submitted that in the matter of assessment governed by Section 126, Adjudicatory Forum provided under U.P. Electricity Regulatory Commission (Consumer Grievance Redressal Forum and Electricity Ombudsman) Regulations, 2007 is not applicable and, therefore, impugned orders are patently without jurisdiction.

8. We have heard counsel for petitioners on the question of "jurisdiction of Respondent-2" and also "whether

assessment in case would be governed by Section 126 or not".

9. It is evident from record that a checking was made by officials of PVVNL (Petitioner-1) on 21.1.2017 on the premises of Consumer (Respondent-3). Checking report is on page 67 of paper book. Checking team found various seals installed on various parts of meter, intact and correct. It also found voltage and current, correct, on all three phases. It also tested meter on the load and found load distributed on all phases, correctly. No tempering was found on meter seals which may suggests any external handling by Consumer himself or through its agent, with meter or seals affixed thereon.

10. Second checking was made on 30th January, 2017. Checking report of 30th January, 2017 has not been placed on record but learned counsel for petitioners could not dispute that what was observed in checking held on 21.1.2017 was also found on 30.1.2017 and no irregularity of any kind was noticed by checking team of PVVNL.

11. He, however, placed reliance on the report of Meter Reading Instrument i.e. MRI showing data recorded in the computer on 12th January, 2017 that between 29th June, 2015 to 6th May, 2016 there was 24 occasions when discrepancy of "current without volt" was noted in computerized uploaded data. On 7.11.2016 a similar defect without volt was recorded. Duration of aforesaid fault ranges between 6 minutes to 89 days.

12. This Court inquired from learned counsel for petitioners to explain as to what does petitioners mean by phrase "current without voltage". He stated that in technical term flow of electricity and its pace is called voltage and when it meet resistance then consequence is creation of current. But how there can be a current without voltage and how it can occur on its own and get rectified when there is no allegation of any tampering with meter seal, meter body etc., in other words when nobody has touched meter, then in what circumstances this situation may occur and disappear, on this aspect learned counsel for petitioners was not capable of explaining things and after receiving instructions said that even the officers concerned were not able to explain anything.

13. When questioned, learned counsel for petitioners could not dispute, that no tempering with meter seals was found. Hence it cannot be said that meter was touched or altered by Consumer at any point of time. He also could not dispute that alleged defect on "current without volts" recorded in MRI report, was not rectified or corrected by any one but it occurred and rectified suo moto. At least MRI report did not show any reason for the alleged discrepancies. From meter seals position which were found in order, it can not be said that Consumer himself or any of its agent has tampered with the meter in any manner so as to cause such discrepancies.

14. Further, shows cause notice dated 4th February, 2017 was not issued on the allegation that Respondent Consumer was using electricity 'unauthorisedly' by doing himself something with meter, which is unauthorised, but it states that the meter was found running slow by 33%. In other words Assessing Officer suggested improper running of the meter developing some snag and thus running slow which may be for any reason of occurrence of any defect in the meter. Show cause notice

nowhere suggests that assessment was proposed on the ground of "unauthorised use of electricity" by Respondent-3 i.e. Consumer.

15. The expression "unauthorized use of electricity' has been explained in Section 126 of Act, 2003 and explanation (b) thereof defines "unauthorised use of electricity" which is as under:

"(b) "unauthorised use of electricity" means the usage of electricity-

(i) by any ***artificial means****; or*

(ii) by ***a means not authorised by the concerned person*** *or licensee; or*

(iii) ***through a tampered meter****; or*

(iv) for the ***purpose other than for which the usage of electricity was authorised;*** *or*

(v) ***for the premises or areas other than those for which the supply of electricity was authorised."*** *(emphasis added)*

16. We repeatedly enquired for learned counsel for petitioner as to under which sub clause of expression (b) of Section 126 of Act, 2003 the alleged assessment of 33% slow running of meter would fall to which learned counsel for petitioners, could give no reply, whatsoever. He also could not dispute that petitioners have not tested meter and its accuracy in Test lab in accordance with procedure prescribed under statute to find out, whether it was defective and actually running slow.

17. Attention of learned counsel for petitioners was drawn to Clause 5.6 of U.P. Electricity Code, 2005 *(hereinafter referred to as "Code, 2005")* which deals with subject of defective meter and contains procedure when a meter is suspected to be defective. He could not dispute that a defective meter has to be dealt under Clause 5.6 of Code, 2005. Aforesaid Clause has been considered by Division Bench of this Court in **Smt. Amrawati Devi vs. Purvanchal Vidyut Vitran Nigam Limited and another, 2009(2) AWC 1189** and it has been laid down therein that before declaring a meter defective, it has to be tested in a Test Lab by giving information to consumer and in his presence, if he chose to remain present after receiving information and if no such procedure is followed, no assessment by treating the meter to be defective can be made. Paras 6, 10 and 11 of the judgment read as under:

"6. From reading of Clause 5.6 (c) (iii) it is clear that this clause in unequivocal terms declares that the defective meter after sealing in presence of consumer, shall be tested, at licensee''s lab/independent lab/Electrical Inspector, as agreed by the consumer. Therefore, the agreement by the consumer is essential for testing of the meter either at the laboratory of the Nigam or at the laboratory of some other independent agency. It further provides that option exercised by consumer once cannot be changed. The clause, therefore, empowers the authorities to seal the meter and get it tested with consumer''s agreement. Since the clause operates harshly against the consumer it has to be construed strictly. The consumer has a right to get the meter tested with independent agency. The authorities, therefore, have a corresponding duty to apprise the consumer of the right. Failure to discharge this duty, which flows from Sub-clause (c) (iii) by the authorities while exercising their right to send the meter for testing, renders the entire proceedings for

sealing the meter irregular and illegal. Annexure-3 dated 26.11.2008 does not comply with this requirement."

"10. In our opinion, in absence of intimation of Clause 5.6 (c) (iii) of the Code, 2005, the Petitioner could not be deemed to have waived her right to exercise her option to get her meter tested at independent laboratory. To be fair to the Nigam as well as consumer, a notice is required to be given by the Nigam to the consumer as to whether the consumer wants to get the defective meter tested at the laboratory of the Nigam or by Electrical Inspector or by an independent agency. The answer of the notice has to be given by the consumer. After the option is exercised by the consumer and he agrees to get the meter tested at the laboratory of the Nigam or Electrical Inspector, then the Nigam may fix the date for testing the meter. If the consumer exercises his option to get the meter tested from outside agency, the list of the names of the outside agency approved by the Nigam should be intimated to the consumer so that he may choose any one of the outside agency and according to the option of the consumer. The outside agency may test the meter and its finding about testing of meter would be final. It is after following this procedure that the option exercised by consumer cannot be changed. The decision on the basis of option exercised by the consumer, and the report of the test laboratory shall be final and binding on the licensee as well as on the consumer. But the Nigam did not inform the Petitioner to exercise her option on 26.11.2008 when the meter of the Petitioner was sealed and she was informed to appear on 4.12.2008 for testing of the meter.

11. We are of the considered opinion that after sealing the meter the Nigam must serve a notice, on which it should be printed in bold capital letters, intimating the consumer or his representative to exercise his option either to get the meter tested by the Electrical Inspector or at the laboratory of the Nigam or the consumer may exercise his option to get his meter tested from one of the outside agencies approved by the Nigam mentioned in the notice. Once the consumer exercises his option then immediately a date has to be fixed for testing of the meter in the presence of the consumer."

18. When the matter in respect of defective meter is covered by Clause 5.6, assessment of theft of energy on the ground of unauthorised use of electricity cannot be made as it is a different contingency. The question of tempering of meter resulting in unauthorised use of electricity etc. is not something which can be said to be covered by the terms defective meter.

19. Whenever a claim is made by electricity supplier that meter installed in the premises of consumer is defective and, therefore, lesser consumption is recorded and consumer is liable to pay something more, then two questions have to be explained. Firstly, whether meter is defective, and when this question is answered in affirmative the second question would be what is the shortage of energy which has been billed to consumer and he is liable to be pay further.

20. As has been said, the manner in which a meter shall be ascertained to be defective is provided in Clause 5.6 of Code, 2005 and that has not been done. There is no ascertainment, whether meter is defective or not, hence question of ascertainment of further billing would not arise. Tempering of energy, theft of electrical energy or unauthorised use of

electrical energy are something different than what is claimed to be "defective meter" and on account whereof short billing to consumer.

21. Learned counsel for petitioners placed reliance on a Supreme Court's decision in **Executive Engineer, Southern Electricity Supply Company of Orissa Ltd. and another vs. Sri Seetaram Rice Mill, 2012(2) SCC 108** but we do not find that it was a case where electricity supplier claimed that there was a defect in the mater and still assessment was made under Section 126(1). Therein the admitted facts were that consumer, a partnership firm, had established a small scale industrial unit for production of rice and for this purpose had electrical connection with contracted load classified as "medium industry category". An assessment was made for unauthorised use of electricity on 25.07.2009 under Section 126(1) of Act, 2003. Consumer was given opportunity to file objection, if any. No objection was filed and instead consumer filed a writ petition stating that provisional assessment made by electricity authorities on the ground of unauthorised use of electricity, is illegal. Department contended that there was a report dated 10.06.2009 showing over drawl of maximum demand by consumer and it amounts to unauthorised use of electricity. High Court decided matter by holding that "unauthorised use of electricity" is a term exhaustively explained by Explanation to Section 126 and overdrawl of maximum demand would not fall under the scope of unauthorised use of electricity. When matter went to Supreme Court, it formulated the following three questions:

"1. Wherever the consumer consumes electricity in excess of the maximum of the contracted load, would the provisions of Section 126 of the 2003 Act be attracted on its true scope and interpretation?

2. Whether the High Court, in the facts and circumstances of the case, was justified in interfering with the provisional order of assessment/show cause notice dated 25th July, 2009, in exercise of its jurisdiction under Article 226 of the Constitution of India?

3. Was the writ petition before the High Court under Article 226 of the Constitution of India not maintainable because of a statutory alternative remedy being available under Section 127 of the 2003 Act?"

22. Question of defective meter, as such, was neither examined by High Court nor Supreme Court and, therefore, aforesaid judgment, in our view, does not help petitioners.

23. Moreover, in the present case, an expert body, i.e., Consumer Grievance Redressal Forum, Gorakhpur, has already examined the matter vide order dated 28.08.2018. Learned counsel for petitioners could not dispute that in the checking, current and voltage on all the three phases in the meter was found correct, twice, but in MRI report there was display of certain period of "current without volt" for which no reason could be explained as to how it happened. When there was no tempering in the meter and current and voltage in all the three phases was found twice correct no case of an unauthorized use of electricity is made out.

24. Even in the show cause notice dated 04.02.2017 (Annexure-4 to writ petition), assessment was not proposed on "unauthorised use of electricity" but on the ground that "meter was found running slow

by 33%". That being so, unless the fact that meter was defective and running slow by 33% is ascertained in accordance with procedure prescribed in Clause 5.6 of Code, 2005, no further assessment could have been made. Admittedly, procedure laid down in Clause 5.6 was not observed. There is no ascertainment or adjudication by authorities concerned that meter was actually running slow. Hence, authorities had no power to make any assessment. Moreso assessment could not have been made for unauthorised use of electricity since it was a case of alleged slow running of meter.

25. We, therefore, find no merit in writ petition. Dismissed accordingly.

(2020)09ILR A647
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.08.2020

BEFORE

THE HON'BLE SALIL KUMAR RAI, J.

WRIT – C No. 33434 of 2013

Sudhir Kumar Maheshwari ...Petitioner
Versus
A.D.J. Bulandshahar & Ors. ...Respondents

Counsel for the Petitioner:
Sri H.M. Srivastava, Sri Neeraj Srivastava

Counsel for the Respondents:
Sri Pankaj Rai

A. Civil Law - Motor Vehicle Act,1988 - Section 166 & Central Motor Vehicle Rules,1989-challenge to- recall of award of Tribunal-the same refused by Tribunal as Tribunal has no inherent power to recall or review its award-registration certificate filed by the petitioner was sufficient evidence that the vehicle had a fitness certificate valid for two years – failure to file fitness certificate is not material and sufficient to hold the petitioner-error apparent on the face of record could be a ground for review if Tribunal had the substantive power to review its order on merits-the Motor Accident Claims Tribunal has no power to review its order on merits.(Para 1 to 20)

B. It is settled legal proposition that unless the statute/rules so permit, the review application is not maintainable in case of judicial/quasi-judicial orders. In the absence of any provision in the Act granting an express power of review, it is manifest that a review could not be made and the order in review, if passed, is ultra vires, illegal and without jurisdiction. (Para 6) (E-6)

List of Cases cited: -

1. Grindlays Bank Ltd. Vs Central Govt. Industrial Tribunal & ors., (1980) (Sup) SCC 420
2. Sunita Devi Singhania Hospital Trust & anr. Vs U.O.I. & anr.(2008) 16 SCC 365

3. Sandhya Vaish & anr. Vs New India Insurance Co. Ltd. & ors.,(2010) 81 ALR 360

4. Shaurabh Agarwal Vs Addl.Commr.(judicial),Agra Mandal, Agra & ors.,(2011) 114 RD 217

5. Naresh Kumar & ors. Vs Govt. (NCT of Delhi),(2019) 9 SCC 416

6. United India Insurance Co. Ltd. Vs Rajendra Singh & ors.,(2000) 3 SCC P. 581

7. Kapra Mazdoor Ekta Union Vs Birla Cotton Spinning And Weaving Mills Ltd. & anr.(2005) 13 SCC 777

8. Debi Prasad & ors. Vs Khelawan & ors., (1956) ALL. L.J. 13

9. Smt. Raj Kumari Vs Motor Accident Claim Tribunal,Jaunpur,(2002) ALJ 833

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

1. Heard Shri H.M. Srivastava and Shri Neeraj Srivastava, counsel for the petitioner.

2. The respondent Nos. 3 to 8 instituted Motor Accident Claim Petition No. 244 of 2008 under Section 166 of the Motor Vehicle Act 1988 (hereinafter referred to as, 'Act, 1988') before Motor Accident Claims Tribunal, District-Bulandshahar (hereinafter referred to as, 'Tribunal') against the petitioner and respondent No. 2 claiming compensation for the death of Shri Nanak Chandra in an accident occurring on 16.6.2008 and caused due to rash and negligent driving of Truck No. U.P. 82 J 9175. The petitioner is the owner of the vehicle, i.e., Truck No. U.P. 82 J 9175 and the vehicle was insured with respondent No. 2, i.e., The National Insurance Company Limited. The respondent Nos. 3 to 8 are the dependents of (Late) Shri Nanak Chand. The Tribunal through its award dated 1.3.2011 awarded, to the claimants, a compensation of Rs. 3,69,500/- with a simple interest of 6% per annum calculated from the date of the institution of the claim petition. In its judgment, the Tribunal recorded that the petitioner had not filed the fitness certificate of the vehicle and, therefore, the Tribunal held that the petitioner, i.e., the owner of the vehicle and not the respondent no. 2, i.e., the Insurance Company, was liable to pay compensation. The petitioner filed a review application for review of the award dated 1.3.2011 alleging that the vehicle was a new vehicle and was registered for the first time on 25.1.2007 and, therefore, under Rule 62(1)(a) of the Central Motor Vehicle Rules, 1989 (hereinafter referred to as, 'Rules, 1989'), the fitness certificate of the vehicle was valid for two years from the date of registration, i.e., from 25.1.2007. The ground for review was that in cases of new vehicles, i.e., vehicles registered for the first time, fitness certificate of the vehicle is issued along with the registration certificate and the petitioner had filed the registration certificate of the vehicle, therefore, it was evident from the documents filed by the petitioner that the vehicle had a fitness certificate. On the aforesaid application of the petitioner, Review Application Case No. 92/2011 was registered before the Tribunal and the Tribunal vide its order dated 18.5.2013 dismissed the said application on the ground that it did not have the power to review its award.

3. The present writ petition has been filed by the petitioner praying for a writ of certiorari to quash the award dated 1.3.2011 passed by the Tribunal as well as the order dated 18.5.2013 of the Tribunal dismissing the review application filed by the petitioner.

4. Challenging the order dated 18.5.2013, the counsel for the petitioner have argued that a vehicle which is registered for the first time is issued a certificate of fitness alongwith the registration certificate itself and the fitness certificate is valid for a period of two years from the date of issue. It was argued that the registration certificate of the vehicle showing that the vehicle had, for the first time, been registered on 25.1.2007 was on record and the said document, by virtue of Rule 62(1)(a) of the Rules was sufficient evidence to prove that the vehicle had a fitness certificate on the relevant date, i.e., the date of accident and the failure of the petitioner to file the fitness certificate was not sufficient to absolve the Insurance Company from paying compensation. It was argued, that for the aforesaid reason,

the award of the Tribunal releasing the Insurance Company and holding the petitioner/owner liable to pay compensation to the claimants on the ground that the petitioner had not filed the fitness certificate of the vehicle was contrary to law and thus liable to be quashed. It was further argued by the counsel for the petitioner that the failure of the Tribunal to consider the aforesaid aspect in its award dated 1.3.2011 was a mistake on the part of the Tribunal causing injustice to the petitioner and therefore the Tribunal had the inherent power to recall its award and the opinion of the Tribunal, as recorded in its order dated 18.5.2013, that it had no power to recall or review its previous award is contrary to law and thus the order dated 18.5.2013 is also liable to be set aside. In support of his arguments, the counsel for the petitioner has relied upon the judgements of the Supreme Court reported in **Grindlays Bank Ltd. Vs. Central Government Industrial Tribunal & Others, 1980 (Sup) SCC 420, Sunita Devi Singhania Hospital Trust & Another Vs. Union of India & Another, (2008) 16 SCC 365** and the judgements of Allahabad High Court reported in **Sandhya Vaish & Another Vs. New India Insurance Company Limited & Others, 2010 (81) ALR 360**; and **Shaurabh Agrawal Vs. Additional Commissioner (Judicial), Agra Mandal, Agra & Others, 2011 (114) RD 217.**

5. I have considered the submissions of the counsel for the petitioner.

6. It is settled law that power of review is not an inherent power and a judicial or a quasi judicial authority can review its previous order on merit only if it is vested with such a power by a statute either expressly or by necessary implication. It would serve no purpose to burden this judgement by reference to the numerous judicial precedents propounding the aforesaid view and it would be sufficient to refer to the observations made by the Supreme Court in paragraph no. 13 of its judgement reported in **Naresh Kumar & Others Vs. Government (NCT OF DELHI), (2019) 9 SCC 416**. Paragraph No. 13 of the aforesaid judgement is reproduced below :-

"13. **It is settled law that the power of Review can be exercised only when the statute provides for the same.** In the absence of any such provision in the statute concerned, such power of review cannot be exercised by the authority concerned. This Court in *Kalabharati Advertising v. Hemant Vimalnath Narichania*, has held as under: (SCC pp. 445-46, paras 12-14)

"... 12. **It is settled legal proposition that unless the statute/rules so permit, the review application is not maintainable in case of judicial/quasi judicial orders. In the absence of any provision in the Act granting an express power of review, it is manifest that a review could not be made and the order in review, if passed, is ultra vires, illegal and without jurisdiction.** *(Vide Patel Chunibhai Dajibha v. Narayanrao Khanderao Jambekar and Harbhajan Singh v. Karam Singh.)*

13. In Patel Narshi Thakershi v. Pradyuman Singhji Arjunsinghji, Chandra Bhan Singh v. Latafat Ullah Khan, Kuntesh Gupta v. Hindu Kanya Mahavidyalaya, State of Orissa v. Commr. of Land Records & Settlement and Sunita Jain v. Pawan Kumar Jain this Court held that **the power to review is not an inherent power. It must be conferred by law either expressly/specifically or by necessary**

implication and in the absence of any provision in the Act/Rules, review of an earlier order is impermissible as review is a creation of statute. Jurisdiction of review can be derived only from the statute and thus, any order of review in the absence of any statutory provision for the same is a nullity, being without jurisdiction.

14. Therefore, in view of the above, the law on the point can be summarised to the effect that in the absence of any statutory provision providing for review, entertaining an application for review or under the garb of clarification /modification/ correction is not permissible."
(Emphasis supplied)

7. However, the courts have also admitted certain exceptions to the above rule.

8. In **United India Insurance Company Ltd. Vs. Rajendra Singh & Others, (2000) 3 SCC P. 581**, the Supreme Court held that a court or tribunal can recall or review its orders, if the judgement of the court or tribunal is obtained by practicing fraud or misrepresentation of such a dimension as would affect the very basis of the claim

9. Further, if the court or the tribunal, while adjudicating on merits, commit a procedural illegality which goes to the root of the matter and invalidates the proceedings itself and consequently the order passed therein, the court or the tribunals have the power to recall their order and rehear the case on merits after ascertaining whether they had committed the procedural illegality alleged by the applicant. Such a review has been referred by the courts as **procedural review**. In this regard it would be relevant to refer to the observations of the Supreme Court in paragraph nos. 19 and 20 of the judgement reported in **Kapra Mazdoor Ekta Union Vs. Birla cotton Spinning And Weaving Mills Ltd. & Another, (2005), 13 SCC 777**. Paragraph Nos. 19 and 20 of the aforesaid judgement are reproduced below :-

"19. Applying these principles it is apparent that where a Court or quasi-judicial authority having jurisdiction to adjudicate on merit proceeds to do so, its judgment or order can be reviewed on merit only if the court or the quasi-judicial authority is vested with power of review by express provision or by necessary implication. **The procedural review belongs to a different category. In such a review, the court or quasi-judicial authority having jurisdiction to adjudicate proceeds to do so, but in doing so commits (sic ascertains whether it has committed) a procedural illegality which goes to the root of the matter and invalidates the proceeding itself, and consequently the order passed therein.** Cases where a decision is rendered by the court or quasi-judicial authority without notice to the opposite party or under a mistaken impression that the notice had been served upon the opposite party, or where a matter is taken up for hearing and decision on a date other than the date fixed for its hearing, are some illustrative cases in which the power of procedural review may be invoked. **In such a case the party seeking review or recall of the order does not have to substantiate the ground that the order passed suffers from an error apparent on the face of the record or any other ground which may justify a review. He has to establish that the procedure followed by the court or the quasi-judicial authority suffered from such**

illegality that it vitiated the proceeding and invalidated the order made therein, inasmuch the opposite party concerned was not heard for no fault of his, or that the matter was heard and decided on a date other than the one fixed for hearing of the matter which he could not attend for no fault of his. **In such cases, therefore, the matter has to be re-heard in accordance with law without going into the merit of the order passed. The order passed is liable to be recalled and reviewed not because it is found to be erroneous, but because it was passed in a proceeding which was itself vitiated by an error of procedure or mistake which went to the root of the matter and invalidated the entire proceeding.** In *Grindlays Bank Ltd. vs. Central Government Industrial Tribunal*, it was held that once it is established that the respondents were prevented from appearing at the hearing due to sufficient cause, it followed that the matter must be re-heard and decided again.

20. The facts of the instant case are quite different. **The recall of the award of the Tribunal was sought not on the ground that in passing the award the Tribunal had committed any procedural illegality or mistake of the nature which vitiated the proceeding itself and consequently the award, but on the ground that some mattes which ought to have been considered by the Tribunal were not duly considered. Apparently the recall or review sought was not a procedural review, but a review on merits.** Such a review was not permissible in the absence of a provision in the Act conferring the power of review on the Tribunal either expressly or by necessary implication." (Emphasis supplied)

10. Apart from the aforesaid exceptions referred in **United Insurance Company Ltd. (Supra)** and **Kapra Mazdoor Ekta Union (Supra)**, a Division Bench of this Court in its judgement reported in **Debi Prasad & Others Vs. Khelawan & Other, 1956 ALL. L.J. 13** has also listed certain exceptions to the general rule that a judicial or quasi-judicial authority can review its order only if it is vested with the power by express provision or necessary implication. Paragraph No. 16 of the aforesaid judgement is relevant for the purpose and is reproduced below :-

"16. But the rule is subject to certain qualifications.

1. **Until a judgment or order has been delivered and signed there is inherent in every Court the power to vary its own orders so as to carry out what was intended and to render the language free from doubt, or even to withdraw the order so that the decision may be recognised**--Halsbury's Laws of England (Hailsham Edition) Vol. 19, p. 261; 'Lawrie v. Lees', (1881) 7 AC 19 (35) (G).

2. After the judgment or order has been entered or drawn up or signed, there is power both under Section 152, Civil P. C., and inherent in the Judge who gave or made the judgment or order **to correct any clerical mistake or error arising from any accidental slip or omission** so as to do substantial justice and give effect to his meaning and intention (1881) 7 AC 19 (G).

3. If an order for judgment has been made or judgment entered without notice to a party when that party had the right to be heard, the Court or Judge may set it aside--The Bolivier 1916-2 AC 203 (H); Halsbury's Laws of England (Hailsham Ed.) Vol. 19, p. 263.

4. If an order has been signed by inadvertence or failure of memory when it was intended that it should not be signed at

that stage, the Court or Judge may recall the order--Jai Karan v. Panchaiti Akhara Chota Naya Udasi Nanak Shahi', AIR 1933 All 49 (I).

5. Where a decree has been passed against a dead person, the order may be vacated and the case reheard--Debi Baksh Singh v. Habib Shah', ILR 35 All 331 (PC) (J). The same rule applies to an order passed against a company which has already been dissolved or which was non-existent--Lazard Brothers & Co. v. Barque Industrielle de Moscou 1932-1 KB 617 (624) (K), S. C. on appeal Lazard Brothers & Co. v. Midland Bank Ltd., 1933 AC 289 (296) (L).

6. A Court has larger power of modifying or getting aside interlocutory orders than it has in respect of final orders. Thus an order for sale of unsaleable property may be set aside--Tafazzul Hussain Khan v. Raghoonath Prasad', 14 Moo Ind App 40 (PC) (M)." (Emphasis supplied)

11. A reading of above case law shows that the courts or tribunals do not have the power to review, on merits, their own orders unless the same is expressly or by necessary implication provided in the statute but can recall and review an order if there has been some procedural illegality which goes to the root of the matter and invalidates the proceedings itself and consequently the order passed therein or if the order has been obtained by practicing fraud on the court. Further, every court has an inherent power to correct any clerical or arithmetical errors in its order. Subject to the aforesaid and also the exceptions listed in **Debi Prasad (Supra)**, any order delivered and signed by a judicial or quasi judicial authority attains finality subject to appeal or revision as provided under the relevant statute and the proceedings cannot be reopened if the court or the quasi judicial authority is not vested with the power of review under the statute.

12. At this stage, it would be appropriate to consider the judgements referred by the counsel for the petitioner. The issue before the courts in **Grindlays Bank Ltd. (Supra), Sandhya Vaish (Supra)** and **Shaurabh Agrawal (Supra)** did not relate to the powers of the courts or tribunals to review their orders, on merit, even though the relevant statute did not confer any such power in them. The facts in the aforesaid cases referred by the counsel for the petitioner were covered by the exceptions admitted in **United India Insurance Company Ltd. (Supra), Kapra Mazdoor Ekta Union (Supra)** and **Debi Prasad & Ors. (Supra).**

13. The issue before the Supreme Court in **Grindlays Bank Ltd. (Supra)** was as to whether an order setting aside an *ex-parte* award would amount to a review and the Supreme Court answered in the negative. The Supreme Court held that ***no finality is attached to an ex-parte award*** which is always subject to its being set aside on sufficient cause being shown and the Tribunal, i.e., the Industrial Tribunal in the said case, had the power to deal with an application for setting aside an *ex parte* award. The issue in the **Grindlays Bank Ltd. (Supra)** did not relate to review of the order on merits. This aspect of the **Grindlays Bank Ltd. (Supra)**, was also noted by the Supreme Court in **Kapra Mazdoor Ekta Union (Supra)**. The observations of the Supreme Court in paragraph nos. 17 and 18 of **Kapra Mazdoor Ekta Union (Supra)** are relevant for the purpose and are reproduced below :-

"17. The question still remains whether the Tribunal had jurisdiction to

recall its earlier Award dated June 12, 1987. The High Court was of the view that in the absence of an express provision in the Act conferring upon the Tribunal the power of review the Tribunal could not review its earlier award. The High Court has relied upon the judgments of this Court in *Kuntesh Gupta (Dr.) v. Management of Hindu Kanya Maha Vidyalaya and Patel Narshi Thakershi v. Pradyumansinghji Arjunsingji* wherein this Court has clearly held that the power of review is not an inherent power and must be conferred by law either expressly or by necessary implication. **The appellant sought to get over this legal hurdle by relying upon the judgment of this Court in *Grindlays Bank Ltd. vs. Central Government Industrial Tribunal.*** In that case the Tribunal made an ex-parte award. The respondents applied for setting aside the ex-parte award on the ground that they were prevented by sufficient cause from appearing when the reference was called on for hearing. The Tribunal set aside the ex-parte Award on being satisfied that there was sufficient cause within the meaning of Order 9 Rule 13 of the Code of Civil Procedure and accordingly set aside the ex-parte award. That order was upheld by the High Court and thereafter in appeal by this Court.

18. **It was, therefore, submitted before us relying upon *Grindlays Bank Ltd. v. Central Government Industrial Tribunal* that even in the absence of an express power of review, the Tribunal had the power to review its order if some illegality was pointed out. The submission must be rejected as misconceived. The submission does not take notice of the difference between a procedural review and a review on merits.** This Court in *Grindlays Bank Ltd. v. Central Government Industrial Tribunal* clearly highlighted this distinction when it observed (SCC p. 425, para 13):-

"Furthermore, different considerations arise on review. The expression 'review' is used in the two distinct senses, namely (1) a procedural review which is either inherent or implied in a court or Tribunal to set aside a palpably erroneous order passed under a misapprehension by it, and (2) a review on merits when the error sought to be corrected is one of law and is apparent on the face of the record. It is in the latter sense that the court in *Patel Narshi Thakershi case* held that no review lies on merits unless a statute specifically provides for it. Obviously when a review is sought due to a procedural defect, the inadvertent error committed by the Tribunal must be corrected *ex debito justitiae* to prevent the abuse of its process, and such power inheres in every court or Tribunal". (Emphasis supplied)

14. In **Sandhya Vaish (Supra)**, the Motor Accident Claims Tribunal had awarded interest to the claimant on the compensation amount at the rate of 9% per annum, but had not specified the period for which the interest was to be paid although it did not award interest for the period the claim petition stood dismissed in default. The aforesaid fact is evident from the contents of paragraph no. 5 of the reports. The claimants filed an application for review. The failure of the tribunal to specify the period for which the interest had to be paid made the award of the tribunal, so far as it related to payment of interest, unenforceable. The award of the Tribunal regarding payment of interest on the compensation amount could not have been satisfied without specifying the period

for which the interest was to be paid. The error in the award in not specifying the period for which interest was payable could be corrected by the Tribunal in its inherent power to make the award enforceable as every court or tribunal has the inherent power to vary its own orders so as to carry out what was intended in the judgment or to correct any clerical mistake or error arising from any accidental slip or omission. The said exceptions to the general rule that no court or tribunal has the inherent power to review its own order, was recognized by the Division Bench of this Court in **Debi Prasad (Supra)**.

15. In **Shaurabh Agrawal (Supra)**, an *ex-parte* order was passed against the petitioner without serving any notice on him. Evidently, the case fell within the exceptions enumerated before.

16. In **Sunita Devi Singhania Hospital Trust (Supra)**, the applicant had filed an application under Section 129-B(2) of the Customs Act for recall of the original order on the ground that certain issues raised by him and the facts involved in his case had not been considered by the Customs Excise and Service Tax Appellate Tribunal which passed the original order on the basis of facts involved in the appeal filed by another assessee whose case had been clubbed with the case of the applicant. The Tribunal dismissed the application on the ground that the application was barred by limitation. In this context, the Supreme Court held that, in such situations, the period of limitation prescribed in Section 129-B(2) of the Custom Act was not attracted if the application was filed within a reasonable time. In this regard, the observations of the Supreme Court in paragraph nos. 20 and 25 of the judgement reported in **Sunita Devi Singhania Hospital Trust (Supra)** are relevant and are reproduced below :-

"20. **While the judges' records are considered to be final, it is now a trite law that when certain questions are raised before the Court of law or Tribunal but not considered by it, and when it is brought to its notice, it is the only appropriate authority to consider the question as to whether the said contentions are correct or not. For the aforementioned purpose the provisions of limitation specified in Sub-section (2) of Section 129 B of the Customs Act would not be attracted.** We, however, do not mean to lay down a law that such an application can be filed at any time. If such an application is filed within a reasonable time and if the Court or Tribunal finds that the contention raised before it by the applicant is prima-facie correct, in order to do justice, which is being above law, nothing fetters the judges hands from considering the matter on merit.

…

…

…

25. It may be true, as has been contended by Mr. Abhichandani, learned senior counsel that Section 14 of the Limitation Act, 1963 will have no application in view of the fact that provisions governing limitation are contained in the Customs Act. It is so for in a matter of this nature the Tribunal was required to consider the application filed by he appellant which was filed within a reasonable time. It should have also considered that the appellant had been bonafide pursuing its remedies before this Court."

(Emphasis supplied)

The observations of the Court in paragraph No. 20 of the reports show that the issue before the Supreme Court in the

said case was regarding the power of the Tribunal to entertain an application under Section 129-B(2) of the Customs Act if the said application was filed after the prescribed period of limitation but otherwise within a reasonable time. It would also be relevant to note that the judgement of the Supreme Court in **Sunita Devi Singhania Hospital Trust (Supra)** was passed under Article 142 of the Constitution of India.

17. There is no provision in Act, 1988 conferring the power of review on the Tribunal. It was in these circumstances that a Single Judge of this Court in **Smt. Raj Kumari Vs. Motor Accident Claim Tribunal, Jaunpur, 2002 ALJ 833** held that the Motor Accident Claims Tribunal did not have the power to review its own order either under the old Act or under the new Act.

18. It is in the light of the aforesaid that I proceed to decide the merits of the present writ petition.

19. A reading of the review application filed by the petitioner (annexed as Annexure No. 4 to the writ petition) shows that the grievance of the petitioner was that the vehicle was a new vehicle registered for the first time on 25.1.2007 and under Rules 62(1)(a) of the Rules, 1989, the fitness certificate issued to the vehicle was valid for two years. The fitness certificate of a vehicle registered for the first time is issued alongwith the registration certificate itself. A reading of the grounds narrated in the review application show that the argument of the petitioner was that the registration certificate had been filed by the petitioner and the same was sufficient evidence that the vehicle had a fitness certificate valid for a period of two years. It was not stated in the review application that the fitness certificate had been filed alongwith the registration certificate. A reading of the award dated 1.3.2011 also shows that a photocopy of the registration certificate had been filed but the fitness certificate had not been filed by the petitioner before the Tribunal. The recital in the award that the petitioner, i.e., the owner of the vehicle had not filed the fitness certificate has not been controverted by the petitioner in the review application. Even if the argument of the petitioner based on Rule 62(1)(a) of the Rules, 1989 and that the registration certificate filed by the petitioner was sufficient evidence that the vehicle had a fitness certificate valid for two years and failure of the petitioner to file the fitness certificate was not material and sufficient to hold the petitioner, and not the Insurance Company, liable to pay compensation, is accepted, the same can be a ground for a review of the award on merits. The failure of the Tribunal to consider the aforesaid aspect is not a mistake or illegality committed by the Tribunal in the procedure followed by it while hearing the claim petition. The said ground does not fall in any of the exceptions narrated previously in the present judgement. The error, if any, by the Tribunal relates to misinterpretation of an evidence filed by the petitioner before the Tribunal or ignoring a relevant and material document and therefore could be an error apparent on the face of record, a ground for review on merits if the Tribunal had the substantive power to review its order on merits. The Motor Accident Claims Tribunal has no power to review its order on merits. Thus, the tribunal rightly refused to review its award and rightly dismissed the application filed by the petitioner.

20. For the aforesaid reasons, there is no illegality in the orders dated 1.3.2011 and 18.5.2013 passed by the Tribunal.

21. The writ petition lacks merit and is accordingly ***dismissed***.

22. Interim order, if any, stands vacated.

(2020)09ILR A656
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.01.2020

BEFORE

THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE RAVI NATH TILHARI, J.

WRIT – C No. 36606 of 2019

Aditya Sharma ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
In Person

Counsel for the Respondents:
A.S.G.I., Sri Krishna Raj Singh Jadaun, Sri R.P.S. Chauhan

A. Petitioner claimed for scholarship-the claim was rejected on the fact that petitioner was ineligible as per schemes-petitioner's claim was allowed by the court in earlier round of litigation and remitted the matter to secretary, Ministry of Tribal Affairs,GOI for reconsideration the claim of petitioner in the light of document filed by the petitioner in review application-respondents failed to reconsider the matter despite providing complete documents again via mail by the petitioner-consequently student has to rush again to the court-petitioner awarded cost of Rs. 50,000/- due to forced litigation. (Para 1 to 30)

Awarding of costs must be treated generally as mandatory inasmuch as the liberal attitude of the courts in directing the parties to bear their own costs had led the parties to file a number of frivolous cases in the Courts or to raise frivolous and unnecessary issues. costs must be awarded to person who has been forced to enter into litigation. In the instant case, the petitioner was compelled to approach the court for the second time. (Para 31 to 35) (E-6)

List of Cases cited: -

1. St. Of U.P. Vs Maharaja Dharmendra Prasad Singh (1989) 2 SCC 505

2. Bachan Singh Vs U.O.I. (2008) 9 SCC 161

3. Bhubaneshwar Development Authority Vs Adolamde Boswa (2012) 11 SCC 731

4. Basavi Engineering College Parents Associaltion Vs St. Of Talengana (2019) 7 SCC pg 172

5. Ramrameshwari Devi & ors. Vs Nirmala Devi & ors. (2011) 8 SCC 249

6. A Shanmugam Vs Ariya Kshetirya Rajakula Vamsathu Madalaya Nandhavana Paripalanai Sangam (2012) 6 SCC 430

7. Jagdev Singh Vs St. Of U.P. & ors. (2014) 32 LCD 2216

(Delivered by Hon'ble Ravi Nath Tilhari, J.)

1. Heard Sri Aditya Sharma, in person, learned Assistant Solicitor General appearing for respondent-1 to 3 and the learned counsel for respondent-4.

2. The petition was filed for quashing of order dated 15.10.2019 passed by respondent-2 Director Scholarship Section, Ministry of Tribal Affairs, New Delhi, by which the petitioner's claim for grant of scholarship under "National Fellowship & Scholarship for Higher Education for Scheduled Tribe Students" (in short called "the Scholarship Scheme") for the session 2018-19, has not been acceded to. The petitioner has further prayed that a

direction may be issued to the respondents to grant him the Scholarship for the session 2018-19.

3. The prayers made in the writ petition are being reproduced as under:-

"a. Issue a writ, order or direction in the nature of certiorari to quash the impugned order dated 15.10.19 passed by Respondent No.2.

b. Issue a writ, order or direction in the nature of mandamus commanding and directing the Ministry of Tribal Affairs through Respondent No.2 to grant amount of Rs.84,274/- for the session 2018-19 and amount of Rs.39,274/- for the session 2019-20 in the favour of petitioner which petitioner was entitled to but could not get because of the foresaid acts of Respondent No.3 and his assistants.

c. issue a writ, order or direction in the nature of mandamus commanding and directing the Ministry of Tribal Affairs through Respondent No.3 and his assistant to compensate the petitioner under Section (1)(vii), Section (1) (ix) & Section (2)(vii) of Prevention of Atrocities (POA) Act, 1989.

d. issue a writ, order or direction in the nature of mandamus commanding Respondent No.3 and his assistant and fine and prosecute same under Section (1) (viii), Section (1)(ix) and Section (2) (vii) of Prevention of Atrocities (POA) Act, 1989for the foresaid acts of Respondent No.3 and his assistants against the petitioner.

e. issue a writ, order or direction in the nature of mandamus commanding and directing the Ministry of Tribal Affairs through Respondent No.2, Respondent No.3 and his assistants for not complying with the Hon'ble High Court order dated 16.09.19 and passing same order which was quashed by the Hon'ble High Court order dated 16.09.19 and for for asking income details from DDO,CRO (ITBP) despite the fact that Hon'ble high court has already observed and ruled in this context in the favour of petitioner. In this way by the virtue of foresaid act questioning, scandalizing and insulting the credibility of Hon'ble high court but also questioning the genuineness of the affidavit that was fled by the petitioner.

f. issue any other suitable order or direction which this Hon'ble Court may deem ft and proper in the facts and circumstances of the case.

g. To award the cost of the writ petition in the favour of petitioner."

4. The petitioner is a student of M.B.B.S. 4th year in the Institute of Medical Sciences, Varanasi (in short called "the Institute"). He belongs to Scheduled Tribe category. He applied for the Scholarship Scheme under a Centrally Section Scheme, for the year 2018-19 but his application was rejected by order dated 12th June, 2019 of Deputy Secretary, Ministry of Tribal Affairs. The rejection was on the ground that as per I.T.R. for the year 2018-19 the gross salary of the petitioner's father Gorakh Singh was Rs.6,02,785/-. The income criterion to be eligible for grant of scholarship, under the said Scheme, is that the total family income of a candidate from all sources should not exceed Rs.6-00 lac per annum. In view of the guidelines, the petitioner was found to be ineligible and his application under Scholarship Scheme was rejected by order dated 12th June, 2019 passed by respondent-2 therein.

5. The petitioner challenged the order dated 12.6.2019 in Writ C No.21914 of 2019(Aditya Sharma vs. Union of India and

two others) which was initially dismissed on 12.7.2019. The petitioner thereafter filed an application for review/recall of the judgment dated 12.7.2019 being Civil Misc. Review Application No.4 of 2019 and along with that the petitioner filed a copy of Form-16 for the Assessment Year 2018-19 of his father and pay slips to show that the entire income of the family of the petitioner did not exceed Rs.6-00 lac. The petitioner also submitted copy of the I.T.R. for the Assessment Year 2018-19, showing that the income of Rs.6.02,785/- also included reimbursement of travelling expenses for discharge of official duties to the extent of Rs.19,200/- and if the same was excluded the income of the petitioner's father did not exceed Rs.6 lac.

6. The petitioner's review application No.4 of 2019 was allowed by this Court, recalling judgment dated 12.7.2019 and restoring the writ petition to its original number. By a separate judgment Writ C No.21914 of 2019 was also allowed on 16.9.2019. The order dated 12.7.2019 rejecting the claim of the petitioner for scholarship was set aside and the respondent-2 therein was directed to reconsider the claim of the petitioner for scholarship in the light of the documents i.e. Form-16, for the Assessment Year 2018-19 showing gross income as Rs.5,43,705/-(Annexure-7 to the review application) and pay slip of the petitioner's father, (Annexure-8 to Review Application) showing gross pay as Rs.43960/- per month, therefore, annual being Rs.5,27, 520/-.

7. The petitioner submitted a copy of the aforesaid documents and the certified copy of the judgment dated 16.9.2019 before the Deputy Secretary, Ministry of Tribal Affairs/respondent-2 in Writ C No. 21914 of 2019 which was received at his end and the same was confirmed by letter dated 01.10.2019. By letter dated 01.10.2019, the petitioner was required to submit another list of documents and the petitioner sent the list of documents on the same day via mail.

8. The Director, Scholarship Division, Ministry of Tribal Affairs, Room No.412-B, Shastri Bhawan, New Delhi/ present respondent-2 passed the impugned order datd 15.10.2019 whereby the petitioner's claim for scholarship for session 2018-19 was again rejected on the same ground that the petitioner did not fulfill the eligibility criteria, as the family income of the petitioner for the Financial Year 2017-2018 exceeded Rs.6-00 lac per annum.

9. Challenging the order dated 15.10.2019 the petitioner has filed the present writ petition for the prayers as mentioned above.

10. Sri Aditya Sharma the petitioner in person, has argued that his claim for scholarship under the Scholarship Scheme has not been accepted, only on the ground that total annual family income of the petitioner from all the sources, exceeded Rs.6-00 lac. The annual family income has been assessed as Rs.6,02,785/-. The basis of such determination is the monthly salary details furnished by DDO, CRO (ITBP) for the year 2017-18 and 2018-19 submitted to the authorities by letters dated 10.10.2019 and 11.10.2019 in respect of Gorakh Singh the petitioner's father. This was mentioned in the order that the eligibility criterion was that the annual family income must not exceed Rs.6-00 lacs in the previous year i.e. 2017-18, as the petitioner had applied in the year 2018-19.

11. Sri Aditya Sharma has submitted that even as per the month-wise salary

statement prepared by DDO, CRO (ITBP) the annual family income of the father of the petitioner did not exceed 6-00 lac per annum. He has submitted that the earlier order dated 12.6.2019 by which the petitioner's claim for scholarship was rejected on the ground of income criteria, was set aside by this Court and the matter was sent back for reconsideration by the respondent No.2 in the earlier petition, in the light of the documents filed by the petitioner in the review application, but in passing the impugned order dated 15.10.2019 those documents were not taken into consideration in spite of a specific direction. He has submitted that the petitioner fulfilled the eligibility criteria for grant of scholarship on the criterion of income as well.

12. Per contra, Sri R.P.S. Chauhan learned counsel for the respondents-1 to 3 has supported the impugned order by submitting that under "National Fellowship and Scholarship for Higher Education for Scheduled Tribe Students", the income criterion is that the total income of the family, from all sources, to be eligible for the scholarship, should not exceed Rs.6-00 lac per annum. He has argued that for re-examination of the petitioner's case, Ministry of Tribal Affairs, vide letter dated 1.10.2019 requested DDO,CRO(ITBP) to furnish monthly salary statement of Gorakh Singh for the years 2017-18 and 2018-19 and on consideration of such salary statement, provided vide letters dated 10.10.2019 and 11.10.2019, the total income of Gorakh Singh was Rs.6,02,785/- for the year 2017-18 which exceeded Rs.6-00 lac, and as such, the petitioner was not eligible for grant of scholarship. He has submitted that no illegality has been committed by the present respondent No.2 in passing the impugned order.

13. Learned counsels for respondent Nos. 1 to 3 and respondent No.4 could not dispute that the impugned order does not show consideration of the documents annexures 7 and 8 to the review application No.4 of 2019.

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

15. The Government of India, Ministry of Tribal Affairs, implements 'National Fellowship and Scholarship for Higher Education for Scheduled Tribe Students'. This Scheme is a centrally sector Scheme. Two erstwhile central sector schemes i.e. "Rajiv Gandhi National Fellowship' and "Top Class Education', were merged by the Ministry of Tribal Affairs into one scheme, mentioned above, to provide financial assistance to Scheduled Tribe Students for pursuing higher education. Under the merged scheme fellowship is provided to Scheduled Tribe students to take up higher studies, after completing post graduation, as, M.Phil and Ph.D. Courses. Similarly, scholarship is provided to encourage meritorious Scheduled Tribe students to pursue courses at graduate/post graduate level in identified institutions of excellence, government and private, in professional fields, such as management, medicine, engineering, information technology, law, etc. The guidelines on which the fellowship/scholarship is provided to the Schedule Tribe student has been filed as Annexure-D to the counter affidavit.

16. Paragraph-4 of the guidelines "Annexure-D' to the counter affidavit provides for eligibility criteria. Since, we are concerned with the refusal of

scholarship on the ground of criterion of family income of the candidate, it is relevant to reproduce guidelines no. 4.0 and 4.2. as under:-

"4.0 Eligibility

The Fellowship/Scholarship will be available only to the ST candidates who fulfill the following conditions for the award:

4.2. Scholarship:

4.2.1. ST students who have secured admission in the notified institutions according to the norms prescribed by the respective institutions will be eligible for the scholarship under the scheme.

4.2.2. The student will be eligible to join only the list of institution identified by Ministry.

4.2.3. The total family income of the candidates to be eligible for this scholarship from all sources should not exceed Rs.6.0 lakh per annum.

4.2.4.The scholarship shall be payable once the student has secured admission and started attending the classes.

4.2.5. The scholarship awarded, will continue till the completion of the course, subject to satisfactory performance of the student."

17. There is no dispute about the eligibility criterion that the total family income of the candidate to be eligible for the scholarship from all sources should not exceed Rs.6.0 lakh per annum. The dispute is, that according to the petitioner he fulfilled income criterion as total family income of the petitioner did not exceed Rs.6-00 lac per annum, whereas according to the respondents 1 to 3 it exceeded Rs.6-00 lac as the income is Rs. 6,02, 785/-, and as such, the petitioner did not fulfill the eligibility criterion relating to income.

18. The moot point is what is the annual family income of the petitioner from all sources. If it exceeds Rs.6-00 lac or not. If it exceeds Rs. 6.00 lac the petitioner is not eligible but if it does not exceed Rs.6.00 lac the petitioner is eligible for grant of scholarship.

19. The question what is the annaul family income of the petitioner is a question of fact. Finding has been recorded that the annual income of the petitioner's father is Rs. 6,02,785. This Court in the exercise of writ jurisdiction under Article 226 of the Constitution of India, ordinarily, does not interfere with the finding of fact. However, it is open to interferance if it has been recorded after ignoring material/evidence on record or suffers from perversity or error of jurisdiction or such determination has not been made by competent authority.

20. The Power of judicial review of this Court, as is well settled lies against the decision making process and not against the decision itself. If the decision making process is flouted inter alia by violation of basic principles of natural justice, or is ultra vires the powers of the decision makers, or the decision makers take into consideration the irrelevant materials or excludes from consideration relevant materials or admits materials behind the back of the person to be affected or if the decision is such that no reasonable person would have taken such a decision, this Court steps in to correct the error by setting aside the decision and requiring the decision maker to take a fresh decision in accordance with law. However, this Court in the garb of judicial review would convert itself into a court of appeal nor would usurp the jurisdiction of the decision maker.

21. We may profitably refer the following decisions on the point.

22. In the case of **State of U.P. Vs. Maharaja Dharmendra Prasad Singh 1989 (2) SCC 505** the Hon'ble Supreme Court has held as under in paragraph No. 28:

"28. It not unoften happens that what appears to be a judicial review for breach of natural justice is, in reality, a review for abuse of discretion. It is true that amongst the many grounds put forward in the show cause notice dated 19.1.1986, quite a few overlap each other and are distinguishable from those urged for the cancellation of the lease itself. Some of the grounds might, perhaps, be somewhat premature. Some of them even if true are so trivial that no authority could reasonably . be expected to cancel the permission on that basis. For instance the ground that the permission was applied for and granted in the name of one only of the two lessees would be one such.

However, Judicial review under Article 226 cannot be converted into an appeal. Judicial review is directed, not against the decision, but is confined to the examination of the decision making-process. In Chief Constable of the North Wales Police v. Evans (1982) 1 WLR 1155 refers to the merits-legality distinction in judicial review. Lord Hailsham said:

The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorised by law to decide for itself a conclusion which is correct in the eyes of the court.

Lord Brightman observed:

...Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made.

And held that it would be an error to think:

...that the court sits in judgment not only on the correctness of the decision-making process but also on the correctness of the decision itself.

When the issue raised in judicial review is whether a decision is vitiated by taking into account irrelevant, or neglecting to take into account of relevant, factors or is so manifestly unreasonable that no reasonable authority, entrusted with the power in question could reasonably have made such a decision, the judicial review of the decision making process includes examination, as a matter of law, of the relevance of the factors. In the present case, it is, however, not necessary to go into the merits and relevance of the grounds having regard to the view we propose to take on the point on natural justice.

It would, however, be appropriate for the statutory authority, if it proposes to initiate action afresh, to classify the grounds pointing out which grounds, in its opinion, support the allegation of fraud or misrepresentation and which, in its view constitute subsequent violations of the terms and conditions of the grant. The grounds must be specific so as to afford the Lessees an effective opportunity of showing cause."

23. In the case of **Bachan Singh Vs. Union of India 2008 (9) SCC 161** it was reiterated that the judicial review is directed against the decision making process and not the decision itself. High Court cannot act as a court of appeal in proceeding under Article 226. Judicial review is not an appeal but a review of the manner in which the decision is made. The Court sits in judgment only on the correctness of the decision making process

and not on the correctness of the decision itself. Paragraph No. 15 of Bachan Singh case (supra) is being reproduced as under:

"15. Having examined the above said order of the learned Single Judge, we find that the findings and reasonings recorded therein are not based upon proper assessment of the facts of the case and it was not necessary for the learned Single Judge to have minutely examined the record of the GCM as if he was sitting in appeal. We find that on merits, the learned Single Judge has not clearly and plainly said that there was no case against the appellant to hold him guilty of the offence charged. It is well-known and well-settled proposition of law that in proceedings under Article 226 of the Constitution the High Court cannot sit as a Court of Appeal over the findings recorded by the GCM. Judicial Review under Article 226 of the Constitution is not directed against the decision but is confined to the decision-making process. Judicial review is not an appeal but a review of the manner in which the decision is made. The court sits in judgment only on the correctness of the decision making process and not on the correctness of the decision itself. Thus, examining the case of the appellant from all angles we are satisfied that there was no irregularity or illegality in the GCM which was fairly and properly conducted by most qualified members holding very high ranks in Army hierarchy."

24. In the case of **Bhubaneshwar Development Authority Vs. Adolamde Boswa; (2012) 11 SCC 731**, the same principle was reiterated that the Court concerns itself to the question of legality and is concerned only with whether the decision making authority exceeded its powers, committed an error of law, committed a breach of rules, reached an unreasonable decision or abused its powers. Paragraph 18 of the case of Bhubaneshwar Development Authority (supra) is being reproduced as under:

"18. We are of the view that the High Court was not justified in sitting in appeal over the decision taken by the statutory authority under Article 226 of the Constitution of India. It is trite law that the power of judicial review under Article 226 of the Constitution of India is not directed against the decision but is confined to the decision making process. The judicial review is not an appeal from a decision, but a review of the manner in which the decision is made and the Court sits in judgment only on the correctness of the decision making process and not on the correctness of the decision itself. The Court confines itself to the question of legality and is concerned only with, whether the decision making authority exceeded its power, committed an error of law, committed a breach of the rules of natural justice, reached an unreasonable decision or abused its powers."

25. In the case of **Basavi Engineering College Parents Association Vs. State of Talengana reported in 2019 (7) SCC page 172** the Hon'ble Supreme court has again held as under in paragraph Nos 17 and 18:

"17. Judicial review, as is well known, lies against the decision-making process and not the merits of the decision itself. If the decision-making process is flawed inter alia by violation of the basic principles of natural justice, is ultra-vires the powers of the decision maker, takes into consideration irrelevant materials or excludes relevant materials, admits

materials behind the back of the person to be affected or is such that no reasonable person would have taken such a decision in the circumstances, the court may step in to correct the error by setting aside such decision and requiring the decision maker to take a fresh decision in accordance with the law. The court, in the garb of judicial review, cannot usurp the jurisdiction of the decision maker and make the decision itself. Neither can it act as an appellate authority of the TFARC. In Fertilizer Corporation Kamgar Union (Regd.), Sindri v. Union of India, MANU/SC/0010/1980MANU/SC/0010/1980 : (1981) 1 SCC 568, it was observed:

35. ...We certainly agree that judicial interference with the administration cannot be meticulous in our Montesquieu system of separation of powers. The court cannot usurp or abdicate, and the parameters of judicial review must be clearly defined and never exceeded. If the directorate of a government company has acted fairly, even if it has faltered in its wisdom, the court cannot, as a super auditor, take the Board of Directors to task. This function is limited to testing whether the administrative action has been fair and free from the taint of unreasonableness and has substantially complied with the norms of procedure set for it by Rules of public administration.

18. Judicial restraint in exercise of Judicial review was considered in the State of (NCT) of Delhi v. Sanjeev, MANU/SC/0257/2005MANU/SC/0257/2005 : (2005) 5 SCC 181 as follows:

16. ...One can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground is "illegality", the second "irrationality", and the third "procedural impropriety". These principles were highlighted by Lord Diplock in Council of Civil Service Unions v. Minister for the Civil Service (commonly known as CCSU case). If the power has been exercised on a non-consideration or non-application of mind to relevant factors, the exercise of power will be regarded as manifestly erroneous. If a power (whether legislative or administrative) is exercised on the basis of facts which do not exist and which are patently erroneous, such exercise of power will stand vitiated."

26. In the present case, we find that in the earlier round of litigation in Writ C No. 21914 of 2019 in which the order dated 12.6.2019 rejecting the petitioner's claim for scholar ship was challenged, this Court by judgment dated 16.9.2019 allowed the writ petition, quashed the order dated 12.6.2019 and remitted the matter to the Respondent No.2 therein, i.e. the Deputy Secretary, Ministry of Tribal Affairs (Scholarship Sections), Government of India, to reconsider the claim of petitioner for scholarship in the light of the documents filed before this Court in review application No.4 of 2019. Those documents were Form-16 for the Assessment Year 2018-19 (Annexure-7 to the review application) and pay slip of the petitioner's father (Annexure No. 8 to the review application).

27. The judgment of this Court dated 16.9.2019 in Writ C No. 21914 of 2019 is being reproduced as under:

"1. The writ petition has been restored vide order or date passed on Review Application, as requested and agreed by the parties, we proceed to hear and decide this case finally at this stage.

2. Heard Sri Aditya Sharma, Petitioner in person, and Sri Manav

Charausia and Sri K.R.S. Jadaun, Advocates, for respondents.

3. It is stated that petitioner has received documents for the assessment year 2018-19 showing gross total income of Rs. 5,43,705/- and copy thereof has been filed as Annexure-7 to the Review Application which is a copy of Form-16 for Assessment Year 2018-19 of Gorakh Singh, father of petitioner. It is pointed out that income certificate, wherein the income of Rs. 6,02,785/- was shown, also included reimbursement of traveling expenses for discharge of official duties to the extent of Rs. 19,200/- and if the same is excluded, the income will be less than Rupees six lacs. Pay slip of petitioner's father has also been filed as Annexure-8 to Review Application showing gross pay as Rs. 43,960/- and annual income, therefore, comes to Rs. 5,27,520/-.

4. In our view, the respondent-competent authority need to re-examine the claim of petitioner for scholarship in the light of above documents.

5. In view thereof, this writ petition is allowed. Order dated 12.06.2019, Annexure-6 to the writ petition, rejecting claim of petitioner for scholarship only on the ground that income of petitioner's father is more than Rs. 6,00,000/- is hereby set aside.

6. Respondent-2 is directed to re-consider the claim of petitioner for scholarship in the light of above documents, copies whereof shall also be submitted by petitioner along with certified copy of this order afresh to respondent-2 within ten days and thereafter respondent-2 shall pass a fresh order, as directed above, within one month."

28. The impugned order dated 15.10.2019 states in paragraph 2 that the petitioner was requested by letter No. 12025/08/2019-SCH dated 30.9.2019 to furnish the document/information which included copy of the Form-16 for Assessment Year 2018-19 of Gorakh Singh, father of the petitioner (Annexure No.7 to the review application) and copy of the pay slip of the petitioner's father (Annexure-8 to the review application). The petitioner has stated in paragraph No. 3 of the writ petition that he had already submitted requisite documents in compliance of the order of this Court dated 16.9.2019 to the Deputy Secretary, (Scholarship), Ministry of Tribal Affairs (Scholarship Division). The petitioner in paragraph No.4 of the petition has stated that on 1.10.2019 a letter from Respondent No.3 i.e. Deputy Director Scholarship Division was received by the petitioner via mail (Annexure No.4) asking the petitioner to supply another list of documents as mentioned in that letter dated 30.9.2019 received on mail on 1.10.2019 in Paragraph No.5. The petitioner has further submitted that on the same day within two hours the petitioner sent all the documents that were asked again via mail (Annexure No.5). In reply to the aforesaid averments of the petitioner in paragraph Nos. 3,4 and 5 of the writ petition, the Respondent Nos. 1,2 and 3 in their counter affidavit have stated that the petitioner had not submitted the complete documents via letter dated 23.9.2019 to the respondent as ordered by the Hon'ble High Court and, therefore, a letter dated 30.9.2019 was sent to the petitioner requesting him to submit the complete document. However, there is no denial of the petitioner's averments that in compliance of the letter dated 30.9.2019 received to the petitioner on 1.10.2019 via mail all the required documents were sent within two hours on the same day via mail. The impugned order also does not state that the petitioner did not submit the documents

required by letter dated 30.9.2019. Besides, the petitioner's averments are supported by Annexure-5 which has not been disputed in the counter affidavit. We have no reason to disbelieve the petitioner's averment substantiated by annexures.

29. We are of the considered view that in passing the impugned order dated 15.10. 2019 decision making process has been faulted. The relevant material as directed by this court was not taken into consideration and the matter has also not been considered by the Deputy Secretary, who was directed to reconsider the matter vide judgement dated 16.09.2019. The ultimate decision, as such cannot be sustained. The impugned order dated 15.10.2019 deserves to be quashed with direction to respondent no.1 that the petitioner's case for grant of scholarship be considered afresh in accordance with law and in the light of the observations and the directions contained in this judgement, by Deputy Secretary, Scholarship Division Ministry of Tribal Affairs, New Delhi.

30. We are further of the considered view that the petitioner's claim for grant of scholarship, as per the directions of this Court vide judgment dated 6.9.2019 passed, in Writ C No. 21914 of 2019 has not been considered. It has also not been considered by the authority who was directed to consider. Consequently, the petitioner who belongs to the Scheduled Tribe and is pursuing studies in the 4th year of MBBS, has to rush again to this Court. He has been imposed a forced litigation.

31. Chapter 21 Rule 11 of the Allahabad High Court Rules 1952 prescribed the award of cost which reads as under:

"19. Chapter XXI, Rule 11 of the Allahabad High Court Rules, 1952 prescribes the award of costs, which reads as under:-

" 11. Costs.--- In disposing of an application under this Chapter the Court may make such order as to costs as it may consider just.

1. Costs--Imposition of.-- it is apparent that non-payment of cost is an exemption for which special reasons have to be given by the Court. The cost imposed should be in accordance with rules and if the proceedings are unnecessarily protracted or adjournments have been sought it is upon the discretion of the Judge to impose exemplary cost taking also into account the circumstances etc. for the purpose of adjournment.

2. Awarding of Costs.--Apex Court in Salem Advocate Bar Association, Tamil Nadu v. union of India, AIR 2005 SC 3353, has held that "so far as awarding of costs at the time of judgment is concerned, awarding of costs must be treated generally as mandatory inasmuch as the liberal attitude of the Courts in directing the parties to bear their own costs had led the parties to file a number of frivolous cases in the Courts or to raise frivolous and unnecessary issues. Costs should invariably follow the event. Costs must be appropriately apportioned. Special reasons must be assigned if costs are not being awarded. Costs should be assessed according to the rule in force."

32. Apart from the aforesaid statutory provision the Supreme Court in the case reported in **Ramrameshwari Devi and others vs. Nirmala Devi and others (2011)8SCC 249** has held that the compensation must be awarded to persons who have been forced to enter into litigation. Paragraph Nos. 31, 32, 33 and 43 of the case of **Ramrameshwari Devi (supra)** are being reproduced as under:

"31.Dr. Arun Mohan, learned amicus curiae, has written an extremely useful, informative and unusual book*Justice, Courts and Delays*. This book also deals with the main causes of delay in the administration of justice. He has also suggested some effective remedial measures. We would briefly deal with the aspect of delay in disposal of civil cases and some remedial measures and suggestions to improve the situation. According to our considered view, if these suggestions are implemented in proper perspective, then the present justice delivery system of civil litigation would certainly improve to a great extent.

32. According to the learned author, 90% of our court time and resources are consumed in attending to uncalled for litigation, which is created only because our current procedures and practices hold out an incentive for the wrongdoer. Those involved receive less than full justice and there are many more in the country, in fact, a greater number than those involved who suffer injustice because they have little access to justice, in fact, lack of awareness and confidence in the justice system.

33. According to Dr. Mohan, in our legal system, uncalled for litigation gets encouragement because our courts do not impose realistic costs. The parties raise unwarranted claims and defences and also adopt obstructionist and delaying tactics because the courts do not impose actual or realistic costs. Ordinarily, the successful party usually remains uncompensated in our courts and that operates as the main motivating factor for unscrupulous litigants. Unless the courts, by appropriate orders or directions remove the cause for motivation or the incentives, uncalled for litigation will continue to accrue, and there will be expansion and obstruction of the litigation. Court time and resources will be consumed and justice will be both delayed and denied.

43.We have carefully examined the written submissions of the learned amicus curiae and the learned counsel for the parties. We are clearly of the view that unless we ensure that wrongdoers are denied profit or undue benefit from the frivolous litigation, it would be difficult to control frivolous and uncalled for litigations. In order to curb uncalled for and frivolous litigation, the courts have to ensure that there is no incentive or motive for uncalled for litigation. It is a matter of common experience that court's otherwise scarce and valuable time is consumed or more appropriately, wasted in a large number of uncalled for cases."

33. Again in the case of **A Shanmugam v. Ariya Kshetirya Rajakula Vamsathu Madalaya Nandhavana Paripalanai Sangam** report in 2012 (6) SCC 430 the Hon'ble Supreme Court has reiterated the same principle.

34. In the case of **Jagdev Singh Vs. State of U.P. and others [2014 (32) LCD 2216] (DB)** this Court held that the imposition of cost is must and the courts can award compensatory cost to the litigants who have approached to the court because of commission and omission of the State Government and as in the said case the petitioner therein was compelled to approach this Court for the second time, cost was imposed. It is relevant to reproduce paragraph Nos. 22 and 23 of the said judgment as under:-

"23. In view of above and keeping in view the factual matrix on record, it appears that the petitioner has been compelled to approach this Court for the second time in spite of the fact that

while passing the impugned order, the government itself recorded a finding that the petitioner is in possession of the infrastructure regarding the agricultural industry which is running over the land in dispute which, according to the petitioner's counsel, is for more than 48 years. Once, the government itself found that no actual possession has been delivered in the manner provided by the Apex Court in the catena of judgments ((supra)), then it was not open for the government to reject the application and adjudicate the controversy in an indecisive manner with contradictory finding. It is a fit case where exemplary cost should be awarded.

24. The writ petition deserves to be and is hereby allowed.

A writ in the nature of certiorari is issued quashing the impugned order dated 3.6.2013, contained in Annexure No. 1 to the writ petition with all consequential benefits. A further writ in the nature of mandamus is issued commanding the State Government to reconsider the petitioner's case keeping in view the observation made in the body of present judgment, expeditiously, say within a period of two months from the date of receipt of a certified copy of the present judgment.

Cost is quantified to Rs. 1 lac, out of which the petitioner shall be entitled to Rs. 50,000/- and the remaining Rs. 50,000/- shall be remitted to the Mediation & Conciliation Centre, High Court, Allahabad. Let the cost be deposited within two months from today. In case the cost is not deposited within the time stipulated above, it shall be recovered as arrears of land revenue by the Collector, Allahabad.

Registry to take follow-up action.

The writ petition is allowed accordingly with cost as above."

35. We, therefore quash the impugned order dated 15.10.2019 and direct the respondent No.1, The Union of India through Ministry of Tribal Affairs, Shastri Bhawan, New Delhi, that the petitioner's case for grant of scholarship be considered afresh by the Deputy Secretary, Scholarship Division Ministry of Tribal Affairs New Delhi in accordance with law after considering the documents i.e. annexure No. 7 and 8 to the Review Application No. 4 of 2019 as well. The petitioner's contention that even as per the letter of DDO, CRO (ITBP) dated 10.10.2019 and 11.10.2019 the annual family income of the petitioner does not exceed rupees 6 lacs, shall also be considered by the said authority.

36. The petitioner is directed to serve the Respondent No.1 and the Deputy Secretary, Scholarship Division Ministry of Tribal Affairs New Delhi, the certified copy of this judgment and the copy of the judgement dated 16.9.2019 along with copy of Annexure Nos. 7 and 8 of the Review Application No. 4 of 2019, with an application/representation in which the petitioner shall explain as to how his annual family income did not exceed rupees 6 lacs even as per the letters of DDO, CRO (ITBP) dated 10.10.2019 and 11.10.2019.

37. The decision shall positively be taken by the Deputy Secretary, Ministry of Tribal Affairs within a period of one month from the date of production of certified copy of this judgment to the said authority.

38. In the circumstances, we impose a cost of Rs. 50,000/- on the present respondent No.2, Director, Scholarship Division, Ministry of Tribal Affairs, New Delhi, which shall be paid to the petitioner within a period of one month from the date of production of a certified copy of this judgment before the said authority, failing

which the amount shall be recovered as arrears of land revenue from the said Respondent No.2 by the concerned collector and shall be paid to the petitioner.

39. The petitioner shall serve certified copy of this judgment on respondent No.2 as well as the Collector of the concerned District.

40. So far as the prayer Nos. (c), (d) and (e) in the writ petition are concerned, we leave it open to the petitioner, if he chooses, to approach appropriate forum in appropriate proceedings.

41. We make it clear that we have not expressed any opinion on merits on the matter in issue, i.e., whether the petitioner is or is not eligible for grant of scholarship under the scholarship scheme on the criterion of income.

42. The writ petition is allowed with costs as aforesaid.

(2020)09ILR A668
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.08.2020

BEFORE

THE HON'BLE J.J. MUNIR, J.

WRIT – C No. 37024 of 2012

M/S Jagran Prakashan Ltd. & Anr.
...Petitioners
Versus
Presiding Officer, Labour Court, U.P. Allahabad & Ors. ...Respondents

Counsel for the Petitioners:
Sri Chandra Bhan Gupta

Counsel for the Respondents:
C.S.C., Ms. Bushra Maryam, Sri M.K. Sharma, Sri Manoj Kumar, Sri Namit Kumar Sharma

(A) Labour Law - Uttar Pradesh Industrial Disputes Act, 1947 (State Act) - Section 4-K - reference - Section 3 - Industrial Disputes Act (central Act) - Section 25-O , Section 25-N - Labour Court is a Court of referred jurisdiction - Working Journalists Act - Section3 - Sections 14, Section 15 - statute brought "to regulate certain conditions of service of working journalists and other persons employed in newspaper establishments' - Labour Court - rightly concluded - closure pleaded by the employers is no closure, but a sham to get rid of the workman - retrenchment has been held to be unlawful and in breach of Section 25-N of the Central Act - retrenchment has been held neither to be lawful or justified - no infirmity with the award impugned. (Para-52,54)

Petitioner(employer) - newspaper establishment - appointment - harness of the employers - terminated service of his workman working as a 'junior plate maker' - reason assigned for dispensation of his services - installation of a C.T.P. Machine, which the workman castigates as improper, wrong and a colourable exercise of powers -Labour Court - Award - answered the reference in favour of the workman and against the employers - holding the termination of service of the workman invalid - ordering his reinstatement with continuity. (Para-2,10)

HELD:- In the totality of circumstances, particularly, the fact that the workman has not after all rendered service during the entire period of time until his superannuation, though not on account of his fault, ends of justice would be met by modifying the award impugned to provide that the workman shall be entitled to receive in full satisfaction of all his claims, a lump sum of **Rs.6 lakhs** from the employers within two months of date. workman would be entitled to simple interest @ 6% per annum till realization if not paid within stipulated time. workman shall be entitled to receive in costs from the employers a sum of **Rs.20,000/-.**(Para-56)

Petition partly allowed. (E-7)

List of Cases cited:-

1. British India Corporation Vs Collector, Kanpur Nagar & ors., 2016 (1) ALJ 202

2. SAIL (Sales Branch), Kanpur Vs St. of U.P. & ors., (2011) 129 FLR 506

3. Mahendra Yadav Vs Om Prakash, 2006 (65) ALR 560

4. Novartis India, Ltd. Vs St. of W.B. & ors., 2004 (101) FLR 278.

5. Novartis India Ltd Sadhu Ram Vs Delhi Transport Corporation, (1983) 4 SCC 156

6. Management of the Daily Pratap Vs Their Katibs, (1972) 2 SCC 342.

7. Pratap Chandra Mohanti Vs General Manager, United News of India & anr., 1993 Lab IC 919 M/s.
8. Triveni Glass Ltd. Vs St. of U.P. & ors., (2008) 3 All LJ 420

9. Mohd. Sarwar Vs St. of U.P. & ors., 2013 (6) AWC 6169

10. Pottery Mazdoor Panchayat Vs The Perfect Pottery Co. Ltd., (1979) 3 SCC 762

11. Firestone Tyre & Rubber Co. of India (P) Ltd. Vs The Workmen Employed represented by Firestone Tyre Employee's Union, (1981) 3 SCC 451

12. Hariprasad Shivshanker Shukla & anr. Vs A.D. Divelkar & ors., AIR 1956 SC 121

13. H.P. Mineral & Industrial Development Corp. Employees' Union Vs St. of H.P. & ors., (1996) 7 SCC 139

(Delivered by Hon'ble J.J. Munir, J.)

1. M/s. Jagran Prakashan Limited, Allahabad and their Establishment at Varanasi, dissatisfied with an award of the Presiding Officer, Labour Court, U.P., Allahabad, dated 27.01.2012 (published on 11.04.2012), made in Adjudication Case no.1 of 2009, have instituted this Writ Petition, challenging the Award. The Award, last mentioned, has been rendered in an industrial dispute between M/s. Jagran Prakashan Limited and their workman, Ram Charitra Mishra. The Adjudication Case is a sequel to a reference made under Section 4-K of the Uttar Pradesh Industrial Disputes Act, 1947 (for short, "the State Act') by the Labour Commissioner, U.P., Kanpur (an *ex officio* Secretary to the Government) in the following terms (rendered into English from Hindi vernacular):

"Whether the act of the Employers in terminating the services of their workman, Sri Ram Charitra Mishra son of Sri Satya Narain Mishra, "junior plate maker', vide order dated 14.11.2006, with effect from 15.11.2006, is justified and/ or lawful? If not, to what benefit/ relief is the concerned workman entitled and in what terms?

2. The petitioners are admittedly a newspaper establishment, who employ working journalists, non-working journalists as well as other employees. According to the case of the second respondent, Ram Charitra Mishra, the workman, who shall hereinafter be referred to as the "workman', was initially enrolled as apprentice in petitioners' establishment w.e.f. 17.07.1989. He trained as an apprentice in the trade of plate making and was employed as a semi-skilled workman in the petitioners' establishment, on the basis of an oral engagement dated 01.11.1989. The petitioners shall hereinafter be referred to as the "employers'. The workman's case is that ever since his appointment, he has been in

harness of the employers, working regularly as a plate maker. He has done his duties honestly and with integrity. He was served with a letter dated 14.11.2006, suddenly terminating his services w.e.f. 15.11.2006. The reason assigned for dispensation of his services was the installation of a C.T.P. Machine, which the workman castigates as improper, wrong and a colourable exercise of powers.

3. It is the workman's further case that in the publication of a newspaper, process is a necessary and intermediate stage. Without processing, there can be no publication of a newspaper. According to the workman, the process department has not been closed down due to installation of the C.T.P. Machine. The Sub-Editor, the clerk and the operator, besides other hands, have been retained in the department after requisite training. The installation of the machine has not led to deprivation of employment to those, who were in the process department. It is also claimed that prior to dispensation of the workman's services, some new hands have been recruited, but his services have been dispensed with without bearing in mind his seniority. He was a permanent workman. He has never been served with a notice of closure. At the time when the workman's services have been dispensed with, more than 100 workmen were in harness of the employers.

4. It is the workman's case that according to Section 25-O of the Industrial Disputes Act (for short, "the Central Act'), it is necessary to secure permission for a valid closure from the Appropriate Government, which in this case, has not been obtained. It is also pleaded by the workman that the provisions of Section 25-N of the Central Act have been observed in breach. The order of termination of his services squarely falls in the category of retrenchment. It is pleaded that he has not been served with three months' prior notice before retrenchment or paid notice pay in lieu thereof. It is also the workman's case that no retrenchment compensation has been paid to him. It is specifically pleaded that whatever sum of money in connection with his unlawful retrenchment has been paid, he has received under protest and without prejudice. Along side, it is pleaded that the dispute raised by him is not barred by estoppel. The order for termination of his services is unjustified and illegal. He sought relief of reinstatement in service with continuity and full back-wages. This case of the workman is based on the written statement that he put in before the Labour Court, after registration of the Adjudication Case under reference.

5. The employers lodged their written statement too in the Adjudication Case, where they admitted the factum of the workman being in their harness and dispensation of his services w.e.f. 15.11.2006. It is pleaded that M/s. Jagran Prakashan Varanasi Pvt. Ltd. has been amalgamated with M/s. Jagran Prakashan Limited. M/s. Jagran Prakashan Limited have a unit of theirs at 7, P.D. Tandon Road, Allahabad, that is registered under the Factories Act, 1948. It is pleaded by the employers that the provisions of the Working Journalists and Other Newspaper Employees (Conditions of Service) and Miscellaneous Provisions Act, 1955 (for the short, "the Working Journalists Act') govern their establishment, and, they are a newspaper establishment.

6. It is the employers' further case the workman was employed as a full time employee, working in their process

department as a junior plate maker since 01.11.1991. On account of a change over to the very modern C.T.P. Printing Machine, their process department has been closed down. The aforesaid closure of the process department has resulted in dispensation of services of a total of seven workmen, including the workman. Those workmen, who had knowledge about working of computers, have been retained after extending some elementary training to them, which enables them to operate the new machine. It is the employers' further case that the workman has been paid due closure compensation, under Section 25-FFF of the Central Act. It is also the employers' case that their establishment, in all its departments, employ a total of 83 hands. As such, the provisions of Sections 25-O and 25-N of the Central Act are not applicable. The closure is justified, *bona fide* and valid.

7. It is pleaded that a case about validity of closure has not been referred. The reference is not maintainable and illegal. The workman has been paid his earned wages upto 15th December, 2006, notice pay, closure compensation and bonus, all totalling a sum of Rs.72,676/-, which the workman has received as full and final payment of his outstandings. He has no right to challenge closure of the Section/ Department, where he was employed. The workman is not entitled to any relief.

8. It may be recorded here that before the Labour Court, both parties filed their written statements and also rejoinder statements, which constitute their pleadings. Both parties filed their documentary evidence, besides leading oral evidence. The workman appeared in support of his case as WW-1. It must be remarked here that a subsidiary issue covered by the reference and, therefore, examined by the Labour Court, was about the date of the workman's retention. The parties appear to be at issue about the date of the workman's retention by the employers, inasmuch as the workman claims that he was retained w.e.f. 17.07.1989, whereas the employers say that it was w.e.f. 01.11.1991. This question was gone into by the Labour Court, on the basis of documentary evidence and also the law applicable to apprentices in an establishment, who lateron go on to become regular employees. It appears that the workman was retained as an apprentice on 17.07.1989 at the Varanasi Unit of the employers. He was an apprentice on a stipend of Rs.650/- per month. This period of paid apprenticeship was duly considered by the Labour Court, bearing in mind the provisions of the Apprentices Act, 1961. It found that the workman was in the employers' harness since 17.07.1989 and not 01.11.1991, as urged by the employers. The time period of retention would have material bearing on the validity of the workman's dispensation from service since closure or retrenchment compensation etc. paid to him, would be determinable on that basis.

9. It was also urged before the Labour Court that the reference was without jurisdiction, inasmuch as the workman qualified as such, under the Central Act on account of extension of the protective umbrella of the Central Act to working journalists and other newspaper employees by Section 3 of the Working Journalists Act; this extension of the benefit of the Central Act to working journalists and other employees of the newspaper leads to the inevitable consequence that the "Appropriate Government', to make a reference, would be the Central

Government, under Section 10 of the Central Act and not the State Government, under Section 4-K of the State Act. The reference here being one made by the State Government, under Section 4-K of the State Act, it was incompetent and all proceedings before the Labour Court on its basis a nullity.

10. The Labour Court by its Award dated 27.01.2012 has answered the reference in favour of the workman and against the employers, holding the termination of service of the workman invalid and ordering his reinstatement with continuity along with 50% back-wages. The sum of money paid towards closure compensation has been ordered to be adjusted. Costs in the sum of Rs.2000/- also, have been awarded in favour of the workman.

11. Heard Sri Chandra Bhan Gupta, learned Counsel for the employers (petitioner) and Sri Manoj Kumar Sharma, learned Counsel appearing on behalf of the workman (respondent no. 2).

12. Before this Court, the learned Counsel for the employers has substantially urged that the impugned award is without jurisdiction, on two counts. First, the reference is incompetent, inasmuch as to every working journalist and other employee of a newspaper establishment, the provisions of the Central Act alone apply, where reference can be made by the Central Government, under Section 10 of the last mentioned Act, and not the State Government under Section 4-K of the State Act. He further submits that even if the State Government be found competent to make a reference, in relation to the workman on ground that he is an employee of a newspaper establishment other than a working journalist, the reference can be made to and dealt with by the competent Labour Court or Industrial Tribunal appointed under the Central Act. It cannot be made to or answered by the Labour Court, constituted under the State Act, assuming that the State Government is competent to make a reference, relating to the workman. As such, the impugned award, if the reference were held competent, would be without jurisdiction, being one rendered by a Labour Court, not competent to decide a reference under the Central Act.

13. Secondly, the impugned award is assailed as one without jurisdiction on ground that it is based on a reference that is completely away from the dispute that is involved between parties. It is pointed out by the learned Counsel for the employers that the reference is one that relates to termination of services of the workman, whereas the dispute involved is about closure. Learned Counsel for the employers submits that a case where the services of a workman come to an end on account of closure of an industry or a part of it, is completely different from termination of services, that fall within the mischief of retrenchment, both under the Central Act and the State Act. Where services of an employee come to an end in consequence of closure of an industrial unit or one of its department, the dispute that is to be referred by the Appropriate Government is about the validity of the closure. It is not about validity of termination of service of a workman, that would fall within the generic category of retrenchment.

14. It is emphasized by the learned Counsel for the employers that a Labour Court is a Court of referred jurisdiction. It cannot enlarge, change or alter the scope of

the reference made. In the present case, the dispute referred was about termination of services of the workman and its validity; it was not at all about the validity of closure of that department of the employers where the workman was serving, leading to dispensation of services. As such, it was not at all open to the Labour Court to examine the question of validity of the closure, that led to dispensation of the workman's service as that was beyond the scope of reference. The Labour Court, in the submission of the learned Counsel for the employers, was, therefore, not at all clothed with jurisdiction to determine the validity of the closure pleaded by the employers, being a Court of referred jurisdiction.

15. The learned Counsel for the workman has refuted the submission advanced on behalf of the employers. These will be noticed a little later, together with a more elaborate statement by the learned Counsel for the employers in support of his contentions summarized above.

16. This Court finds that on the submissions of parties advanced, the following two questions arise for consideration:

(1) Whether a junior plate maker employed with a newspaper establishment is a workman by virtue of the Working Journalists Act alone, and exclusively governed by the provisions of the Central Act so as to render a reference under Section 4-K of the State Act in his case incompetent? If so, is the Labour Court/ Industrial Tribunal constituted under the Central Act, alone competent to answer a reference in relation to such a workman?

(2) Whether on a reference about validity of termination of services of a workman, the Labour Court as a Court of referred jurisdiction, can go into the validity of a closure pleaded by the employers to determine if it is sham and no closure at all?

17. The submissions of the learned Counsel for the employers with regard to question no.1 have been summarized hereinabove. Dilating on those submissions, learned Counsel for the employers has placed reliance on a decision of this Court in **British India Corporation vs. Collector, Kanpur Nagar and others, 2016 (1) ALJ 202**. In the said case, the question was whether the workman of a Central Government Company, where the Central Government had deep and pervasive control over its affairs, could invoke the provisions of Section 6-H(1) of the State Act to recover his dues found for him under an award passed in an adjudication case by the competent Labour Court/ Tribunal. The award was also passed on a reference made under the State Act. It was held by this Court that the employers being entirely a Central Government Company, the award passed by the Industrial Tribunal on a reference made by the State Government under the State Act, though not challenged, would not clothe the Deputy Labour Commissioner with jurisdiction to recover, on the basis of the award under Section 6-H(1) of the State Act. In **British India Corporation** *(supra)*, it was held:

"9. In Civil Misc. Writ Petition No. 3667 of 2011 the *British India Corporation v. State of U.P.* decided on 12th March, 2013 this Court quashed the labour court award dated 7th October,'2010 holding that the appropriate government is the Central Government in the matter of the petitioners. In view of the above discussions it is clear that from the very

beginning the appropriate government with respect of the petitioner-company was the Central Government. In the petitioner's case itself reported in 2011 (2) AWC 1316: 2011(2) ALJ (NOC) 154 (All) in paragraph No.18 as quoted above, this Court noted, the fact that the notification under section 39 of the Industrial Disputes Act issued by the Central Government empowering the state authority to refer the dispute even in the case of Central Government company would not be applicable in the present case for the reason that firstly the reference was made in July, 1996 when the said notification was not in existence and secondly under the notification the state authorities could refer an industrial dispute under Section 10 of the Central Act to the Labour Court or Tribunal constituted by the Central Government. In the present set of facts the basis of the impugned order under section 6 H(1) of the U.P. Act is the award dated 16th March, 1988 which was passed by the Labour Court under the U.P. Act. No reference was made under Section 10 of the Industrial Disputes Act, 1947 to the Labour Court or Tribunal constituted by the Central Government. This Court in the judgment noted in para 8 above held the reference to be void and quashed the award.

10. In both the present writ petitioners the award is not under challenge but the fact remains that the source of claim of the Respondent- workman is the award dated - 16th Marcy, 1988 which was passed upon a reference by the State Government under the U.P. Act and not by the Central Government which was the appropriate Government under the Central Act. Under the circumstances the respondent No. 3 cannot be said to have jurisdiction in respect of industrial dispute or matter incidental thereto, relating to the petitioners. Thus both the impugned orders passed by the Deputy Labour Court Commissioner respondent No. 3 are held to be without jurisdiction."

18. Further reliance has been placed by the learned Counsel for the employers on a decision of this Court in **Steel Authority of India Ltd. (Sales Branch), Kanpur vs. State of U.P. and others, (2011) 129 FLR 506**, where the issue was, whether the Steel Authority of India being an industry under the authority of the Central Government, or so to speak a public sector undertaking, would be subject to the jurisdiction of the Labour Court, appointed under the State Act on a reference made by the State Government, under that Act. Answering this issue in the negative, it was held by this Court in **Steel Authority of India Ltd.** *(supra)*:

"8. It will be seen that so far as SAIL is concerned, it answers the description of an Industry under the authority of the Central Government. The aforesaid aspect of the matter is further established from the notification dated 3.7.1998 (referred to above) issued by the Central Government under section 39 of the Act, 1947 which contains the list of Central Public Sector Undertakings and includes the name of SAIL at Item No. 119.

9. Counsel for the respondent workmen could not refer to any relevant fact for disputing the said contention of the petitioner. It is, therefore, held that so far as the SAIL is concerned, the appropriate government under the Act, 1947 is the Central Government.

10. Reference of disputes to the Labour Court/Industrial Tribunal is under section 10(c) of the Act, 1947. The section provides that a dispute or any matter appearing to be connected with, or relevant to, the dispute, covered by matters

specified in Second Schedule, the reference shall be referred to the Labour Court for adjudication. Section 10(d) of the Act, 1947 provides that a dispute or any matter appearing to be connected with, or relevant to any matter specified in the Second Scheduled or the Third Schedule shall be referred to a Tribunal for adjudication.

11. From the aforesaid it is apparently clear that so far as the disputes qua matters covered by Second Schedule are concerned, it can either be referred to the Labour Court or to the Industrial Tribunal. Dispute pertaining to matters covered by Third Schedule have to be referred to the Industrial Tribunal only. Labour Court has been defined under section 2(kkb) to be a Court constituted under section 7 of the Act, 1947. Section 7 provides that appropriate Government may, by notification in the official gazette, constitute one or more Labour Courts for adjudication of the industrial disputes relating to any matter specified in the Second Schedule and for performing such other functions as may be assigned to them under the Act.

12. So far as the Industrial Triburial is concerned, the same has been defined under section 2(r) and means an Industrial Tribunal constituted under section 7- A of the Act, 1947.

13. It is not in dispute that the Central Government has constituted Industrial Tribunal cum Labour Court in exercise of powers under the Act, 1947.

14. This Court may record that a dispute pertaining to discharge/removal of workmen including reinstatement or grant of relief to the workmen of a Central Government Undertaking who had wrongly been dismissed is covered by section 4 of the Act, 1947. What logically follows is that for such a dispute, the appropriate government to refer the matter to the Labour Court or the Industrial Tribunal in exercise of powers under section 10(c) would be the Central Government.

15. It is admitted on record that the reference in the facts of the case was made by the State Government to the Labour Court under section 4-K of the U.P. Industrial Disputes Act, 1947 on 6.2.1998 which was registered as Adjudication Case No. 12 of 1998 and was transferred to the Labour Court U.P. at Kanpur-III on 24.5.2006 and allotted new registration No. as Adjudication Case No. 105 of 2006.

16. It is held that on the date the reference was made it was the Central Government which had the competence to make the reference under section 10.

17. The notification relied upon by the Counsel for the workmen dated 3.7.1998 is prospective in nature and will not infuse life in a dead reference which was made by the State Government on a date it was not competent to do so.

18. It has also been brought to the notice of the Court that the notification dated 3.7.1998 has since been withdrawn and as on date it is the Central Government which can refer the disputes in respect of Public Sector Undertakings are concerned.

19. Since the reference itself was bad, any decision thereon would fall automatically for want of authority."

19. Learned Counsel for the workman on the other hand submits that the question in hand goes to the root of the matter, as it puts in issue the power of the State Government to make a reference. The employers ought to have challenged the order of reference, at the time it was made. He submits that no challenge at the stage of reference was laid through appropriate proceedings by the employers, and now, after an award has been made by the Labour Court, it is no longer open to

question the jurisdiction of the State Government to make a reference under the State Act or the jurisdiction of the Labour Court, functioning under that Act, to pronounce the award impugned. Learned Counsel for the workman has submitted that mere mention of a wrong provision would not denude the Court of jurisdiction, which it otherwise has. In support his contention, reliance has been placed on the decision of this Court in **Mahendra Yadav vs. Om Prakash, 2006 (65) ALR 560**. The said decision was rendered in the context of challenge to a compromise recorded in a Civil Suit by filing a Miscellaneous Civil Appeal instead of a regular Appeal under Section 96 CPC. Since both, a regular Appeal and a Miscellaneous Appeal would lie to the same Court, it was held in paragraph 12 of the report in **Mahendra Yadav** *(supra)*:

"12. The submission of the learned Counsel for the appellant that instead of filing a miscellaneous appeal, a regular appeal under section 96, C.P.C. was filed and therefore the same was not maintainable needs to be noted. However, he could not dispute that even if a miscellaneous appeal would lie before the Court below and there will not be change of forum of the Appellate Court may be a regular appeal or a miscellaneous appeal. Assuming for a moment that the said argument of the appellant has some force it will not make any difference as it has been firmly established that mere mention of a wrong section will not make any difference if the Court had the jurisdiction to entertain and decide the appeal."

20. It is next submitted that the question as to which Government is the Appropriate Government under the Central Act depends upon the fact as to which Government is responsible for maintaining industrial peace of the territory, in relation to a particular industrial dispute. Reliance has been placed on a decision of the Calcutta High Court in **Novartis India, Ltd. v. State of West Bengal and others, (2004) 101 FLR 278**. In **Novartis India Ltd.** *(supra)*, the controversy was about which State Government would have territorial jurisdiction over the industrial dispute, and in that context it was held:

"19. From the discussions made hereinabove and the decisions referred to hereinabove the following broad principles emerge:

(1) Head office of a company may be located in one State but it may have a branch in another State. The branch may be under the control of the head office yet it is a separate branch engaged in an industry and is itself an industry being carried on by the company as a separate unit. *Hindustan Aeronautics Ltd. case* [1979 (1) L.L.N. 204] (vide supra)].

(2) If there is any disturbance of industrial peace at a branch office located in a different State where considerable number of workmen are working the appropriate Government concerned in the maintenance of industrial peace is the Government of that State where the branch is located. [*Hindustan Aeronautics Ltd*. case [1979 (1) L.L.N. 204] (vide supra)].

(3) If the parties to an industrial dispute reside within a State or if the subject-matter of the industrial dispute substantially arises within the State then the Government of that State will be the appropriate Government to make a reference under S. 10 of the said Act. *Indian Cable Company, Ltd. (vide supra) Workmen of Sri Ranga Vilas Motors (Private) Ltd. case* (vide supra)].

(4) Ordinarily, if there is a separate establishment and the workman is

working in that establishment, the industrial dispute will arise at that place *[Workman of Sri Ranga Vitas Motors (Private), Ltd. case* (vide supra)].

(5) There should clearly be some nexus between the dispute and the territory of the State and not necessarily between the territory of the State and the industry concerning which the dispute arose. *Workmen of Sri Ranga Vitas Motors (Private), Ltd. case* (vide supra).

22. There is no doubt that the State Government was competent and has jurisdiction and authority to refer the industrial dispute regarding termination of services of--

(1) Sri Bikash Bhusan Ghosh;

(2) Sri Pradip Kumar Mukherjee; and

(3) Sri Shyama Charan Mallick to the Tribunal under S. 2-A of the said Act separately instead of referring the dispute separately the State Government by one reference had referred the matter to the Tribunal regarding termination of services of the said workmen.

It is evident from the order No. 888-IR/IR/11L-11/95, dated 12 June, 1997 (Annexure P12 of the writ application), that the Government exercised the power under S. 10 read with S. 2-A of the said Act. It is not a case that Government had no jurisdiction to refer the industrial dispute under S. 10 read with S. 2-A of the said Act individually. A careful reading of Annexure P12 of the writ application shows that though the industrial disputes regarding termination of service of--

(1) Sri Bikash Bhusan Ghosh;

(2) Sri Pradip Kumar Mukherjee; and

(3) Sri Shyama Charan Mallick were referred to the Tribunal by a single order but the dispute referred to the Tribunal are industrial disputes separate from each other and each one is a dispute under S. 2-A of the said Act.

There was no inherent lack of jurisdiction of the State Government to refer those industrial disputes. At best it may be said that the reference made was irregular but such irregularity did not go to the root of the matter and therefore the order of reference was neither null and void nor even voidable. The objection raised by the writ-petitioner is trivial and on hyper-technical grounds which should not be entertained by this Court exercising writ jurisdiction."

21. It is next contended by the learned Counsel for the workman that where the reference of a dispute validly confers jurisdiction on the Labour Court or Tribunal, findings on jurisdictional facts recorded by the Labour Court are not open to interference by this Court under Article 226 of the Constitution. It is also urged that interference on a mere technical ground is not at all appropriate. In support of his contention, learned Counsel for the workman has placed reliance upon a decision of the Supreme Court in **Sadhu Ram vs. Delhi Transport Corporation, (1983) 4 SCC 156**. In **Sadhu Ram** *(supra)*, the legality of termination of services of the workman, a bus conductor, was the subject matter of reference by the Delhi Administration to the Labour Court. It was urged on behalf of the employer that the reference was incompetent, because the workman had not raised any demand with the Management before moving the Conciliation Authority. It was contended, therefore, that there was no industrial dispute that could be referred. After the award was made, the employers challenged it in the High Court, where aforesaid contention of the employers was accepted. Reversing the High Court, the Supreme Court held in **Sadhu Ram** *(supra)*:

"2. ..... The management invoked the jurisdiction of the High Court of Delhi under Article 226 of the Constitution questioning the award of the Labour Court. The High Court went into a learned discussion on what was an industrial dispute and what was a jurisdictional fact, a discussion which in our opinion was an entirely unnecessary exercise. In launching into a discussion on these questions needlessly, the High Court appeared to forget the basic fact that the Labour Court had given two categoric findings: *(i)* that the Union had raised a demand with the management and *(ii)* that the termination of the services of the workman was a mala fide and colourable exercise of power. Delving into the evidence as if it was an appellate court, and reappreciating the evidence, the High Court thought that one of the documents upon which the Labour Court had relied was a suspicious document; and the High Court went on to find that no demand had been raised and there was no industrial dispute which could be properly referred by the Government for adjudication. On those findings a learned Single Judge of the High Court quashed the award of the Presiding Officer of the Labour Court. The decision of the learned Single Judge was affirmed by a Division Bench. The workman has come before us under Article 136 of the Constitution.

3. We are afraid the High Court misdirected itself. The jurisdiction under Article 226 of the Constitution is truly wide but, for that very reason, it has to be exercised with great circumspection. It is not for the High Court to constitute itself into an appellate court over tribunals constituted under special legislations to resolve disputes of a kind qualitatively different from ordinary civil disputes and to readjudicate upon questions of fact decided by those tribunals. That the questions decided pertain to jurisdictional facts does not entitle the High Court to interfere with the findings on jurisdictional facts which the Tribunal is well competent to decide. Where the circumstances indicate that the Tribunal has snatched at jurisdiction, the High Court may be justified in interfering. But where the tribunal gets jurisdiction only if a reference is made and it is therefore impossible ever to say that the Tribunal has clutched at jurisdiction, we do not think that it was proper for the High Court to substitute its judgment for that of the Labour Court and hold that the workman had raised no demand with the management. There was a conciliation proceeding, the conciliation had failed and the Conciliation Officer had so reported to the Government. The Government was justified in thinking that there was an industrial dispute and referring it to the Labour Court."

22. This Court has considered the rival submissions advanced. To the understanding of this Court, the propositions advanced on both sides, so far as the question in hand is concerned, do not do much to resolve it. The decisions relied upon by the learned Counsel for the employers generally refer to cases where the employers were a Central Government Company or an undertaking, where the Central Government had deep and pervasive control. It was in that context held in the decisions relied upon by the learned Counsel for the employers that the Appropriate Government would be the Central Government, and the Labour Court or the Tribunal competent to decide, would be one appointed under the Central Act. In Section 2(dd) and 2(f) of the Working Journalists Act, a non-journalist newspaper employee and a working journalist are defined as under:

"**2. Definitions** .-In this Act, unless the context otherwise requires,-

(a)

(b)

(c)

(d)

(dd) "non-journalist newspaper employee" means a person employed to do any work in, or in relation to, any newspaper establishment, but does not include any such person who-

(i) is a working journalist, or

(ii) is employed mainly in a managerial or administrative capacity, or

(iii) being employed in a supervisory capacity, performs, either by the nature of the duties attached to his office or by reason of the powers vested in him, functions mainly of a managerial nature;]

(e)

[(ee)

(f) "working journalist" means a person whose principal avocation is that of a journalist and [who is employed as such, either whole-time or part-time, in, or in relation to, one or more newspaper establishments], and includes an editor, a leader-writer, news-editor, sub-editor, feature-writer, copy-tester, reporter, correspondent, cartoonist, news-photographer and proof-reader, but does not include any such person who-

(i) is employed mainly in a managerial or administrative capacity; or

(ii) being employed in a supervisory capacity, performs, either by the nature of the duties attached to his office or by reason of the powers vested in him, functions mainly of a managerial nature;"

23. Section 3 of the Act under reference provides:

"**3. Act 14 of 1947 to apply to working journalists** .-(1) The provisions of the Industrial Disputes Act, 1947 (14 of 1947), as in force for the time being, shall, subject to the modification specified in sub-section (2), apply to, or in relation to, working journalists as they apply to, or in relation to, workmen within the meaning of that Act.

(2) Section 25-F of the aforesaid Act, in its application to working journalist, shall be construed as if in clause (a) thereof, for the period of notice referred to therein in relation to the retrenchment of a workman, the following periods of notice in relation to the retrenchment of a working journalist had been substituted, namely:-

(a) six months, in the case of an editor, and

(b) three months, in the case of any other working journalist."

24. Also, relevant would the provisions of Sections 14 and 15 occurring in Chapter III of the Working Journalists Act, that read:

"**14. Act 20 of 1946 to apply to newspaper establishments .**-The provisions of the Industrial Employment (Standing Orders) Act, 1946 (20 of 1946), as in force for the time being, shall apply to every newspaper establishment wherein twenty or more newspaper employees are employed or were employed on any day of the preceding twelve months as if such newspaper establishment were an industrial establishment to which the aforesaid Act has been applied by a notification under sub-section (3) of section 1 thereof, and as if a newspaper employee were a workman within the meaning of that Act.

15. Act 19 of 1952 to apply to newspaper establishments .-The Employees' Provident Funds Act, 1952 (19 of 1952), as in force for the time being, shall apply to every newspaper

establishment in which twenty or more persons are employed on any day, as if such newspaper establishment were a factory to which the aforesaid Act had been applied by a notification of the Central Government under sub-section (3) of section 1 thereof, and as if a newspaper employee were an employee within the meaning of that Act."

25. A conjoint reading of the aforesaid provisions together with the preamble of the Act shows that it is statute brought "to regulate certain conditions of service of working journalists and other persons employed in newspaper establishments', to borrow the precise phraseology of the preamble. The Working Journalists Act is, thus, by no means a wholesome or a complete legislation, governing or regulating the entire gamut of service conditions of working journalists and other newspaper employees. Section 3 of the Act, under reference, clearly shows that to working journalists, who are otherwise not workmen within the meaning of the Central Act, the provisions of the Central Act have been extended by virtue of sub-Section (1) of Section 3 in the same manner as they apply to workman, subject to modifications, detailed in sub-Section (2) of Section 3. The effect of Section 3 is that working journalists, as defined under the Working Journalists Act, who are not otherwise workmen, would be treated to be so and extended all benefits available to workmen under the Central Act, subject to modifications provided under sub-Section (2) of Section 3.

26. It must be remarked that so far as working journalists are concerned, it is not the intendment of Section 3 on a plain reading of the statute or any construction of its terms that in their case, the Appropriate Government, under the Central Act, would be the Central Government alone. Section 3 of the Working Journalists Act extends application of the provisions of the Central Act to working journalists as they occur in the latter statute, subject to the modifications envisaged under sub-Section (2) of Section 3 of the Working Journalists Act. Now, under the Central Act, it is not in every case that the Appropriate Government, in relation to workmen governed by that Act, is the Central Government alone. Rather, a reading of the definition of the "Appropriate Government', under Section 2(a)(i) and (ii) would show that under sub-clause (i) of Clause (a) of Section 2, there are enumerated specific categories or named employers in relation to whose workmen, the Appropriate Government would be the Central Government. Sub-Clause (ii) of Clause (a) of Section 2 shows it to be a residual clause, which says that in relation to any other industrial dispute, the State Government would be the Appropriate Government. A newspaper establishment as defined under Section 2(d) of the Working Journalists Act or by way of any other reference, does not find mention in sub-clause (i) of Clause (a) of Section 2 of the Central Act. Thus, a newspaper establishment would clearly fall under sub-Clause (ii) of Clause (a) of Section 2, making the Appropriate Government, in relation to a newspaper establishment, the State Government.

27. It is not the employers' case that they are a Company in which not less than 51% of the paid-up share capital is held by the Central Government or a subsidiary company set up by a Principal Undertaking or Autonomous Body owned and controlled by the Central Government. Thus, the case of the employers would clearly be

governed by sub-Clause (ii) of Clause (a) of Section 2 of the Central Act, where in relation to a working journalist employed with them, the State Government would the Appropriate Government under the Central Act. It is, therefore, a fallacious proposition for the employers to urge that since working journalists are treated to be workmen under the Central Act by virtue of Section 3 of the Working Journalists Act, the Appropriate Government in case of working journalists employed with them, would be the Central Government. In the opinion of this Court, it would be the State Government under the Central Act.

28. The question, however, remains whether a junior plate maker employed with a newspaper establishment is a workman by virtue of Section 3 of the Working Journalists Act, alone. To the understanding of this Court, the more pertinent issue would be whether a junior plate maker is at all a working journalist, and if not, is he still a workman, either under the Central Act or the State Act?

29. A working journalist has been defined under Section 2(f) of the Working Journalists Act, the terms of which have been extracted above. A reading of the definition of the working journalist shows that it defines in substance and in general terms who a working journalist is, and then in the later part, furnishes illustrative categories of newspaper employees who would qualify for working journalists. The categories indicated are inclusive and illustrative; not exhaustive. There is, in the last part of the definition, a clause, that would exclude anyone, who qualifies under the first part as a working journalist from that category.

30. Now, what is to be seen is, whether a plate maker qualifies as a working journalist, under Section 2(f) of the Working Journalists Act? A working journalist is primarily defined as a person whose principal avocation is that of a journalist, but the word journalist is nowhere defined in the statute. Therefore, the import and meaning of the word "journalist' has to be understood according to its ordinary meaning, falling back for its definition on extrinsic sources. The **Cambridge International Dictionary of English** (published by the Press Syndicate of the University of Cambridge) defines the word "journalist' as, "a person who writes news stories or articles for a newspaper or magazine, or broadcasts them on radio or television." The essence of the avocation of journalism is literary or intellectual contribution made to print or electronic media in the form of news, stories, articles or photographs and the like, in some form or the other. The specific illustrations in the inclusive list of who a journalist is, under Section 2(f) of the Working Journalists Act, answer the above description of a journalist as understood in ordinary parlance. It is, thus, a journalist, employed, as such, with a newspaper establishment, who alone can qualify as a working journalist under the Act, last mentioned. The illustrative categories of employees are all functionaries, who are bound by a common thread about their different functions in a newspaper establishment - the common thread being their literary or intellectual contribution to newspaper publication, in one way or the other. Clearly, therefore, other functionaries or employees working in the newspaper establishment, who do not qualify for a journalist, judged on the essence of their function, would not be working journalist under the Working Journalists Act.

31. A plate maker by the nature of his functions is a technical hand, engaged in the working of the newspaper press. He has no literary or intellectual contribution to make to the contents of the newspaper at all. He is a part of the technical process of

printing. In this connection, the best evidence to hold that a plate maker is not a working journalist are the recommendations of the Manisana Wage Board, that was constituted in September, 1994 by the Central Government in exercise of their powers, under Sections 9 and 13-C of the Working Journalists Act. The recommendation of the **Manisana Wage Board** were accepted by the Central Government on 25th July, 2000, in exercise of their powers under Section 12 of the Act, last mentioned. The recommendations were published in the Gazette of India Extraordinary, dated 5th and 15th December, 2000. These recommendations were subject matter of challenge before different High Courts, but ultimately came to be notified by the Central Government, in the Gazette of India Extraordinary, dated 14th May, 2019, enforcing the recommendations of the Wage Board in terms of the two notifications, originally accepting them, as these were in force immediately before 1st February, 2006. The circumstances leading to the first acceptance of the recommendations of the Manisana Wage Board through the two notifications of 5th and 15th December, 2000, the subsequent quashing of these notifications, the history of the legal challenges laid and their result, leading to the eventual acceptance and publication of the Manisana Wage Board recommendations are detailed in the Gazette of India, dated 14th May, 2019.

32. The Manisana Wage Board Award broadly classifies employees of newspaper establishments into three categories. Paragraph 8 of the Wage Board Recommendations speaks about working journalists in the regular cadre, to wit, full time employees in newspaper establishments, whose details are indicated in the First Schedule to the Wage Board Recommendations. In the Second Schedule read with paragraph 8 of the Wage Board Recommendations, functional definitions of various categories of working journalists are explained and defined. In the Third Schedule to the Wage Board Recommendations read with paragraph 8 (2), non-journalist newspaper employees, who are administrative staff in the newspaper establishment find mention with reference to their varying designations. These non-journalist employees in the administrative staff are divided into eight groups, as detailed in the Third Schedule. The Fourth Schedule read with paragraph 8(3) of the Wage Board Recommendations, carries a very detailed list of another category of employees in the newspaper establishment who have been called the "factory staff'. The factory staff have been classified into seven groups. Three designations of employees falling in the category of factory staff, mentioned in Group 1-A are Nylo Plate Maker, Off-Set Plate Maker and Plate Maker (Colour). Likewise, in Group 2 of the factory staff, an employee designated as Assistant Plate Maker (Colour) finds place. The note, appended to the Fourth Schedule to the Wage Board Recommendations, reads thus:

"Note: (1) Any newspaper employee employed with any designation different from those enumerated in the schedules, the doing the same or similar job or same or similar nature of job of any group in the schedule, shall be deemed to be a non-journalist in that group.

(2) All categories of employees mentioned in the schedule may or may not exist in every class of newspaper establishment.

(3) Categorization of missing category of employment, if any, should be

mutually decided by the employees and the management through bilateral agreement."

33. To the understanding of this Court, the designation of a workman as a "junior plate maker' involves a job similar to that of either the Nylo Plate Maker or Offset Plate Maker or Plate Maker (Colour) or Assistant Plate Maker (Colour), detailed in Groups 1-A and 2 of the Fourth Schedule to the Wage Board recommendations. No suggestion to the contrary has come from the employers, which may show that a "junior plate maker' is not part of the factory staff, as classified by the Manisana Wage Board. The classification of plate makers of different kinds as factory staff by the Manisana Wage Board, makes it explicit that the workman is not a working journalist, within the meaning of the Working Journalists Act.

34. The question, *"whether the Katibs are working journalists under the definition of "calligraphists" as prescribed by the Wage Board and whether they are entitled to rates of wages as prescribed for calligraphists under Government Notification no.80-3883, dated the 26th October, 1967, and if so, what directions are necessary in this respect?"* was the precise reference made to the Labour Court, that travelled to the Supreme Court, and fell for their Lordships' decision in the **Management of the Daily Pratap vs. Their Katibs, (1972) 2 SCC 342**. Since the word, "Katib' did not find place in the recommendations of the Wage Board, their Lordships examined the conclusions based on evidence and the law, recorded by the Labour Court that the nature of the "Katibs' work was journalistic. The Katibs satisfied the requirements of the definition of "calligraphists" carried in the Wage Board Recommendations. There was still some contention before their Lordships as to whether the principal avocation of a calligraphist is that of a journalist, so as to satisfy the test of Section 2(f) of the Working Journalists Act. The said question was answered in **Daily Pratap** *(supra)* thus:

"23. It needs no explanation to say that the above reading will not be a very happy one. When once the Wage Board has given the definition of a Calligraphist and included persons coming under that category in the definition of a "working journalist" the only test to be applied will be whether the person concerned satisfied the requirements of the definition given by the Wage Board. We have already referred to the fact that it is no longer open to the appellant to question the jurisdiction of the Wage Board when it included Calligraphists in the definition of "Working Journalist". Once the jurisdiction of the Wage Board is conceded, the approach to be made is only to find out whether a person, who claims to be a Calligraphist satisfies the definition as given by the Wage Board. No doubt the definition of Calligraphist will have to be read along with the definition of "Artist" given by the Wage Board. We have already held that the Labour Courts' finding that Katibs are Artists as defined by the Wage Board is correct."

The present case does not involve an issue where the Wage Board Recommendations do not at all refer to plate makers and their identity has to be correlated with some other descriptions of employment, as in the case of the *Katibs*. Four different kinds of plate makers have been described by the Manisana Wage Board, as factory staff in the newspaper establishment. Applying the principle in

Daily Pratap *(supra)*, it is safe to assume that the classification of plate makers of whatever kind is that of factory staff who are not journalists in the newspaper establishment.

35. In fact, the title of the Act and its preamble clearly indicate that it applies both to working journalists and other persons employed in the newspaper establishment. Section 3(1) of the Working Journalists Act, however, extends the application of the Central Act to working journalists alone, providing that the Central Act would apply to working journalist in the same manner as it would apply to workmen within the meaning of the last mentioned Act. But, does that mean that the Central Act or for that matter the State Act, would not apply to other employees, even if they otherwise qualify for workmen under those statutes. This Court does not think so. Clearly, going by the nature of duties of the workman and the wages drawn by him, he qualifies for a workman under Section 2(f) of the Central Act and also under Section 2(z) of the State Act.

36. It has not at all been seriously disputed by the employers that a newspaper establishment would not be "industry' within the meaning of Section 2(j) of the Central Act or under Section 2(k) of the State Act. The workman would, therefore, qualify for a "workman', both under the Central Act and State Act, *de hors* the provisions of the Working Journalists Act.

37. The view that this Court takes finds support in a Division Bench decision of the Orissa High Court in **Pratap Chandra Mohanti vs. General Manager, United News of India and another, 1993 Lab IC 919**, In **Pratap Chand Mohanti** *(supra)* speaking for the Division Bench, B.L. Hansaria, C.J. (as His Lordship then was) held:

"11. We have duly considered the aforesaid submission of Sri Mohanty and, according to us, it would be difficult to say that the benefit of the Industrial Dispute Act would not be available to newspaper employees other than working journalists even if they be workmen within the meaning of that Act. As to S. 3(1) of the Working Journalist Act, we would say that the provision in that section making the Industrial Disputes, Act applicable to working journalists cannot be taken to be that the said Act would not apply to other newspaper employees. S. 3(1) might have been enacted to make it abundantly clear that the Industrial Disputes Act would apply to working journalists even if they may not satisfy the definition of "workman" as given in the Industrial Disputes Act. It is worth pointing out in this connection that a working journalist as defined in Section. 2(f) of the Working Journalists Act may not be a "workman" if the definition of that expression as given in the Industrial Disputes Act were to apply to him. The Legislature, however, wanted the benefits of the Industrial Disputes Act to be made available to working journalists and it is perhaps because of this that S. 3(1) was inserted in the Act. This apart, reference to S. 3(1) shows that certain modifications were made in the provisions of the Industrial Disputes Act in their application to working journalists. We do not think if we would be justified in denying the benefits of a statute as important as the Industrial Disputes Act to other categories of newspaper employees, if otherwise they be workmen within the meaning of that Act, because of what has been provided in S. 3(1) of the Working Journalists Act.

12. As to the application of the two specific Acts to newspaper employees

because of what has been provided in Ss. 14 and 15 of the Working Journalists Act, we would say that these two sections were enacted to make the two Acts in question applicable to newspaper establishments because de hors these provisions, those Acts might not have applied to such establishments. The Legislature, however, wanted to give the benefit of those Acts to all newspaper employees. It may be pointed out that Ss. 14 and 15 have referred to the application of the two Acts in question to "every newspaper establishment" and not to "newspaper employees." Of course, by making these two Acts applicable to all newspaper establishments, the benefits of the same were conferred on all newspaper employees. This does not mean that the Legislature wanted to rob the newspaper employees of the benefits of other Acts. According to us, no such conclusion can be drawn on the basis of what has been provided in Ss. 14 and 15 of the Working Journalists Act."

38. The workman in this case is, therefore, a workman, both under the Central Act and the State Act as he satisfies the definition of a workman under both the statutes, independent of the provisions of the Working Journalists Act. The employers here being not an industry carried on by or under the authority of the Central Government or one who fall under any of the specified categories or named establishment, authorities or bodies, mentioned under Section 2(a)(i) of the Central Act, the Appropriate Government would be the State Government in accordance of the provisions of Section 2(a) (ii) of the Act, last mentioned. Accordingly, reference of the dispute under Section 4-K of the State Act is valid and competent. Since the reference under Section 4-K of the State Act is competent, the further question, *"Whether the Labour Court/ Industrial Tribunal constituted under the Central Act alone is competent to answer a reference in relation to the workman?"* is not required to be answered.

39. Now, turning to the other question, that relates to the jurisdiction of the Labour Court as a Court of the referred jurisdiction, the contention of the learned Counsel for the employers is that the Labour Court has no jurisdiction to go into the validity or question of closure on a reference about termination, that does not refer to closure. His submissions on the point have been noticed hereinbefore. The learned Counsel for the workman, on the other hand, submits that the reference is cast in terms wide enough to clothe the Labour Court with jurisdiction to examine whether the closure is mere sham and a camouflage to terminate the workman's services. This legal issue, according to Mr. Sharma, learned Counsel for the workman, is to be examined in the foreshadow of the fact that it is not a case where the entire unit of the employers has been closed down. It is a case where a particular department, to wit, the process department, has been allegedly closed on account of introduction of a new technology. The new technology is a C.T.P. Machine, which according to the employers has done away with the process of manual plate making. The employers say that the C.T.P. Machine is a computerized machine, that has rendered the process department dysfunctional. It is on that account that the workman along with a total of six others, circumstanced like him, have had their services dispensed with.

40. Learned Counsel for the workman submits that the Labour Court has found on the basis of evidence that the "process' is an

intermediate step in the publication of a newspaper. Formerly, the process involved was that after finalization of layout of an issue, the process department made an aluminium plate thereof which was utilized in printing the newspaper. All that the C.T.P. Machine has done is that in substitution of manual plate making, the job is done employing the Machine. The Labour Court has concluded that the work of plate making, that was formerly done, is still being done after installation of the C.T.P. Machine. The C.T.P. Machine is operated by a man. As such, plate making still involves employment of manpower. The Labour Court has concluded that evidence clinchingly shows that whatever work was done in the process department, involving plate making, continues to be done after the installation of the C.T.P. Machine; the method alone has changed. Plates are still made. The Labour Court has finally concluded that on account of installation of the C.T.P. Machine, the entire work of the process department has not come to an end. It has further been held that if the process department were to be held an undertaking (of the employers), the undertaking has not closed; the method of operation has changed. Mr. Sharma emphasizes that the Labour Court has concluded, after a very detailed analysis of evidence, particularly, regarding other units of the employers, where the same C.T.P. Machine has been installed with retention of existing employees in the process department of those units, that the closure is a camouflage to terminate the workman's services of 17 years and more; it constitutes retrenchment. Learned Counsel for the workman urges that termination of services of the workman, that is essentially retrenchment and not a bona fide closure of the employers' unit or a part thereof or an undertaking of theirs, could well be examined on the terms of the reference made to the Labour Court. He submits, to add, that the word "termination' is a word of wide import, that would take within its fold any kind of determination of employment, including closure.

41. In support of his contention, learned Counsel for the workman has placed reliance upon a decision of this Court in **M/s. Triveni Glass Limited vs. State of U.P. and others, (2008) 3 All LJ 420**. In that case, on the basis of a settlement between the employers and their workmen, the dispute referred to arbitration of the Deputy Labour Commissioner, under Section 5-B of the State Act was in terms whether the termination of services of 50 workmen of plant no.1 was justified or legal, and if not, to what relief, the workmen were entitled. The employers had pleaded closure. The Arbitrator found that the services of the workmen were terminated on account of illegal closure of plant no.1 without securing permission of the State Government, under Section 6-W read with Section 6-V of the State Act. The Arbitrator awarded reinstatement with full back-wages. One of the grounds of challenge to the award of the Arbitrator was that he had travelled beyond the reference and decided the validity of closure, which was not a question referred to him. Certain decisions of their Lordships of the Supreme Court were relied on by the learned Counsel for the employers in that case to fortify his stand that the Arbitrator could not have gone into the validity of closure while answering a reference, that spoke of termination alone. It is pointed out by the learned Counsel for the workman that this Court in **M/s. Triveni Glass Ltd.** *(supra)* repelled the said contention and held:

"6. The petitioner's counsel submitted that the Arbitrator has decided

the question of validity of the closure, which was not a question referred to him nor was the closure ever challenged before any forum. In support of his contention that the Arbitrator cannot decide an issue, which has not been referred to him, reliance was placed by the learned counsel upon three decisions:-- (1) *Firestone Tyre & Rubber Co. of India (P) Ltd. v. The Workmen Employed represented by Firestone Tyre Employee's Union* [(1981) 3 SCC 451 : AIR 1981 SC 1626 (para 9)], (2) *Pottery Mazdoor Panchayat v. The Perfect Pottery Co. Ltd.* [(1979) 3 SCC 762 : AIR 1979 SC 1356 (Para. 11)] and *The Delhi Cloth and General Mills Co. Ltd. v. The Workmen* [AIR 1967 SC 469 (Para 9)]

7. What has been held in these decisions by the Apex Court is that the Tribunal is required to confine its decision to the points of reference and matters incidental to them. In the *Firestone Tyre & Rubber Co. of India (P) Ltd. Case* ((1981) 3 SCC 451 : AIR 1981 SC 1626) (supra) the dispute about the validity of the dismissal from service of the workmen was referred and it was held that the Tribunal acted beyond the terms of reference when it considered the question of unfair labour practice or discrimination by the employers in reinstating some of the workmen. The Apex Court held that this subsequent act of reinstatement of the workmen was irrelevant for adjudging the validity of the earlier dismissal and when no issue on the alleged discrimination had been framed. In *Pottery Mazdoor Panchayat* (supra) case ((1979) 3 SCC 762 : AIR 1979 SC 1356) it was held that the Tribunal was not entitled to enter into the question as to the fact of closure when the reference was whether the closure was proper and justified. In the *D.C.M. Case* (AIR 1967 SC 469) (supra) it was held that where the dispute referred was whether the strike and the sit down strike were legal or justified the Tribunal had to proceed on the footing that there was a strike and sit down strike and it could not go into the question whether there was or was not a strike or a sit down strike. It was held that the Tribunal could not enlarge the scope of the reference. In the present case the terms of reference are very wide. It is in three parts viz., (i) whether the termination of the services of the workmen was legal, (ii) whether the termination of the services of the workmen was justified and (iii) what relief, if any, to which the workmen were entitled to.

8. The expression "termination' is wide enough to cover every kind of termination of the services of an employee whether on account of dismissal or by way of retrenchment or by way of closure. The dictionary meaning of the word "termination' in the *New Lexicon Webster's Dictionary* of the English Language is as follows:--

"termination - n.a terminating or being terminated if the end something in space or time, at the termination of the examination, (gram.) the final sound, letters or syllable of a word[fr. L. termination (terminationis)]"

9. The terms of reference relating to the termination of the services of the workmen is therefore wide enough to cover every kind of termination of services including termination of services by way of closure and it was there fore open to the Arbitrator to enter into the question of legality of the closure for answering the reference. In *Agra Electric Sup ply Company Limited Agra v. Workmen* [1983 SCC (L&S) 210) one of the contentions advanced was that the terms of reference did not cover the question of payment of gratuity and therefore the award of the tribunal was bad. Dealing with the contention, the Apex Court held in para 2 of the judgment which is as follows:

"2. It is useful to examine the terms of reference. There are two disputes and two references, but it is enough if one of them is reproduced:

Whether the employers have retired their workmen Sri Peerbux (son of Sri Inam Bux) Bank Peon and Sri Sahadat Ali (son of Sri Banne Ali) Coolie, Maintenance Department, by their orders dated May 30, 1970 (copies attached) in a justified and/or legal manner? If not, then to what benefit/compensation are the workmen entitled and with what details?

It is plain that industrial jurisprudence is an alloy of law and social justice, and one cannot be too\pedantic in constructing the terms of a. reference respecting a dispute for industrial adjudication. Liberally viewed, we are left with the impression that the Tribunal's construction of the terms of reference is correct. The question referred may be dichotomized. Was the retirement of the workmen legal and justified? If not, what compensation was payable to them? The first limb of the reference contains the pregnant impression "justified". It is one thing to say, speaking in terms of industrial jurisprudence that an action is legal. It is another thing to say that it is justified. When the reference is comprehensive enough to cover both these concepts, it is within the jurisdiction of the Tribunal to investigate into whether the retirement is legal and, if legal, whether it is also justified. In the ordinary law of contracts, when a thing done is legal there is an end of the matter but in industrial law the rigid rules of contract do not govern the situation and an amount of flexibility in the exercise of powers taking liberties with the strict rights of parties is permitted to Tribunals. Relying on a series of decisions of this Court for this wider ambit of jurisdiction permissible in industrial adjudication, the Tribunal has held that the grievance of the workmen that their services should come an end by way of retirement without payment of gratuity in real and substantial and that pragmatic considerations justify a direction for payment of gratuity more or less prevalent in many industries in this region. This approach is informed by social direction for payment of gratuity. We read the award in a composite and comprehensive sense as an award that the retirement is justified if it is accompanied by payment of gratuity. The dissection attempted in the submission made by learned counsel is a distortion of the true intendment of the award. In this view, we think there is no substance in the first contention"

10. In *State Bank of India v. N. Sundra Money* (1976 (32) F.L.R. (SC) 197 : ((1976) 1 SCC 822 : AIR 1976 SC 1111) while considering the case of retrenchment under Section 2(oo) of the Industrial Disputes Act, 1947 the Apex Court held as follows:--

"A break-down of Section 2(oo) unmistakably expands the semantics of retrenchment. Termination for any reason whatsoever are the key words. Whatever the reason, every termination spells retrenchment. So the sole question has the employee's service been terminated? Verbal apparel apart, the substance is decisive. A termination is where a term expires either by the active step of the master or the running out of the stipulated term. To protect the weak against the strong this policy of comprehensive definition has been effectuated. Termination embraces not merely the act of termination by the employer, but the fact of termination however produced, may be, the present may be a hard case, but we can visualize abuses by employers, suitable verbal devices, circumventing the armor of Section 25-F and Section 2(oo)."

11. For the purpose of deciding whether the termination of the services of

the workmen in this case was legal, the Arbitrator could therefore have gone into the question whether the closure was legal or not if the services of the workmen had been terminated on account of closure. As to whether termination of the workmen's services was the direct result of closure is a question, which can be answered with reference to the pleadings of the parties relating to the nature of the dispute between them."

(Emphasis by Court)

42. This Court has carefully considered the submissions advanced by learned Counsel for both parties. It is true that the expression "termination' is a word of wide import and termination of a workman's services, in whatever manner effected, would constitute retrenchment under the State Act as well as the Central Act, except those specific classes or contingencies of termination, which the statute excludes from the definition of retrenchment. Retrenchment is defined under Section 2(s) of the State Act, which reads as follows:

"Section 2 - Definitions -

(s) 'Retrenchment' means the termination by the employer of the service of a workman or any reason whatsoever, otherwise than as punishment inflicted by way of disciplinary action, but does not include--

(i) voluntary retirement of the workmen; or

(ii) retirement of the workmen on reaching the age of superannuation if the contract of employment between the employer and workman concerned contains a stipulation in that behalf;"

43. The question, whether on a reference about the validity of termination of services of the workman, made under Section 4-K of the State Act, the validity or the issue of closure, could be examined, fell for consideration of this Court in **Mohd. Sarwar vs. State of U.P. and others, 2013 (6) AWC 6169**. This Court in **Mohd. Sarwar** *(supra)* held:

"17. In order to appreciate the rival stand of the learned counsel for the parties, it would be appropriate to refer to certain provisions of the U.P. Industrial Disputes Act. Section 2(s) defines "retrenchment" as under:

"(s) "Retrenchment' means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as punishment inflicted by way of disciplinary action, but does not include--

(i) voluntary retirement of the workmen; or

(ii) retirement of the workmen on reaching the age of superannuation if the contract of employment between the employer and workman concerned contains a stipulation in that behalf;

18. Section 6-N of the U.P. Industrial Disputes Act provides a procedure for retrenchment of workman, which is extracted herein under:

"6-N. Conditions precedent to retrenchment of workmen.--No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,--

(a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice wages for the period of the notice;

Provided that no such notice shall be necessary if the retrenchment is under an

agreement which specifies a date for the termination of service;

(b) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay for every completed year of service or any part thereof in excess of six months; and

(c) notice in the prescribed manner is served on the State Government."

19. Section 6-W of the U.P. Industrial Disputes Act provides procedure for closure of an undertaking, which is also extracted hereunder: (quotation omitted)

20. The definition of "retrenchment" is divided into two parts. The first part lays down that "retrenchment" means the termination of the services of a workman by the employer for any reason whatsoever otherwise than by way of punishment inflicted by way of a disciplinary action. The second part of the definition further excludes voluntarily retirement of the workman or retirement on reaching the age of superannuation.

21. The words "for any reason whatsoever" would include termination on account of closure of the establishment is no longer res integra and this issue has been decided by a Constitutional Bench of the Supreme Court.

22. In *Pipraich Sugar Mills Ltd. v. Pipraich Sugar Mills' Mazdoor Union*, 1957 (1) LLJ 235, the Supreme Court dealt with the question whether the discharge of the workman on the closure of the undertaking would constitute retrenchment or not and whether the workmen were entitled for retrenchment compensation. The Supreme Court observed:

"But retrenchment connotes in its ordinary acceptation that the business itself is being continued but that a portion of the staff or the labour force is discharged as surplusage and the termination of services of all the workmen as a result of the closure of the business cannot, therefore, be properly described as retrenchment."

23. Based on these observations, the Constitutional Bench of the Supreme Court in *Hariprasad Shiv shankar Shukla v. A.D. Divelkar*, AIR 1957 SC 121, explained further the meaning of the word "retrenchment" as defined under Section 2(oo) of the Industrial Disputes Act, which is more or less the same as defined under Section 2(s) of the Act. The Supreme Court observed that the expression "for any reason whatsoever" though wide must necessary draw within its ambit, not any act of commission and omission on the part of the employers, but the concept of termination of the surplus workers' services due to reason such as economy rationalisation in industry, installation of new labour saving machinery or devices, standardisation or improvement of plant or technique or the like.

24. The Supreme Court held that the words "for any reason whatsoever" must be read and construed as such. The Supreme Court after considering the definition of "retrenchment" as defined under Section 2(s) of the Act concluded that the entire scheme of the Act to give the definition clause relating to "retrenchment" such a meaning as would include within the definition termination of services of all workman by the employers when the business itself ceases to exist, meaning thereby that "retrenchment" means discharge of surplus workmen in an existing or continuing business and does not include "retrenchment" of workers on a bona fide closure of business. The Supreme Court, accordingly, held:

"For "the reasons given above, we hold, contrary to the view expressed by the Bombay High Court, that retrenchment as

defined in Section 2(oo) and as used in Section 25F has no wider meaning than the ordinary, accepted connotation of the word: it means the discharge of surplus labour or staff by the employer for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, and it has no application where the services of all workmen have been terminated by the employer on a real and bona fide closure of business as in the case of *Shri Dinesh Mills Ltd.* or where the services of all workmen have been terminated by the employer on the business or undertaking being taken over by another employer in circumstances like those of the Railway Company."

25. Pursuant to the decision in *Hari Prasad's case* (AIR 1957 SC 121) (supra) the Legislature amended the Industrial Disputes Act by Amending Act No. 18 of 1957 and incorporated the present Sections 25-F and 25-FFF of the Industrial Disputes Act, which made provisions for notice and for payment of compensation or payment of wages in lieu of notice and compensation to be given to a workman discharged from service on a transfer or closure of an Industrial undertaking as if the workman had been retrenched. Similar provisions of Sections 6-N and 6-W was also incorporated under the U.P. Industrial Disputes Act, but, the definition Clause 2(s) of the of the U.P. Industrial Disputes Act or 2(oo) of the Industrial Disputes Act was not amended. Consequently, this Court is of the opinion, that even after the amendment of the Act by the Amendment Act, 1957, the interpretation of "retrenchment" as given by the Supreme Court in the Constitution Bench decision in *Hari Prasad case* (supra) remains the same, which means that retrenchment necessarily postulate termination of the employees service in an existing running industry and that retrenchment does not postulate retrenchment where there has been a valid closure of an undertaking or an establishment.

26. This view of mine is fortified by a decision of the Supreme Court in *H.P. Mineral and Industrial Development Corporation Employees' Union v. State of H.P.*, (1996) 7 SCC 139, wherein the Supreme Court observed that in view of the fact that Section 25(O) of the Industrial Disputes Act (relating to closure) had been struck down and the amended provision had not come into existence and was not in operation on the day of the closure of the industry, the workers could not invoke the protection of Section 25-N of the Industrial Disputes Act (which relates to retrenchment compensation) and that the only protection that was available to them was that contained in Sections 25-FFA and 25-FFF, which relates to payment of closure compensation. The Supreme Court observed:

"We are unable to accept this contention. It is no doubt true that in Section 2(oo) the expression "retrenchment' is defined to mean the termination by the employer of the service of a workman for any reason whatsoever otherwise then as a punishment inflicted by way of disciplinary action and categories referred to in clauses (a) to (c) have been expressly excluded from the ambit of the said definition. But as far back as in 1957 a Constitution Bench of this Court in *Hariprasad Shiv shankar Shukla v. A.D. Divikar* had laid down that "retrenchment' under Section 2(oo) of the Act would not cover termination of services of all workmen as a result of the closure of the business. The said decision was considered by the Constitution Bench of this Court in *Punjab Land Development*

and Reclamation Corpn. Ltd. v. Presiding Officer, Labour Court ((1990) 3 SCC 682), wherein it has been observed SCR (pp. 140-42, 143 and 152-53: SCC pp. 709, 710 and 718-19, paras 52, 53 and 76).

***

Mr. V.A. Bobde submits, and we think rightly, that the sole reason for the decision in *Hariprasad* was that the Act postulated the existence and continuance of an industry and where the industry i.e. the undertaking, itself was closed down or transferred, the very substratum disappeared and the Act could not regulate industrial employment in the absence of an industry. The true position in that case was that Sections 2(oo) and 25F could not be invoked since the undertaking itself ceased to exist.

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The Judgments in Sundara Money ((1976) 1 SCC 822 : AIR 1976 SC 111) (supra) and the subsequent decisions in the line could not be held to be per incuriam inasmuch as in Hindustan Steel ((1976) 4 SCC 222 : AIR 1977 SC 31) and *Santhosh Gupta's cases* ((1980) 3 SCC 340 : AIR 1980 SC 1219), the Division Benches of this Court had referred to *Hariprasad's case* and rightly held that its ratio did not extend beyond a case of termination on the ground of closure and as such it would not be correct to say that the subsequent decisions ignored a binding precedent."

and further held--

From the aforementioned observations it is evident that the definition of "retrenchment" as defined in Section 2(oo) of the Act has to be read in the context of Section 25-FF and 25-FFF of the Act and if thus read "retrenchment' under Section 2(oo) does not cover termination of service as a result of closure or transfer of an undertaking though such termination has been assimilated to retrenchment for certain purposes, namely, the compensation payable to the workmen whose services are terminated as a result of such closure. In that view of the matter Section 25-N which deals with retrenchment cannot apply to the present case where termination of the services of the workmen was brought about as a result of the closure of the undertaking."

27. In the light of the aforesaid, it is clear that the words "for any reason whatsoever" in Section 2(s) of the Act does not include closure of an establishment and, consequently, termination of the services of the workman on account of closure of an establishment does not amount to retrenchment.

29. The reference order is clear and explicit, namely, whether the employer's were justified in terminating the services of the workman. The validity and legality of the order of termination was referred to the labour court. It was urged that the validity and legality of the closure of the establishment can also be considered and looked into by the Tribunal while deciding the validity and legality of the order of termination under the referring order. According to the petitioner, this is an incidental question, which can be considered and that the powers of the Tribunal is wide enough to decide such question while moulding the reliefs.

30. In this regard before the proceeding further, the provisions of Section 4-K of the U.P. Industrial Disputes Act be looked into and compared with the provisions of Section 10 and Section 10(4) of the Industrial Disputes Act. For facility, Section 4-K of the U.P. Industrial Disputes Act is extracted hereunder:

"4-K. Reference of disputes to Labour Court or Tribunal.--Where the State Government is of opinion that any

industrial dispute exists or is apprehended, it may at any time by order in writing refer the dispute or any matter appearing to be connected with, or relevant to, the dispute to a labour court, if the matter of industrial dispute is one of those contained in the First Schedule, or to a Tribunal if the matter of dispute is one contained in the First Schedule or the Second Schedule for adjudication.

Provided that where the dispute relates to any matter specified in the Second Schedule and is not likely to affect more than one hundred workmen, the State Government may, if it so thinks fit, make the reference to a labour court."

31. A perusal of the aforesaid indicates that the State Government may by an order in writing refer the dispute or any matters appearing to be connected with or relevant to the dispute. The language of Section 4-K of the Act is very clear, namely, that the dispute has to be referred in writing so that parties are aware of the terms of the referring order and the Tribunal is aware of its jurisdiction to decide the matter. It is settled law that the Tribunal gets the power from the reference order and that it cannot travel beyond the referring order. Therefore, the dispute is required to be referred or any matter which is connected or relevant to the main dispute is also required to be referred in writing.

33. Section 10 of the Industrial Disputes Act indicates that the State Government can refer a dispute by an order in writing for adjudication to the Labour Court or Tribunal. Section 10(4) of the Industrial Disputes Act further provides that where the referring order has specified the points of dispute for adjudication, the Labour Court or the Tribunal shall confine its adjudication to those points and matters incidental thereto. The words "matters incidental thereto" is not specified under Section 4-K of the U.P. Industrial Disputes Act.

34. In *Pottery Mazdoor Panchayat v. The Perfect Pottery Co. Ltd. and another,* AIR 1979 SC 1356, the Supreme Court while considering the provision of Section 10(4) of the Industrial Disputes Act held that the jurisdiction of the Tribunal in Industrial Dispute is limited to the point specifically referred for its adjudication and to matters incidental thereto and that the Tribunal could not go beyond the terms of the reference order. The Supreme Court went on to hold, that in the instant case, the terms of the reference showed that the points in dispute between the parties was not the fact of closure of its business by the employers and that the reference was limited to the narrow question as to whether the closure was proper and justified. The Tribunal by the very terms of the reference order had no jurisdiction to go behind the fact of closure and inquire as to whether the business was in fact closed down by the Management.

35. In *M/s. Firestone Tyre & Rubber Co. of India (P) Ltd.*, AIR 1981 SC 1626, the Supreme Court again held that the Tribunal could not travel outside the terms of the referring order.

36. In the light of the aforesaid, the Court is of the opinion, that the Tribunal was justified in holding that since the validity and legality of the closure of the establishment was not specified as a point of dispute to be adjudicated in the referring order, the Tribunal was justified in not adjudicating the same. .....…"

44. This Court in **M/s. Triveni Glass Ltd.** *(supra)* did consider the decision in **Pottery Mazdoor Panchayat v. The Perfect Pottery Co. Ltd., (1979) 3 SCC 762** as well as the decision in **Firestone Tyre & Rubber Co. of India (P) Ltd. v.**

The Workmen Employed represented by Firestone Tyre Employee's Union, (1981) 3 SCC 451, and distinguished the same about their application to the issue in hand. The decision of this Court in **M/s. Triveni Glass Ltd.** *(supra)* was not brought to the notice of the Court in **Mohd. Sarwar** *(supra)*. The reasoning on which the decision of this Court in **M/s. Triveni Glass Ltd.** *(supra)* has proceeded is that the reference being whether termination of services of the workman in that case was legal, the Arbitrator there could go into the question whether the closure was legal or "if the services of the workman had been terminated on account of closure', to borrow the words of His Lordship in **M/s. Triveni Glass Ltd.** *(supra)*. The Court, in the decision under reference, went ahead to hold that the question, whether termination of services was a direct result of closure, is a question that could be answered with reference to pleadings of parties about the nature of the dispute between them.

45. The decision of the Constitution Bench in **Hariprasad Shivshanker Shukla and another vs. A.D. Divelkar and others, AIR 1956 SC 121** relied upon by this Court in **Mohd. Sarwar** arose in the context of facts, where in one appeal, the entire undertaking of the employer had been transferred, and in the other, it had been closed down. In both cases, the workmen had moved the Authority under the Payment of Wages Act, claiming retrenchment compensation, under Clause (b) of Section 25 of the Central Act. The workmen failed before the Authority under the Payment of Wages, in one case on the question of jurisdiction, but with two issues about their entitlement to retrenchment compensation under Section 25 of the Act, being decided in their favour. In the other case, the Authority under the Payment of Wages Act decided on all issues against the workmen, including jurisdiction and their entitlement to receive retrenchment compensation, under Clause (b) of Section 25-F of the Central Act. On writ petitions being filed, in the case related to the Railway Company, which was one about the employer's undertaking being transferred, the High Court held that the Payment of Wages Authority had jurisdiction and also that the workmen were entitled to claim compensation, under Clause (b) of Section 25 of the Central Act. In the other case, that relates to Shri Dinesh Mills Ltd., where the workmen had failed on all issues, the High Court set aside the order of the Payment of Wages Authority, with a direction to dispose of the application, under the Payment of Wages Act made to him, in accordance with law. Certificate of fitness was granted in both matters by the High Court, on the strength whereof Appeals were carried to the Supreme Court. Their Lordships of the Supreme Court reversed the Bombay High Court, and about the issue in hand, held:

"19. For the reasons given above, we hold, contrary to the view expressed by the Bombay High Court, that retrenchment as defined in S. 2(oo) and as used in S. 25-F has no wider meaning than the ordinary, accepted connotation of the word: it means the *discharge of surplus labour or staff* by the employer for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, and it has no application where the services of all workmen have been terminated by the employer on a real and bona fide closure of business as in the case of *Shri Dinesh Mills Ltd.* or where the services of all workmen have been terminated by the employer on the business or undertaking being taken over by another employer in circumstances

like those of the Railway Company. Mr Mehta, appearing for respondents Nos. 4 and 5 in Civil Appeal No. 105 of 1956, tried to make a distinction between transfer of ownership with continuation of employment (which according to him did not come within the definition) and termination of service on closure of business. There is in fact a distinction between transfer of business and closure of business; but so far as the definition clause is concerned, both stand on the same footing if they involve termination of service of the workmen by the employer for any reason whatsoever, otherwise than as a punishment by way of disciplinary action. On our interpretation, in no case is there any retrenchment, unless there is *discharge of surplus labour or staff* in a continuing or running industry."

46. It must be borne in mind that the decision of the Supreme Court in **Hariprasad Shivshanker Shukla** is not about the issue, whether in a reference regarding the legality and justifiability of a termination, the validity of closure can be examined by the Labour Court. It is about the issue whether closure constitutes retrenchment, as defined under Section 2(oo) and the subject matter of Section 25-F of the Central Act. The principle laid down by their Lordships is that, "where the services of all workmen have been terminated by the employer on a real and bona fide closure of business..... or where the services of all workmen have been terminated by the employer on the business or undertaking being taken over by another employer....", it is not retrenchment under the Central Act. The principle is stated further, in its most fundamental form, by their Lordships in **Hariprasad Shivshanker Shukla** *(supra)* holding: "On our interpretation, in no case is there any retrenchment, unless there is discharge of surplus labour or staff in a continuing or running industry." The principle laid down by the Constitution Bench in **Hariprasad Shivshanker Shukla** *(supra)* comes to no more than this that wherever on account of a bona fide closure of the employer's business or a transfer of undertaking, his business is no longer a continuing or running industry in his hands, the resultant termination of services of workmen is not retrenchment within the meaning of Section 2(oo) or 25-F of the Central Act.

47. But, there is no proposition, in the opinion of this Court, deducible from the holding in **Hariprasad Shivshanker Shukla** that a closure of the employer's establishment, which is a mere sham, camouflage or facade, to get rid of a particular workman or some of them, while his business as a whole survives or the part of it, where the concerned workman was employed, subsists in the same or some altered form, it would still not be retrenchment. If a mere sham or facade of closure is not retrenchment, there is not the slightest reason to hold that on a reference that speaks about validity of termination of the workman's services or its justifiability, the Labour Court cannot go into the limited question whether it is a bona fide closure or a mere facade to terminate employment.

48. This, however, does not mean that on a reference about the legality or justifiability of termination of services of a workman, the legality of a bona fide closure can be examined by the Labour Court. If the closure is bona fide and there is some illegality about it, like violation of Section 6-W of the State Act or Section 25FFA or 25FFF or 25-O of the Central Act, a claim about illegality of that kind with the closure of an undertaking,

resulting in termination of a workman's services, cannot be gone into in a reference that does not specifically spell out legality or justifiability of closure in its terms. It certainly cannot be gone into in a case where the reference is limited to the validity and justifiability of termination of services alone.

49. No different principle is discernible from the decision of the Supreme Court in **H.P. Mineral & Industrial Development Corporation Employees' Union vs. State of H.P. and others (1996) 7 SCC 139**. This was again a case of *bona fide* closure of business of the H.P. Mineral and Industrial Corporation where the employers complied with the provisions of Section 25FFA of the Central Act, before services of their workmen were brought to an end in consequence of closure. The workman had raised an industrial dispute asking for compliance with the provisions of Section 25N of the Central Act, relating to retrenchment. It was in the context of the said facts that closure was not held to be retrenchment within the meaning of Section 2(oo) of the Central Act. To emphasize, **H.P. Mineral** is not remotely an authority for the proposition that a bogus or pretentious closure by an employer, to do away with his workmen's services, would not constitute retrenchment.

50. The facts in **Mohd. Sarwar** *(supra)* would be best appreciated the way they have been set out there. In paragraph 2 of the report in **Mohd. Sarwar** *(supra)*, the facts are succinctly stated thus:

"2. Before the Tribunal, the workman contended that he was appointed in a permanent capacity in the year 1969 and, since then, was working continuously without any break in service and that he was illegally terminated on 8.7.2000 without holding any inquiry and without granting any opportunity of hearing. The workman contended that the unit of the employers factory had closed down illegally without complying with the provisions of Section 6W of the Act. It was contended that no notice or wages in lieu of notice was paid nor the provisions of Section 6N of the Act was complied with. The workman contended that no permission was taken by the employers from the State Government for closure of its undertaking and, therefore, the provisions of Sections 25M, 25N and 25-O of the Indusrial Disputes Act (hereinafter referred to as the "I.D. Act') was violated as well as the provisions of Sections 6N, 6P and 6Q and 6W of the Act. The workman, accordingly, prayed that he is entitled to be reinstated with continuity of service and with full back wages."

51. A perusal of the facts involved in **Mohd. Sarwar** *(supra)* do not spare doubt that the employer's factory was closed down, in consequence whereof the workman had lost his job. The workman assailed the closure of the employer's undertaking as one done illegally, without complying with the provisions of Section 6-W of the State Act. It was in that context that the violation of provisions of Section 6-N of the State Act was also alleged. Thus, **Mohd. Sarwar** was a case, where there was no pretence of a closure or a facade. The reference, however, made under Section 4-K of the State Act was in the following terms:

"whether the employers were justified in terminating the service of the workman w.e.f 8.7.2000? If not, to what relief is the workman entitled to?"

[quoted from the report in **Mohd. Sarwar** *(supra)*]

The remarks of the Court, therefore, in **Mohd. Sarwar** to the effect, "that the Tribunal was justified in holding that since the validity and legality of the closure of the establishment was not specified as a point of dispute to be adjudicated in the referring order, the Tribunal was justified in not adjudicating the same. .....", are well in tune with the law considered in the earlier part of the decision under reference.

52. This Court has doubts that the principle in **M/s. Triveni Glass Ltd.** *(supra)* is slightly overstated, where it is held that, *"The terms of reference relating to the termination of the services of the workmen is therefore wide enough to cover every kind of termination of services including termination of services by way of closure and it was therefore open to the Arbitrator to enter into the question of legality of the closure for answering the reference."* That doubt need not be considered for the present, as this case involves a principle of much narrower scope. The principle in **M/s. Triveni Glass Ltd.** *(supra)* applicable on much narrower ground and what has been held hereinbefore, would indubitably clothe the Labour Court with jurisdiction to find out, whether it was at all a case of closure or just a sham to get rid of the workman. The Labour Court, on the pleadings of parties and the evidence, has arrived at a reasonable conclusion that there was no closure at all of a part of the unit or undertaking of the employers. The Labour Court has rightly held that the process department continues to function, may be with a changed technology. It has also been held by the Labour Court that in other units of the employers, the change over to the C.T.P. Machines has not led to dispensation of services of plate makers, like the workman. The Labour Court has, therefore, rightly concluded that the closure pleaded by the employers is no closure, but a sham to get rid of the workman. The retrenchment has been held to be unlawful and in breach of Section 25-N of the Central Act. The retrenchment has been held neither to be lawful or justified. It must, therefore, be held in answer to question no.2 that in case of a reference about the validity of termination of the services of a workman, the Labour Court can examine the validity of a closure pleaded by the employers and determine, if it is sham and no closure at all.

53. No other point was pressed on behalf of the employers in criticism of the impugned award.

54. In view of the answers to the two questions formulated and recorded hereinabove, no infirmity can be found with the award impugned on merits.

55. It has been brought to the notice of this Court that the impugned award insofar as it directs reinstatement has become incapable of implementation, inasmuch as the workman has attained the age of superannuation on 23.05.2018, pending this writ petition. Apparently, the workman cannot be reinstated in service in compliance with the award on account of a supervening development, that is, superannuation of the workman. It is apparent from the impugned award that at the time when the workman's services were dispensed with, he was in receipt of a monthly salary of Rs.6,624/-. This has been revised upwards in accordance with the recommendations of the Wage Board. A supplementary affidavit filed by the

employers dated 15th January, 2017, acknowledges in paragraph 3 that the then prevalent salary of the workman (contemporaneous with the affidavit) would be Rs.16,856/-. It is presumably the then current monthly salary, though in the affidavit, the stipulation of the acknowledged remuneration as a monthly entitlement, is conspicuous by its absence. There is a detailed calculation furnished by the workman in paragraph 11 of his affidavit dated 17th January, 2017, showing his entitlement to arrears, worked at 50% of his wages in terms of the award at a figure of Rs.14,70,137/-. The calculation takes into account periodic revision of salary and the varying entitlement during different periods of time as per prevalent wages/ salary.

56. This Court is of opinion that in the totality of circumstances, particularly, the fact that the workman has not after all rendered service during the entire period of time until his superannuation, though not on account of his fault, ends of justice would be met by modifying the award impugned to provide that the workman shall be entitled to receive in full satisfaction of all his claims, a lump sum of **Rs.6 lakhs** from the employers within two months of date. In the event, the sum of money directed to be paid in lump sum by the employers is not paid to the workman within the stipulated period of time, the workman would be entitled to simple interest @ 6% per annum till realization. The workman shall be entitled to receive in costs from the employers a sum of **Rs.20,000/-.**

57. The writ petition is **partly allowed**. Costs shall be payable as directed.

(2020)09ILR A698

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 16.09.2019

BEFORE

THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE PRAKASH PADIA, J.

WRIT – C No. 37710 of 2016

Smt. Saroj Gautam ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Satyhaveer Singh

Counsel for the Respondents:
A.S.G.I., Sri Rajesh Kumar Jaiswal, Sri Vikas Bushwar

LPG Distributor - Selection - Guidelines in brochure - Relaxation - Constitution of India – Article 226 - High Court in exercise of power under Art. 226 cannot relax terms and conditions of brochure on guidelines for selection of regular LPG Distributors - petitioner not having clear title of land for construction of godown as per the Clause 6.1 of the Guidelines - Rejection of candidature, proper (Para 17, 18)

Dismissed (E-5)

List of Cases cited: -

Durgawati Devi Vs. Union of India & ors. 2019 (6) AWC 6252

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

1. Heard learned counsel for the petitioner, Sri R.K. Jaiswal, learned counsel respondent No.1 and Sri Vikas Budhwar, learned counsel for respondent Nos.2 to 4.

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

"I Issue a writ, order or direction in thenature of certiorari by quashing the impugned order dated 01.08.2016 passed by respondent No.4 (Annexure No.11).

II. Issue a writ order or direction in the nature of mandamus by directing the respondents to grant the distributorship of L.P.G. Place - Naini, District Allahabad under Schedule Caste Category in the favour of petitioner.

III. Issue such other and further order which this Hon'ble court may deem fit and proper under the facts and circumstances of the case;

IV. Award cost of this petition to the petitioners."

3. Facts in brief as contained in the writ petition are that the Hindustan Petroleum Corporation Limited (hereinafter referred to as "the corporation") has published an advertisement on 29.9.2013 for appointment of L.P.G. distributors for various locations. Pursuant to the aforesaid advertisement, the petitioner applied for allotment of L.P.G. distributorship in respect of location No.131 namely H.P.C. Naini Allahabad under Scheduled Caste Category Candidate for Urban Area Vipran Yojna 2013-2014. A letter dated 14.6.2014 was written by the respondent No.4 namely Senior Regional Manager of respondent Corporation to the petitioner by which she was informed that draw for the location in question was held on 05.07.2014. In the draw the petitioner was found selected and thereafter a letter dated 5.7.2014 was written by the respondent No.4 to the petitioner directing her to deposit a demand draft of Rs.25,000/- for field verification. By the aforesaid letter, the petitioner was further directed to place certain papers and documents before the respondent No.4.

4. It is contended that the petitioner had duly completed all the formalities well within time. During the course of verification, the land offered by the petitioner for construction of godown was not found suitable as such a letter dated 10.10.2014 was written by the respondent-corporation to the petitioner to offer an alternative land either in the name of the petitioner or any other family unit available on or before the date of application.

5. In the reply, it is stated by the petitioner that objection raised by the respondent-corporation dated 10.10.2014 is not sustainable, since the petitioner has annexed rent agreement in respect of aforesaid Gata No.844/1 area 1260 sq. meter along with No Objection Certificate of other co-owners in the prescribed format. It is further stated that the petitioner has also annexed registered supplementary deed dated 18.10.2014 to the rent agreement dated 26.10.2013. After the aforesaid letter was received in the Office of respondent-corporation, another letter dated 15.11.2014 was written by the respondent-corporation stating therein that the land provided by the petitioner was co-owned by five brothers and share of the lease holder is only 1/5th of 1260 sq. meters, i.e., 252 sq. meters which is less than the required land, i.e., 25 meters x 30 meters, i.e., 750 sq. meters.

6. In response to the same, a letter was written by the petitioner on 4.12.2014 stating therein that the petitioner has another land for godown at Gata No.903 area 756 sq. meter situated at Mouja Karehada Uparhar Pargana Teshil Sadar District Allahabad for which there is a registered rent agreement for the period 23.11.2011 to 21.11.2027.In this regard, counsel for the petitioner also relied upon a letter dated 26.3.2015 written by the respondent Corporation to the petitioner asking for land suitable for construction of godown. In the said letter, it is further stated by the respondent corporation to

provide an alternate land within a period of seven days as per the terms and conditions otherwise the corporation authorities will take action as per the procedure. In response to the same, again a reply was given by the petitioner on 13.4.2015. Being not satisfied with the petitioner's, reply, another letter was written by the respondent-corporation to the petitioner on 27.5.2015 again asking for providing suitable land for construction of godown. Since no reply was given by the petitioner in response to the aforesaid letter, a letter dated 1.8.2016 was written by the respondent No.4 to the petitioner informing him that appointment of the petitioner was cancelled and the security amount deposited by the petitioner towards field verification i.e. Rs.25,000/- was forfeited.

7. Challenging the aforesaid order/letter dated 1.8.2016, the petitioner has preferred the present writ petition on the ground that the order impugned is absolutely arbitrary and illegal and liable to be set aside. It is stated that all the objections raised in the impugned order are unwarranted and not sustainable in the eyes of law. It is contended that the power of attorney is not mandatory to be registered as per the provisions of Registration Act, 1908. It is stated that since No objection certificate has already been given by the co-owners of the land, the demand of registered power of attorney is illegal.

8. A detailed counter affidavit has been filed on behalf of the respondent-corporation/respondent Nos.2, 3 and 4. It is stated in the counter affidavit that the procedure and manner according to which selections are made for the award of regular LPG distributorship are set out in the Brochure on Guidelines for Selection of Regular LPG Distributors, August, 2013. Copy of the aforesaid Guidelines is annexed as Annexure -1 to the counter affidavit. The eligibility criteria for individual applicants is contained in clause 6 of the aforesaid guidelines which is reproduced below:-

6. ELIGIBILITY CRITERIA FOR INDIVIDUAL APPLICANTS

All applicants fulfilling the eligibility criteria will become eligible for the draw for selection of the LPG distributorship. The eligibility Criteria is as under: -

6.1. Common Eligibility Criteria for all Categories applying as Individual

The applicant should

"Family Unit' in case of married person/ applicant, shall consist of individual

concerned, his/her Spouse and their unmarried son(s)/daughter(s). In case of unmarried person/ applicant, "Family Unit' shall consist of individual concerned, his/her parents and his/her unmarried brother(s) and unmarried sister(s). In case of divorcee, "Family Unit' shall consist of individual concerned, unmarried son(s)/unmarried daughter(s) whose custody is given to him/her. In case of widow/widower, "Family Unit' shall consist of individual concerned, unmarried son(s)/unmarried daughter(s).

vii Should own as on the last date for submission of application as specified in the advertisement or corrigendum (if any)

A plot of land of minimum dimensions 25 Metre x 30 Metre (within 15 km from municipal/town/village limits of the location offered in the same State) for construction of LPG Godown for storage of 8000 Kg of LPG in cylinders. The plot of land for construction of godown not meeting the minimum dimensions of 25 Metre x 30 Metre will not be considered.

Or

a ready LPG cylinder storage godown (within 15 km from municipal/town/village limits of the location offered in the same State) of 8000 Kg capacity.

In case there are any state specific requirements/norms applicable for construction of the LPG Godown, then the same will be applicable for the respective Regular Distributorship locations including revised minimum dimensions of plot of land will be required as specified in the Advertisement of that respective State.

The plot of land or ready LPG cylinder storage godown should be freely accessible through all weather motorable approach road (public road or private road connecting to the public road). In case of private road connecting to the public road, the same should belong to the applicant/member of Family Unit (as per the multiple dealership/distributorship norm of eligibility criteria) as per the ownership criteria defined below. In case of ownership/co-ownership by family member(s) in respect of such private road, consent letter from respective family member(s) will be required.

The land should also be plain, in one contiguous plot, free from live overhead power transmission or telephone lines. Canals/Drainage.Nallahs should not be passing through the plot. The land for construction of LPG godown should also meet the norms of various statutory bodies such as PWD/Highway authorities/ Town and Country Planning Department etc.

In case an applicant has more than one suitable plot for construction of godown for storage of minimum 8000 Kg of LPG in cylinders or ready LPG cylinder storage godown as on the last date for submission of application as specified in the advertisement or corrigendum (if any), the details of the same can also be provided in the application.

(viii) Own a suitable shop of minimum size 3 metre by 4.5 metre in dimension or a plot of land for construction of showroom of minimum size 3 metre by 4.5 metre as on the last date for submission of application as specified in the advertisement or corrigendum (if any) at the advertised location i.e. within the municipal/town/village limits of the place which is mentioned under the column of ''location' in the advertisement. In case locality is also specified under the column of ''location' in the advertisement, the candidate should own a suitable shop of minimum size 3 metre by 4.5 metre in dimension or a plot of land for construction of showroom of minimum size 3 metre by 4.5 metre as on the last date for submission of application as specified in the advertisement or corrigendum (if any) as per the standard layout in the said ''locality'. It should be easily accessible to general public through a suitable approach road.

In case an applicant has more than one shop of minimum size 3 metre by 4.5 metre in dimension or a plot of land for construction of showroom of minimum size 3 metre by 4.5 metre as on the last date for submission of application as specified in the advertisement or corrigendum (if any) at the advertised location or locality as specified under the column of ''location' in the advertisement, the details of the same can also be provided in the application.

''Own' means having ownership title of the property or registered lease deed having minimum 15 yrs of valid lease period from the date of advertisement in the name of applicant / member of "Family Unit" (as defined in multiple dealership/distributorship norm of eligibility criteria). The applicant should

have clear ownership as defined under the term "Own' above as on last date for submission of application as specified in the advertisement or corrigendum (if any). In case of ownership/co-ownership by family member(s) as given above, consent in the form of a Notarized Affidavit from the family member(s) will be required.

In case the land is jointly owned by the applicant / member of "Family Unit' (as defined in multiple dealership / distributorship norm) with any other person(s) and the share of the land in the name of applicant / member of the "Family Unit' meets the requirement of land including the dimensions required, then that land for godown/showroom will also qualify for eligibility as own land subject to submission of "No Objection Certificate' in the form of an Notarized Affidavit from other owner(s)."

9. It is stated in the counter affidavit that pursuant to the advertisement dated 29.09.2013, an application form was submitted by the petitioner on 27.10.2013. The last date for submission of application form was 28.10.2013. Column nine of the application form is pertaining to the land offered by the petitioner for LPG godown. The petitioner offered Khasra no.844/1 showing herself to be owner of the land by virtue of registered lease deed dated 26.10.2013. From perusal of the aforesaid lease deed, it appears that same was in respect of Gata No.844/1 and the same was executed by one Vijay Kumar in favour of the petitioner. The total area mentioned in the application form was 1260 square meters. On the basis of the aforesaid disclosure made by the petitioner in her application form, a call letter was issued to the petitioner on 14.6.2014. The draw of lot was conducted on 5.7.2014. In the aforesaid draw, the petitioner was declared successful. As per the procedure prescribed in the brochure, the field verification was conducted by the officials of the Corporation on 10.10.2014 in which it was found that in Gata No.844/1 share of Vijay Kumar was 1/5th, i.e., total area 252 square meters whereas the requirement as per Clause 6(iii) is 25 meters x 30 meters, i.e., 750 square meters. In view of the same, a letter dated 10.10.2014 was issued by the respondent Corporation to the petitioner to provide any other alternative piece of land in her name or in the name a member of of her "family unit" available on or before the date of submission of application form. Pursuant to the same, a letter dated 22.10.2014 was written by the petitioner to the respondent corporation stating therein that Gata No.844/1 area 1260 square meters is in the joint ownership of five persons and along with the said letter, the petitioner appended No Objection Certificate of four other owners and also an unregistered power of attorney dated 27.4.2013. Apart from the same, the petitioner has also appended a copy of the correction lease deed dated 18.10.2014.

10. It is argued that Sri Vikas Budhwar, learned counsel appearing on behalf of respondent corporation that as per clause 6 (vii), the applicant should have a plot of land having minimum dimension of 25 meters x 30 meters on the last date of submission of application form. The petitioner has neither submitted No Objection Certificate on or before the said date nor any correction deed was executed by her before the last date of submission of her application form, i.e., 28.10.2013. In view of the same, the aforesaid papers submitted by the petitioner were not taken into consideration by the respondent-corporation. It is further argued that alleged no objection certificate dated 26.10.2013

which is on record cannot be taken into consideration, since it does not contain any recital to the effect that other co-owners are ready and they have no objection about the lease of land to the petitioner.

11. Pursuant to the same, the petitioner offered another registered lease agreement so executed by one Sheshdhar in favour of the petitioner showing lease of land for 16 years from execution from the date of lease deed, i.e., 23.11.2011. The registered lease deed was executed on 23.11.2011by Sheshdhar for Arazi No.903 area 756 square meters does not confer the requirement mentioned under clause 6.1(vii) since the lease was not of minimum 15 year on the last date of submission of the application form, i.e., 28.10.2013.

12. In the circumstances, another letter dated 15.11.2014 was written by the respondent corporation to the petitioner permitting the petitioner to offer another alternative piece of land having registration on or before the last date of submission of application form, i.e., 28.10.2013 within seven days of receipt of the letter either in the name of the petitioner or a member of her family unit as prescribed in the brochure.

13. Apart from the same, a rent agreement dated 02.12.2014 was also provided by the petitioner, copy of which is appended as Annexure 8 to the writ petition. Although the same was executed in favour of the petitioner but the same was not taken into consideration on the ground that the aforesaid agreement was executed after the last date of submission of application form i.e., 28.10.2013. Subsequently, taking a lenient view, another letter dated 26.3.2015 was written by the respondent corporation to the petitioner by which again a request was made by the corporation to the petitioner to submit alternative piece of land registered on or before the last date of submission of application form, i.e. 28.10.2013.

14. The reply submitted by the petitioner was not found satisfactory, since no alternative land was provided by the petitioner as per requirement of the Brochure, the order dated 1.8.2016 was passed by the respondent corporation rejecting the candidature of the petitioner and forfeiting a sum of Rs.25,000/-. It is further argued by Sri Vikas Budhwar, learned counsel that the petitioner is not an illiterate person and knew the terms and conditions applicable for LPG distributorship. The application form was filled up by the petitioner with her open eyes. The petitioner was fully aware that she should own the land for a period of 15 years on the last date of submission of application form, i.e, 28.1.2013.

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

16. From perusal of record, it transpires that pursuant to the advertisement dated 29.9.2013, an application form was submitted by the petitioner on 27.10.2013. Along with application form, the petitioner offered a land for LPG godown situated at Gata No.844/1. In the application form, she showed herself to be owner of th land by virtue of registered lease deed dated 26.10.2013. During field verification, it was found that Sri Vijay Kumar who executed lease deed in favour of the petitioner having only 1/5th share of the total area of land, i.e., 252 square meters. In view of the same, the petitioner does not have a minimum land for the construction

of godown as per requirement of the advertisement. A letter was written by the Corporation to the petitioner with a request to offer alternative piece of land in her name, though no objection certificate was submitted by the petitioner but the same was not found suitable by the respondent corporation. Subsequently, the petitioner submitted registered lease agreement so executed by one Sheshdhar in favour of the petitioner. The aforesaid lease deed was executed on 23.11.2011. The same was also not found suitable since the same did not confirm with the requirement contained under Clause 6.1 (vii) of the brochure as the lease was not for minimum 15 years on the last date of submission of application form. Insofar as the correction lease deed dated 18.10.2014 is concerned, the same was also not taken into consideration by the Corporation since as per the terms and conditions of the brochure a document cannot taken into consideration which was submitted after the last date of the application form.

17. It is settled law that the terms and conditions contained in the brochure cannot be relaxed by the court of law. In the case of ***Durgawati Devi Vs. Union of India and others 2019 (6) AWC 6252*** , the Supreme Court was pleased to hold that High Court should not exercise power under Article 226 of the Constitution of India to relax the terms and conditions of the tender notice. Relevant paragraps of the aforesaid judgment is quoted below:-

"4. Clause 6H (iii) explains "own' to mean having clear ownership title of the property in the name of the applicant, or in the name of family members of the "Family Unit' of the applicant as defined in multiple dealership/distributorship norms, or land belonging to parents and grandparents (both maternal and paternal) of the applicant, as on the last date for submission of applications as specified in the advertisement or corrigendum (if any) in case of ownership/co-ownership) by family members.

5. Admittedly, as on the last date for submission of applications in terms of the advertisement referred to above, the petitioner did not own land as required. The petitioner only had an agreement for sale in her favour. It is well-settled that execution of a sale agreement does not transfer ownership/title. Ownership can only be acquired by a registered deed of conveyance. The petitioner was not eligible as on the last date for submission of applications.

6. Counsel appearing on behalf of the petitioner strenuously contended that a deed of conveyance has since been executed and the petitioner is now the owner of the land. However, it is not disputed that as on the relevant date, that is the last date for submission of applications, the petitioner was not the owner of the land.

7. The High Court cannot, and rightly did not, in exercise of power under Article 226 of the Constitution of India, relax the terms and conditions of a tender notice.

8. Such relaxation would be patently discriminatory, for it would then be open for other applicants ineligible on the last date for submission of applications to contend that, they could have acquired eligibility subsequently.

9. In our view, the High Court rightly dismissed the Writ Petition, challenging the rejection of the candidature of the petitioner as devoid of merit. The impugned judgment and order does not call for interference. Accordingly, the special leave petition is dismissed."

18. In view of the facts as stated above, it is clear that the petitioner does not have a clear title of land for construction of godown as per the Clause 6.1 of the Guidelines issued by the respondent-corporation for selection of regular LPG distributors.

19. In view of the aforesaid facts as stated above, in our view the respondent corporation rightly rejected the candidature of the petitioner. The order passed by the respondent corporation dated 1.8.2016 is a perfect and valid order and does not call for any interference by this Court especially under Article 226 of the Constitution of India.

20. The writ petition being devoid of merits is liable to be dismissed.

21. The writ petition is dismissed. No order as to costs.

(2020)09ILR A705
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.01.2020

BEFORE

THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE RAVI NATH TILHARI, J.

WRIT – C No. 38586 of 2018

Smt. Kaushalya Chaubey ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Nand Kishore Mishra

Counsel for the Respondents:
C.S.C.

(A) Civil Law - principles of natural justice -audi alteram partem - procedural fairness which ensures taking of correct decision - any order or any action having civil consequences has to be passed/taken after affording opportunity of hearing to the person concerned, in consonance with the principles of natural justice - If this requirement not fulfilled - order or the action cannot be sustained - person has a right to show cause against the proposed action which, if taken, would adversely affect his rights or impose some liability on him/her - revisional order & demand notice quashed .(Para-15)

District Magistrate By order/notice dated 13.7.2018 - cancelled the petitioner's mining permit - after determining the petitioner's liability for payment - directed for recovery of the said amount from the petitioner - petitioner's revision dismissed - petitioner was directed to make the payment failing which, it was provided that the same shall be recovered as arrears of land revenue - order/notice - composite one - passed in violation of the principles of natural justice of providing opportunity of hearing to the petitioner . (Para-2,20)

HELD:- The order/notice dated 13.7.2018 shall be treated only as a show cause notice to the petitioner for (i) cancellation of petitioner's mining permit, (ii) for determination of petitioner's liability for payment of amount under different heads as mentioned therein and (iii) black listing on the grounds mentioned therein. The cancellation of mining permit and direction to deposit the amount determined in the order dated 13.7.2018 shall be treated only as the proposed actions against the petitioner.(Para-21)

Petition allowed partly. (E-7)

List of Cases cited: -

1. Nisha Devi Vs St. of H.P. & ors., (2014) 16 SCC 392

2. Dharampal Satyapal Vs Deputy Commissioner of Central Excise & ors., (2015) 8 SCC 519

UOI Vs Hanil Era Textiles Ltd, (2018) 13 SCC 219

(Delivered by Hon'ble Ravi Nath Tilhari, J.)

1. We have heard Sri Nand Kishor Mishra learned counsel for the petitioner and learned Standing Counsel for Respondent Nos. 1 to 5 and have perused the material on record. The petitioner has filed the present writ petition for the following reliefs:

"(a) Issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 17.10.2018 passed by the Respondent No.3 and order dated 13.7.2018 as well as notice dated 27.10.2018 issued by the District Magistrate, Mahoba (Annexure Nos. 1,2 and 3 to the writ petition).

(b) Issue a writ, order or direction in the nature of Mandamus directing the respondents not to realize/recover the amount Rs. 57,36,750/- mineral cost (Khaniz Mulya) as well as penalty sum of Rs. 50,000/- from the petitioner on the basis of the notice dated 27.10.2018.

(c) Issue a writ, order or direction in the nature of mandamus directing the respondents to restore the mining permit of the petitioner and issue Form MM-11 for the remaining quantity by extending the time period which has been lapsed due to passing of the impugned order dated 13.7.2018, cancelling the mining permit.

(d) Issue any other suitable writ, order or direction as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.

(e) Award cost of the petition in favour of the petitioner."

2. By order/notice dated 13.7.2018 the District Magistrate, Mahoba had cancelled the petitioner's mining permit and after determining the petitioner's liability for payment, directed for recovery of the said amount from the petitioner. By order dated 17.10.2018 the petitioner's revision was dismissed by the Additional Chief Secretary/Special Secretary, Department of Geology and Mining Government of U.P., Lucknow. By notice dated 27.10.2018 the petitioner was directed to make the payment failing which, it was provided that the same shall be recovered as arrears of land revenue.

3. The facts of the case are that the petitioner was granted mining permit on 12.5.2018 for removal of 12350 cubic meter of sand/maurram from her agricultural field of Gata No. 39 kha having an area of 1.235 hectares situated in village Barano, Tehsil Kulpahar, District Mahoba, for a period of three months w.e.f. 12.5.2018 upto 11.8.2018 and in pursuance thereof petitioner deposited an amount of Rs. 25,00,876/- in total under different heads on 12.5.2018 itself, whereupon the mining plan was approved by the competent authority and after getting the mining permission the petitioner started excavation work for removal of the mineral/sands/mauram from her agricultural gata.

4. On 13.7.2018 the Respondent No.4/District Magistrate, Mohaba passed the impugned order (Annexure No.2) according to which, as per the inspection/survey report dated 13.7.2018 of the inspecting team, there were following irregularities found at the time of inspection;-

"(a) that as per the inspection and survey made by the inspection team petitioner had mined total 13,976 cubic meter of mineral whereas till date of

inspection for only 6,327 cubic meter of mineral e-MM-11 has been issued hence petitioner has done 7,649 cubic meter of illegal mining.

(b) That in the area petitioner has done the mining for 13,976 cubic meter of mineral which is more than the approved quantity of 12,350 cubic meter of mineral.

(c) The petitioner has used the machines in the area.

(d) Approach roads of the villages have been damaged.

(e) Adjoining land has damaged.

(f) Mining has been done beyond the approved depth.

(g) Unsafe and undercut mining work has been done.

(h) Mining permit has been granted for making the land cultivable but petitioner has made the land unlevel with pits."

5. Consequently, the mining permit was cancelled with direction to the petitioner to deposit the amount of royalty, mineral cost and penalty, failing which it was provided that the said amount shall be recovered as arrears of land revenue. The petitioner was also directed by order/notice dated 13.7.2018 to submit explanation with respect to the irregularities mentioned above and as to why legal proceedings be not initiated against her and she not be blacklisted. The petitioner's Revision No. 136 (R)/ACS/M of 2018 under Rule 78 of the U.P. Minor Minerals (Concession) Rules, 1963 (in short 'the Rules 1963') was dismissed by the Respondent No.3 and a notice dated 27.10.2018 (Annexure No.3) was issued to the petitioner for recovery of the amount determined by order/notice dated 13.7.2018.

6. The State-Respondents, inspite of time having been granted, did not file any counter affidavit.

7. Sri Nand Kishore Mishra, learned counsel for the petitioner has submitted that the impugned order/notice dated 13.7.2018 has been passed in gross violation of the principles of natural justice of affording opportunity of hearing to the petitioner before cancelling her mining permit. On the one hand the petitioner was issued the show cause notice but at the same time by the same notice/order the petitioner's mining permit was also cancelled. He has further submitted that the inspection report dated 13.7.2018, which is the very basis of the order of cancellation, was not provided to the petitioner and she was also not associated in the said inspection which was conducted, if conducted at all, behind the back of the petitioner without any notice of such inspection. The liability for payment has been fastened on the petitioner in gross violation of principles of natural justice. He next submitted that the above aspects were raised before the revisional authority, but without considering the same the petitioner's revision was dismissed, mechanically, affirming the order dated 13.7.2018 and demand notice dated 27.10.2018 was also issued.

8. The learned Standing Counsel has submitted that the order/notice dated 13.7.2018 has been passed in view of the illegal mining being done by the petitioner and the grave irregularities committed by her which are evident from the inspection report dated 13.7.2018, and, as such, the impugned orders and the demand notice are perfectly justified.

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

10. The order dated 13.7.2018 is being reproduced as under:

''प्राप्त शिकायतो के दृष्टिगत बाढ़ से एकत्रित बालू/मोरम को हटाने के लिए उ0प्र0 उपखनिज ;परिहारद्ध नियमावली 1963 के नियम 52 क के अन्तर्गत स्वीकृत खनन अनुज्ञा क्षेत्रों की जांच के लिए कार्यालय आदेश संख्या 4340/एम0एम0सी0–30 दिनांक 03.07.2018 द्वारा जांच दल का गठन किया गया। उक्त जांच दल द्वारा प्रस्तुत निरीक्षण/सर्वेक्षण आख्या दिनांक 13.07.2018 में यह अवगत कराया गया कि आपके द्वारा कार्यालय आदेश संख्या 3694ए/एम0एम0सी0–30 दिनांक 18.05.2018 द्वारा आपके पक्ष में स्वीकृत खनन अनुज्ञा क्षेत्र ग्राम–बरानों के गाटा संख्या 39 ख रकवा 1.235 हे0 में निरीक्षण/सर्वेक्षण उपरान्त निम्नानुसार अनियमितताए पायी गयी :–

1. जांच दल की पैमाइश के अनुसार स्वीकृत क्षेत्र में 13,976 घनमीटर खनन किया गया है जबकि आपके द्वारा निरीक्षण दिनांक तक 6,327 घनमीटर प्रपत्र ई–एम0एम0–11 का ही निर्गमन किया गया है, इस प्रकार आप द्वारा 7,649 घनमीटर का अवैध खनन/बिना रायल्टी का परिवहन किया गया है।

2. क्षेत्र में अनुज्ञा पत्र में स्वीकृत मात्रा 12,350 घनमीटर से भी अधिक 13,976 घनमीटर खनन कर लिया गया है।

3. क्षेत्र में मशीनों का प्रयोग किया गया है।

4. ग्रामीण सम्पर्क मार्गो को क्षतिग्रस्त किया गया है।

5. आस–पास की भूमि को नुकसान पहुॅचाया गया है।

6. स्वीकृत गहराई से अधिक गहराई में खनन किया गया है।

7. असुरक्षित एंव अन्डरकट खनन कार्य किया गया है।

8. खनन अनुज्ञा पत्र बाढ़ से एकत्रित बालू/मोरम को हटाकर खेती योग्य बनाने के लिए दिया गया है परन्तु क्षेत्र को असमतल तथा गड्

अतः आप तत्काल खनन एंव परिवहन कार्य रोक दे एंव अवैध खनन की मात्रा 7,649 घनमीटर के लिए खान एंव खनिज ;विकास एंव विनियमनद्ध अधिनियम 1957 की धारा 4 व 21 के अन्तर्गत रायल्टी रू0 11,47,350.00 एंव उसका खनिमुख मूल्य रू0 57,36,750.00 की धनराशि 15 दिन के अन्दर निर्धारित लेखा शीर्षक में जमा कराया जाना सुनिश्चित करे तथा मशीनों के प्रयोग के सम्बन्ध में उ0प्र0 उपखनिज ;परिहारद्ध नियमावली 1963 के नियम –59 ;संशोधितद्ध के अन्तर्गत रू0 50,000 की धनराशि निर्धारित लेखा शीर्षक में जमा कराया जाना सुनिश्चित करे अन्यथा समस्त धनराशि मय ब्याज के भू–राजस्व की भॉति वसूल कर ली जायेगी।

आपको यह भी सूचित किया जाता है कि उपरोक्त अनियमितताओं के अन्तर्गत अपना स्पष्टीकरण एक सप्ताह के अन्दर कार्यालय में प्रस्तुत करे कि क्यों न आपके विरुद्ध नियमानुसार कानूनी कार्यवाही संस्तुत की जाये एंव आपका नाम काली सूची में दर्ज कर दिया जाय।

आपको पुनः सचेत किया जाता है कि क्षेत्र में कोई खनन कार्य पाया जाता है तो आपके विरूद्ध नियमानुसार कठोर कार्यवाही की जायेगी।''

11. A perusal of the impugned order/notice dated 13.7.2018 shows that on the one had the petitioner's mining permit was cancelled and the liability for payment of royalty etc. was imposed and at the same time, the petitioner was also directed to show cause against the irregularities mentioned therein pointed by the report of the inspection team, as well as to show cause as to why legal proceedings be not initiated against the petitioner and she be not black listed. It is evident that the order/notice dated 13.7.2018 was issued as some complaints were made and in view thereof an inspection team was constituted by office order dated 4340/MMC-2018 which submitted its report dated 13.7.2018 pointing out so many irregularities and illegalities committed by the petitioner in her mining permit area.

12. We find that there is nothing on record to show that the inspection was made after notice to the petitioner or the petitioner was given any opportunity to show cause against the inspection report dated 13.7.2018, serving a copy thereof to the petitioner. There is also nothing on record to show that any show cause notice

for the proposed cancellation of mining permit was issued to the petitioner after submission of the inspection report. The date of the inspection report and the impugned order/notice is the same i.e. 13.7.2018 whereby mining permit was also cancelled and the liability was determined ex parte, on the basis of the inspection report. After doing that, the respondent No.2 by the same order directed the petitioner to submit explanation as to why legal proceedings be not taken against the petitioner and she be not black listed.

13. Any thing contrary to the above mentioned could not be brought to our noticce by the learned standing counsel.

14. We thus find that the order dated 13.7.2018 to the extent of cancellation of the petitioner's mining permit and a direction to deposit the amount determined thereunder, has been passed without affording any opportunity of hearing to the petitioner, although the same adversely affects the petitioner and has civil consequences.

15. It is settled in law that any order or any action having civil consequences has to be passed/taken after affording opportunity of hearing to the person concerned, in consonance with the principles of natural justice. If this requirement is not fulfilled, the order or the action cannot be sustained. The person has a right to show cause against the proposed action which, if taken, would adversely affect his rights or impose some liability on him/her.

16. In the case of **Nisha Devi vs. State of Himanchal Pradesh and others (2014) 16 SCC 392** wherein the income certificate of the appellant therein was cancelled on the report of Tehsildar, which was itself predicated only on the revenue records and it was admitted that the appellant was not afforded any opportunity of being heard before cancellation, inasmuch as the report of the tehsildar being based on revenue records, was presumed to be correct, the Hon'ble Apex Court held as under:-

"4. In the course of arguments addressed before us, the fervent submission of counsel of the Appellant that she was not afforded any opportunity of being heard has not been controverted, inasmuch as it has been contended that the Report of the Tehsildar was based on revenue records, which, therefore, was presumed to be correct. The High Court has acted upon this one sided or unilateral Report of the Tehsildar in arriving at the conclusion that the Appellant indeed had an income in excess of Rupees twelve thousand per annum and, accordingly, was ineligible for appointment as an Anganwadi Worker.

5. Trite though it is, we may yet again reiterate that the principle of audi alteram partem admits of no exception, and demands to be adhered to in all circumstances. In other words, before arriving at any decision which has serious implications and consequences to any person, such person must be heard in his defence. We find that the High Court did not notice the violation and infraction of this salutary principle of law. Accordingly, on this short ground, the impugned Judgments and Orders require to be set aside, and are so done. The matter is remanded back to the Divisional Commissioner for taking a fresh decision after giving due notice to the Appellant and affording her an opportunity of being heard. The Divisional Magistrate, Kullu, shall complete the proceedings expeditiously, and not later than six months from the date on which a copy of this Order is

served on him."

17. In the case of **Dharampal Satyapal Vs. Deputy Commissioner of**

Central Excise and others (2015) 8 SCC 519 the Hon'ble Apex court has elaborately discussed the rule of audi alteram partem, its origin, scope and the consequences of its non-observance. We consider it appropriate to reproduce relevant paragraphs of Dharampal's case (supra) as under:

"18. Natural justice is an expression of English Common Law. Natural justice is not a single theory-it is a family of views. In one sense administering justice itself is treated as natural virtue and, therefore, a part of natural justice. It is also called 'naturalist' approach to the phrase 'natural justice' and is related to 'moral naturalism'. Moral naturalism captures the essence of commonsense morality-that good and evil, right and wrong, are the real features of the natural world that human reason can comprehend. In this sense, it may comprehend virtue ethics and virtue jurisprudence in relation to justice as all these are attributes of natural justice. We are not addressing ourselves with this connotation of natural justice here.

19. In Common Law, the concept and doctrine of natural justice, particularly which is made applicable in the decision making by judicial and quasi-judicial bodies, has assumed different connotation. It is developed with this fundamental in mind that those whose duty is to decide, must act judicially. They must deal with the question referred both without bias and they must given to each of the parties to adequately present the case made. It is perceived that the practice of aforesaid attributes in mind only would lead to doing justice. Since these attributes are treated as natural or fundamental, it is known as 'natural justice'. The principles of natural justice developed over a period of time and which is still in vogue and valid even today were: (i) rule against bias, i.e. nemo judex in causa sua; and (ii) opportunity of being heard to the concerned party, i.e. audi alteram partem. These are known as principles of natural justice. To these principles a third principle is added, which is of recent origin. It is duty to give reasons in support of decision, namely, passing of a 'reasoned order'.

20. Though the aforesaid principles of natural justice are known to have their origin in Common Law, even in India the principle is prevalent from ancient times, which was even invoked in Kautilya's 'Arthashastra'. This Court in the case of Mohinder Singh Gill and Anr. v. The Chief Election Commissioner, New Delhi and Ors. MANU/SC/0209/1977MANU/SC/0209/1977 : (1978) 1 SCC 405 : AIR 1978 SC 851 explained the Indian origin of these principles in the following words:

Indeed, natural justice is a pervasive facet of secular law where a spiritual touch enlivens legislation, administration and adjudication, to make fairness a creed of life. It has many colours and shades, many forms and shapes and, save where valid law excludes, it applies when people are affected by acts of authority. It is the bone of healthy government, recognised from earliest times and not a mystic testament of judge-made law. Indeed from the legendary days of Adam-and of Kautilya's Arthashastra-the rule of law has had this stamp of natural justice, which makes it social justice. We need not go into these deeps for the present except to indicate that the roots of natural justice and its foliage are noble and not new-fangled. Today its application must be sustained by current legislation, case law or other extant principle, not the hoary chords of legend and history. Our jurisprudence has sanctioned its

prevalence even like the Anglo-American system.

21. Aristotle, before the era of Christ, spoke of such principles calling it as universal law. Justinian in the fifth and sixth Centuries A.D. called it 'jura naturalia', i.e. natural law.

22. The principles have sound jurisprudential basis. Since the function of the judicial and quasi-judicial authorities is to secure justice with fairness, these principles provide great humanising factor intended to invest law with fairness to secure justice and to prevent miscarriage of justice. The principles are extended even to those who have to take administrative decision and who are not necessarily discharging judicial or quasi-judicial functions. They are a kind of code of fair administrative procedure. In this context, procedure is not a matter of secondary importance as it is only by procedural fairness shown in the decision making that decision becomes acceptable. In its proper sense, thus, natural justice would mean the natural sense of what is right and wrong.

23. This aspect of procedural fairness, namely, right to a fair hearing, would mandate what is literally known as 'hearing the other side'. Prof. D.J. Galligan1 attempts to provide what he calls 'a general theory of fair treatment' by exploring what it is that legal rules requiring procedural fairness might seek to achieve. He underlines the importance of arriving at correct decisions, which is not possible without adopting the aforesaid procedural fairness, by emphasizing that taking of correct decisions would demonstrate that the system is working well. On the other hand, if mistakes are committed leading to incorrect decisions, it would mean that the system is not working well and the social good is to that extent diminished. The rule of procedure is to see that the law is applied accurately and, as a consequence, that the social good is realised. For taking this view, Galligan took support from Bentham2 , who wrote at length about the need to follow such principles of natural justice in civil and criminal trials and insisted that the said theory developed by Bentham can be transposed to other forms of decision making as well. This jurisprudence of advancing social good by adhering to the principles of natural justice and arriving at correct decisions is explained by Galligan in the following words:

On this approach, the value of legal procedures is judged according to their contribution to general social goals. The object is to advance certain social goals, whether through administrative processes, or through the civil or criminal trial. The law and its processes are simply instruments for achieving some social good as determined from time to time by the law makers of the society. Each case is an instance in achieving the general goal, and a mistaken decision, whether to the benefit or the detriment of a particular person, is simply a failure to achieve the general good in that case. At this level of understanding, judgments of fairness have no place, for all that matters is whether the social good, as expressed through laws, is effectively achieved.

Galligan also takes the idea of fair treatment to a second level of understanding, namely, pursuit of common good involves the distribution of benefits and burdens, advantages and disadvantages to individuals (or groups). According to him, principles of justice are the subject matter of fair treatment.

However, that aspect need not be dilated.

24. Allan, on the other hand, justifies the procedural fairness by

following the aforesaid principles of natural justice as rooted in rule of law leading to good governance. He supports Galligan in this respect and goes to the extent by saying that it is same as ensuring dignity of individuals, in respect of whom or against whom the decision is taken, in the following words:

The instrumental value of procedures should not be underestimated; the accurate application of authoritative standards is, as Galligan clearly explains, an important aspect of treating someone with respect. But procedures also have intrinsic value in acknowledging a person's right to understand his treatment, and thereby to determine his response as a conscientious citizen, willing to make reasonable sacrifices for the public good. If obedience to law ideally entails a recognition of its morally obligatory character, there must be suitable opportunities to test its moral credentials. Procedures may also be though to have intrinsic value in so far as they constitute a fair balance between the demands of accuracy and other social needs: where the moral harm entailed by erroneous decisions is reasonably assessed and fairly distributed, procedures express society's commitment to equal concern and respect for all.

It, thus, cannot be denied that principles of natural justice are grounded in procedural fairness which ensures taking of correct decision and procedural fairness is fundamentally an instrumental good, in the sense that procedure should be designed to ensure accurate or appropriate outcomes. In fact, procedural fairness is valuable in both instrumental and non-instrumental terms.

25. It is on the aforesaid jurisprudential premise that the fundamental principles of natural justice, including audi alteram partem, have developed. It is for this reason that the courts have consistently insisted that such procedural fairness has to be adhered to before a decision is made and infraction thereof has led to the quashing of decisions taken. In many statutes, provisions are made ensuring that a notice is given to a person against whom an order is likely to be passed before a decision is made, but there may be instances where though an authority is vested with the powers to pass such orders, which affect the liberty or property of an individual but the statute may not contain a provision for prior hearing. But what is important to be noted is that the applicability of principles of natural justice is not dependent upon any statutory provision. The principle has to be mandatorily applied irrespective of the fact as to whether there is any such statutory provision or not.

De Smith captures the essence thus-"Where a statute authorises interference with properties or other rights and is silent on the question of hearing, the courts would apply rule of universal application and founded on plainest principles of natural justice".

Wade also emphasizes that principles of natural justice operate as implied mandatory requirements, non-observance of which invalidates the exercise of power. In Cooper v. Sandworth Board of Works (1863) 14 GB (NS) the Court laid down that:

'...although there is no positive word in the statute requiring that the party shall be heard, yet justice of common law would supply the omission of Legislature". Exhaustive commentary explaining the varied contours of this principle can be traced to the judgment of this Court in Managing Director, ECIL, Hyderabad and Ors. v. B. Karunakar and Ors.

MANU/SC/0237/1994MANU/SC/0237/1994 : (1993) 4 SCC 727, wherein the Court discussed plenty of previous case law in restating the aforesaid principle, a glimpse whereof can be found in the following passages:

20. The origins of the law can also be traced to the principles of natural justice, as developed in the following cases: In A.K. Kraipak v. Union of India MANU/SC/0427/1969MANU/SC/0427/1969 : (1969) 2 SCC 262 : (1970) 1 SCR 457, it was held that the rules of natural justice operate in areas not covered by any law. They do not supplant the law of the land but supplement it. They are not embodied rules and their aim is to secure justice or to prevent miscarriage of justice. If that is their purpose, there is no reason why they should not be made applicable to administrative proceedings also especially when it is not easy to draw the line that demarcates administrative enquiries from quasi-judicial ones. An unjust decision in an administrative inquiry may have a more far reaching effect than a decision in a quasi-judicial inquiry. It was further observed that the concept of natural justice has undergone a great deal of change in recent years. What particular rule of natural justice should apply to a given case must depend to a great extent on the facts and circumstances of that case, the framework of the law under which the inquiry is held and the constitution of the tribunal or the body of persons appointed for that purpose. Whenever a complaint is made before a Court that some principle of natural justice has been contravened, the Court has to decide whether the observance of that rule was necessary for a just decision on the facts of that case. The rule that inquiry must be held in good faith and without bias and not arbitrarily or unreasonably is now included among the principles of natural justice.....…"

27. From the aforesaid discussion, it becomes clear that the opportunity to provide hearing before making any decision was considered to be a basic requirement in the Court proceeding. Later on, this principle was applied to other quasi-judicial authorities and other tribunals and ultimately it is now clearly laid down that even in the administrative actions, where the decision of the authority may result in civil consequences, a hearing before taking a decision is necessary. It was, thus, observed in A.K. Kraipak's case (supra) that if the purpose of rules of natural justice is to prevent miscarriage of justice, one fails to see how these rules should not be made available to administrative inquiries. In the case of Maneka Gandhi v. Union of India and Anr. MANU/SC/0133/1978MANU/SC/0133/1978 : (1978) 1 SCC 248 also the application of principle of natural justice was extended to the administrative action of the State and its authorities. It is, thus, clear that before taking an action, service of notice and giving of hearing to the noticee is required. In Maharashtra State Financial Corporation v. Suvarna Board Mills and Anr. MANU/SC/0527/1994MANU/SC/0527/1994 : (1994) 5 SCC 566, this aspect was explained in the following manner:

3. It has been contended before us by the learned Counsel for the Appellant that principles of natural justice were satisfied before taking action Under Section 29, assuming that it was necessary to do so. Let it be seen whether it was so. It is well settled that natural justice cannot be placed in a straight-jacket; its rules are not embodied and they do vary from case to case and from one fact-situation to another. All that has to be seen is that no adverse civil consequences are allowed to ensue before one is put on notice that the consequence would follow if he would not take care of the lapse, because of which the action

as made known is contemplated. No particular form of notice is the demand of law: All will depend on facts and circumstances of the case.

28. In the case of East India Commercial Co. Ltd., Calcutta and Anr. v. The Collector of Customs, Calcutta MANU/SC/0179/1962MANU/SC/0179/1962 : AIR 1962 SC 1893, this Court held that whether the statute provides for notice or not, it is incumbent upon the quasi-judicial authority to issue a notice to the concerned persons disclosing the circumstances under which proceedings are sought to be initiated against them, failing which the conclusion would be that principle of natural justice are violated. To the same effect are the following judgments:

a) U.O.I. and Ors. v. Madhumilan Syntex Pvt. Ltd. and Anr. MANU/SC/0550/1988 MANU/SC/0550/1988 : (1988) 3 SCC 348

b) Morarji Goculdas B and W Co. Ltd. and Anr. v. U.O.I. and Ors.

MANU/SC/1267/1995MANU/SC/1267 /1995 : (1995) Supp 3 SCC 588

c) Metal Forgings and Anr. v. U.O.I. and Ors.

MANU/SC/1029/2002MANU/SC/1029 /2002 : (2003) 2 SCC 36

d) U.O.I. and Ors. v. Tata Yodogawa Ltd. and Anr.

MANU/SC/0694/1988MANU/SC/0694/198 8 : 1988 (38) ELT 739 (SC) : 1988 (19) ECR 569 (SC)

29. Therefore, we are inclined to hold that there was a requirement of issuance of show-cause notice by the Deputy Commissioner before passing the order of recovery, irrespective of the fact whether Section 11A of the Act is attracted in the instant case or not."

18. In the case of **Union of India (UOI) Vs. Hanil Era Textiles Ltd (2018) 13 SCC 219** wherein the Development Commissioner had passed order in review but without issuing any show cause notice to the assessee affected by the order of review, the Hon'ble Apex Court held as under:

"9. In the instant case, it is not in dispute nor it can be disputed by the Revenue that before passing the review order the Development Commissioner had not issued a show cause notice to the Assessee(s) inter alia asking it to show cause as to why the order passed earlier should not be reviewed. In our view, the omission on the part of the Development Commissioner would go to the fundamentals in the sense that no order could be passed against a person without issuing a show cause notice to him/it. This would be in violation of the principles of natural justice and also infringe Article 14 of the Constitution of India. Audi Alteram Partem, as the basic principle of natural justice ensures an opportunity of fair hearing to the parties. Issuance of a show cause notice is a part and parcel of the aforesaid principle which provides that the parties are in a position to defend themselves adequately; after being aware of the exactness of the allegation against them. The concept of natural justice cannot be put into a strait-jacket formula. The only essential point is that in the given facts of a case, if the person concerned has reasonable opportunity of presenting his case and if the administrative authority have acted fairly, impartially and reasonably. In the instant case, no show cause notice has been issued to the Respondent before the review order was passed by the Development Commissioner which had put the Respondent No. 1 at a disadvantage by not allowing them to defend themselves. The aim of the rules of

natural justice is to secure justice or to put it negatively to prevent miscarriage of justice and therefore, this doctrine is the most paramount doctrine that goes to the root of all laws and to the concept of justice. The order passed by the Development Commissioner is in contravention to the principles of natural justice and is therefore cannot be sustained. In that view of the matter, we set aside the order passed by the Appellant No. 2, dated 4-6-2003."

19. Thus, it is consistently held, that the principles of natural justice, including audi alteram partem are grounded in procedural fairness which ensures taking of correct decision. Before taking an action against a person, service of notice and giving of hearing to the person concerned is required. Even though there are no positive words in the statute, requiring that the party shall be heard, the principles of natural justice are to be mandatorily applied, unless their applicability is specifically barred/excluded. The opportunity to provide hearing before giving any decision has been considered to be a basic requirement in the court proceedings and this principle has been applied to quasi judicial proceedings before tribunals etc. and to the administrative actions as well, where the decision of the authority may result in civil consequences.

20. Thus considered the order/notice dated 13.7.2018 to the extent it cancels the mining permit of the petitioner and imposes liability for payment of royalty etc. cannot be sustained having been passed in violation of the principles of natural justice of providing opportunity of hearing to the petitioner. The very basis of the order of cancellation of permit was exparte inspection report with which the petitioner was not confronted nor was granted any opportunity to rebut the same or submit explanation to the irregularities/ illegalities mentioned in the inspection report.

21. The order/notice dated 13.7.2018 is composite one. It cancels the mining permit and imposes liability for payment of royalty etc. and also directs the petitioner to submit reply. We are of the considered view that the order/notice dated 13.7.2018 shall be treated only as a show cause notice to the petitioner for (i) cancellation of petitioner's mining permit, (ii) for determination of petitioner's liability for payment of amount under different heads as mentioned therein and (iii) black listing on the grounds mentioned therein. The cancellation of mining permit and direction to deposit the amount determined in the order dated 13.7.2018 shall be treated only as the proposed actions against the petitioner.

22. We issue the following further directions:

(i) The petitioner shall serve certified copy of this judgment to the District Magistrate Mahoba/Respondent No.4, along with an application for providing a copy of the inspection report of the joint inspecting team dated 13.7.2018 upon which the same shall be provided to the petitioner within a period of next one week.

(ii) The petitioner shall have three weeks thereafter to file reply/explanation to the notice dated 13.7.2018.

(iii) The District Magistrate, Mahoba/Respondent No.4 shall take final decision within a period of next two weeks.

23. The revisional order dated 17.10.2018 and the demand notice dated 27.10.2018 are hereby quashed.

24. We make it clear that we have not adjudicated the controversy on its merit either way.

25. The writ petition is allowed in part with the aforesaid directions. No order as to costs.

(2020)09ILR A716
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.08.2020

BEFORE
THE HON'BLE J.J. MUNIR, J.

WRIT – C No. 38708 of 2018

M/s Super Cassettes Industries Pvt. Ltd. ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Diptiman Singh

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

Civil Law - U.P. Industrial Disputes Act (28 of 1947) – Transfer of workman outside State - workman refused to comply with transfer order – as transfer not part of his service conditions - S.4K - Reference to Labour Court - regarding validity of termination - *Held* - On reference about the validity of the workman's dismissal - based on a charge of disobeying transfer order - Labour Court has jurisdiction to examine whether the transfer order could be lawfully made - though validity of the transfer order not referred - validity of dismissal order referred & validity of transfer order cannot be separated - requires wholesome determination - Labour Court directed to firstly examine the validity of the transfer order & then determine the validity of the order of dismissal referred (Para 18)

Allowed in part. (E- 5)

List of Cases cited: -

1. Workman of Bijlibari Tea Estate Vs Management of Bijlibari Tea Estate (2010) 4 Gauhati Law Reports 849

(Delivered by Hon'ble J.J. Munir, J)

1. This writ petition is directed against an award of the Labour Court, dated 27.07.2018 (published on 06.09.2018) passed by the Presiding Officer, Labour Court, NOIDA, Gautam Budh Nagar in Adjudication Case no.33 of 2018, between Kishan Bahadur and Toni Electronics Limited. By the said award, the Labour Court has answered the reference made to it, under Section 4-K of the Uttar Pradesh Industrial Disputes Act, 1947 (for short, "the Act'), regarding the validity of termination of services of Kishan Bahadur in favour of the workman and against the employers. The termination of the services of the workman with effect from 16.01.1996 has been held to be illegal and he has been ordered to be reinstated in service with full back-wages, continuity and other benefits.

2. It must be pointed out here that the industrial dispute was raised between Kishan Bahadur and Toni Electronics Limited, the employers. Pending the industrial dispute before the Labour Court, Toni Electronics Limited was amalgamated into Super Cassettes Industries Private Limited, in consequence of which Super Cassettes Industries Private Limited took over as the employers. They also took over all rights, liabilities and pending actions by or against Toni Electronics Limited. Accordingly, Super Cassettes Industries Private Limited made an application to the Labour Court that the cause title of the industrial dispute, pending before it, may be appropriately amended to indicate the

new identity of the employers. The said application was made on 13.08.2001 and allowed by the Labour Court on 02.08.2002. In this judgment, Kishan Bahadur shall hereinafter be referred to as, "the workmen', whereas the petitioner, M/s. Super Cassettes Industries Private Limited shall be referred to as, "the employers'.

3. This industrial dispute arose in relation to a unit of M/s. Toni Electronics Limited, situate at G-3,4, Sector 11, NOIDA, since amalgamated with the employers, under an order of the Registrar of Companies, dated 13.12.1999. The employers' unit was engaged in the manufacturing of Audio Cassettes. It is said that the employers have moved over to production and promotion of films, music and marketing of electronic goods, since audio cassettes have become an obsolete technology. The workman was employed as an Air Conditioner Mechanic with effect from 01.03.1989 with the employers. It appears that the workman was transferred from NOIDA, Gautam Budh Nagar to a unit of the employers, situate at Malanpur, District Bhind, Madhya Pradesh, by transfer order dated 03.07.1995, requiring him to join his station of transfer by 08.07.1995.

4. Shorn of unnecessary detail, the workman did not join at Malanpur in compliance with the transfer order, last mentioned. He was charge sheeted for the misconduct, in not complying with the transfer order. A charge sheet dated 19.08.1995 was issued to him. A domestic inquiry was held, where the workman was found guilty. An inquiry report dated 14.11.1995, holding him guilty, was submitted by the Inquiry Officer. A show cause notice dated 20.12.1995 was issued to the workman, following which the workman was dismissed from service vide order dated 13.01.1996, with effect from 16.01.1996. It is this action of the employers that led the workman to move the Authority under the Act by an Application, under Section 2-A, seeking conciliation. The conciliation having failed, an industrial dispute, under Section 4-K of the Act was referred by the Additional Labour Commissioner in the following terms (translated into English from Hindi vernacular):

"Whether the action of the employers in terminating the services of their workman, Sri Kishan Bahadur son of Sri Nand Ram, A.C. Operator w.e.f. 08.07.1995, is lawful and justified? If not, to what relief, compensation, the concerned workman is entitled and in what terms and with what effect."

5. The said reference led to registration of Adjudication Case no.489 of 1996. Objection was raised by the employers to the validity of this reference, inasmuch as the services of the workman were not terminated with effect from 08.07.1995, which is the date of his transfer order. Rather, he was dismissed from service after an inquiry on a charge of disobeying the transfer order vide order dated 13.01.1996 w.e.f. 16.01.1996. It appears that on 08.07.1996, a second reference was made regarding the industrial dispute between the employers and their workman, relating to termination of his services. This reference was made in the following terms by the Additional Labour Commissioner, Ghaziabad vide order dated 14.11.1996 (translated into English from Hindi vernacular):

"Whether the action of the employers in terminating the services of

their workman, Sri Kishan Bahadur son of Sri Nand Ram vide order dated 16.01.1996, is lawful and justified? If not, to what relief, compensation, the concerned workman is entitled and in what terms and with which date and what particulars."

6. On the basis of the reference dated 08.07.1996, Adjudication Case no.242 of 1997 was registered before the Presiding Officer, Labour Court, Ghaziabad. An objection was raised by the employers, this time, that a similar Adjudication Case no.489 of 1996 is pending between parties. The workman made an application in Adjudication Case no.489 of 1996 that he does not want to pursue the reference. Accordingly, the Presiding Officer, Labour Court, Ghaziabad accepted the application and held that on the reference, no industrial dispute survived, answering it accordingly. In Adjudication Case no.242 of 1997, parties lodged their written statements, their rejoinder statements, besides adducing evidence, both oral and documentary. Through their stand before the Labour Court, the employers informed that the workman had been dismissed from service in consequence of disciplinary proceedings by the order, the legality of which was subject matter of the reference. The employers' case, amongst others, made it clear that the workman was dismissed from service vide order dated 13.01.1996, after full course of disciplinary proceedings, on the charge that he had disobeyed the transfer order dated 03.07.1997.

7. It is pointed out that on 25.10.2007, Adjudication Case no.242 of 1997 was transferred from the Labour Court, Ghaziabad to the Labour Court, NOIDA, District Gautam Budh Nagar. At NOIDA, District Gautam Budh Nagar, the Adjudication Case was renumbered as 33 of 2008. The Labour Court proceeded to frame a preliminary issue regarding fairness of the domestic inquiry, undertaken by the employers. By an order dated 12.07.2017, the Labour Court held that the domestic inquiry conducted by the employers was fair and proper. In doing so, the Labour Court had before him the Inquiry Officer, who testified as a witness and the workman also. Evidence relating to proceedings of the inquiry was adduced. The Labour Court in holding the inquiry to be fair has recorded reasons that more than meet the eye.

8. The Labour Court has remarked that at the time of decision of the preliminary point, it is not to be seen whether the transfer order regarding disobedience, on which the charge was laid, was lawful or not. What had to be seen was, according to the Labour Court, whether the inquiry was procedurally fair. The Labour Court has then gone on to say that looked at from this point of view, it is clear that a charge sheet was given to the workman. His explanation being not satisfactory, inquiry proceedings were scheduled with a first date on 23.09.1995, when the workman did not appear. Again, 21.10.1995 was the date scheduled for the inquiry, when the workman appeared. He accepted the charge and said that he had no evidence to produce or witness to examine in his defence. He also did not cross-examine any witness. On the foot of these facts, the Labour Court held that it cannot be said that there was any violation of principles of natural justice or the charges were established against him through a flawed procedure.

9. It was also held that the preliminary point was answered in favour of the employers, holding the disciplinary

proceedings to be fair and one conducted according to the principles of natural justice. The Labour Court then directed the industrial dispute to come up for the purpose of determination, whether the transfer of the workman from the employers' unit at NOIDA to Malanpur, District Bhind, Madhya Pradesh, was lawful and further if for disobeying an order of that kind, the workman could be penalized.

10. Heard Sri Diptiman Singh, learned Counsel for the petitioner-Employers and Sri Shekhar Srivastava, learned Counsel appearing for the respondent-workman.

11. This Court has perused the deposition of the Inquiry Officer, Sri Anil Singhal before the Labour Court and also that of the workman. A wholesome reading of the deposition of the workman does not show that he has admitted the charge to be correct as remarked by the Labour Court in its order dated 12.09.2017, disposing of the preliminary point about fairness of the inquiry. If that were so, there would be nothing left for the Labour Court to determine. What in substance the workman has said in his testimony recorded on 23.03.2004, is that after a strike, the Management had reduced on facilities, like dress allowance, free tea and meals. He has also said that it is correct to say that he was pressurized to resign. On his refusal, he was suspended with effect from 22.02.1995. Departmental proceedings followed. He appeared at the inquiry. The charges could not be proved against him by the Management in that inquiry. The suspension order was withdrawn, but instead of being reinstated, he was transferred the same day, that is to say, 03.07.1995 to Malanpur, District Bhind, Madhya Pradesh. It was specifically stated by the workman in his evidence that transfer was not part of his service conditions and, therefore, he refused to comply with the transfer order. He has also said that Certified Standing Orders were never displayed on the notice board. The workman has said that he did not appear further before the Inquiry Officer because transfer is not a condition of his service. The inquiry convened is, therefore, manifestly illegal. In his cross-examination, the workman has accepted it for a fact that on 03.07.1995, he was transferred to Malanpur to join there by 08.07.1995. He has also acknowledged the fact that he did not join at Malanpur. He has also not denied that he was served with a charge sheet on 19.08.1995, to which he submitted a reply on 22.08.1995. He has also acknowledged the fact that when his reply was not found satisfactory, inquiry proceedings were convened. There is a long winded cross-examination further, recorded on 19.02.2007. He has acknowledged facts fairly about the inquiry proceedings; about when he appeared and when he did not. He has said for a fact that he admitted before the Inquiry Officer that when he did not join at Malanpur, he was served with a show cause notice. He has, however, denied the fact that he was ever provided his appointment letter. He has denied the fact that the employers did not withdraw facilities. He has also stated that it is wrong to say that he was not stopped from joining duties on 08.07.1995. It must be remarked that this statement of the workman perhaps refers to stopping him from joining work at NOIDA, Gautam Budh Nagar. He has then said in the concluding part of his cross-examination that his services have been wrongfully dispensed with, as a result of the inquiry proceedings.

12. This Court also notices that the Inquiry Officer appears to have been cross-

examined on behalf of the workman by one Ompal Singh, who appears to be his defence representative. He put the following questions to the Inquiry Officer:

"प्रश्न. क्या कारखाने के प्रमाणित स्थायी आदेशो अनुसार उन श्रमिको का दूसरे राज्य में स्थानान्तरण किया जा सकता है जो कर्मकार की परिभाषा में आते है ।

उत्तर. प्रमाणित स्थायी आदेश की धारा.19 (ए) के अनुसार सभी कर्मकारो का स्थानान्तरण एक विभाग से दूसरे विभाग एक फैक्टरी ६ आफिस६ स्थान से दूसरी फैक्टरी / आफिस६ स्थान पर स्थानान्तरण किया जा सकता है। उसमें एक राज्य से दूसरे राज्य में स्थानान्तरण के सम्बन्ध में कुछ नही लिखा गया है।

मैने स्थायी आदेश प्रमाणित होने के सम्बन्ध में कर्मकारो के निर्वाचित प्रतिनिधियों के बारे में कुछ नहीं देखा है।"

13. This testimony of the workman leaves this Court to wonder how the Labour Court inferred that the workman has admitted the charge. What the workman had admitted, is the fact that he did not comply with the transfer order; he was proceeded with departmentally for non-compliance and punished. He has taken a stand that transfer is not one of his conditions of service and, therefore, the punishment order is bad.

14. This Court is, therefore, of firm opinion that the Labour Court recorded a perverse finding in its order dated 12.09.2017 that on 21.10.1995, the workman appeared before the Inquiry Officer and accepted the charges against him, and signed proceedings. The findings that he did not ask for opportunity to lead evidence or cross-examine witnesses is also perverse. The stand of the workman is clear that he denied the charge that he committed any misconduct, but admitted the fact that he did not comply with the transfer order. What the workman clearly said was that since transfer was not part of his service conditions, disregarding that order was no misconduct. If this was his stand, he would have little evidence to offer in the matter of decision of the preliminary point about fairness of the inquiry. The order of the Inquiry Officer, disposing of the preliminary issue dated 12.09.2017 is bad, more fundamentally for another reason. After recording his conclusion that the inquiry was fair and the workman has admitted the charge, the Labour Court posted the industrial dispute for adjudication on the point whether the transfer order was lawful and if its disobedience could be punished. This was never the subject matter of reference, made to the Inquiry Officer.

15. Mr. Deeptiman Singh, learned Counsel for the employers has argued that the impugned award is bad because the Labour Court has gone into the validity of the transfer order, which he could not do as a Court of referred jurisdiction.

16. On the other hand, Sri Shekhar Srivastava, learned Counsel for the workman has aruged that the order of reference is about dismissal from service of the workman, at the bottom of which lies the validity of a transfer order. The validity of the transfer would, therefore, have to be adjudged while judging the issue about the validity of termination of the workman's services on a charge of disobeying the transfer order.

17. These submissions of learned Counsel for both sides represents a correct

perspective of the matter from their respective vantage. It has to be put together to form a wholesome and complete picture. This situation has come about because in this case and going by the structure of the dispute and the terms of reference, the Labour Court could not have decided the question as a preliminary about the procedural fairness of the inquiry. Any step towards resolution of the industrial dispute would require the Labour Court to determine whether the transfer order was indeed valid for the workman. If it was not the inquiry conducted, howsoever fairly, would be proceeding built on the edifice of a charge, that was *non est.*

18. The submission of Mr. Deeptiman Singh, learned Counsel for the employers that on a reference about the validity of the workman's termination from service or dismissal pursuant to disciplinary proceedings vide order dated 16.01.19996, the validity of the transfer order dated 03.07.1995, could not be gone into, is not acceptable. It is for the reason, already indicated, and made more clear by saying that the charge on the basis of which the workman has been dismissed or removed from service has as its necessary concomitant, the validity and legality of the transfer order dated 03.07.1995. In deciding the validity of the order of dismissal dated 16.01.1996, subject matter of reference, the Labour Court has jurisdiction to examine whether the transfer order could be lawfully made. But, by recording the order dated 12.09.2017 holding that the workman has accepted the charges against him and the inquiry is fair, the Labour Court has virtually left itself with nothing to decide. Also, the Labour Court in passing the impugned award has dealt with a truncated reference, under these circumstances. To add, the Labour Court has recorded in the impugned award and the order dated 12.09.2017, conclusions that would virtually run contrary to one another. The principle is that the Labour Court while judging the validity of an order of removal based on a charge about the violation of a transfer order, where the terms of reference are about the validity of the termination/ dismissal from service, can well go into the validity of the transfer order also; though validity of the transfer order is not *per se* referred.

19. The view of this Court finds support from the decision of the Gauhati High Court in **Workman of Bijlibari Tea Estate vs. Management of Bijlibari Tea Estate, (2010) 4 Gauhati Law Reports 849**, where considering the question of validity of dismissal from service of the workman on his refusal to accept an unlawful transfer, it was held:

"14. In the instant case, it is evident from the domestic enquiry proceeding (Exhibit-1) conducted against the concerned workman, relating to the charge levelled against him that the workman had participated in such proceeding and the reasonable opportunity of being heard was given. There is no allegation of victimisation or unfair labour practice as well as the allegation against the management that it had not acted in good faith. It appears that the case of the Union is that the domestic enquiry is not fair and valid as no finding has been recorded into the charge of misconduct levelled against the workman and no reason has also been recorded, inasmuch as, the Enquiry Officer did not go into the aspect as to whether by the order of transfer the conditions of employment has been violated. According to the Union, disobedience of a transfer

order which is lawful and reasonable, only amounts to the misconduct under clause 10 of the standing order in force and in the instant case, as the workman was engaged in Bijlibari Tea Estate, he cannot be transferred out of the said Tea Estate and to a new venture/Tea Estate, which was not in existence at the time of his appointment. The further case, as it appears from the evidences adduced before the labour court, is that in any case, he cannot be transferred out of Dibrugarh district and the transfer order amounts to depriving him from the enjoyment of other benefits attached to his service like housing facilities, etc.

15. The Enquiry Officer though in his report had rejected the contention of the workman that he cannot be transferred out of Dibrugarh district and also relating to deprivation from enjoyment of certain benefits, had not, however, recorded any finding relating to the plea of the workman that since he was appointed in respect of Bijlibari Tea Estate only, he cannot be transferred to any other Tea Estate subsequently established by the management, while recording the finding that the lawful order of transfer has been disobeyed by the concerned workman, which amounts to misconduct, without, however, considering as to whether the order of transfer is lawful as the concerned workman was appointed only in respect of Bijlibari Tea Estate. That aspect of the matter has also not been gone into by the labour court.

16. Clause 10 of the standing order in force provides the acts or omissions of the workman constituting gross misconduct. Clause 10(a)(1) of the standing order provides that the wilful insubordination or disobedience of only a lawful or a reasonable order of a superior constitutes gross misconduct. In the case in hand, the charge against the concerned workman was that he did not obey the order of transfer, which was the basis for taking disciplinary action against the concerned workman. The management, therefore, has to prove that the order of transfer is lawful and reasonable so as to constitute misconduct within the meaning of clause 10 of the standing order. The concerned workman, as noticed above, has all along pleaded that he being appointed in Bijlibari Tea Estate, he cannot be transferred out of the said Tea Estate. If such plea is accepted then he cannot be transferred out of Bijlibari Tea Estate and in that case the order of transfer would not be lawful and consequently, the concerned workman cannot be punished for not carry out such an order, the same having not constituted misconduct within the meaning of clause 10 of the standing order in force.

17. As discussed above, the Enquiry Officer did not record any finding on the vital aspect of the matter as to whether the workman could be transferred out of Bijlibari Tea Estate, his appointment being in respect of Bijlibari Tea Estate only. It has not been disputed by the learned senior counsel for the management that the concerned workman was appointed in respect of Bijlibari Tea Estate and there was no other venture of the management at the point of time when the concerned workman was appointed. It is also not in dispute that by the order dated 8.8.1994, he was sought to be transferred to a new venture, which according to the management, is the out garden. The domestic enquiry held against the concerned workman, therefore, cannot be held to be fair and valid so as not to go into the merit of the case by the labour court, as has been done in the instant case, as the Enquiry Officer did not go into the vital aspect of the matter, as noticed above, which amounts to violation of the principles of natural justice.

22. It appears from the order of transfer dated 8.8.1994 that the pay and other benefits of the concerned workman had not been disturbed. The management by, proving the communication dated 7.9.1994 (Exhibit-6) has proved that all his service benefits including the salary and other incentives would be paid and he would be provided with rental housing facility or house rent commensurate to his status. That being the position, the concerned workman's salary, other incentives and the housing facilities etc. were 20 not disturbed and he would continue to enjoy the same, which he was enjoying in Bijlibari Tea Estate. The plea of the concerned workman that he cannot be transferred out of Dibrugarh district was also rightly found to be not acceptable by the Enquiry Officer in his report. However, it is an admitted position of fact that the concerned workman was appointed initially as trainee and thereafter, as Hazira Maharar for Bijlibari Tea Estate only. It is also not in dispute that by the order of transfer dated 8.8.1994, the workman was sought to be transferred to a proposed new venture at Margherita, which naturally was not in existence while the concerned workman was appointed. Unless there is a specific condition in the order of appointment that he can be transferred out of the Tea Estate, where he was appointed and even to a new venture, the management in exercise of its right of transfer of its workman cannot transfer such workman to a new venture, as such right of the management cannot be implied as conditions of service. If a workman is appointed in respect of one Tea Estate, he cannot be transferred to another Tea Estate, as it would be the violation of his conditions of employment he being appointed in respect of a particular Tea Estate only. In the case in hand, as noticed above, there is no dispute that the concerned workman was appointed in respect of Bijlibari Tea Estate only and hence, he cannot be transferred out of Bijlibari Tea Estate, even though the new venture is under the same management, but he can definitely be transferred to another section or to any other transferable post within the tea estate. The management though has taken the plea that the said new venture is nothing but an extension of Bijlibari Tea Estate, did not produce any evidence before the labour court in that regard. The order of transfer reveals that the concerned workman was transferred to a new venture proposed to be started.

23. The Apex Court in Kundan Sugar Mills, (supra) while considering almost the similar facts involved in the case in hand, has held that the employer has no inherent right to transfer his employee to another place where he chooses to start a business subsequent to the date of the employment, when there was no condition of service of employment of the employee either express or implied that the employer has the right to transfer to such new venture started or proposed to be started subsequent to the date of his employment. The Apex Court in that case has uphold the judgment of the labour Appellate 21 Tribunal holding that the management had no right to transfer the workman to a new factory and hence, the order dismissing him from service was illegal, based on the fact that such workman employed in a factory owned by the management was sought to be transferred to a new venture. The Single Bench decision of this court in Kakodanga Tea Estate (P.) Ltd., (supra), on which the learned senior counsel for the management places reliance, cannot be applied in the case in hand, in view of the aforesaid discussion and as in that case, the concerned workman was transferred from a post in the tea garden to the Head Quarter of the Tea Company."

20. The reference in **Workman of Bijlibari Tea Estate** was in the following terms (quoted verbatim from the report in **Workman of Bijlibari Tea Estate**):

"(a) Whether the management of Bijlibari T.E., Hoogrijan, PO-Hoogrijan, Dist. Dibrugarh is justified in dismissing Sri Sankar Dutta, Hazira, Mohurrer from service or not?

(b) It not, is he entitled to reinstatement with full back wages or any other relief in lieu thereof?"

21. In **Workman of Bijlibari Tea Estate**, the Gauhati High Court held the dismissal of the workman bad on a reference about dismissal from service on ground that the charges were based on a transfer order, which was illegal. This is precisely the workman's case here. This Court does not wish to say at all whether the order of transfer is valid or invalid.

22. Mr. Deeptiman Singh has attempted to show that the Certified Standing Orders of the Company do make provision for an inter-State transfer. Mr. Shekhar Srivastava, on the other hand, submits that the provisions there do not warrant a transfer outside the State. Other issues have also been attempted to be raised by the learned Counsel. This Court is not inclined to go into those matters in the present petition as in the opinion of this Court, this matter must go back to the Labour Court for a wholesome determination of the reference. The Labour Court would examine the validity of the transfer order, first in sequence, and then proceed to determine the validity of the order of dismissal referred. The validity of the order of dismissal referred and the validity of the order of transfer cannot be separated. It requires a wholesome determination.

23. In the result, the impugned award is liable to be quashed, as also the order separately made, disposing of the point regarding validity of the inquiry proceedings, though the said order dated 12.09.2017 is not formally challenged by the employers. That order is patently illegal and cannot be permitted to survive.

24. In the result, this writ petition is **allowed in part**. The impugned award dated 27.07.2018 (published on 06.09.2018) passed by the Presiding Officer, Labour Court, NOIDA, Gautam Budh Nagar in Adjudication Case no.33 of 2018 and the order dated 12.09.2017 passed by the Labour Court in the Adjudication Case aforesaid, are hereby **quashed**. Reference dated 08.07.2016 is upheld. The Labour Court shall proceed to redetermine the reference in accordance with law and endeavour to decide the same within a period of six months next, after hearing both parties and bearing in mind guidance in this judgment. It is further ordered that out of the sum of Rs.50,000/- deposited by the employers with the Labour Court in compliance with the interim order dated 27.11.2018, the sum of Rs.25,000/- paid to the workman, shall not be recovered, whereas the balance of Rs.25,000/-, invested with whatever Nationalized Bank, shall be forthwith withdrawn, together with accrued interest and remitted to the employers. There shall be no order as to costs.

(2020)09ILR A724
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 11.06.2020

BEFORE

THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE RAVI NATH TILHARI, J.

WRIT - C No. 39872 of 2018

Brij Kumar Singh ...Petitioner
Versus

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

Counsel for the Petitioner:
Sri Bidhan Chandra Rai

Counsel for the Respondents:
C.S.C., Sri Krishna Mohan Asthana, Sri Satish Chaturvedi, Sri Mohan Ji Srivastava, Mrs. S. Rathi

Civil Law -Urban Land (Ceiling and Regulation) Act,1976 - Urban Land (Ceiling and Regulation) Repeal Act - Section 3, Section 4 - Land Ceiling - Actual physical possession - possession contemplated u/s 3 & 4 of the Repeal Act, 1999, is actual possession of surplus land & not a mere paper possession - If on the date of the coming into force of the Repeal Act, 1999, actual physical possession of surplus land with land holder - entitled to the benefit of the Repeal Act, 1999 (Para 29)

Held - On the date of the coming into force of the Repeal Act, 1999, actual physical possession of the land declared surplus was with the petitioner - actual physical possession of the surplus land neither delivered to the Government voluntarily nor taken forcefully by the Government in the proceedings under the Principal Act - transfer of possession of the surplus land by the Government in favour of respondent no. 4 on paper, of no consequence - petitioner entitled to the benefit of the Repeal Act, 1999 - Direction issued to expunge name of State from the revenue record and restore that of the petitioner who is the owner of the land (Para 35)

Allowed. (E-5)

List of Case cited :-

1. Devaki Nandan Prasad Vs St. of Bihar 1983 Law Suit (SC) 129

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

1. Heard Sri B.C. Rai, learned counsel for the petitioner, Sri M.C. Chaturvedi, learned Additional Advocate General, U.P. assisted by Sri Mohanji Srivastava, learned counsel for respondent nos. 1, 2 and 3 and Mrs. S. Rathi, learned counsel for respondent no. 4.

2. This writ petition has been filed by the petitioner with the following prayer to :-

i. issue a writ of certiorari to quash the impugned order dated 06.08.2018 as contained in Annexure No. 17 passed by the Principal Secretary, Avas Evam Sahari Niyojan Anubhag-6, Lucknow/ Respondent No. 1 and E-tender notice dated 11.10.2018 as contained in Annexure No. 19 issued by the Moradabad Development Authority, Moradabad/Respondent no. 4 inviting bid for development of a residential colony over Gata No. 02 (2A and 2B) situated at village- Shahpur Tigri, Tehsil and District-Moradabad;

ii. issue a writ, order or direction in the nature of writ of mandamus directing the Competent Authority, Urban Land Ceiling, Moradabad to restore the entry of the name of the petitioner in revenue records in respect to Gata Nos. 2A (area 40523.93 sq. metres) and 2B (area 2063.97 sq. metres), total area 42587.96 square metres situated in revenue village- Shahpur, Tigri, Tehsil- Moradabad, District- Moradabad;

iii. issue a writ, order or direction in the nature of writ of mandamus commanding the respondents not to interfere in the actual physical possession of the petitioner over the Gata Nos. 2A & 2B situated in revenue village- Shahpur, Tigri, Tehsil- Moradabad, District-Moradabad;

iv. issue such other and further writ, order or direction which this Hon'ble Court may deem fit and proper in the circumstances of the case; and

v. award the cost of the writ petition.

3. Briefly stated the facts of this case are that the petitioner's plot namely Gata Nos. 2A (area 40523.93 sq. metres) and 2B (area 2063.97 sq. metres), total area 42587.96 square metres situated in revenue village- Shahpur, Tigri, Tehsil- Moradabad, District- Moradabad (hereinafter referred to as the 'land in question') was declared surplus under the Urban Land (Ceiling and Regulation) Act, 1976, hereinafter referred to as the 'principal Act'. He challenged the proceeding by means of Writ Petition No. 19264 of 1993 wherein this Court on 7.6.1993 passed an interim order that the petitioner will not be dispossessed from the land in question. Vide order dated 14.10.1993, the said interim order was continued. In the meantime, the principal Act was repealed. In view of the said fact, a Division Bench of this Court vide its judgement dated 21.9.2001 abated the proceedings under the principal Act and in view of the said fact, the writ petition was disposed of. It appears that inspite of the said judgement, no consequential steps were taken by the respondents on the representation of the petitioner. Therefore, the petitioner preferred a Writ Petition No. 4085 of 2006 in which this Court found that a short question was required to be decided whether actual physical possession was or was not taken in the proceedings under the principal Act. Pursuant to the order of Division Bench dated 23.1.2006, a decision was taken by respondent no. 1 on 9.5.2007 wherein the authorities found that the petitioner is not in physical possession.

4. Dissatisfied with the order dated 9.5.2007, the petitioner again approached this Court by way of filing Writ Petition No. 28150 of 2007. The said writ petition was allowed with the following observation :-

"Possession on paper is a symbolic possession and word 'possession' used in Clause (a) of Section (2) of Section 3 of the Act mean actual physical possession and not the symbolic possession.

After the repealing of the Urban Land (Ceiling & Regulation Repeal) Act 1976 by Act No. 15 of 1999 Urban land (Ceiling and Regulation Repeal) Act 1999 the petitioners are entitled to the benefit of Section 3 of the Act No. 15 of 1999. The petitioner's land shall not be treated to have been declared as vacant land under the repeal Act.

For the reasons recorded above, the instant writ petition is allowed.

No orders as to cost."

5. The Moradabad Development Authority aggrieved by the said order preferred a Special Leave Petition No. 12283 of 2012 wherein initially status quo order was passed. Later on, the Hon'ble Supreme Court directed the District Judge, Moradabad to submit a report after inspection of the land in question regarding the physical possession of the land in question. The District Judge in its report found that the petitioner is in physical and cultivated possession. The District Judge submitted a report. The relevant part of the report of the District Judge reads as under:-

"Later on, A visit has also been made at Gata No.2A and 2B measuring 42587.93 Sq. M. situated at village Shahpur Tigri, District Moradabad. All the aforesaid officers and Sri Brij Kumar Singh were present there. In this gata number, there is no development or construction/residential colony. The total land is lying vacant in the shape of cultivated land and there is no crop standing on the said disputed land as shown in the map prepared by Amin as Annexure No. 4."

6. The Supreme Court upon considering the said report dismissed the special leave petition No. 30659 of 2010 of the Moradabad Development Authority with the following observations:-

"Be it noted, in the report, it has been clearly stated that the plots in respect of which possession has not been taken over, the same shall remain in possession of the persons who are already in possession."

7. The aforesaid facts clearly demonstrate that the findings recorded by this Court in Writ Petition No. 28150 of 2007 quoted herein above had not been set aside by the Supreme Court. The said fact leaves no room for any doubt that the petitioner is in possession over the land in question. It appears that inspite of the aforesaid judgements when no consequential steps were taken by the respondents, the petitioner again approached this Court by means of a Writ Petition No. 8789 of 2018. This Court without expressing any opinion on merits observed as under:-

"Accordingly, we direct the respondents No.1, 2 and 3 to consider the application of the petitioner for recording his name over the land in dispute in accordance with law after hearing the petitioner as well as the Moradabad Development Authority as expeditiously as possible, preferably within a period of three months."

8. In compliance of the said order the respondent no.1, Principal Secretary, Awas Evam Sahari Niyojan, Government of U.P., Lucknow, passed the impugned order dated 06.8.2018 referring the opinion of the D.G.C. (Civil). In the said report, the Principal Secretary, Awas Evam Sahari Niyojan, Government of U.P., Lucknow, has held that Moradabad Development Authority is in possession of the land and he has referred some documents.

9. It appears that the coordinate Bench of this Court took note of the fact that the Principal Secretary, Awas Evam Sahari Niyojan, Government of U.P., Lucknow while passing the impugned order dated 06.08.2018 had ignored the judgement of the Hon'ble Supreme Court and this Court where categorical findings were recorded that the petitioner was in possession of the disputed plot and had placed its conclusion on the report of the D.G.C. and directed the Principal Secretary, Awas Evam Sahari Niyojan, Government of U.P., Lucknow to file his personal affidavit.

10. The Moradabad Development Authority filed Civil Appeal No. 3242 of 2019 arising out of SLP (C) No. 2900/2019 before the Hon'ble Apex Court challenging the interim order dated 18.12.2018 which was finally disposed of by the order of Hon'ble Supreme Court passed on 27.03.2019 which runs as hereunder :-

Leave granted.

1. The appellants are aggrieved by the observations made in the interim order passed by the High Court on 18.12.2018.

2. Mainly, according to Shri Rakesh U. Upadhyay, learned counsel for the appellants, the High Court ought not to have observed "that the Principal Secretary, Awas Evam Shahri Niyojan, Government of U.P., Lucknow, should not have ignored the judgement of the Supreme Court and this Court where clear finding has been recorded regarding the

possession of the petitioner". According to the appellants this Court vide order dated 04.01.2017 passed in SLP (C) Nos. 30658-30659/2010 and connected matter recorded a specific finding about possession i.e., whether it is with the petitioner(s) or with the respondent(s). We find that the submission of Shri Upadhyay in this regard is correct.

3. Shri M.L. Lahoty, learned counsel for the respondents pointed out that there is reference to the possession being with the respondents in the High Court's order dated 19.08.2019. This however, is countered by Shri Upadhyay by submitting that the possession referred to in the High Court's order is symbolic possession and not actual possession. It is not necessary for us to render any finding on possession, particularly, since these appeals are only against an interim order. We, however, feel that the observations in the order of the High Court were not necessary for the purpose of the interim order and the matter needs a final decision on the entire dispute in Writ C No. 39872/2018, pending before the High Court.

4. We accordingly, set aside the impugned order and request the High Court to dispose of Writ C No. 39872/2018 as early as possible, preferably not later than one year.

5. The appeals are disposed of accordingly.

6. Shri M.L. Lahoty seeks permission to withdraw Contempt Petition No. 4646 of 2018 in view of the above order.

7. Ordered accordingly.

8. In view of the order passed in the above appeals, these appeals are also disposed of.

11. We therefore, proceed to decide this matter finally on merits in pursuance of the direction issued by the Apex Court vide order dated 27.03.2019.

12. It is urged by the learned counsel for the petitioner that the Principal Secretary, Awas Evam Sahari Niyojan, Government of U.P., Lucknow, has tried to over reach the order of the Supreme Court. Once the matter was settled by this Court against which S.L.P. was dismissed, the Principal Secretary, Awas Evam Sahari Niyojan, Government of U.P., Lucknow, has no business to pass a contrary order. He has referred a judgment of the Supreme Court in the case of ***Devaki Nandan Prasad Vs. State of Bihar*** reported in ***1983 Law Suit (SC) 129***. He further urged that in fact the order of the Principal Secretary, Awas Evam Sahari Niyojan, Government of U.P., Lucknow is contemptuous, perverse and not warranted by any material on record.

13. Per contra Sri M.C. Chaturvedi, learned Additional Advocate General, U.P. assisted by Sri Mohanji Srivastava, learned counsel for respondent nos. 1, 2 and 3 and Mrs. S. Rathi, learned counsel for respondent no. 4 made a feeble attempt to defend the impugned order and submitted that the material on record indicates that the possession of the land in question was transferred by the respondent nos. 1 to 3 to respondent no. 4 and hence, the impugned order which is based upon relevant consideration and supported by cogent reasons warrants no interference by this Court. This writ petition lacks merit and is liable to be dismissed.

14. We have heard learned counsel for the parties and perused the material brought on record including the original record pertaining to the proceedings taken under the principal Act in respect of the

petitioner's land which was produced before us by the learned counsel appearing for the respondent nos. 1 to 3.

15. The twin questions which arise for our consideration in this writ petition inter-alia are that whether on the date of the coming into force of the Repeal Act, 1999, actual physical possession of the disputed land was with the petitioner or the same stood delivered to the State and; whether the petitioner is entitled to the benefit of the Repeal Act ?

16. In order to examine the aforesaid questions, it would be useful to reproduce the provisions of the principal Act and The Urban Land (Ceiling and Regulation) Repeal Act, 1999 which are relevant for our purpose :-

6. Persons holding vacant land in excess of ceiling limit to file statement-

(1) Every person holding vacant land in excess of the ceiling limit at the commencement of this Act shall, within such period as may be prescribed, file a statement before the competent authority having Jurisdiction specifying the location, extent, value and such other particulars as may be prescribed of all vacant land and of any other land on which there is a building, whether or not with a dwelling unit therein, held by him (including the nature of his right, title or interest therein) and also specifying the vacant land within the ceiling limit which he desires to retain: Provided that in relation to any State to which this Act applies in the first instance, the provisions of this sub-section shall have effect as if for the words "Every person holding vacant land in excess of the ceiling limit and the commencement of this Act", the words, figures and letters "Every person who held vacant land in excess of the ceiling limit on or after the 17th day of February, 1975 and before the commencement of this Act and every person holding vacant land in excess of the ceiling limit at such commencement" had been substituted. Explanation.--In this section, "commencement of this Act" means,--

(i) the date on which this Act comes into force in any State;

(ii) where any land, not being vacant land, situated in a State in which this Act is in force has become vacant land by any reason whatsoever, the date on which such land becomes vacant land;

(iii) where any notification has been issued under clause (n) of section 2 in respect of any area in a State in which this Act is in force, the date of publication of such notification.

(2) If the competent authority is of opinion that--

(a) in any State to which this Act applies in the first instance, any person held on or after the 17th day of February, 1975 and before the commencement of this Act or holds at such commencement; or

(b) in any State which adopts this Act under clause (1) of article 252 of the Constitution, any person holds at the commencement of this Act, vacant land in excess of the ceiling limit, then, notwithstanding anything contained in sub-section (1), it may serve a notice upon such person requiring him to file, within such period as may be specified in the notice, the statement referred to in sub-section (1).

(3) The competent authority may, if it is satisfied that it is necessary so to do, extend the date for filing the statement under this section by such further period or periods as it may think fit; so, however, that the period or the aggregate of the periods of such extension shall not exceed three months.

(4) The statement under this section shall be filed,--

(a) in the case of an individual, by the individual himself; where the individual is absent from India, by the individual concerned or by some person duly authorised by him in this behalf; and where the individual is mentally incapacitated from attending to his affairs, by his guardian or any other person competent to act on his behalf;

(b) in the case of a family, by the husband or wife and where the husband or wife is absent from India or is mentally incapacitated from attending to his or her affairs, by the husband or wife who is not so absent or mentally incapacitated and where both the husband and the wife are absent from India or are mentally incapacitated from attending to their affairs, by any other person competent to act on behalf on the husband or wife or both;

(c) in the case of a company, by the principal officer thereof;

(d) in the case of a firm, by any partner thereof;

(e) in the case of any other association, by any member of the association or the principal officer thereof; and

(f) in the case of any other person, by that person or by a person competent to act on his behalf. Explanation.--For the purposes of this sub-section, "principal officer"--

(i) in relation to a company, means the secretary, manager or managing-director of the company;

(ii) in relation to any association, means the secretary, treasurer, manager or agent of the association, and includes any person connected with the management of the affairs of the company or the association, as the case may be, upon whom the competent authority has served a notice of his intention of treating his as the principal officer thereof.

7. Filing of statement in cases where vacant land held by a person is situated within the jurisdiction of two or more competent authorities.--

(1) Where a person holds vacant land situated within the jurisdiction of two or more competent authorities, whether in the same State or in two or more States to which this Act applies, then, he shall file his statement under sub-section (1) of section 6 before the competent authority within the jurisdiction of which the major part thereof is situated and thereafter all subsequent proceedings shall be taken before that competent authority to the exclusion of the other competent authority or authorities concerned and the competent authority, before which the statement is filed, shall send intimation thereof to the other competent authority or authorities concerned.

(2) Where the extent of vacant land held by any person and situated within the jurisdiction of two or more competent authorities within the same State to which this Act applies is equal, he shall file his statement under sub-section (1) of section 6 before any one of the competent authorities and send intimation thereof in such form as may be prescribed to the State Government and thereupon, the State Government shall, by order, determine the competent authority before which all subsequent proceedings under this Act shall be taken to the exclusion of the other competent authority or authorities and communicate that order to such person and the competent authorities concerned.

(3) Where the extent of vacant land held by any person and situated within the jurisdiction of two or more competent authorities in two or more States to which

this Act applies is equal, he shall file his statement under sub-section (1) of section 6 before any one of the competent authorities and send intimation thereof in such form as may be prescribed to the Central Government and thereupon, the Central Government shall, by order, determine the competent authority before which all subsequent proceedings shall betaken to the exclusion of the other competent authority or authorities and communicate that order to such person, the State Governments and the competent authorities concerned.

8. Preparation of draft statement as regards vacant land held in excess of ceiling limit-

(1) On the basis of the statement filed under section 6 and after such inquiry as the competent authority may deem fit to make the competent authority shall prepare a draft statement in respect of the person who has filed the statement under section 6.

(2) Every statement prepared under sub-section (1) shall contain the following particulars, namely:--

(i) the name and address of the person;

(ii) the particulars of all vacant land and of any other land on which there is a building, whether or not with a dwelling unit therein, held by such person;

(iii) the particulars of the vacant lands which such person desires to retain within the ceiling limit;

(iv) the particulars of the right, title or interest of the person in the vacant land; and

(v) such other particulars as may be prescribed.

(3) The draft statement shall be served in such manner as may be prescribed on the person concerned together with a notice stating that any objection to the draft statement shall be preferred within thirty days of the service thereof.

(4) The competent authority shall duly consider any objection received, within the period specified in the notice referred to in sub-section (3) or within such further period as may be specified by the competent authority for any good and sufficient reason, from the person whom a copy of the draft statement has been served under that sub-section and the competent authority shall, after giving the objector a reasonable opportunity of being heard, pass such orders as it deems fit.

9. Final Statement.--After the disposal of the objections, if any, received under sub-section (4) of section 8, the competent authority shall make the necessary alterations in the draft statement in accordance with the orders passed on the objections aforesaid and shall determine the vacant land held by the person concerned in excess of the ceiling limit and cause a copy of the draft statement as so altered to be served in the manner referred to in sub-section (3) of section 8 on the person concerned and where such vacant land is held under a lease, or a mortgage, or a hire-purchase agreement, or an irrevocable power of attorney, also on the owner of such vacant land.

10. Acquisition of vacant land in excess of ceiling limit-

(1) As soon as may be after the service of the statement under section 9 on the person concerned, the competent authority shall cause a notification giving the particulars of the vacant land held by such person in excess of the ceiling limit and stating that--

(i) such vacant land is to be acquired by the concerned State Government; and

(ii) the claims of all person interested in such vacant land may be made by them personally or by their agents giving particulars of the nature of their

interests in such land, to be published for the information of the general public in the Official Gazette of the State concerned and in such other manner as may be prescribed.

(2) After considering the claims of the persons interested in the vacant land, made to the competent authority in pursuance of the notification published under sub-section (1), the competent authority shall determine the nature and extent of such claims and pass such orders as it deems fit.

(3) At any time after the publication of the notification under sub-section (1) the competent authority may, by notification published in the Official Gazette of the State concerned, declare that the excess vacant land referred to in the notification published under sub-section (1) shall, with effect from such date as may be specified in the declaration, be deemed to have been acquired by the State Government and upon the publication of such declaration, such land shall be deemed to have vested absolutely in the State Government free from all encumbrances with effect from the date so specified.

(4) During the period commencing on the date of publication of the notification under sub-section (1) and ending with the date specified in the declaration made under sub-section (3)--

(i) no person shall transfer by way of sale, mortgage, gift, lease or otherwise any excess vacant land (including any part thereof) specified in the notification aforesaid and any such transfer made in contravention of this provision shall be deemed to be null and void; and

(ii) no person shall alter or cause to be altered the use of such excess vacant land.

(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 authorized by the State Government in this behalf within thirty days of the service of the notice.

(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.

17. Section 3 and 4 of the Repeal Act, 1999 are as hereunder :-

3. Saving.--

(1) The repeal of the principal Act shall not affect--

(a) the vesting of any vacant land under sub-section (3) of Section 10, possession of which has been taken over the State Government or any person duly authorised 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 authorised 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.

18. From the perusal of the aforesaid provisions of the principal Act, it transpires that Section 6 provides that every person holding vacant land in excess of the ceiling limit was required to file a statement before the competent authority having jurisdiction specifying the location, extent, value and such other prescribed particulars of the vacant land and of any other land on which there was a building, whether or not with a dwelling unit therein, held by him.

19. Section 7 provides the procedure for filing of statement in cases where vacant land held by a person was situated within the jurisdiction of two or more competent authorities.

20. Section 8 provides that on the basis of the statement filed u/s 6 and after such inquiry as the competent authority may deem fit to make, the competent authority shall prepare the draft statement.

21. Section 8 (3) stipulates that the draft statement prepared u/s 8 shall be served on the person concerned together with a notice stating that any objection to the draft statement shall be prepared within 30 days of the service thereof.

22. Section 9 provides that after disposal of the objections, if any, received under sub-section (4) of Section 8, the competent authority shall prepare the final statement.

23. Section 10 (1) provides that after the service of the statement u/s 9 on the person concerned, the competent authority shall cause a notification giving the particulars of the vacant land held by such person in excess of the ceiling limit to be published in the Official Gazette of the State concerned for the information of the general public.

24. Section 10 (2) empowers the competent authority to decide the claims of the persons interested in the vacant land filed in pursuance of the notification published under sub-section (1).

25. Section 10 (3) provides that the competent authority concerned may, by notification published in the Official Gazette of the State concerned, anytime

after the publication of the notification under sub-section (1) declare that excess vacant land referred to in the notification published under sub-section (1) with effect from such date as may be specified in the declaration, be deemed to have been acquired by the State Government. Such land shall be deemed to have vested absolutely in the State Government free from all encumbrances.

26. Section 10 (4) prohibits transfer by way of sale, mortgage, gift, lease or otherwise by any person any excess vacant land (including any part thereof) specified in the notification aforesaid and any such transfer made in contravention of this provision shall be deemed to be null and void and no person shall alter or cause to be altered the use of such excess vacant land.

27. Section 10 (5) empowers the competent authority to order any person by notice in writing who is in possession of any vacant land vested in the State Government under sub-section (3) to surrender or deliver possession thereof to State Government or to any person duly authorized by the State Government in this behalf within thirty days of the service of the notice.

28. Section 10 (6) states where 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 authorized by such State Government in this behalf and may for that purpose use such force as may be necessary.

29. The kind of possession contemplated u/s 3 & 4 of the Repeal Act, 1999, in our opinion, is actual possession and not a mere paper possession and if the possession of the petitioner's land which was declared surplus land stood vested in the State Government u/s 10 (3) of the principal Act was not taken and no proceedings u/s 11, 12, 13 and 14 of the principal Act were pending on the date of coming into force of the Repeal Act, 1999, the petitioner is entitled to the benefit of the Repeal Act, 1999.

30. From the perusal of the original record, notification u/s 10 (3) of the principal Act in respect of the land in question was published on 28.02.1986 while notice u/s 10 (5) of the principal Act was issued on 25.05.1990 and published in the official gazette on 28.07.1990. There is also a possession memo dated 13.11.1992, copy whereof has been brought on record as Annexure No. C.A.-4 to the counter affidavit filed on behalf of the respondent no. 4 in the writ petition, by which the possession of the land in question was purported to have been taken by the respondent no. 2. The possession memo neither contains name of the person from whom respondent no. 2 had obtained the actual physical possession of the land in question nor the said document has been signed by the petitioner.

31. It is also not the case of the respondents that after publication of the notice u/s 10 (5) of the principal Act in the official gazette, the petitioner had delivered the physical possession of his surplus land to the respondent nos. 1 to 3.

32. We have very carefully scanned the original record and we are constrained to observe that there is no material on record indicating that forcible possession of the land in question was taken by the

respondents from the petitioner u/s 10 (6) of the principal Act. The possession memo dated 13.04.1992 appears to be a sham document and there is nothing which may persuade us into holding that either the possession of the land in question was peacefully delivered by the petitioner to the respondents after the publication of the notice u/s 10 (5) of the principal Act or the respondent no. 2 had taken forcible possession of the land in question from the petitioner.

33. Thus, we have no hesitation in holding that the petitioner was in possession of the land in question on the date on which the Repeal Act, 1999 came into force. Even otherwise the Hon'ble Apex Court as well as this Court have recorded categorical findings of fact in their judgements that the possession of the land in question was with the petitioner.

34. In **State of U.P. v. Hari Ram**, reported in **(2013) 4 SCC 280**, the Apex Court observed that what is required for a land to come out from the purview of Repeal Act is that it should be a case of forceful dispossession in the event of there being no peaceful dispossession. The peaceful dispossession is related to proceedings u/s 10 (5) of the principal Act, whereas, the forceful dispossession is related to proceedings u/s 10 (6) of the principal Act vide paragraph 39 of **Hari Ram (supra)**, the Court concluded thus :-

"39. Above-mentioned directives make it clear that sub-section (3) takes in only de jure possession and not de facto possession, therefore, it the land owner is not surrendering possession voluntarily under sub-section (3) of Section 10, or surrendering or delivering possession after notice, u/s 10 (5) or dispossession by use of force, it cannot be said that the State Government has taken possession of the vacant land."

(emphasis added)

35. There is another document on record showing that the State Government had allegedly delivered the possession of the land in question to the respondent no. 4 on 30.03.1993, copy whereof has been brought on record as Annexure No. C.A.- 5 to the counter affidavit filed on behalf of respondent no. 4 in the writ petition.

36. We are of the considered view that the actual physical possession of the surplus land neither having been delivered to the Government voluntarily nor taken forcefully by the Government, any transfer of possession of the surplus land by the Government in favour of respondent no. 4 on paper, in pursuance of the Government orders as mentioned therein, is of no relevance or consequence. Such a paper transaction in favour of respondent no. 4 by the State Government to defeat the rights of the petitioner is not recognized under law.

37. In **Lalla Vs. State of U.P.** reported in **2014 (9) ADJ 524**, this Court in paragraph 11 of the judgement has held as hereunder :-

"The law does not contemplate transfer of possession by Government orders. It needs to be clarified that the land for the purposes of management would vest in the local authorities/development authorities only when the State came in valid possession over land, pursuant to lawful proceedings under Section 10 (5) or 10 (6) of the Act. The local authorities/development authorities merely steps into shoes of the State Government. If

the State Government through the Collector/District Magistrate has not taken possession over the land in question, as contemplated by law, the transfer of possession in favour of the local authorities/development authorities cannot be presumed under Government order. If the possession of land has not been taken by the State, as per the procedure already determined by the Apex Court, the local authorities//development authorities cannot claim independent right over the land merely on the strength of the Government order."

38. Thus, we find that actual physical possession of the petitioner's surplus land was never taken by the State Government from the petitioner and the petitioner stood in possession of the land in question on the date of the coming into force of the Repeal Act, 1999. This writ petition deserves to be allowed.

39. Accordingly, the writ petition is **allowed**.

40. The impugned order dated 06.08.2018 is hereby quashed. A further direction is issued to the respondents to expunge the name of respondent-State from the revenue record and to restore that of the petitioner who is the owner of the land in question.

(2020)09ILR A736
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.02.2020

BEFORE
THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE PRAKASH PADIA, J.

WRIT - C No. 42478 of 2017

Gyanveer Singh ...Petitioner

Versus

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

Counsel for the Petitioner:
Sri Syed Safdar Ali Kazmi, Sri Babboo Ram

Counsel for the Respondents:
C.S.C., Sri Ashish Kumar Singh, Smt. Tahira Kazmi, Sri Tarun Agarwal

A. Election - Gram Pradhan - Constitution of India - Article 243ZG, bar to interfere by Courts in electoral matters - Art.226, Quo warranto - a writ of quo warranto challenging Election to an office of Gram Pradhan cannot be entertained- alternative remedy to file election petition (Para 22)

B. Election - Gram Pradhan - U.P. Panchayat Raj Act, 1947 - Section 6A, Decision on question as to disqualification to hold office of Gram Pradhan - election of the Gram Pradhan could only be challenged by filing an election petition U/s 6 -A of the U.P. Panchayat Raj Act, 1947 (Para 23)

Fact - Writ in the nature of quo-warranto filed against the Respondent No. 6 to vacate the post of Gram Pradhan - allegation that R-6 working on the post of clerk in Government aided Institution - he neither resigned from the post of clerk prior to his election nor after he was elected - post comes within the purview of the office of profit and attracts disqualification U/s 5-A (c) of U.P. Panchayat Raj Act, 1947 - *Held* - in view of the provisions contained under sub-clause (b) of Article 243-ZG, section 6-A of the U.P. Panchayat Raj Act, 1947 read with Rules 4, 5 and 6 of the Rules of 1994, writ petition under Article 226 not at all maintainable before this Court. (Para 23)

Dismissed. (E-5)

List of Cases cited: -

1.Smt. Sarita Devi VsSt. of U.P. &ors. 2011 (1) AWC 793

2. Jaspal Singh Arora Vs St. of M.P. (1998) 9 SCC 594

3. Gurdeep Singh Dhillon Vs Satpal (2006) 10 SCC 616

4. Jyoti Basu Vs Debi Ghosal AIR 1982 SC 983

5. K. Venkatachalam Vs A. Swamickan & anr. (1999) 4 SCC 526

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

1. The petitioner has preferred the present writ petition with the prayer to issue a writ in the nature of quo-warranto against the Respondent No. 6 to vacate the post of Gram Pradhan of Gram Panchayat Gohra Alamgirpur, Block Simbhawi, Tehsil and District Hapur Forthwith with the further prayer to issue a mandamus directing the concerned respondent to restrain the Respondent No. 6 from functioning as Gram Pradhan of the village in question.

2. Facts in brief as contained in the writ petition are that in the Panchayat General Elections of 2015 the respondent no. 6 namely Sanchit son of Ramkishan had filed his nomination papers on 23.11.2015 for the post of Gram Pradhan of village Panchayat Gohra Alamgirpur, Block Simbhavli, Tehsil and District Hapur. General Election of Gram Panchayat in question was held on 01.12.2015 in which respondent no. 6 was elected as Gram Pradhan. The petitioner came to know regarding the fact that respondent no. 6 was elected as Gram Pradhan for the first time in the month of April, 2017 and immediately thereafter he moved an application asking certain information's under Right to Information Act, 2005 from the office of District Inspector of Schools, Hapur. It is contended that the petitioner came to know that the respondent no. 6 was working on the post of Assistant Clerk in an institution namely Sri Gandhi Smarak Inter College, Hapur (hereinafter called as 'Institution').

3. It is stated in the writ petition that the respondent no. 6 has not resigned from the post of clerk prior to election of Gram Pradhan nor after he was elected on the post of Gram Pradhan. It is further stated in the writ petition that the institution in question is a Government aided Institution and all its teachers and employees are getting their salary from State Exchequer in terms of Uttar Pradesh High Schools and Intermediate Colleges (Payment of Salaries of Teachers and Other Employees) Act, 1971. It is further stated in the writ petition that the post on which the respondent no. 6 is working comes within the purview of the office of profit and attracts disqualification U/s 5-A (c) of U.P. Panchayat Raj Act, 1947.

4. It is further stated in the writ petition that Part-IX of the Constitution of India was inserted by the Seventy Third Amendment Act, 1992 w.e.f. 24.04.1993. By the aforesaid amendment Article 243-F was also inserted in the constitution. Article 243-F is reproduced below:-

"243F Disqualification for membership-

(1) A person shall be disqualified for being chosen as and for being, a member of a Panchayat-

(a) if he is so disqualified by or under any law for the time being in force for the purposes of elections to the Legislature of the State concerned:

Provided that no person shall be disqualified on the ground that he is less than twenty-five years of age, if he has attained the age of twenty-one years;

(b) if he is so disqualified by or under any law made by the Legislature of the State.

(2) If any question arises as to whether a member of a Panchayat has become subject to any of the disqualifications mentioned in clause (1) the question shall be referred for the decision of such authority and in such manner as the Legislature of State may, by law, provide."

5. It is further stated in the writ petition that the sub clause (a) of Article 191 of the Constitution of India deals with the disqualifications for membership of the Legislative Assembly or Legislative Council of a State. Relevant portion of Article 191 is reproduced below:-

"Article 191 Disqualification for membership-

(1) A person shall be disqualified for being chosen as, and for being, a member of the Legislative Assembly or Legislative Council of a State-

(a) if he holds any office of profit under the Government of India or the Government of any State specified in the First Schedule, other than an office declared by the Legislature of the State by law not to disqualify its holder;"

6. In this view of the matter it is argued that in terms of the provisions contained under section 5-A (c) of the U.P. Panchayat Raj Act, 1947 as well as under Article 191 (1) (a) of the Constitution of India since the respondent no. 6 holds the office of clerk in the institution in question which comes within the purview of office of profit as such the respondent no. 6 was not qualified to contest the election of Gram Pradhan. Learned counsel for the petitioner also relied upon a Division Bench judgment of this Court in the case of **Smt. Sarita Devi versus State of U.P. and others 2011 (1) AWC 793.**

7. It is further argued that the respondent no. 6 being disqualified has no authority to hold the office of Gram Pradhan and writ of quo-warranto be issued. It is further argued that the petitioner not being a candidate in the election could not have filed an election petition and the only remedy left to the petitioner is to challenge the election by means of filing the present writ petition. In this view of the matter it is argued that the writ of quo-waranto be issued against the respondent no. 6.

8. Learned Standing Counsel appearing on behalf of respondent nos. 1, 2 and 4 as well as Sri Ashish Kumar Singh learned counsel for respondent no. 6 argued that the present writ petition filed on behalf of petitioner is not at all maintainable. It is further argued that the present writ petition is barred by the provisions of Article 243-ZG of the Constitution of India. It is further argued that the election could only be challenged by filing election petition and not by filing a writ petition before this Court in the nature of quo warranto.

9. With the consent of the learned counsel for the parties, the present writ petition is decided finally in terms of the Rules of the Court.

10. We have heard the submissions of the counsel for the parties and have perused the record. The petitioner has preferred the present writ petition challenging the election of respondent no. 6 as Gram Pradhan of Gram Panchayat Gohra Alamgirpur, Block Simbhawi, Tehsil and District Hapur. It is relevant to mention hear that the petitioner in paragraph-2 of the present writ petition mentioned that the petitioner is the elector/voter of Gram Panchayat in question from which the

respondent no. 6 has been elected as Gram Pradhan.

11. From the pleadings of the petitioner as stated above, it is clear that the challenge in the present writ petition is essentially to the election of the respondent no.6. The election of the Gram Pradhan was held in accordance with the provisions contained of the U.P. Panchayat Raj Act, 1947. The aforesaid election could only be challenged by filing an election petition as provided under the relevant rules. Whether election to an office of Gram Panchayat has to be challenged under the Statutory rules and whether a writ of quo-warranto should be entertained by this Court under Article 226 of the Constitution of India, are the questions to be answered.

12. Under Section 5-A of the U.P. Panchayat Raj Act 1947 (here-in-after called as Act '1947') deals with the disqualification of the membership. The relevant portion of Section 5-A of the Act of 1947 is reproduced below:-

"[5-A. Disqualification of membership-A person shall be disqualified for being chosen as, and for being [the Pradhan or] a member of a Gram Panchayat, if he-

(a) is so disqualified by or under any law for the time being in force for the purpose of elections of the State Legislature.

Provided that no person shall be disqualified on the ground that he is less than twenty-five years of age, if he has attained the age of twenty-one-years.

(b) is a salaried servant of the Gram Panchayat or a Nayaya Panchayat;

(c) holds any office of profit under a State Government or the Central Government or a [local authority other than a Gram Panchayat or Nyay Panchayat; or a Board, Body or Corporation owned or controlled by a State Government or the Central Government;

(d) has been dismissed from the service of State Government, the Central Government or a local authority or a Nyaya Panchayat for misconduct;

(e) is in arrears of any tax, fee, rate or any other dues payable by him to the Gram Panchayat, Kshettra Panchayat or Zila Panchayat for such period as may be prescribed, or has, in spite of being required to do so by the Gram Panchayat, Kshettra Panchayat or Zila Panchayat failed to deliver to it any record or property belonging to it which had come into his possession by virtue of his holding any office under it;

(f) is an undischarged involvement;

(g) has been convicted of an offence involving moral turpitude;

(h) has been sentenced to imprisonment for a term exceeding three months for contravention for any order made under the Essential Commodities Act, 1955;

(I) has been sentenced to imprisonment for a term exceeding six months or to transportation for contravention of any order made under the Essential Supplies (Temporary Powers) Act, 1946 or the U.P. Control of Supplies (Temporary Powers) Act, 1947;

(j) has been sentenced to imprisonment for a term exceeding three months under the U.P. Excise Act, 1910;

(k) has been convicted of an offence under the Narcotic Drugs and Psychotrapic Substances Act, 1985;

(l) has been convicted of an election offence;

(m) has been convicted of an offence under the U.P. Removal of Social

Disabilities Act, 1947 or the Protection of Civil Rights Act, 1955; or

(n) has been removed from office under sub-clauses (iii) or (iv) of Clause (g) of sub-section (1) of Section 95 unless such period, as has been provided in that behalf in the said section or such lesser period as the State Government may have ordered in any particular case, has elapsed;

Provided that the period of disqualification under Clauses (d), (f), (g), (h), (i), (j), (k), (l) or (m) shall be five years from such date as may be prescribed.

Provided further that the disqualification under Clause (e) shall cease upon payment of arrears or delivery of the record of property, as the case may be;

Provided also that a disqualification under any of the clauses referred to in the first proviso may in the manner prescribed, be removed by the State Government."

13. Under Section 6-A of the U.P. Panchayat Raj Act, 1947, it is provided that if any question arises as to whether a person has become subject to any disqualification mentioned in Section 5-A or in sub-section (1) of Section 6, the question shall be referred to the prescribed authority for his decision and his decision shall, subject to the result of any appeal as may be prescribed, be final. Section 5 and 6-A of the U.P. Panchayat Raj Act, 1947 is reproduced below:-

"6-A. Decision on question as to disqualifications.- *If any question arises as to whether a person has become subject to any disqualification mentioned in Section 5-A or in sub-section (1) of Section 6, the question shall be referred to the prescribed authority for his decision and his decision shall, subject to the result of any appeal as may be prescribed, be final."*

14. Rules were also framed by the State Government for settlement of dispute of disqualification in the year 1994 namely U.P. Panchayat Raj (Computation of period of Five years for removal of Disqualification, Fixation of period of Dues etc and Settlement of Dispute of Disqualification) Rules, 1994. Under Rule 4 of the Rules of 1994 it is provided that an application for removal of the disqualification under clauses (d), (f), (g), (i), (j), (k), (I) or (m), of Section 5-A of the Act of 1947, shall be in the form given in the Appendix and shall show the grounds upon which the applicant claims removal of the disqualification. It is further stated under Sub Rule (2) of the Rule 4 that the application shall be presented to Sub-Divisional Officer of Sub-Division concerned. It is further provided under Sub-rule (3) of Rule 4 that the Sub-Divisional Officer may, after such inquiry as he may deem fit either accept the application and remove the disqualification or reject the application. Under Rule 5 of the Rules of 1994 it is clearly stated that the question regarding disqualification shall be referred to the Tehsildar as referred under section 6-A of the Act of 1947. Relevant Rules namely Rule 4, 5, 6 as well as Appendix contained under the Rules of 1994 are reproduced below:-

"4. Removal of disqualification under Section 5-A.-*(1) An application for removal of the disqualification under clauses (d), (f), (g), (I), (j), (k), (l) or (m), of Section 5-A of the Act, shall be in the form given in the Appendix and shall show the grounds upon which the applicant claims removal of the disqualification.*

(2) The application shall be presented to Sub-Divisional Officer of Sub-Division concerned.

(3) The Sub-Divisional Officer may, after such enquiry as he deems fit, either accept the application and remove the disqualification or reject the application.

(4) A copy of the order passed under sub-rule (3), removing the disqualification shall be sent to the secretary of the concerned Gram Panchayat and to the Assistant Development Officer (Panchayat) and to the concerned Kshettra Panchayat.

5. Reference under Section 6-A pertaining to disqualification.*-(a) Where any question as is referred to in Section 6-A of the Act is raised otherwise than in a claim or objection, it shall be referred to the Tehsildar by the officer or authority before whom such question arises for consideration.*

(2) On the receipt of a reference under sub-rule (1) the Tehsildar shall fix the date, time and place for its hearing and shall give notice to the parties concerned.

(3) The Tehsildar shall, after hearing the parties and after such other enquires as he deems fit, give his decision of the question referred to him.

(4) Any person aggrieved by the order of the Tehsildar may, within fifteen days of the date of such order, prefer an appeal to the Sub-Divisional Officer.

(5) The Sub-Divisional Officer shall, after notice to the parties and after hearing such of them as desire to be heard, dispose of the appeal.

(6) A copy of the final order passed on the question referred to the Tehsildar as modified in appeal, if any, shall be forwarded to the Secretary of the Gram Panchayat and to the Assistant Development Officer (Panchayat) of the concerned Kshettra Panchayat.

6. Disqualification on account of non-payment of tax, etc.*-(1) A person shall be disqualified under clause (c) of Section 5-A of the Act for being chosen as, and for being a member of the Gram Panchayat, if he is in arrears of any tax, fee, rate or any other dues payable by him to the Gram Panchayat, Kshettra Panchayat or Zila Panchayat for a period exceeding one year or if he fails to produce certificate from the Secretary of the Gram Panchayat, Khand Vikas Adhikari or Mukhya Adhikari, as the case may be, regarding delivery of the record of property belonging to Gram Panchayat, Kshettra Panchayat or Zila Panchayat which had come into his possession by virtue of his holding any office under it:*

Provided that in the case of a person who is a candidate for being elected or is being nominated or appointed to any office in the Gram Panchayat the said disqualification shall cease as soon as the arrears paid on before his nomination paper for election is rejected or he is nominated or appointed, as the case may be.

(2) The secretary of the Gram Panchayat shall, in Form II given in the Appendix, prepare a list of all such persons, who, according to the record of the Gram Panchayat, are in arrears of any tax, fee, rate or any other dues as aforesaid.

(3) the list prepared under sub-rule (2) shall be published by affixing it on Notice Board of the office of the Gram Panchayat and an announcement to this effect shall also be made by beat of drum in the Panchayat area.

(4) The name of the person who has paid, whether under protest or otherwise, all the arrears shown against his name in the list shall be struck off the list. A receipt issued by the Secretary of the Gram

Panchayat, Khand Vikas Adhikari or Mukhya Adhikari, as the case may be, in payment of any such amount shall be conclusive proof of the fact that the person is not in arrears of tax, fee or rate, as the case may be."

Appendix Form [Rule 4 (1)]

Application for removal of disqualifications in clause (d), (f), (g), (h), (I), (j), (k), (l) or (m) of Section 5-A of the United Provinces Panchayat Raj Act, 1947.

1. Name of applicant.....

2. Father's/Husband's name.....

3. Village/Gram Panchayat.....

4. House Number.....

5. Details of Disqualification.....

6. Date/Dates from which disqualification incurred.....

7. Grounds for removal of disqualification.....

8. Remarks.....

Place.....

Signature.....

Date.....

Name.....

Note-Except of the electoral roll of the concerned territorial constituency of the Gram Panchayat shall be enclosed herewith.

15. Article 243-ZG of the Constitution of India provides for Bar to interference by courts in electoral matters which is quoted below:

"Art.243ZG.Notwithstanding anything in this Constitution,-

(a) the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made under article 243ZA shall not be called in question in any court;

(b) no election to any Municipality shall be called in question except by an election petition presented to such authority and in such manner as is provided for by or under any law made by the Legislature of a State."

16. It would be better to consider as to whether bar provided under Article 243-ZG (b) is an absolute bar or not. At least from the language of clause (b), it is clear that the bar is absolute Normally, where such a bar is expressed in a negative language as is the case here, it has to be held that the tone of clause (b) is mandatory and the bar created therein is absolute.

17. Supreme Court in the case of ***Jaspal Singh Arora v. State of M.P.*** reported in ***(1998) 9 SCC page 594*** has already held the bar to be absolute. In this case election of the petitioner as the President of the Municipal Council was challenged by a writ petition under Article 226, which was allowed setting aside the election of the petitioner. In paragraph 3 of the aforesaid judgment the Supreme Court observed as follows:-

"3. ... it is clear that the election could not be called in question except by an election petition as provided under that Act. The bar to interference by courts in electoral matters contained in Article 243-ZG of the Constitution was apparently overlooked by the High Court in allowing the writ petition. Apart from the bar under

Article 243-ZG, on settled principles interference under Article 226 of the Constitution for the purpose of setting aside election to a municipality was not called for because of the statutory provision for election petition…."

18. Again the Supreme Court in the case of **Gurdeep Singh Dhillon v. Satpal** reported in **(2006) 10 SCC page 616**, after quoting Article 243-ZG(b) was pleased to observed that the shortcut of filing the writ petition and invoking constitutional jurisdiction of the High Court under Articles 226/227 was not permissible and the only remedy available to challenge the election was by raising the election dispute under the local statute.

19. Apart from the same the Supreme Court in the case of ***Jyoti Basu Vs. Debi Ghosal***, reported in ***AIR 1982 SC 983***, has laid down following:-

"A right to elect, fundamental though it is to democracy, is, anomalously enough, neither a fundamental right nor a common law right. It is pure and simple, a statutory right. So is the right to be elected. So is the right to dispute an election. 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 but only 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 strait-jacket. Thus the entire election process commencing from the issuance of the notification calling upon a constituency to elect a member or members right up to the final resolution of the dispute, if any, concerning the election is regulated by the Representation of the People Act, 1951, different stages of the process being dealt with by different provisions of the Act. There can be no election to Parliament or the State Legislature except as provided by the Representation of the People Act, 1951 and again, no such election may be questioned except in the manner provided by the Representation of the People Act. So the Representation of the People Act has been held to be a complete and self-contained code within which must be found any rights claimed in relation to an election or an election dispute. ……."

20. The Supreme Court in the case of **K. Venkatachalam Vs. A. Swamickan & Anr, (1999) 4 SCC 526** held that in such a situation writ of quo-warranto is not maintainable. Relevant paragraphs of the aforesaid judgment namely paragraph, 27, 29, 31 and 34 are quoted below:-

"27. We are afraid, we are not in position to agree with the contention that K. Venkatachalam v. A Swamickan & Anr. (1999) 4 SCC 526 is applicable to the present situation. Here the appellant had very specifically asserted in his counter affidavit that he did not belong to the Christian religion and that he further asserted that he was a person belonging to the Scheduled Caste. Therefore, the Caste

status of the appellant was a disputed question of fact depending upon the evidence. Such was not the case in K. Venkatachalam v. A Swamickan & Anr. (1999) 4 SCC 526. Every case is an authority for what is actually decided in that. We do not find any general proposition that even where there is a specific remedy of filing an Election Petition and even when there is a disputed question of fact regarding the caste of a person who has been elected from the reserved constituency still remedy of writ petition under Article 226 would be available.

29.Shri Gupta, however, further argued that in the present case what was prayed for was a writ of quo warranto and in fact the election of the appellant was not called in question. It was argued that since the writ petitioners came to know about the appellant not belonging to the Scheduled Caste and since the post of the Chairperson was reserved only for the Scheduled Caste, therefore, the High Court was justified in entering into that question as to whether he really belongs to Scheduled Caste.

31. It is an admitted position that Ward No.8 was reserved for Scheduled Cast and so also the Post of Chairperson. Therefore, though indirectly worded, what was in challenge in reality was the validity of the election of the appellant. According to the writ petitioners, firstly the appellant could not have been elected as a Ward member nor could he be elected as the Chairperson as he did not belong to the Scheduled Caste. We can understand the eventuality where a person who is elected as a Scheduled Caste candidate, renounces his caste after the elections by conversion to some other religion. Then a valid writ petition for quo warranto could certainly lie because then it is not the election of such person which would be in challenge but his subsequently continuing in his capacity as a person belonging to a particular caste.

34.Once it is held that the aforementioned case was of no help to the respondents, the only other necessary inference which emerges is that the bar under Article 243-ZG would spring in action. "

21. The Apex Court in the aforesaid judgment has also noticed the submission as to whether the writ of quo warranto can be issued when an incumbent is holding an elected office by virtue of election. The answer was given in negative. It was held that challenge essentially is to the election of an elected candidate and hence the bar under Article 243 ZG is attracted.

22. In so far as the judgment delivered by a Division Bench of this Court in the case of **Smt. Sarita Devi (Supra)** relied upon by the counsel for the petitioner is concerned, the said judgment does not help the petitioner. The said judgment is an authority that Anganbari Workers are disqualified from contesting the election of Panchayat and they are not eligible to contest the Panchayat election, but the said case was not a case challenging any election, but the question which was considered in the said case was whether the State Election Officer has any right to debar the Siksha Mitra/Anganbari Worker from contesting the Panchayat Election and, whether the honorarium received by Shiksha Mitra and/or Aanganbari workers for rendering their respective services falls within the purview of "office of profit." There cannot be any dispute to the propositions as laid down in the said case. However, the said judgment does not help the petitioner in the present case, and it is not an authority for the proposition to hold

that election of an elected member of Gram Panchayat can be challenged by filing a writ of quo-warranto.

23. From the facts and circumstances as stated above, it is clear that in view of the provisions contained under sub-clause (b) of Article 243-ZG, section 6-A of the U.P. Panchayat Raj Act, 1947 read with Rules 4, 5 and 6 of the Rules of 1994, the present writ petition filed by the petitioner is not at all maintainable before this Court. The only remedy available to the petitioner to file an election petition as provided under section 6-A of the U.P. Panchayat Raj Act, 1947. Writ petition is liable to be dismissed on the ground of availability of alternative remedy.

24. Accordingly, the writ petition is dismissed on the ground of availability of alternative remedy to the petitioner.

(2020)09ILR A745
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.02.2020

BEFORE

THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE RAVI NATH TILHARI, J.

WRIT - C No. 44309 of 2017

Yasir Ali Khan ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Birendra Pratap Singh

Counsel for the Respondents:
C.S.C., Sri Mahendra Pratap

A. Admission -Medical Education-NEET 2017-Refund of Security Money -Clause VIII of G.O. dated 03.07.2017 provides if any candidate fails to take admission in allotted college or leaves the college his security money shall not be refunded - *Held* - Clause VIII cannot be read in isolation other provisions of the said G.O are also to be read together particularly which fixed date for declaration of result - security amount can be forfeited if the time schedule for declaration of result is strictly adhered to - But if result is not declared in time and is delayed Clause VIII cannot be invoked to forfeit the security money - Reading clause VIII in isolation would confer arbitrary powers on the authorities to forfeit the security money even in those cases where the fault does not lie on the part of the candidate but lies on the authorities - Authorities cannot take advantage of its own wrong (Para 27)

Facts – As per Schedule of NEET 2017 result was to be declared on 19.08.2017, candidate to take admission on 20th & 21st August, 2017 – In fact result published on 20.08.2017 - Petitioner could not get reasonable time for approaching allotted college for admission - Held - fault lies on the part of the respondents in not adhering to the time schedule in publication of the result - Respondents directed to refund the amount of security money to the petitioner (Para 27, 30, 32)

B. Education- Medical Education - Admission -Regulations on Graduate Medical Education -No direction can be given to take admission in the first year MBBS Course, after 31st August, 2017 -in view of Supreme Court decision in the case of Ashish Ranjan vs. Union of India, (2016)11 SCC 225 **(Para 11)**

Allowed in Part. (E-5)

List of Cases cited: -

1. Ashish Ranjan Vs Union of India, (2016)11 SCC 225

2. Priya Gupta Vs St. of Chhatisgarh & ors. (2012) 7 SCC 433

3. Mridul Dhar Vs Union of India (2005) 2 SCC 65

4. Royal Medical Trust (Regd.) & anr. Vs Union of India & anr. (2015) 10 SCC 19

5. Kusheshwar Prasad Singh Vs St. of Bihar (2007)11 SCC 447

(Delivered by Hon'ble Ravi Nath Tilhari, J)

1. Heard Sri Birendra Pratap Singh, learned counsel for the petitioner, learned Standing Counsel for respondents-1 and 3 and Sri Mahendra Pratap, learned counsel for respondent-2.

2. The present writ petition has been filed by the petitioner for the following reliefs:

"a) Issue a writ, order or direction in the nature of mandamus commanding and directing the respondents to take admission in Ist year M.B.B.S. Course 2017-18 in the allotted college of respondent no.3 namely T.S. Mishra Medical College and Hospital Lucknow (Private) Co-Education which is allotted in second counseling held by respondent no.2.

(c) Issue a writ order or direction in the nature of mandamus for refunding the counseling fees of Rs.2 lakh to the petitioner deposited to the D.G.M.E. &T, Lucknow through D/D.

b) Issue any other appropriate writ, order or direction which this Hon'ble Court may deems fit and proper in the demand of justice.

c) Allow the writ petition with cost."

3. The facts of the present case are that the petitioner appeared in National Eligibility cum Entrance Test Counseling-2017 NEET 2017 for admission in M.B.B.S//B.D.S. Course conducted by C.B.S.E Board and got NEET marks 170 and NEET Rank 413792 and thereafter he appeared in U.P. NEET U.G. counseling and his registration no. was 1000122, wherein the petitioner's original documents were verified at the document verification center S.N. Medical College Agra. The petitioner submitted a demand draft of Rs.2-00 lac as security money in favour of Director, Medical Education-respondent-2. In the second counseling, the petitioner was allotted T.S. Mishra Medical College and Hospital, Lucknow(Private Co-education) by respondent-2. The total fee for the first year, was Rs.22,01,000/-to be deposited at the time of admission in the allotted college and the security money of Rs.2-00 lac was to be adjusted in it. The Director, General Medical Education/respondent-2, who was the Chairman of the counseling Board, issued a Schedule dated 4.8.2017(Annexure-3 to the writ petition), for the second counseling and as per the said schedule the documents verification was to be done between 9th August and 12th August, 2017 (both dates inclusive) and merit list was to be published on 13th August, 2017. The candidates were required to fill choice on 18th August,2017 and the result was to be declared on 19th August, 2017. The candidate was to download the result and take admission in the allotted institute on 20th and 21st August, 2017.

4. Further case of the petitioner is that the result of the counseling was not published on 19th August, 2017 but was published on 20th August, 2017 at 1-30 P.M. and thereafter, the petitioner acquiring knowledge that he was allotted T.S. Mishra Medical College and Hospital, Lucknow, on 21.8.2017 itself contacted the allotted college for admission and requested that some time for deposit of admission fee be given but the petitioner's request was turned down. The petitioner on 21st August, 2017 reporting about the College, sent messages on g-mail to respondent no.2.

On 22nd August, 2017 all India banks were on strike and after opening of the Bank on 23rd August, 2017, the petitioner got prepared the demand draft for Rs.8,50,000/- from Axis Bank. The petitioner again requested the respondent-2 on 28th August, 2017 through g-mail for mop up round but no response was received, although many students were allowed to appear in mop up round who had already availed the earlier counseling and college was also allotted to them. This continued up to 31st August, 2017. On 2nd September, 2017, the petitioner sent a representation via g-mail to the respondent-2 (Annexure-6 to the writ petition) raising all the grievances therein which was followed by representation dated 6.9.2017, but, the respondent-2 neither permitted the petitioner to take admission in the allotted college nor took any decision on the application/representations of the petitioner.

5. Learned counsel for the petitioner has submitted that as the result was not published on 19th August, 2017 the scheduled date, but was published late on 20th August, 2017 at 1-30 P.M. the petitioner could not get reasonable time, as per the schedule, for approaching the college for admission with complete required formalities. If the result had been published as per the schedule, on the website, the petitioner would have got sufficient time to appear for admission on the date fixed along with requisite fee to be deposited. Thus, there was fault on the part of the respondents in not adhering to the time schedule in publication of the result and as such the authorities are bound either to take admission of the petitioner or refund the amount of Rs.2,00,000/- of security money to the petitioner.

6. Sri Mahendra Pratap, learned counsel for respondent-2 has submitted that the second round of counseling of NEET PG 2017 was held as per the prescribed time schedule. On 19th August, 2017, National Informatics Centre(NIC) completed the processing of choice filling and choice lock of the seats, at about 1-00 hrs in the mid-night of 19th August, 2017 and later on cross checking was also done. NIC made the result available to the students on official website on 20th August, 2017 at 02:16:18 hours. Many candidates took admission after downloading their allotment letters on 20th August, 2017 and 21st August, 2017.

7. Learned counsel for respondent-2 has further submitted that there was no change in the time schedule. He submitted that as per the Government Order dated 3rd July, 2017 and brochure, the petitioner was not eligible for mop up round and as per the Supreme Court's judgment as well as the notifications of the Medical Council of India(MCI), no admission was possible after 31st August, 2017. The petitioner himself did not complete the formalities for admission in the allotted Medical College in time and was rightly denied admission.

8. Learned counsel for respondent-2 has further submitted that G.O. No.2234/71-2-17-158/2017 dated 3rd July, 2017 and 02nd August, 2017 (SCA-1 to the counter affidavit) provided for the procedure for depositing the security money and the conditions under which the security money was liable to be returned/refunded and as to when it would be forfeited. In the NEET UP Counseling 2017, Brochure also, there is a specific clause about the security money (Annexure No. SCA-2) according to which, if a candidate does not take admission in the allotted college or after taking admission leaves the college, his security money shall be forfeited and cannot be refunded. His

submission is that as the petitioner did not take admission in the allotted college, the security money deposited by him was not liable to be refunded/returned, in view of the aforesaid Government Orders. He has further submitted that there is no challenge to the Government Orders and the Brochure, on the point, and as such no relief can be granted to the petitioner for refund of the security money, particularly, when the condition under which it becomes refundable does not exist.

9. Learned Standing Counsel has also submitted that the petitioner not having taken admission in time, is not entitled for refund of the security money and after 31st August, 2017, he cannot be allowed admission.

10. We have considered the submissions advanced by the learned counsel for the petitioner as well as learned counsels for the respondents and have perused the material on record.

11. We are of the considered view that as per the judgment of the Hon'ble Supreme Court, in the case of **Ashish Ranjan vs. Union of India, (2016)11 SCC 225**, giving the stamp of approval to the schedule for completion of the admission process for First MBBS Course, in the 'Regulations on Graduate Medical Education, 2015', petitioner's prayer 'a)' for giving direction to the respondents to take admission of the petitioner in the first year MBBS Course, 2017, after 31st August, 2017, the last date upto which students could be admitted/joined against vacancies arising due to any reason, is misconceived and liable to be rejected. No such direction can be issued.

12. The learned counsel for the petitioner has vehemently pressed for prayer 'c)' for direction to the respondents to refund security money of Rs.2,00,000/- to the petitioner, which was deposited with D.G.M.O. through demand draft.

13. We now proceed to consider if the security money of Rs.2-00 lac deposited by the petitioner can or cannot be directed to be refunded to the petitioner.

14. The G.O. No.2234/71-2-17-158/2017 dated 3rd July, 2017(Annexure SCA-1 to the supplementary counter affidavit) contains specific clause about the security money. As per clause VIII, the candidate to whom private college is allotted, has to deposit Rs.2-00 lac as security money which shall be refunded to the candidates who take admission in the allotted college but if after allotment of college, any candidate fails to take admission or resigns/leaves the college after taking admission, his security money shall not be refunded.

15. Clause VIII of the G.O. Dated 03.07.2017 reads as follows:-

" (VIII) सिक्योरिटी मनी (धरोहर धनराशि):–

नीट यू0जी0 2017 की ऑनलाईन काउंसिलिंग के माध्यम से राजकीय मेडिकल/डेण्टल कालेजों/विश्वविद्यालयों/संस्थानों में आवंटन प्राप्त अभ्यर्थियों द्वारा 20,000/– (रूपये बीस हजार मात्र) तथा निजी क्षेत्र के मेडिकल/डेण्डल कालेंजों, विश्वविद्यालयों, अल्पसंख्यक संस्थानों, अल्पसंख्यक विश्वविद्यालयों, डीम्ड विश्वविद्यालयों में आवंटन प्राप्त अभ्यर्थियों द्वारा रू0 2,00,000/– (रूपये दो लाख मात्र) की धनराशि सिक्योरिटी मनी के रूप में एलॉटमेन्ट लैटर डाउनलोड के पहले ऑनलाईन प्रक्रिया (डेबिट/क्रेडिट कार्ड/इन्टरनेट बैंकिंग से ही) के माध्यम से जमा करना अनिवार्य होगा।

जिन छात्रों द्वारा आवंटन के पश्चात सम्बन्धित कालेजों में प्रवेश प्राप्त कर लिया जायेगा,

उनकी सिक्योरिटी धनराशि वापस कर दी जायेगी। यदि कोई अभ्यर्थी आवंटन के पश्चात पाठ्यक्रम में प्रवेश नहीं लेता है अथवा प्रवेश लेने के पश्चात त्यागपत्र दे देता है (नीट स्टेट कोटा सीटों पर पुनर्आवंटन की स्थिति को छोड़कर) तो उसे उसके द्वारा जमा की गयी धरोहर धनराशि वापस नहीं की जायेगी। "

16. By subsequent Government Order No.2823/71-217-178/2017 dated 02.08.2017 issued for NEET UG 2017 (Annexure SCA-2 to the supplementary affidavit) the earlier G.O. dated 3.7.2017 was modified to some extent, but maintaining the rest of the conditions and provisions as they were. This G.O. dated 2.8.2017 re-scheduled/modified the programme of second round and mop up round counselling. The modified schedule and the provision regarding security money as per G.O. dated 2.8.2017 are being reproduced as **under**:-

(i) "(द्वितीय राउण्ड/माप–अप राउण्ड की काउंसिलिंग तथा प्रवेश आदि की कार्यवाही निम्नलिखित यथासंशोधित शिड्यूल के अनुसार करायी जायः–

क्र0 स0	*विवरण*	*अवधि*	*दिवस*
1	*पुनः पंजीकरण*	*दिनांक 06 से 10 अगस्त 2017 तक*	*05*
2	*द्वितीय काउंसिलिंग हेतु अभिलेखों का सत्यापन*	*दिनांक 09 अगस्त 2017 से 12 अगस्त 2017 तक*	*04*
3	*मेरिट सूची का प्रकाशन*	*दिनांक 13 अगस्त 2017*	
4	*द्वितीय चक्र की च्वाईस फिलिंग*	*18 अगस्त 2017*	*01*
5	***परिणाम की घोषणा***	***19 अगस्त 2017***	***01***
6	***आवंटन पत्र डाउनलोड करने तथा प्रवेश की तिथि***	***दिनांक 20 एवं 21 अगस्त 2017***	***02***
7	*माप–अप राउण्ड हेतु पंजीकरण*	*दिनांक 23 अगस्त 2017*	*01*
8	*मेरिट सूची का प्रकाशन*	*24 अगस्त 2017*	*01*
9	*राजकीय सीटों हेतु मॉप अप राउण्ड आवंटन की कार्यवाही एवं प्रवेश*	*दिनांक 25 अगस्त 2017*	*01*
10	*निजी क्षेत्र की एम0बी0बी0ए स0 पाठ्यक्रम की सीटों हेतु मॉप अप राउण्ड की कार्यवाही एवं प्रवेश*	*दिनांक 26 एवं 27 अगस्त 2017*	*02*
11	*निजी क्षेत्र की बी0डी0एस0 पाठ्यक्रम की सीटों हेतु मॉप अप*	*भारत सरकार द्वारा बी0डी0ए स0*	*–*

	राउण्ड की कार्यवाही एवं प्रवेश।	*पाठ्यक्रमों में प्रवेश हेतु जारी नवीन समय–सारिणी के अनुसार आदेश अलग से निर्गत किये जायेगें।*	

(iv) सिक्योरिटी मनी–

शासनादेश

संख्या–2234/71–2–17–158/2017, दिनांक 03.07.2017 द्वारा निजी क्षेत्र के मेडिकल/डेण्टल कालेजों, विश्वविद्यालयों, अल्पसंख्यक संस्थानों, अल्पसंख्यक विश्वविद्यालयों, डीम्ड विश्वविद्यालयों में आवंटन प्राप्त अभ्यर्थियों द्वारा रू0 2,00,000/– (रूपये दो लाख मात्र) की धनराशि सिक्योरिटी मनी के रूप में एलॉटमेन्ट लैटर डाउनलोड के पहले ऑनलाइन प्रक्रिया (डेबिट/क्रेडिट कार्ड/इन्टरनेट बैंकिग से ही) के माध्यम से जमा किए जाने के आदेश निर्गत किए गये थे।

नीट यू0जी0 2017 की प्रथम चक्र की ऑनलाइन काउंसिलिंग में निजी क्षेत्र के मेडिकल कालेजों की एम0बी0बी0एस पाठ्यक्रम की कुल 2550 सीटों के सापेक्ष 2530 सीटों पर तथा बी0डी0एस0 पाठ्यक्रम की 2200 सीटों के सापेक्ष 2120 सीटों पर आवंटन की कार्यवाही की गयी थी। एम0बी0बी0एस की आवंटित 2530 सीटों के सापेक्ष 153 सीटों तथा बी0डी0एस0 पाठ्क्रम की आवंटित 2120 सीटों के सापेक्ष 254 सीटों पर ही अभ्यर्थियों द्वारा एलॉटमेंट लेटर डाउनलोड कर प्रवेश लिया गया है। इससे स्पष्ट है कि अधिकतर अभ्यर्थियों ने प्रथम चक्र की काउंसिलिंग के माध्यम से आवंटित सीटों के सापेक्ष एलॉटमेंट लेटर डाउनलोड कर प्रवेश नहीं लिया गया हैं अतः प्रवेश हेतु इच्छुक अभ्यर्थी ही सीट लॉक करे इसके लिए च्वाइस लाकिंग के पूर्व ही सम्बन्धित अभ्यर्थी से सिक्योरिटी की धनराशि रू0 2.00 लाख प्रकिया (डेबिट/क्रेडिट कार्ड/इन्टरनेट बैंकिंग) तथा बैंक द्वारा आर0टी0जी0एस0 के माध्यम से जमा करायी जाय।

2– शासनदेश दिनांक 03.07.2017 के बिन्दु–ट में उल्लिखित शैक्षिक अर्हता की तालिका के क्रमांक–2, 3 एवं 4 में उल्लिखित अनुसूचित जाति/अनुसूचित जनजाति एवं अन्य पिछड़ा वर्ग हेतु छममज च्मतबमदजपसम के कालम मे 45 के स्थान पर Neet Percentile 40 समझा जाय।

3– काउंसिलिंग/प्रवेश के सम्बन्ध में पूर्व में निर्गत शासनादेश दिनांक 03.07.2017 को उपर्युक्त सीमा तक संशोधित समझा जाय। शेष शर्ते एवं प्रतिबन्ध यथावत् रहेगी।

4– महानिदेशक चि0शि0 द्वारा उपर्युक्त आदेशों का व्यापक प्रचार–प्रसार समाचार पत्रों के माध्यम से सुनिश्चित किया जायेगा तथा निजी क्षेत्र के समस्त मेडिकल/डेण्टल कालेजों, विश्वविद्यालयों, अल्पसंख्यक संस्थानों, अल्पसंख्यक विश्वविद्यालयों, डीम्ड विश्वविद्यालयों को प्रश्नगत शासनदेश की प्रति उपलब्ध कराना सुनिश्चित किया जायेगा। शासनादेश की प्रति वेबसाइट www.updgme.in एवं https://upneet.gov.in पर महानिदेशक, चिकित्सा शिक्षा एवं प्रशिक्षण, लखनऊ द्वारा अपलोड की जायेगी।

कृपया उपरोक्तानुसार अग्रेतर कार्यवाही समयबद्ध रूप से सुनिश्चित करने का कष्ट करें।"

17. Brochure of NEET U.P. Counseling 2017 also contains specific clause about the security money. It also provides that if a candidate does not take admission after allotment or if leaves the allotted college after taking admission, security money shall not be refunded. It is relevant to reproduce the provision as regards security money in the Brochure as follows:-

राजकीय तथा निजी क्षेत्र के मेडिकल/ डेण्टल कालेजों हेतु धरोहर
धनराशि लिये जाने के सम्बन्ध में

1. नीट यू०जी० 2017 की उत्तर प्रदेश की आँनलाइन काउंसिलिंग के माध्यम से राजकीय मेडिकल / डेन्टल कालेजों / विश्वविद्यालयो / संस्थानों में आवंटन प्राप्त अभ्यर्थियों द्वारा रू० 20,000/- (रूपये बीस हजार मात्र) तथा निजी क्षेत्र के मेडिकल / डेण्टल कालेजों / विश्वविद्यालयों / अल्पसंख्यक संस्थानों

/ अल्पसंख्यक विश्वविद्यालयों / डीम्ड विश्वविद्यालयों में आवंटन प्राप्त अभ्यथियों द्वारा 2,00,000/-(रूपये दो लाख मात्र) की धनराशि सिक्योरिटी मनी के रूप में आनलाईन प्रक्रिया(डेबिट / क्रेडिट कार्ड / इन्टरनेट बैंकिंग से ही) के माध्यम से जमा करना अनिवार्य होगा।

ऑनलाईन काउंसिलिंग (Online counseling)

ऑनलाईन काउंसिलिंग प्रवेश सबंधी सूचनाः

(अ) .....

(ब) .....

(स) .....

(द) यदि कोई अभ्यर्थी आवंटन के पश्चात पाठ्यक्रम में प्रवेश नहीं लेता है अथवा प्रवेश लेने के पश्चात् त्यागपत्र दे देता है तो धरोहर धनराशि वापस नहीं की जायेगी।

18. From a conjoint reading of the Government Orders dated 3.7.2017 and 2.8.2017, it is evident that there was no change as regards the provision for refund of security amount. It continued as it existed in G.O. Dated 3.7.2017. However, the schedule was changed and as per this schedule, 19.8.2017 was the date for declaration of result.

19. The Director General, Medical Education and Training, U.P. Lucknow issued letter No.M.E.-3/2017 dated 4.8.2017 for the second counselling and as per this letter, 19.8.2017 was the date for declaration of result and the date for downloading allotment letter and for taking admission in the allotted college was 20th and 21st August, 2017. The said schedule is being reproduced as **under**:-

"कार्यालय महानिदेशक, चिकित्सा शिक्षा एवं प्रशिक्षण, उत्तर प्रदेश, छठा, तल, जवाहर भवन, लखनऊ

संख्या–एम0ई0–3 / 2017 /

लखनऊः दिनांक 04 अगस्त 2017

राष्ट्रीय पात्रता सह प्रवेश परीक्षा (N.E.E.T) 2017 की द्वितीय चक्र की ऑनलाईन काउंसिलिंग हेतु ऑनलाईन पंजीकरण, अभिलेखो के सत्यापन, च्वाईस फिलिंग तथा प्रवेश आदि के संबध में महत्वपूर्ण सूचना

शासनादेश

संख्या–2823 / 71–2–17–158 / 2017 दिनांक 02 अगस्त 2017 में निहित निर्देशों के क्रम में NEET-2017 के माध्यम से चयनित छात्रों के शैक्षणिक सत्र 2017–18 में उत्तर प्रदेश राज्य की एम0बी0बी0एस0 एवं बी0डी0एस0 पाठ्यक्रम की सीटों पर द्वितीय चक्र की आनॅलाइन काउंसिलिंग तथा माप–अप राउण्ड आवंटन तथा प्रवेश आदि की कार्यवाही निम्नानुसार सम्पन्न की जाएगीः–

क्र0 सं0	विवरण	अवधि
1	आनलाईन पुनः पंजीकरण	दिनांक 06 से 10 अगस्त 2017 तक
2	द्वितीय काउंसिलिंग हेतु अभिलेखों का सत्यापन	दिनांक 09 अगस्त 2017 से 12 अगस्त 2017 तक
3	मेरिट सूची का प्रकाशन	दिनांक 13 अगस्त 2017
4	दिव्यांग छात्रों हेतु मेडिकल बोर्ड का गठन	दिनांक 08 से 10 अगस्त 2017 तक
5	द्वितीय चक्र की च्वाईस फिलिंग	दिनांक 18 अगस्त 2017
6	**परिणाम की घोषणा**	**19 अगस्त 2017**
7	**आवंटन पत्र डाउनलोड करने तथा प्रवेश की तिथि**	**दिनांक 20 एवं 21 अगस्त 2017**
8	माप–अप राउण्ड हेतु आनलाईन पंजीकरण	दिनांक 23 अगस्त 2017

9	मेरिट सूची का प्रकाशन	दिनांक 24 अगस्त 2017
10	राजकीय सीटों हेतु मॉपअप राउण्ड आवंटन की कार्यवाही एवं प्रवेश	दिनांक 25 अगस्त 2017
11	निजी क्षेत्र की एम0बी0बी0एस0 पाठ्यक्रम की सीटों हेतु मॉप अप राउण्ड की कार्यवाही एवं प्रवेश	दिनांक 26 एवं 27 अगस्त 2017

20. There is no dispute that the result was to be declared on 19.8.2017 as per the schedule. However, according to the petitioner, result was declared on the website on 20.8.2017 at about 12 noon or 1-00 P.M. and according to the respondent-2, as per the counter affidavit, paragraph-4, the processing for second round of counseling was completed on 19.8.2017, at about 01-00 midnight and later on cross checking was also done and NIC uploaded the result on the official website on 20.8.2017 at 02:16:18 hours.

Paragraph-4 of the counter affidavit of respondent no.2 is being reproduced as under:-

"4. That, in reply to para 9, 10,11, 12, 13 & 14 of the writ petition it is respectfully submitted that the second round of conseling NEET PG 2017 was held as per procedure prescribed and time schedule according to G.O. Dated 02.08.2017. On 19.08.2017 the NIC completed the processing of choice filing and choice lock of the seats. Processing was completed at about 01.00 in the mid night of 19.08.2017 and later on cross checking was also done. The NIC made the result available to the students on official web site on 20.08.2017 at 02.16.18 Hr. The candidates had taken admission after downloading their allotment letters on 20.08.2017 and 21.08.2017. There was no change in time schedule."

21. Thus, the respondent-2 has admitted that the result of the second counseling was not declared on 19.8.2017, the date fixed as per the schedule, for declaration of result but it was declared on 20.8.2017.

22. In **Priya Gupta vs. State of Chhatisgarh and others, (2012) 7 SCC 433**, the Hon'ble Supreme Court held that the schedule prescribed have the force of law and are binding on all concerned and it is difficult to comprehend that any authority can have the discretion to alter these schedules to suit a given situation. Paragraph-40 of **Priya Gupta case** (supra) is being reproduced as under:-

"40. The schedules prescribed have the force of law, in as much as they form part of the judgments of this Court, which are the declared law of the land in terms of Article 141 of the Constitution of India and form part of the regulations of the Medical Council of India, which also have the force of law and are binding on all concerned. It is difficult to comprehend that any authority can have the discretion to alter these schedules to suit a given situation, whether such authority is the Medical Council of India, the Government of India, State Government, University or the selection bodies constituted at the college level for allotment of seats by way of counseling. We have no hesitation in clearly declaring that none of these authorities are vested with the power of relaxing, varying or disturbing the time schedule, or the procedures of admission, as provided in the judgments of this Court

and the Medical Council of India Regulations."

23. In the case of **Mridul Dhar vs. Union of India**, reported in (2005) 2 SCC 65 the Hon'ble Supreme Court of India emphasized for timely declaration of results, to save the candidates and their parents from facing undesirable hardships. Paragraph 17 of **Mridul Dhar** (supra) is being reproduced as under:-

17. Another connected aspect is declaration of result of qualifying Examination/Entrance Examination for State quota seats. The State Governments, as per the time schedule are required to declare the said results by 15th June of every year. The timely declaration of result will enable the students to take a decision about participation in All India counseling or State counseling. The Central Government has rightly pointed out that due to late declaration of result of State level entrance examination, candidates and their parents travel from all over the country to participate in All India Quota Counseling which is conducted in Delhi and then travel to allotted medical/dental colleges. Later on, if the candidates get admission in the colleges of their choice in their respective States through State counseling, they have to travel back to the college allotted through All India Quota to get their college leaving certificate and other documents which are deposited with allotted college before joining the State college. By timely declaration of the results of the State level entrance examination i.e. by 15th June, which is before the start of All India Quota counseling, candidates and their parents can be saved from facing undesirable hardships."

24. In **Priya Gupta** (supra), also the importance of declaration of result for the entire admission process was observed. The Supreme Court while noticing Mridul Dhar case(supra) observed in paragraph-30 as under:-

"30. The Court in Mridul Dhar case(Mridul Dhar v. Union of India, (2005) 2 SCC 65 noticed that the holding of 10+2 examination and declaration of results is also of importance for the entire admission process and, therefore, directed strict adherence to the Schedule in all respects and by all concerned. The date of 30th September was stated not t be the date of normal admission but is to give opportunity t grant admission against stray vacancies. The Court clarified that adherence to the time schedule by everyone was a paramount concern. In that case, the Court issued a specific direction to all the State functionaries, particularly the Chief Secretaries and heads of the Ministries/Departments concerned participating in the States/Union Territories adopting the time schedule and holding he State examination to ensure declaration of results on or before 15.-6.2005.."

In Paragraph 72 of **Priya Gupta** (Supra) adherence to the time schedule, procedure for selection/admission and strict observance of M.C.I. Regulations by all concerned was emphasized. Paragraph 72 is being quoted as under:-

"72. Balancing of equities by the Court itself is inequitable. Some party or the other would suffer a set back or adverse consequence from the order of the Court. On the one hand, if admissions are cancelled, the students who have practically completed their MBBS course would lose their professional education as well as nearly five years of their life spent in such education. If their admissions are protected, then the standard of education, the merit of the candidates and the desirability of the persons of higher merit

becoming doctors is negated. The best solution to such problems is strict adherence to the time schedule, procedure for selection/admission and strict observance of the Medical Council of India Regulations, by all concerned. Once these factors are adhered to, not only would such situation not arise, but also it will prevent avoidable litigation before the Courts. The persons who violate the time schedule to grant admissions in an arbitrary manner and by colourable exercise of power, who are not adhering to Medical Council of India Regulations and the judgments of this Court, should be dealt with strictly by punishment in accordance with law, to prevent such mischief from repeating."

25. Subsequent to Priya Gupta decision, Regulations of M.C.I. were amended empowering the Central Government to modify the Stages and time limits in the schedule to the regulations. In **Royal Medical Trust (Regd.) and another vs. Union of India and another (2015) 10 SCC 19**, the Hon'ble Supreme Court held that the directions in Priya Gupta case must now be understood in the light of such statutory empowerment and it was declared that it was open to the Central Government to extend or modify the time limits in the schedule to the Regulations.

26. Thus, the schedules prescribed have the force of law and have to be mandatorily followed. The non observance of the schedules may give rise to many mischiefs, including arbitrariness in giving admission to the candidates. However, here, we are concerned with the refund or forfeiture of security money, deposited by a candidate, who could not take admission in time, in the allotted college.

27. Clause VIII of the G.O. Dated 3.7.2017 as well as the Brochure, as reproduced above, provide that if a candidate after allotment does not take admission in the allotted college or if after taking admission leaves the college, the security amount shall not be refunded/returned. However, we cannot read Clause VIII, in isolation. The other provisions of the G.O dated 03.07.2017, particularly, the final schedule for declaration of result, as fixed and modified by G.O. Dated 2.8.2017, are also be read. When we read the aforesaid provisions, together, we are of the considered view that the security amount can be forfeited or not refunded to a candidate, if the time schedule for declaration of result, is strictly adhered to by the authorities. If the result is declared as per the time schedule, on the date fixed for declaration of result, and in spite thereof the candidate to whom college is allotted does not take admission, the security money, deposited by the candidate shall not be refunded to the candidate. But, if the result is not declared in time and is delayed, as in the present case, it was declared on 20.8.2017 instead of 19.8.2017, Clause VIII cannot be invoked to forfeit the security money, if the candidate fails to take admission in the allotted college in time as per the time schedule for taking admission.

28. We are of the considered view that as per the schedule, the authorities in their own wisdom allowed two complete days' time to the candidate for taking admission in the allotted college, after the date of declaration of the result, considering such time as a reasonable time. The delay in declaration of one day necessarily reduced the period of 2 days for taking admission in the allotted college. On the face of the schedule and the actual date of declaration of result , the petitioner did not get that reasonable time of 2 days for admission in the allotted college. The petitioner cannot be held to have failed to

take admission in the allotted college in time, in terms of Clause VIII of the Government Order dated 3.7.2017. Any such failure to take admission by the petitioner is referable to the act of the respondents in failing to declare result as per the schedule, in time.

29. It is well settled in law that an authority cannot take advantage of its own wrong. In the case of **Kusheshwar Prasad Singh vs. State of Bihar**, reported in (2007)11 SCC 447 the Hon'ble Supreme Court has held that an authority cannot be allowed to take advantage of its own wrong giving favourable interpretation of law. It is relevant to reproduce paragraphs 13 to 16 of the report as under:-

"13. The appellant is also right in contending before this Court that the power under Section 32B of the Act to initiate fresh proceedings could not have been exercised. Admittedly, Section 32B came on the statute book by Bihar Act 55 of 1982. The case of the appellant was over much prior to the amendment of the Act and insertion of Section 32B. The appellant, therefore, is right in contending that the authorities cannot be allowed to take undue advantage of its own default in failure to act in accordance with law and initiate fresh proceedings.

14. In this connection, our attention has been invited by the learned counsel for the appellant to a decision of this Court in Mrutunjay Pani & Another v. Narmada Bala Sasmal & Another, AIR 1961 SC 1353, wherein it was held by this Court that where an obligation is cast on a party and he commits a breach of such obligation, he cannot be permitted to take advantage of such situation. This is based on the Latin maxim 'Commodum ex injuria sua nemo habere debet' (No party can take undue advantage of his own wrong).

15. In Union of India & Ors. v. Major General Madan Lal Yadav (Retd.), (1996) 4 SCC 127, the accused-army personnel himself was responsible for delay as he escaped from detention. Then he raised an objection against initiation of proceedings on the ground that such proceedings ought to have been initiated within six months under the Army Act, 1950. Referring to the above maxim, this Court held that the accused could not take undue advantage of his own wrong. Considering the relevant provisions of the Act, the Court held that presence of the accused was an essential condition for the commencement of trial and when the accused did not make himself available, he could not be allowed to raise a contention that proceedings were time-barred. This Court referred to Broom's Legal Maxims (10th Edn.) p. 191 wherein it was stated;

"it is a maxim of law, recognised and established, that no man shall take advantage of his own wrong; and this maxim, which is based on elementary principles, is fully recognised in Courts of law and of equity, and, indeed, admits of illustration from every branch of legal procedure".

16. It is settled principle of law that a man cannot be permitted to take undue and unfair advantage of his own wrong to gain favourable interpretation of law. It is sound principle that he who prevents a thing from being done shall not avail himself of the non-performance he has occasioned. To put it differently, "a wrong doer ought not to be permitted to make a profit out of his own wrong"."

30. We are not convinced with the submission of the learned counsel for respondent-2 that in the absence of any challenge to the G.O.s dated 3.7.2017 and 2.8.2017, with respect to the security

money clause contained therein, any relief of refund of the security amount cannot be granted to the petitioner, inasmuch as the manner in which we have read the aforesaid Government Orders and Brochure, make the provisions relating to security money, its refund/forfeiture, equitable and reasonable. On the other hand, if we read the above provisions in the manner suggested by the learned counsel for respondent-2, i.e. in isolation from the schedules prescribed for declaration of result and taking of admission in the allotted college, that would confer arbitrary powers on the authorities to forfeit the security money in all the cases, including those cases where the fault does not lie on the part of the candidate but lies on the authorities. This would be inequitable and would render the provision arbitrary as well as conferring arbitrary power on the authorities. It is settled in law that arbitrariness in State action is negation of rule of law and violates the right of equality as enshrined in Article 14 of the Constitution of India.

31. In view of the above reading of the Government Orders relating to security money clause, the same does not require any challenge by the petitioner for the relief of refund of the security amount.

32. We, therefore, allow this petition in part and direct the respondents to refund the amount of security money of Rs.2,00,000/-, deposited with respondent-2, within a period of two weeks from the date of production of a certified copy of this judgment before the said authority.

33. No orders as to costs.

(2020)09ILR A756
ORIGINAL JURISDICTION
CIVIL SIDE

DATED: ALLAHABAD 28.02.2020

BEFORE

THE HON'BLE RAVI NATH TILHARI, J.

WRIT – C No. 46379 of 2006

Smt. Manju Mittal & Anr. ...Petitioners
Versus
The State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sri M.A. Mishra

Counsel for the Respondents:
C.S.C.

(A) Civil Law - Motor Vehicles Act, 1988 - Section 166 -Application for compensation, Section 173-Appeals, Section 174 - Recovery of money from insurer as arrear of land revenue - statutory forum created by law for redressal of grievances - writ petition should not be entertained ignoring the statutory dispensation i.e. without first relegating the petitioner to exhaust the remedies available under the statute - a self-imposed restriction; a rule of policy convenience and discretion rather than a rule of law - In at least three contingencies: (i) Violation/infringement of fundamental rights; (ii) Violation of the principles of natural justice; (iii) the order or proceedings being wholly without jurisdiction or the vires of an Act being under challenge, this Court may still exercise its writ jurisdiction.(Para-27)

Petitioner No.1 is the owner of the offending vehicle/bus bearing registration No. PB-13E-9775 - purchased from Petitioner No.2, on 6.5.2002 - causing the accident dated 16.5.2002 - resulting into death of one Sri Mahipal Singh - legal heirs of late Mahipal Singh filed Motor Accident Claim for grant of compensation under Section 166 of the Motor Vehicles Act, 1988. (Para - 4)

HELD:- Petitioners have statutory alternative remedy of appeal against the award dated 5.11.2004 passed by the Motor Accident Claims

Tribunal, under Section 173 of the Motor Vehicles Act. (Para-29)

Petition dismissed. (E-7)

List of Cases cited: -

1. V. Subbulakshmi & ors. Vs Lakshmi & anr., AIR 2008 SC 1256

2. Narendra Kumar & anr. Vs Yarenissa & ors., (1998) 9 SCC 202

3. Smt. Surinder Kaur Vs Motor Accident Claims Tribunal/Special Judge AC Act, Bareily & anr., 2009 (4) ALJ 613

4. Ghanshyam Gupta Vs United India Insurance Co. Ltd & ors., 2012 (2) ALJ 406

5. Nivedita Sharma Vs Cellular Operators Assn. Of India & ors., (2011) 14 SCC 337

6. Commissioner of Income Tax & ors. Vs Chhabil Das Agarwal, (2014) 1 SCC603

7. Agarwal Tracom Pvt. Ltd. Vs Punjab National Bank & ors., (2018) 1 SCC 626

8. Authorized Officer, State Bank of Travancore & anr. Vs Mathew K.C. (2018) 3 SCC 85

9. Whirlpool Corporation Vs Registrar of Trade Marks, Mumbai & ors., (1998) 8 SCC 1

10. Commissioner of Income Tax & ors.Vs Chabil Das Agarwal, (2014) 1 SCC 603

(Delivered by Hon'ble Ravi Nath Tilhari, J.)

1. I have heard Sri M.A. Mishra, learned counsel for the petitioners and learned Standing Counsel for Respondent No.1 and perused the record.

2. As per office report dated 5.12.2019 the petitioners have not taken steps to serve the Respondent No.2, The New India Insurance Co. Ltd., in pursuance of the order of this Court dated 29.8.2006. The writ petition is listed for admission.

3. I proceed to consider the admission of the writ petition.

4. The facts of the case are that the petitioner No.1 is the owner of the offending vehicle/bus bearing registration No. PB-13E-9775 which she had purchased from Petitioner No.2, on 6.5.2002, causing the accident dated 16.5.2002 resulting into death of one Sri Mahipal Singh. The legal heirs of late Mahipal Singh filed Motor Accident Claim No. 857 of 2002 (Smt. Savitri Devi and others Vs. Sudha Singh and others) for grant of compensation under Section 166 of the Motor Vehicles Act, 1988.

5. After contest the claim was allowed by the Motor Accident Claims Tribunal, Meerut (Special Judge/Anti Corruption) vide judgment and award dated 5.11.2004 awarding compensation of Rs. 1,90,000/- against opposite party No.2 and 3 in the claim petition (present petitioners) jointly and severally with interest @ 6% and cost, with further direction that the compensation amount shall be indemnified by the New India Insurance Company Ltd./Respondent No.2 (in short the "Insurance Company') and it will be open to the Insurance Company to recover the said amount either from the insured (petitioner No.2) or from the transferee of the vehicle.

6. It appears from the record that the Insurance Company deposited an amount of Rs. 2,15,455.00/- before the claims tribunal on 21.12.2004 and thereafter filed an application for recovery of that amount from the petitioners in terms of the award dated 5.11.2004 which application, registered as Misc. Case No.1 of 2005 (New India Insurance Company Ltd. Vs. Sudha Singh and another)was allowed by the Claims Tribunal by order dated

20.1.2006. There after a recovery certificate dated 22.2.2006 under Section 174 of the Motor Vehicles Act, 1988 was sent to the Collector/District Magistrate, Muzaffar Nagar to recover the amount from the petitioners as arrears of land revenue and to pay the same to the Insurance Company. In pursuance of the recovery certificate dated 22.2.2006 the District Magistrate, Muazffar Nagar on 17.3.2006 directed for necessary action being taken as per law.

7. The petitioners have filed the present writ petition challenging the award dated 5.11.2004 and the order dated 22.2.2006 (Annexure Nos. 2 and 3 respectively) as well as for a direction to the Claims Tribunal not to proceed further in Misc. Case No. 1 of 2005, making following prayers:-

"(1) issue a writ, order or direction in the nature of writ of certiorari for quashing the impugned judgment and award dated 05.11.2004 and order dated 22.02.2006 passed by the Motor Accident Claim Tribunal-1 Meerut Special Judge Anti Corruption Act as contained in Annexure Nos. 2 and 3 respectively to the writ petition.

(2) issue a writ, order or direction in the nature of writ of mandamus commanding the Motor Accident Claim Tribunal not to proceed further in Misc. Case No. 1 of 2005"

(3) issue any suitable writ, order or direction which this Hon'ble Court may deem fit and proper under the facts and circumstances of the case.

(4) award the cost of the writ petition in favour of the petitioners."

8. The learned Standing Counsel has raised a preliminary objection that the petitioners have equally efficacious alternative remedy to challenge the award dated 5.11.2004 under Section 173 of The Motor Vehicles Act, 1988 by filing appeal and in view thereof the writ petition deserves to be dismissed.

9. Learned counsel for the petitioners has submitted that as the awarded amount has been deposited by the Insurance Company, the remedy of appeal is not available under Section 173 of the Motor Vehicles Act to the petitioners. He has next submitted that the petitioners have no remedy of appeal against the order dated 22.2.2006 also under challenge.

10. I have considered the submissions advanced by the learned counsel for the petitioners and the learned Standing counsel and have perused the material on record.

11. Section 173 of the Motor Accident Act, 1988 provides as under:

"(1) Subject to the provisions of sub-section (2) any person aggrieved by an award of a Claims Tribunal may, within ninety days from the date of the award, prefer an appeal to the High Court:

Provided that no appeal by the person who is required to pay any amount in terms of such award shall be entertained by the High Court unless he has deposited with it twenty-five thousand rupees or fifty per cent. of the amount so awarded, whichever is less, in the manner directed by the High Court:

Provided further that the High Court may entertain the appeal after the expiry of the said period of ninety days, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal in time.

(2) No appeal shall lie against any award of a Claims Tribunal if the amount in dispute in the appeal is less than ten thousand rupees."

12. A bare reading of Section 173 (1) of the Motor Vehicle Act, 1988 shows that any "person aggrieved" by the award of the Claims Tribunal may within 90 days prefer an appeal to the High Court, subject to the provisions of sub Section (2) which provides that no appeal shall lie against any award of the Claims Tribunal if the amount in dispute is less than ten thousand rupees.

13. In the case of **V. Subbulakshmi & Others Vs. Lakshmi & Anr. AIR 2008 SC 1256**, where facts were that against the award of the claims tribunal appeal was filed under Section 173 (1) of the Motor Vehicles Act before the High Court jointly by the Insurer and the insured and the High Court held that no appeal would be maintainable at the instance of the Insurance Company unless permission was obtained by it in terms of Section 170 of the Act but observed that the owner of the vehicle being the appellant, the appeal would be maintainable at his instance, the Hon'ble Supreme Court referring to the case of **Narendra Kumar and Another Vs. Yarenissa and others [(1998) 9 SCC 202]** held that an appeal by the owner of the vehicle is maintainable as he was an aggrieved person, despite the fact that in terms of an award, he was to be reimbursed by the Insurance Company. Paragraph 13 of the said judgment is being reproduced as under:

"13. In the instant case, the owner of the bus was an aggrieved person. He could maintain an appeal of his own. Section 173 of the Act confers a right on any aggrieved person to prefer an appeal from an award."

Though this judgment is with respect to the maintainability of the appeal by the owner where in terms of the award the owner was to be reimbursed by the Insurance Company but the same principle would apply with greater force in the present case, in as much as here also the liability for payment of compensation has been fixed on the owner/petitioners and the Insurance Company has been given the right to recover the awarded amount from the owner/petitioners after making its payment to the claimants. The petitioners, as such, are the persons aggrieved by the award of the claims Tribunal which fixed their liability for payment of compensation.

14. Section 174 of the Motor Vehicles Act, 1988 provides as under:

"174. Recovery of money from insurer as arrear of land revenue.--Where any amount is due from any person under an award, the Claims Tribunal may, on an application made to it by the person entitled to the amount, issue a certificate for the amount to the Collector and the Collector shall proceed to recover the same in the same manner as an arrear of land revenue."

15. In the case of **Smt. Surinder Kaur Vs. Motor Accident Claims Tribunal/Special Judge AC Act, Bareily & Another 2009 (4) ALJ 613** this Court in paragraph nos. 8 and 12 held as under:

"8. From the simple reading of the language of Section 174, it is apparently clear that it confers a right upon the person (named under the award by the Tribunal) to recover the amount in terms of the award from a person against whom such an order has been passed. The word "any person' so used in the Section would include the owner of the vehicle provided in the award a direction against

the owner has been made. Similarly the words "the person entitled' would include the insurance company provided a direction in its favour has been made in the award.

12. In view of the aforesaid, the Tribunal is justified in recording a finding that since the petitioner has not challenged the main award, he cannot be permitted to question the order passed on the application of the Insurance company under Section 174 of the Act, 1988 qua recovery of the amount in terms of the award made by the Tribunal earlier."

16. In **Ghanshyam Gupta Vs. United India Insurance Co. Ltd and others 2012 (2) ALJ 406** this Court held that as in the award the claimant was the person entitled to recover the amount from the opposite party in the claim petition in the manner it was directed by the Tribunal it included the Insurance Company as well as the petitioner. The Insurance Company discharged its burden and paid the amount to the claimant. Thereafter as per direction in the award of the Tribunal, the Insurance Company was entitled to recover the amount from the petitioner, i.e. owner of the vehicle. The application of the Insurance company would also be covered by Section 174 of the Act. The relevant paragraphs 6 and 7 are being reproduced as under:

"6. Section 174 clearly provides, when an amount is due to any person under the award, if such a person moves an application, the Claims Tribunal may issue a certificate to the Collector for recovery of the said amount from the person liable to pay. The term 'person' used in section 174 has been defined in General Clauses Act as under:

'Person' shall include any company or association or body of individuals, whether incorporated or not.'

7. It includes natural and legal person both. In the award, the claimant was person entitled to recover the amount from the opposite parties in the claim petition in the manner it was directed by the Tribunal. It included the insurance company as well as the petitioner. The insurance company discharged its burden and paid the amount to the claimant. Thereafter as per direction in the award of the Claims Tribunal, the insurance company was entitled to recover the amount from petitioner, i.e., owner of the vehicle, Therefore, the insurance company's application would also be covered by section 174 of 1988 Act."

17. Thus in the present case the Tribunal having provided that the Insurance Company after indemnifying the claimants of the awarded amount, for which the petitioners were held liable, may recover the same from the petitioners. The application of the insurance company to recover the amount from the petitioners was competent under Section 174 of the Motor Vehicles Act in terms of the award. As such, unless there is a challenge to the award dated 5.11.2004 the petitioners cannot challenge the order dated 22.2.2006 on the same ground as taken to challenge the award. The petitioners have not challenged this order dated 22.2.2006 on independent grounds. The petitioners have challenged the award dated 5.11.2004 and have raised the dispute that the claims tribunal had no jurisdiction to direct recovery of the awarded amount from the petitioners by the insurance company, after its payment to the claimants by the insurance company. The challenge is that such an award could not legally be passed. The challenge to the order dated 22.2.2006 thus rests on challenge to the award dated 5.11.2004 and unless such challenge is

successful against the award dated 5.11.2004 the petitioner cannot be successful in challenging the order dated 22.2.2006. The main grievance of the petitioners, therefore, is against the award dated 5.11.2004 and they are the persons aggrieved against the award.

18. The submission of the petitioners' counsel that the Insurance Company having deposited the awarded amount before the claims tribunal, the petitioners have no remedy of appeal under Section 173, deserves rejection being without substance. The deposit has been made by the insurance company pursuant to the liability fixed upon the petitioners by the award and the petitioners feel aggrieved from imposition of such liability. The statute does no where provide that if the insurance company indemnifies the claimants the appeal would not be maintainable at the instance of the owners. The only exception to the remedy of appeal under Section 173 is that the awarded amount of compensation is less than 10,000/- rupees.

19. Thus, I am of the considered view that Section 173(1) of the Motor Vehicles Act, 1988 is clearly attracted and as the amount awarded is not less than Rs. 10,000/-, sub Section (2) of Section 173 is not attracted. The petitioners, thus, have a statutory remedy to file appeal under Section 173(1) against the award dated 5.11.2004.

20. In the case of **Nivedita Sharma Vs. Cellular Operators Assn. Of India and others reported in (2011) 14 SCC 337** the Hon'ble Apex Court has held that it is settled in law that when a statutory forum is created by law for redressal of grievances a writ petition should not be entertained ignoring the statutory dispensation. Paragraph Nos. 12,13 and 14 of the said judgment are being reproduced as under:

12. We have considered the respective arguments/submissions. There cannot be any dispute that the power of the High Courts to issue directions, orders or writs including writs in the nature of habeas corpus, certiorari, mandamus, quo warranto and prohibition under Article 226 of the Constitution is a basic feature of the Constitution and cannot be curtailed by parliamentary legislation L. Chandra Kumar v. Union of India MANU/SC/0261/1997MANU/SC/0261/199 7 : (1997) 3 SCC 261. However, it is one thing to say that in exercise of the power vested in it under Article 226 of the Constitution, the High Court can entertain a writ petition against any order passed by or action taken by the State and/or its agency/instrumentality or any public authority or order passed by a quasi-judicial body/authority, and it is an altogether different thing to say that each and every petition filed under Article 226 of the Constitution must be entertained by the High Court as a matter of course ignoring the fact that the aggrieved person has an effective alternative remedy. Rather, it is settled law that when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation.

"13. In Thansingh Nathmal v. Superintendent of Taxes MANU/SC /0255/1964MANU/SC/0255/1964 : AIR 1964 SC 1419, this Court adverted to the rule of self-imposed restraint that writ petition will not be entertained if an effective remedy is available to the aggrieved person and observed:

The High Court does not therefore act as a court of appeal against the decision of a court or tribunal, to

correct errors of fact, and does not by assuming jurisdiction under Article 226 trench upon an alternative remedy provided by statute for obtaining relief. Where it is open to the aggrieved Petitioner to move another tribunal, or even itself in another jurisdiction for obtaining redress in the manner provided by a statute, the High Court normally will not permit by entertaining a petition under Article 226 of the Constitution the machinery created under the statute to be bypassed, and will leave the party applying to it to seek resort to the machinery so set up.

14. In Titaghur Paper Mills Company Ltd. v. State of Orissa MANU/SC /0317/1983MANU/SC/0317/1983 : (1983) 2 SCC 433. this Court observed:

It is now well recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of. This rule was stated with great clarity by Willes, J. in Wolverhampton New Waterworks Company v. Hawkesford (1859) 6 CBNS 336: 141 ER 486 in the following passage:

... There are three classes of cases in which a liability may be established founded upon a statute.....Hut there is a third class, viz., where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it.....The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to.

The rule laid down in this passage was approved by the House of Lords in Neville v. London Express Newspapers Ltd. 1919 AC 368: (1918-19) All ER Rep. 61 (HL) and has been reaffirmed by the Privy Council in Attorney General of Trinidad and Tobago v. Gordon Grant and Company Ltd 1935 AC 532 and Secy, of State v. Mask and Company MANU/PR/0022/1940MANU/PR/0022/1940 : (1939-40) 67 IA 222: AIR 1940 PC 105. It has also been held to be equally applicable to enforcement of rights, and has been followed by this Court throughout. The High Court was therefore justified in dismissing the writ petitions in limine."

21. In the case of **Commissioner of Income Tax and others Vs. Chhabil Das Agarwal (2014) 1SCC603** the Hon'ble Apex Court reiterated that it is now well settled that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of. Paragraph Nos. 14,15,16 and 17 of this judgment are being reproduced as under:

"14. In the instant case, the only question which arises for our consideration and decision is whether the High Court was justified in interfering with the order passed by the assessing authority under Section 148 of the Act in exercise of its jurisdiction under Article 226 when an equally efficacious alternate remedy was available to the Assessee under the Act.

15. Before discussing the fact proposition, we would notice the principle of law as laid down by this Court. It is settled law that non-entertainment of petitions under writ jurisdiction by the High Court when an efficacious alternative remedy is available is a rule of self-imposed limitation. It is essentially a rule of policy, convenience and discretion rather than a rule of law. Undoubtedly, it is within the discretion of the High Court to grant relief under Article 226 despite the existence of an alternative remedy.

However, the High Court must not interfere if there is an adequate efficacious alternative remedy available to the Petitioner and he has approached the High Court without availing the same unless he has made out an exceptional case warranting such interference or there exist sufficient grounds to invoke the extraordinary jurisdiction under Article 226. (See: State of U.P. v. Mohammad Nooh MANU/SC/0125/1957MANU/SC/0125/1957 : AIR 1958 SC 86; Titaghur Paper Mills Co. Ltd. v. State of Orissa MANU/SC/0317/1983MANU/SC/0317/1983 : (1983) 2 SCC 433; Harbanslal Sahnia v. Indian Oil Corporation Ltd. MANU/SC/1199/2002MANU/SC/1199/2002 : (2003) 2 SCC 107; State of H.P. v. Gujarat Ambuja Cement Ltd. MANU/SC/0421/2005MANU/SC/0421/2005 : (2005) 6 SCC 499).

16. The Constitution Benches of this Court in K.S. Rashid and Sons v. Income Tax Investigation Commission MANU/SC/0123/1954MANU/SC/0123/1954 : AIR 1954 SC 207; Sangram Singh v. Election Tribunal, Kotah MANU/SC/0044/1955MANU/SC/0044/1955 : AIR 1955 SC 425; Union of India v. T.R. Varma MANU/SC/0121/1957MANU/SC/0121/1957 : AIR 1957 SC 882; State of U.P. v. Mohd. Nooh MANU/SC/0125/1957MANU/SC/0125/1957 : AIR 1958 SC 86 and K.S. Venkataraman and Co. (P) Ltd. v. State of Madras MANU/SC/0293/1965MANU/SC/0293/1965 : AIR 1966 SC 1089 have held that though Article 226 confers a very wide powers in the matter of issuing writs on the High Court, the remedy of writ absolutely discretionary in character. If the High Court is satisfied that the aggrieved party can have an adequate or suitable relief elsewhere, it can refuse to exercise its jurisdiction. The Court, in extraordinary circumstances, may exercise the power if it comes to the conclusion that there has been a breach of principles of natural justice or procedure required for decision has not been adopted.

(See: N.T. Veluswami Thevar v. G. Raja Nainar MANU/SC/0094/1958MANU/SC/0094/1958 : AIR 1959 SC 422; Municipal Council, Khurai v. Kamal Kumar MANU/SC/0227/1964MANU/SC/0227/1964 : (1965) 2 SCR 653; Siliguri Municipality v. Amalendu Das MANU/SC/0017/1984MANU/SC/0017/1984 : (1984) 2 SCC 436; S.T. Muthusami v. K. Natarajan MANU/SC/0426/1988MANU/SC/0426/1988 : (1988) 1 SCC 572; Rajasthan SRTC v. Krishna Kant MANU/SC/0786/1995MANU/SC/0786/1995 : (1995) 5 SCC 75; Kerala SEB v. Kurien E. Kalathil MANU/SC/0435/2000MANU/SC/0435/2000 : (2000) 6 SCC 293; A. Venkatasubbiah Naidu v. S. Chellappan MANU/SC/0581/2000MANU/SC/0581/2000 : (2000) 7 SCC 695; L.L. Sudhakar Reddy v. State of A.P. MANU/SC/0445/2001MANU/SC/0445/2001 : (2001) 6 SCC 634; Shri Sant Sadguru Janardan Swami (Moingiri Maharaj) Sahakari Dugdha Utpadak Sanstha v. State of Maharashtra MANU/SC/0602/2001MANU/SC/0602/2001 : (2001) 8 SCC 509; Pratap Singh v. State of Haryana MANU/SC/0832/2002MANU/SC/0832/2002 : (2002) 7 SCC 484 and GKN Driveshafts (India) Ltd. v. ITO MANU/SC/1053/2002MANU/SC/1053/2002 : (2003) 1 SCC 72).

17. In Nivedita Sharma v. Cellular Operators Assn. of India MANU/SC/1538/2011MANU/SC/1538/2011 : (2011) 14 SCC 337, this Court has held that where hierarchy of appeals is provided by the statute, party must exhaust the statutory remedies before resorting to writ jurisdiction for relief and observed as follows:

12. In Thansingh Nathmal v. Supdt. of Taxes MANU/SC/0255/1964MANU/SC/0255/1964 : AIR 1964 SC 1419 this Court adverted to the rule of self-imposed restraint that the writ petition will not be entertained if an effective remedy is available to the aggrieved person and observed: (AIR p. 1423, para 7).

7. ... The High Court does not therefore act as a court of appeal against the decision of a court or tribunal, to correct errors of fact, and does not by assuming jurisdiction under Article 226 trench upon an alternative remedy provided by statute for obtaining relief. Where it is open to the aggrieved Petitioner to move another tribunal, or even itself in another jurisdiction for obtaining redress in the manner provided by a statute, the High Court normally will not permit by entertaining a petition under Article 226 of the Constitution the machinery created under the statute to be bypassed, and will leave the party applying to it to seek resort to the machinery so set up.

13. In Titaghur Paper Mills Co. Ltd. v. State of Orissa MANU/SC/0317/1983MANU/SC/0317/1983 : (1983) 2 SCC 433 this Court observed: (SCC pp. 440-41, para 11)

11. ... It is now well recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of. This rule was stated with great clarity by Willes, J. in Wolverhampton New Waterworks Co. v. Hawkesford 141 ER 486 in the following passage: (ER p. 495)

... There are three classes of cases in which a liability may be established founded upon a statute. ... But there is a third class viz. where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it.

The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to.

The rule laid down in this passage was approved by the House of Lords in Neville v. London Express Newspapers Ltd. 1919 AC 368 and has been reaffirmed by the Privy Council in Attorney General of Trinidad and Tobago v. Gordon Grant and Co. Ltd. 1935 AC 532 (PC) and Secy. of State v. Mask and Co. MANU/PR/0022/1940MANU/PR/0022/1940 : AIR 1940 PC 105 It has also been held to be equally applicable to enforcement of rights, and has been followed by this Court throughout. The High Court was therefore justified in dismissing the writ petitions in limine.

14. In Mafatlal Industries Ltd. v. Union of India MANU/SC/1203/1997MANU/SC/1203/1997 : (1997) 5 SCC 536 B.P. Jeevan Reddy, J. (speaking for the majority of the larger Bench) observed: (SCC p. 607, para 77)

77. ... So far as the jurisdiction of the High Court under Article 226--or for that matter, the jurisdiction of this Court under Article 32--is concerned, it is obvious that the provisions of the Act cannot bar and curtail these remedies. It is,

however, equally obvious that while exercising the power under Article 226/Article 32, the Court would certainly take note of the legislative intent manifested in the provisions of the Act and would exercise their jurisdiction consistent with the provisions of the enactment."

22. In the case of **Agarwal Tracom Pvt. Ltd. Vs. Punjab National Bank and others (2018) 1SCC 626** the Hon'ble Apex Court reiterated the same principle once again. Paragraph Nos. 33 and 34 are being reproduced as under:-

33. In United Bank of India v. Satyawati Tondon and Ors., MANU/SC/0541/ 2010MANU/SC/0541/2010 : (2010) 8 SCC 110, this Court had the occasion to examine in detail the provisions of the SARFAESI Act and the question regarding invocation of the extraordinary power Under Article 226/227 in challenging the actions taken under the SARFAESI Act. Their Lordships gave a note of caution while dealing with the writ filed to challenge the actions taken under the SARFAESI Act and made following pertinent observations which, in our view, squarely apply to the case on hand:

42. There is another reason why the impugned order should be set aside. If Respondent 1 had any tangible grievance against the notice issued Under Section 13(4) or action taken Under Section 14, then she could have availed remedy by filing an application Under Section 17(1). The expression "any person" used in Section 17(1) is of wide import. It takes within its fold, not only the borrower but also the guarantor or any other person who may be affected by the action taken Under Section 13(4) or Section 14. Both, the Tribunal and the Appellate Tribunal are empowered to pass interim orders Under Sections 17 and 18 and are required to decide the matters within a fixed time schedule. It is thus evident that the remedies available to an aggrieved person under the SARFAESI Act are both expeditious and effective.

43. Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a petition Under Article 226 of the Constitution if an effective remedy is available to the aggrieved person and that this Rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions. In our view, while dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc. the High Court must keep in mind that the legislations enacted by Parliament and State Legislatures for recovery of such dues are a code unto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasi-judicial bodies for redressal of the grievance of any aggrieved person. Therefore, in all such cases, the High Court must insist that before availing remedy Under Article 226 of the Constitution, a person must exhaust the remedies available under the relevant statute.

44. While expressing the aforesaid view, we are conscious that the powers conferred upon the High Court Under Article 226 of the Constitution to issue to any person or authority, including in appropriate cases, any Government, directions, orders or writs including the five prerogative writs for the enforcement of any of the rights conferred by Part III or for any other purpose are very wide and there is no express limitation on exercise of

that power but, at the same time, we cannot be oblivious of the Rules of self-imposed restraint evolved by this Court, which every High Court is bound to keep in view while exercising power Under Article 226 of the Constitution.

45. It is true that the Rule of exhaustion of alternative remedy is a Rule of discretion and not one of compulsion, but it is difficult to fathom any reason why the High Court should entertain a petition filed Under Article 226 of the Constitution and pass interim order ignoring the fact that the Petitioner can avail effective alternative remedy by filing application, appeal, revision, etc. and the particular legislation contains a detailed mechanism for redressal of his grievance.

34. In the light of foregoing discussion, we are of the considered opinion that the Writ Court as also the Appellate Court were justified in dismissing the Appellant's writ petition on the ground of availability of alternative statutory remedy of filing an application Under Section 17(1) of SARFAESI Act before the concerned Tribunal to challenge the action of the PNB in forfeiting the Appellant's deposit under Rule 9(5). We find no ground to interfere with the impugned judgment of the High Court."

23. In the case of **Authorized Officer, State Bank of Travancore and another Vs. Mathew K.C. (2018)3 SCC 85** the Hon'ble Apex Court has held as under in paragraph No.6:

"6. We have considered the submissions on behalf of the parties. Normally this Court in exercise of jurisdiction Under Article 136 of the Constitution is loathe to interfere with an interim order passed in a pending proceeding before the High Court, except in special circumstances, to prevent manifest injustice or abuse of the process of the court. In the present case, the facts are not in dispute. The discretionary jurisdiction Under Article 226 is not absolute but has to be exercised judiciously in the given facts of a case and in accordance with law. The normal Rule is that a writ petition Under Article 226 of the Constitution ought not to be entertained if alternate statutory remedies are available, except in cases falling within the well defined exceptions as observed in Commissioner of Income Tax and Ors. v. Chhabil Dass Agarwal, MANU/SC/0 802/2013MANU/SC/0802/2013 : 2014 (1) SCC 603, as follows:

15. Thus, while it can be said that this Court has recognised some exceptions to the Rule of alternative remedy i.e. where the statutory authority has not acted in accordance with the provisions of the enactment in question, or in defiance of the fundamental principles of judicial procedure, or has resorted to invoke the provisions which are repealed, or when an order has been passed in total violation of the principles of natural justice, the proposition laid down in Thansingh Nathmal case, Titaghur Paper Mills case and other similar judgments that the High Court will not entertain a petition Under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance still holds the field. Therefore, when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation."

24. There are also well defined exceptions to the rule of exhaustion of alternative statutory remedies.

25. In the case of Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and others (1998) 8 SCC 1 the Hon'ble Apex Court held as under in paragraph Nos. 15 to 20 which are being quoted as under:-

15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction.

But the alternative remedy has been consistently held by this court not to operate as a bar in at least three contingencies, namely, where the Writ Petition has been filed for the enforcement of any of the Fundamental rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged.

There is a plethora of case law on this point but to cut down this circle of forensic whirlpool we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field.

16. Rashid Ahmad v. Municipal Board, kairana, MANU/SC/0005/ 1950MANU/SC/0005/1950 : [1950]1SCR566 , laid down that existence of an adequate legal remedy was a factor to be taken into consideration in the matter of granting Writs. This was followed by another Rashid case, namely, K.S. Rashid & Son v. The Income Tax Investigation Commissioner, MANU/SC/0123/1954MANU/SC/0123/195 4 : [1954] 25ITR167 (SC) which reiterated the above proposition and held that where alternative remedy existed, it would be a sound exercise of discretion to refuse to interfere in a petition under Article 226. This proposition was, however, qualified by the significant words, "unless there are good grounds therefor", which indicated that alternative remedy would not operate as an absolute bar and that Writ Petition under Article 226 could still be entertained in exceptional circumstances.

17. Specific and clear rule was laid down in State of U.P. v. Mohd. Nooh, MANU/SC/ 0125/1957MANU/SC/ 0125/1957:[1958]1SCR595, as under :

"But this rule requiring the exhaustion of statutory remedies before the Writ will be granted is a rule of policy convenience and discretion rather than a rule of law and instances are numerous where a writ of certiorari has been issued in spite of the fact that the aggrieved party had other adequate legal remedies."

18. This proposition was considered by a Constitution Bench of this Court in A. V. Venkateswaran, Collector of Customs. Bombay v. Ramchand Sobhraj Wadhwani and Anr., MANU/ SC/ 0158/ 1961 MANU/ SC/ 0158/ 1961:1983ECR2151D(SC) and was affirmed and followed in the following words:

"The passages in the judgments of this Court we have extracted would indicate (1) that the two exceptions which the learned solicitor General formulated to the normal rule as to the effect of the existence of an adequate alternative remedy were by no means exhaustive and (2) that even beyond them a discretion vested in the High Court to have entertained the petition and granted the petitioner relief notwithstanding the existence of an alternative remedy. We need only add that the broad lines of the

general principles on which the Court should act having been clearly laid down, their application to the facts of each particular case must necessarily be dependent on a variety of individual facts which must govern the proper exercise of the discretion of the Court, and that in a matter which is thus pre-eminently one of discretion, it is not possible or even if it were, it would not be desirable to lay down inflexible rules which should be applied with rigidity in every case which comes up before the Court".

19. Another Constitution Bench decision in Calcutta Discount co. Ltd. v. Income Tax Officer Companies Distt, I MANU/SC/0113/1960MANU/SC/0113/196 0 : [1961]41ITR191(SC) laid down :

"Though the writ of prohibition or certiorari will not issue against an executive authority, the High Courts have power to issue in a fit case an order prohibiting an executive authority from acting without jurisdiction. Where such action of an executive authority acting without jurisdiction subjects or is likely to subject a person to lengthy proceedings and unnecessary harassment, the High Court will issue appropriate orders or directions to prevent such consequences. Writ of certiorari and prohibition can issue against Income Tax Officer acting without jurisdiction Under Section 34 I.T. Act".

20. Much water has since flown beneath the bridge, but there has been no corrosive effect on these decisions which though old, continue to hold the field with the result that law as to the jurisdiction of the High Court in entertaining a Writ Petition under Article 226 of the Constitution, in spite of the alternative statutory remedies, is not affected, specially in a case where the authority against whom the Writ is filed is shown to have had no jurisdiction or had purported to usurp jurisdiction without any legal foundation.

26. In the case of Commissioner of Income Tax and others Vs. Chabil Das Agarwal (2014) 1SCC 603 the Hon'ble Apex Court has reiterated the same principles.

27. Thus it is settled in law that when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation i.e. without first relegating the petitioner to exhaust the remedies available under the statute. This is a self imposed restriction; a rule of policy convenience and discretion rather than a rule of law. In at least three contingencies: (i) Violation/infringement of fundamental rights; (ii) Violation of the principles of natural justice; (iii) the order or proceedings being wholly without jurisdiction or the vires of an Act being under challenge, this Court may still exercise its writ jurisdiction.

28. It has not been argued by the petitioner's counsel that any of the exceptions to the rule of exhaustion of alternative remedy as aforesaid is attracted in the present case.

29. Thus considered the petitioners have statutory alternative remedy of appeal against the award dated 5.11.2004 passed by the Motor Accident Claims Tribunal, Meerut under Section 173 of the Motor Vehicles Act. The challenge to the order dated 22.2.2006, being dependent on the challenge to the award dated 5.11.2004, can also not be made in the present writ petition.

30. The writ petition is dismissed on the ground of availability of statutory alternative remedy of appeal.

(2020)09ILR A769
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.11.2019

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE AJIT KUMAR, J.

WRIT - C No. 54312 of 2008
with
WRIT – C No. 52994 of 2008
with
WRIT – C No. 51053 of 2008
with
WRIT – C No. 51056 of 2008
with
WRIT – C No. 52993 of 2008

Manish Kumar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Rajesh Kumar Singh

Counsel for the Respondents:
C.S.C., Sri Manoj Kumar, Sri Subodh Kumar

(A) Civil Law - Enemy Property Act, 1968 - Section 18 - Defence of India Act, 1971 - Indian Rules 1971 , Custodian of Enemy Property Amendment Act, 1977 - Defence of Indian Rules, 1971 - Enemy Property (Amendment and Validation) Act, 2017 - Section 6 , Section12 - tenure holder who continues to be recorded and has executed a sale deed, the purchaser has a genuine legitimate expectation that if revenue entry is sought to be changed, a notice to concerned - if a recorded tenure holder not traceable, issuance of notice to public at large is a must - permitted to raise his grievance under the Enemy Property (Amendment and Validation) Act, 2017 as the competent authority is provided thereunder - so his grievance can be addressed to by the Central Government under the newly substituted section 18 of the Act of 1968 by virtue of Section 12 of the Validation Act, 2017. (Para-12)

Petitioner (original tenure holder) - left for Pakistan in the year December, 1974 - acquired citizenship of that country on 6.5.1976 - owning the property in India - she came here back on 17.12.2007 - executed a sale deed on 17.12.2007 - Her name came to be struck off from the revenue records of the land by the order of the Collector on 9.9.2008 - treating the property to be enemy property - vested in the custodian of the enemy property by operation of law. (Para - 4)

HELD: - Petitioner granted liberty to move an appropriate representation before the Central Government for consideration of his claim regarding rights and tile *qua* the land in question within a period of eight weeks from today, the competent authority of the Central Government shall look into the grievance of the petitioner raised in the representation and shall dispose of the same as expeditiously as possible within a further period of eight weeks. (Para-13,14)

Petition disposed of. (E-7)

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

1. Heard Sri Rajesh Kumar Singh, learned counsel for the petitioner and Sri Udit Chandra, holding brief of Sri Subodh Kumar learned counsel appearing for Respondent Nos. 5 and 6 and learned Standing Counsel appearing for the State-Respondent and perused the record.

2. All these petitions raise common question of law and, therefore, are decided by this common order and the Writ Petition 54312 of 2008 (Manish Kumar Vs. State of U.P. through Secretary, Finance and Revenue and others) is taken as a leading case. The facts narrated in the said writ petition are referred hereunder.

3. By means of this petition filed under Article 226 of the Constitution of

India, the petitioner has challenged the order dated 6th September, 2008 passed by Respondent No.2, namely, the District Magistrate, Muzaffar Nagar by which the name of the recorded original tenure holder over the land in question has been directed to be struck off holding the property to be an enemy property.

4. Briefly stated facts of the case are that the original tenure holder Smt. Shafiya Khatoon, widow of late Zaki Mohammad, left for Pakistan in the year December, 1974 and acquired citizenship of that country on 6.5.1976. However, since she was owning the property in India, she came here back on 17.12.2007 and executed a sale deed on 17.12.2007 in favour of the petitioner, copy whereof has been annexed as Annexure-5 to the writ petition. Her name came to be struck off from the revenue records of the land by the order of the Collector on 9.9.2008 treating the property to be enemy property, vested in the custodian of the enemy property by operation of law.

5. Assailing the order impugned the argument advanced by learned counsel for petitioner is that he is a bona fide purchaser of the property in question and that the original tenure holder had every right to execute sale deed in respect of the land in question. He submits that she was recorded tenure holder in the capacity of Bhumidhar with transferable rights and, therefore, she had every right to execute sale deed in respect of the said land and the Collector while passing the order, ought to have issued notices to the original tenure holder but from the order impugned it does not transpire that any such notice was ever issued to the petitioner or published for that matter.

6. Per contra the argument advanced by learned counsel appearing for the Respondent No.6 is that the property in question has stood vested in the Custodian of Enemy Property by virtue of provision as contained under the Enemy Property Act, 1968 (for short 'Act of 1968') enacted on 20th August, 1968 and he submits that as a consequence to the aggression by Pakistan in 1971 the proclamation of emergency took place w.e.f. 3rd December, 1971 under the Defence of India Act, 1971 and the Rules framed thereunder. He submits that all the immovable and specified immovable property characterised as Pakistani property in India were vested in the Custodian of Enemy Property. Taking recourse provisions of Indian Rules 1971 and the orders made thereunder, he submits proclamation of emergency though was revoked on 20th September, 1977 but the question arose of the validation of Enemy Property Act, 1968 which could have continued beyond the period of six months from the date of revocation of emergency and accordingly the Enemy Property (Amendment) Ordinance 1977 was promulgated under the signature of the Vice-President of India issued on 23rd September, 1977. The said Ordinance came to be replaced by the Act called the Custodian of Enemy Property Amendment Act, 1977 (for short Amendment Act, 1977). Thus according to the petitioner the Defence of India Rules remained in force beyond 27.9.1977 hence he submits that since the original tenure holder had left Pakistan in 1974 and obtained its nationality in 1977 during proclamation of emergency that land stood automatically vested by fiction of law in the Custodian of Enemy Property. For convenience to appreciate the argument advanced by learned counsel for the Respondent, Sub-section 2 of Section 5 as came to be inserted vide the Amendment Act of 1977, in the Enemy Property Act, 1968 is reproduced as under:

[2] Notwithstanding the expiration of the Defence of India Act, 1971 and the Defence of India Rules, 1971, all enemy property vested before such expiration in the Custodian of Enemy Property for India appointed under the said Rules and continuing to vest in him immediately before the commencement of the Enemy Property (Amendment) Act, 1977 shall, as from such commencement, vest in the custodian].

7. A bare reading of the aforesaid provision make it quite explicit that while the Defence of Indian Rules, 1971 and the Defence of India Act, 1971 were in force, if the properties of the Pakistani National in India continued to be vested in Custodian of Enemy Property and the status as such has continued on the date of coming into force Enemy Property Amendment Act, 1977, shall from such commencement after Act, 1977 vest in the custodian. As referred to hereinabove that Defence of Indian Rules and the Act of 1971 proclaimed on 4th December, 1971 were to continue during proclamation of emergency and, however, beyond period of six months from the date of revocation of emergency, the Original Tenure Holder of Smt. Shafiya Khatoon we find her to have left for Pakistan in 1974 and acquired nationality of that country in 1977 while the emergency was in force and, therefore, the property in question stood vested in the custodian of Enemy Property.

8. Learned counsel for the respondent has further placed reliance upon the newly substituted Section 6 of the Act of 1968 by virtue of Section 6 of the Enemy Property (Amendment and Validation) Act, 2017 and submits that property once vested under the Act of 1968 and the Amendment Act, 1977, if has continued to vest with the Custodian of Enemy Property on the date of commencement of the Validation Act, 2017, any transfer of such property shall be void and shall always be deemed to have been void.

9. Section 6 of the Validation Act, 2017 runs as under:

6. On and from the date of commencement of the principal Act, for section 6 of the principal Act, the following section shall be substituted and shall always be deemed to have been substituted, namely:-

"6.(1) No enemy or enemy subject or enemy firm shall have any right and shall never be deemed to have any right to transfer any property vested in the Custodian under this Act, whether before or after the commencement of this Act and any transfer of such property shall be void and shall always be deemed to have been void.

(2) Where any property vested in the Custodian under this Act had been transferred, before the commencement of the Enemy Property (Amendment and Validation) Act, 2017, by an enemy or enemy or enemy subject or enemy firm and such transfer has been declared, by an order, made by the Central Government, to be void, and the property had been vested or deemed to have been vested in the Custodian [by virtue of the said order made under section 6, as it stood before its substitution by section 6 of the Enemy Property (Amendment and Validation) Act, 2017] such property shall, notwithstanding anything contained in any judgment, decree or order of any court, tribunal or other authority, continue to vest or be deemed to have been vested in the Custodian and no person (including an enemy or enemy subject or enemy firm) shall have any right

or deemed to have any right (including all rights, titles and interests or any benefit arising out of such property) over the said property vested or deemed to have been vested in the Custodian."

10. Thus the legislative intent, it is argued, is that since 1968 the Act continued in its operation with its validation from time to time; first in the year 1977 and then in the year 2017, the property left by person who migrated to Pakistan and then acquired its citizenship before 1977, the property of such Pakistani national left behind in India, stood vested in Custodian of the Enemy Property in 1977 itself with the commencement of 1977 Amendment Act in respect of Act of 1968.

11. In the above view of the matter it is urged by learned counsel for the Respondent that no sale of such property would have taken place after 1977 under any circumstance.

12. At this stage learned counsel for the petitioner submits that on the date of sale deed in the year 2007, the name of the original tenure holder was continuing in the revenue records and so the petitioner has been a *bona fide* purchaser and the respondent, therefore, before changing the entry at least should have caused public notice issued. A tenure holder who continues to be recorded and has executed a sale deed, the purchaser has a genuine legitimate expectation that if revenue entry is sought to be changed, a notice to concerned and if a recorded tenure holder not traceable, issuance of notice to public at large is a must. He submits that he may, at least be permitted to raise his grievance under the Enemy Property (Amendment and Validation) Act, 2017 as the competent authority is provided thereunder and so his grievance can be addressed to by the Central Government under the newly substituted section 18 of the Act of 1968 by virtue of Section 12 of the Validation Act, 2017. Section 12 of the Act, 2017 runs as under:

"12. For section 18 of the principal Act, the following section shall be substituted, namely:-

"18. The Central Government may, on receipt of a representation from a person, aggrieved by an order vesting a property as enemy property in the Custodian within a period of thirty days from the date of receipt of such order or from the date of its publication in the Official Gazette, whichever is earlier and after giving a reasonable opportunity of being heard, if it is of the opinion that any enemy property vested in the Custodian under this Act and remaining with him was not an enemy property, it may by general or special order, direct the Custodian that such property vested as enemy property in the Custodian may be transferred to the person from whom such property was acquired and vested in the Custodian."

13. Learned counsel appearing for the Respondent No.6 submits that he has no objection in case the petitioner moves an appropriate representation before the Central Government for consideration of his claim regarding rights and tile *qua* the land in question.

14. Accordingly, we deem it appropriate to dispose of this petition at this stage granting liberty to the petitioner to move an appropriate representation before the Central Government within a period of eight weeks from today and we further direct that in the event any such representation is made, the competent

authority of the Central Government shall look into the grievance of the petitioner raised in the representation and shall dispose of the same as expeditiously as possible within a further period of eight weeks.

15. We may further clarify that any order shall be passed only in accordance with law addressing the grievance of the petitioner and the order shall be reasoned and speaking one and with due consideration of relevant laws discussed hereinabove.

(2020)09ILR A773
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.04.2020

BEFORE

THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE PRAKASH PADIA, J.

WRIT – C No. 62727 of 2017

Shyam Narayan Yadav ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sri Nand Kishore Singh, Sri Kunal Shah, Sri Rahul Agarwal

Counsel for the Respondents:
C.S.C.

(A) Civil Law - Legal Remembrancer Manual - clause 7.06 - Engangement and renewal , clause 7.07 - Political Activity , clause 7.08 - Renewal of duration-appointment of Government Law Officers/Counsel/Pleader - it is the duty of the Government to act in a fair, reasonable, objective and in a non-discriminative manner -action of the State Government in the matter of such contractual appointments can be tested by way of judicial review - no lawyer has any vested right to be reappointed or to get his term renewed as a District Government Counsel/Additional District Government Counsel as a matter of right even though his integrity and work may be reported to be good and that the opinion of the District Judge will have supremacy - Arbitrariness shall vitiate the administrative order.(Para - 14,15,19)

Petitioner initially appointed on the post of Assistant District Government Counsel (Criminal) - post of District Government Counsel (Criminal) fell vacant - petitioner duly applied for the post - term was going to expire - applied for renewal - respondent no.1(District magistrate) refused to renewal the term of the petitioner on the post of District Government Counsel (Criminal) without assigning any reasons as to why the recommendations made by the District Judge was not accepted - impugned order does not record any such satisfaction and the entitlement of the petitioner does not appear to have been considered in the light of the provisions of Legal Remembrancer's Manual as also the decisions referred to herein-above. (Para-3,6,32)

HELD:- Impugned order dated 27.10.2017 passed by the respondent no.1 is set aside and the consequential communication dated 1.11.2017 is also set aside. However, this order would not amount to re-engagement of the petitioner or his continuance. Matter shall be decided afresh keeping in view the observations made as well as the provisions of Legal Remembrancer's Manual within a period of four months. (Para-32,33)

Petition allowed. (E-7)

List of Cases cited: -

1. Kumari Shrilekha Vidyarthi Vs St. of U.P. & ors. , AIR 1991 SC 537

2. Virendra Pal Singh Rana Vs St. of U.P. & ors., (2003) 52 ALR 302

3. St. of U.P. & ors. Vs Ashok Kumar Nigam, (2013) 3 SCC 372

4. St. of Punj. & anr. Vs Brijeshwar Singh Chahal & ors. (2016) 6 SCC 1

5. Breen Vs Amalgamated Engg. Union, 1971(1) AIIER 1148

6. Alexander Machinery (Dudley) Ltd.Vs Crabtress, 1974(4) IRC 120

7. (NIRC) S G Jaisinghani Vs UOI , AIR 1967 SC 1427

8. E. P. Royappa Vs St. of TM & anr., (1974) 4 SCC 3

9. Maneka Gandhi Vs UOI, (1978) 2 SCR 621,
10. Ramana Shetty Vs International Airport Authority, (1979) 3 SCC 489

11. D.S. Nakra Vs UOI, (1983) 1 SCC 305

12. Dwarkadas Marfatia Vs. Board of Trustees of the port of Bombay, (1989) 3 SCC 293

13. Som Raj & ors. Vs St. of Har. & ors. , (1990) 2 SCC 653,

14. Neelima Misra Vs Harinder Kaur Paintal & ors. (1990) 2 SCC 746 and

15. Sharma Transport Vs Govt. of A.P & ors. (2002) 2 SCC 188

16. Assistant Commissioner, Commercial Tax Department, Works Contract and Leasing, Kota Vs M/s Shukla & Bros., 2010 AIR SCW 3277

17. S.N. Mukherjee Vs UOI, (1990) 4 SCC 594

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

1. Heard Sri Kunal Shah, learned counsel for the petitioner and Sri Neeraj Tripathi, learned Additional Advocate General assisted by Sri Shashank Shekhar Singh, learned Additional Chief Standing Counsel on behalf of State.

2. The petitioner has preferred the present writ petition with the prayer to quash the orders dated 27.10.2017 passed by the respondent no.1/Principal Secretary, Nyaya Anubhag-3, (Niyuktia), Government of U.P., Lucknow, order dated 1.11.2017 as well as notification dated 8.12.2017 issued by the respondent no.2 namely District Magistrate, Ballia, District-Ballia.

3. The facts in brief as contained in the writ petition are that the petitioner was initially appointed on the post of Assistant District Government Counsel (Criminal) in the year 1999 and he continued to perform as such upto 27.5.2014 and renewals were also granted to him after considering his work, conduct, performance and legal knowledge. The post of District Government Counsel (Criminal) in District Judgeship, Ballia fell vacant in the year 2013. In order to engage or select the Advocates having requisite qualifications and the experience on the said post, the State Government issued a Government Order dated 4.6.2014. Pursuant to the same a notification dated 16.6.2014 was issued by the respondent no.2. Pursuant to the same petitioner duly applied for the post in question, thereafter, a panel was prepared by the respondent no.2 in which name of the petitioner found place at serial no.1. The aforesaid penal was prepared after due consultation with the District Judge, Ballia. Thereafter, respondent no.2 forwarded the application of the petitioner along-with the comments to the respondent no.1 and respondent no.1 vide Order dated 25.4.2016 appointed the petitioner on the post in question for one year, i.e., upto 24.4.2017. Before the aforesaid term was going to expire an application was submitted by the petitioner before the respondent no.2 for renewal of his term. He forwarded the same before the respondent no.1 for the grant of renewal in terms of the relevant rules. The respondent no.1 vide its order dated 27.10.2017 rejected the renewal

application of the petitioner. Pursuant to the same, respondent no.2 passed consequential order dated 1.11.2017 directing the petitioner to hand over the charge to Additional District Government Counsel (Criminal). Subsequently, another notification was issued by the respondent no.2 on 8.12.2017 inviting applications from the Advocates for their engagement as Additional District Government Counsel (Criminal). The petitioner has preferred the present writ petition challenging the aforesaid orders.

4. The appointment and conditions of engagement of a counsel on the post of Additional District Government Counsel (Criminal) are governed by the provisions of Legal Remembrancer's Manual. In paragraph 7.08 of the manual it is provided that the District Officer will forward his recommendations after seeking the estimate of the quality of the counsel's work from the judicial stand point, keeping in view his public reputation in general, his character, integrity and professional conduct.

5. It is stated in paragraph 14 of the writ petition that in so far as the case of the petitioner is concerned, the District Officer as well as the District Judge has appreciated the quality of work of the petitioner including his knowledge, professional conduct and public reputation.

6. The basic ground, which was taken by the counsel for the petitioner in the writ petition that the refusal to renewal the term of the petitioner on the post of District Government Counsel (Criminal) was passed by the respondent no.1 without assigning any reasons as to why the recommendations made by the District Judge was not accepted. It is argued that the respondent no.1 passed the order without application of mind. It is further argued that the quality or capability of the petitioner in extending such an assistance has been appreciated by the District Judge, Ballia and therefore, there is no reason to refuse the renewal of the tenure of the petitioner for the said post.

7. In the counter affidavit filed on behalf of respondent no.1 it is stated that the District Government Counsel (Criminal) does not enjoy any statutory right in respect to the renewal of the tenure. The State Government enjoyed the discretionary power in this regard. It is further argued on behalf of respondents that the renewal is not the indefeasible right of the Advocates as District Government Counsel (Criminal) and it is for the State Government to consider to appoint as District Government Counsel (Criminal) or not. Various judgements were cited in the counter affidavit.

8. In rejoinder affidavit filed on behalf of petitioner it is contented that though it is true that the Advocates have no indefeasible rights for appointment on the post of District Government Counsel (Criminal) but while ignoring the cases for renewal, the procedure given in the manual should be followed. It is further stated in the rejoinder affidavit that the order was passed by the respondent no.1 without assigning any reasons whatsoever and as such the order passed by the respondent no.1 is liable to be set aside.

9. Heard learned counsel for the parties. With the consent of learned counsel for the parties, the writ petition is being disposed of finally.

10. Apart from various arguments, the basic argument which was advanced by the

counsel for the petitioner is that the order impugned does not assign any reason for refusing to renew the term of the petitioner. The State Government cannot act in an unfair and unreasonable manner. Even in the matters of contractual appointment the provisions of the LR Manual should have been followed.

11. In the matter of taking service of lawyers as District Government Counsel, way back in ***AIR 1991 SC 537 Kumari Shrilekha Vidyarthi Vs. State of U.P. and others***, it was laid down that the District Government Counsel cannot be removed en bloc in an arbitrary manner and, as such, the removal can be tested on the anvil of Article 14 of the Constitution even if they happen to be contractual in nature.

12. A Division Bench of this Court in ***Virendra Pal Singh Rana Vs. State of U.P. and others 2003 (52) ALR 302*** observed that competent lawyers of integrity and sound knowledge of law ought to be appointed as District Government Counsel after consulting the District Judge whose opinion would prevail over that of the District Magistrate.

13. In ***State of U.P. and others Vs. Ashok Kumar Nigam 2013 (3) SCC 372***, in the matter of appointment of District Government Counsel, it was held that the renewal of the term depends upon the age, continuous good work, sound integrity and physical fitness of the counsel and that no counsel has any right to appointment even up to the age of 60 years irrespective of work, conduct and integrity.

14. The latest decision on the point is that of ***State of Punjab and another Vs. Brijeshwar Singh Chahal and others 2016 (6) SCC 1*** wherein it has been laid down that in the expanding horizon of the jurisprudence the executive power is exercisable not only as per rule of law but according to public trust doctrine. Thus, in the manner of appointment of Government Law Officers/Counsel/Pleader it is the duty of the Government to act in a fair, reasonable, objective and in a non discriminative manner and that the action of the State Government in the matter of such contractual appointments can be tested by way of judicial review. It was also observed that the Government and the Government bodies are free to choose the method of selection but the method should be such as to search out the meritorious ones uninfluenced by extraneous considerations.

15. In view of the aforesaid decisions, one thing is clear that no lawyer has any vested right to be reappointed or to get his term renewed as a District Government Counsel/Additional District Government Counsel as a matter of right even though his integrity and work may be reported to be good and that the opinion of the District Judge will have supremacy.

16. In the case before us, we are not concerned with the matter of appointment of District Government Counsel/ Additional District Government Counsel, rather with the renewal of their term for which purpose clause 7.06 to 7.08 of the LR Manual is material which reads as under:

"7.06. Engangement and renewal- *(1) The legal practitioner finally selected by Government may be appointed District Government Counsel for one year from the date of his taking over charge.*

(2) At the end of the aforesaid period, the District Officer after consulting

the District Judge shall submit a report on his work and conduct to the Legal Remembrancer together with the statement of work done in Form no.9. Should his work or conduct be found to be unsatisfactory the matter shall be reported to the Government for orders. If the report in respect of his work and conduct is satisfactory, he may be furnished with a deed of engagement in Form No.1 for a term not exceeding three years. On his first engagement a copy of Form no.2 shall be supplied to him and he shall complete and return it to the Legal Remembrancer for record.

(3) The engangement of any legal practitioner as a District Government Counsel is only professional engagement terminable at will on either side and is not appointment to a post under the Government. Accordingly the Government reserves the power to terminate the appointment of any District Government Counsel at any time without assigning any cause.

7.07. Political Activity- *The District Government Counsel shall not participate in political activities so long they work as such; otherwise they shall incur a disqualification to hold the post.*

7.08 Renewal of duration

1. Collector after consulting with the District Judge, shall send the report regarding past work, conduct and income of the District Govt. Counsel and the work done by him in Form 9 at least 3 months prior to expiry his tenure to the Legal Remembrancer with the opinion that whether tenure of such advocate be extended or not? Along with the report of Collector, a copy of the opinion of District Judge shall also be send.

2. In case recommendation for extending tenure of District Govt. Counsel is made for any specified period, then such reasons shall also be mention by the Collector.

3. For the renewal of tenure of District Govt. Counsel, while sending his recommendation

(1) Collector shall consider the various aspect of capacity of a Advocate, from the judicial view, shall mentioned the work of the Advocate, merits, which would visible while operating before him the cases of State.

(2) Collector, shall give the report of the applicability of the govt. counsel from an administrative prospective and shall mentioned in its about the fame in the general public, his conduct, integrity and professional conduct.

4. In case Legal Remembrancer is agree with the certificate given by the Collector and District Judge regarding good hard work and integrity and this recommendation that the tenure of the Govt. Counsel shall be renewed, then for extending his tenure once for more than 3 years, shall got the order from govt. ***but renewal of tenure shall not be the right of any Advocate and govt. shall have liberty to remove any of the Advocate at any time without assigning any reason.***

5. If, in any case Legal Remembrancer is not agree with the recommendation made by the Collector regarding renewal of the tenure of govt. Counsel then he shall submit the case to the Govt. for order. ***In case Govt. decide not to reappoint any Govt. Advocate then Legal Remembrancer shall request the Collector to send the new recommendation as per the rule given in Para 7.03."*** *(emphasis supplied)*

17. Since no reasons were assigned by the State Government while rejecting the renewal of engagement of the petitioner on the post of Assistant District Government

Counsel (Criminal), the records were summoned from the State Government. The original records were placed by the learned counsel for the respondents before the Court. The records produced did not show proper consideration by the State Government before refusing to grant renewal of the term of the petitioner. It is further clear from perusal of the records that the State Government had taken en-block decision that the renewal in the case of such Government Counsel whose terms have come to an end will not be granted. It was pursuant to this decision that the Government refuse to grant renewal.

18. We have examined the records and after being satisfied that the record produced did not exhibit proper application of mind or due consideration as provided under law and there is nothing on record placed before the Court by the respondents that could demonstrate that the order was passed after taking into consideration any material on record. The prescribed procedure under para 7.08 of the manual requires the Government to invite the opinion of the District Judge and District Officer three months prior to the expiry of the term of the Assistant District Government Counsel (Criminal). As per prescribed procedure the office of the Legal Remembrance was expected to consider the past record of work and conduct of the District Government Counsel, concerned and then to send a report together with the statement of work done by such applicant.

19. Total non-application of mind and the order being supported by no reason whatsoever would render the order passed as "arbitrary'. Arbitrariness shall vitiate the administrative order. The rules provide a procedure and even require the State Government to consider the case for renewal of the government counsel whose term is coming to an end. The scheme of para 7.06 of the Manual is that appointment of a government pleader is to be made for a period of one year and at the end of the period, the District Officer in consultation with the District Judge is required to submit a report on the work and conduct to the legal remembrancer together with the work done in Form

9. It is only when his work or conduct is found to be unsatisfactory that it is so reported to the government for appropriate orders. If the report is satisfactory, the rule requires that he may be furnished with a deed of engagement in form I, for a term not exceeding three years, on his first engagement.

20. In terms of para 7.06 (3), the Government reserves the power to terminate the appointment of any District Government Counsel at any time without assigning any cause. Firstly, one has to examine the entire scheme of para 7.06 (3). It cannot be read in isolation. The right of consideration for renewal for the specified period is a legitimate right vested in an applicant and he can be deprived of such right and be declined renewal where his work is unsatisfactory and is so reported by the specified authorities. It is difficult to comprehend that clause (3) of para 7.06 can be enforced in the manner as suggested. If it is construed, as suggested, that the government has an absolute right to terminate the appointment at any time without specifying any reason, it will be violative of Articles 14 and 16 of the Constitution of India and such rule shall be arbitrary, thus not sustainable in law.

21. In ***Breen Vs. Amalgamated Engg. Union, reported in 1971(1) AIIER 1148***, it

was held that the giving of reasons is one of the fundamentals of good administration. In ***Alexander Machinery (Dudley) Ltd.Vs. Crabtress***, reported in ***1974(4) IRC 120 (NIRC)*** it was observed that "failure to give reasons amounts to denial of justice. Reasons are live links between the mind of the decision taker to the controversy in question and the decision or conclusion arrived at".

22. In ***S G Jaisinghani v. Union of India reported in AIR 1967 SC 1427,*** Supreme Court held that absence of arbitrary power is the first essential of "Rule of Law" upon which rests our Constitutional system. The Supreme Court ruled that in a system governed by rule of law, any discretion conferred upon the executive authorities must be confined within clearly defined limits. The Supreme Court quoted with approval, the following observations of Douglas J. in United States vs. Wunderlick 1951 342 US 98:96 Law Ed 113:

"Law has reached its finest moments when it has freed man from the unlimited discretion of some ruler... Where discretion is absolute, man has always suffered." (Wunderlich case, SCC Online US SC para 9).

23. The same view was again taken by the Supreme Court in the case of ***E. P. Royappa v. State of Tamil Nadu and Anr. (1974) 4 SCC 3*** wherein the Supreme Court declared that Article 14 is the genus while Article 16 is a specie and the basic principle which informs both these Articles is equality and inhibition against discrimination. Equality, declared this Court, was antithetic to arbitrariness. The Court described equality and arbitrariness as sworn enemies, one belonging to the rule of law in a republic and the other to the whims and caprice of an absolute monarch. Resultantly if an act is found to be arbitrary, it is implicit that it is unequal both according to political logic and constitutional law, hence violative of Article 14 and if it affects any matter of public employment it is also violative of Article 16. Supreme Court reiterated that Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and inequality of treatment.

24. The Supreme Court in the case of ***Maneka Gandhi v. Union of India*** reported in ***(1978) 2 SCR 621***, wherein Supreme Court held that the principle of reasonableness both legally and philosophically is an essential element of equality and that non-arbitrariness pervades Article 14 with brooding omnipresence. This implies that wherever there is arbitrariness in State action whether, it be legislative or executive Article 14 would spring into action and strike the same down. This Court held, that the concept of reasonableness and non-arbitrariness pervades the constitutional scheme and is a golden thread, which runs through the entire Constitution.

25. In ***Ramana Shetty v. International Airport Authority*** reported in ***1979 (3) SCC 489***, Supreme Court relying upon the pronouncements of E.P. Royappa and Maneka Gandhi (supra) once again declared that state action must not be guided by extraneous or irrelevant considerations because that would be denial of equality. The Supreme Court recognized that principles of reasonableness and rationality are legally as well as philosophically essential elements of equality and non-arbitrariness as projected by Article 14, whether it be authority of

law or exercise of executive power without the making of a law. The Supreme Court held that State cannot act arbitrarily in the matter of entering into relationships be it contractual or otherwise with a third party and its action must conform to some standard or norm, which is in itself rational and non-discriminatory.

26. In ***D.S. Nakra v. Union of India*** reported in ***1983 (1) SCC 305***, the Supreme Court reviewed the earlier pronouncements and while affirming and explaining the same held that it must now be taken to be settled that what Article 14 strikes at is arbitrariness and that any action that is arbitrary must necessarily involve negation of equality.

27. In ***Dwarkadas Marfatia v. Board of Trustees of the port of Bombay 1989 (3) SCC 293***, the Supreme Court again an occasion to examine whether Article 14 had any application to contractual matters. This court declared that every action of the state or an instrumentality of the State must be informed by reason and actions that are not so informed can be questioned under Articles 226 and 32 of the Constitution.

28. Similar view was again taken by the Supreme Court in the case ***Som Raj & Ors. v. State of Haryana & Ors.*** reported in ***(1990) 2 SCC 653, Neelima Misra v. Harinder Kaur Paintal & Ors.*** reported in ***(1990) 2 SCC 746*** and ***Sharma Transport v. Government of A.P & Ors.*** Reported in ***(2002) 2 SCC 188*** have simply followed, reiterated and applied the principles settled by the pronouncements in the earlier mentioned cases.

29. The Supreme Court in case of ***Assistant Commissioner, Commercial Tax Department, Works Contract and Leasing, Kota Vs. M/s Shukla and Brothers*** reported at ***2010 AIR SCW 3277*** dealt with the principles of law while exercising power of judicial review on administrative action. It was held by the Supreme Court in the aforesaid case that the doctrine of audi alteram partem has three basic essentials-

i) A person against whom an order is required to be passed or whose rights are likely to be affected adversely must be granted an opportunity of being heard.

ii) The concerned authority should provide a fair and transparent procedure.

iii) The authority concerned must apply its mind and dispose of the matter by a reasoned or speaking order.

Paragraph 9 of the aforesaid judgment is quoted below-

"9. The increasing institution of cases in all Courts in India and its resultant burden upon the Courts has invited attention of all concerned in the justice administration system. Despite heavy quantum of cases in Courts, in our view, it would neither be permissible nor possible to state as a principle of law, that while exercising power of judicial review on administrative action and more particularly judgment of courts in appeal before the higher Court, providing of reasons can never be dispensed with. The doctrine of audi alteram partem has three basic essentials. Firstly, a person against whom an order is required to be passed or whose rights are likely to be affected adversely must be granted an opportunity of being heard. Secondly, the concerned authority should provide a fair and transparent procedure and lastly, the authority concerned must apply its mind and dispose of the matter by a reasoned or speaking order. This has been uniformly applied by courts in India and abroad."

30. In the case of ***S.N. Mukherjee v. Union of India*** reported in ***1990 (4) SCC 594*** while referring to the practice adopted and insistence placed by the courts in United States, emphasised the importance of recording of reasons for decisions by the administrative authorities and tribunals. It said "administrative process will best be vindicated by clarity in its exercise". To enable the courts to exercise the power of review in consonance with settled principles, the authorities are advised of the considerations underlining the action under review.

31. In paragraph 12 of the aforesaid judgment the scope of judicial review has been dealt with in great detailed. The paragraph 12 is quoted hereinbelow :-

"12. In exercise of the power of judicial review, the concept of reasoned orders/actions has been enforced equally by the foreign courts as by the courts in India. The administrative authority and tribunals are obliged to give reasons, absence whereof could render the order liable to judicial chastisement. Thus, it will not be far from an absolute principle of law that the courts should record reasons for their conclusions to enable the appellate or higher courts to exercise their jurisdiction appropriately and in accordance with law. It is the reasoning alone, that can enable a higher or an appellate court to appreciate the controversy in issue in its correct perspective and to hold whether the reasoning recorded by the court whose order is impugned, is sustainable in law and whether it has adopted the correct legal approach. To subserve the purpose of justice delivery system, therefore, it is essential that the courts should record reasons for their conclusions, whether disposing of the case at admission stage or after regular hearing."

32. Having heard learned counsel for the parties, we are satisfied that the impugned order does not record any such satisfaction and the entitlement of the petitioner does not appear to have been considered in the light of the provisions of Legal Remembrancer's Manual as also the decisions referred to herein-above.

33. Accordingly, the impugned order dated 27.10.2017 passed by the respondent no.1 is set aside and the consequential communication dated 1.11.2017 is also set aside. However, this order would not amount to re-engagement of the petitioner or his continuance. The matter shall be decided afresh keeping in view the observations made hereinabove as well as the provisions of Legal Remembrancer's Manual within a period of four months from the date of production of certified copy of this order.

34. Accordingly, present writ petition is allowed.

(2020)09ILR A781
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.09.2019

BEFORE

THE HON'BLE B.AMIT STHALEKAR, J.
THE HON'BLE SHEKHAR KUMAR YADAV, J.

Criminal Misc. Bail Application No. 01 of 2019
In
Criminal Appeal No.3319 of 2019

Suraj & Ors. ...Appellants(In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Amit Daga, Sri Rajiv Lochan Shukla, Sri Ajay Kumar Pandey, Sri S,N, Yadav, Sri Satish Trivedi

Counsel for the Opposite Party:
A.G.A., Sri Kartikeya Bhargava, Sri Ram Bahadur Kushwaha, Sri Manoj Kumar Srivastava.

Criminal Law-Appeal Against Conviction U/S 147,148,302/149, 307/149 IPC and 25/27 U/S Arms Act

Non-Explanation of Injury by Prosecution – No explanation given by prosecution – indicates deliberate suppression of the origin and genesis of occurrence – however, the aforesaid principle not applicable in case of minor/superficial injury-Instant case not of minor injury.

Applicant is entitled for bail. (E-2)

List of Cases cited :-

1. State of Gujarat Vs Bai Fatima, 1975 SCC (Cri) 384

2. Lakshmi Singh & ors. Vs St. of Bihar, (1976) 4 SCC 394

3. Babu Ram & ors. Vs St. of Punj. 2008 (3) SCC 709

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

1. Heard Sri Rajiv Lochan Shukla, Advocate, Sri Ajay Kumar Pandey, Sri S. N. Yadav, Advocate appearing for the appellants and learned AGA for the State and Mr Kartikeya Bhargava, learned counsel for the complainant.

2. The present criminal appeal has been filed by the appellants Suraj Bhan, Jomdar, Mahesh, Shishu Pal @ Rishi Pal, Surendra and Satendra against the judgment and order dated 11.4.2019 passed by the Addl. Sessions Judge, Agra in **Sessions Trial No. 1139 of 2009** (State Vs Jomdar and others), and **Sessions Trial No. 123 of 2010** (State Vs Surendra), under Sections 147, 148, 302/149, 307/149 IPC, P.S. Kagarol, District Agra and **Sessions Trial No. 03 of 2010** (State Vs Satendra), under Section 25/27 Arms Act and **Sessions Trial No. 1140 of 2009** (State Vs Shishu Pal @ Rishi Pal), under Sections 25/27 Arms Act, whereby the appellants Suraj Bhan, Jomdar, Mahesh, Shishu Pal @ Rishi Pal, Surendra and Satendra have been convicted under Sections 148, 302/149, 307/149 IPC and sentenced to undergo rigorous imprisonment for two years each and a fine of Rs. 1,000/- under Section 148 IPC with default stipulation, and they have been sentenced to undergo life imprisonment under Section 302/149 IPC along with fine of Rs. 30,000/- each with default stipulation and further all the appellants have also been sentenced under Section 307/149 IPC for seven years rigorous imprisonment along with fine of Rs. 5000/- with default stipulation. Appellants Shishupal @ Rishi Pal and Satendra Singh have been convicted under Section 25/27 Arms Act and sentenced to undergo two years rigorous imprisonment with fine of Rs. 1000/- with default stipulation.

3. The appellants have prayed for their release on bail during the pendency of this criminal appeal before this Court.

4. An abridgment of the facts of the prosecution case are that on 10.8.2009 at about 4 p.m., the complainant Ramesh Singh (P.W.-1), his brother Rajveer and his father Harcharan Lal (P.W.-2) and one Rajan Singh were coming to his village Maselya from Village Baseri Bhar, P.S.

Dauki, District Agra City in his Tavera vehicle and when they reached near their village, they stopped their vehicle and seeing the crowd at their field, they went there and saw that measurement of fields of Ganpati and Bachchu Koli were going on and at that time seeing them, appellant Jomdar son of Hajarilal exhorted others to kill them because at their instance, the measurements of their fields got started. At this, appellants Suraj Bhan, Mahesh, Rishi Pal, Surendra, Satendra, who were armed with country made pistols, revolver and fire arms, with an intention to kill opened fire at them, as a result of which, brother of complainant Rajveer Singh died instantaneously on the spot and the complainant and his father also sustained grievous injuries.

5. Learned counsel for the appellants has argued that the trial Court has not appreciated the evidence properly with regard to cross case so as to determine as to which party was aggressor and has convicted the appellants without proper application of mind. He further submitted that the statements of prosecution witnesses are not reliable and trustworthy, who were also an accused in cross case. It is further submitted that genesis of the incident has been suppressed by the prosecution and the members of both the side have received injuries but the prosecution has failed to explain the injuries sustained by the accused appellants.

6. Further submission is that in this case, there were cross cases and total ten persons have been convicted on both the sides. It is further submitted that the witnesses have not made any attempt to explain any injuries on the side of accused. The attention of the court was invited to the medical evidence to point out that injuries have been sustained by the members of both the sides. The attention of the court was also invited to the findings recorded by the trial court to submit that the trial court has failed to establish as to who was the aggressor.

7. It is further submitted that having regard to the facts which have come on record, the accused had every reason to apprehend that such assault would cause death or at least grievous hurt to them. It was submitted that under the circumstances, it cannot be said that the accused had exceeded their right to self defence. The learned advocate appearing on behalf of the appellants vehemently contends that the members of the victim-party were the aggressors.

8. It is further contended by learned counsel for the appellants that on the date of incident, the measurements of field was going on in presence of police personnel and the revenue officer and it is the complainants' side, who came there in a Travera Car and thereafter the alleged incident took place to contend that it was the deceased party, who were the aggressor and they had assaulted the appellants side and also inflicted injuries on the appellants side in which four persons from the side of the appellants had sustained grievous injuries.

9. Submission of learned counsel for the appellants is further that the appellants are innocent. It is stated that the appellant no. 1 is aged about 82 years, appellant no. 2 Jomdar is aged about 84 years and all the appellants were on bail during trial and have not misused the liberty of bail granted to them. They are in jail since 11.4.2019 and there is a fair chance to succeed in the appeal and disposal of the appeal will take time.

10. On the other hand, leaned AGA as well as learned counsel for the complainant invited the attention of the court to the first information report as well as the testimonies of the witnesses to submit that the witnesses have consistently deposed and narrated the incident and hence their depositions cannot be said to be untrustworthy. It is submitted that from the evidence on record, it is evident that the applicants-accused were the aggressors in the offence and that, this is not a case of a free fight. It is further submitted that having regard to the facts and circumstances of the case, no case is made out for exercise of discretion in favour of the applicants and the application, being devoid of any merit, deserves to be dismissed.

11. The evidence on record prima facie reveals that apart from deceased, the accused side also sustained injuries, however, it is the case of the applicants that such injuries are not explained by the prosecution.

12. It is well settled law that if accused is proved to have sustained injuries in course of same incident and there is no explanation of such injuries by the prosecution, it is a manifest defect in the prosecution case and shows that the origin and genesis of the occurrence had been deliberately suppressed which leads to the irresistible conclusion that the prosecution has not come out with a true version of the occurrence.

13. In the case of **State of Gujarat VS Bai Fatima, 1975 SCC (Cri) 384,** it has been observed as under:-

"In a situation like this when the prosecution fails to explain the in juries on the person of an accused, depending on the facts of each case, any of the three results may follow:

(1) That the accused had inflicted the injuries on the members of the prosecution party in exercise of the right of self defence.

(2) It makes the prosecution version of the occurrence doubtful and the charge against the accused cannot be held to have been proved beyond reasonable doubt.

(3) It does not affect the prosecution case at all."

14. In the case of **Lakshmi Singh and Others Vs State of Bihar, (1976) 4 SCC 394**, the Hon'ble Supreme Court has observed as under:-

"It seems to us that in a murder case, the non-explanation of the injuries sustained by the accused at about the time of the occurrence or in the course of altercation is a very important circumstance from which the Court can draw the following inferences:

(1) That the prosecution has sup-pressed the genesis and the origin of the occurrence and has thus not presented the true version:

(2) that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and therefore their evidence is unreliable;

(3) that in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the prosecution case."

15. Aforesaid settled view of Hon'ble Supreme Court was further followed in Para 18 of the case reported in **Babu Ram & others vs. State of Punjab, 2008 (3) SCC 709,** and further in para 22 of another case reported in **(2009) 16 SCC 649 (Amarjit Singh vs. State of Haryana).**

16. It is, therefore, incumbent upon the prosecution to explain the injuries on the person of the accused as well and prima facie this lacuna or infirmity appearing in the prosecution case, entitles the applicants to be enlarged on bail. However, there may be cases where the non-explanation of the injuries by the prosecution may not affect the prosecution case but that would apply to cases where the injuries sustained by the accused are minor and superficial. In the instant case, prima facie what we find from the record is that four persons from the accused side namely Shishupal, Suraj Bhan, Mahesh and Surendra have sustained grievous injuries of which there is no explanation forthcoming from the side of the prosecution.

17. Having scanned through the evidence on record, considering the facts and circumstances of the case, and also rival submissions of the parties, without commenting anything on the merit of the case, prima facie we find that a case of bail is made out.

18. Let the appellants, namely Suraj Bhan, Jomdar, Mahesh, Shishu Pal @ Rishi Pal, Surendra and Satendra be released on bail on each of them executing a personal bond and furnishing two sureties each in the like amount to the satisfaction of the court concerned in **Sessions Trial No. 1139 of 2009** (State Vs Jomdar and others), and **Sessions Trial No. 123 of 2010** (State Vs Surendra), arising out of Case Crime No. 199 of 2009, under Sections 147, 148, 302/149, 307/149 IPC, and **Sessions Trial No. 03 of 2010** (State Vs Satendra), and **Sessions Trial No. 1140 of 2009** (State Vs Shishu Pal @ Rishi Pal) arising out of Case Crime Nos. 200 of 2009 & 201 of 2009 respectively, under Sections 25/27 Arms Act, P.S. Kagarol, District Agra subject to deposit of whole of the fine amount imposed on them within a month from the date of their release.

19. On acceptance of bail bond and personal bond, the lower court shall transmit photostat copies thereof to this Court for being kept on the record of this appeal.

20. It is made clear that any observations made while deciding this application are merely prima facie observations made for the purpose of grant of bail and shall have no bearing on the final outcome of the appeal.

21. The lower court record is available. Office is directed to prepare the paper book within two months.

Learned counsel for the parties may collect the paper book thereafter from the office.

22. List this appeal for hearing in due course.

(2020)09ILR A785
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.08.2020

BEFORE

THE HON'BLE RAJ BEER SINGH, J.

Criminal Appeal No.14 of 1987

Ram Shanker & Ors. ...Appellants
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Vindhyachal Singh, Sri P.S. Yadav, Sri S.N. Singh, Sri Ajai Kumar, Sri Rajesh Kumar Tripathi, Sri Phool Singh Yadav

Counsel for the Opposite Party:
Sri Amit Kumar Singh, A.G.A.

Criminal Law-Appeal against Conviction U/S Section 302 & 307 of IPC

Genuineness of Identification Parade of Accused-Delay in conducting the test identification parade, No specific features of accused mentioned in F.I.R. The fact of witness and informant being known to accused since prior to incident – no specific role assigned to accused, renders the test identification parade doubtful and insufficient to conviction of the applicant/accused.

Appeal allowed. (E-2)

List of Cases cited: -

1. Subhash & anr. Vs St. of U.P. AIR 1987 SC 1222

2. Anil Kumar Vs St. of U.P. reported in (2003) 3 SCC 569

3. Muthuswami Vs St. of Madras AIR 1954 SC 4, 1954 Cri LJ 236

4. Musheer Khan Vs St. of M.P.2010 (2) SCC 748

(Delivered by Hon'ble Raj Beer Singh, J.)

1. This Criminal Appeal has been preferred against judgment dated 19.12.1986 and order dated 20.12.1986 passed in Session Trial No. 194 of 1979 (State Vs. Ram Shanker and 4 others), Crime No. 65/1979, under Sections 395 of IPC, Police Station Shivrajpur, District Kanpur Dehat, whereby accused-appellants Ram Shanker, Mahesh, Bodhu, Chhotey Lal and Ram Babu were convicted under section 395 of IPC and sentenced to five years rigorous imprisonment.

2. During pendency of this appeal, appellant no. 4 Chhotey Lal has passed away thus, this appeal qua appellant No. 4 was abated.

3. Prosecution version is that on the intervening night of 22/23.03.1979, informant / PW-1 Kailash Nath was sleeping under thatch roof of his house whereas women of his family were sleeping inside the house and there was light of lantern. At around midnight, 6-7 bandits, armed with pistols, hockey and sticks, intruded into his house through the roof and opened the main gate of the house. Out of them, two bandits over-powered informant Kailash Nath and his father whereas other bandits committed dacoity in his house. Hearing noise, many villagers including Ramesh Chandra, Bhagwan Deen, Bhagwat, Udai Narayan and Vansh Gopal came and challenged the miscreants. Bhagwan Deen set "sirsori', lying near house of informant, to fire and thereby in the light of the same, they have seen the said bandits. After committing dacoity at the house of informant, said bandits also committed dacoity at the house of his neighbour Devi Prasad and Heera Lal. It was alleged that the said miscreants have robbed various jewellery items, cash and clothes and after committing dacoity, all the miscreants succeeded in running away from there.

4. In the morning, the informant Kailash Nath reported the matter to police by submitting tehrir exhibit Ka-1. and consequently, the case was registered on 23.07.1979 at 09:45 hrs against 6-7 unknown persons. During investigation, one lantern, produced by witness Hari Lal was taken into possession vide seizure memo exhibit Ka-7. One slipper and 'gamchha', found at the spot were seized

vide memo exhibit ka-8. The lantern produced by informant and witness Shyam Babu were seized vide memo exhibit Ka-9 and Ka-10.

5. In the alleged incident, witness Devi Prasad and his son Shyambabu have sustained injuries and they were sent for medical examination. Injured Devi Prasad was examined vide MLC exhibit Ka-4 and he has sustained following injuries.

(i) Lacerated wound 2 cm x 1/2 cm x skindeep on middle of head about 12 cm from left ear.

(ii) Lacerated wound 4 cm x 1/2 cm x skin deep on left side forehead 3.5 cm above the left eye brow.

(iii) Abraded contusion on front side of chest left side about 10 cm x 1 cm, 3 cm below the clavicle bone of left side.

(iv) Contusion 6 cm x 2 cm on left shoulder joint.

(v) Abrasion 2 cm x 1.5 cm right side of 6 cm above right nipple. (vi) Contusion 22 cm x 2.5 cm on epigastrium area of abdomen 7 cm above the umbilicus.

(vii) Abraded contusion 5 cm x 3 cm on backside of body in centre on 6th thoracic vertebra.

(viii) Contusion 18 cm x 4 cm on right side back 4.5 cm above the right iliac crest.

(ix) Abraded contusion 7 cm x 3 cm on back left side just above the left iliac crest.

(x) Traumatic swelling over upper 1/3 of forearm right side advised x-ray at UHM hospital Kanpur.

Injured Shyam Babu has sustained following injuries:-

(i) Abraded contusion 2 cm x 1 cm on left side of forehead over 1 cm left eye brow.

(ii) Complaint of pain and tenderness over right gluteal region (Hip region) but no swelling detected.

6. It is further the case of prosecution that on the night of 27/28.04.1979, accused-appellants Ram Shanker, Mahesh, Bodhu, Chhotey Lal and Ram Babu and two other persons were apprehended near village Jaitpur by the police of Police Station Shivli, while these accused-appellants were planning to commit dacoity and a case was registered against them under Section 399/402 of IPC and Section 25 of Arms Act. After their arrest in that case, they have confessed before the police that they were involved in the alleged incident of dacoity, committed at house of informant Kailash Nath. The accused persons were produced in Court in "baaparda' condition (in face covered condition). Their test identification parade was conducted in jail on 16.06.1979 by PW-6 Har Govind Sahai Mathur, Magistrate Kanpur. In the identification parade, witness Kailash has identified accused Bodhu, Chhotey Lal and Ram Babu correctly but he could not identify accused Mahesh, witness Devi Prasad has identified all the five accused persons correctly, witness Heera Lal has identified only accused Mahesh, witness Ramesh Chandra has identified only accused Rameshwar and Ram Babu, witness Bhagwan Deen has identified accused Ram Shanker, Bodhu and Ram Babu, witness Udai Narayan has identified Ram Shanker, Mahesh, Bodhu and Ram Babu and witness

Vansh Gopal has identified accused Ram Shanker and Ram Babu vide identification memo exhibit Ka-7.

7. After completion of investigation, all the five accused persons were charge sheeted for offence under Section 395 of IPC.

8. Trial Court framed charge under Section 395 of IPC against all the five accused persons. In order to bring home guilt of accused appellants, prosecution has examined seven witnesses.

9. Accused persons were examined under Section 313 Cr.P.C. wherein they have denied the prosecution evidence and alleged that they were known to informant and witnesses since before the incident. Accused Ram Shanker has alleged that his agricultural land is adjoining to village Maharajpur and that he has got education in the village of informant. Accused Mahesh Chandra has alleged that his land is situated at Sukhkha Nivada and that boundary of village Sukhkha Nivada and Manoh are adjoining. Accused appellant Bodhu Singh alleged that he runs a flour mill (aata chakki) and informant and witnesses used to come there for getting flour.

10. In their defence, accused persons have filed certified copy of judgment passed in Session Trial No. 161/1979 (State Vs. Ram Shanker and others), under section 399/402 IPC, copy of order passed in Misc. Case No. 2/1981 under Section 411 IPC, statements of witnesses recorded in session trial No. 161/1979 and all these documents have been exhibited as Kha-1 to Kha-5.

11. After hearing and analysing the evidence on record, all the four accused-appellants as well as accused Chhote Lal (since dead) were convicted under section 395 of IPC vide impugned judgment and order dated 19/20.12.1986 and sentenced as stated in opening part of this judgment.

12. Being aggrieved by the impugned judgment and order, accused-appellants have preferred present criminal appeal.

13. Heard Sri Vindhyachal Singh, learned counsel for appellant No. 1 and Sri P.S. Yadav, learned counsel for appellant Nos. 2, 3 and 5 and Sri Amit Kumar Singh, learned A.G.A. for the State and perused the record.

14. In evidence, PW-1 Kailash Nath has stated that on the night of incident, he was sleeping under the thatch roof of his house and there was light of lantern. After hearing noise of his father, he raised an alarm and called villagers. Bhagwan Deen has put "sirsori', lying outside his house, at fire and thereby there became sufficient light. The bandits went away after robbing jewellery, clothes and cash from his house. PW-1 Kailash Nath further stated that he has recognized the miscreants in the light of torch, fire and lantern. He has also identified the accused persons in the Court during his statement in court.

15. PW-2 Devi Prasad has stated that a dacoity was committed at the house of Kailash and others by 10-12 dacoits. He has recognised all the five accused persons in the light of lantern and torch. He has identified all the five accused-appellants during his statement in court.

16. PW-3 Udai Narayan has stated that about four and a half year back, a dacoity was committed at house of Kailash Nath in the midnight. Hearing noise of

Kailash, he had reached near door of Kailash and he has put the "sirsori' lying outside his home at fire and that there was also light of lantern. He has identified four accused persons during his statement and that he has also identified them in test identification parade.

17. PW-4 Constable Rajju Prasad has stated that on 29.07.1979 he along with other constables has taken the accused persons to jail and during that period, their faces were kept coverned.

18. PW-5 Chhotey Lal Sharma has stated that on the night of 27/28.4.1979, he has apprehended the accused persons, however, his statement could not be completed as this witness could not appear for further examination-in-chief and cross examination, thus, his mere part examination in chief cannot be read in evidence.

19. PW-6 Har Govind Sahai Mathur, Special Executive Magistrate has conducted test identification parade in District Jail.

20. PW-7 Constable Triloki Nath is a witness of arrest of accused-appellants.

21. Learned counsel for the accused-appellants has mainly argued that accused-appellants are not named in first information report and that as per prosecution version, they were apprehended after 35 days of the incident, in case under Sections 399/402 IPC by police of Police Station Shivli, Kanpur and that their test identification parade was conducted on 16.06.1979, ie after about 49 days of their arrest and after about 82 days of incident, and thus, this long delay in test identification parade has rendered the evidence regarding test identification parade unreliable. It was stated that even otherwise mere test identification parade is not sufficient to base conviction of accused appellants. No recovery has been effected from any of the accused appellant. It was also pointed out that accused-appellants have already been acquitted in case under Section 399/ 402 IPC and section 25 Arms Act vide judgement and order dated 26.03.1981 passed by First Assistant Sessions Judge, Kanpur and thus, their arrest becomes fully doubtful. In this connection, it was also stated that public witnesses, examined in Session Trial No. 161/1979, have denied the prosecution version regarding arrest of accused appellants. Learned counsel further submitted that accused persons were known to the informant and witnesses since before the incident as they were residents of nearby villages and that accused persons have taken specific plea in this regard but the FIR was lodged against unknown persons, which indicates that the informant and alleged witnesses have not recognized any of the miscreant during incident and later on accused-appellants were falsely implicated. In support of his contentions, learned counsel for the appellants has relied the case of Kamlesh Vs. State of U.P. [2018 (102) ACC 199]. It was submitted that trial court has committed grave error by convicting the accused-appellants merely on the basis of test identification parade, which was thoroughly unreliable.

22. Per-contra, learned State Counsel argued that there is clear evidence that at the time of alleged incident, there was light of lantern and that "sirsori', lying outside the house of informant, was also put at fire and thus, there was sufficient light to recognise the faces of miscreants. In alleged incident, PW-2 Devi Prasad has

sustained several injuries and thus, there was sufficient opportunity to recognise the miscreants. All the accused-appellants were identified during test identification parade, which has been duly proved by PW-6 Har Govind Sahai Mathur. It was submitted that conviction of accused appellants is based on evidence and it calls for no interference.

23. At the outset, it may be mentioned that alleged incident took place in mid-night and that no one was named in FIR and that no recovery has been effected from any of the accused-appellant. The conviction of accused appellants is solely based on the identification of accused-appellants.

As per prosecution, alleged incident of dacoity took place on the night of 22/23.03.1979 and that accused-appellants were arrested in an another case under Sections 399/ 402 IPC in the intervening night of 27/28.04.1979 and that after their arrest they have admitted their involvement in the said incident of dacoity. Thereafter, the test identification parade of accused-appellants was conducted on 16.06.1979. Thus, their test identification parade was conducted after about 82 days of the incident. It is also clear that even after arrest of the accused-appellants, their test identification parade was conducted after about 49 days. There is absolutely no explanation as to why this long delay in conducting the test identification parade took place.

24. It is trite to say that the substantive evidence is the evidence of identification in court. Apart from the clear provisions of Section 9 of the Evidence Act, the position in law is well settled by a catena of decisions of the Hon'ble Apex Court. The facts, which establish the identity of the accused persons, are relevant under Section 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in court. The purpose of a prior test identification is to test and strengthen the trustworthiness of that evidence. The identification parades belong to the stage of investigation, and though there is no provision in the Criminal Procedure Code which obliges the investigating agency to hold a test identification parade, but it is quite desirable that the Test Identification Parade should be conducted as early as possible, however, at the same time, the very purpose of conducting Test Identification Parade during the investigation is for the satisfaction of the investigating officer that the suspect is the real culprit, but the substantive evidence is the identification of the accused in the Court. There is no hard and fast rule that in every case, where the Test Identification Parade was conducted belatedly, the identification of the accused by the victim should be discarded. (Budhsen and another vs. State of U.P. : AIR 1970 SC 1321). If the delay in holding the Test Identification Parade is duly explained or where the delay had occurred due to reasons beyond the control of the investigation officer, then the delay in holding the Test Identification Parade may not be fatal. Thus, in nutshell, it can be said that in each and every case, the effect of delay in holding the Test Identification Parade has to be considered in the peculiar facts and circumstances of that case.

25. In Lal Singh and others Vs. State of U.P. 2003 (12) SCC 554, the Hon'ble Apex court in Paragraphs 28 and 43 dealt with the value or weightage to be attached to Test Identification Parade and the effect of delay in holding such Test Identification Parade. Said paragraphs are as under:-

"28. The next question is whether the prosecution has proved beyond reasonable doubt that the appellants are the real culprits. The value to be attached to a test identification parade depends on the facts and circumstances of each case and no hard-and-fast rule can be laid down. The court has to examine the facts of the case to find out whether there was sufficient opportunity for the witnesses to identify the accused. The court has also to rule out the possibility of their having been shown to the witnesses before holding a test identification parade. Where there is an inordinate delay in holding a test identification parade, the court must adopt a cautious approach so as to prevent miscarriage of justice. In cases of inordinate delay, it may be that the witnesses may forget the features of the accused put up for identification in the test identification parade. This, however, is not an absolute rule because it depends upon the facts of each case and the opportunity which the witnesses had to notice the features of the accused and the circumstances in which they had seen the accused committing the offence. Where the witness had only a fleeting glimpse of the accused at the time of occurrence, delay in holding a test identification parade has to be viewed seriously. Where, however, the court is satisfied that the witnesses had ample opportunity of seeing the accused at the time of the commission of the offence and there is no chance of mistaken identity, delay in holding the test identification parade may not be held to be fatal. It all depends upon the facts and circumstances of each case.

43, It will thus be seen that the evidence of identification has to be considered in the peculiar facts and circumstances of each case. Though it is desirable to hold the test identification parade at the earliest- possible opportunity, no hard-and-fast rule can be laid down in this regard. If the delay is inordinate and there is evidence probabilising the possibility of the accused having been shown to the witnesses, the court may not act on the basis of such evidence. Moreover, cases where the conviction is based not solely on the basis of identification in court, but on the basis of other corroborative evidence, such as recovery of looted articles, stand on a different footing and the court has to consider the evidence in its entirety."

26. In ***Soni vs. State of U.P. : (1982) 3 SCC 368,*** test identification parade was held after a lapse of 42 days from the date of arrest of the appellant. The delay in holding the test identification parade created a doubt in the genuineness thereof, apart from the fact that it may be difficult that after lapse of such a long time the witnesses would be remembering the facial expressions of the appellant. The Hon'ble Apex Court, therefore, held that if this evidence cannot be relied upon and there is no other evidence which can sustain the conviction of the appellant. In these circumstances the appellant was acquitted

27. In ***Subhash and another vs. State of U.P. : AIR 1987 SC 1222*** the test identification parade was held three weeks after the arrest of the appellant and it was observed that there was a room for doubt as to whether the delay in holding the test identification parade was in order to enable the identifying witnesses to see him in the police lock-up or in the jail premises and make a note of his features. The Court also noticed that 4 months had elapsed between the date of occurrence and the date of holding of the test identification parade.

The descriptive particulars of the appellant were not given when the report was lodged. But while deposing before the Sessions Judge, the witnesses had stated that the appellant was a tall person and had sallow complexion. It was observed that if on account of these features the witnesses were able to identify appellant at the identification parade, they would have certainly mentioned about them at the earliest point of time when his face was fresh in their memory. As the conviction of the appellant was based solely on the identification at the test identification parade, the Apex Court extended benefit of doubt to the appellant, while upholding the conviction of the co-accused. There being a delay in holding the test identification parade and in the absence of corroborative evidence, the Apex Court found it unsafe to uphold his conviction.

28. In ***Anil Kumar v. State of U.P. reported in (2003) 3 SCC 569*** the Supreme Court has observed as under:

"9. ... It is to be seen that apart from stating that delay throws a doubt on the genuineness of the identification parade and observing that after lapse of such a long time it would be difficult for the witnesses to remember the facial expressions, no other reasoning is given why such a small delay would be fatal."

29. In ***Muthuswami v. State of Madras AIR 1954 SC 4, 1954 Cri LJ 236,*** where an identification parade was held about 2½ months after the occurrence, it it was held that it would not be safe to place reliance on the identification of the accused by the eyewitnesses.

30. In another case Mohd. Abdul Hafeez v. State of A.P. AIR 1983 SC 367 (1983) 1 SCC 143, it was held that where the witnesses had not given any description of the accused in the first information report, their identification of the accused at the sessions trial cannot be safely accepted by the court for awarding conviction to the accused.

31. Similarly the issue of delay weighed with the Hon'ble Supreme court in ***Musheer Khan vs. State of M.P.2010 (2) SCC 748*** in discarding the evidence regarding test identification as under:

"8. Insofar as the identification of A-5 is concerned that has taken place at a very delayed stage, namely, his identification took place on 24-1-2001 and the incident is of 29-11-2000, even though A-5 was arrested on 22-12- 2000. There is no explanation why his identification parade was held on 24- 1-2001 which is after a gap of over a month from the date of arrest and after about 3 months from the date of the incident. No reliance ought to have been placed by the courts below or the High Court on such delayed TI parade for which there is no explanation by the prosecution."

32. In the instant case, as noticed earlier, the alleged incident of dacoity took place on the night of 22/23.03.1979 and thereafter the accused-appellants were arrested on the night of 27/28.04.1979 in an another case under Sections 399/ 402 IPC, wherein allegedly they have disclosed their involvement in the said incident of dacoity. However, their test identification parade of accused-appellants was conducted on 16.06.1979, that is after about 82 days of the incident and 49 days of their arrest. Prosecution has not offered any explanation, what so ever, regarding this long delay in holding the Test Identification

Parade of accused-appellants. The investigating officer of the case has not been examined by the prosecution. In fact there is absolutely no explanation as to why this long delay took place in conducting test identification parade took place.

33. Considering the above stated legal position, in the peculiar facts and circumstances of the instant case, it can not be ruled out that the delay of seven weeks in holding the test identification parade of accused-appellants was in order to enable the identifying witnesses to see them in the police lock-up or in the jail premises and make a note of his features. Here it would be pertinent to mention that in the first information report, no specific descriptive features/ particulars of alleged dacoits were mentioned. Only it was mentioned that some bandits were of dusky complexion and some of wheatish. It is a too general description to identify a person after about three months of incident. Alleged incident took place in mid night. It appears doubtful that on account of such common features the witnesses were able to identify accused-appellants after three months of incident in the identification parade. It may also be noticed that after their arrest, during the above stated period of 49 days, the accused appellants might have been produced before the court of Magistrate for several times for extension of their judicial remand but there is no evidence that whenever they were taken into court or produced in court for extension of judicial remand, they were kept "baaparda'. All these facts give rise to a serious doubt about the genuineness of the identification parade of the accused-appellants.

34. Further, the accused-appellants have taken specific pleas that they were known to the informant and the witnesses since before the incident. Accused-appellant Ram Shanker, in his statement under Section 313 Cr.P.C., stated that his agricultural land is just adjoining with the informant's village and that informant and witnesses were known to him since before the incident. Accused-appellant Mahesh has also taken a similar plea. Accused-appellant Bodhu Singh has stated that he runs a flour mill (aata chakki) and that informant and witnesses used to visit his flour grinder for grinding flour and thus, they know him since before the incident. Accused-appellant Ram Babu has alleged that his land is also adjoining to the land of informant. Here it may be stated that in his cross examination, PW-1 Kailash Nath has not denied the suggestion that accused-appellant Ram Shanker used to study in his village and that he has worked as tailor in his village. PW-1 has admitted that the village of accused-appellant Ram Shanker is situated at a distance of one kilometer from his village. In his cross-examination, PW-1 Kailash Nath has also stated that there are 3-4 flour grinder in village Abdulpur but he does not know whether one of the flour grinder is of accused Bodhu Singh. In his cross examination, PW-2 Devi Prasad has stated that he came to know about the villages of accused-appellants outside the gate of jail, while he has gone for test identification parade. This fact shows that he was already aware about the villages of accused-appellants before the test identification parade. PW-3 Uday Narayan has admitted in his cross-examination that accused-appellant Ram Shanker is a resident of Maharaj Nagar and that agricultural land of Maharaj Nagar is adjoining to the land of his village. PW-3 has also admitted that some time he used to visit village Sukha Navada but he is not aware whether land of father of accused Mahesh is situated in that village or not. It

is apparent that all the accused-appellants were residents of nearby villages. Considering all these facts, this possibility cannot be ruled out that accused-appellants were known to the informant and other witnesses since before the incident. Further, as stated earlier, in the first information report, no specific descriptive particulars of alleged miscreants / dacoits were mentioned. Only it was mentioned that some bandits were of dusky complexion and some of wheatish. As stated earlier, it is a too general description to identify a person after long period of several months of the incident.

35. In case of Kamlesh V State of UP (supra), relied by learned counsel for appellants, the Division Bench of this court held as under:

"27. The evidence of identification is no exception to the definition of the word 'proof' in section 3 of the Evidence Act. The court should approach the evidence of identification with the reasonable doubts of an intelligent person and accept it only if those doubts were removed. In order to remove these doubts, the touchstone to be adopted could be (i) fair, if not good, opportunity of the witness for observation, (ii) reasonable time within which the identification was made, (iii) reliable power of observation of the witness, (iv) his credibility, and (v) the fact whether the witness got any opportunity to identify the accused at the time of incident and also after arrest of the accused. The crucial requirement would be the satisfaction of the court on the acceptability of the identification.

28. The condition precedent for accepting the evidence of identification should be fair and beyond approach to secure that it has to be ensured that prior to the test identification that suspect was not shown to the identity witness and identification was held in manner stipulated by the Criminal Manual. When the learned trial court itself has observed that the miscreants were shown to the witnesses because all the three miscreants and witnesses were present in the police station on that date, then this possibility cannot be ruled out that this appellant was also shown to the witnesses in advance to the test identification parade. The appellant has clearly stated in his statement recorded under Section 313 Cr.P.C. that police men had taken his photograph from his mother, which was shown to the witnesses and on that basis he was identified by the witnesses.

29. When a witness identifies an accused in court, court has to appreciate the evidence in the light of its intrinsic worth, other evidence, circumstances probabilities.30. If the witness knew any miscreant, obviously it is a matter of recognition, if not, it is a matter of identification. Recognition of a familiar person is certainly more reliable than identification of stranger. When a stranger witness identifies an accused in court, the court, by way of caution or prudence may seek same assurance before accepting the identification as correct. This assurance may be available from other sources and circumstances.

30. When the persons are known, identification is possible from the physique, gesture of movement, manner of walking etc. and gesticulating and special features of a person like the physical attributes; in such cases even where a light is dim, known persons can be successfully identified as was held in State of U.P. Vs. Babu, AIR

*2003 SC 3408. But here this is not a case because no miscreant is known to any of the witnesses, no source of light has been proved, then no question arises to identify any of the miscreant on the spot by any of the witness. It is also proved that occurrence had taken place during early hours of the day, but there was darkness and only dim light of the trucks were present. In our opinion this was not sufficient for any person to identify and recognize any person and have their phiz in their memory for such a long time. It is also very important to note here that when miscreants came on the spot, they immediately started beating the persons present there. In that circumstance all these witnesses must have been in a state of daze as they were themselves one of the victims and father of one of the victim was shot dead on the spot. In such circumstances it was not possible for any of the witness to identify any miscreant and to remember phiz for such a long period. In these circumstances, in our opinion it would not be reasonable and pr*oper to accept the evidence of identification that recorded the conviction on that basis".

36. In case of Budhsen and another vs. State of U.P. : AIR 1970 SC 1321, the prosecution case depended upon the identification of the appellants and this identification was founded solely on test identification parade. The Apex Court found that the High Court had not correctly appreciated the evidentiary value of these parades though they had treated it as the primary evidence in support of the prosecution case. It was observed that the High Court seems to have proceeded on the erroneous legal assumption that it was a substantive piece of evidence and that on the basis of that evidence alone the conviction could be sustained. The Court also ignored important evidence on the record in regard to the manner in which the test identification parades were held suggesting that they were held more or less in a mechanical way without the necessary precautions being taken to eliminate unfairness. It was observed that this was clearly an erroneous way of dealing with the test identification parades and had caused failure of justice. In these circumstances that the Apex Court set aside the conviction of the appellants in that case, which was based solely on the identification of the appellants in a test identification parade.

37. In the instant case after careful consideration of the evidence and attending facts and circumstances of case, it appears that the witnesses had no fair opportunity to see the accused-persons or note their special features on spot because there was no occasion for the witnesses to fix themselves in the memory as incident took place suddenly and in the mid of night and that this possibility can not be ruled out that accused-appellants were known to witnesses since before the incident, and thus, the identification made by the witnesses in the court cannot be found free from doubt. There is no evidence that accused-appellants have any special and outstanding feature which enabled the witnesses to carefully mark the visages of the appellants so that witnesses could identify him even after a long gap. Only by identifying the appellants in TIP and in court would not be sufficient to convict the appellant as the value to be attached to identification evidence would depend on the facts of each case. The evidence of identification in order to carry conviction should ordinarily clarify as to how and under what circumstances the identifying witnesses came to pick out the particular

accused person, details of the part which the accused played in the crime in question with reasonable particularity. In the instant case it would also be pertinent to state that no specific role was assigned to any of the accused-appellant. The injury report of PW 2 Devi Prasad has been filed on record but in his statement, he has not stated a single word that he sustained injury in the said incident nor he has assigned any specific role or weapon to any of the accused-appellant. In view of these facts, the identification of accused-appellants in alleged test identification parade becomes throughly doubtful. Since the identification in test identification parade is doubtful, thus the alleged dock identification of accused-appellants also loses its credibility.

38. No doubt the substantive evidence is the evidence of identification in court and that purpose of a prior test identification is to test and strengthen the trustworthiness of that evidence, however in the instant case long and undue delay in holding the test identification parade, non mentioning of any specific features or identification marks of the miscreants in first information report, absence of evidence that after their arrest accused-appellants were kept "baaparda" whenever they were produced in Court before their test identification report and the possibility that accused-appellants were known to witnesses since before the incident, render the evidence of the said eye-witnesses regrding identification of accused-appellants throughly doubtful and unreliable.

39. One important aspect of the matter is that accused-appellants were arrested on the night of 27/28.04.1979 in a case under Section 399/ 402 of IPC and thereafter, they have disclosed about their involvement in the alleged incident of dacoity. All the accused-appellants have already been acquitted by judgment and order dated 26.03.1981 passed by Ist Asstt. Sessions Judge, Kanpur in session trial No. 161/1979. It would also be relevant to mention here that in that case public witness Kanhai, Gangaram and Radhey Shyam have stated that accused persons were not apprehended in their presence and they have denied the prosecution version regarding arrest of accused-appellants in said case under Section 399/ 402 of IPC. There is nothing to show that any appeal has been filed against the said judgement and order dated 26.03.1981 and thus, that judgment has become final. Accused persons have filed certified copy of judgment of session trial No. 161 of 1979, under Section 399 / 402 IPC as well as certified copies of statements of above stated witnesses of that case. Here it would be relevant to mention that PW-5 S.I. Chhotey Lal Sharma, who as per prosecution version, has arrested the accused persons, did not appear for his further examination-in-chief or for his cross examination and thus, his statement could not be considered in evidence. The cumulative effect of all this facts makes it thoroughly doubtful that the accused-appellants were arrested on the alleged date, time and place and in the manner alleged by prosecution. This factor further causes a serious dent in prosecution case.

40. It is a cardinal principle of criminal jurisprudence that the guilt of the accused must be proved beyond all reasonable doubts. Another golden thread which runs through the web of the administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to

his innocence, the view which is favourable to the accused should be adopted. [Vide Kali Ram Vs. State of Himachal Pradesh, (1973) 2 SCC 808; State of Rajasthan Vs. Raja Ram, (2003) 8 SCC 180; Chandrappa & Ors. Vs. State of Karnataka, (2007) 4 SCC 415; Upendra Pradhan Vs. State of Orissa, (2015) 11 SCC 124 and Golbar Hussain & Ors. Vs. State of Assam and Anr., (2015) 11 SCC 242]. In the instant case, considering entire evidence carefully it is quite manifest that the long delay in holding the test identification parade coupled with other infirmities and inconsistencies, as pointed out above, render the prosecution case doubtful. As stated earlier no recovery has been effected from possession of any of the accused-appellants and that it is also thoroughly doubtful whether the accused-appellants have been arrested in the manner as alleged by the prosecution. In view of all these facts, it would not be safe to base conviction of accused-appellants merely on the basis of their alleged identification.

41. All the five accused-appellants deserve benefit of doubt. Accordingly, impugned judgment and order of conviction and sentence is set aside and accused appellants Ram Shanker, Mahesh, Bodhu, Chhotey Lal and Ram Babu are acquitted of the charge levelled against them. Accused-appellants are stated on bail, their personal bonds are cancelled and sureties discharged.

42. Appeal allowed.

43. Office is directed to transmit the record of trial court as well as copy of this judgment to the court below.

(2020)09ILR A797
APPELLATE JURISDICTION

CRIMINAL SIDE
DATED: ALLAHABAD 10.02.2020

BEFORE

THE HON'BLE ARVIND KUMAR MISHRA-I, J.
THE HON'BLE GAUTAM CHOWDHARY, J.

Criminal Appeal No.1400 of 1993

Ram Kishore & Anr. ...Appellants(In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Lallu Singh, Sri Rahul Mishra

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

Criminal Law-Appeal Against the Conviction U/S 302,34, 201 IPC

Circumstantial Evidence- Circumstantial Evidence must be interwoven to establish the guilt. (Para 15)

Section 106 of Evidence Act- Fact especially within knowledge of accused- burden of proof to disprove the fact is on the accused. Burden not discharged by Applicant No. 1. Hence, appeal by Applicant No. 1 dismissed, is exonerated. However, Applicant No. 2.

Appeal partly allowed. (E-2)

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

1. Heard Sri Lallu Singh and Rahul Mishra, learned counsel for the appellants and Sri Rajiv Kumar Rai, learned A.G.A. for the State and perused the record.

2. By way of the instant appeal challenge has been made to the authenticity and veracity of the judgment and order of conviction dated 19.8.1993 passed by the

IV Additional Sessions Judge, Fatehpur in S.T. No. 403 of 1992 State Versus Ram Kishore and others under sections 302/34 I.P.C. whereby the appellants have been convicted under sections 302/34 I.P.C. and sentenced to imprisonment for life in the first count. In the second count convicted and sentenced under section 201 I.P.C. for five years rigorous imprisonment. Both the sentences have been directed to run concurrently.

3. The facts relevant for adjudication of this appeal as gathered from the record, appear to be that some written report was presented by the informant Ram Saran, scribed by one Kishori Lal Pradhan addressed to the Station House Officer of Police Station Husainganj district Fatehpur with the allegations that the informant is the resident of village Latikpur within the police station Thariyon. The informant's brother Goverdhan had lent Rs. 500/- to Ram Kishore son of Maiku Lodh and on demand being raised for paying back the money, it was refused and dilly dallying tactic was adopted for the last for months. It so happened that Kishori Lal began to reside in village Kazipur within the police station Husainganj with his brother-in-law(Sarhu) Chheddu and used to visit his village occasionally. It was on Saturday 24th August, 1991, the informant's brother Goverdhan raised demand for the money whereupon his brother(Ram Kishore), Ram Kripal asked Goverdhan to accompany them to Kazipur where the money will be given to him, whereupon, the two brothers departed in the company with the deceased. When the deceased did not return, inquiry was made at Kazipur also, besides being made at several places but no trace of the deceased was made. While the process of search was on, the dead body of the informant's brother was found/traced in the western side lake of the village Hasanapur. Information of the same was given at the police station. It is gathered from the record that this written report was received at P.S. Husainganj at 3.30 p.m. and relevant note of the same entered in the G.D. Rapat No. 22 at 3.30 P.M. on 28.8.1991. The investigation ensued and the same was entrusted to the Investigating Officer R.B.Singh,the S.O. who after lodging of the report proceeded to the spot and prepared the inquest report and also prepared the relevant papers for sending the dead body for post mortem examination.

4. Dr. S.S. Banarjee, P.W. 4 conducted the autopsy on the cadaver of the deceased on 24.8.1991 at 3.00 P.M. The dead body was identified by Constable Ram Sukh and Constable Rajendra Prasad. Following ante mortem injuries were noted at the time of examination by the doctor on the cadaver of the deceased.

1. Firearm wound of entry 5 cm x 4 cm just behind left ear, bone deep, blackening around wound was present. On dissection there was fracture of temporal and occipital bone. 24 pellets and one wadding were present in the brain cavity.

2. Firearm wound of entry 3 cm x 2.5 cm left mid axillary line on left lateral aspect of abdomen 8 cm above illiac crest cavity deep. Blackening around wound was present. On dissection spleen and left kidney lacerated. Stomach and intestine perforated. About 1 lit. of blood present 33 pellets, 1 Tikuli and 1 wedding pieces recovered.

5. The post mortem examination report has been proved which is exhibit Ka-2.

6. Besides, he also prepared the site plan Exhibit Ka-10. These papers are exhibit Ka-4 to Ka-10. The further course of investigation from hence onward was taken over by the second Investigating Officer Ghanshyam Ahirwar on 9.9.1991. He recorded the statement of the wife of the deceased Yasodiya and Ram Raj and after completing the investigation filed the charge sheet Exhibit Ka-3.

7. Consequently, the case was committed to the court of Sessions from where it was transacted to the trial court of Additional Sessions Judge, Fatehpur, who in turn heard the prosecution and the accused on the point of charge under sections 302/34 and 201 I.P.C., charges explained to the accused but the same were denied by the accused and they opted for trial. Consequently, the prosecution produced in all seven witnesses. Brief sketch of the same is ut infra:-

8. P.W. No. 1 Ram Raj, is a witness of fact of last seen. Ram Saran, is P.W. 2 who is the informant and has proved the written report, which is exhibit Ka-1. Yasodiya, P.W. 3 is the wife of the deceased and star witness and she is the witness of fact of last seen, apart from proving the fact of the lending transaction (worth Rs 500/-) between the deceased Goverdhan and Ram Kishore.

9. Dr. S.S. Banarjee, P.W.4 has conducted the autopsy and has proved it as exhibit Ka-2. Ghanshyam Ahirwar P.W. 5 was the subsequent Investigating Officer, he has proved the filing of the charge sheet exhibit Ka-3. S.I. R.B. Singh P.W. 6 is the first Investigating Officer who took over the investigation on 28.8.1991 and took several steps in furtherance of completion of the investigation. However, the investigation was taken over by another Investigating Officer from him. Constable Hakim Singh, P.W.7 is the formal witness who has proved the entry made by him after the receipt of the written report in the concerned G.D. of date 28.8.1991 and has proved it as exhibit Ka-1.

10. The prosecution evidence was closed and the statement of the accused was recorded under section 313 Cr.P.C. wherein the case was stated to be false one and no evidence whatsoever was led by the accused-appellants. The court below after considering various aspects of the case and considering the nature of the case to be one based on circumstantial evidence scrutinized the relevant record and the vital circumstances of the case and recorded finding of conviction under sections 302/34 and section 201 I.P.C. and consequently, sentenced the accused to life imprisonment and rigorous imprisonment for five years respectively resultantly, this appeal.

11. Learned counsel Sri Rahul Mishra, for appellant No. 2 Ram Kripal claimed that it is a case of blind murder and no one knows as to how it occurred and a baseless, false concocted theory has been setup by the prosecution regarding existence of some money transaction having taken place between the deceased (Govardhan) and the brother of the present appellant to the ambit that some lending transaction worth Rs. 500/- took place whereby Ram Kishore, in fact, obtained on credit the above money from Goverdhan. There is nothing in the shape of consistent circumstances which may point out that the appellant ever participated at any moment of time in the commission of the crime. More so, assuming it to be that the money transaction had taken place between the deceased and the brother (Ram Kishore) of

the appellant (Ram Kripal) and it was existing even then the present appellant Ram Kishore who is and was admittedly residing separately in separate house in the village at the time of the occurrence had no motive to commit the offence because the money transaction in question was exclusively between the two persons, the deceased and the accused Ram Kishore. Merely being real brother of the main accused (Ram Kishore) would not itself be sufficient to impute motivation to commit the crime. On the contrary, it would be highly conjectural to act on that aspect as Ram Kripal being interested in involving Govardhan, as such there is every possibility of false implication of the appellant Ram Kripal in this case. The testimony of the prosecution witnesses is on the face testimony of interested and partisan witnesses, they are not worthy of credit. There are various loopholes explicit and implicit in the prosecution story. There is no certainty as to what the witnesses of fact depose either circumstantial or as direct testimony that the accused appellants were ever seen around the place from where the dead body of deceased Govardhan was recovered and no whisper in that regard emerges from the entire testimony. The prosecution evidence on the point of the alleged presence of the accused on the spot at the relevant point of time gives rise to the fact that it is a case of false implication on the ground that enmity existed between the parties and hot altercation also took place while the chakbandi process was underway/followed in the village. The motive suggested is weak. There is no direct and clinching testimony on point showing fact that the money transaction in fact assumed graver objective for committing the murder of Govardhan.

12. So far as the proximity of the time gap between the last seen theory and the recovery of the dead body is concerned, admittedly the dead body was recovered on 28.4.1991 and the matter was reported around 3.30 p.m. the very same day however the last seen is stated to have taken place after 3.00 p.m. on 24.8.1991. No efforts made by the I.O to collect the development that took place between the above period.

13. There is no recovery of any sort whatsoever from any of the accused what to say about the appellants. Under the aforesaid attendant facts and circumstances of this case, possibility of some other committing the offence cannot be ruled out and it cannot be said that all the circumstances have been consistently established by the prosecution against the accused so as to establish the hypothesis of guilt. The circumstances proved do not give rise to any hypothesis of the guilt of the accused that he alone is the author of the crime to the exclusion of all others. The various links in the chain of circumstances are woefully incomplete in this case.

14. Surprisingly, the Investigating Officer being highly enthusiastic and zealous has perfunctorily investigated the case and filed the charge sheet, apart from other sections of Indian Penal Code, under section 364 I.P.C as well. It means the act of abduction was also found proved against the appellants by the Investigating Officer but there is no evidence in regard to any abduction being made of the deceased Govardhan.

15. All the prosecution witness are highly interested and partisan witnesses and their testimony cannot be believed to be clinching one and in the absence of any independent corroboration from independent source the testimony becomes

wholly unreliable. No one in fact saw the deceased in the company of Ram Kishore. There is no cogent evidence of fact of last seen and the proximity of the time between last seen and the day when the dead body was recovered is huge not properly explained. No one saw the appellants accused near or around the place of occurrence (lake) at any point of time after the alleged disappearance of the deceased Goverdhan from his house, which raises serious doubt and questions authenticity of the version of fact of accompaniment of the deceased by the accused Ram Kishore. Fact is that, no money transaction whatsoever took place between the deceased Goverdhan and Ram Kishore and a false story has been set up in order to falsely implicate the accused-appellants for no worthy reason except on account of the village enmity. All the circumstances as were required to be proved in such a case like the present one, based on circumstantial evidence have not been properly proved. The circumstances proved are weak, incomplete and inconsistent. Normally, in a case based on circumstantial evidence all the links in the chain of the various circumstances must be consistently interwoven to establish the guilt leading to the inevitable evidence that the accused was the perpetrator of the crime and to exclude every hypothesis except the guilt of the accused.

16. Learned counsel summed up that the conduct of the informant side is most unnatural. Assuming it to be that any such incident as last seen occurred on 24.8.1991 as alleged by the prosecution, then till the recovery of the dead body, the conduct of all the family members of the deceased was not natural as was expected in the wake of disappearance of the deceased Goverdhan from his house and that natural aspect has neither been appraised by the trial court nor established by the prosecution.

17. While replying to the aforesaid contention the learned A.G.A. Sri Rajiv Kumar Rai, vehemently claimed that it is a case based on circumstantial evidence for the reasons that no one saw the actual occurrence, the dead body was recovered on 28.8.1991 when alone the matter was reported by P.W. 2 Ram Saran. The occurrence has its genesis/origin in specific motive to commit the murder on account of fact that Rs. 500/- was obtained/borrowed by Ram Kishore earlier from the deceased Goverdhan and demand was raised by Govardhan for payment of the same, the evidence is overwhelming to the ambit that out of Rs. 500/- some money- say Rs. 200/- had been returned but Rs. 300/- remained to be paid. It so happened that Goverdhan was whisked away on 24.8.1991 after 3.00 p.m. by the accused Ram Kishore from his house, while the wife of the deceased (Goverdhan) was also present in the house. The deceased took his meal/ lunch while Ram Kishore waited outside the house sitting on a cot. After the meal was over, Ram Kishore took the deceased (Goverdhan) in the name of paying back the money by asking him (the deceased) to accompany him upto Kazipur. Thereafter, no trace of the deceased could be made despite hectic search being made by the members of the family of the deceased. But prior to that it as emerged in the testimony of the prosecution witness particularly- P. W. 1 and P.W. 2 that Ram Kripal, the brother of the main accused Ram Kishore, who resided in a separate house in the same village also joined Ram Kishore on way with the deceased. This fact of last seen is unimpeachable. Thus, the complicity of both the accused being real brothers having strong motive against the deceased in not

returning the money lent by the deceased to Ram Kishore was the deciding factor for committing the murder of the deceased Goverdhan. The theory of last seen has been proved by both P.W. 2 and P.W. 3 against both the appellants, and it cannot be doubted from any stretch of imagination. The various links in the chain of circumstances have been consistently proved and these circumstances inevitably point of guilt of the accused beyond shadow of doubt. There is no reason for false implication and leaving the real culprit at wisdom.

18. So far as the Investigating Officer is concerned, he has rightly conducted the investigation and recorded the statement and has rightly filed the charge sheet against the accused in view of the proved facts and circumstances. This being so the onus to disprove the various facts pertaining to the accompaniment of the deceased by both the accused can be discharged under section 106 of the Indian Evidence Act, 1872. But this burden has not been discharged even in the least.

19. Now, the disappearance of the deceased from his house in company with the accused is a fact specially within the knowledge of both the accused and they alone are required to disprove this fact by a reasonable explanation as to at what point of time they departed the company with the deceased. This explanation is altogether missing and in the absence of any such explanation explicit or implicit, the only hypothesis that emerges from the circumstances proved that the accused are guilty of the charge, thus leaving aside every hypothesis of crime being committed any other person but the accused. Not only this but also suggestion has been made by the defence in that regard that there was some one else who could have committed the murder.

20. Also considered the rival submissions.

21. We may proceed upon the material to co-relate the entire story say exhibit Ka-1. The description of the background of the incident and the incident of last seen as claimed by the prosecution is very much detailed in the report. The written report was lodged after the dead body of the victim was recovered from a huge water body in village Hasanapur on 28.8.1991. It describes the incident in the shape that some time prior to 24.8.1991 Rs. 500/- was demanded by Ram Kishore from Goverdhan understood in terms of some loan and the money was given by Govardhan to Ram Kishore, on demand being raised for return of the money, the same was prolonged and not returned for the last four months prior to the incident, the deceased began to reside with his brother-in-law Chheddu at village Kazipur within police station Husainganj. On 24.8.1991 Goverdhan demanded from Ram Kishore the money whereupon Ram Kishore and his brother Ram Kripal asked him to accompany them to Kazipur where the money will be given and took away with them the deceased but the deceased did not return and on search being made no trace of the deceased was found. The search for trace continued from the day of disappearance (24.8.1991) and, it so happened that the dead body of the deceased Goverdhan was recovered from the lake at village Hasanapur. It was only after recovery of the dead body that the information was given to the police station Husainganj. It is noticeable that the case was lodged at case crime no.181 of 1991 under section 364 I.P.C. 302/201 I.P.C. and

the investigation was commenced. Particular to take note of the fact that the Investigating Officer recorded the statement of the various witnesses and in particular the statement of P.W. 1 and P.W. 3 to the effect that both the accused being the real brothers somehow whisked away the deceased Goverdhan and thereafter the dead body of the deceased (Goverdhan) was recovered from a pond/lake in village Hasanapur.

22. In the backdrop of the aforesaid asserted facts, we may scrutinize the testimony of the witnesses of fact, but before proceeding with the same certain aspects of the case which are admitted to both the sides need be referred for convenience. It is admitted case that there is no eye account testimony of the occurrence by which the two firearm wounds (as per PMR) were caused to the deceased, therefore, it is a case purely based on circumstantial evidence.

23. In this case, the various links in the chain of evidence should be specific and must be consistently interwoven so as to point out and establish invariably the guilt thus proving the case within the four corners of circumstantial evidence case and lastly, the various links in the chain of circumstances being proved consistently must be of nature leaving aside every hypothesis of innocence but the one proposed to be proved against the accused that they alone committed the offence to the exclusion of all others!

24. While considering the case on meritorious count we come across the testimony of the prosecution witnesses of vital facts-say-the last seen in the shape of P.W. 1 Ram Raj and P.W.3 Yasodiya. To be specific, the testimony of P.W. 3 Yasodiya direct, is cogent and consistent on the point of the specific day i.e. 24.8.1991 when the last seen episode occurred. She has come out with the description that it was around 3.00 p.m. when her husband Goverdhan returned home from market along-with Ram Kishore and took his noon meals while Ram Kishore was sitting outside the house on a cot. Thereafter on the pretext of giving money to the deceased, Ram Kishore took the deceased with him and proceeded to Kazipur. At this place there is no mention of another co-accused say Ram Kripal that he was either present on the spot or he accompanied the deceased along-with Ram Kishore at the starting point the house of Goverdhan from where the last seen theory commenced as emerging in the testimony of P.W. 3, but the clue is supplied by the testimony of P.W 1 Ram Raj regarding fact of accompaniment of Ram Kripal with the deceased. The magnitude of his statement shows that while sitting at his house he saw Ram Kishore and Goverdhan coming together whereas while so proceeding Ram Kripal who resides in another house of the village joined them. This specific piece of testimony of P.W. 3 and P.W. 1 when taken as a whole goes to cumulatively establish fact of 'last seen' of causing disappearance of both the accused with the deceased at a particular point of time on 24.8.1991, but we have reasonable doubt regarding the fact of such participation in the incident by co-accused Ram Kripal particularly on the point as to from where Ram Raj saw Ram Kripal joining the deceased and Ram Kishore, because there is no site plan prepared of the place from where Ram Raj in fact saw the house of Ram Kripal and it cannot be said with certainty that Ram Raj was either in front of the house of Ram Kripal or the house of Ram Kripal was near his house within the visibility of this

witness. In the absence of any such direct testimony about the exact position of the respective houses of Ram Raj and Ram Kripal, we may conclude, in so far as the point of presence of Ram Kripal in the act of joining the accused is concerned the same is rendered most suspicious, and this is a vital link in the chain of circumstances, thus rendering this act of participation in the crime by Ram Kripal becomes doubtful. Therefore, Ram Kripal can not be considered to have participated in the incident of last seen thus this part of evidence cannot be given credence. More so, the witness P.W. 1 Ram Raj is also a family member/relative of the deceased. There are certain reasons for this witness being interested in falsely involving the real brother of the main accused (Ram Kishore) in the incident. Therefore it is not safe to believe the theory of last seen to have been reasonably established and proved as against the another co-accused Ram Kripal. However, in so far as the fact of last seen against the main accused Ram Kishore is concerned then we have before us not only the testimony but also the circumstances of this case, which innocuously and inevitably lead us to the conclusion that Ram Kishore in fact took with him Goverdhan to his house and from there he took him to Kazipur and this piece of testimony is virtually unassailable and unimpeachable. P.W. 3 Yasodiya has not been challenged even in the least manner about the very fact of presence of Ram Kishore at the house of Goverdhan. Similarly, there is no challenge to the act of accompaniment as has been alleged against the accused Ram Kishore. Not only this much, but also the fact of accompaniment had a motive and that motive also stood proved and has not been challenged even in the least and in particular P.W.3 Yasodiya by the defence particularly by the accused Ram Kishore. For that count without unnecessarily scrutinizing threadbare dealing with fact of last seen and also on the ancillary aspects of the case we may unhesitatingly hold that in this case prosecution has been able to prove and establish the fact of strong motive to commit the crime against the accused Ram Kishore and each link on the chain has been reasonably established. Theory of last seen and the very motive behind the crime have been proved and established beyond doubt. Now the last seen stood unassailably established against the accused Ram Kishore along-with the motive. Now the point is to be explained by Ram Kishore himself as to where he took the deceased with him after he departed with the deceased from his house and this particular aspect became a fact within the special knowledge of accused Ram Kishore. Thus this particular fact is a state of thing or mental condition of which the accused is conscious and in this case 'fact in issue' is disappearance and consequent death of Goverdhan. We may observe that burden of proof of special and particular fact if found to be within the knowledge of any person then the person whosoever he may be is required to prove that fact.

25. We have carefully perused the entire statement of accused Ram Kishore recorded under section 313 Cr.P.C. wherein no specification in shape of reasonable explanation of this particular fact has come. At the time of arguing this appeal no explanation is forthcoming on this point. Argument has been raised to the ambit that in this case the time gap between the last seen and the time of recovery of the dead body is huge and it indicates that the offence might have been committed by any one else. But the contention raised is merely based on imagination for the reason

that the doctor has deposed, inter alia, with an explanation that the death of Goverdhan might have taken place any time after 3.00 p.m. on 24.8.1991 up to the time of recovery of the dead body (which day is 28.8.1991). In between that span of time fact of death has been affirmed and there is no one else who can be imputed to have any interest in committing the murder of the deceased nor any such circumstance is found emerging, surprisingly not a single suggestion on this point has been given by the defence as to who else could have been the interested person to have the animus to commit the offence.

26. Upon consideration of the aspect of investigation, we may observe that it cannot be said that the I.O was somehow interested in availing conviction of the accused and with that motive in mind he carried out unfair investigation and filed the charge sheet against the accused. Consequently, the contention raised in that regard are hereby not accepted by us. Moreover, no evidence or circumstance exist in this case to think of argument that the investigation of this case was shoddy.

27. We may conclude that the trial court while analyzing/scrutinizing the various facts and circumstances of the case vis a vis the testimony of P.W 1 and P.W 3 wrongly recorded the finding of conviction against the accused Ram Kripal that he too was involved in carrying away/abducting Goverdhan in the company with Ram Kishore. The case of Ram Kripal as observed above becomes doubtful and for the reason aforesaid his complicity in the offence has becomes dubious and we can observe with ease that he (Ram Kripal) being the real brother of Ram Kishore, has been falsely implicated in this case. We may add here that he had no strong motive to commit the murder and he resided separately from his brother Ram Kishore. At that point of time when the alleged disappearance of the deceased was caused by Ram Kishore, merely a balld statement in the form that Ram Kripal also accompanied his brother Ram Kishore and Goverdhan on way while they were proceeding towards Kazipur would not be suffice to believe the theory of last seen as against him though proved beyond doubt against Ram Kripal.

28. Consequently, in so far as the finding of conviction in respect of appellant co-accused No. 2 Ram Kripal is concerned, finding of conviction recorded under section 302/34 I.P.C. and section 201 I.P.C. against him is set aside and he is exonerated of both the charges, accordingly he is acquitted of the same. He is stated to be on bail. His personal bond is cancelled and sureties are discharged.

29. However, in so far as the case of another appellant No. 1 Ram Kishore is concerned his case stands proved in totality qua the charges and he has been rightly convicted by the trial court and this finding of conviction recorded under sections 302/34, and section 201 I.P.C. are hereby affirmed by us.

30. Consequently, this appeal in so far as it relates to the conviction and sentence of accused Ram Kishore; under aforesaid sections of the Indian Penal Code is concerned, is hereby dismissed whereas the case of the appellant No. 2 is accepted and his claim for exoneration is allowed. Thus, this appeal is partly allowed in terms aforesaid.

31. Appellant Ram Kishore is on bail, his personal bail bonds are cancelled he be

taken into custody forthwith to serve out the sentence imposed on him by the trial court.

32. A copy of this order be certified to the court concerned.

(2020)09ILR A806
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.09.2020

BEFORE

THE HON'BLE SUNEET KUMAR, J.
THE HON'BLE RAVI NATH TILHARI, J.

Criminal Appeal No.1557 of 2015

Tushar ...Appellant(In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Vinod Singh, Sri Rajeev Trivedi, Sri Rohit Verma, Sri Shailesh Pandey, Sri S.S. Tripathi

Counsel for the Opposite Party:
A.G.A., Sri Rahul Kumar Pandey

Appeal against Conviction U/S Section 302 & 307 of IPC

Criminal Law-Delay in Lodging F.I.R.- No adverse inference\ for delay in lodging F.I.R. (Para 19)

Prosecution version cannot be rejected solely on the ground of delay in lodging F.I.R. (Para 22)

F.I.R. is not Encyclopaedia
Only essential and broad picture needs to be stated in the F.I.R. (Para 35)

Section 313 of CrPC. – (Power to examine the accused) – Once a plausible version has been put in defence at the examination stage, then it is for the prosecution to negate each defense plea. (Para 40)

Importance of motive in direct witnesses- Where the direct witness is worthy of credence and can be believed then question of motive does not carry much weight. (Para 61)

Appellant was rightly held guilty by the trial court.

Appeal dismissed. (E-2)

List of Cases cited: -

1. Ravinder Kumar & anr. Vs St. of Punj.

2. Sahebrao & anr. Vs St. of Mah.

3. Palani Vs St. of T.N.

4. Amar Singh Vs Balwinder Singh & 4ors. & Tara Singh Vs St. of Punj.

5. V.K. Mishra & ors. Vs St. of Uttar. & 6 ors. Latesh Vs St. of Maha.

6. M. Abbas Vs St. of Kerala

7. Parminder Kuar @ P.P. Kaur @ Soni Vs St. of Punj

8. Sampath Kumar Vs Inspector of Police, Krishnagiri

9. Sachin Kumar Singhraha Vs St. of Madhya Pradesh

10. Smt. Shamim Vs State of (GNCT of Delhi)

11. Shivraj Bapuray Jadhav & ors. Vs St. of Karnataka

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

1. The instant appeal assails the correctness of the judgment and order dated 16 February 2015, passed by the Additional Sessions Judge, Court No. 3, Bulandshahr, in State of U.P. vs. Tushar @ Golu, arising from:

i. Sessions Trial No. 3A of 2013 Crime No. 428 of 2012 under Sections 302 and 307 IPC;

ii. Sessions Trial No. 339 of 2013 Crime No. 430 of 2012 under Section 25 of Arms Act, P.S. Anoopshahar;

2. Both the cases were heard and decided by a common judgment.

3. The Additional Sessions Judge has convicted the appellant, namely, Tushar @ Golu with life imprisonment and a fine of Rs. 50,000/- under Section 302 IPC and on default of payment of fine the appellant shall further undergo simple imprisonment of 1 year. Appellant is further convicted and sentenced to undergo life imprisonment and a fine of Rs. 50,000/- under Section 307 IPC and on default of payment of fine he shall further undergo simple imprisonment of 1 year. The appellant Tushar @ Golu is further convicted and sentenced to undergo 3 years imprisonment and fine of Rs. 10,000/- under Section 25 of Arms Act and in default of payment of fine he shall further undergo simple imprisonment of 3 months. All sentences made to run concurrently.

4. Narrated concisely the prosecution case against the appellant is that on the date of occurrence i.e. 30.11.12, the accused-appellant Tushar @ Golu came to the house of Kapil after sunset with an intention to kill him. The appellant resorted to firing on Kapil, people of the locality gathered, appellant left the place. Kapil in the night of 30.11.12 proceeded to Anoopshahr with an intention to settle the dispute with the appellant. It is alleged that while going to Anoopshahar, the appellant at village Birauli fired on him, consequently, Kapil succumbed to the injury. Rahul Kumar, driver, who was sitting adjacent to Kapil in the vehicle received gun shot injury. Rahul Kumar informed the mother of the informant over the mobile phone of the incident which had taken place at about 12:30 in the night of 30.11.12 and 1.12.12.

5. Shilpi Sharma (P.W.-1) informant lodged a written complaint (exhibit Ka-1) on 1.12.12 at about 11:30 AM with the police station Anoopshahar, District Bulandshahar, alleging that she is resident of Mohalla Lakshmi Nagar, residing with her mother Vijay Laxmi and her elder brother Kapil (deceased), his wife and children. On the date of the incident she was at Lucknow along with her mother, wife and children of Kapil to attend marriage ceremony. Her brother Tushar @ Golu (appellant) lives at Anoopshahar along with his family. The appellant and his wife Mayuri @ Neha regularly misbehaved with them, consequently, they were separated by giving their share of the property. Despite this, the appellant and his wife were demanding larger share in the property, thus held grudge and enmity with them. On 30.11.12 at about 9:30 PM Kapil informed her on phone that Tushar @ Golu/appellant had come to their house in the evening with an intention to kill Kapil, appellant resorted to firing. He left the place after people of the locality gathered. It was further alleged that Kapil informed her that he is proceeding to Anoopshahar to meet his brother Tushar @ Golu/appellant to settle the matter with him. On the way to Anoopshahar, Tushar apprehended Kapil at Birauli, caused firearm injury, consequently, Kapil succumbed to the injury. Rahul Kumar, (PW-2) who was sitting on the adjacent seat of the vehicle also received gun shot injury, he was referred to Delhi for treatment. Rahul Kumar (PW-2) informed mother of the informant of the incident on mobile phone. The incident had taken place at about 12:30 in the night. He further informed that

villagers have informed the police of the incident.

6. After the incident the dead body of Kapil and injured Rahul Kumar (PW-2) were taken to CHC Anoopshahar, he was reffered to District Hospital Bulandshahar. The injury report of Rahul Kumar (exhibit Ka-4) was prepared by Dr. Rajeev Verma at about 3:40 AM on 1.12.12. The following injuries were found on the body of Rahul Kumar (PW-2):-

"Injury of P.W.-2 Rahul Kumar:

"(1) Lacerated wound 1 c.m. x 1 c.m. depth not probed present on (Rt) chest middle part, lateral aspect, 16 cm away from mid line, margin are inverted, KUO advised X Ray"

7. The autopsy of the deadbody of Kapil was conducted on 1.12.12 at about 5:00 PM, postmortem report (exhibit Ka-5) was prepared by Dr. Pankaj Kumar (P.W.7). The following antemortem injuries were noted:-

Injuries on the body of deceased:

"(1) Firearm wound of entry size 1 c.m. X 1 c.m. X chest cavity deep present on left side chest on lateral aspect. Margins invested, 6 c.m. below from left nipple at 4'o clock position. On exploration left lung, left pleura, spleen and liver found lacerated. About 800 ml. of blood present in abdominal cavity.

(2) Firearm wound of exit size 2.5 cm x 2 cm x abdominal cavity deep, 26 cm below from right nipple at right side of the abdomen, lateral aspect at 7 o' clock position, margins everted.

On exploration injury number 1 and 2 are communicating to each other.

Death due to shock and haemorrhage as a result of antemortem injuries."

8. The investigation of Case Crime No. 428/12 under Sections 302, 307 IPC was carried out by two Investigating Officers (hereinafter referred to as "I.O."), I.O. Keshav Singh (P.W.-7), prepared the inquest report (exhibit Ka-6). He visited place of occurrence and prepared the site plan (exhibit Ka13). He collected blood stained earth, as well as, plain earth from the place of occurrence. One empty cartridge 315 bore was recovered from the place of occurrence (exhibit Ka-14). The I.O. recorded the statement of the witnesses. The appellant came to be arrested on 2.12.12 from Karanpur village, a Pistol-315 bore and two live cartridges 315 bore was recovered from possession of the appellant (exhibit Ka-15). On the same day Case Crime No. 430/12 under Section 25 of Arms Act was registered against the appellant Tushar @ Golu, its investigation was handed over to Sub Inspector Lalit Harish Chandra Gangwar (P.W.-10). On 7.12.12 team of field unit Bulandshahar collected necessary samples form the vehicle (Gypsy) of the deceased bearing registration number H.P.-27-0067 from the place of occurrence and prepared recovery memo (exhibit Ka-16).

9. The second I.O. of Case Crime No. 428/12, Hari Ram Singh Yadav (P.W.-11) took over the investigation on 10.12.l2. Appellant Tushar @ Golu was taken on remand and on the pointing of the appellant the Maruti Car (Swift Desire) bearing registration number D.L.5CE 0739 employed by the appellant in the commission of the offence was recovered from a sugar cane field at village Torai (exhibit Ka-20), a site plan (exhibit Ka-21)

was prepared. The statement of injured Rahul Kumar (PW-2) was recorded on 20.12.12. Pistol of 315 bore, 2 live cartridges 315 bore recovered from the appellant on 2.12.12 and empty cartridge of 315 bore recovered from the place of occurrence on 1.12.12 was sent to the Forensic Science Laboratory Agra. On 20.2.13 the I.O. filed charge-sheet no. 20/13 (exhibit Ka-23) under Sections 302, 307 IPC in Case Crime No. 428/12.

10. P.W.-10 S.I. Lalit Harish Chandra Gangwar, I.O. of Case Crime No. 430/12 under Section 25 of Arms Act recorded the statement of witnesses including the informant. He visited the place of occurrence and prepared the site plan (exhibit Ka-17). Sanction of District Magistrate (exhibit Ka-18) was obtained to prosecute the appellant under the Arms Act. After investigation on 19.1.13 charge-sheet no. 6/13 under Section 25 of Arms Act was filed against the appellant in Case Crime No. 430/12. Both cases were committed to the Court of Sessions by the Chief Judicial Magistrate, Bulandshahar, on 10.4.13 after taking cognizance. On 13.7.13 charges under Section 307, 302 IPC and Section 25 Arms Act was framed against the appellant. The appellant denied the charges and claimed trial. The prosecution was called upon to adduce evidence in support thereof.

11. To bring home the guilt of the appellant, prosecution has examined 13 witnesses.

12. Incriminating evidence and circumstances were put to the appellant under Section 313 Cr.P.C., appellant denied all of them and claimed false implication. The appellant stated that it is wrong, as well as, false that near village Birauli he chased and fired upon Kapil, and of causing injury to Rahul Kumar (PW-2). He further stated that Shilpi Sharma (P.W.-1) wants to grab property. The deposition of Rahul Kumar (P.W.-2) and Pranav Bharadwaj @ Appu (P.W.-3) is false and wrong. He further stated that the case was wrongly investigated, false recovery has been shown. On being confronted with the report of Forensic Science Laboratory Agra, the appellant stated that he has nothing to say about it. He further stated that he desired to present documentary evidence and expert evidence.

13. After statement of the appellant under Section 313 Cr.P.C., the defense produced Constable Nahar Singh as (D.W.-1) and Dr. R.K. Lal as (D.W.-2) and documentary evidence (paper No. 50A to 59A; 70A to 74A).

14. The trial court held that the appellant committed the alleged offence and prosecution established the circumstances, proving the guilt beyond reasonable doubt for charges punishable under Section 307 and 302 IPC and under Section 25 of Arms Act. Accordingly, appellant-Tushar @ Golu was convicted and sentenced as noted in para 3 above.

15. Shri Shailesh Pandey, learned counsel for the appellant has made the following submissions:

i. FIR was lodged belatedly after due thought and consultation;

ii. Rahul Kumar (P.W.-2) , the injured witness, nor, Pranav (P.W.-3) has lodged the FIR;

iii. there is no motive to commit the offence;

iv. Pranav Bharadwaj @ Appu (P.W.-3) is not mentioned in the FIR as a witness of the incident but has been subsequently introduced/planted, his presence at the place of occurrence, is doubtful;

v. presence of the appellant on the spot and causing firearm injury as reflected from the postmortem report makes the prosecution case doubtful;

vi. single gun shot fired from the running car could not have made entry from the left chest and exit wound from the right abdomen of the deceased, who was driving the vehicle;

vii. deceased Kapil could have incurred the injury only if the deceased turned around at about 180 degrees which is not possible while driving the vehicle;

viii. murder of Kapil Sharma was committed by Rahul Kumar (P.W.-2) and Pranav (P.W.-3), the injury of Rahul Kumar (P.W.-2) is self inflicted, there is blackening and tattooing;

ix. there is no blackening/tattooing on the body of the deceased though it is alleged that the firing was made from a distance of 2-3 feet;

x. the prosecution has miserably failed to prove its case beyond reasonable doubt.

16. Per contra, Shri Krishna Pahal, learned Additional Advocate General appearing for the State contended that the prosecution has established the guilt of the appellant in the commission of the crime in this case. The FIR version has been fully supported by medical and ocular evidence, based on the said evidence, the trial court rightly convicted the appellant. The impugned judgment warrants no interference.

17. No one appeared for the informant.

18. We have considered the rival contentions and perused the impugned judgment and order of the trial court and material placed on record with the assistance of the learned counsels.

19. So far as the question of delay in lodging FIR, it is well settled, that if delay in lodging FIR has been explained from the evidence on record, no adverse inference can be drawn against prosecution merely on the ground that the FIR was lodged with delay. There is no hard and fast rule that any length of delay in lodging FIR would automatically render the prosecution case doubtful. Supreme Court in **Ravinder Kumar & Anr. Vs. State of Punjab**1, has observed;

"The attack on prosecution cases on the ground of delay in lodging FIR has almost bogged down as a stereotyped redundancy in criminal cases. It is a recurring feature in most of the criminal cases that there would be some delay in furnishing the first information to the police. It has to be remembered that law has not fixed any time for lodging the FIR. Hence a delayed FIR is not illegal. Of course a prompt and immediate lodging of the FIR is the ideal.....

20. In **Sahebrao & Anr. Vs. State of Maharashtra2**, Apex Court has held:

"The settled principle of law of this Court is that delay in filing FIR by

itself cannot be a ground to doubt the prosecution case and discard it. The delay in lodging the FIR would put the Court on its guard to search if any plausible explanation has been offered and if offered whether it is satisfactory."..

21. Recently in **Palani V State of Tamilnadu3**, it was observed by Supreme Court that in some cases delay in registration of FIR is inevitable. Even a long delay can be condoned if witness has no motive for falsely implicating the accused.

22. From the above discussed exposition of law, it is manifest that prosecution version cannot be rejected solely on the ground of delay in lodging FIR. Court has to examine the explanation furnished by prosecution for explaining delay. There may be various circumstances for delayed FIR.

(Refer: Amar Singh vs. Balwinder Singh & Other4 and Tara Singh vs. State of Punjab5)

23. In the present case, on 30.11.12 at about 9:30 PM the appellant came to the residence of the deceased Kapil, fired upon him with an intention to kill, thus, attempted to murder Kapil. In the intervening night of 30.11.12 and 1.12.12 at about 00:30 hours near village Birauli, the appellant fired on the vehicle being driven by Kapil. The firearm injury resulted in the death of Kapil. The bullet fired by the appellant on the deceased Kapil passed through his body and caused grievous firearm injury to Rahul Kumar (PW-2) which was sufficient to kill him in ordinary course. Thus, the appellant had attempted to murder Rahul Kumar.

24. The aforesaid facts are substantiated by the averments made in the first information report lodged by Shilpi Sharma (P.W.-1), and the eyewitness account of injured Rahul Kumar (P.W.-2) and Pranav Bharadwaj @ Appu (P.W.-3), medical evidence and the report of Forensic Science Laboratory Agra (Exhibit Ka-36). Shilpi Sharma (P.W.-1) categorically stated that she along with her mother, wife and children of the deceased Kapil were in Lucknow to attend a marriage ceremony. On 30.11.12 at about 9:30 PM, she received a call from Kapil informing her that appellant Tushar @ Golu came to the house and resorted to firing with an intention to kill him. She further stated that Kapil had informed her that he is going to Anoopshahar to settle the matter with Tushar @ Golu. In the night Rahul Kumar (P.W.-2) driver of Kapil informed her mother about the incident that while they were on their way to Anoopshahar, appellant and his friends surrounded them near village Birauli and resorted to firing causing death of Kapil. After receiving the information at about 12:30 in the night, P.W.-1 proceeded for Bulandshahr within half an hour. From Bulandshahr she directly went to Anoopshahar and filed a written complaint with the thana. She was not aware in which hospital Rahul Kumar (P.W.-2) was admitted.

25. Rahul Kumar (P.W.-2) in his examination-in- chief stated that he informed about the incident to the mother of the deceased Kapil. Pranav Bharadwaj @ Appu (PW-3) was accompanying them but fled from the place of occurrence after the incident. PW-2 further stated that he was seriously injured by the bullet that hit Kapil, consequently, he came out of the car and fled for his life to reach a nearby cane crusher. After sometime people at the crusher informed the police; police arrived within 20-25 minutes. PW-2 further stated

that police had taken him to Government Hospital, Anoopshahr, from there he was referred to District Hospital Bulandshahr. After receiving first aid at Government Hospital Bulandshahr he was referred to Delhi. The dead body of Kapil was also brought along with him to the Bulandshahr Government Hospital. He further stated that he was subsequently admitted to Guru Teg Bahadur (for short G.T.B.) Hospital Delhi. After 2 to 3 days Shilpi Sharma (P.W.-1) and Pranav Bharadwaj @ Appu (P.W.-3) met him at the hospital in Delhi.

26. Pranav Bhardwaj @ Aappu (PW-3) stated that deceased Kapil Sharma and Rahul (PW-2) on receiving bullet injuries, he jumped out of the rear window of the vehicle and fled in the agriculture field to save his life. After walking 8-10 kilometers he took lift on a truck and came to Bulandshahar at about 7.00 AM. Since he did not have his mobile, he did not inform of the incident to Shilpi Sharma (PW-1).

27. S.I. Keshav Singh Bhadoria (PW-7), stated that Constable Ravindra Singh informed about the incident to S.I. Ram Kumar, who in turn informed the concerned Police Station, thereafter, information was given to him. The police patrolling party arrived at the place of occurrence headed by S.I. Ram Kumar and his associates. He admitted that he had not taken any further steps in the case before registration of the F.I.R.

28. From the evidences and depositions of witnesses, PW-1, PW-2, PW-3 and PW-7, it transpires that F.I.R. was not lodged by the injured witness (PW-2) or PW-3. Shilpi Sharma (PW-1), at the time of the incident was at Lucknow and on receiving information, she immediately proceeded for Bulandshahar. On reaching Bulandshahar she went straight to Anoopshahar Thana for lodging the F.I.R. From these facts and the circumstances, it cannot be said that there was wilful delay in lodging of the F.I.R.

29. The injury report prepared at Government Hospital, Bulandshahar (Ex. Ka-4) records that the injured Rahul (PW-2) was brought to Government Hospital, Bulandshahar by Constable 272 Ravindra Kumar referred from C.H.C. Anoopshahar at about 3.40 A.M. on 01.12.12, i.e., about three hours from the incident. It can reasonably be inferred that incident would have occurred at about 12.30 in the night. After the incident, injured Rahul (PW-2) was taken to C.H.C. Anoopshahar; thereafter, to District Hospital, Bulandshahar. It is also clear from the statement of Dr. Amit Gupta (PW-13) and Ex. Ka-26 of District Hospital, Bulandshahar, that injured Rahul (PW-2) was referred to Delhi for better treatment. This fact is reflected from the medical papers (Ex. Ka-25 to Ka-35) pertaining to the treatment of injured Rahul (PW-2) at G.T.B. Hospital, Delhi. Thus, from the sequence of events, established by the prosecution, it can be inferred that seriously injured Rahul (PW-2) was not in a position to lodge the F.I.R.

30. Pranav Bhardwaj @ Appu (PW-3) clearly stated that on Kapil and Rahul receiving bullet injuries, he fled out of fear to save his life and did not return to the spot. He did not have his mobile phone with him. Shilpi Sharma (PW-1), after being informed of the incident within half an hour commenced travel to Anoopshahar to lodge the report. Hence, it cannot be said that there was any unexplained or intentional delay in lodging of the F.I.R. Further, there is no evidence of prior

consultation either with the eye-witnesses or with any other person. It cannot be said that the F.I.R. was lodged after due consultation or there is any delay in lodging the F.I.R.

31. Learned counsel for the appellant next contended that there are several omissions in the prosecution case which create reasonable doubt about the presence of Pranav Bhardwaj @ Aappu (PW-3). He has not been named in the F.I.R., but subsequently implanted. It is urged that F.I.R. mentions that the incident took place while the deceased was going to Anoopshahar but during evidence it has come that incident had taken place when deceased was returning from Anoopshahar. Had Pranav Bhardwaj (PW-3) been present on the spot, he would not have fled but would have tried to help his brother-in-law, who sustained bullet injuries in his presence and lodged F.I.R.

32. Shilpi Sharma (PW-1) stated in her examination-in-chief that her elder brother Kapil Sharma has three brother-in-laws, namely, Pranav (PW-3), Shivam and Omarhari. Pranav lives in Dibai; Omhari lives in Baharin and Shivam at Aligarh. Shilpi Sharma categorically stated that she met Rahul (PW-2) after two to three days of the incident at the Hospital in Delhi. Rahul (PW-2) told her that Pranav (PW-3) was present on the date of the incident at Bulandshahar and had accompanied them (Kapil and Rahul) to Anoopshahar to meet the appellant. She admitted that at the time of lodging of FIR, this fact was not known to her as she had not talked to Pranav (PW-3) until then.

33. Rahul Kumar (PW-2) in his examination-in-chief stated that on 30.11.12 at about 9.00 P.M., appellant Tushar resorted to firing at the residence of Kapil at Bulandshahar with the intention to kill Kapil; Pranav (PW-3) brother-in-law of Kapil Sharma, was present in the house, he came out on hearing the sound of firing. Kapil Sharma, thereafter, proceeded for Anoopshahar to meet the appellant; Pranav (PW-3) also accompanied them. Incident had taken place at Birauli where appellant fired and killed Kapil. Pranav fled from the place of occurrence. Pranav (PW-3) had come to Bulandshahar after seeing off his brother at New Delhi Airport. He further stated that in the vehicle, Pranav (PW-3) was sitting on the rear seat. The vehicle was being driven by deceased Kapil and he (P.W.-2) was sitting in the front seat beside Kapil. After fleeing from the place of occurrence, Pranav (PW-3) met Rahul (PW-2) after 2-3 days at G.T.B. Hospital, Delhi.

34. Pranav Bhardwaj (PW-3) stated that on 30.11.12, he was at the house of his brother-in-law, i.e., deceased Kapil. On 28.11.12, his brother, an engineer in Baharin, had to board return flight from Delhi. He went to see off his brother, thereafter, returned to Bulandshahar by taxi. He stayed back, at Bulandshahar at the request of Kapil as he was alone in the house. He accompanied the deceased, Kapil, to Anoopshahar on 30.11.12.

35. From the evidence, there is a strong explanation about the presence of Pranav Bhardwaj @ Appu (PW-3) at Bulandshahar, as well as, the place of occurrence. Merely not naming Pranav Bhardwaj (PW-3) in the F.I.R. does not mean that he was not present either at Bulandshahar or at the place of crime. F.I.R. was lodged by Shilpi Sharma (PW-1) on the information received from Rahul (PW-2) at Lucknow. Having due regard to

the evidence and circumstances, it is normally not expected that seriously injured Rahul (PW-2), has to furnish every detail about the incident. Only the essential or broad picture need to be stated in the F.I.R. All minute details need not be mentioned therein. F.I.R. is not a verbatim summary or encyclopedia of the prosecution case. It is not expected to contain a minute by minute and step by step version. **(Refer: V.K. Mishra and others vs. State of Uttarakhand and others6; Latesh vs. State of Maharashtra7)**

36. On the basis of the discussions, herein above, we are of the view that non mentioning the name of Pranav Bhardwaj (PW-3) in the F.I.R. is not fatal for the prosecution case as there is ample evidence that Rahul Kumar (P.W.-2) and Pranav Bhardwaj (PW-3) were present at the place of occurrence. It cannot be said that Pranav Bhardwaj (PW-3) is an imposed witness, rather, an eye-witness of the incident.

37. Learned counsel for the appellant has laid much emphasis raising doubt of the incident by contending that the manner in which prosecution is trying to explain the murder of Kapil Sharma is impossible and not corroborated from the post-mortem report of deceased Kapil Sharma. It is urged that firing made from a moving car on the driver of the parallel moving car, the entry wound would normally be from the right side of the body of the driver and not from the left side as recorded in the post-mortem report. In the present case, the fired bullet made entry wound from the left side of deceased Kapil Sharma and an exit wound from right side of the body. This is not possible as it has specifically come in the evidence of Rahul Kumar (PW-2) that vehicle of the deceased, as well as, vehicle of the appellant were moving when firing was resorted to by the appellant.

38. Learned counsel for appellant further submitted that it has come in the discharge summary (Ex. Ka-27), prepared at G.T.B. Hospital that there was blackening around entry wound of Rahul (PW-2). Dr. Amit Gupta (PW-13) in his examination has confirmed that there is blackening around the entry wound of PW-2. It is urged that it is not possible that a bullet after making an exit wound from the body of deceased Kapil would make entry wound in the body of Rahul Kumar (PW-2), by that time, the bullet would have lost the necessary velocity to cause blackening around the entry wound of Rahul Kumar (PW-2). In the absence of blackening around the entry wound of deceased Kapil Sharma the prosecution has failed to explain the manner in which the alleged crime was committed. It is further submitted that Rahul (PW-2), who was sitting beside deceased Kapil Sharma, had first fired upon Kapil Sharma and thereafter caused self inflicted injury upon himself to give colour to the incident.

39. Learned counsel for the appellant has laid much emphasis on the evidence of Dr. R.K. Lal (DW-2) to submit that having regard to his long experience in medical field and countless post-mortem conducted by him, Dr. R.K. Lal was of the opinion that such an injury, as narrated by the prosecution, is not possible unless the deceased was in a position to turn around at 180 degree at the moment of firing. Only in such a situation the bullet could enter from left side and make an exit wound from right side. Distance between two cars was about 2-3 feet; it was natural that blackening would have come around the entry wound of the deceased, but no blackening is seen

around the entry wound of deceased, rather, blackening has been noted in the entry wound of Rahul (PW-2). It is also contended that height of Gypsy car being driven by deceased Kapil is higher than that of Maruti (Swift Desire) car, driven by the appellant. In this position, the direction of the wound would not be upward to downward, rather, it would be downward to upward. In the present case, the direction of bullet is upward to downward which is not possible in the given circumstances. It is therefore urged that prosecution story is false, doubtful and without any basis.

40. In **M. Abbas vs. State of Kerala8,** Supreme Court observed that unlike the prosecution which needs to prove its case beyond reasonable doubt, the accused merely needs to create reasonable doubt or prove their alternate version by mere preponderance of probabilities. Thus, once a plausible version has been put forth in defence at the Section 313 CrPC examination stage, then it is for the prosecution to negate such defense plea. **(Refer: Parminder Kuar @ P.P. Kaur @ Soni Vs. State of Punjab9**)

41. To appreciate the submission advanced by learned counsel for appellant, raising reasonable doubt of the incident, it is relevant to examine the evidence available on record on this point.

42. Shilpi Sharma (PW-1) stated that at about 12.30 in the night Rahul (PW-2), informed on mobile phone that while Kapil was going to Anoopshahar, at Birauli, appellant stopped their car by overtaking it and then fired upon Kapil. Kapil succumbed to the injury and Rahul also received gunshot injures. Rahul (PW-2) deposed that appellant was not found at Shaubhagya Vatika; they were returning to Bulandshahar; on reaching Birauli appellant came from behind in a Swift Car and started firing upon their car. Kapil backed his car but appellant started chasing them; appellant overtook their car and fired upon Kapil by bringing his car parallel to their car. Rahul (PW-2) further stated that he was sitting on the passenger seat next to Kapil, who was on the driving seat; bullet hit Kapil Sharma. On receiving bullet injury, Kapil fell on his thigh. He further stated that the same bullet hit him on the right side and got entrapped in his body. Appellant was driving the vehicle himself. Rahul (PW-2) categorically stated in cross-examination that Kapil turned towards him to escape the injury, hence, the bullet fired from the right side entered from the left side and made exit wound from right side of body of the deceased. After making exit from the body of the deceased the bullet entered his body and got entrapped. He stated that both the vehicles were in running position.

43. Pranav Bhardwaj (PW-3) deposed that when they were returning to Bulandshahar a Swift car after overtaking them stopped their car. Kapil immediately backed his car towards Anoopshahar. In between appellant fired upon their car near the speed-breaker as their car had slowed down. He stated that the car of the appellant came parallel to their car; appellant stepped down from the car and fired at Kapil. The car was being driven by the appellant. Their car stopped on the Kachchai patari, it is then appellant, Tushar @ Golu, stepped down and resorted to firing. He further stated that Kapil, in momentary reaction, to save himself turned towards left thereby causing injury in his left side of the body. The bullet also hit Rahul. Kapil's face was towards Rahul on receiving injury and in the same position

Kapil fell down on Rahul. The distance between the appellant and deceased was 2-3 feet. PW-3 further stated that he was sitting on the rear seat of the car, he immediately jumped from window of the vehicle and fled to save his life.

44. On the basis of the evidences, it has to be examined as to what was the position of two cars at the time of firing. Whether the two cars were moving or stationary.

45. Shilpi Sharma (PW-1) and Pranav Bhardwaj (PW-3) categorically stated that the appellant after stopping his car fired upon deceased Kapil Sharma. Pranav Bhardwaj (PW-3) clearly stated that after stopping the car appellant stepped out from his car and then resorted to firing. The deposition of Rahul (PW-2) that ^^tc mlds ckn xksyw us Qk;fjax dh rks nksuksa xkfM+;k¡ py jgha Fkha vkSj dfiy dks xksyh yxus ds ckn xksyw pyrh gqbZ xkM+h dks Hkxkdj ys x;k^^ has been heavily relied upon by learned counsel for the appellant to contend that both the vehicles were moving and not stationary, therefore, the injury would not have been caused as is reflected from the post mortem report of Kapil.

46. The statement of Rahul (PW-2), in the circumstances can be interpreted that while the engines of both the vehicles were in start/ignited position, but the vehicles were stationary. This construction of the depositions of Rahul (PW-2) is in consonance with the statement of Shilpi Sharma (PW-1) and Pranav Bhardwaj (PW-3). Shilpi Sharma, got information from Rahul, hence, the deposition of Shilpi Sharma makes it clear that after the incident, she was informed by Rahul (PW-2) that when firing was resorted to, the car of the appellant and that of the deceased were stationary, though their engines were in start/running condition. Pranav Bhardwaj (PW-3), was sitting on the rear seat of the vehicle at the time of firing, he has not stated that firing was resorted to by the appellant from inside the car. The site-map (Ex. Ka-13) does not show that the car of the deceased was accidented but was found stationary at the place marked "A'. This establishes the case of the prosecution that firing was restored to by the appellant when both the vehicles were stationary. Pranav Bhardwaj (PW-3) has categorically deposed that their car stopped. The position of the car of deceased Kapil at the place of occurrence supports the version of Pranav Bhardwaj (PW-3). It can be reasonably concluded that both the cars were in stationary position, though their engines were running when the incident of firing was resorted to upon Kapil.

47. Now it has to be seen whether in this condition there is possibility that firing resorted to from right side of the driver of the vehicle can make entry wound from left side of the body of the driver (Kapil).

48. The witnesses have stated that deceased Kapil was driving the vehicle (Gypsy); Rahul (PW-2) was sitting beside him and Pranav (PW-3) was sitting on the rear seat. Pranav stated that appellant after overtaking the car of the deceased came out of his car and then fired upon the deceased. If the appellant came out of his car then certainly he was in standing position, whereas, the deceased was seated in his car. In this position, when firing is resorted, definitely its path would be from upward to downward as the appellant is higher in position while firing than the deceased. The appellant fired at the deceased, who was comparatively in a lower position seated inside the car, in this position the direction

of the bullet injury shown from upward to downward, is the natural course in the circumstances.

49. In this backdrop, it is to be examined from the evidence and the circumstances whether there was any possibility that the bullet coming from right direction will make an entry wound from the left side of the body of the deceased Kapil who was on the driving seat. The evidence of Pranav Kumar (PW-3) is to the effect that appellant came out of his car and resorted to firing upon the deceased. Under the circumstance, the natural and prompt reaction of the deceased in spur of the moment would be to avoid injury and escape death. The deceased, accordingly, reacted to escape the imminent danger to his life. The deceased being trapped in the vehicle on the driving seat, had very limited option to escape. The deceased was not in a position to bend forward as the steering of the vehicle was an impediment. He could not open the door to escape from driver's side as the assailant was standing there to shoot him; deceased could not escape from the opposite door as Rahul (PW-2) was sitting beside him. The only course available to the deceased, to escape the onslaught of firing was to turn around and move towards the rear seat of the vehicle. As soon as the accused-appellant stepped out of his car, the deceased in reaction turned towards the rear seat to escape the injury and on doing so, it is obvious that the deceased would turn around 180 degree towards his left to escape from the rear of the vehicle. As soon as the deceased turned towards the rear seat, firing was resorted upon him by the appellant which caused entry wound from left side of the body of deceased. In the given circumstances faced by deceased trapped between the assailant and Rahul (PW-2), only natural course available to the deceased was to escape from the rear of the vehicle, which was possible by turning 180 degree to the left to escape from the rear side of the vehcile. Accordingly, entry and exit wounds correspond to the natural reaction of the deceased in the existing circumstances. Dr. Pankaj Kumar (PW-6) and Dr. R.K. Lal (DW-2) have categorically deposed that had the deceased turned 180 degree, then the injury, as received by deceased, could have been inflicted upon him. In the given circumstances, it is clear that only option available to the deceased was to turn 180 degree left to escape imminent threat to his life. There is nothing unnatural about the injures sustained by the deceased caused by firing inflicted by the appellant. There is no contradiction between oral and medical evidence, Rahul Kumar (PW-2) stated that he was sitting beside the deceased on the passenger seat, hence, it was also well expected that he would have seen the deceased turning towards the rear seat. The bullet after making entry and exit wound came out of the body of the deceased and would have naturally hit the right side of the body of Rahul Kumar (PW-2). The deceased after receiving bullet injures, fell on the thigh of Rahul. Pranav Bhardwaj (PW-3) also stated that after receiving bullet injury, deceased had fallen in the lap of PW-2. Thus, the two wounds of the deceased and the single wound of Rahul Kumar (PW-2) are possible in the circumstances. It is also clear that firing was resorted to from a close distance, hence, velocity of the bullet was such that it was possible that the bullet after making exit from the body of the deceased caused injury to Rahul (PW-2) as well, who was seated next to the deceased.

50. In the light of the discussion hereinabove, we are of the opinion that in the given circumstances, there is cogent explanation regarding the injuries on the

body of deceased, Kapil Sharma, and the injured, Rahul Kumar (PW-2). The testimony of eye-witness is crystal clear regarding the genesis and manner of the crime.

51. It is next submitted by the Learned counsel for the appellant that the bullet was fired from close proximity but there is no blackening around the wound inflicted upon the deceased Kapil, whereas, there is blackening around the injury of Rahul (PW-2).

52. From the inquest report (Exhibit Ka-6), postmortem report (Exhibit Ka-6) and from the deposition of Dr. Pankaj Kumar (P.W.-6) and Keshav Singh Bhadauria (P.W.-7), it is clear that at the time of receiving bullet injury, deceased Kapil was wearing a jacket over and above other clothes. The jacket usually being of a thicker material, the bullet that entered the body of the deceased after penetrating the jacket, the sign of blackening around the entry wound of the deceased may not be a possibility. There is nothing unnatural about it.

53. In the injury report (Exhibit Ka-4) of Rahul Kumar (P.W.-2) prepared at District Hospital Bulandshahar, it is nowhere mentioned that there was blackening around the entry wound of Rahul Kumar (P.W.-2), hence, it has to be given weightage over that of the injury noted in the discharge summary (Exhibit Ka-27) prepared at G.T.B. Hospital Delhi. The first prescription (Exhibit Ka-26) prepared on 1.12.12 at G.T.B. Hospital Delhi shows that Rahul Kumar (P.W.-2) was referred from District Hospital Bulandshahr. It further mentions that Rahul Kumar (P.W.-2) received gun shot injury at Anoopshahr. There is no mention of blackening around the entry wound. Thus, the injury report (Exhibit Ka-4) prepared on 1.12.12 at District Hospital Bulandshahr and injury report (Exhibit Ka-26) prepared at G.T.B. Hospital Delhi on 1.12.12., there is no mention about blackening around the entry wound of Rahul Kumar (P.W.-2). In the circumstances the blackening noted in discharge slip (Exhibit Ka-27) prepared on 11.12.12 at G.T.B. Hospital Delhi, should not be given much credence, accordingly, the evidence of Dr. Amit Gupta (P.W.-13) that there was blackening around the entry wound of Rahul Kumar (P.W.-2) based on the discharge slip (Exhibit Ka 27) cannot be accepted in the backdrop of other injury reports that preceeds the discharge slip.

54. In view of the discussions herein above, it is clear that there is no variation or contradiction between the oral and the medical evidence. Further, the oral evidence is also corroborated by the Ballistic Report (Exhibit Ka-36). It is clear that Pistol 315 bore and 2 live Cartridges of 315 bore which was recovered from the possession of the appellant and the empty cartridge recovered from the place of occurrence on 1.12.12, on examination it was found that empty cartridge (E.C.-1) recovered from the place of occurrence, was fired from the pistol recovered from possession of the appellant at the time of his arrest. Thus, the report of Forensic Science Laboratory, Agra, scientifically connects the appellant with the alleged crime and makes it clear that the appellant was the person, who fired upon deceased Kapil Sharma and also caused fatal firearm injury to Rahul Kumar (P.W.-2). The vehicle involved in the crime (Exhibit Ka-10) was recovered at the instance of the appellant and it was the same car which was used in the commission of the crime. Absence of blackening around the wound

of deceased Kapil in the circumstances and in the backdrop of the evidence would not demolish the prosecution case.

55. Learned counsel next submitted that there are major contradictions in the statements of the witnesses. Some of the contradictions pointed out by the learned counsel for the appellant is as follows:

i. Rahul Kumar (P.W.-2) deposed that when the appellant was not found at Shaubhagya Vitika Anoopshahr they returned to Bulandshahr. Whereas, Pranav Bharadwaj (P.W.-3) deposed that when the appellant was not found at Shaubhagya Vatika Anoopshahr they went to the orchard but appellant was not found, thereafter proceeded to Bulandshahr;

ii. Rahul Kumar (P.W.-2) deposed that at Birauli they were being chased by the appellant, their car slowed down near the speed breaker and at this place the appellant came from behind, then deceased Kapil Sharma backed his car towards Anoopshahr. On the other hand, Pranav Bharadwaj (P.W.-3) deposed that on the car being backed by deceased Kapil Sharma, the car slowed down at the speed breaker, the appellant over took their car and fired upon Kapil Sharma resulting in his death;

iii. Rahul Kumar (P.W.-2) deposed that front glass of the car was broken at the place of occurrence where the deceased was killed, whereas, Pranav Bharadwaj (P.W.-3) deposed that front glass of the car had broken at the place where the car was backed;

iv. Pranav Bharadwaj (P.W.-3) deposed that a bullet also hit the stepney of the car of the deceased whereas Keshav Singh Bhadauria (P.W.-7) deposed that there was no bullet mark on the stepney;

v. Shilpi Sharma (P.W.-1) deposed that the incident occurred when the deceased Kapil Sharma was going to Anoopshahr, whereas, Rahul Kumar (P.W.-2) and Pranav Bharadwaj (P.W.-3) deposed that the incident occurred when the deceased Kapil Sharma was returning from Anoopshahr.

56. The contradictions pointed out by the learned counsel for the appellant are not material to justify the rejection of the testimony of eye-witnesses. Slight discrepancies in the statements of the eye-witnesses are not uncommon even in the case of a truthful witness. The discrepancies are natural which intake the truth of the commission of the crime rather than falsify their version. Minor discrepancies or some improvements would not demolish the testimony of the eye-witnesses if they are otherwise reliable. Time gap between the date of occurrence and the date on which witnesses give their deposition in the court, sociological background of the witnesses, are bound to lead to some discrepancies. In the present case it is amply evident that the witnesses have deposed cogently on the different aspects of the incident and the circumstances, their depositions stand corroborated by documentary and material evidence as noted earlier.

57. In **Sampath Kumar vs. Inspector of Police, Krishnagiri10**, Apex Court has held that minor contradictions are bound to appear in the statements of truthful witnesses as memory sometimes plays false and sense of observation differs from person to person.

58. In **Sachin Kumar Singhraha vs. State of Madhya Pradesh11,** Supreme

Court has observed that discrepancies of this nature which do not go to the root of the matter do not obliterate otherwise acceptable evidence. It need not be stated that it is by now well settled that minor variations should not be taken into consideration while assessing the reliability of witness testimony and the consistency of the prosecution version as a whole.

59. Lest we forget that no prosecution case is foolproof and the same is bound to suffer from some lacuna or the other. It is only when such lacunae are on material aspects going to the root of the matter, it may have bearing on the outcome of the case, else such shortcomings are to be ignored. Reference may be made to a recent decision in **Smt. Shamim vs. State of (GNCT of Delhi)12.**

60. We do not find any force in the contention of the learned counsel for the appellant that there are major contradiction in the prosecution case. Minor discrepancies are natural and reflect the truthfulness of the testimony. The broad narration given by the witnesses are not so self contradictory as to make it untrustworthy.

61. The learned counsel for the appellant finally submitted that the accused-appellant had no motive to commit the offence. On the contrary, Shilpi Sharma, Rahul Kumar and Pranav had motive to eliminate Kapil. Admittedly, the appellant was having grudge over the huge property left by his father. Kapil was the sole male member living with his mother and sister, Shilpi (PW-1). The documents pertaining to court cases and suit brought on record by the defense, instituted immediately after the murder of Kapil substantiates the prosecution case that property was a bone of contention between the members of the family. The motive sought to be attached to Rahul Kumar (P.W.-2) and Pranav (P.W.-3) by the defence of lending money by Kapil for business was categorically denied by the witnesses and not proved. It is settled principle of proposition that where direct evidence is worthy of credence and can be believed then the question of motive does not carry much weight.

62. In **Shivraj Bapuray Jadhav and others vs. State of Karnataka13**, the Supreme Court held that:

"In a case of direct evidence, the motive element does not play such an important role as to cast any doubt on the credibility of the prosecution witness even if there be any doubts raised in this regard."

63. The offence under Section 25 of the Arms Act was proved by the recovery memo (Exhibit Ka-15). Keshav Singh Bhadauria along with constables Dhanveer Singh, Ajeet Kumar and Sushil Kumar (PW-7) arrested the accused/appellant on search a Pistol of 315 bore and 2 live cartridges of 315 bore was recovered exhibit Ka-15. The signature of the appellant is present. Keshav Singh Bhadauria (P.W.-7) in his examination-in-chief clearly deposed that he recovered one Pistol and 2 live cartridges (315 bore) from the possession of the appellant when he was arrested. Lalit Harish Chandra Gangwar prepared the site map of the place of recovery (Exhibit Ka-17) The sanction of District Magistrate, Bulandshahr (Exhibit Ka-18) was obtained. He prepared the charge-sheet submitted under Section 25 of the Arms Act (Exhibit Ka-19) thus it is clear that the appellant having one Pistol

of 315 bore and 2 live cartridges of 315 bore of which he was not authorized have without license.

64. We are thus of the opinion that the trial court rightly held the appellant guilty of murder of deceased Kapil Sharma under Sections 302, 307 IPC and under Section 25 of Arms Act for unauthorised possession of firearms and cartridges.

65. For the reasons stated herein above, we see no reason to interfere with the order and judgment dated 16 February 2015, passed by the Additional Sessions Judge, Court No. 3, Bulandshahr, in State of U.P. vs. Tushar @ Golu and the same deserves to be sustained. The appeal is liable to be dismissed and is, accordingly, dismissed.

66. The appellant is in jail since 1.12.2012, he shall remain in jail to serve out the sentence awarded by the trial court pursuant to the impugned judgment.

67. Registrar General is directed to ensure compliance by forwarding the copy of the judgment to the District Judge, Bulandshahr.

(2020)09ILR A821
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.07.2020

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE DINESH PATHAK, J.

Criminal Appeal No.1706 of 2013

Ravi Pratap Singh @ Tinku ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:

Sri Satyendra Narayan Singh, Sri Dileep Kumar, Sri Rajrshi Gupta, Sri Rajul Bhargava, Sri Shesh Narain Mishra, Sri Sanjay Mani Tripathi, Si Satya Prakash Singh.

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

Dying Declaration U/S 32(1) Evidence Act-Maxim- "nemo moritusus prasumitus mennre", - 'no one at the time of death is presumed to lie and he will not meet his maker with a lie in his mouth".

Minor Inconsistency in Dying Declaration - The deposition of the deceased before investigating officer, doctor and executive magistrate could not shake the credibility of statement recorded by the executive magistrate in due exercise of his statutory power.

All inculpatory circumstances unerringly point towards the guilt of applicant. Conviction upheld.

Appeal Dismissed. (E-2)

List of Case cited: -

1. St. of U.P. Vs Kismata @ Krishnawati & ors.

2. Umakant & ors. Vs St. of Chatt.

3. Harish Kumar Vs St. of Hary.

4. St.of Guj Vs Jayrajbhai Punjabhai Varu

5. Chinnamma Vs St. of Kerala

6. Mehiboonsab Abbasabi Nadaf Vs St. of Karnataka

7. Apex Court in Kushal Rao Vs The St. Of Bombay

8. Ram Nath Madho Prasad Vs St. of M.P.

9. Godhu & anr. Vs St. of Raj.

10. Harjit Kaur Vs St. of Punj.

11. Koli Chunnilal Savji & anr. Vs St. of Guj.

12. St. of Pun. Vs Praveen Kumar

13. St. of U.P. Vs Santosh Kumar

14. Prem Kumar Gulati Vs St. of Hary. & anr.

15. Kushal Rao Vs Godhu & anr.

(Delivered by Hon'ble Mrs. Sunita Agarwal, J. & Hon'ble Dinesh Pathak, J)

1. Heard Sri Rajarshi Gupta learned counsel for the appellant and learned AGA for the State-respondent.

2. This appeal is directed against the judgment and order dated 21.03.2013 passed by the Additional Sessions Judge/Special Judge (E.C. Act), U.P. at Basti in Sessions Trial No.141 of 2007 **(State of U.P. Vs. Kismata @ Krishnawati & others),** whereby appellant Ravi Pratap Singh @ Tinku son of Mukhtar Singh has been convicted for the offence under Section 302 IPC and sentenced with life imprisonment alongwith fine of Rs.10,000/- with the condition that in case of non-deposit of fine, the appellant has to undergo additional sentence of one year rigorous imprisonment.

3. The prosecution story has been unfolded with the first information report lodged on 02.01.2007 at about 19.30 hours. It was a written report given by the brother of victim Sunita @ Babbi, daughter of Sri Shyam Narayan Singh. It is stated therein that victim Sunita @ Babbi was got married to Jai Prakash Singh son of Mukhtar Singh on 16.05.2005. While Jai Prakash Singh was employed in Delhi, victim resided in her marital home with her in-laws at the village. During the marriage ceremony, sufficient dowry had been given by the father of the victim, but Jai Prakash Singh and his family members were dissatisfied and adamant on their demand for a car in the dowry. One month after the marriage, Sunita came to her parent's house and told them that her in-laws (father and mother-in-law, sister and brothers in-law) were pressing their demand for a car in the dowry. The victim told her parents that in case their demand was not fulfilled, it would be difficult for her to live in her marital home. Somehow, family members of the victim had persuaded her to go back to her marital house. The victim, however, was being tortured both physically and mentally by her in-laws on account of non-fulfillment of their demand. The victim also pleaded her husband to take her alongwith him to Delhi, but he also stated that unless the demand is fulfilled, he would not take her alongwith him.

4. The victim narrated her ordeal to her family members whenever she came to her parental home. On 25.12.2006, the victim telephoned her brother, the first informant and said that it would not be possible for her to bear the torture of her in-laws furthermore and if he wanted to see her alive, the demand of car had to be fulfilled. On hearing this, the first informant alongwith his father, uncle and brother-in-law went to meet her in-laws to persuade them. During the meeting, brothers-in-laws of the victim had misbehaved with the victim party. The victim party somehow had tried their best to convince the father and mother-in-law but all of them remained adamant and told that either they should fulfill their demand or else the girl would suffer. Being helpless, all of them came back after counseling the girl. On 01.01.2007, at about 11.30 P.M., father-in-law

telephonically informed that the victim got burnt due to bursting of the gas cylinder in their house. The first informant told him to take the victim to the District Hospital, Basti and that they would also reach there soon. It is then averred that father-in-law of the victim got her admitted in the District Hospital, Basti and left. Upon asking the reason for the accident, victim Sunita told that while she was sleeping after dinner, her mother-in-law and sister-in-law Sannu poured kerosene oil upon her and when she tried to escape, her father-in-law and one brother-in-law caught hold of her and another brother-in-law (the appellant) lit the matchsticks and set her on fire. It is then narrated in the written report that the Doctor in the District Hospital had referred the victim to Lucknow because of her critical condition. The father, uncle and other relatives of the victim took her to Lucknow for treatment and that she was still in a critical condition. On the said report being lodged by Manoj Kumar Singh, brother of the victim, the chik FIR was prepared and the case was registered and entered in G.D. rapat No.34 at 19.30 hours on 02.01.2007. The said G.D. entry has been proved by PW-21 and exhibited as 'Exhibit Ka-28'.

5. At the outset, we may note that there is no dispute about the date and time of lodging of the first information report and that on the said date, the victim was under treatment in a hospital at Lucknow. It appears that after lodging of the first information report, police came into action and an Executive Magistrate namely the Additional City Magistrate, Lucknow went to the hospital to record the statement of victim, which was recorded on 03.01.2007 at about 11.30 AM. The local police had also inspected the site of the incident and recovered incriminating materials such as plastic can, matchbox, half lit matchstick, broken pieces of bangles, some pieces of clothes of victim and ash from the spot, wherefrom smell of kerosene oil was coming. All of these were sealed and exhibited as 'Exhibit Ka-2'.

6. The injury report dated 2.01.2007 of victim prepared by the Doctor, District Hospital, Basti indicates that the victim suffered superficial to deep burns all over the body except soles both sides. At places blisters present. At places skin pulled off. Hair of scalp charred. Kerosene oil smell from the body was present. In the opinion of the doctor, burn was about 95% due to dry flame. The victim was referred to Lucknow and had succumbed to her injuries in the hospital namely Mayo Medical Center Pvt. Limited, Vikas Khand-II, Gomti Nagar, Lucknow on 15.01.2007 at about 10.55 AM. After the inquest and completion of all formalities body was sent to the RMS Hospital, Gomti Nagar, Lucknow and the postmortem was conducted on 15.01.2007 at about 4.45 P.M. As per opinion of the postmortem doctor, death was caused due to Septicemia as a result of Ante-mortem burn injuries. The Ante-mortem injuries found on the person of deceased are:-

"Superficial to deep septic burn wound present on all over the body except back of neck & both sole, pus slough & debris & granulation tissues present in burn wound on opening & section cutting of both lungs, liver spleen & kidney-multiple pus focci present."

7. After the investigation was completed, charge sheet was submitted against all accused persons named in the first information i.e. the father and mother-in-law, two brother-in-laws one sister-in-

law of deceased on the charges of committing offences under Section 498-A, 304-B, 302, 504, 506 IPC and ¾ of the D.P. Act, as also against her husband Jai Prakash Singh who was charged under Section 498-A, 307, 304-B, 302, 504, 506 IPC and ¾ D.P. Act. The accused persons denied all the charges and demanded trial. After committal to the Court of Sessions, the appellant Ravi Pratap Singh @ Tinku and Mukhtar Singh father-in-law of the victim were charged with the offences under Section 302 read with Section 34 IPC in addition to the offences under Sections 304-B, 498-A, 504, 506 IPC and ¾ D.P. Act. Other accused persons namely Daddan Singh, Jai Prakash Singh and Smt. Kismiata, the brother-in-law, husband and mother-in-law of the victim and sister-in-law Sanno @ Sanu were charge sheeted under Section 498-A, 304-B, 504, 506 IPC and ¾ D.P. Act.

8. All the witnesses of fact who happened to be the family members of deceased girl had turned hostile except the first informant who also did support the prosecution case before the Court. The charges pertaining to demand of dowry and resultant mental and physical harassment of victim at the hands of her in-laws and husband were not proved. Other accused persons including the appellant herein have been acquitted of all the charges pertaining to demand of dowry as also dowry death. The father-in-law of the victim has also been acquitted of the offence of murder with common intention with the accused appellant Ravi Pratap @ Tinku Singh. The trial court had, however, found accused appellant Ravi Pratap Singh @ Tinku Singh guilty of the offence of murder under Section 302 IPC and convicted him to sentence with imprisonment for life.

9. Challenging the decision of the trial court, the learned counsel for the appellant argued that there was no evidence against appellant Ravi Pratap Singh of causing death of victim by setting her alive on fire. The only evidence against the appellant is the dying declaration of deceased which itself is a weak piece of evidence. It is further vehemently urged that there are three dying declarations of the victim which were given to different persons at different points of time and they are contrary to each other. There is no consistency in the statement of victim. The first version of the incident given by the victim has been narrated in the first information report lodged by her brother wherein all members of the matrimonial family including her husband had been implicated for commission of offences of demand of dowry, the resultant atrocities as also burning her to death. Though it has come up in the statement of the victim as narrated in the first information report that her husband was not at home and was away in Delhi, i.e. place of his employment but there is a clear indication of demand of dowry by her husband also.

10. In the second statement recorded by the Executive Magistrate on 03.01.2007 in the Mayo Hospital, Lucknow the allegations were made only against the appellant her brother-in-law. As per the said statement the appellant had an evil eye on his sister-in-law (victim) and made attempts to outrage her modesty on previous occasions also. On a complaint made by victim to her husband and mother-in-law, the appellant got annoyed and set her on fire when she went to toilet in their house at about 11.30 P.M.

11. The victim had given another version of the incident to the Investigating Officer Paras Nath Singh as part of the statement recorded in the case diary. As per

the deposition of Investigating Officer as PW-20, the deceased had narrated the similar story of the incident as averred in the first information report. According to the said version, the mother-in-law and sister-in-law of deceased poured kerosene oil upon her while she was sleeping and when she tried to run away, her father-in-law and brother-in-law namely Daddan Singh caught hold of her and the appellant Ravi Pratap Singh set her ablaze by lightening the matchstick. In the said statement, the victim had apparently stated that apart from her husband, no-one in her matrimonial family wanted her alive and none of them made any effort to save her life.

12. Placing the above three statements, it is urged by the learned counsel for the appellant that the dying declaration is a weak piece of evidence though sanctity has been attached to it by Section 32 of the Evidence Act. The scrutiny of a dying declaration has to be made with greater circumspection as it is a statement made behind the back of the accused and he/they have no opportunity to cross-examine the witness. Where there are multiple dying declarations of the victim, the Court has to see the consistency factor therein. It is argued that in case of more than one dying declaration, the intrinsic contradictions in those declarations are extremely important. The Court has to weigh all the attending circumstances and come to an independent finding as to whether (i) a dying declaration was properly recorded and (ii) it was voluntary and truthful. According to learned counsel for the appellant, the apparent contradictions in the dying declarations of victim recorded at different points of time shake the credibility of her version of the incident. It is clear that the victim was not in a fit mental condition to make a proper statement to give correct narration of her ordeal. A doubt is, thus, created on the prosecution story that the victim was murdered by the appellant.

13. This apart, it is contended that tutoring of the victim cannot be ruled out as she was under care of her family members, her own father and sister-in-law in the hospital. Moreover, the statement recorded by the Executive Magistrate relied by the trial court as dying declaration of the victim cannot be given undue importance, in as much as, before recording her statement the Magistrate did not record his independent satisfaction that she was in a fit medical condition to make a statement. No separate fitness certificate was given by the doctor. The statement was not properly recorded as it is in the form of a story and not in question answer form. It cannot be gathered as to whether the Executive Magistrate while recording the statement of victim, had given her hint by putting some leading questions. The statement does not indicate the questions which were asked by the Executive Magistrate.

14. It is further urged that a bare reading of the statement shakes its credibility and genuineness as such a large statement could not have been recorded with so much of precision by a person who had suffered 95% burn injuries. This could not, in any case, be the correct version of the incident given by deceased. Further, there is contradiction in the version of the Doctor and the Executive Magistrate regarding the presence of the Doctor at the time of recording of the statement. The Doctor who gave fitness certificate stated in the cross examination that he was not present during the course of recording of the statement, whereas the Executive

Magistrate stated that the Doctor was throughout present. This contradiction in the version of two officers who put their endorsement on the dying declaration, relied by the trial court, is sufficient to discard the same being untruthful and untrustworthy. Additionally, the fitness certificate given by the Doctor on the same page on which dying declaration was recorded does not indicate the parameters on the basis of which the doctor declared victim being fit enough to make a statement. The incoherent story of the incident narrated by victim also becomes highly unbelievable for her statement that she called her husband through her mobile when she was set on fire and locked in the bathroom, and that the door of toilet/bathroom was opened by her brother-in-law Daddan Singh when her husband told him to do so. Further, there is no recovery of mobile nor any electronic evidence has been produced by the prosecution to substantiate the said version. The story allegedly narrated by victim to the Executive Magistrate itself is full of embellishment and improbable. Further, the prosecution witnesses, her family members themselves had admitted that victim was not fit enough to make a statement.

15. It is further pointed out that the Investigating Officer (PW-20) in his examination-in-chief had stated that on 05.01.2007 he went to Lucknow to record the statement of the victim under Section 164 Cr.P.C. as no such statement was available by that time. This shows that the dying declaration dated 03.01.2007 was not in existence and is a fabricated document. As far as the narration recorded by the Investigating Officer in the case diary, it is contended that it was nothing but reproduction of the version of the first informant in the first information report. The submission, thus, is that infact the Investigating Officer did not record any statement of the victim on 05.01.2007 and simply implicated all the accused persons on his own by reproducing the same story as narrated in the written report given by the first informant to gave it a colour of the statement of the victim under Section 164 Cr.P.C.

16. It is, thus, urged by the learned counsel for the appellant that entire version of the prosecution case was faulty in as much as, the Investigating Officer had submitted charge sheet against all the accused persons under the influence of the family members of victim who later turned hostile and did not support the prosecution story.

17. Lastly, it is contended that the dying declaration recorded by the Executive Magistrate is belied by the site plan prepared by the Investigating Officer which shows that the place where the incident had occurred was different than that narrated in the said dying declaration. As per the site plan, the in-laws of deceased had threatened her to set ablaze by pouring kerosene on her in the Verandah outside her room. Hearing that, to save her life, the victim ran towards the latrine located outside the house within the precincts of residential location. A place just outside the latrine has been shown in the site plan where kerosene oil was poured on victim by her in-laws and fire was lit. The margin note in the site plan further indicates that the accused persons made an effort to lock the victim inside the latrine. By placing the above narration from the site plan, it is argued by the learned counsel for the appellant that the statement of the victim that she was locked in the latrine by the

appellant after setting her ablaze and lock was opened when she called her husband through mobile is false. The dying declaration recorded by the Executive Magistrate, thus, cannot be treated as trustworthy.

18. Placing the decision of the Apex Court in **Umakant & others Vs. State of Chatisgarh1,** it is contended that inspite of all the importance attached and the sanctity given to the piece of dying declaration, Courts have to be very careful while analyzing the truthfulness, genuineness of the dying declaration to arrive at a proper conclusion that the dying declaration is not a product of prompting or tutoring. Relying upon the decision of the Apex Court in Harish Kumar Vs State of Haryana2, it is contended that it was held therein that the presumption as to the dowry death under Section 304-B could not have been weighed by the trial court to convict the accused when it did not rely on the dying declaration recorded by the Naib Tehsildar.

19. On the strength of the decision in the **State of Gujrat Vs. Jayrajbhai Punjabhai Varu3**, it is contended that in case of more than one dying declaration, they have to be very scrupulously examined while the court must remain alive to all the attendant circumstances at the time when the dying declaration came into being. Any contradiction in multiple dying declarations are extremely important. It cannot be such that a dying declaration which supports the prosecution alone can be accepted while the other dying declarations have to be rejected. The Court has to come to an independent finding whether dying declaration was properly recorded and whether it was voluntary and truthful.

20. Placing the decision in **Chinnamma Vs. State of Kerala4 and Mehiboonsab Abbasabi Nadaf Vs. State of Karnataka5**, it is submitted that contradictory and inconsistent stand taken in multiple dying declarations in the instant case, had created suspicion with regard to correctness of the statement, in addition to fact that tutoring by family members was possible as deceased was being attended in the hospital by her own father and sister-in-law.

21. In the crux, it is submitted that the statement of victim implicating her all relatives in-law was not believed by the trial court for the apparent contradictions therein and on insufficient evidence to corroborate the demand of dowry and the atrocities committed upon the victim by her in-laws. Once this is the situation, the only evidence remains is the dying declaration dated 03.01.2007 recorded by the Executive Magistrate which does not stand the test of scrutiny being highly improbable. In the said situation, the conviction of the appellant under Section 302 IPC cannot be sustained and the appeal deserves to be allowed by setting aside the judgment of the trial court.

22. Learned AGA, however, defends the judgement of the trial court to support the conviction and the sentence awarded by it. It is contended that the dying declaration recorded by the Executive Magistrate clearly inculpates the appellant for the offence of murder and it is not possible for the Court to reject the same on the above pleas of the learned counsel for the appellant.

23. Having heard learned counsel for the parties and perused the record, this Court finds that all the prosecution witnesses of fact PW-2 to PW-12 except PW-1 had turned hostile. None of them

including PW-1, the first informant had supported the allegations of demand of dowry and the atrocities or harassment of victim. The appellant as also the other accused persons had, therefore, been acquitted of the offences relating to demand of dowry and dowry death. The acquittal of the co-accused has not been challenged by the State.

24. As far as the appellant is concerned, we find that he has rightly been acquitted under Section 304-B IPC as evidence regarding dowry death were insufficient. No infirmity in the acquittal recorded by trial court could be pointed out by the prosecution. We, are therefore, left with the only question as to whether the conviction of the appellant under Section 302 IPC for causing murder of his sister-in-law is supported by the evidence lead by the prosecution.

25. Having noticed the statement of the prosecution witnesses specially the parents and sibling of deceased, we find that no-one had supported the prosecution story. There is no eye witnesses of the occurrence. The incident had occurred inside the periphery of the marital house of victim. The case of the prosecution rests entirely on the dying declaration recorded by the Executive Magistrate. It is the case of the appellant that three dying declarations of the deceased are full of inconsistencies which is a material contradiction in the story put forth by the prosecution solely through the dying declaration of deceased. First account of the incident was given by deceased to her brother, the first informant who had entered in the witness box as PW-1. Second statement of deceased was recorded on 03.01.2007 by the Executive Magistrate and third statement was recorded on 05.01.2007 by the Investigating Officer (PW-20) as part of the Case diary. By placing the decisions of the Apex Court it is asserted that the contradictions in the dying declaration recorded at different points of time shake the credibility of deceased as a witnesses of the occurrence.

26. To understand the law pertaining to the appreciation of dying declaration and to answer the question before us, in our opinion, it would be appropriate at this stage that the legal pronouncements pertaining to the statement of victim recorded prior to his/her death termed as Dying declaration, which is covered under Section 32(1) of the Evidence Act, are examined.

27. The legislature in its wisdom has enacted in Section 32 (1) of the Evidence Act as under:-

"When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question."

28. (i) The legislative intent and the first principle governing the statement of victim covered by the Section 32(1) of the Evidence Act has been considered by the **Apex Court in Kushal Rao vs The State Of Bombay6.**

It was held in **Kushal Rao6** that such a statement written or verbal made by

a person who is dead is itself a relevant fact. This provision has been made by the Legislature as a matter of sheer necessity by way of an exception to the general rule that hearsay is no evidence and that the evidence which has not been tested by cross examination is not admissible. The purpose of cross-examination is to test the veracity of the statement made by a witness. In the view of the Legislature, that test is supplied by the solemn occasion when it was made, namely, at a time when the person making the statement was in danger of losing his life.

The philosophy of law which signifies the importance of a dying declaration is based on the maxim "nemo moritusus prasumitus mennre", which means 'no one at the time of death is presumed to lie and he will not meet his maker with a lie in his mouth". The philosophy is that at such a serious and solemn moment, that person is not expected to tell lies. The sanctity attached to the dying declaration is firstly for the above reason and secondly that the test of cross examination would not be available. In such a case, the necessity of oath also has been dispensed with for the same reason.

It was held therein that a statement made by the dying person as to the cause of death has been accorded by the legislature, a special sanctity which should, on first principles, be respected unless there are clear circumstances brought out in the evidence to show that the person making the statement was not in expectation of death, not that that circumstance would affect the admissibility of the statement, but only its weight. It may also be shown by the evidence that a dying declaration is not reliable because it was not made at the earliest opportunity, and, thus, there was a reasonable ground to believe it having been put into the mouth of the dying man, when his power of resistance against telling a falsehood, was ebbing away; or because the statement has not been properly recorded, for example, the statement had been recorded as a result of prompting by some interested parties or was in answer to leading questions put by the recording officer, or, by the person purporting to reproduce that statement. These may be some of the circumstances which can be said to detract from the value of a dying declaration.

It was, however, observed in **Kushal Rao6** that there is no absolute rule of law, or even a rule of prudence which has ripened into a rule of law, that a dying declaration unless corroborated by other independent evidence is not fit to be acted upon and made the basis of a conviction. Thus, it cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated. Each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made. It was held that it cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other pieces of evidence. It was stated that a dying declaration stands on the same footing as another piece of evidence and has to be judged in light of surrounding circumstances and with reference to the principles governing the weighing of evidence.

"16.The requirement is that:- ".....a dying declaration which has been recorded by a competent magistrate in the proper manner, that is to say, in the form of questions -and answers, and, as far

as practicable, in the words of the maker of the declaration, stands on a much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human, memory and human character....."

It was further stated:-

"17. Hence, in order to pass the test of reliability, a dying declaration has to be subjected to a very close scrutiny, keeping in view the fact that the statement has been made in the absence of the accused who had no opportunity of testing the veracity of the statement by cross-examination. But once the court has come to the conclusion that the dying declaration was the truthful version as to the circumstances of the, death and the assailants of the victim, there is no question of further corroboration.

If, on the other hand, the court, after examining the dying declaration in all its aspects, and testing its veracity has come to the conclusion that it is not reliable by itself, and that it suffers from an infirmity, then, without corroboration it cannot form the basis of a conviction. Thus, the -necessity for corroboration arises not from any inherent weakness of a dying declaration as a piece of evidence, as held in some of the re- ported cases, but from the fact that the court, in a given case, has come to the conclusion that that particular dying declaration was not free from the infirmities referred to above or from such other infirmities as may be disclosed in evidence in that case."

(ii) In **Ram Nath Madho Prasad Vs. State of M.P.7** it was held that in the case of a dying declaration where the exact words stated by a deceased matter and are of importance, a suggestion of the kind that deceased might have said something by a mistake cannot be entertained. The conviction of the appellants on the uncorroborated dying declaration of deceased recorded by the Magistrate which was not only vague but which admittedly did not at all represent the whole truth was set aside therein by observing that there was no warrant for such a suggestion.

(iii) In **Godhu & another Vs. State of Rajasthan8**, it was held that there may be cases wherein a part of the dying declaration is not found to be correct, the remaining part, however, must not necessarily be rejected. Meaning thereby that if a part of the dying declaration has not been proved to be correct, it must not resolved for necessary rejection of the whole of the dying declaration. The Court would be put on the guard to apply the rule of caution for appreciation of the remaining part. Where the part of the dying declaration which is not found to be correct is so indissolubly linked with the other part of the dying declaration that it is not possible to sever the two parts, the Court would be justified in rejecting the whole of the dying declaration. Whereas in other cases wherein two parts of the dying declaration may be severable and the correctness of one part does not depend upon the correctness of the other part, the Court would normally look for corroboration in a material particular by the other evidence on record to rely on that part. If such other evidence shows that that part of the dying declaration relied upon is correct and trustworthy, the Court can act upon that part of the dying declaration despite the fact that another part of the dying declaration has not been proved to be correct.

(iv) In **Harjit Kaur Vs. State of Punjab9**, the Court was faced with two dying declarations which were contradictory to each other. The sole basis to assail the conviction based on the second dying declaration was that it was not recorded in the question and answer form and that the victim in her first dying declaration made to the police officer had stated that she had received burn injuries as a result of an accident and that no-one else was responsible for the same. Having perused the surrounding circumstances therein, the Apex Court had accepted the reasoning given by the trial court and the High Court for rejecting the first dying declaration as not voluntary. The circumstances therein clearly indicated that the deceased was surrounded by her in-laws at the time of making the first dying declaration and she was not a free person. The second dying declaration made before the Magistrate was found to be more probable and natural for the reasons above stated.

(v) In **Koli Chunnilal Savji & another Vs. State of Gujrat10,** multiple dying declarations were made by the deceased. First statement was recorded by the police which was treated as the first information report and another in the presence of the Executive Magistrate. It was argued that both the dying declarations cannot be relied upon as the Doctor had not made any endorsement on the dying declaration recorded by the Executive Magistrate and further that the Doctor in whose presence the statement was allegedly recorded had not been examined. While upholding the conviction based upon the second dying declaration, it was observed by the Apex Court that the Executive Magistrate was a disinterested witness and a responsible officer and that there was no circumstance or material on record to suspect that the Executive Magistrate had any animus against the accused or in any way interested in fabricating the dying declaration. The question of genuineness of the dying declaration recorded by the Executive Magistrate to be doubted did not arise. The Executive Magistrate further deposed before the Court that when she reached the Hospital, she enquired from the Doctor about the condition of deceased who categorically stated that deceased was in a conscious condition. It was further found that though there was no endorsement on the dying declaration recorded by the Magistrate with regard to the condition of the patient but there had been an endorsement on the police yadi, indicating that deceased was fully conscious.

Having analyzed both the dying declaration, it was held therein that the statement made by deceased at two different points of time to two different persons, corroborate each other and there was no inconsistency in those two declarations made. Having found them truthful and voluntary, it was held that the prosecution had established its case beyond reasonable doubt.

(vi) In **State of Punjab Vs. Praveen Kumar11** faced with the challenge to the judgement of acquittal on appreciation of two different and inconsistent dying declarations, it was held by the Apex Court that while appreciating the credibility of the evidence produced before the Court, the Court must view the evidence as a whole to reach at a conclusion as to its genuineness and truthfulness. The mere fact that in two different versions one name was common would not be a ground for convicting the

named person. The Court must be satisfied that the dying declaration is truthful. If there are two dying declarations giving two different versions, a serious doubt is created about the truthfulness of the statement. It may be that if there was any other reliable evidence on record, the Court could have considered such corroborative evidence to test the truthfulness of the dying declarations. It was held that where there is no reliable evidence on record by reference to which their truthfulness can be tested, two inconsistent dying declarations cannot be made basis of conviction. It was observed that:-

"The two dying declarations, however, in the instant case stand by themselves and there is no other reliable evidence on record by reference to which their truthfulness can be tested. It is well settled that one piece of unreliable evidence cannot be used to corroborate another piece of unreliable evidence. The High Court while considering the evidence on record has rightly applied the principles laid down by this Court in Thurukanni Pompiah and another Vs. State of Mysore, AIR 1965 SC 939, and Khusal Rao Vs. State of Bombay, 1958 SCR 552"

(vii) In **State of U.P. Vs. Santosh Kumar12** three dying declarations were made by the deceased. The first was to the father of deceased and second was recorded under Section 161 of the Cr.P.C. in the Case diary by the Investigating Officer. Third dying declaration was made before the Magistrate on the certificate of the Doctor that deceased was in her full senses and she was in a fit condition to give her statement.

The veracity of the dying declaration was considered on the same principles on which the statement of the prosecution witnesses are appreciated. It was observed in paragraph Nos.24, 25 and 26 as under:-

"24. In any criminal case where statements are recorded after a considerable lapse of time, some inconsistencies are bound to occur. But it is the duty of the court to ensure that the truth prevails. If on material particulars, the statements of prosecution witnesses are consistent, then they cannot be discarded only because of minor inconsistencies.

25. While appreciating the evidence, the courts must also consider the fact carefully as to why would the father of the deceased falsely implicate only one of the members of the family and let go the real culprit? At that juncture, usual anxiety is to ensure that the real assailant must be punished.

26. The court in this case ought to have considered what was the interest of the Tehsildar/Magistrate to have wrongly recorded the statement of the deceased. Similarly, when the statement Ext. Ka 16 recorded by the Investigating Officer gets full corroboration from the other two dying declarations, there is no justification in discarding the testimony of the investigating officer."

(viii) In a recent decision in **Prem Kumar Gulati Vs. State of Haryana & another13,** considering the decisions of the Apex Court in **Kushal Rao 6 and Godhu & another8,** it was held that merely because dying declaration was not in the question and answer form, the sanctity attached to it as it comes from the mouth of the dying person cannot be brushed aside and its reliability cannot be doubted. The

legal position about admissibility of the dying declaration settled by the Apex Court in several decisions, thus, can be summarized as under:-

(I) The dying declaration can be the sole basis of conviction if it inspires full confidence of the Court.

(II) The Court must be satisfied that (i) the deceased was in a fit state of mind at the time of making the statement and; (ii) it was not under the result of tutoring, prompting or imagination; (iii) where the Court is satisfied that the dying declaration is true and voluntary it can based its conviction without any further corroboration.

(iv) It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence.

(v) Even if a part of the dying declaration is not found to be correct, the remaining part can be relied upon by the Court if corroborated in material particular by the other evidence on record.

(vi) Where the dying declaration is suspicious, it should not be acted upon without corroboration of evidence.

(vii) The dying declaration which suffers from inherent infirmity, such as the deceased was unconscious and could never make any statement, cannot form the basis for conviction.

(viii) Merely because the dying declaration does not contain all the details as to the occurrence, it is not to be rejected. The brief statement is not to be discarded.

(ix) In the crux, the Court must be fully satisfied that the dying declarations has the impress of truth on it, after examining all the circumstances in which the dying person made his statement exparte and when the accused having the opportunity of cross examining him. If on such a cross examination, the Court was satisfied that the dying declaration was true version of the occurrence, conviction can be based solely on it.

(x) Multiple dying declarations are to be carefully scrutinized to ascertain the voluntary and truthfulness keeping in mind the circumstances in which it was made in an individual case.

(xi) Thus, the dying declaration has to be examined as any other prosecution evidence on the principle that if on material particular the statement of the prosecution witnesses are consistent, then they cannot be discarded only because of minor inconsistencies as it is the duty of the Court to ensure that the truth prevails. The Court has to weigh all the attending circumstances and come to an independent conclusion whether the dying declaration was properly recorded and whether it was voluntary and truthful. The rule requiring corroboration is merely a rule of prudence. Each criminal trial is on individual event, mechanical approach to the law of dying declarations has to be shunned.

29. In light of the above legal position when we analyze the facts and circumstances of the instant case, we find that there are three versions of deceased mentioned in the prosecution story. The first statement is her version narrated in the written report given by her brother to register the first information report, the first informant entered in the witness box as

PW-1. In the said written report, it was narrated that when they (her family members) asked about the incident, deceased implicated all her in-laws. A perusal of the deposition of PW-1 indicates that though in the examination-in-Chief he had reiterated the version in the first information report but in the cross-examination he took a somersault and denied all allegations of demand of dowry and harassment of deceased by her in-laws including her version narrated in the first information report. He has also refuted his statement under section 161 Cr.P.C. and averred that the police officer took his signature on blank papers and whatever is found written on it is own version of the officer. This witness was not declared hostile as he supported the prosecution case in his deposition in the examination-in-chief but we failed to understand as to why this witness was not examined by the public prosecutor to explain the contradictions in his deposition in the Court. However, we find it clearly that PW-1 is not a reliable witness. Moreover, the narration of the incident in the first information report is stated to be version of deceased but we are afraid to treat it as a dying declaration of deceased to attach it the sanctity under Section 32(1) of the Evidence Act, for the reason that we have serious doubts on the credibility of PW-1. For his conduct in the Court of law, his words in the first information report put into the mouth of deceased do not inspire confidence of the Court. It may be his own cooked up story or exaggeration to take revenge on account of death of his sister. Further, it has come up in evidence that sister-in-law of deceased namely Sanno @ Sanju Singh (one of the accused) was admitted in the hospital at Balrampur on 31.12.2006 and was discharged on 04.01.2007. This fact was proved by the defence from the evidence of DW-1, the Chief Pharmacist of Women Hospital, Balrampur from the original Indor-diary of admission in the hospital. Inclusion of her name in the first information report as an accomplice, thus, makes its version unreliable and shaky.

30. The statement of victim, as per the prescribed procedure, has been recorded by the Executive Magistrate in the presence of doctor on 03.01.2007 at 11.30 A.M. This statement has been termed as second dying declaration of deceased by the counsel for the appellant. The Investigating Officer also extracted the statement of victim in the case diary which he had recorded on 05.01.2007 and it is her third statement according to the learned counsel for the appellant. The argument placed by learned counsel for the appellant is that though first and third statement of deceased are consistent but there is material contradiction in her version in the second statement recorded by the Executive Magistrate. This apart, there are material contradictions in the version of the doctor and the Executive Magistrate who appeared in the witness box, with regard to the presence of Doctor during the course of recording of the statement. Above all, presence of parents and family members of deceased in the hospital raises a serious suspicion about her statement being an outcome of tutoring and not voluntary.

31. Testing these submissions, we find that the statement recorded on 03.01.2007 appears to be voluntary and truthful. The said statement of victim was recorded by the Executive Magistrate after she was referred to Lucknow on account of sustaining serious burn injuries. The Executive Magistrate took the certificate of fitness from the doctor in the hospital. The

Executive Magistrate and the doctor both had appeared in the witness box as PW-14 and PW-19. In his deposition before the Court, the Executive Magistrate proved that he recorded the statement of victim after satisfying himself that she was fit to make a statement. The doctor PW-19 proved that he gave certificates of fitness of victim to make a statement at the beginning of the recording and on completion of the same also. The certificates proved by the doctor as exhibit Ka '25' and Ka-'26' are on the same paper on which dying declaration has been recorded by the Executive Magistrate.

32. Having perused the depositions of these officers, we have no reason to doubt the credibility of the dying declaration recorded by the Executive Magistrate. The Executive Magistrate and doctor both are disinterested witnesses and are responsible officers and there is no circumstance or material on record to suspect that they had any animus against the accused or were in any way interested in fabricating the dying declaration. The correctness or genuineness of the dying declaration recorded by the Executive Magistrate cannot be doubted for the mere reason that it has not been recorded in the question answer form. The apprehension raised by the learned counsel for the appellant that the Executive Magistrate might have put leading questions to the deceased is wholly unfounded. Nothing could be pointed out from the testimony of the Executive Magistrate PW-14 which indicates that he had first ascertained the mental condition of deceased and then proceeded to record her statement. He deposed that whatever was stated by the deceased, the same was transcribed by him; though some questions were put to the deceased while recording her statement but the statement has not been transcribed in the question answer form.

33. A further perusal of the dying declaration recorded by the Executive Magistrate indicates that in the opening statement victim narrated the motive and the reason why the appellant was annoyed with her. The deceased categorically stated that the appellant had an evil eye on her and whenever he found her alone in the house he made inappropriate gestures in order to outrage her modesty. She even made complaint to her mother-in-law who shun away it being her apprehension by saying that the appellant being brother-in-law must be joking. In the later part of the statement, the deceased had narrated the whole account of the occurrence on the fateful night. She stated that when she went to the toilet at about 12.00 mid night, her brother-in-law (appellant) came inside and poured kerosene on her and lit the fire. The toilet door was then locked by him. She called her husband and on his insistence door of toilet was opened by another brother-in-law namely Daddan present in the house but by that time she was completely burned. No one in the family made any effort to save her life. It is clear from a careful reading of the said statement of victim that she made allegations clearly against the appellant and did not implicate her other in-laws who were present in the house and only expressed her disappointment against them that they did not save her. In our opinion, if this statement was a result of tutoring, it was very easy for deceased to implicate the entire family of her husband in the case of dowry demand and burning her alive for non-fulfillment of the same. There is no reason before us to raise any doubt upon the version of deceased recorded by the

Executive Magistrate or to discard her statement being not voluntary or untruthful.

34. There is one more reason why we opined that deceased was not tutored. It has come up on record that when deceased was admitted in the Mayo Hospital at Lucknow she was being attended by her parents, PW-1, brother of deceased (first informant) did not accompany her to Lucknow and he stayed at Basti to arrange the finances for her medical treatment. Father of deceased was examined as PW-2. From a perusal of his testimony, it is clear that he was totally indifferent to what had happened with his daughter after marriage. He even stated that he had never talked to his daughter about her well being in her matrimonial home. He admitted that though he was present in the Lucknow Hospital when statement of deceased was recorded but denied his presence during recording of the same. This witness was declared hostile by the prosecution as he refuted the version of deceased recorded on 03.01.2007.

35. The mother of the deceased was also examined as PW-4. She was though declared hostile but on a question put by the Court, her answer is as under:-

साक्षी से यह प्रश्न पूछा गया कि आपकी लड़की जब लैट्रिन रूम मे गयी तो दरवाजा बंद करके मिट्टी का तेल डाल दिया तथा वह जल गयी इसकी आपको जानकारी है इस पर साक्षी लगभग 5 मिनट तक चुप रही तथा कुछ भी जबाब नही दी। मै मृतका से नही पूछी कि वह टिंकू को क्यो गाली दे रही हो। टिंकू के द्वारा मिट्टी का तेल डालने के बारे मे मैने अपनी लड़की सें नही पूछी। हमे यह लगता है कि ससुराल वालों ने मेरी लड़की को जलाकर मारा है। मेरे विचार से मेरी लड़की के मरने मे उसके ससुराल वालो मे सबसे बड़ा दोषी किस्मिता ही है। लखनऊ में मृतका के कमरे मे मैं थी तथा थोड़ी देर के लिए किसी आवश्यक कार्य वश बाहर भी जाती थी। यह हो सकता है कि जब मैं थोड़ी देर के लिए बाहर जाती थी तभी मजिस्ट्रेट साहब आकर ब्यान मृतका का दर्ज कर लिए हो। मृतका मजिस्ट्रेट के ब्यान के बारे में मुझसे कुछ नहीं बतायी।

36. Looking to the attitude of the parents of deceased towards their female child as is gathered from their statement, this much is clear that they were not such persons who would have tutored her daughter to implicate her brother-in-law falsely that too on the allegation of outraging her modesty in the midst of night and burning her alive on the resistance put by her. It seems that even the thought of such an incident was beyond their comprehension. We cannot be oblivious of our social fabric wherein such incident still remain a hush-hush affair in the four corners of the house and even the family members of the girl do not support her on any such allegation ordinarily and advise her to keep silence or ignore any such act of younger brother-in-law having regard to the nature of their relation. There is still social pressure on the women in some families to keep quiet as any incident of outraging modesty of a women is seen a blot on the social reputation of the family especially when it is with reference to a man-in-law.

37. As observed above, in the event of tutoring it would have been easier for deceased to implicate her all in-laws by telling the same story which has been narrated in the first information report by her brother.

38. Further, the minor inconsistency pointed out from the deposition of the doctor (PW-17) and the Executive

Magistrate (PW-14) are not such which would shake the credibility of the statement recorded by the Executive Magistrate in due exercise of his statutory power. No procedural irregularity much less illegality can be found. Besides that, the statement was made at the earliest opportunity, and, there is not one reasonable ground to believe it having been put into the mouth of deceased. There is no reason to accept that the statement had been recorded as a result of prompting by the person (Executive Magistrate) purporting to reproduce that statement. There is no circumstance which could be said to detract from the value of a dying declaration accorded special sanctity by the legislature under Section 32 (1) of the Evidence Act. As observed by the Apex Court in **Kushal Rao6**, the test is supplied by the solemn occasion when it was made, namely, at a time when the person making the statement was in danger of losing his life. At such a serious and solemn moment, that person is not expected to tell lies. Thus, a statement made by a dying person as to the cause of his death has been accorded by the legislature, a special sanctity which should, on first principles be respected unless there are clear circumstances brought out in the evidence to show that the person making the statement was not in expectation of death, not that that circumstance would affect the admissibility of the statement, but only its weight.

39. As regards the statement of deceased recorded in the Case diary, we have carefully perused the testimony of the Investigating Officer (PW-20), as also the Sub Inspector Hawaldar Yadav (PW-13), who went to Lucknow on 03.01.2007 alongwith a Constable on the instructions of the Investigating Officer to get a copy of the statement of deceased recorded by the Executive Magistrate. PW-13 Sub Inspector Hawaldar Yadav deposed that he had informed the Investigating Officer that statement of deceased under Section 164 Cr.P.C. had been recorded by the Executive Magistrate and a copy thereof could be obtained by him. The Investigating Officer (PW-20) also testified that he was aware of the fact of recording of statement of deceased on 03.01.2007. He, however, states that he proceeded to record the statement of deceased on 05.01.2007 independently as the earlier recorded statement was not available to be extracted in the case diary. The reason given by the Investigating Officer for recording the statement of deceased on 05.01.2007 does not appear to be sound. Even otherwise, he admits that the said statement has been recorded without obtaining certificate of the doctor about the fitness of deceased to make a statement. From a perusal of the said statement of deceased narrated in the examination-in-chief of the Investigating Officer, it appears that he has reiterated the version of the first informant in the written report registered on 02.01.2007. According to the said version, deceased had implicated all her in-laws excluding her husband for the offence of demand of dowry and the act of burning her alive. The record indicates that the statement recorded by the Executive Magistrate was obtained by the Investigating Officer from the Court of Chief Judicial Magistrate only on 16.01.2007 and entered at Parcha No.10 of G.D.

40. We are afraid to accept the version of the Investigating Officer regarding the occurrence of the incident which appears to have been put into the mouth of deceased. The conduct of the Investigating Officer in recording the statement without adopting due procedure

(certificate of the doctor) is condemnable and may be seen as an attempt to subvert the prosecution case.

41. Be that as it may, the said statement of deceased recorded in the case diary cannot be attached the same sanctity as given to the dying declaration recorded under Section 32(1) of the Evidence Act. We may also note that in all three versions of deceased, the main role of setting ablaze her has been assigned only to the appellant and other family members have been roped in only as accomplices in the first and third statement of deceased. There is no dispute that her husband was not at home. The motive assigned to commit the crime differs in three statements of deceased. From the first and third version allegedly made by the deceased, the motive was cruelty for non-fulfillment of demand of dowry, whereas in the second statement it was lust of her brother-in-law. We cannot ascertain the motive from the deposition of the family members of deceased as all of them have turned hostile and as regards the demand of dowry, they did not support the prosecution case. Moreover, it is difficult for the Court to ascertain the motive as it primarily looms in the minds of the accused, but it is certain that all inculpatary circumstances unerringly point towards guilt of the appellant. It is proved that the appellant is the person who set ablaze his sister-in-law in the midst of the night at a place (toilet) situated within the boundaries of his house in which he was ordinarily living with her. In the opinion of the Court, the accused owe an explanation to the Court. The incriminating articles found at the site of the incident, which is the latrine located at one corner of the house, are "upper undergarments and blouse of deceased alongwith pieces of her broken bangles; they are telling their own story. The motive of the appellant to commit the crime could have been ascertained provided this angel of the crime was properly investigated by two officers who were In-charge of the investigation. We are constrained to observe that the Investigating Officers have adopted a lackadaisical approach and the investigation was not carried out in the required manner and there are loopholes in it.

42. This apart, in the case in hand, there is no eye witness of the occurrence and the inference of the guilt is to be drawn form the statement of the dying person and the surrounding circumstances. In similar circumstances, it is observed by the Apex Court in **Trimukh Maroti Kirkan Vs. State of Maharashtra14,** as the offence took place inside the privacy of the house, it becomes extremely difficult for the prosecution to lead evidence to establish the guilt of the accused as the assailants had all the opportunity to plan and commit the offence at the time and in circumstances of their choice. In such a situation, the initial burden to establish the case would undoubtedly be upon the prosecution but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparative lighter character as in view of the Section 106 of the Evidence Act, there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The in-laws of deceased cannot get away by simply keeping quiet and offering no explanation on the supposed premises that the burden to establish this case lies entirely upon the prosecution and there is no onus at all on the accused persons to offer any explanation.

43. In the case in hand, the statement of accused persons under Section 313 Cr.P.C. have been recorded. All the incriminating circumstances were put to the accused persons but no-one offered any explanation. The parents-in-law and two brother-in-laws including the appellant were present in the house and all of them have kept quiet and did not offer any explanation to the incriminating circumstances put to them. The appellant only stated that he had seen his sister-in-law burning and tried to put aside the fire and in the process he had also got his hands burnt, but did not explain as to why and how she was burnt. Who had set her on fire? Another brother-in-law Daddan Singh only states that they were falsely implicated. Mother-in-law gave an explanation that she was ill and could not see anything properly because of lack of proper eyesight. None of them have even averred that deceased had committed suicide nor it could be a case of accidental fire as the incident had occurred in the mid night in the latrine of the house. Who had kept three litres Can of kerosene oil in the latrine and why is not known? As deceased was normally residing with the appellant in the house wherein the incident had occurred, we expect the appellant had to give explanation as to how and why his sister-in-law had died. Mere denial cannot be treated to be the discharge of the onus. Onus laid on the accused appellant had to be discharged by leading proper and cogent evidence or furnishing plausible explanation. The explanation rendered by the appellant in his statement under Section 313 Cr.P.C. is not convincing. This circumstance becomes an additional link in the evidence put forth by the prosecution in the form of dying declaration. We are also benefited by the observations of the Apex Court in **Trimukh Maroti Kirkan14** in paragraph Nos. 13 & 14 as under:-

"13.The demand for dowry or money from the parents of the bride has shown a phenomenal increase in last few years. Cases are frequently coming before the Courts, where the husband or in-laws have gone to the extent of killing the bride if the demand is not met. These crimes are generally committed in complete secrecy inside the house and it becomes very difficult for the prosecution to lead evidence. No member of the family, even if he is a witness of the crime, would come forward to depose against another family member. The neighbours, whose evidence may be of some assistance, are generally reluctant to depose in Court as they want to keep aloof and do not want to antagonize a neighbourhood family. The parents or other family members of the bride being away from the scene of commission of crime are not in a position to give direct evidence which may inculpate the real accused except regarding the demand of money or dowry and harassment caused to the bride. But, it does not mean that a crime committed in secrecy or inside the house should go unpunished.

14. If an offence takes place inside the privacy of a house and in such circumstances where the assailants have all the opportunity to plan and commit the offence at the time and in circumstances of their choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence, as noticed above, is insisted upon by the Courts. A Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. Both are public duties. (See Stirland v. Director of Public Prosecution 1944 AC 315 quoted with approval by Arijit Pasayat, J. in State of Punjab vs. Karnail Singh (2003) 11 SCC 271). The law does not enjoin a duty on the prosecution to lead evidence of such character which is almost impossible to be led or at any rate extremely

difficult to be led. The duty on the prosecution is to lead such evidence which it is capable of leading, having regard to the facts and circumstances of the case. Here it is necessary to keep in mind Section 106 of the Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."

44. Rest of the argument of learned counsel for the appellant with regard to the dispute raised relating to the place of incident mentioned in the site plan and the version of deceased in her dying declaration recorded by the Executive Magistrate seem to be flaw in the investigation or may be a missing fact in the statement of deceased recorded as dying declaration, but the said discrepancy is not such which would go to the root of the matter to shake the very basis of the prosecution case.

45. Having carefully examined the evidence on record and the reasoning given by the trial court, we uphold the conviction of accused-appellant Ravi Pratap Singh @ Tinku Singh under Section 302 I.P.C. As the sentence awarded to the appellant is minimum, the same cannot be interfered.

46. The appeal is, accordingly, **dismissed**.

47. The accused appellant is in jail.

48. Certify this judgement to the court below immediately for compliance.

49. The compliance report be submitted through the Registrar General, High Court, Allahabad.

(2020)09ILR A840
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.07.2020

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE DINESH PATHAK, J.

Criminal Appeal No.1905 of 2011

Ratan Lal & Ors. ...Appellants(In Jail)
Versus
The State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Pt. K.K.Dubey, Sri A.J. Pandey, Sri Ajashatru Pandey,Sri Birendra Singh, Sri Dileep Kumar, Sri R.K. Kaushik, Sri Rajrshi Gupta, Sri Yogesh Srivastava, Sri Manish Kumar, Ms. Shambhavi Gupta

Counsel for the Opposite Party:
A.G.A., Sri S.K. Singh, Sri Sunil Vashisth

Criminal Law-Appeal against Conviction U/S 147,148,396 r/w 149 and 412 IPC

Plea of Prejudice – The Courts are required to examine both the content of allegation of prejudice and its extent in relation to facts of the case. Courts has to ensure that end of justice are made. (Para 45)

Defect in framing of charges does not itself vitiated the trial. (Para 46)

Punishment for the lesser offences than charged – Permissible where offences are cognate with commonality in their feature and supported by evidence on record.

Minor Contradiction- Minor inconsistencies and the variations in the statement of eyewitnesses could not affect the core of prosecution.

Conviction upheld. Accordingly, Appeal dismissed. (E-2)

List of Cases cited: -

1. Shahid Khan Vs St. of Raj. reported in 2016 LawSuit (SC) 202,

2. Harbeer Singh, St. of Raj. Vs Sheeshpal & ors . reported in 2016 Law Suit(SC)1031,

3. Jhandu & ors Vs St. of U.P. reported in Criminal Appeal no.209 of 1983 decided on 25 April, 2018,

4. Shivlal & ors Vs St. of Chhatt. in Criminal Appeal no.610 of 2007 decided on 19 September, 2011

5. Mahabir Singh Vs St. of M.P in Criminal Appeal no.1141 of 2007

(Delivered by Hon'ble Mrs. Sunita Agarwal, J. & Hon'ble Dinesh Pathak,J)

1. Heard Sri Rajrshi Gupta assisted by Sri Manish Kumar and Ms. Shambhavi Gupta learned Advocates for the appellants, Sri L.D. Rajbhar and Sri Prem Shankar Mishra learned A.G.A.(s) for the State.

2. This appeal is directed against the judgment and order dated 19.2.2011 passed by the Special Judge Dacoity Prohibition Area, Jhansi in Sessions Trial No.53 of 1998 arising out of Case Crime no.42 of 1998 under Sections 147, 148, 396 read with Sections 149 and 412 IPC, as also in the Sessions Trial No.46 of 1998 arising out of Case crime nos.52 and 53 of 98 under Section 25 Arms Act, P.S-Punchh, District Jhansi.

3. The appellants herein (7 in number) have been sentenced for life imprisonment for the offence under Section 396 taking aid of Section 149 IPC along with Rs.3000/- as fine. In case of default in payment of fine, the appellants have to undergo six months of additional rigorous imprisonment. They have also been sentenced for three years simple imprisonment for the offence under Section 148 IPC. Four appellants Ratan Lal, Khadak Singh, Jitendra Kumar and Dinesh Kumar have been sentenced for life imprisonment alongwith fine of Rs.2000/- for the offence under Section 412 I.P.C. In case of default in payment of fine, they have to undergo additional six months of rigorous imprisonment. Appellants Ratan Lal and Khadak Singh have been sentenced for three years imprisonment along with fine of Rs.2000/- under Section 25 Arms Act and in case of default in payment of fine they have to undergo three months additional imprisonment. All the punishments are to run concurrently.

4. The prosecution story starts with the written report dated 14.3.1998 given by Jitendra Singh s/o Surendra Pal Singh resident of Gram Fatehpur, P.S-Punchh, District-Jhansi wherein it is averred that on 14.3.1998 at about 5.30 p.m, first informant alongwith his maternal grand father Sri Indrabhan Singh and Kishore Singh s/o Ramdas, Veerpal Singh s/o Jai Karan Singh, Rampal Singh s/o Veer Singh, Kushal Pal Singh s/o Jagdish Singh went to P.S Punch District Jhansi to register a First Information report lodged by Kishore Singh and to get release of the licencee rifle/revolver and gun of Indra Bhan Singh deposited in the Police Station during elections.

5. After lodging of the report and getting release of the rifle, they all were coming back to the village on a tractor No.UP 85 A 0902. When they reached on a puliya about 9 kms away from the village, all of them had seen the accused persons standing on their way. Ratan Lal and Dinesh sons of Karore were carrying guns in their hands, Narendra was having farsa, Jitendra was with Kulhari, Murat s/o Dinesh was carring country made pistol in his hand, Karan Singh was carrying farsa and Ram Khilawan was having lathi whereas Khadak Singh had gun in his hand. They stopped the tractor and while using abusive language, they told "you .... went to the police station to lodge report against us. The court will give its verdict later but we

would give your verdict today, just now." Then Ratan lal opened fire upon Indrabhan Singh with an intention to kill him, other accused persons started hitting and cutting Indrabhan Singh through farsa and kulhari while yelling at deceased that "this .... became leader" and all others had fired from the country made pistol and guns on him. Resultantly, Indrabhan Singh died on the spot and Kishore Singh and Kushal Pal Singh got injured.

6. It was further stated that the accused persons keeping the dead body of his grand father in the trolly took away the tractor and trolley to Kashipura mod, leaving the trolley with dead body there, they took away the tractor towards the river. This incident occurred at about 9.00 p.m and they all witnessed it in the torch light and the light of the tractor. They all recognized the assailants being the accused persons named in the F.I.R. It was also averred that the licencee revolver and gun of Indrabhan Singh, maternal grand father of first informant, was also looted by the accused persons. Informing the police that the dead body was lying in the trolly on the spot mentioned above, this First Information Report was drawn by Jitendra Singh in his own hand writing.

7. The chik FIR was prepared and registered at about 22.45 hours 10.45 p.m under section 396 I.P.C for the offence of loot and murder. Recovery of gun of Ratan lal, Khadak Singh and Axe of Jitendra Singh had been made on 2.4.1998 on their own pointing out from the field of co-accused Dinesh. The items of recovery were proved as material 'Exhibit Ka-2, Ka-3 and Ka-4' by the constable Kamal Singh, a witness of recovery. After recovery of the illegal fire arm, First Information Report under Section 25 of the Arms Act was registered against Ratan Lal and Khadak Singh on 2.4.1998 at about 20.10 hours. The tractor was recovered from the Canal on 2.4.1998. The recovery of it was proved by P.W-5 and the memo of recovery has been exhibited as Exhibit Ka-5 as P.W.-5 proved his signature on the same. Blood stained and plain earth collected from the spot were kept in the recovery memo as Exhibit Ka-19 proved by the Investigating Officer. Chaap (Belt) of SBBL gun and two used 12 bore empty cartridges were recovered from the place of incident and kept in 'Exhibit Ka-20'. Two torches belonging to Rampal Singh and Kushal Pal Singh were handed over to the police and have been exhibited as 'Exhibit Ka-21' and 'Exhibit Ka-22.' Recovery memo 'Exhibit-Ka-24' dated 2.4.1998 of recovery of murder weapons records that when the police party along with witnesses went to the field of Dinesh, after recovery of two guns and Axe belonging to the accused persons, Ratan lal and Dinesh further lead to the police party towards the northern side of the field and after walking about 25 paces, they removed some hay covered on the pit and the mud over it but nothing was found there. Upon asking, the accused told that looted gun and rifle of Indrabhan Singh and rifle of Dinesh (used in crime) were concealed there but probably some relative got to know and took them away. Thus, by means of the recovery memo, (Exhibit Ka-24) it was sought to be presented by the prosecution that the looted gun and rifle of Indrabhan Singh were misplaced from the custody of the accused persons.

8. At this juncture, it would be relevant to mention here that the entire prosecution case is silent about the recovery of gun and rifle of deceased Indrabhan. At one point of time, during cross examination of P.W-2 Jitendra Singh,

he was shown a rifle no.315 Bore No.1665 from material Exhibit, which was released by the Court in favour of Aniruddha Singh s/o deceased Indrabhan Singh. P.W-2 Jitendra Pal Singh identified it as the looted gun of his maternal grand father deceased Indrabhan Singh. Learned counsel for the appellant vehemently argued that the silence of prosecution about the place and time of recovery of alleged looted gun of Indrabhan Singh speaks volume about falsity of the prosecution case.

9. Submission is that the offence of loot of gun and rifle allegedly committed by the accused persons is based upon a concocted story. There is no recovery of the looted articles (gun and rifle) either at the pointing out of the accused persons or from their custody or possession. The above noted narration of concealment of looted gun and rifle of Indrabhan Singh in the field of accused Dinesh in the recovery memo (Ka-24) is without any basis. The narration in this regard in the recovery memo 'Exhibit Ka-24' is of no consequence as it does not add any credit to the prosecution case. The said narration itself cannot, by any stretch of imagination, attribute the recovery (alleged) of the looted gun to the accused persons. No one knows as to when and from where or at whose instance the looted gun rifle no.315 Bore No. 1665 (shown to P.W-2) was recovered by the police. Learned counsel has further drawn attention of the Court to the deposition of P.W-1 and P.W-2, wherein they had denied that the said gun was released and handed over to Indrabhan Singh at the P.S Punch, District Jhansi in their presence. Submission is that in absence of any evidence regarding the recovery of looted articles i.e. licencee gun and rifle of Indrabhan Singh, entire prosecution case under Section 396 I.P.C would fall.

10. It was further argued that as far as tractor No.UP 85 A 0902 belonging to the victim party, it was recovered from the Canal as per own case of the prosecution, the said recovery on the alleged pointing out of the accused persons under the recovery memo 'Exhibit Ka-5' is also of no relevance. The entire prosecution case based on the alleged loot of gun, rifle and tractor falls apart and the conviction of accused persons under Section 396 read with Section 149 I.P.C is liable to be set aside being without any basis.

11. It is further argued that the first informant stated that two persons namely Kushal Pal Singh and Kishore Singh got injured in the incident-in-question, however, only one of the alleged injured Kishore Singh was produced in the witness box. As far as injured Kishore Singh P.W-1 is concerned, his injuries as per the injury report are (i) a contusion in the right knee and (ii) abrasion in the left leg lower outer part. These injuries were minor in nature and, moreover, from the deposition of P.W-1, it is evident that these injuries had been caused during the course of a previous altercation which took place on the same day at about 4.30 p.m. P.W-1 Kishore Singh admitted in the cross examination that an incident of 'Marpeet' (physical assault) with him had occurred at about 4.30 pm on 14.3.1996, though he denied having sustained any injury in the same. The statement of P.W-1 that accused Jitendra and Karan both hit him by Axe and he sustained injuries from Axe at his back is not proved from the injury report. His deposition of having sustained injuries during the course of occurrence of the incident in question reported by Jitendra Singh does not seem to be a true story. Submission is that P.W-1 cannot be placed in the category of an injured witness to

accord any credit for the same in the present trial. Moreover, his deposition is full of falsehood and cannot be taken as a proof of his presence at the place of incident.

12. With regard to the deposition of P.W.-2 first informant Jitendra Singh, it is argued that admittedly a previous incident of Marpeet (physical assault) had occurred during the course of the day and as per narration of P.W-2, seven (7) persons accompanied Kishore Singh (appeared as P.W-1) to lodge the First Information Report whereas deceased Indrabhan Singh went to the Police station for a different purpose, P.W.-2, however, did not prove either of the reason set up by the prosecution to go to the police station in his testimony. On one hand he denied that the gun was released and handed over to his maternal grand father in his presence and on the other he also showed ignorance about the contents of the F.I.R lodged by Kishore Singh. Even the copy of the said F.I.R has not been brought on record by the prosecution. All these inconsistencies in the deposition of the prosecution witnesses make them highly unreliable. Atleast one of the witnesses could come out with the clear version about the genesis of the incident. If the version in the F.I.R is to be believed, the accused persons were annoyed from deceased Indrabhan Singh as he led Kishore Singh and others to the police station to lodge report. It is not disclosed as to who were the accused persons implicated in the said report and whether the appellants herein have been assigned any role in the said incident. Even if the version of P.W-2 about the genesis of incident is taken as true, there is no question of bringing Section 396 I.P.C which talks of offence of dacoity and murder committed in the course of dacoity. The narration in the First Information Report and the deposition of P.W.-2 the first informant, does not indicate any nexus or any connection between death and alleged loot of gun and tractor.

13. Submission is that when prosecution failed to establish any nexus between the death and commission of dacoity, the prosecution case instituted under Section 396 would automatically fall. At the most the trial court could have charged the appellants for committing murder under Section 302 I.P.C which has not been done. In absence of recovery of gun and rifle of Indrabhan from the possession of the accused persons, the offence of loot or dacoity under Section 396 is not established.

14. It is urged that presence of both P.W-1 and P.W-2 at the time of murder of deceased Indrabhan Singh is highly doubtful from their own statement in the Court. Injuries of Kishore Singh (P.W-1) are concocted and there is a clear contradiction in his (ocular) version and medical evidence on record. The previous incident and the entire story of P.W-1 going to the police station Punchh to lodge F.I.R along with deceased Indrabhan Singh is a concocted story created to make his presence natural with deceased at the time of murder. Projection of P.W-1 as an injured witness was nothing but a failed attempt of the prosecution to add strength to its case. First Information Report itself becomes a suspicious document as it narrates a different story. It is difficult to sustain conviction as there are serious doubts about the genesis of the incident and the presence of witnesses. The injury report of P.W-1 is also doubtful. Statements of prosecution witnesses are full of contradictions and inherent infirmities in

them are sufficient to discard the version of prosecution witnesses as untruthful and untrustworthy.

15. Further, it is urged that the F.I.R is Ante-time and Ante dated. In fact, no one had seen the incident. The dead body of Indrabhan Singh was found near the place of incident in the morning on 15.3.1998 and all appellants herein have been roped in by framing a concocted story by the first informant in the report lodged on 15.3.1998. The lodging of First Information Report at the time when the chik F.I.R is prepared is not proved by the competent witness. There were interpolations in the general diary and, moreover, original general diary was not brought by the prosecution witness. The special report of the incident was not sent. The prosecution witness P.W-7, constable Mohiuddin who had prepared the Chik F.I.R had admitted that though it was written in the F.I.R that report under Section 157 Cr.P.C was sent to the higher official through post but there was no receipt of C.A office nor any entry with regard to the dispatch post was brought by him to prove the same. Submission is that intimation of registration of FIR to the higher officials under Section 157 Cr.P.C ensures that the F.I.R was lodged at the time mentioned in the Chik report. This check and balance is provided to rule out any interpolation by the police authority. In fact, entire investigation is tainted.

16. Further, it is argued that the place of incident has been shifted, none of the documents containing F.I.R and crime show that F.I.R was in existence in the letter sent to the doctor, case particular has not been given. There was not one but several factors which show that the prosecution has not come with true version of the incident. There is no explanation as to why seven (7) persons with different work would go together to go to the police station. Motive to commit the crime though stated but has not been proved either cumulatively or individually. The common object to commit the crime is, thus, not proved. Taking aid of Section 149 to convict seven (7) accused of the offence of loot and murder under Section 396 is a patent error of law. The recovery of weapons cannot be related to the transaction, in as much as, it was from an open place and hence is a planted one. Similarly, the recovery of tractor from an open place namely canal though made after arrest of the accused persons but cannot be attributed to them for convicting for the offence of loot, and murder caused in commission of the loot.

17. Further from the evidence of doctor, it is clear that fire shot was made from a close range as scorching was present around the gunshot wound. There is no injury of Axe on the person of deceased which has clearly been ruled out by the doctor. There is no recovery of farsa, alleged weapon allegedly used to injure the deceased. As per opinion of the doctor, the recovery of bloodstained Axe (kulhari), therefore, cannot connect accused to the crime. In any case, medical evidence also rules out all possibility of the crime being committed in the manner as narrated by the prosecution. It is further pointed out that the doctor has categorically stated that there was no indication of gunshot in the clothes of the deceased, which is impossible in light of the facts put forth by the prosecution.

18. Lastly, it is argued that the Investigating Officer, P.W-8 had admitted that he did not collect blood from the trolly.

This shows that the dead body was not found in the tractor trolly. Thus, appreciating all evidence cumulatively, it is more than evident that the first informant had not narrated the true story of the incident. The entire story of going on the tractor to the police station and the murder having been committed at puliya when victim party was going the tractor trolly is a concocted story. In any case, offence of dacoity and murder in connection with the same under Section 396 I.P.C is neither suggested nor proved to have been committed by the accused party. The entire prosecution case is liable to be discarded and while setting aside conviction of the appellants, appeal deserves to be allowed.

19. Learned counsel for the appellant has placed reliance on the judgment of the Apex Court in ***Shahid Khan vs State of Rajasthan*** reported in ***2016 LawSuit (SC) 202, Harbeer Singh, State of Rajasthan vs Sheeshpal & Ors*** reported in ***2016 Law Suit(SC)1031, Jhandu and others vs State of U.P*** reported in Criminal Appeal no.209 of 1983 decided on 25 April, 2018, ***Shivlal and other vs State of Chhattisgarh in Criminal Appeal no.610 of 2007 decided on 19 September, 2011 and Mahabir Singh vs State of M.P in Criminal Appeal no.1141 of 2007 decided on 9.11.2016*** to lay thrust on various lapses pointed out in the investigation and submit that delay in recording statement of the first informant under Section 161 Cr.P.C remained unexplained. The report of crime was not submitted to the Ilaka Magistrate as mandated under Section 157 Cr.P.C. after lodging of the First Information Report. The time of registration of F.I.R. is, thus, not substantiated. The lapses in investigation coupled with the fact of non sending of report about F.I.R to the concerned Magistrate shows that the First Information Report is Ante timed. It was, thus, the result of embellishment and a creature of an afterthought. That being the position, entire prosecution would become uncreditworthy.

20. Learned A.G.A, on the other hand, submits that the First Information Report is a prompt report of the incident and the recoveries related to the incident clearly prove that the looted tractor was concealed in the Canal by the accused party. It was proved that licencee gun and revolver of Indrabhan were looted by the accused party. Above all, homicidal death of Indrabhan Singh at the site of occurrence is proved by the prosecution. There are three eye witnesses who made their depositions before the Court to clearly prove the place and time of the incident and the involvement of the accused appellant in the murder of Indrabhan Singh. All material facts point towards the guilt of the accused. All inculpatory materials put together clearly established the prosecution version of the incident and ruled out any other hypothesis put forth by the defence.

21. Learned A.G.A placing reliance on the judgment of Apex Court in case of ***Umar Mohammad and others vs State of Rajasthan*** reported in ***2008 (4) SCJ 253*** submits that the non-recovery of incriminating material from the possession of accused persons by itself would not exonerate them of the charges when the eye witnesses examined by the prosecution prove their complicity with the crime. Mere non-recovery of the incriminating material from the accused would not be a ground to throw the prosecution evidence with regard to the presence of prosecution witnesses at the time of occurrence or their knowledge with regard to the incident.

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

23. To deal with the arguments put forward by the counsels for the rival parties, we may note at the beginning that the incident-in-question had occurred on the fateful day at about 9.00 p.m. The first report of the incident was given by Jitendra Singh in writing which was proved as 'Exhibit Ka -1'. The said report was registered in P.S-Punchh District Jhansi as Chik No.15 of 1998 at 22.45 hours (10.45 p.m). Eight persons were named as accused in the First Information Report. The first informant narrated the place of incident and the manner in which the murder was executed as also the motive to cause murder of Indrabhan. However, it appears that because of loot of licencee gun and rifle of Indra Bhan Singh, the First Information Report was registered for an offence under Section 396 I.P.C which deals with the offence of committing Dacoity/Robbery coupled with the murder in so committing Dacoity/Robbery. The inquest was done at about 7.00 a.m on 15.3.1998. It is recorded in the report that the inquest was done on the spot in the morning and the body was found lying in the trolly of a tractor near Kashipura mod on a kachha rasta. As there was no sun light, the inquest could not be done before 7 a.m. The post mortem report indicates fatal injuries of gunshot and sharp-edged weapon on head, neck and abdomen of deceased. It was a brutal and cold blooded killing of 65 years old man.

24. Three eye witnesses produced by the prosecution are Kishore Singh (P.W.-1) Jitendra Singh (P.W-2) and Veer Pal Singh (P.W.-3). The first witness (P.W-1) Kishore Singh was produced as an injured witness and in the words of learned counsel for the appellants he was falsely projected as an eye witness and was given the colour of being injured witnesses so as to add strength or give credit to the testimony of other eye witnesses namely P.W.-2 and P.W-3, whose presence on the spot also is doubtful. Submission is that in cross-examination of P.W.-1, he admitted that he sustained injuries in the previous incident which occurred at about 4.30 p.m, the report of which was lodged by him at about 5.30 p.m. when P.W-1 went along with Indrabhan and others to the P.S Punchh, District Jhansi. Submission is that the act of the prosecution to project P.W-1 as an injured witness itself demolishes the whole prosecution case being untruthful as this witness is proved to be a liar.

25. Having said that, it was vehemently contended by learned counsel for the appellants that this witness (P.W-1) had a previous enmity with one of the accused Dinesh and, therefore, entered in the witness box to depose against the accused party, whereas another alleged injured person Kushal Pal Singh did not enter in the witness box. As per the prosecution story, seven persons without any reason or purpose had joined at one place in order to execute the crime, i.e. killing of deceased Indrabhan Singh. The victim party consisted of seven persons who according to the prosecution were coming back from the P.S-Punchh District Jhansi on a tractor no.UP 85 A 0902. One of them, Kishore Singh went to lodge the First Information Report of a previous incident of assault occurred during day time whereas deceased Indrabhan Singh had joined them to get his rifle and gun released from the police station. It is the same rifle and gun which was projected as items of loot/dacoity by the prosecution.

26. It is vehemently contended that from the narration of the incident by the first informant itself, atleast this much is

clear that it was not a case of commission of dacoity or loot. None of the incriminating material suggesting loot or dacoity was recovered from the possession of the accused persons. The entire story of loot had been created at the behest of the victim party to grant severe punishment to five persons of the accused party with whom they had previous enmity. The recovery of looted articles namely rifle and gun of Indrabhan Singh from the possession of accused persons has not been proved by the prosecution. In fact prosecution is silent over the issue. As far as tractor is concerned, the same was recovered from an open place and not from the possession of the accused persons and that too the recovery of it is a planted one and has illegally been shown to be at the pointing out of the accused. With these, learned counsel for the appellant has pointed out various discrepancies in the statements of the three eyewitnesses which would be dealt in this judgment at the relevant juncture.

27. Coming to the testimony of P.W-1, Kishore Singh, we find that purpose of him joining the victim party to the police station Punchh was to lodge a first information report. In cross, this witness has stated that a report was lodged by him under Section 307 I.P.C on the fateful day at about 5.30 p.m and after that while returning from the police station they stayed on way to Sirsa village for a short duration. They reached at the place of the incident at about 8.30 pm. He states that the persons of accused party attacked Indrabhan Singh while yelling at him that they would teach him lesson for becoming leader of the villagers. All accused persons were armed with deadly weapons such as gun, farsa, Axe (kulhari), country made pistol and lathi. According to P.W-1, Dinesh Kumar fired a shot at the deceased and others had attacked him by farsa and kulhari. With regard to his own injury, P.W-1 states that he was hit by Jitendra and Karan by Axe (kulhari) whereas the injury report clearly proved that there was no injury corresponding to the weapon Axe (kulhari). P.W.-1 suffered two injuries of which one was a contusion on the back side of right knee joint and another was an abrasion of 2cm x 2 cm on the left side of leg upper 1/3 area of Fibula bone. Both these injuries cannot be said to have been caused by Axe (kulhari), moreso, when P.W-1 stated that he was hit on his back by kulhari and clot of blood was created. The cross examination of this witness (P.W-1)gives a clear suggestion that his injuries in all likelihood had been caused during the previous altercation occurred at about 4.30 p.m, which was reported by P.W-1 (Kishore Singh) with the allegation of offence under Section 307 I.P.C. We, thus, find force in the arguments of the learned counsel for the appellants that P.W-1 cannot be placed in the category of an injured witness as projected by the prosecution so as to attach credibility to his version of necessarily present at the scene of occurrence. However, by saying so we do not mean to say that we can discard the whole testimony of this witness being an eye witness for the above reason only. It is settled principle of appreciation of evidence that falsity in the statement of witnesses on some point would not make his whole testimony untrustworthy, in as much as, it is proved that Kishore Singh (P.W-1) went to the police station on 14.3.1998 with P.W -3 Veerpal Singh and lodged a First Information Report under section 307 I.P.C. It is stated by P.W-3 Veer Pal Singh in his examination-in-chief that they went to lodge the report of the altercation which took place between Dinesh and Kishore

Singh. Dinesh and his son are accused in the present trial. The statement of P.W-1, P.W.-2 and P.W-3 for going to the P.S-Punchh on the fateful day and being present at the place and time of incident is consistent. They categorically stated in their testimony in examination-in-chief that they went to the police station to lodge the report by Kishore (P.W-1). Nothing could be elicited from their cross examination so as to discard this version. The presence of P.W-1, Kishore Singh as one of the members of the victim party at the place of incident is, thus, proved.

28. As far as Jitendra Singh, P.W-2 is concerned, he is grand son of deceased Indrabhan. Three eye witnesses (P.W-1, P.W-2, P.W-3) proved in their testimony that Indrabhan went to the police station to get his gun and rifle released, which were deposited during the course of election. Various questions were put to these witnesses as to whether the licencee gun and rifle of Indrabhan Singh were handed over to him in their presence but no plausible answer could be given by anyone of them. Their shaky answers have been placed before us to vehemently contend that they were making a story on their own and were actually not present with deceased Indrabhan Singh. In our opinion, the minor inconsistencies in the statement of eye witnesses regarding the return/release of rifle and gun to the licencee Indrabhan Singh and their presence at the relevant point of time inside the police station is immaterial and does not discredit the prosecution story.

29. Further noticeable is the fact that P.W.-2 was cross-examined over the stretch of a period of one year. His examination in chief was recorded in October, 2003 whereas cross was completed in April, 2004. He was again recalled in the year 2005. When one witness is examined on different dates for different accused persons over a long period of one year, some discrepancies in his statement are bound to occur. However, nothing much could be elicited from his statement recorded on recall.

30. As far as another injured witness Kushal Pal Singh is concerned, it has come on record that he could not enter in the witness box as he died after 4-5 months of the incident. In this case, the oral testimony of the prosecution witnesses commenced only in the year 2001, i.e. after about three years of the incident.

31. Thus, analysing the testimony of P.W-2 the first informant, it is proved that he left the spot of crime at about 9.30 p.m to lodge the First Information Report. There is no doubt about the report being registered at 10.15 p.m. No circumstance could be placed before us to establish that it was an Ante-time report. The prompt report of the incident by P.W-2 who himself was driving the tractor carrying seven members of the victim party is proved by the prosecution and is an assurance of earliest reporting of the crime without any embellishment or cooked up story.

32. As far as the discrepancy in the statement of P.W-1 and P.W-2 as to who had opened the first fire on Indrabhan, we may note that the members of the victim party were taken by surprise and when Indrabhan was attacked, all of them rushed to save their life. P.W-2 was driving the tractor, he stated that he jumped from the tractor and hid to save himself, others followed the suit. In this scenario, it is not possible for the prosecution witness to describe the manner of assault vividly. The

discrepancy which has occurred in the statement of eye witnesses (P.W-1 to P.W-3) as to which of the assailants first assaulted deceased and how, was natural and was bound to occur. Atleast this much is proved that only person of the victim party namely Indrabhan came in the hands of the accused persons as he was first hit on the trolly of the tractor and could not run to save his life. Further, the accused party attacked Indrabhan and while assaulting took him on the tractor with trolly to another place and caused his death. It, therefore, could not be ascertained clearly as to how many shots were fired by whom or actually who killed deceased by inflicting fatal injuries.

33. The post mortem report indicates that there were seven injuries on the person of deceased and all of them were on his vital parts:-

(i) Injury no.1, is Incised wound of 1 cm x 7 cm bone deep on the neck with bone cut in the middle.

(ii) Injury no.2 is Incised wound 3 cm x 2 cm skin deep on chin deep with bone cut.

(iii) Injury no.3 is lacerated wound 11 cm x 5 cm skull bone deep, brain cut. Brain matter was coming out.

(iv) There is one gun shot injury (entry wound) (Injury No.5) on the abdomen left side below ribs corresponding to which an exit wound (Injury no.6) was found at the back, scorching present around the entry wound (Injury no.5).

34. Internal examination revealed that Riotal occipetal bone of skull was broken below injury no.3. Brain & its membranes were damaged. Rib no.9 was broken below injury no.5. Bronchea was cut below injury no.1. Heart was empty. Gases present in small intestine. Faecal matter was present in large intestine. Cause of death was shock and hemorrage due to Ante-mortem injuries.

35. This shows that deceased was hit from the front while he was on the trolly. Since P.W-2 was driving the trolly he could not have seen as to how the attack was made. And further, as he and other members of victim party hid to save their life, they could not give the details as to how murder was caused.

36. There is one more argument which was placed to dispute the presence of the eye witness, that is the entry wound of gunshot, which was inverted and scorching was present around the same. The submission of learned counsel for the appellants is that it was a close range firing which is in clear contradiction to the statement of eyewitnesses that Indrabhan Singh (deceased) was fired first while he was on tractor and then was assaulted with sharp-edged weapons. As per the witnesses the members of the accused party were on the road. In that event, the injury no.5 entry wound of gun shot could not be a close range firing as it could not have occurred from the distance mentioned in the narration of the eye witnesses.

37. To deal with the same, we may reiterate that it was not possible for the prosecution in an incident diabolical planned to explain each and every injury suffered by the victim. Eye witnesses, in the instant case, consistently stated that attack on deceased was made in the trolly and accused party took the tractor and trolly to another place while attacking him.

The deceased Indrabhan Singh could not left the trolly. Such consistent evidence can not be discarded on the ground that the oral depositions of eye witnesses do not match with the medical evidence regarding the distance from which deceased was fired. Rather, in the facts and circumstances of the instant case, looking to the nature of assault it was natural that the witnesses missed the details of attack and when they were cross examined for a long period of seven years from the incident. The statement of P.W-3 was recorded in the year 2005.

38. Moreover, scorching around the firearm wound would also depend upon the constituent of the propellant charged. Some discrepancies as to the distance of gun shot on the facts of this case would not weaken the prosecution case. The medical evidence cannot be given primacy to discredit the value of the eye witness testimony when their presence at the time of the incident otherwise has been established.

39. From the above analysis of evidence of the prosecution witnesses, this much is clear that deceased was brought to death at the time and the place narrated in their testimony, by the accused persons from the weapons carried by them.

40. It is also proved that deceased was challenged by the accused persons when the victim party expressed their annoyance for the support given by him to Kishore Singh (P.W-1).

41. From the narration in the First Information Report and the statement of three eye witnesses, it is proved to be a case of brutal and cold blooded killing of Indrabhan Singh for the reason of annoyance of accused party on account of lodging of the First Information Report against Dinesh a co-accused. Dacoity or robbery was not the motive. The offence committed with an intention to kill Indrabhan Singh which is clear from the testimony of the prosecution witnesses. As it is clearly averred, that the accused persons had attacked Indrabhan while yelling at him and exhorting each other that he should be killed for his act of leadership. The injuries on the person of deceased and manner in which murder was executed, it cannot be said to be a murder which occurred during the course of committing robbery or dacoity. We say so for more that one reason that is that the prosecution nowhere suggested that the accused persons had any information regarding the rifle and gun being in possession of deceased or release of the same from the police station. The offence of loot or robbery has not been established by the prosecution, in as much as, looted articles were not recovered from the possession of the accused persons nor there is any proof of 'loot'. Though during the course of cross examination, P.W-2 was shown a rifle no.1665 315 bore which was released by the Court in favour of the son of deceased Indrabhan Singh, but it has not come in evidence as to in which proceeding the said rifle was released and how and from where it was recovered. The recovery memo dated 2.4.1998 (Exhibit Ka-24), police does not disclose recovery of rifle from the possession of the accused or at their pointing out. The prosecution is completely silent about motive and recovery for conviction under Section 396 I.P.C, which requires that two ingredients are satisfied:

(i) Commission of dacoity/robbery;

(ii) Commission of murder in so committing dacoity/robbery.

If one of the two elements are not found present or not proved conviction under Section 396 I.P.C is not possible.

42. For the above reasoning, we found it difficult to sustain the conviction of the accused under Section 396 I.P.C, however, in our opinion, for committing murder of Indrabhan in an organised manner, the accused persons are liable to be convicted for the offences under Section 302 I.P.C read with Section 149 I.P.C. The life sentence awarded to the accused persons under Section 396 I.P.C, read with Section 149 I.P.C is to be treated as sentence for the offence under Section 302 read with Section 149 I.P.C. We propose to modify the operative portion of the trial Court judgment to that extent.

43. At this stage, a question may come up about the power of the Court to modify the conviction and uphold the life sentence under Section 302 I.P.C read with Section 149 I.P.C, as the accused persons have not been charged under the said sections. The charge against the accused persons was for committing offences under Section 396 read with Section 149 I.P.C. This issue, however, can be answered safely with the aid of the decision of the Apex Court in ***Rafiq Ahmad @ Rafiq vs State of U.P*** reported in ***AIR (2011) SC 3114***, wherein a short question before the Court was whether the appellant therein who was charged for an offence under Section 396 I.P.C could be convicted for the offence under Section 302 I.P.C without reformulation/alteration of the charge. The ground to challenge the conviction was that the appellant therein was deprived of a fair opportunity of defence. Conviction under Section 302 I.P.C in absence of framing of a charge had caused him serious prejudice. It was urged that Section 302 I.P.C is graver than an offence punishable under Section 396 I.P.C and as such entire trial and conviction of the appellant is vitiated in law.

44. In the said case, while dealing with the meaning of prejudice to an accused it is held that "prejudice" is incapable of being interpreted in its generic sense and applied to criminal jurisprudence because of the protection available to an accused under the Indian Criminal Jurisprudence. The accused has the freedom to maintain silence during the investigation as well as before the Court. He may choose to maintain silence or make complete denial even when his statement under Section 313 of the Code of Criminal Procedure is being recorded. Right to fair trial, presumption of innocence until pronouncement of guilt and the standards of proof, i.e. the prosecution must prove its case beyond reasonable doubt are the basic and crucial tenets of our criminal jurisprudence. The Courts are, thus, required to examine both the contents of the allegation of prejudice as well as its extent in relation to these aspects of the case of the accused. It will neither be possible nor appropriate to state such principle with exactitude as it will always depend on the facts and circumstances of a given case. In any event, the Court has to ensure that the ends of justice are met as that alone is the goal of criminal adjudication.

45. It was further observed that whenever plea of prejudice is raised by the accused, it must be examined with reference to the above rights and safeguards, as it is the violation of these rights alone that may result in weakening of the case of the prosecution and benefit to the accused in accordance with law.

46. It was further considered that as far as settled principle of criminal jurisprudence that in all cases, non-framing of charge or some defect in drafting of the charge per se would not vitiate the trial itself, will have to be examined in the facts and circumstances of a given case. [Reference was made to the decision in ***Dinesh Seth vs State of NCT of Delhi, (2008) 14 SCC 94]***

47. Having said that, it was also considered therein that a person charged with a heinous or grave offence can be punished for a less grave offence of cognate nature whose essentials are satisfied with the evidence on record i.e. where the offences are cognate offences with commonality in their feature, duly supported by evidence on record. The Court can always exercise its power to punish the accused for one or the other offence provided the accused does not suffer any prejudice as afore indicated.

48. Referring to the previous decisions of the Apex Court along the same line it was held therein that there is no absolute bar or impediment in law, in punishing a person for an offence less grave than the offence for which the accused was charged during the course of the trial provided the essential ingredients for adopting such a course are satisfied. Having stated that, it was further considered whether an accused charged with an offence punishable under Section 396 I.P.C can be convicted in alternative for an offence under Section 302 I.P.C. Answering this question, it was observed in paragraph '32' and '33' of the report as under:-

" 32. In the present case, we are primarily concerned with an offence punishable under Section 396 IPC and in alternative for an offence under Section 302 of the IPC. The offence under Section 396 consists of two parts: firstly, dacoity by five or more persons, and secondly, committing of a murder in addition to the offence of dacoity. If the accused have committed both these offences, they are liable to be punished with death or imprisonment for life or rigorous imprisonment for a term which may extend to ten years and be liable to pay fine as well. Under Section 302 IPC, whoever commits murder shall be punished with death or imprisonment for life and shall also be liable to pay fine. The offence of murder has been explained under Section 300 IPC. If the act by which the death is caused is done with the intention of causing death, it is murder. It will also be a murder, if it falls in any of the circumstances secondly, thirdly and fourthly of Section 300 and it is not so when it falls in the exception to that Section.

33. On the conjoint reading of Sections 396 and 302 IPC, it is clear that the offence of murder has been lifted and incorporated in the provisions of Section 396 IPC. In other words, the offence of murder punishable under Section 302 and as defined under Section 300 will have to be read into the provisions of offences stated under Section 396 IPC. In other words, where a provision is physically lifted and made part of another provision, it shall fall within the ambit and scope of principle akin to 'legislation by incorporation' which normally is applied between an existing statute and a newly enacted law. The expression 'murder' appearing in Section 396 would have to take necessarily in its ambit and scope the ingredients of Section 300 of the IPC. In our opinion, there is no scope for any

ambiguity. The provisions are clear and admit no scope for application of any other principle of interpretation except the 'golden rule of construction', i.e., to read the statutory language grammatically and terminologically in the ordinary and primary sense which it appears in its context without omission or addition. These provisions read collectively, put the matter beyond ambiguity that the offence of murder, is by specific language, included in the offences under Section 396. It will have the same connotation, meaning and ingredients as are contemplated under the provisions of Section 302 IPC."

49. It was, thus, held that the offence of murder has been lifted and incorporated in the provisions of Section 396 I.P.C and, therefore, the offence punishable under Section 302 will have to be read into the provisions of offence stated under Section 396 I.P.C.

50. We may also note that the murder defined under Section 300 is an act done with such knowledge, and has been committed without any excuse for incurring the risk of causing the death or bodily injury to fall under Section 302 I.P.C. The requirement of Section 302 is that the act of homicidal death should be wholly inexcusable ***[Reference AIR 1940 All 486, Emperor vs Dhirajia]***

51. In view of the above discussion of the evidence and legal position, we are not convinced to accept or act upon the hypothesis put forward by the learned counsel for the appellants that it was a blind murder and that the incident had occurred in the night hours and no one had seen it. The said alternative hypothesis brought by the defence is not possible to believe as the prosecution has proved the presence of witnesses with deceased at the place and time of the incident. As stated above, minor inconsistencies and variations in the statement of eyewitnesses in the instant case are not such which would shake the basis of the prosecution case.

52. We, therefore, convict the appellants of the offence under Section 302 read with 149 I.P.C. The accused persons have been sentenced with life imprisonment for the offence under Section 396 read with Section 149 I.P.C, by the trial court. The minimum punishment under Section 302 I.P.C is life imprisonment. No modification of sentence is, thus, needed. As far as the conviction of some of the appellants under Section 412 I.P.C is concerned, the same is set aside, in as much as, there is no evidence of receipt of stolen articles after dacoity by them and as the offence of dacoity has not been proved by the prosecution.

53. For conviction of appellants Ratan lal and Khadak Singh under Section 25 Arms Act, the fire weapons recovered on their pointing out were without licence, their conviction under Section 25 Arms Act is, therefore, upheld. The fine imposed by the trial court for conviction under Section 396 read with Section 149 I.P.C shall be deemed to be the fine for conviction of the offences under Section 302 read with Section 149 I.P.C. The condition imposed on default in payment of fine would operate. The sentence under Section 25 Arms Act and the fine and the condition of default imposed by the trial court for that offence is also upheld.

54. Resultantly, the appeal is **dismissed** with modification in the trial court judgment as indicated above.

55. The appellant nos.1, 3, 4 and 6 Ratan lal, Narendra @ Vinnu, Jitendra and Ram Khilawan; respectively, are in jail.

56. The appellant nos.2, 5 and 7 namely Dinesh, Karan and Khadak Singh; respectively, are on bail. Their bail bonds are cancelled and sureties are discharged. They shall surrender before the court concerned forthwith from where they shall be sent to jail to undergo the sentence. The office is directed to transmit back the lower court record along with a certified copy of this judgment for information and necessary compliance.

57. Necessary steps shall be taken by the court below to notify this judgment to all concerned.

58. The compliance report be furnished to this Court through the Registrar General, High Court, Allahabad.

(2020)09ILR A855
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.04.2019

BEFORE
THE HON'BLE PRADEEP KUMAR SRIVASTAVA, J.

Criminal Appeal No.2994 of 2019

Shivam (Minor) ...Appellant(In Jail)
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Appellant:
Sri Dushyant Singh, Sri Mahesh Chand, Sri Mahesh Chandra Singh

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

Condition for bail to juvenile accused – Serious/heinous offence alleged - Not relevant – consideration of the possibility of the juvenile accused being associated with known criminals or some sort of moral, physical or psychological danger to him or likelihood of end of justice being defeated, necessary for granting of bail.

Impugned order does not show any specific role of accused. Hence, order set aside.

Appeal allowed. (E-2)

List of Cases cited:-

1. Dr. Subramaniam Swamy Vs Raju, 2014 (86) ACC 637

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

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

2. Admit.

3. Learned A.G.A. has accepted notice on behalf of State of U.P. He does not propose to file any counter affidavit in the matter.

4. This criminal appeal has been preferred against the impugned judgment and order dated 02.04.2019, passed by Additional District and Sessions Judge, Court No. 12/Special Judge (P.O.C.S.O. Act), Bulandshahr, in Criminal Misc. Bail Application No. 842 of 2019, arising out of Case Crime No. 1194 of 2018, under Sections 302, 504, 506 I.P.C. and Section 3(2)(5) of the S.C./S.T. Act, Police Station Khurja Nagar, District Bulandshahr, whereby the bail application of the juvenile Shivam has been rejected.

5. As per first information report, the juvenile Shivam along with other co-accused persons came with lathi, danda and iron rod and started beating the Banti, due to which Banti has sustained serious injuries on his person. It appears that subsequently, during the course of treatment, the said Banti expired and thereafter, the case was modified under Section 302 I.P.C.

6. The appellant has challenged the impugned order submitting that he is juvenile. He is in juvenile home since 17.11.2018 and his age has been determined below 18 years by Juvenile Justice Board, Bulandshahr, vide its order dated 01.03.2019 (Annexure No. 1 to this appeal). From perusal of the said order, it is clear that the Board while referring the case of the present appellant to the children court has referred that on the date of incident i.e. 22.10.2018, the age of the juvenile was determined to be 16 years, 4 months and 17 days. It has further been submitted that the first information report is delayed and lodged after about five hours from the time of occurrence. The injured Banti had died during the course of treatment at Sabdarjang Hospital, New Delhi and his post-mortem was also conducted there. The accused-appellant has been falsely implicated in the present case and no specific role has been assigned to him. Learned counsel for the accused-appellant has submitted that juvenile Shivam does not belong to the family of either of the co-accused persons and the first information report does not disclose any specif role and participation of the juvenile Shivam. The other co-accused persons have already been granted bail by the order of this Court, vide order dated 27.03.2019, passed in Criminal Appeal No. 625 of 2019, hence, the present accused-appellant who has no previous criminal history to his credit is also entitled for bail.

7. Learned A.G.A. has vehemently opposed and has contended that the learned trial court has rightly rejected the bail application of the accused-appellant and there is sufficient evidence against the present accused-appellant.

8. Provision has been made under Section 12 of the Act that when any person accused of a bailable or a non-bailable offence and apparently a juvenile, is arrested or detained or is brought before a board then irrespective of the accusation he shall be released on bail or placed under the supervision of a probation officer or under the care of any fit institution or fit institution except when :-

1. if there appear reasonable grounds for believing that the release is likely to bring him into association with any known criminals or

2. that it will expose him to moral, physical or psychological danger, or

3. that his release would defeat the ends of justice.

9. It has been held by the supreme court in **Dr. Subramaniam Swamy vs Raju, 2014 (86) ACC 637** that a juvenile has to be released on bail unless the court has a reasonable ground to believe that his release will bring him into association of some known criminal, or will expose him to moral, physical or psychological danger or his release would defeat the ends of justice.

10. Section 15 of the Amending Act only provides for transfer of a juvenile to the Children Court for trial as an adult. Where the child has attained the age of 16 years and has been alleged to have committed heinous offence, the JJ Board is required to conduct a preliminary inquiry with regard to his mental and physical capacity to commit offence, ability to understand the consequence of the offence and the circumstances in which the offence was committed considering their physical, psychological and mental status in commission of crime. Section 18(3) of the

Act provides that after making the assessment under section 15, JJ Board comes to a conclusion that there is a need for trial of the child as an adult, the Board may pass an order for the transfer of the trial of the case to the Children Court.

11. It is pertinent to mention here that Section 12 of the Juvenile Justice (Care and Protection of Children) Act has not been amended so far as the parameters and yardstick for granting bail to the juvenile-accused is concerned. Therefore, while rejecting the bail application of such juvenile, it cannot be the criteria that the alleged offence is of serious and heinous nature. The order must show that the grant of bail to the juvenile-accused is against his interest as there is possibility of his being associated with known criminals, or there is some short of moral, physical or psychological danger to him or there is likelihood of end of justice being defeated. All these conditions have been incorporated in law in order to ensure justice to the juvenile.

12. The impugned order does not show any specific role of the present accused-appellant (juvenile Shivam) and as such, I find perversity and illegality in the impugned order, therefore, the same is liable to be set aside.

13. The appeal is **allowed**. The impugned order dated 02.04.2019 is set aside.

14. The juvenile, accused-appellant namely Shivam be released on bail and he be given in the custody of the mother guardian namely Smt. Kamlesh Devi on her filing a personal bond and two sureties of the like amount to the satisfaction of the court concerned with undertaking that the guardian mother Smt. Kamlesh Devi shall keep the juvenile away from unsocial and criminal association and will look after his education and health, keeping his mental and social status. She will also give an undertaking that on being so released on bail, the accused-appellant namely juvenile Shivam will not however indulge in commission of any crime and she will ensure his presence during trial before the court whenever so required by court.

15. Office is directed to transmit the certified copy of this order to the court concerned for information and its necessary compliance.

(2020)09ILR A857
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.04.2020

BEFORE

THE HON'BLE PRADEEP KUMAR SRIVASTAVA, J.

Criminal Appeal No.3190 of 2019

Dahchalu @ Pahalwan @ Deva
...Appellant(In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Sonu Kumar Tiwari

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

Criminal Law-Quantum of Sentence– Sentence should be based on facts of a given case. Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account. Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically.

Accused-appellant who has been convicted and sentenced for five years rigorous imprisonment, considering the long period in jail, the term of

imprisonment is reduced by one year and fine of Rs. 20,000/- .

Appeal finally disposed off. (E-2)

List of Cases cited: -

1. Mohd. Giasuddin Vs St. of A.P., AIR 1977 SC 1926

2. Sham Sunder Vs Puran, (1990) 4 SCC 731

3. St. of M.P. Vs Najab Khan, (2013) 9 SCC 509

4. Guru Basavraj Vs St. of Karnatak, (2012) 8 SCC 734

5. Deo Narain Mandal Vs St. of U.P. (2004) 7 SCC 257

6. Shyam Narain Vs State (NCT of delhi), (2013) 7 SCC 77

7. Sumer Singh Vs Surajbhan Singh, (2014) 7 SCC 323 ,

8. St. of Punj. Vs Bawa Singh, (2015) 3 SCC 441,

9. Raj Bala Vs St. of Hary., (2016) 1 SCC 463.

10. Kokaiyabai Yadav Vs St. of Chhatt. (2017) 13 SCC 449

11. Ravada Sasikala Vs St. of A.P. AIR 2017 SC 1166

12. Jameel Vs St. of U.P. (2010) 12 SCC 532,

13. Guru Basavraj Vs St. of Karnatak, (2012) 8 SCC 734,

14. Sumer Singh Vs Surajbhan Singh, (2014) 7 SCC 323 ,

15. St. of Punj Vs Bawa Singh, (2015) 3 SCC 441,

16. Raj Bala Vs St. of Hary., (2016) 1 SCC 463

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

1. Heard learned counsel for the parties.

2. The present appeal has been preferred against the judgment and order dated 15.03.2019, passed by Special Judge, Gangster Act/3rd Additional Sessions Judge, Chitrakoot, in Sessions Trial No. 14 of 2012 (State of U.P. vs. Dahchalu @ Pahalwan @ Deva and others), in Case Crime No. 6 of 2010, under Section 2/3 U.P. Gangster and Anti Social Activities (Prevention), Act, 1986, Police Station Mau, District Chitrakoot, whereby the accused appellant has been convicted and sentenced to undergo rigorous imprisonment for five years along with fine of Rs. 20,000/- with default stipulation.

3. Admit.

Learned A.G.A. has accepted notice on behalf of State of U.P. He does not propose to file any counter affidavit in the matter.

4. Learned counsel for the appellant has submitted that he does not want to argue on the bail applicant but he would like to argue on the merits of this appeal. At the very outset, learned counsel for the accused-appellant has submitted that he wants to confine his arguments on the quantum of sentence only to which learned A.G.A. has agreed. He has however submitted that lower court record is not available but in view of fact that the learned counsel for the accused-appellant has chosen to argue this appeal on the quantum of sentence, there is no need to summon the lower court record.

5. Learned counsel for the accused-appellant has further submitted that from the last more than three years and eight months, the accused-appellant is in jail, therefore, taking a lenient view, either the accused-appellant should be released on

undergone or the sentence may be substantially reduced.

6. Learned A.G.A. has submitted that the accused-appellant is a gang leader and on the basis of evidence on record, the learned trial court has very rightly convicted and sentenced him, as aforesaid. He has submitted that he has no objection, if the term of sentence is slightly reduced. Learned A.G.A. has further submitted that in the gang chart, three cases has been mentioned against the accused-appellant. The first case is registered as Case Crime No. 966 of 2009, under Sections 392, 411, 120B I.P.C., the second case is registered as Case Crime No. 71 of 2000, under Sections 147, 148, 149, 302, 307 I.P.C. and Section 7 of the Criminal Law Amendment Act and the third case is registered as Case Crime No. 85 of 2000, under Section 25/27 Arms Act, in which it has been submitted by the learned counsel for the accused-appellant that the accused-appellant has been released on bail.

7. In ***Mohd. Giasuddin Vs. State of AP, AIR 1977 SC 1926***, explaining rehabilitary & reformative aspects in sentencing it has been observed by the Supreme Court:-

"Crime is a pathological aberration. The criminal can ordinarily be redeemed and the state has to rehabilitate rather than avenge. The sub-culture that leads to ante-social behaviour has to be countered not by undue cruelty but by re-culturization. Therefore, the focus of interest in penology in the individual and the goal is salvaging him for the society. The infliction of harsh and savage punishment is thus a relic of past and regressive times. The human today vies sentencing as a process of reshaping a person who has deteriorated into criminality and the modern community has a primary stake in the rehabilitation of the offender as a means of a social defence. Hence a therapeutic, rather than an 'in terrorem' outlook should prevail in our criminal courts, since brutal incarceration of the person merely produces laceration of his mind. If you are to punish a man retributively, you must injure him. If you are to reform him, you must improve him and, men are not improved by injuries."

8. In ***Sham Sunder vs Puran, (1990) 4 SCC 731***, where the high court reduced the sentence for the offence under section 304 part I into undergone, the supreme court opined that the sentence needs to be enhanced being inadequate. It was held:

"The court in fixing the punishment for any particular crime should take into consideration the nature of offence, the circumstances in which it was committed, the degree of deliberation shown by the offender. The measure of punishment should be proportionate to the gravity of offence."

9. In ***State of MP vs Najab Khan, (2013) 9 SCC 509,*** the high court, while upholding conviction, reduced the sentence of 3 years by already undergone which was only 15 days. The supreme court restored the sentence awarded by the trial court. Referring the judgments in Jameel vs State of UP (2010) 12 SCC 532, ***Guru Basavraj vs State of Karnatak, (2012) 8 SCC 734***, the court observed as follows:-

"In operating the sentencing system, law should adopt the corrective machinery or the deterrence based on factual matrix. The facts and given circumstances in each case, the nature of

the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration. We also reiterate that undue sympathy to impose inadequate sentence would do more harm to the justice dispensation system to undermine the public confidence in the efficacy of law. It is the duty of court to award ***proper sentence*** *having regard to the nature of offence and the manner in which it was executed or committed. The courts must not only keep in view the rights of victim of the crime but also the society at large while considering the imposition of appropriate punishment."*

10. Earlier, "Proper Sentence" was explained in ***Deo Narain Mandal Vs. State of UP (2004) 7 SCC 257*** by observing that Sentence should not be either excessively harsh or ridiculously low. While determining the quantum of sentence, the court should bear in mind the principle of proportionately. Sentence should be based on facts of a given case. Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account. Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically.

11. In subsequent decisions, the supreme court has laid emphasis on proportional sentencing by affirming the doctrine of proportionality. In ***Shyam Narain vs State (NCT of delhi), (2013) 7 SCC 77,*** it was pointed out that sentencing for any offence has a social goal. Sentence is to be imposed with regard being had to the nature of the offence and the manner in which the offence has been committed. The fundamental purpose of imposition of sentence is based on the principle that the accused must realize that the crime committed by him has not only created a dent in the life of the victim but also a concavity in the social fabric. The purpose of just punishment is that the society may not suffer again by such crime. The principle of proportionality between the crime committed and the penalty imposed are to be kept in mind. The impact on the society as a whole has to be seen. Similar view has been expressed in Sumer Singh vs Surajbhan Singh, (2014) 7 SCC 323 , State of Punjab vs Bawa Singh, (2015) 3 SCC 441, and Raj Bala vs State of Haryana, (2016) 1 SCC 463.

12. In ***Kokaiyabai Yadav vs State of Chhattisgarh(2017) 13 SCC 449,*** it has been observed that reforming criminals who understand their wrongdoing, are able to comprehend their acts,have grown and nartured into citizens with a desire to live a fruitful life in the outside world, have the capacity of humanising the world.

13. In **Ravada Sasikala vs. State of A.P. AIR 2017 SC 1166,** the Supreme Court referred the judgments in ***Jameel vs State of UP (2010) 12 SCC 532, Guru Basavraj vs State of Karnatak, (2012) 8 SCC 734, Sumer Singh vs Surajbhan Singh, (2014) 7 SCC 323 , State of Punjab vs Bawa Singh, (2015) 3 SCC 441, and Raj Bala vs State of Haryana, (2016) 1 SCC 463*** and has reiterated that, in operating the sentencing system, law should adopt corrective machinery or deterrence based on factual matrix. Facts and given circumstances in each case, nature of crime, manner in which it was planned and committed, motive for commission of crime, conduct of accused, nature of weapons used and all other

attending circumstances are relevant facts which would enter into area of consideration. Further, undue sympathy in sentencing would do more harm to justice dispensations and would undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to nature of offence and manner of its commission. The supreme court further said that courts must not only keep in view the right of victim of crime but also society at large. While considering imposition of appropriate punishment, the impact of crime on the society as a whole and rule of law needs to be balanced.

14. The judicial trend in the country has been towards striking a balance between reform and punishment. The protection of society and stamping out criminal proclivity must be the object of law which can be achieved by imposing appropriate sentence on criminals and wrongdoers. Law, as a tool to maintain order and peace, should effectively meet challenges confronting the society, as society could not long endure and develop under serious threats of crime and disharmony. It is therefore, necessary to avoid undue leniency in imposition of sentence. Thus, the criminal justice jurisprudence adopted in the country is not retributive but reformative and corrective. At the same time, undue harshness should also be avoided keeping in view the reformative approach underlying in our criminal justice system.

15. In view of the above, the accused-appellant who has been convicted and sentenced for five years rigorous imprisonment, considering the long period of detention in jail, if the term of imprisonment is reduced by one year, the ends of justice would be adequately served. The learned trial court has also sentenced the present accused-appellant for Rs. 20,000/- as fine, which appears to be adequate, therefore, there is no need to disturb the sentence in lieu of fine.

16. Hence, the conviction and sentence awarded by the learned trial court to the present accused-appellant under Section 2/3 U.P. Gangster and Anti Social Activities (Prevention), Act, 1986 is reduced from from five years rigorous imprisonment to four years years rigorous imprisonment and in lieu of fine which is Rs. 20,000/-, there is no need to disturb the same.

17. With the aforesaid observation, the appeal is finally disposed of.

18. Office is directed to transmit the certified copy of this order to the court concerned for information and necessary compliance.

(2020)09ILR A861
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.09.2020

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Criminal Appeal No.6966 of 2010
Connected with
Criminal Appeal No.7153 of 2010

Gurpeet @ Sodi ...Appellant(In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Devendra Saini, Sri Dharmendra Singhal, Sri Gaurav Kakkar, Sri Govind Saran Hajela, Sri Nafees Ahmad, Sri Noor

Mohammad, Sri Rajeev Pandey, Sri Vinay Kumar Sharma, Suman Pandey

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A.G.A., Sri P.S. Pundir

Criminal Law-Appeal Against Conviction U/S 376,506 IPC

Delay in lodging F.I.R.- -Neither fatal nor illegal. But if prosecution fails to give satisfactory explanation, the delay then may affect the credibility of prosecution version.

Credibility of Sterling witnesses (victim)-
Conviction in rape case could be based on victim statement without corroboratory witnesses, in case victim is a sterling witness. (Para 15)
Minor Contradiction and non-explanation of vital issues witness has failed to pass the test of Sterling Witness. (Para 17)

In present case, prosecutrix is not a sterling witness as well as other witnesses are not able to provide any supporting evidence. (Para 18)

The material contradiction and variation in the version of victim. Prosecution has failed to fix the place of occurrence. Prosecution has failed to prove the case beyond reasonable doubt.

Appeal allowed. (E-2)

List of Cases cited: -

1. Santosh Prasad @ Santosh Kumar Vs The St. of Bihar, (2020) 3 SCC 443

2. Himachal Pradesh Vs Gian Chand, (2001) 6 SCC 71

3. Parminder Kaur @ P.P. Kaur @ Soni Vs St. of Punj. 2020 SCC Online SC 605

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

1. Appellant-Gurpreet alias Sodi (in Criminal Appeal No. 6966 of 2010) and appellant-Balbindra alias Bagga (in Criminal Appeal No. 7153 of 2010) have preferred present appeals under Section 374(2) of Criminal Procedure Code *(hereinafter referred to as "Cr.P.C.")* challenging the judgment and order dated 19.10.2010 passed by Additional Session Judge, Room No. 7, Saharanpur in Session Trial No. 87 of 2010 (State vs. Gurpreet alias Sodi and others), whereby appellants were convicted under Section 376(2)g IPC and sentenced for rigorous imprisonment for life with fine of Rs. 20,000/- each and in case of default, one year rigorous imprisonment. Appellant-Gurpreet alias Sodi was also convicted under Section 506(2) IPC and sentenced for three years rigorous imprisonment with fine of Rs. 3000/- and in case of default, six months rigorous imprisonment.

2. Prosecution Story

2 01 Ram Kumar (PW-1), father of victim (PW-2), (name of the victim is withheld in compliance with the ratio of **Bhupinder Sharma vs. State of Himachal Pradesh (2003) 8 SCC 551)**, lodged a written report (Exhibit Ka 1) at Police Station Kotwali Nakud, District Saharanpur on 11.06.2009 at 18.20 hours, stating that her daughter (victim) went to attend nature's call on 07.06.2009 at about 8.00 P.M. but she did not came back till late night. Despite best efforts of family members she remained untraceable.

2.02 Next day (08.06.2009) in the morning at about 9.00 A.M. victim telephoned from a Phone No. 01331-322426 to Sanjay Singh (PW-3), resident of same village informing about her wherebout. Thereafter Sanjay Singh (PW-3) informed Rajveer (PW-4), resident of same village, who went to Village Husainpur and accompanied the victim back to her home.

2.03 Victim, after returning back to her home, narrated the occurrence to her father (PW-1) that, when she was going to attend nature's call, accused Gurpreet alias Sodi son of Gurmeet Singh alongwith other two boys having their face covered took her forcefully to a far away sugarcane field and one by one committed rape, after that they ran away leaving her in unconscious state.

2.04 After regaining consciousness, with great difficulty, she reached to nearby Village Husainpur and tried to contact her father but failed, thereafter she called Sanjay Singh (PW-3) and informed about her whereabout, who informed Rajveer (PW-4) who went to Village Husainpur on motorcycle and took her back to her house.

2.05 At about 4.30 P.M. on 08.06.2009, appellant-Gurpreet alias Sodi make a threatened call to PW-1 of dire consequences in case the incident was reported to police but any how after muster courage he reported the incident to police on 11.06.2009 at about 06.20 P.M.

2.06 Consequently, First Information Report (FIR) was lodged against appellant-Gurpreet alias Sodi and two unknown persons under Sections 376, 506 IPC at Police Station on 11.06.2009 at 06.20 P.M. Victim was medically examined. In Pathology report "smear found to be negative for spermatozoa". Doctor opined that, "no definite opinion about rape can be given". Hymen was found old torn. On the basis of physical and radiological finding, her age was reported to be about 18 years. On the person of victim following injuries of simple nature were found:

(i) Multiple hard scabbed abrasion measuring 8 cm x 2 cm on left side front of neck. Partially cracked.

(ii) A hard scabbed abrasion of 4 cm x 2 cm on back of right upper and just above elbow.

(iii) A hard scabbed abrasion of 3 cm x 2 cm on left side of face. Partially cracked.

(iv) Partially hard scabbed abrasion of 4 cm x 3 cm on front of left upper arm, 7 cm from left rib. Partially cracked.

2.07 Statement of the victim under Section 164 Cr.P.C. was recorded on 30.06.2009 by Judicial Magistrate/ Civil Judge (Junior Division), Saharanpur, where she supported the version of FIR and also named appellant-Balbindra alias Bagga to be one of the two unknown assailants as she recognised him when he visited appellant-Gurpreet alias Sodi's residence, which was opposite to her house, after 7-8 days of the occurrence. She had seen his face during the occurrence, when his mask was removed.

Charge

3. After completion of investigation charge sheet was submitted and charges under Sections 376(2)g and 506(2) IPC, were framed against both appellants on 09.04.2010, to which they denied and claimed trial.

Prosecution Witnesses

4.01 In support of its case prosecution examined, in all, eight witnesses, namely, Ram Kumar, father of victim (PW-1); victim (PW-2); Sanjay (PW-3); Rajveer (PW-4); Constable Vipin Kumar (PW-5); Dr. Abha, Women Medical Officer (PW-6); Police Inspector, Syed

Laik Hasan (PW-7); and, Dr. Keshav Swami, E.M.O. (PW-8).

4.02 PW-1, Ram Kumar, supported the prosecution case, as narrated in written complaint and further stated that victim recognized appellant- Balbindra alias Bagga after 7-8 days when he visited the place of appellant-Gurpreet alias Sodi who lives opposite to their house. In cross-examination he stated that distance of Village Husainpur from his house was about 8-1/2 km and in between Villages Kazibans, Samaspur, Aplana and Kutubpur fall. He further stated that battery of his Phone was discharged on the day of occurrence. Victim was not taken to any Doctor because she had not suffered any injury. He denied of any pressure put on the accused-Gurpreet alias Sodi to sell his land. This witness has admitted that even before occurrence accused- Balbindra alias Bagga was also acquainted to him as he usually visited the house of accused-Gurpreet alias Sodi.

4.03 Victim (PW-2) supported prosecution case, narrated the incident and manner in which she recognised appellants. She admitted that she was acquainted with appellant-Gurpreet alias Sodi for 8-9 months prior to occurrence but she never talked to him. She denied acquaintance with accused Balbindra alias Bagga. She mentioned that place of occurrence was at a distance of 6-7 field from her house. She regained consciousness at about 8-9 A.M. on the next day of occurrence. After crossing field she found PCO at some distance. Her statement was recorded on 11.06.2009, after four days of occurrence, when FIR was lodged and on the same day she was medically examined. After occurrence all the accused took her to nearby field where she become unconscious. She did not remember, whether she washed the clothes, which she was wearing at the time of occurrence or she threw it away, then said she burnt the clothes. Subsequently she got married in December, 2009 and staying at her matrimonial house. She did not remember the phone number of her father due to recent change of sim card but she knew the number of Sanjay (PW-3), therefore, she called him intimating her whereabout. She neither remembered the time taken by her to reach Village Husainpur nor number of villages crossed till she reach Village Husainpur. She was raped in a maize field and regained consciousness at sugarcane field near Village Husainpur. She denied any physical relationship with Sanjay (PW-3) or with any one else before her marriage. She even shouted for help during the occurrence, however, none came forward for help. She also stated that engine was working at that time. She was confronted with her statement recorded under Sections 161 as well as 164 Cr.P.C. on the issue, whether faces of accused were covered or not during occurrence and visit of accused, Balbindra at the place of accused, Gurpreet after 10-11 days of occurrence. She denied false implication of accused, Gurpreet due to land deal and accused, Balbindra as he was doing pairavi of accused, Gurpreet.

4.04 Sanjay was examined as PW-3, who supported prosecution case that on 08.06.2009 at about 8.30 /9.00 am, he received a call on his mobile number from the victim, who in stressed voice asked him to pick her from PCO at Village Husainpur. He asked Rajveer (PW-4) to accompany the victim back to her house. He came to know about the occurrence only from Ram Kumar, the father of the victim. In cross-examination he mentioned that his statement was recorded by police after 20

days of occurrence. He admitted his friendship with Ram Kumar (PW-1). He denied that PW-1 exerted pressure on accused-Gurpreet alias Sodi to sell his land. He also denied any illicit relationship with the victim. He did not remember the phone number of PCO from where the victim called him on the next day of occurrence. After the occurrence it was a talking issue amongst the villagers. He also denied false implication of accused-Balbindra alias Bagga as he was doing pairavi of co-accused, Gurpreet alias Sodi.

4.05 Rajveer (PW-4) stated in his testimony that he met Sanjay (PW-3) at about 9.00-9.15 A.M. on 08.06.2009 on road, who told that he had received a phone call from his cousin sister (victim) from a PCO at Village Husainpur and asked him to accompanied her back to her house. This witness reached Husainpur by motorcycle, where he met the victim, whose clothes were torn and dirty and was in a distressed state. They return back to her house. In cross-examination he admitted about visiting terms with accused-Gurpreet alias Sodi. His statement was recorded after 20-25 days of the occurrence by police. He was acquainted with accused- Balbindra alias Bagga being schoolmates.

4.06 PW-5, Constable 316, Vipin Kumar proved the written report and FIR.

4.07 PW-6, Dr. Abha, Women Medical Officer, Women Hospital, Saharanpur, who examined the victim, has proved medical examination report and reiterated that on the basis of report no definite opinion could be given regarding rape. She further mentioned that hymen was old torn, which means it was possible that occurrence could happened seven days before or might be earlier.

4.08 SI Syed Laik Hasan, Investigating Officer (PW-7) supported the prosecution case. He visited place of occurrence as told by the victim, prepared site plan of place of occurrence but not the place where victim regained consciousness. He arrested accused-Gurpreet alias Sodi on 12.06.2009. Accused-Balbindra alias Bagga was arrested on 24.08.2009 from Court premises after he surrendered before Court. In cross-examination he mentioned that distance between sugarcane field of Rajveer (PW-4) and maize field was about 4 kms. Place of occurrence was told to be sugarcane field of Rajveer (PW-4) and not the maize field. He could not get the clothes of victim despite efforts. He did not prepared map of PCO at Village Husainpur. He stated that distance between Rajveer's (PW-4) field and maize field was 450 meters. Sanjay and Rajveer were not found in the village on 11.06.2009 and 16.06.2009. Informant or victim had not disclosed identity of any of unknown accused before 30.06.2009 though they met him on many occasion prior to it. This witness has further stated that victim has not told him about removal of face mask of unknown persons during the occurrence. He further states that victim has specifically stated that she could not saw the faces of unknown accused persons, as they were covered by mask.

4.09 Dr. Keshav Swamy (PW-8), who examined injuries of the victim, proved the injury report and stated that all the injuries were of simple nature and could be caused by friction to any rough surface. He further stated that injuries could be caused during struggle when rape was committed.

Statements under Section 313 Cr.P.C.

5. Both appellants recorded their statements under Section 313 Cr.P.C. wherein they denied prosecution case. Accused-Gurpreet alias Sodi has mentioned in his statement that he was falsely implicated in the case as Complainant, Ram Kumar (PW-1) was pressurizing him and his father to sell their land, whereas accused-Balbindra alias Bagga has stated that he belonged to Sikh community, who kept beard and wear headgear and victim knew him very well even before alleged occurrence.

Defence Witnesses

6. Appellants examined two defence witnesses, namely, Mahendra Singh (DW-1) and Om Singh (DW-2) in order to support their case regarding false implication of accused-Gurpreet alias Sodi as Ram Kumar (PW-1) was pressurizing to sell his land and false implication of accused-Balbindra alias Bagga as he was doing pairavi for co-accused, Gurpreet alias Sodi, respectively.

Impugned Judgment

7. The Trial Court after considering the evidence and other material on record convicted and sentenced the accused-appellants as mentioned above.

8. Heard Sri Dharmendra Singhal, learned Senior Advocate assisted by Sri Shivendra Raj Singhal, Advocate and Sri Noor Mohammad, Advocate for appellant-Gurpreet alias Sodi and Sri Kameshwar Singh, Advocate for appellant-Balbindra alias Bagga, Sri P.S. Pundir, learned counsel for Complainant, Sri Amrit Raj Chaurasia, learned A.G.A. for State and perused the record.

Submission on behalf of Appellants

9. Learned Senior counsel appearing for appellants submitted that:-

(i) Delay of five days in lodging FIR remained unexplained which indicates false implication of the appellants.

(ii) Defence has successfully brought on evidence that family of the victim was pressurizing accused Gurpreet alias Sodi to settle issue regarding sale of his land which was the reason of his false implication and further co-accused, Balbindra alias Bagga was falsely implicated as he was doing pairavi of accused-Gurpreet alias Sodi and Ram Kumar (PW-1) has objected him for doing so and threatened to implicated him in the case.

(iii) There are major contradictions in the statement of victim recorded under Sections 161, 164 Cr.P.C. and statement recorded during trial before Court on the issue of identification of accused-Balbindra alias Bagga as she was not sure whether the faces of unknown assailants were covered or not. Disclosing name of appellant-Balbindra alias Bagga after 19 days of lodging FIR in the statement under Section 164 Cr.P.C. was nothing but a case of false implication. Place of occurrence is also changed as she mentioned in chief examination it to be sugarcane field whereas in cross it was mentioned to be maize field.

(iv) Medical evidence on record has ruled out possibility of rape, injuries inflicted on victim were simple in nature and likely to be caused by friction on a rough surface, therefore, medical evidence does not support the prosecution case.

(v) Victim has not able to explain how she reached Village Husainpur which was about 8-1/2 kms from the place of

occurrence. Even she has not explained why she did not call (by phone) from the villages fall in between the place of incident and Village Husainpur which were more than 5 or 6 in number. She did not even remember the phone number of her father. In these circumstances victim could not be termed as sterling witness being untrustworthy and blemished.

(vi) The Trial Court has passed the impugned judgment on the basis of conjectures and surmises and erroneously convicted appellants on the basis of sole witness of victim ignoring major contradictions in her testimony and improbability of events as mentioned in the testimony of other witness.

(vii) Relying on a judgment passed by Apex Court in **Santosh Prasad @ Santosh Kumar vs. The State of Bihar, (2020) 3 SCC 443** it is contended that in a case where evidence of prosecutrix does not inspire confidence and appears to be untrustworthy and blemished and is not of sterling quality, it would not safe to convict accused only on solitary evidence of prosecutrix.

Submission on behalf of State

10. Opposing submissions made on behalf of appellants learned A.G.A. appearing for State and counsel for informant submitted that:-

(i) In the present case delay of four days in lodging FIR is duly explained by complainant PW-1 in the complaint itself that he was under fear due to threatening call made by accused-Gurmeet alias Sodi of dire consequences in case of lodging FIR.

(ii) Evidence of victim is trustworthy and she has explained the manner of occurrence and when she became conscious she found herself to be near the Village Husainpur, therefore, in the natural course she would have called (by phone) from Village Husainpur only. Contradictions, if any, are trivial in nature.

(iii) Injuries to the victim as well as testimony of Dr. Keshav Swami (PW-8) supports prosecution case that injuries to victim might be caused due to struggle during the occurrence.

(iv) Defence has not able to prove their case and, therefore, Trial Court has rightly convicted appellants on the basis of trustworthy and reliable sole evidence of the prosecutrix.

Analysis : (A) Delay in lodging FIR

11. As per prosecution case occurrence took place in the night of 07.06.2009 and victim reached at her house at about 8.45 am on 08.06.2009 and narrated occurrence to her father (PW-1). However, they remained silent for about three days and lodged FIR only on 11.06.2009 at about 18.20 hours. The only explanation was some threat given by accused-Gurmeet alias Sodi on telephone, which remained unproved. It has come in the evidence of PW-3, Sanjay that villagers had knowledge about the incident soon after the victim reached her house. Therefore, there was no reason of fear for informant from going to Police Station to lodge FIR promptly.

12. It is well settled that mere delay in lodging FIR may not prove fatal in all cases, but in a given circumstance, even a minor unexplained delay in lodging FIR could be one of the factors which may

affect credibility of the prosecution version. In State of **Himachal Pradesh vs Gian Chand, (2001) 6 SCC 71** Apex Court held:

"12. Delay in lodging the FIR cannot be used as a ritualistic formula for doubting the prosecution case and discarding the same solely on the ground of delay in lodging the first information report. Delay has the effect of putting the Court in its guard to search if any explanation has been offered for the delay, and if offered, whether it is satisfactory or not. If the prosecution fails to satisfactorily explain the delay and there is possibility of embellishment in prosecution version on account of such delay, the delay would be fatal to the prosecution. However, if the delay is explained to the satisfaction of the court, the delay cannot by itself be a ground for disbelieving and discarding the entire prosecution case."

(emphasis supplied)

13. In the present case, prosecution is not able to satisfactorily explain the delay of three days in lodging FIR though it would not, on its own, discredit the prosecution case in its entirety and we have to now consider, whether the intervening period was utilized for concocting a story to falsely implicate appellants.

14. It has come in evidence from prosecution side as well as from defence side that both the accused were acquainted to victim and their family. Therefore, the prosecution story that victim was unable to recognize any one of the unknown accused, even after their faces masks were removed during occurrence, cannot be believed. Implication of accused-Balbindra alias Bagga after 19 days of lodging FIR, further discredit the prosecution story. Defence has come up with their case that false implication was due to land deal. Thus, in the present case, FIR comes under grave suspect and it is possible that time taken in lodging FIR was utilized to falsely implicate accused-Gurpreet alias Sodi. Disclosing name of other accused-Balbindra alias Bagga after 19 days of lodging FIR though he was acquaintance to family of the victim even before the occurrence also comes under scanner.

(B) Whether victim is a sterling witness?

15. It is well settled that conviction in rape case could be based on sole testimony of victim without corroboration if witness is a sterling witness. In the judgment relied by appellants in **Santosh Prasad @ Santosh Kumar vs. The State of Bihar (supra) Apex Court held that:**

"5.4 Before considering the evidence of the prosecutrix, the decisions of this Court in the cases of Raju (supra) and Rai Sandeep @ Deepu, relied upon by he learned Advocate appearing on behalf of the appellant-accused, are required to be referred to and considered.

5.4.2 In the case of Rai Sandeep alias Deepu (supra), this Court had an occasion to consider who can be said to be a "sterling witness". In paragraph 22, it is observed and held as under:

"22 In our considered opinion, the "sterling witness" should be of a very high quality and calibre whose version should, therefore, be unassailable. The court considering the version of such witness should be in a position to accept it

for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as the sequence of it. Such a version should have co-relation with each and every one of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other such similar tests to be applied, can it be held that such a witness can be called as a "sterling witness" whose version can be accepted by the court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged."

5.4.3 In the case of Krishna Kumar Malik v. State of Haryana (2011) 7 SCC 130, it is observed and held by this Court that no doubt, it is true that to hold an accused guilty for commission of an offence of rape, the solitary evidence of the prosecutrix is sufficient provided the same inspires confidence and appears to be absolutely trustworthy, unblemished and should be of sterling quality."

(emphasis supplied)

16. Keeping in mind the above mentioned observations of Apex Court we have scanned the testimony of victim (PW-2) in order to ascertain, whether her evidence inspire confidence and appears to be absolutely trustworthy, unblemished and is of sterling quality. Having gone through the deposition of prosecutrix we find that there are material contradictions on various issues which are as follows:

(i) Victim in her chief has mentioned the place of occurrence to be field of sugarcane. However, in cross examination she changed the place of occurrence to be maize field. Even evidence of IO (PW-7) is not corroborated with her statement regarding place of occurrence. IO (PW-7) in his cross examination has mentioned place of occurrence to be sugarcane field and not maize field.

(ii) In her chief victim has stated that she become unconscious and regained

consciousness only in the next morning in a sugarcane field near to Village Husainpur which was about 8-9 kms from the place of occurrence. Though she mentioned that after committing rape accused took her to nearby field, where she became unconscious, but it remained unexplained how she reached to a field which was far away. IO (PW-7) has not even inspected the said place as well as site of PCO. Thus, prosecution has failed to fix place of occurrence and also place where victim regained consciousness.

(iii) It has come in the evidence that both accused were acquainted to victim and her family, therefore, it is highly improbable that she was not able to recognize accused-Balbindra alias Bagga when as per her statement his face mask was removed during the occurrence. There is no explanation afforded by the victim, why she did not disclose name of accused-Balbindra alias Bagga to police before her statement was recorded under Section 164 Cr.P.C. on 30.06.2009 disclosing his name, though as per her version she came to know about identity of appellant-Balbindra alias Bagga after 7 days of occurrence according to her statement recorded under Section 164 Cr.P.C. or after 10-11 days, as mentioned in her testimony. Unexplained delay of at least 10 days in disclosing name of the accused, Balbindra alias Bagga to police by the prosecutrix after she identified him during his visit to the house of co-accused, Gurmeet alias Sodi casts grave suspicion on the prosecution version.

(iv) Even otherwise the medical evidence does not support the prosecution case as it has come in medical evidence that no definite opinion could be made regarding rape and injuries might be caused due to friction on a rough surface.

17. Considering above referred major contradictions and non explanation of vital issues, we are of the opinion that this witness has failed to pass any of the test of being sterling witness.

(C) Other supporting evidence:

18. Testimony of PW-1, PW-3 and PW-4, who are not eye witnesses are not helpful for prosecution case. PW-1, father of the victim has stated what her daughter (victim) has told him. His prior acquaintance with both the accused also goes contrary to the testimony of the victim. PW-3, Sanjay, who was the first person with whom victim contacted after the occurrence, recorded his statement before the police after 20 days of occurrence. There are material contradiction on his availability for recording to statement in his testimony and in the testimony of IO (PW-7). PW-3 has stated that he visited police station after the occurrence, whereas IO has stated PW-3 and PW-4 were not available in the village for recording their statements. Therefore prosecution would not get any help from the statements of PW-1, PW-3 and PW-4. In the present case prosecutrix is not a sterling witness as well as other witnesses are not able to provide any supporting evidence.

Conclusion

19. The off shoot of above discussion is that there are material contradictions and variation in the version of the victim. Prosecution has failed to fix the place of occurrence as well as place where victim regained consciousness. Prosecution has failed to come up with any plausible explanation how the victim reached at a place which was 8-9 Kms. from place of

occurrence. IO has failed to explain delay of about 20 days in recording statements of PW-3 and PW-4. Even statement of the victim under Section 164 Cr.P.C. was recorded after 19 days of lodging FIR. There is unexplained delay in lodging FIR and also in disclosing the name of appellant-Balbindra alias Bagga. Medical report does not support case of the prosecution. Clothes of the victim were not recovered. In absence of any supporting evidence, the manner in which occurrence is stated to have occurred is not believable. There is likelihood of false implication of accused appellants. The evidence of victim cannot be taken as gospel truth at its face value and in absence of any other supporting ocular or medical evidence, there is no scope to sustain the conviction and sentence of the appellants.

20. It is also apt to mention a recent judgment of Supreme Court in **Parminder Kaur @ P.P. Kaur @ Soni versus State of Punjab: 2020 SCC Online SC 605** which has dealt the issue of "failure to refute Section 313 Cr.P.C. statement" and held as follows:-

"21. Under the Code of Criminal Procedure, 1973 after the prosecution closes its evidence and examines all its witnesses, the accused is given an opportunity of explanation through Section 313(1)(b). Any alternate version of events or interpretation proffered by the accused must be carefully analysed and considered by the Trial Court in compliance with the mandate of Section 313(4). Such opportunity is a valuable right of the accused to seek justice and defend oneself. Failure of the Trial Court to fairly apply its mind and consider the defence, could endanger the conviction itself. Unlike the prosecution, which needs to prove its case beyond reasonable doubt, the accused merely needs to create reasonable doubt or prove their alternate version by mere preponderance of probabilities. Thus, once a plausible version has been put forth in defence at the Section 313 CrPC examination stage, then it is for the prosecution to negate such defense plea." (emphasis supplied)

21. In the present case the accused have given their version of false implication and prior acquaintance, supported by defence witnesses, which is a plausible version but neither the prosecution has negate such evidence nor the Trial Court has analyzed it properly. This is also a reason to allow these appeals.

22. In view of above discussion, we are of the considered view that the impugned judgment cannot be sustained and is liable to be set aside.

23. Both the appeals are allowed. Judgment and order dated 19.10.2010 passed by Additional Session Judge, Room No. 7, Saharanpur in Session Trial No. 87 of 2010, is hereby set aside. The appellants are acquitted of the charges under Sections 376(2)g and 506(2) IPC. Appellant-Gurpreet alias Sodi (Criminal Appeal No. 6966 of 2010) is in jail and shall be released forthwith, if not detained in any other case. Appellant-Balbindra alias Bagga (Criminal Appeal No. 7153 of 2010) is on bail and need not to surrender. His bail bonds are cancelled and sureties are discharged.

24. Lower Court record alongwith a copy of this judgment be sent back immediately to Trial Court concerned for compliance and further necessary action.

25. Keeping in view provisions of Section 437-A Cr.P.C., accused-appellants

Gurpreet alias Sodi and Balbindra alias Bagga are directed to forthwith furnish a personal bond in terms of Form No. 45 prescribed in Cr.P.C. of the sum of Rupees twenty-five thousand each and two reliable sureties each in the like amount before concerned Court, which shall be effective for a period of six months, alongwith an undertaking that in the event of filing of Special Leave Petition against the instant judgment or for grant of leave, the aforesaid appellants on receipt of notice thereof shall appear before Hon'ble Supreme Court.

(2020)09ILR A872
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.09.2020

BEFORE

THE HON'BLE PRITINKER DIWAKER, J.
THE HON'BLE RAJEEV MISRA, J.

Criminal Appeal No. 7957 of 2006
and
Criminal Appeal No.7044 of 2006
and
Criminal Appeal No.7672 of 2006
and
Criminal Appeal No.106 of 2007

Vaibhav Jain ...Appellant(In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Gaurav Kakkar,Sri Abhikesh Mishra, Sri K.K.Mishra, Sri Sushil Jain, Sri Sushil Shukla.

Counsel for the Opposite Party:
A.G.A., Sri K.M. Tripathi

Circumstantial Evidence – Parameters for deciding a case based on circumstantial evidence – necessary to establish motive against accused appellants to commit the crime, the complete chain of circumstances in proximity to time and situation leading to occurrence, if proved, point at the guilt of the accused and no other hypothesis.

Circumstantial Evidence proved point at guilty of only one accused. The test of circumstantial evidence to prove guilt not satisfied regarding other three accused.

No direct evidence on record of motive on part of co-accused to commit the crime. Finding of trial court of motive of co-accused to commit crime, set aside.

Section 106 of Evidence Act - Fact especially within knowledge of accused-
Accused/applicant failed to discharge the burden in terms of Section 106 of Evidence Act- No explanation of facts given by him which were in his special knowledge - Adverse interference drawn – offence punishable U/S 364 I.P.C. fully proved

No Evidence of meeting of mind to commit the crime in question – Conviction U/S 120-B & 149 I.P.C. set aside.

No evidence to prove the guilt for offence punishable under U/S 427 I.P.C.

List of Cases cited:-

1. Sharad Birdhichand Sarda, Vs St. of Maha. AIR 1984 Supreme Court 1622.

2. Rohtash Kumar Vs St. of Hary., reported in (2013)14 SCC 434.

3. H. P. Vs Raj Kumar reported in (2018) 2 SCC 69

4. Dhananjay Chatterjee Vs St. of W.B.(1994) 2-SCC 220.

5. Padlaveera Reddy Vs St. of A.P. AIR 1990 SC 79,

6. C. Chinna Reddy Vs St. of A.P., (1996) 10 SCC 193,

7. St. of U.P. Vs Satish, (2005) 3 SCC 114,

8. Ramreddy Rajeshkhanna Reddy & ors. Vs St. of And.P., 2006 (10) SCC 172

9. Sukhpal Singh Vs St. of Punj. (2019) 15 SCC 622

10. Dalveer & ors. Vs St. of U.P. 2020 (30) ADJ 373

11. Ramchandra Sao Vs St. of Bihar (2000) 10 SCC 467

12. Hardyal Prem Vs St. of Raj.1991(Supp.) 1SCC 148

13. St. of Raj. Vs Raja Ram (2003) 8 SCC 182

14. St. of Raj. Vs Teja Ram AIR, 1999 SC 1776

15. R. Shaji Vs St. of Kerala, AIR 2013 SC 651

16. AIR 2017 SC 279, Kishore Bhadke Vs St. of Mah.

17. Prabhu Dayal Vs St. of Raj., AIR 2018 SC 3199

18. State of Karnatka Vs David Rozrio (2002) 7SCC 728

19. Mujeeb Vs St. of Kerala, (2000) 10 SCC 315

20. Asar Mohammad & ors. Vs. St. of U.P., (2019) 12 SCC 253.

21. Jai Karan Pasi Vs St. of U.P. reported in 2019 (6) ALJ 177

22. State of Maharashtra Vs Damu, (2000) 6-SCC 269

23. Sudama Pandey Vs St. of Bihar (2002) 1SCC 679

24. Rajeev Misra,J. in Ashok Kumar & ors. Vs St. of U.P. 2018 (ADJ) Online 0377

25. St. of W. B. Vs Mir Mohammad Umar & ors. (2000) 8 SCC, 382

26. Trimukh Maroti Kirkan Vs St. of Mah. (2006) 10 SCC 681

27. St. of H.P. Vs. Raj Kumar (2018) 2 SCC 69

28. Joydeb Patra & ors. Vs St. of W.B. (2014) 1 SCC 444

29. Vikramjit Singh Vs St. of Punj. (2006) 12 SCC 306

30. Sawal Das Vs St. of Bihar (1974) 4 SCC 193

31. Dhananjay Chatterjee Vs St. of U.P. (1994) 2 SCC 220

32. Firozuddin Basheeruddin & ors. Vs St. of Kerala, (2001) 7 SCC, 596

33. Soyebbhai Yusufbhai Bharania & ors. Vs St. of Guj. (2017) 13-SCC 342

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

1. These four connected criminal appeals arise out of a common judgement and order dated 09.11.2006 passed by Special Judge (E. C. Act)/ Additional Sessions Judge, Rampur in Sessions Trial No. 76 of 2005 (State Vs. Vaibhav Jain and four others) under Sections 364, 302, 201, 120B and 427 I.P.C., P.S.-Bilaspur, District-Rampur arising out of Case Crime No. 315 of 2004 under Sections 302, 201, 427 I.P.C. P.S.-Bilaspur, District-Rampur whereby four of the accused namely Vaibhav Jain, Kaushal Kishore Jain, Suresh Pal and Rajendra Vohra have been held guilty of the charges framed against them, whereas the fifth accused namely Sadab has been acquitted. Accordingly aforesaid four accused have been convicted and sentenced under Section 302 I.P.C. readwith Section 149 I.P.C. They have, therefore, been sentenced to life imprisonment alongwith fine of Rs.5000/- each. In case of default in payment of fine as noted above, each of four accused are to undergo one year additional rigorous

imprisonment. Aforesaid four accused have also been convicted under Section 120B I.P.C. As such, they have been sentenced to life imprisonment alongwith fine of Rs.5000/- each. On failure to pay aforesaid amount of fine, they are to undergo one year additional rigorous imprisonment. The above noted four accused have further been convicted under Section 364 I.P.C. As such they have been sentenced to life imprisonment alongwith fine of Rs.5000/- each. On failure to deposit above mentioned amount of fine, they are to undergo one year additional rigorous imprisonment. Above named four accused have further been convicted under Section 201 I.P.C. Accordingly, they have been sentenced to two years imprisonment alongwith fine of Rs.1000/ each. In case of default in payment of fine, above mentioned four accused are to further undergo additional imprisonment of three months each. Lastly, above-noted four accused have been convicted under Section 427 I.P.C. and consequently, sentenced to six months rigorous imprisonment. All the sentences are to run concurrently. It may be noticed here that State has not filed any appeal against acquittal granted by Court below to accused, Sadaf.

2. We have heard Mr. Sushil Shukla, learned counsel for accused-appellants-Vaibhav Jain and Kaushal Kishore Jain in Criminal Appeals No. 7957 of 2006 and 7044 of 2006 respectively, Mr. Abhishek Mishra learned Amicus Curiae for accused-appellant Rajendra Vohra in Criminal Appeal No. 106 of 2007, Mr. Amit Saxena, learned A.G.A. for State and Mr. K.M. Tripathi, learned counsel for complainant. No one appeared on behalf of accused-appellant Suresh Pal in Criminal Appeal No. 106 of 2007, even upon revision of cause list, though names of Mr. Vishnu Kumar, Mr. K. K. Mishra, Mr. Subhash Chandra Pandey and Mr. Awadesh Kumar Srivastava are duly published in cause list as counsel for aforesaid accused-appellant.

3. Prosecution of all the accused was set in motion when P.W.-1, Abhay Kumar Goyal, submitted a written report dated 07.05.2004 (Ext. Ka.-1) at Police Station-Kotwali Bilaspur, District-Rampur regarding death of his brother, Sanjeev Kumar Goyal (deceased) in mysterious circumstances. Aforesaid written report was entered in General Diary of Police Station-Kotwali Bilaspur on 07.05.2004 at 9:35 am by P.W.-7 C-256 Om Prakash. Thereafter P.W.-7 scribed check F.I.R. dated 07.05.2004 (Ext. Ka.-61) which was registered as Case Crime No. 315 of 2005 under Sections 302, 201, 427 I.P.C. P.S.-Bilaspur District-Rampur.

4. Prosecution story, as unfolded in F.I.R. dated 07.05.2004, can be gathered from F.I.R. itself. For ready reference same is quoted herein under:-

''नकल तहरीर हिन्दी वादी

सेवा में श्रीमान् प्रभारी निरीक्षक कोतवाली बिलासपुर रामपुर उ0प्र0 महोदय निवेदन है कि मेरा भाई संजीव कुमार गोयल जो सरकारी विभागों मे ठेकेदारी करता है। सपरिवार आवास विकास रूद्रपुर जिला उधमसिहं नगर उत्तरांचल में रहता था उससे उसके मुँह बोले साले वैभव जैन पुत्र उपेन्द्र कुमार जैन नि0 28आ0 वि0 रूद्रपुर जिला उधमसिंह नगर उत्तरांचल ने कई लाख रूपये उधार ले रखे थे जिनकी वापसी के लिए संजीव ने कई बार वैभव जैन से तगादे किये थे दो दिन पूर्व वैभव जैन मेरे भाई संजीव के पास आया और उनकी मारूति वैन नं0 यू.ए06बी–9209 यह कह कर मांग कर ले गया कि उसे कहीं बाहर जाना है। बीती शाम करीब 7 बजे संजीव अपनी पत्नी श्रीमती सरिता गोयल से यह कह कर गया कि वह वैभव जैन से रूपये मांगने जा रहा है

लगभग 6:30 बजे सांय संजीव का अपने घर फोन आया उसने अपनी पत्नी से कहा कि मै वैभव जैन के साथ सिधु बार मे बैठा खाना खा रहा हूँ तुम लोग खाना खा लेना मै रम्पुरा वाला काम देखकर देर रात लौटूँगा श्रीमती सरिता गोयल को इस फोन पर कुछ शक हुआ तो उसने मेरे घर आकर मुझे बताया और कहा कि आप सिधु बार जाकर देख आओ इस पर मे तुरन्त सिधु बार पहुँचा तो वहाँ पर बाहर मेरे भाई संजीव की उपरोक्त वैन खड़ी थी जिसके पास सुरेश पाल ड्राइवर व तीन लोग और अन्य खड़े थे। पास ही संजीव की मोटर साइकिल टी.वी.एस. विक्टर यू0ए006बी–5780 खड़ी थी सिधुं बार में अन्दर मेरा भाई संजीव गोयल व वैभव जैन बैठे खा पी रहे थे यह बात मैने घर आकर संजीव की पत्नी को बता दी लगभग 10:30 बजे रात संजीव की पत्नी का मेरे पास फोन आया कि संजीव अभी तक घर नही आये है। जिस पर हम सभी को चिन्ता हुई और हम सभी भाई अन्य लोगो को साथ लेकर संजीव की तलाश में निकल पड़े काफी तलाश करने के बावजूद वही नही मिला रात करीब 2 बजे के करीब किसी का फोन आया कि संजीव की मोटर साइकिल वाराइटी रेलवे क्रासिंग के पास रेल की पटरी पर पड़ी है। हम लोग तुरन्त वहाँ पहुँचे तो वहाँ मोटर साइकिल टूटी पड़ी थी संजीव को काफी तलाश किया तो आज करीब 8:30 बजे प्रातः संजीव की लाश ग्राम इन्दर पुर में सरदार ज्ञान सिंह के झाले के सामने मेहर सिंह के खते के पास पड़ी मिली उसकी गर्दन पर कटे के निशान है। मुझे पूर्ण विश्वास है कि वैभव जैन व उसके साथियों ने पैसों की खातिर मेरे भाई संजीव गोयल की हत्या कर दी है। मै रिपोर्ट लिखाने कोतवाली आया हूँ मेरी रिपोर्ट दर्ज कर कानूनी कार्यवाही करने की कृपा करे मेरे भाई की लाश मौके पर पड़ी है। दिनांक 7.5.04 द0 भवदीय हस्ताक्षर अंग्रेजी मे 7.5.02 अभय कुमार गोयल एस/ओ0 श्री कृष्ण गोयल नि0 108/अ0वि0 रूद्रपुर उधम सिंह नगर उत्तरांचल।

नोट :– मै सी/सी 256 ओम प्रकाश सिंह प्रमाणित करता हूँ कि नकल तहरीर चिक हाजा पर शब्द व शब्द अंकित की गयी है जो हमरिस्ता मूल एफ.आई.आर. है।

प्रदर्श क–61
ह0अस्पष्ट
7-5-04"

"Written report of the complainant in Hindi

To,

The SHO,

Kotwali Bilaspur, Rampur, UP.

Sir, it is submitted that, my brother Sanjeev Kumar Goyal who works as a contractor with Government Departments, recides along-with his family, at Avas Vikas, Rudrapur, Distt.- Udham Singh Nagar, Uttranchal. His so-called brother-in-law accused-Vaibhav Jain s/o Upendra Kumar Jain, r/o 28 Aa. Vi. Rudrapur, Distt.- Udham Singh Nagar, Uttranchal had borrowed several lacs of rupees from him. For return of this amount, Sanjeev had asked accused-Vaibhav Jain several times. Two days ago, accused-Vaibhav Jain came to my brother Sanjeev and borrowed his Maruti Van No. U.A.6B-9209 on the pretext that he has to go somewhere. Yesterday at around 07pm, Sanjeev went away informing his wife that he is going to demand his money from Viabhav Jain. Around 8:30pm (sic.) Sanjeev made a phone call to his house, Informing his wife that he is taking meal aongwith Vaibhav Jian at Sindhu Bar and further suggested her that they too should take meal. He further stated that he would return late night after inspecting the work at Rampura. Upon this phone call, Smt. Sarita Goyal developed suspicion and then she reached my home and asked me to go to Sindhu Bar to see (the matter). Thereupon, on reaching Sidhu Bar immediately, I saw aforesaid Van of my brother Sanjeev which was parked outside there and driver Suresh Pal and three other persons were standing there. Sanjeev's bike TVS Victor no-UA 06B 5780 was also parked nearby. Inside Sindhu Bar, my brother Sanjeev Goyal and accused-Vaibhav Jain were sitting together and

were eating and drinking. I came back home and c conveyed aforesaid to Sanjeev's wife. Around 10.30 p.m., I received a call from Sanjeev's wife informing that Sanjeev had not returned home by then. On this, all of us got worried. We all the brothers, alongwith few others went out in search of Sanjeev. In spite of enormous effort, he could not be found. Someone gave a phone call around 2.00 a.m, informing that motor cycle of Sanjeev is lying at the railway track near Baradari railway crossing. We immediately reached there. The motor cycle was lying there in damaged condition. We tried hard to search Sanjeev, then today around 8.30 a.m, dead body of Sanjeev was found lying in village Indarpur in front of Jhala of Sardar Gyan Singh near filed of Sardar Mehar Singh. There was a cut injury on his throat. I have firm belief that accused-Vaibhav Jain and his companions have murdered my brother Sanjeev Goyal on the matter of money. I have come to Kotwali lodge the report. My report may kindly be lodged and legal action be taken . The dead body of my brother is lying at the spot.

Sd/-

Illegible (In English)

Dt:

7.5.04, Abhay Kumar Goyal
S/o Sri Krishna Goyal R/o 108/Aa.Vi.

Rudrapur, Udham Singh Nagar

Uttaranchal"

Note: I, C/c 256 Om Prakash Singh, verify that copy of the tahreer has been entered on this Chik verbatim, and which is as per the F.I.R.

ExtKa61
Sd/- Illegible

7.5.04

(English Translation by Court)

5. In the aforesaid F.I.R., two persons namely Vaibhav Jain and Suresh Pal were nominated as named accused whereas three others were nominated as unnamed accused.

6. Above mentioned F.I.R. was registered in presence of P.W.-8, S.I. Hardev Singh, who was posted as S.H.O. P.S. Bilaspur, District-Rampur. Upon registration of same, this Police Officer appointed himself as Investigating Officer. He accordingly entered written report and F.I.R. in Case Diary and immediately, proceeded to place of occurrence.

7. P.W.-8, S.I. Hardev Singh, upon reaching place of occurrence on 07.05.2004, found dead body of Sanjeev Kumar Goyal (deceased) in village Indarpur in front of Jhala of Sardar Mehar Singh near field of Sardar Gyan Singh. He recovered a sum of Rs.7500/-cash from pocket of pant worn by deceased and also a gold chain from his person. He took possession of aforesaid articles and gave them in Supurdagi of brother of deceased/first informant-Abhay Kumar Goyal (P.W.-1). He also prepared a recovery memo of same dated 07.05.2004 (Ext. Ka.-2). Aforesaid recovery was witnessed by P.W.-1, Abhay Kumar Goyal and Shyam Sundar.

8. Investigating Officer, also recovered damaged motorcycle bearing Registration No UA-06B-5780, which was of TVS Victor make belonging to Sanjeev Kumar Goyal (deceased) and was lying abandoned at a distance of 500 steps from

Baradari Railway Crossing towards Rampur on the far side. Same was given in Supurdagi of brother of deceased/first informant Abhay Kumar Goyal (P.W.-1). This recovery was witnessed by Ajay Goyal and Shyam Sundar. He accordingly prepared recovery memo of above dated 07.05.2004 (Ext. Ka.-3).

9. At this juncture, Investigating Officer P.W.-8, S.I. Hardev Singh received information from informant regarding location of some of the accused. He immediately rushed to the place of their presence alongwith PW1 Abhay Kumar Goel and others to arrest them. Seeing police, accused persons who were washing Maruti Van bearing Registration No. UA-06-B-9209 belonging to Sanjeev Kumar Goyal (deceased) made an attempt to flee but were overpowered Accordingly, this witness arrested three persons, who were identified as named accused-Vaibhav Jain and Suresh Pal as well as one unnamed accused Rejendra Vohra, from paved road (Khadanja), near Guest House of Irrigation Department.

10. This Police Officer also recovered the Maruti Van described above, which belonged to Sanjeev Kumar Goyal (deceased) from aforesaid accused. On examination, it was found that rear seat of this vehicle was having marks of blood. Part of the back seat, which was having blood stains, was cut away. He accordingly sealed the same and prepared its recovery memo dated 07.05.2004 (Ext. Ka.-4). Aforesaid recovery was witnessed by P.W.-1, Abhay Kumar Goyal and P.W.4 Vishal Anand.

11. To establish place of occurrence, P.W.-8, S.I. Hardev Singh also recovered plain earth as well as earth mixed with blood from place of occurrence in presence of two witnesses namely Shyam Sundar and Ajay Goyal. He sealed them in separate boxes and prepared their's recovery memo dated 07.05.2004 (Ext. Ka. 69).

12. The knife used in commission of offence was recovered by P.W. 8 Investigation Officer on pointing of named and arrested accused-Vaibhav Jain on 7.5.2004. He, accordingly, sealed it and prepared a recovery memo of same dated 07.05.2004 (Ext. Ka.-5). Aforesaid recovery was witnessed by P.W. 1 Abhay Kumar Goyal and P.W. 4 Vishal Anand.

13. After aforesaid recoveries were made, P.W.-8, S.I. Hardev Singh prepared Map of place from where weapon of assault i.e. Knife was recovered on 07.05.2004 (Ext. Ka.-71).

14. P.W.-8, S.I. Hardev Singh also inspected place of occurrence and on pointing of first informant i.e. P.W.-1, Abhay Kumar Goyal prepared Site Plan of same on 07.05.2004 (Ext. Ka.-70).

15. After undertaking aforesaid exercise, P.W.-8, S.I. Hardev Singh proceeded to conduct inquest/panchayatnama of deceased. He, accordingly, appointed panch witnesses. Thereafter, he prepared inquest report dated 07.05.2004 (Ext. Ka.62A). Aforesaid inquest report categorically records the Case Crime Number in which inquest was performed i.e. Case Crime No. 315 of 2004 under Sections 302, 201, 427 I.P.C. P.S.-Bilaspur, District-Rampur, the place of inquest i.e. village Indarpur, time of commencement of inquest i.e. 11:05 am. In the opinion of Panch witnesses, death of deceased Sanjeev Kumar Goyal, was homicidal in nature.

16. Having completed inquest of the body of deceased, P.W.-8, Investigating Officer, took possession of dead body of deceased. He prepared detailed police scroll i.e. Ext. Ka-63, Ext. Ka-64, Ext. Ka-66, Ext. Ka-67, Ext. Ka-68 and dispatched dead body of Sanjeev Kumar Goyal (deceased) for postmortem on 07.05.2004 through P.W.-5, Constable 775, Satyveer Sing and Ram Dhani.

17. P.W.-6, Dr. H. K. Mitra, who pas posted as an Orthopadic Surgeon at District Hospital, Rampur conducted autopsy on dead body of deceased on 07.05.2004 at 5.00PM. In the opinion of autopsy surgeon cause of death of deceased was shock and haemorrhage as a result of ante-mortem injuries. He found following ante-mortem injury on the body of deceased:-

"Incised would on left side of neck 7cm. above medial 1/3rd of clavicle size 5.5cm.x1cm. x 5cm deep tail facing toward 'anteriorly upto Hyoid cartilage (Left centered cutting cut at site of wound. Left centered vein cut)."

18. On 12.05.2004, P.W.-8, S.I. Hardev Singh, recorded statement of P.W.-2, Sarita Goyal widow of Sanjeev Kumar Goyal (deceased). He thereafter received information from informant regarding location of accused Kaushal Kishore. This Police Officer, accordingly, proceeded to the place of his presence and arrested aforesaid accused on 12.5.2004.

19. Investigating Officer, who was continuing with investigation of above mentioned case crime number, arrested unnamed accused Sadab on 26.05.2004. He then recorded statements of first informant, panch witnesses and others under section 161 Cr.P.C.

20. Forensic Science Laboratory, Agra submitted FSL report dated 23.10.2004 (Ext. Ka-73) in respect of articles i.e. clothes worn by deceased, mobile cover belonging to deceased, weapon of assault i.e. knife, back seat-cover of Maruti Van which had blood-stains and earth mixed with blood, that were sent for forensic examination. As per aforesaid FSL report, blood stains found on articles sent for forensic examination were of human blood. However, same were insufficient for classification.

21. Upon completion of investigation in terms of Chapter XII Cr.P.C., Investigating Officer P.W.-8, S.I. Hardev Singh formed an opinion to submit a charge-sheet against named as well as unnamed accused, who were arrested during course of investigation as their complicity was found in commission of crime under investigation. Accordingly, P.W.-8, S.I. Hardev Singh submitted charge-sheet dated 29.05.2004 (Ext. Ka-72) against accused-Vaibhav Jain, Kaushal Kishore Jain Suresh Pal, Rajendra Vohra and Sadab under Sections 302/149, 120B, 201, 364 and 427 I.P.C. Upon submission of aforesaid charge-sheet, cognizance was taken by C.J.M., Rampur vide cognizance taking order dated 21.6.2004. Thereafter, case was committed to Court of Sessions, as it was triable by Court of Sessions, vide committal order dated 4.2.2005, passed by CJM, Rampur. Consequently, Sessions Trial No. 76 of 2005 (State Vs.Vaibhav Jain and four others) under Sections 364, 302, 201, 120B and 427 I.P.C., P.S.-Bilaspur, District-Rampur, came to be registered.

22. Court below vide order dated 30.03.2005 framed five distinct charges against all the charge-sheetted accused i.e.

Vaibhav Jain, Kaushal Kishore, Suresh Pal, Rejendra Vohra and Sadab under Sections 302/149, 120B, 364,201 and 427 I.P.C.

23. Above named accused denied the charges so framed and demanded trial. Consequently, burden fell upon prosecution to prove the charges alleged against accused.

24. Prosecution in discharge of it's aforesaid burden and to bring home the charges leveled against accused, adduced eight witnesses namely:

I. P.W.-1, Abhay Kumar Goyal (First Informant).

II. P.W.-2, Sarita Goyal, Widow of Sanjeev Kumar Goyal (deceased).

III. P.W.-3, Anil Kumar (Independent Witness).

IV. P.W.-4, Vishal Anand (Independent witness).

V. P.W.-5, Satyaveer Singh (Police Constable).

VI. P.W.-6, Dr. H. K. Mitra (Doctor, who conducted postmortem of the body of deceased).

VII. P.W.-7, Om Prakash (Police Constable).

VIII. P.W.-8, S.I., Hardev Singh, S.H.O. P.S.-Bilaspur (Investigating Officer).

25. Apart from relying upon testimonies of aforesaid witnesses, prosecution further adduced documentary evidence which is tabulated herein below:

Ext. Ka.-1, Written report dated 07.05.2004 submitted by P.W.-1, Abhay Kumar Goyal, first informant/brother of deceased at P.S.-Kotwali Bilaspur, District-Rampur regarding death of Sanjeev Kumar Goyal (deceased).

Ext. Ka.-2, Recovery Memo dated 07.05.2004 regarding recovery of Rs. 7500/- cash and a Gold Chain from body of Sanjeev Kumar Goyal (deceased).

Ext. Ka.-3, Recovery Memo dated 07.05.2004 regarding recovery of Motorcycle of Sanjeev Kumar Goyal (deceased) bearing registration number UA-06-B-5780, which was of TVS Victor make.

Ext. Ka.-4, Recovery Memo dated 07.05.2004 regarding recovery of blood stained seat cover, from rear seat of Maruti Van bearing registration number UA-06B-9209 belonging to Sanjeev Kumar Goyal (deceased).

Ext. Ka.-5, Recovery Memo dated 07.05.2004, regarding recovery of weapon of assault i.e knife recovered on the pointing of named accused Vaibhav Jain.

Ext. Ka.-6 to Ext. Ka.-51, pages of diary of Sanjeev Kumar Goyal (deceased) from 2nd January to 16th February (M. Ext.-1).

Ext. Ka.-52, Account maintained by Sanjeev Kumar Goyal (deceased), regarding money lended to accused-Vaibhav Jain.

Ext. Ka.-53, Registration Certificate granted to Sanjeev Kumar Goyal (deceased) by Rural Engineering Services Authority, Dehradoon.

Ext. Ka.-54, Registration Certificate pertaining to Motorcycle of TVS Victor make having registration no. UA-06-B-5780 belonging to Sanjeev Kumar Goyal (deceased)

Ext. Ka.-55, Registration Certificate dated 13.07.2001 issued by Sales Tax Officer, Udham Singh Nagar.

Ext. Ka.-56, Certificate dated 20.11.2002, issued in favour of Pragya Traders, Krishi Utpadan Mandi Parishad, Uttranchal.

Ext. Ka.-57, Letter dated 26.8.2003 issued by Joint Director (Cantt.) Krishi Utpadan Mandi Parishad. Haldwani Nainital whereby registration granted to Pragya Traders was renewed.

Ext. Ka.-58, Registration Certificate of Maruti Van bearing no. UA-06B-9209 belonging to Sanjeev Kumar Goyal (Deceased)

Ext. Ka.-59, Notice dated 30.06.2003 issued by Superintending Engineer, PWD, Haldwani, Nainital.

Ext. Ka.-60, Post-mortem report dated 07.05.2004 pertaining to Sanjeev Kumar Goyal (deceased).

Ext. Ka.-61, Check F.I.R. of Case Crime No.315 of 2004 under Sections 302, 201, 427 I.P.C.

Ext. Ka.-62, Carbon Copy of G.D. regarding registration of F.I.R.

Ext. Ka.62A, Panchayatnama/inquest memo of Sanjeev Kumar Goyal (deceased) dated 07.05.2004.

Ext. Ka.-63, Letter dated 7.5.2004 sent by P.W.8- S.I. Hardev Singh to Medical Officer, Sadar Hospital, Rampur regarding Post-mortem of dead body of Sanjeev Kumar Goyal (deceased).

Ext. Ka.-64, Letter dated 07.05.2004 also sent by P.W.-8, S.I. Hardev Singh to medical officer Sadar Hospital, Rampur for post-mortem of dead body of Sanjeev Kumar Goyal (deceased).

Ext. Ka.-65, Letter dated 07.05.2004 sent by S.P. Rampur to Civil Surgeon, Civil Hospital, Rampur regarding Post-mortem of dead body of Sanjeev Kumar Goyal (deceased).

Ext. Ka.-66 Photograph of dead body.

Ext. Ka.-67, Specimen of Seal.

Ext. Ka.-68, Challan Lash.

Ext. Ka.-69, Recovery memo of plain earth and earth mixed with blood.

Ext. Ka.-70, Site Plan regarding place, where dead body of Sajeev Kumar Goyal (deceased), was found in Village Indarpur in front of Jhala of Sardar Mehar Singh near field of Sardar Gyan Singh.

Ext. Ka.-71, Site Plan/Map of place dated 07.06.2004 from where weapon of assault i.e. knife was recovered on pointing of accused Vaibhav Jain.

Ext. Ka.-72, Charge-sheet No. 83 dated 29.05.2004 submitted under Sections 364, 302, 201, 120B, 427 I.P.C. against accused-Vaibhav Jain, Suresh Pal, Rajendra Vohra, Kaushal Kishore Jain and Sadab

Ext. Ka.-73, FSL report dated 23.10.2004.

26. Prosecution also relied upon material exhibits namely M. EXT.-1 Diary of deceased, M. EXT.-2 to M. EXT.-6, Vest, Shirt, Pant, Underwear, Mobile-Cover of deceased, M. EXT.-7 Knife, M. EXT.-8 Plain Earth, M. EXT.-9, Earth mixed with blood, M. EXT.-10 Plain Earth, M. EXT.-11 Earth mixed with blood, M. EXT.-12 Ring, M. EXT.-13 Challa (Ring).

27. P.W.-1, Abhay Kumar Goyel in his testimony has detailed entire prosecution case, which fully corroborates the prosecution story as unfolded in F.I.R. This witness has clearly deposed that Vaibhav Jain (accused) was very close to Sanjeev Kumar Goyal (deceased) and therefore his widow Sarita Goyal, used to treat him like her brother. This witness has further deposed that Vaibhav Jain (accused) had taken huge amount of money from Sanjeev Kumar Goyal (deceased) which remained unpaid. Two days prior to occurrence, Vaibhav Jain (accused) had borrowed Maruti Van of deceased bearing Registration No. UA-06-B-9209. According to this witness, on 06.05.2004, Sanjeev Kumar Goyal (deceased) left his home at around 7.00PM after informing his wife Sarita Goyal (PW2) that he is going to Vaibhav Jain (accused) for demanding his money. He further states that P.W.-2 Sarita Goyal came to his house at around 8.30 PM, and informed that she received a phone call from her husband Sanjeev Kumar Goyal (deceased) telling her that he is sitting in Sindhu Bar Restaurant alongwith Vaibhav Jain (accused) and shall return late after inspecting his work at Rampura, therefore, they may take their dinner. As she felt suspicious on receiving aforesaid phone call, she requested P.W.-1 to find out whereabouts of her husband Sanjeev Kumar Goyal (deceased) and also his well being. On this anxiety expressed by wife of Sanjeev Kumar Goyel (deceased) P.W. 2 Sarita Goyal, this witness proceeded to Sindhu Bar Restaurant where he found Maruti Van and Motorcycle of his brother Sanjeev Kumar Goyal (deceased) parked outside and one Suresh Pal (co-accused) alongwith three other persons was seen standing near the same. He further states that he went inside aforesaid Restaurant and saw Sanjeev Kumar Goyal (deceased) sitting with Vaibhav Jain (accused). Both were drinking beer and having their dinner together. He has further deposed that having acquired location of his brother Sanjeev Kumar Goyal (deceased) and also his well being, he did not speak to aforesaid two persons, but returned to house of P.W.-2 Sarita Goyal and informed her accordingly. He has also stated that P.W.-2 on 06.05.2004 gave a phone call in the night at around 10.00 PM that Sanjeev Kumar Goyal (deceased) has not yet returned home. He, accordingly, went out in search of his brother Sanjeev Kumar Goyal (deceased). When all attempts to find his brother Sanjeev Kumar Goyal (deceased) failed, this witness went to house of Vaibhav Jain (accused) where his mother and wife jointly informed that Vaibhav Jain (accused) is not at home. He, thereafter, returned and informed P.W.-2 Sarita Goyal, accordingly.

28. He has also categorically deposed that a phone call was received by Sarita Goyal, P.W.-2 (widow of Sanjeev Kumar Goyal) from an unknown person at 2: 30 am in the night of 6/7-5.2004 informing her that motorcycle of Sanjeev Kumar Goyal (deceased) is lying abandoned near Baradari Railway Crossing in damaged condition. Aforesaid information was communicated by P.W.2 Sarita Goyal to P.W.1 Abhay Kumar Goyal. Upon above

communication by phone, this witness alongwith others immediately proceeded to Baradari Railway Crossing and at around 2.30 P.M. i.e in the night of 6/7.05.2004 found damaged motorcycle of his brother Sanjeev Kumar Goyal (deceased) lying abandoned there. This witness has further stated as to how thereafter he alongwith others continued to search for Sanjeev Kumar Goyal (deceased) and after five to six hours, found his dead body in village Indarpur in front of Jhala of Sardar Mehar Singh near field of Sardar Gyan Singh. Thereafter, this witness has deposed that he scribed the written report dated 07.05.2004 (Ext. Ka.-1) on basis of which, F.I.R. dated 07.05.2004 (Ext. Ka. 61) was lodged and registered as Case Crime No. 315 of 2004 under Sections 302, 201, 427 I.P.C.

29 . This witness goes on to state that after aforesaid F.I.R. was registered Police arrived on spot. Investigating officer recovered Rs. 7,500/- cash and a gold chain from person of deceased. Aforesaid recovery was witnessed by this witness. Thereafter, Investigating Officer P.W.8 prepared recovery memo of same dated 7.5.2004 (Ext. Ka-2). He further states that subsequently, Investigating officer recovered damaged motorcycle of Sanjeev Kumar Goyal (deceased) and prepared it's recovery memo dated 7.5.2004 (Ext. Ka-3). At this juncture, on information given by informant that some of the accused are present near Guest House of Irrigation Department, P.W.-8 S.I. Hardev Singh alongwith police team, P.W.-1, P.W.-4 and others, reached Kharanja (paved-road) near Guest House of Irrigation Department. He saw that three persons were washing a Maruiti Van which was later discovered to be belonging to Sanjeev Kumar Goyal (deceased). These three persons on seeing police attempted to run away but were overpowered. Thereafter, Investigating Officer, P.W.-8, arrested them in presence of P.W.-1. They were identified as named accused-Vaibhav Jain, Suresh Pal and one unnamed accused Rajendra Vohra. Maruti Van belonging to Sanjeev Kumar Goyal (deceased) was also recovered form their possession. Aforesaid accused at the time of arrest were washing the Maruti Van belonging to deceased and upon scrutiny the Investigating Officer in presence of P.W.-1 and P.W.-4 and others found that seat-cover of back-seat of Maruti Van was having blood stains which was cut off and sealed. P.W.-8, Investigating Officer, accordingly, prepared its recovery-memo Ext. Ka.-4. P.W.-1 is a witness of this recovery. Accordingly, Ext. Ka-1, Ext. Ka-2, Ext. Ka-3, Ext. Ka-4 and Ext. Ka-5 and the recoveries evidenced by same, have been proved by this witness.

30. This witness was contradicted by his own previous statement as recorded under Section 161 Cr.P.C. but defence failed to establish any contradiction in his testimony. He was also cross-examined by defence, but it failed to cull out any such statement from him on basis of which his testimony could be discarded on account of it being from an incredible witness and therefore, unreliable. As such, this witness has remained intact even after lengthy cross-examination by defence. The Defence has failed to establish any exaggeration, embellishment or contradiction in his testimony.

31. P.W.-2, Sarita Goyal is widow of Sanjeev Kumar Goyal (deceased). This witness in her deposition has categorically deposed that Vaibhav Jain (accused) was very intimate to her family and on account of aforesaid intimacy, she treated him like her brother. She has further deposed that

huge amount of money was taken by Vaibhav Jain (accused) from her husband Sanjeev Kumar Goyal (deceased). This witness has also stated that her husband Sanjeev Kumar Goyal (deceased) repeatedly demanded return of his money from Vaibhav Jain (accused). According to this witness on 6.5.2004 at 7:00 pm, her husband Sanjeev Kumar Goyal (deceased) left home stating that he is going to Vaibhav Jain (accused) for demanding return of his money. At around 8:30 pm, her husband gave a phone call informing her that he is sitting in Sindhu Bar Restaurant along with Vaibhav Jain (accused). Therefore, they may take their dinner as he shall return late at night. On receiving above phone call, this witness alleges to have become suspicious and accordingly she went to house of P.W.1 Abhay Kumar Goyal requesting him to locate the whereabouts and also find out well being of her husband Sanjeev Kumar Goyal (deceased). She then states that on this request, P.W.1 Abhay Kumar Goyal went to Sindhu Bar Restaurant. He found Maruti Van and Motorcycle of her husband Sanjeev Kumar Goyal (deceased) parked outside the restaurant and Suresh Pal (co-accused), driver of Vaibhav Jain (accused) was standing near the same. She also stated that P.W.1 went inside and saw her husband Sanjeev Kumar Goyal (deceased) and Vaibhav Jain (accused) sitting together. Both were drinking beer and having their dinner. She further states that P.W.1 disclosed aforesaid information to her after his return from Sindhu Bar Restaurant.

32. She has thereafter deposed that on 6.5.2004, Sanjeev Kumar Goyal (deceased) did not return home even till 10:30 pm. Accordingly, P.W.2 Sarita Goyal informed P.W.1 Abhay Kumar Goyal on telephone regarding aforesaid and requested P.W.1 to search for her husband Sanjeev Kumar Goyal (deceased). On this Abhay Kumar Goyal (P.W.1) along with others went out to search Sanjeev Kumar Goyal (deceased). When all attempts to locate Sanjeev Kumar Goyal (deceased) failed, P.W.1 alongwith others reached house of Vaibhav Jain (accused). On query being raised regarding location of Sanjeev Kumar Goyal (deceased), mother and wife of Vaibhav Jain (accused) jointly stated that Vaibhav Jain (accused) himself has not returned since he left home. P.W.1, accordingly, returned and informed P.W.2 of aforesaid.

33. She then states that she received a phone call at 2:30 am in the night of 6/7.5.2004 from an unknown person who informed that motorcycle of Sanjeev Kumar Goyal (deceased) is lying abandoned near Baradari Railway Crossing in damaged condition. On receiving this information, she immediately informed her Jeth (elder brother of her husband) P.W. 1 Abhay Kumar Goyal who along with others immediately rushed to Baradari Railway Crossing and found damaged motorcycle of Sanjeev Kumar Goyal (deceased) lying abandoned near Baradari Railway Crossing. She then states that thereafter P.W.1 and others searched for Sanjeev Kumar Goyal (deceased) and after some time they found dead body of her husband Sanjeev Kumar Goyal (deceased). At around 8:00 am she received information regarding murder of her husband. This witness has also stated that Money given by Sanjeev Kumar Goyal (deceased) to Vaibhav Jain (accused) was maintained in the form of an account Ext. Ka-52. She has also deposed that her husband Sanjeev Kumar Goyal (deceased) maintained a diary (Material Ext.-1) where all transactions relating to money lended to accused accused-Vaibhav Jain (accused) as

well as return made by Vaibhav Jain (accused) were entered.

34. This witness has proved Material Ext.-1- Diary of deceased. Pages from 2nd January to 16 February of aforesaid diary were marked as Ext. Ka-6 to Ext.-Ka-51, Ext. KA-52 in A/c maintained by deceased, in respect of money lended to Vaibhav Jain (accused). She also proved Ext Ka-53 i.e. Registration Certificate granted to Sanjeev Kumar Goyal by Rural Engineering Services Authority, Dehradun, Ext. Ka-54 Registration Certificate belonging to Sanjeev Kumar Goyal. Ext. Ka-55, Registration Certificate issued by Sales Tax Officer, Udham Singh Nagar. Ext. Ka-56 Certificate dated 20.11.2002, issued in favour of Pragya Traders by Krishi Utpadan Mandi Parishad, Uttranchal. Ext. Ka-57, letter dated 26.8.2003, issued by Joint Director (Cantt.) Krishi Utpadan Mandi Parishad Haldwani, Nainital, regarding renewal of registration granted to Pragya Traders. Ext. Ka- 58, Registration certificate of Maruti Van, Ext. Ka-59 Notice dated 30.6.2003, issued by Superintending Engineer P.W.D Haldwani, Nainital. Aforesaid documents were filed by P.W. 2 in court at the time of her deposition.

35. The defence objected to the filing of documents by P.W.2 i.e. Material Ext-2, Ext. KA-52 etc. during course of her deposition before Court below. Objection regarding admissibility of such documents was also raised by defence. However, it was held by Court below that question of admissibility of above documents shall be decided at later stage. Court below has, however, in the impugned judgement held that aforesaid documents are admissible in evidence.

36. This witness was specifically cross-examined by defence regarding Material Ext.-1 and other exhibits. However this witness categorically stated that she recognizes handwriting of her husband Sanjeev Kumar Goyal (deceased) and entries in the diary (Material Ex-1) are in his handwriting. She has further stated that around Rs. 5 to 6 lakhs were taken by accused-Vaibhav Jain (accused) from her husband.

37. However, defence failed to dislodge this witness even after cross examination. His testimony remains devoid of any contradiction, embellishment or exaggeration. As such this witness remains credible and reliable and consequently, her testimony is worthy of trust.

38. P.W.-3, Anil Kumar is an independent witness. He has deposed that while standing near check post near Rudravilash, he saw Maruti Van No. UA-06B-9209 belonging to Sanjeev Kumar Goyal (deceased) driven by Suresh Pal (co-accused). In the rear seat of aforesaid Maruti Van, Vaibhav Jain (accused), Sadab (co-accused) and Rajendra Vohra (co-accused, who is a waiter at Sindhu Bar Restaurant), were seen sitting alongwith Sanjeev Kumar Goyal (deceased). He also stated that aforesaid Maruti Van was being driven by Suresh Pal (co-accused and driver of Vaibhav Jain). Behind Maruti Van, Motorcycle belonging to Sanjeev Kumar Goyal (deceased) bearing No. (UA-O6B-5780) was being driven by Kaushal Kishore (co-accused and brother-in-law of accused-Vaibhav Jain). The tesimony of this witness is relevant only for the fact that the deceased was last seen in company of accused persons at 10-10.30 PM on 06.05.2004. This witness has also stated the factum regarding lending of money by Sanjeev Kumar Goyal (deceased) to Vaibhav Jain (accused).

39. Accused Sadab was put to identification before this witness. According to this witness, the accused Sadab produced before him is not that

Sadab who was seen sitting by him in Maruti Van of deceased alongwith other co-accused and deceased.

40. This witness was crossed examined by defence regarding his credibility and reliability particularly his seeing deceased in company of accused persons in his Maruti Van late at night. Court below, however, believed this witness and accordingly, relied upon his testimony.

41. P.W.-4, Vishal Anand, is also an independent witness. This witness has also stated that on 6.5.2004, at around 9:30 pm, he was standing at Indra Crossing when he saw Maruti Van of Sanjeev Kumar Goyal (deceased). According to this witnees, Maruti Van of deceased was going from Rudra Pur to Bilaspur and was being driven by Suresh Pal (co-accused) driver of Vaibhav Jain (accused). On the rear seat of this vehicle, Sadab (co-accused), Vaibhav Jain (accused) and Rajendra Vohra (co-accused) were seen sitting along with Sanjeev Kumar Goyal (deceased). Following Maruti Van of deceased was motorcycle of deceased which was being driven by Kaushal Kishore (co-accused).

42. This witness then goes on to depose as to how information was received regarding motorcycle of deceased lying abandoned near Baradari Railway Crossing. On this information, this witness accompanied P.W.1 to Baradari Railway Crossing. He has then deposed regarding recovery of cash and gold chain from person of deceased, recovery of motorcycle of deceased, arrest of accused Vaibhav Jain, Suresh Pal and Rajendra Vohra, recovery of Maruti Van belonging to deceased followed by recovery of blood stains on the rear seat cover of Maruti Van (Ext. Ka-4). This witness is also a witness of recovery as evidenced, vide Recovery memo dated 7.5.2004, (Ext. Ka-4) which relates to recovery of blood stained back seat cover of Maruti Van and another recovery evidenced, vide Recovery memo dated 7.5.2020 (Ext. Ka-5) regarding recovery of weapon of assault i.e. knife.

43. For the purpose of identification, accused Sadab was put to identification before this witness. However, according to this witness, the accused Sadab produced before him, is not that Sadab who was seen sitting by him in Maruti Van of deceased along with other co-accused and deceased.

44. This witness was further corss-examined by defence to doubt his credibility and reliability regarding last seen. Court below has, however, believed this witness and accordingly relied upon his testimony.

45. P.W.-5, Constable/775 Satyaveer Singh was posted at P.S Bilaspur, District Rampur. This witness sealed the dead body of deceased. He along with constable Ram Dhani carried dead body of deceased for post mortem. After post-mortem of dead body of deceased was conducted, they brought the dead body of the deceased at Civil Hospital, Rampur. This witness was cross-examined by defence regarding timing of commencement of inquest/panchayatnama as well as recovery from the person of deceased. However, nothing adverse could be culled out from this witness. As such, his testimony remained intact.

46. P.W.-6. Dr. H.K. Mitra, was posted as Orthopedic Surgeon at District Hospital, Rampur. He conducted post-mortem of the body of deceased and

prepared post-mortem report dated 07.05.2004 (Ext. Ka.-60). He proved the same. According to this witness, following ante-mortem injuries were found on the body of deceased:

"Incised would on left side of neck 7cm. above medial 1/3rd of clavicle size 5.5cm.x1cm. x 5cm deep tail facing toward 'anterior only upto Hyoid cartilage (Left created cutting cut at site of wound. Left created vein cut".

47. On internal examination, this witness found that carotid artery of deceased was cut and both ends were separate. There was gap of about 1cm. between the two ends. About 200ML of semi digested food was present in stomach. Digested food was present in small intestine. Faecal material alongwith gas was present in large intestine. Gall-bladder was full. Urine bladder was empty.

48. According to this witness, deceased was aged about 32 years and death had occurred one day prior to post-mortem. In the opinion of this witness, cause of death of deceased was asphyxia and haemorrhage on account of ante-mortem injuries. This witness further opined that death could occur within one and a half hour from the injuries sustained by deceased.

49. This witness was cross-examined by defence, particularly on behalf of accused-Vaibhav Jain. However, defence could not dislodge his testimony. As such, this witness remained intact.

50. P.W.-7, C-256, Om Prakash was posted as Police Constable at P.S. Bilaspur District Rampur on date of occurrence. He is scribe of F.I.R. (Ext. Ka.-61) and has proved the same. He has further proved G.D. Entry No. 21 dated 7.5.2004 regarding entry of written report dated 7.5.2004 in General Diary of above police station. He has also proved Carbon copy of G.D. entry (Ext. Ka-62). This witness was cross-examined by defence in respect of persons who accompanied first informant P.W. 1 Abhay Kumar Goyal to Police Station for lodging F.I.R. He was further cross-examined with regard to time of departure of S.H.O. P.S. Bilaspur i.e. P.W.-8, S.I. Hardev Singh to place of occurrence on 7.5.2004. Apart from above, this witness was specifically cross-examined regarding place of lodging of F.I.R. i.e. P.S. Bilaspur inasmuch as according to defence, occurrence took place within jurisdiction of P.S. Rudrapur. On all the above mentioned three issues, on which this witness was cross-examined, he remained intact. As such, prosecution failed to dislodge this witness.

51. P.W.-8, S.I., Hardev Singh is Investigating Officer of the crime giving rise to present criminal proceedings. At the time of occurrence, this witness was posted as Station House Officer, Police Station-Bilaspur, District-Rampur.

52. After F.I.R. dated 07.05.2004 was registered as Case Crime No. 315 of 2004 under Sections 302, 201, 427 IPC, P.S. Bilaspur, District-Rampur, this witness appointed himself as Investigating Officer. He reached place of occurrence on 07.05.2004 itself and found dead body of Sanjeev Kumar Goyal (deceased) in Village Indarpur in front of Jhala of Sardar Mehar Singh near field of Sardar Gyan Singh. He recovered Rs. 7,500/- cash and a gold chain from person of deceased. He took possession of aforesaid articles and gave them in Supurdagi of the brother of

deceased/first informant Abhay Kumar Goyal (P.W.-1). He also prepared recovery memo of same dated 07.05.2004 (Ext. Ka-2). This witness also recovered motorcycle bearing registration no. UA-06B-5780 of TVS Victor make belonging to Sanjeev Kumar Goyal (deceased), which was lying abandoned near Baradari Railway Crossing in damaged condition. Same was given in Supurdagi of P.W.-1 Abhay Kumar Goyal. This witness prepared recovery memo dated 07.04.2005 (Ext. Ka-3) in respect of above. On 07.05.2004, this witness received information regarding presence of some of the accused near Guest House of Irrigation Department. He, accordingly, proceeded to arrest them. Seeing Police Party accused persons present tried to flee, but were overpowered. Accordingly, this witness arrested three persons who were identified as named accused-Vaibhav Jain and Suresh Pal and one unnamed accused namely Rajendra Vohra. From aforesaid accused, he recovered Maruti Van belonging to Sanjeev Kumar Goyal (deceased), which was bearing Registration No. UA-6B-9209 and was being washed by them to remove the blood stains on it. He further discovered that rear seat of aforesaid vehicle was having blood stains. He, accordingly, cut the same and sealed it. He also prepared its recovery memo dated 07.05.2004 (Ext. Ka-4). To establish place of occurrence, he recovered plain earth as well as earth mixed with blood from that place and sealed them separately. The recovery memo dated 07.05.2004 in respect of above (Ext. Ka.-69) was prepared. This witness also recovered the knife used in commission of offence on pointing of named and arrested accused-Vaibhav Jain. He, accordingly, prepared recovery memo of above dated 07.05.2004 (Ext. Ka.-5). He further prepared map of place from where weapon of assault (knife) was recovered (Ext. Ka.-71). On pointing of first informant, this witness prepared map regarding place of occurrence (Ext. Ka.-70). After aforesaid recoveries were made, this witness got inquest/panchayatnama of deceased performed. After completion of inquest proceeding, he prepared inquest report/ panchayatnama (Ext. Ka.-62). He, thereafter, prepared detailed Police Scroll i.e. Ext. Ka.63 letter dated 7.5.2004 sent by P.W.8- S.I. Hardev Singh to Medical Officer, Sadar Hospital, Rampur regarding Post-mortem of dead body of deceased Sanjeev Kumar Goyal. Ext. Ka.-64, Letter dated 07.05.2004 also sent by P.W.-8, S.I. Hardev Singh to Medical Officer Sadar Hospital, Rampur for post-mortem of dead body of deceased. Ext. Ka.-66 Photograph of dead body. Ext. Ka.-67, Specimen of Seal. Ext. Ka.-68, Challan Lash. This witness on the information of informant arrested accused Kaushal Kishore on 12.05.2004. On 26.05.2004, this witness arrested accused Sadab. Upon completion of investigation, this witness submitted charge-sheet dated 29.5.2004 (Ext. Ka-72) against all the five accused.

53. P.W.-8, accordingly, proved Ext. 62A-Panchyatnama of deceased Ext. Ka.63. Letter by P.W.-8, S.I. Hardev Singh to Medical Officer, Sadar Hospital, Rampur regarding post-mortem of deceased. Ext. Ka.64-Letter sent by P.W.-8, S.I.Hardev Singh to Medical Officer, Sadar Hospital, Rampur, regarding post-mortem of deceased. Ext.Ka. 65- Letter dated 07.05.2004 sent by S. P. Rampur to Civil Surgeon, Civil Hospital Rampur, regarding post-mortem of dead body of deceased. Ext. Ka. 66-Photograph of dead body (Photolash). Ext. Ka. 67-Specimen of Seal. Ext. Ka.68- Challan Lash. Ext. Ka.69-Recovery memo of plain earth and earth mixed with blood. Ext. Ka.70-Site plan of

the place where dead body of deceased was found. Ext. Ka.71-Site plan of the place where weapon of assault i.e. Knife was discovered on pointing of accused Vaibhav Jain. Ext. Ka.-72, Charge-sheet No. 83 dated 29.05.2004 submitted against all the accused under Sections 364, 302, 201, 120B, 427 I.P.C.

54. This witness was cross-examined by defence regarding lodging of F.I.R. of crime in question at wrong place, non-mentioning of names of accused in Panchayatnama, deficiency in investigation regarding taking of money by accused-Vaibhav Jain from deceased, timing regarding departure of this witness from police station.

55. In spite of detailed cross-examination, this witness could not be dislodged by defence, as such his testimony has remained intact.

56. The accused neither adduced any documentary evidence to prove their innocence nor they produced any witness, nor themselves appeared in witness box to prove their innocence or false implication in the crime in question. Thus, only version of occurrence is the prosecution version.

57. After prosecution evidence was over, accused were examined under Section 313 Cr.P.C. All the incriminating materials/adverse circumstances were put to them one by one. The accused denied most of the questions put to them one by one by repeatedly saying that it is false.

58. On behalf of accused, it was urged before court below that no motive can be attached to them for committing the alleged crime. The M. Ext.-1, Diary is a forged document and cannot be relied upon. P.W.-1, Abhay Kumar Goyal, did not see the accused at Sindhu Bar Restaurant. Maruti Van of deceased was not technically examined to prove that it was in driving condition. Investigation is defective and therefore accused are liable to be acquitted of the charges levelled against them. No identification parade of accused was undertaken by Investigating Officer. P.W.-3, Anil Kumar and P.W.-4, Vishal Anand are chance witnesses. They are also interested witnesses and tutored. Material witnesses namely Owner and Manager of Sindhu Bar Restaurant have not been examined to prove the last seen theory. The recovery of weapon of assault i.e. knife on the alleged pointing of accused-Vaibhav Jain, is forged and therefore, cannot be relied upon. Statement of witnesses of recovery of weapon of assault is contradictory. Testimony of Doctor, who conducted autopsy of body of deceased namely Dr. H.K. Mitra, P.W.-6 is incomplete and therefore cannot be relied upon. Investigation should have been conducted by Police of police station Rudrapur, Uttranchal where the deceased resided. As such, entire investigation is without jurisdiction. There is serious contradiction in the statements of two eye-witnesses of last seen namely P.W.-3 Anil Kumar and P.W.-4 Vihasl Anand, who have deposed in favour of prosecution that Sanjeev Kumar Goyal (deceased) was last seen in company of accused, as such their testimony is not worthy of reliance. Crime in question has been committed by P.W.-1 Abhay Kumar Goyal, himself, who is brother of Sanjeev Kumar Goyal (deceased), so that entire property falls in his share. P.W.-2, Sarita Goyal is widow of deceased and is, therefore, an interested witness. Her testimony is, therefore, not worthy of credit. Lastly, it was submitted that no motive can be assigned to one of the accused Kaushal Kishore regarding commission of alleged crime and therefore he is liable to be acquitted.

59. Court below before proceeding to evaluate aforesaid submissions urged on behalf of accused in light of circumstances forming chain of events leading to occurrence, reiterated parameters under which case in hand has to be examined. It, accordingly, held that as case in hand is one of circumstantial evidence, therefore, same has to be decided as per mandate of law laid down by Apex Court in **Sharad Birdhichand Sarda, Vs. State of Maharashtra, AIR 1984 Supreme Court 1622.**

60. Submissions urged on behalf of accused were evaluated by court below in the light of evidence on record as well as law as settled by Supreme Court on each of the issues so raised.

61. Since case in hand is related to circumstantial evidence, Court below, accordingly, synchronized circumstances, which accordingly to Court below form the complete chain of events in proximity to time and manner of occurrence and to establish that in case the said circumstance are proved, same shall point at the guilt of each of accused and no other hypothesis:

62. Following circumstances were noticed by Court below against accused-Vaibhav Jain, Suresh Pal and Rajendra Vohra, in reference to above:

i. Accused-Vaibhav Jain owed huge amount of money from Sanjeev Kumar Goyal (deceased) which he had taken on loan from deceased.

ii. For return of lended amount Sanjeev Kumar Goyal (deceased) had repeatedly reminded accused-Vaibhav Jain.

iii. Amount lended by Sanjeev Kumar Goyal (deceased) to accused accused-Vaibhav Jain was not returned by him to Sanjeev Kumar Goyal (deceased).

iv. Three days before the occurrence, accused-Vaibhav Jain had borrowed car (of Maruti Van make) bearing no. UA 06 B 9209 belonging to Sanjeev Kumar Goyal (deceased).

v. On 06.05.2004, Sanjeev Kumar Goyal (deceased) went out after telling his wife PW-2 Sarita Goyal that he was going to accused-Vaibhav Jain, for demanding retrun of lended money.

vi. On 06.05.2004, Sanjeev Goyal (deceased) directed his wife PW-2 Sarita Goyal on telephone that he was having dinner with accused-Vaibhav Jain.

vii. Suspecting something foul, PW-2 Sarita Goyal told PW-1 Abhay Kumar Goyal to go and check Sindhu Bar Restaurant.

viii. When PW-1 Abhay Kumar Goyal reached Sindhu Bar Restaurant, he found Sanjeev Kumar Goyal (deceased) and accused-Vaibhav Jain sitting together inside the restaurant. They were enjoying beer while taking their meal.

ix. Outside Sindhu Bar Restaurant, Maruti Van, bearing no. UA 06B 9209 of Sanjeev Goyal and motorcycle (of TVS Victor make) bearing no. UA 06B 5780 belonging to Sanjeev Kumar Goyal (deceased) were found parked.

x. Near aforementioned Maruti Van parked outside Sindhu Bar Restaurant, co-accused Sureshpal and 3 other persons were standing.

xi. On 06.05.2004 at 10:30 p.m., P.W.-2 Sartia Goyal w/o Sanjeev Kumar Goyal (deceased) made a phone call to P.W.-1, Abhay Kumar Goyal that Sanjeev

Kumar Goyal (deceased) has not returned home by then.

xii. P.W. 1 Abhay Kumar Goyal along with other persons went out in search of Sanjeev Kumar Goyal (deceased), but did not find him.

xiii. P.W.-1, Abhay Kumar Goyal went to house of accused-Vaibhav Jain and Vaibhav's wife/mother told him that Vaibav has not returned home form the time he had left. Accused-Vaibhav Jain was thus found absent from his house.

xiv. On the intervening night of 06.05.2004/07.05.2004 at 2:00 am, an unidentified person gave a phone call informing P.W. 2 Sarita Goyal that motorcycle of Sanjeev Kumar Goyal (deceased) is lying abandoned near Railway line at Baradari Railway crossing.

xv. In the night itself, PW-1 Abhay Kumar Goyal along with others went to Baradari Railway Crossing i.e. at 2.30 P.M. on 06/7.05.2004 where he found damaged motorcycle of Sanjeev Kumar Goyal (deceased) lying abandoned.

xvi. Body of Sanjeev Kumar Goyal was discovered in the field of Sardar Mehar Singh on 09.05.2004 at 8.30AM. A cut injury was found on the neck of the deceased.

xvii. Deceased Sanjeev Goyal was last seen by PW-3 Amit Kumar and PW-4 Vishal Anand at 9:30-10:00 p.m. in the company of accused persons in former's Maruti Van bearing no. UA 06B 9209.

xviii. Body of deceased Sanjeev Kumar Goyal was found in the field of Mehar Singh at 8:30 a.m. on 07.05.2004. Thereafter, report of the occurrence was lodged, and subsequent thereto investigating officer reached place of occurrence.

xix. On the paved road in front of irrigation department at Vilaspur, accused persons were found washing blood stains present on Maruti van bearing no. UA 06 B 9209, belonging to Sanjeev Kumar Goyal (deceased).

xx. Accused persons Vaibhav Jain, Sureshpal and Rajendra Vohra, tried to flee from the spot after seeing PW-8 Investigating Officer Shri Hardev Singh and other police personnel, but they were apprehended. Attempt made by accused person to flee from the spot too, is an additional circumstance (Dhananjay Chaterjee Vs West Bengal, 1994 (2), SCC, page 220).

xxi. On back-seat of Maruti Van bearing no. UA 06B 9209, blood stains were found, which after having been examined in forensic laboratory, were stated to be of human blood.

xxii. On 08.05.2004, a knife on pointing of accused-Vaibhav Jain, was found a little farther from the spot where body of Sanjeev Kumar Goyal (deceased) was recovered.

xxiii. On being examined by Forensic Science Laboratory, blood stains on recovered knife were tested and found to be human blood.

63. **Circumstances against Kaushal Kishore Jain:**

i. He is behnoi (sister's husband) of accused-Vaibhav Jain.

ii. On Ext. 40 and Ext. 41 of Material Ext. - 2 (diary), names of accused persons have been entered.

iii. The motorcycle by which Sanjeev Kumar Goyal (deceased) went, was seen at Sindhu Bar Restaurant. On this very motorcycle, this accused was seen going.

iv. Following the van through which the deceased was being taken away by accused persons, this accused was seen riding the motorcycle.

v. The motorcycle was found near Baradari Railway Crossing at 2:30 a.m.

vi. The motorcycle was found on Rudrapur-Vilaspur Road, which is about 2½ KM from the spot where body of Sanjeev Kumar Goyal (deceased) was found (PW-1 Abhay Kumar 'page 28').

64. None of the submissions urged on behalf of accused were found cogent enough in the back drop of circumstances noted by Court below (as according to Court below they not only form a complete chain of events in proximity to time and manner of occurrence but also point at the guilt of accused) to dislodge the prosecution case. Consequently, court below by means of impugned judgement and order dated 09.11.2006 convicted and sentenced accused Vaibhav Jain, Kaushal Kishore Jain, Suresh Pal and Rajendra Vohra under Sections 302, 120B, 364, 201 and 427 I.P.C. One of the accused namely Sadab was acquitted of the charges levelled against him. Thus feeling aggrieved by aforesaid judgement and order dated 09.11.2006 passed by court below, the four convicted and sentenced accused have preferred above mentioned four criminal appeals, before this Court.

65. We may point out here that accused-appellant Kaushal Kishore Jain has been enlarged on bail vide order dated 22.11.2006 whereas, accused-appellant, Rajendra Vohra, has been enlarged on bail vide order dated 20.02.2007. Accused-appellant-Vaibhav Jain and Suresh Pal have been denied bail vide order dated 13.08.2009. As such, these two accused-appellants are in jail since 9.11.2006.

66. Case in hand is one of circumstantial evidence. What are the parameters for deciding a case based on circumstantial evidence has been settled in the celebrated case of **Sharad Birdhichand Sarda (supra)** which remains the locus clasicus on the point wherein following has been observed in paragraphs 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158 and 159.

"148. We now come to the nature and character of the circumstantial evidence. The law on the subject is well settled for the last 6-7 decades and there have been so many decisions on this point that the principles laid down by courts have become more or less axiomatic.

149. The High Court has referred to some decisions of this Court and tried to apply the ratio of those cases to the present case which, as we shall show, are clearly distinguishable. The High Court was greatly impressed by the view taken by some courts, including this Court, that a false defence or a false plea taken by an accused would be an additional link in the various chain of circumstantial evidence and seems to suggest that since the appellant had taken a false plea that would be conclusive, taken along with other circumstances, to prove the case. We might, however, mention at the outset that this is

not what this Court has said. We shall elaborate this aspect of the matter a little later.

150. It is well settled that the prosecution must stand or fall on its own legs and it cannot derive any strength from the weakness of the defence. This is trite law and no decision has taken a contrary view. What some cases have held is only this: where various links in a chain are in themselves complete than a false plea or a false defence may be called into aid only to lend assurance to the Court. In other words, before using the additional link it must be proved that all the links in the chain are complete and do not suffer from any infirmity. It is not the law that where is any infirmity or lacuna in the prosecution case, the same could be cured or supplied by a false defence or a plea which is not accepted by a Court.

151. Before discussing the cases relied upon by the High Court we would like to cite a few decisions on the nature, character and essential proof required in a criminal case which rests on circumstantial evidence alone. The most fundamental and basic decision of this Court is Hanumant v. The State of Madhya Pradesh, 1952 SCR 1091: (air 1952 sc 343) This case has been uniformly followed and applied by this Court in a large number of later decisions uptodate, for instance, the cases of Tufail (Alias) Simmi v. State of Uttar Pradesh, (1969) 3 SCC 198 and Ramgopal v. Stat of Maharashtra, AIR 1972 SC 656. It may be useful to extract what Mahajan, J. has laid down in Hanumant's case (at pp. 345-46) (supra):

"It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground far a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

152. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. *There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved' as was held by this Court in Shivaji Sahabrao Bobade & Anr. v. State of Maharashtra('1973) 2 scc 793 (AIR 1973 SC 2622) where the following observations were made:*

"Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."

(2) ***The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say. they should not be explainable on any other hypothesis except that the accused is guilty, (3) the circumstances should be of a conclusive nature and tendency.***

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

153. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence.

154. t may be interesting to note that as regards the mode of proof in a criminal case depending on circumstantial evidence, in the absence of a corpus deliciti, the statement of law as to proof of the same was laid down by Gresson, J. (and concurred by 3 more Judges) in The King v. Horry, (1952) NZLR 111, thus:

"Before he can be convicted, the fact of death should be proved by such circumstances as render the commission of the crime morally certain and leave no ground for reasonable doubt: the circumstantial evidence should be so cogent and compelling as to convince a jury that up on no rational hypothesis other than murder can the facts be accounted for."

155. Lord Goddard slightly modified the expression, morally certain by 'such circumstances as render the commission of the crime certain'.

156. his indicates the cardinal principle' of criminal jurisprudence that a case can be said to be proved only when there is certain and explicit evidence and no person can be convicted on pure moral conviction. Horry's case (supra) was approved by this Court in Anant Chintaman Lagu v. The State of Bombay (1960) 2 SCR 460: (AIR 1960 SC 500). Lagu's case as also the principles enunciated by this Court in Hanumant's case (supra) have been uniformly and consistently followed in all later decisions of this Court without any single exception. To quote a few cases Tufail's -Tufail's case (1969 (3) SCC 198) (supra). Ramgopal's case (AIR 1972 SC 656) (supra). Chandrakant Nyalchand Seth v. State of Bombay (Criminal Appeal No. 120 of 1957 decided on 19.2.58), Dharmbir Singh v. The State of Punjab (Criminal Appeal No. 98 of 1958 decided on 4.11.1958). There are a number of other cases where although Hanumant's case has not been expressly noticed but the same principles have been expounded and reiterated, as in Naseem Ahmed v. Delhi Administration (1974) 2 SCR 694 (696); (AIR 1974 SC 691) at (693), Mohan Lal Pangasa v. State of U.P., AIR 1974 SC 1144 (1146), Shankarlal Gyarasilal Dixit v. State of Maharashtra, (1981) 2 SCR 384 (390): (AIR 1981 SC 675 at [/ 767) amd M.C. Agarwal v. State of Maharashtra (1963) 2 SCR 405 (419); (AIR 1963 SC 200 at p.206) a five-Judge Bench decision.

157. It may be necessary here to notice a very forceful argument submitted by the Additional Solicitor-General relying

on a decision of this Court in Deonandan Mishra v. The State of Bihar (1955) 2 SCR 570 (582): (AIR 1955 SC 801 at p. 806) to supplement this argument that if the defence case is false it would constitute an additional link so as to fortify the prosecution case. With due respect to the learned Additional Solicitor General we are unable to agree with the interpretation given by him of the aforesaid case, the relevant portion of which may be extracted thus:

"But in a case like this where the various links as started above have been satisfactorily made out and the circumstances point to the appellant as the probable assailant, with reasonable definiteness and in proximity to the deceased as regards time and situation- such absence of explanation of false explanation would itself be an additional link which completes the chain."

158. t will be seen that this Court while taking into account the absence of explanation or a false explanation did hold that it will amount to be an additional link to complete the chain but these observations must be read in the light of what this Court said earlier, viz., before a false explanation can be used as additional link, the following essential conditions must be satisfied:

(1) various links in the chain of evidence led by the prosecution have been satisfactorily proved.

(2) the said circumstance point to the guilt of the accused with reasonable definiteness, and

(3) the circumstance is in proximity to the time and situation.

159. If these conditions are fulfilled only then a court can use a false explanation or a false defence as an additional link to lend an assurance to the court and not otherwise. On the facts and circumstances of the present case, this does not appear to be such a case. This aspect of the matter was examined in Shankarlal's case (supra) where this Court observed thus:

"Besides, falsity of defence cannot take the place of proof of facts which the prosecution has to establish in order to succeed. A false plea can at best be considered as an additional circumstance, if other circumstances point unfailingly to the guilt of the accused."

(Emphasis added)

67. Above noted legal proposition which now stands crystallized as an axiomatic principle has been reiterated in **Rohtash Kumar vs State of Haryana, reported in 2013 (14) SCC 434.** Paragraphs 6 and 7 of aforesaid judgement are relevant for the controversy in hand and accordingly, same are reproduced here under:-

"6. The present case is of circumstantial evidence, as there exists no eye-witness to the occurrence. The primary issue herein involves determination of the requirements for deciding a case of circumstantial evidence.

7. This Court, in R. Shaji v. State of Kerala, AIR 2013 SC 651 has held, "the prosecution must establish its case beyond reasonable doubt, and cannot derive any strength from the weaknesses in the defence put up by the accused. However, a false

defence may be brought to notice, only to lend assurance to the Court as regards the various links in the chain of circumstantial evidence, which are in themselves complete. The circumstances on the basis of which the conclusion of guilt is to be drawn, must be fully established. The same must be of a conclusive nature, and must exclude all possible hypothesis, except the one to be proved. Facts so established must be consistent with the hypothesis of the guilt of the accused, and the chain of evidence must be complete, so as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused, and must further show, that in all probability, the said offence must have been committed by the accused." (See also: Sharad Birdhichand Sarda v. State of Maharashtra, AIR 1984 SC 1622; and Paramjeet Singh @ Pammu v. State of Uttarakhand, AIR 2011 SC 200). "

68. Recently Apex Court has also considered this very issue in State of **Himanchal Pradesh Vs. Raj Kumar reported in 2018 (2) SCC 69**, wherein it has been held that an inference of guilt can be drawn in a case based on circumstantial evidence. Following has been observed by Court in paragraphs 9 and 10 of the judgement which are extracted here under:-

"9. Prosecution case is based on circumstantial evidence. It is well settled that in a case based on circumstantial evidence, the circumstances from which an inference of guilt is sought to be drawn must be cogently and frmly established and that those circumstances must be conclusive in nature unerringly pointing towards the guilt of the accused. Moreover all the circumstances taken cumulatively should form a complete chain and there should be no gap left in the chain of evidence. Further the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence.

10. In a case, based on circumstantial evidence, the inference of guilt can be drawn only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused. In Trimukh Maroti Kirkan V. State of Maharashtra (2006) 10 SCC 681, it was held as under:-

"12. .....The normal principle in a case based on circumstantial evidence is that the circumstances from which an inference of guilt is sought to be drawn must be cogently and frmly established; that those circumstances should be of a defnite tendency unerringly pointing towards the guilt of the accused; that the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and they should be incapable of explanation on any hypothesis other than that of the guilt of the accused and inconsistent with their innocence."

69. Thus in the light of caution given by Apex Court, as noted herein above, which must be born in mind while dealing with a case based on circumstantial evidence, we proceed to evaluate the submissions urged by counsel for appellants to find out whether prosecution has successfully discharged it's burden to establish motive against accused appellants to commit the crime, the complete chain of circumstances in proximity to time and situation leading to occurrence and further if proved point at the guilt of the accused

and no other hypothesis. But before we undertake aforesaid exercise, it will be prudent on our part to crystallize the circumstances ourself which complete the chain of events and are required to be dealt with to determine the guilt of accused appellants if any. According to us following circumstances form the chain of circumstance in proximity to time and manner of occurrence and if proved, shall determine the guilt of accused appellants, if any.

(I) P.W.1 Abhay Kumar Goyal is elder brother of Sanjeev Kumar Goyal (deceased).

(ii) Accused Kaushal Kishore Jain is Jija (sister's husband) of accused-Vaibhav Jain.

(iii) Relationship between accused-Vaibhav Jain and Sanjeev Kumar Goyal (deceased) was very intimate. As such, Sarita Goyal (P.W.-2) widow of Sanjeev Kumar Goyal used to call accused -Vaibhav Jain as her brother.

(iv) Accused-Vaibhav Jain took sufficient amount of money from Sanjeev Kumar Goyal (deceased).

(v) Amount taken by accused-Vaibhav Jain from Sanjeev Kumar Goyal (deceased) was not returned by him.

(vi) On 5.5.2004, i.e. two days prior to lodging of F.I.R., accused-Vaibhav Jain borrowed Maruti Van of Sanjeev Kumar Goyal (deceased) which was bearing Registration No. UA-63-9709.

(vii) In the evening of 6.5.2004 at 7:00 pm Sanjeev Kumar Goyal (deceased) left his home after informing his wife Sarita Goyal PW 2 that he is going to accused-Vaibhav Jain for demanding return of his money taken by him.

(viii) Subsequently, on 6.5.2004, Sanjeev Kumar Goyal (deceased) gave a phone call to his wife, Sarita Goyal PW 2 that he is having dinner with accused-Vaibhav Jain at Sindhu Bar restaurant and will return late after inspecting his work at Rampura, as such they may take their dinner.

(ix) After receiving aforesaid phone call from her husband Sanjeev Kumar Goyal (deceased), P.W.2 Sarita Goyal, wife of Sanjeev Kumar Goyal became suspicious. She accordingly went to P.W.1, Abhay Kumar Goyal informing him of the phone call given by Sanjeev Kumar Goyal (deceased) and requested P.W.1 Abhay Kumar Goyal to go to Sindhu Bar restarurant and enquire about her husband Sanjeev Kumar Goyal (deceased).

(x) Pursuant to the anxiety expressed by P.W.2 Sarita Goyal, wife of Sanjeev Kumar Goyal (deceased) as noted above P.W.1 Abhay Kumar Goyal, came to Sindhu Bar restaurant on 6.5.2004 a little after 8.30PM. He found motorcycle of Sanjeev Kumar Goyal (deceased) which was of TVS Victor make bearing registration No. UA-63-9709 as well as his Maruti Van bearing Registration No. UA-6B-9209 parked outside Sindhu Bar Restaurant. Aforesaid Motorcycle was parked near Maruti Van, belonging to Sanjeev Kumar Goyal (deceased), and accused Suresh Pal and three others, were standing near the same.

(xi) P.W.-1, Abhay Kumar Goyal went inside Sindhu Bar Restaurant and saw Sanjeev Kumar Goyal (deceased) and

accused-Vaibhav Jain, were sitting together drinking beer and having their dinner.

(xii) After having acquired the whereabouts and well being of his brother Sanjeev Kumar Goyal (deceased), P.W.1 Abhay Kumar Goyal came to house of his brother and disclosed the location and also well being of Sanjeev Kumar Goyal (deceased) to his brother's wife Sarita Goyal P.W.2.

(xiii) On 6.5.2004 at around 10:30 pm, P.W.2 Sarita Goyal, wife of Sanjeev Kumar Goyal (deceased) made a phone call to P.W.1 Abhay Kumar Goyal that her husband Sanjeev Kumar Goyal (deceased) has not yet returned home.

(xiv) On aforesaid information P.W.1 Abhay Kumar Goyal along with others, went out to search Sanjeev Kumar Goyal (deceased).

(xv) When in spite of best efforts P.W.1 Abhay Kumar Goyal could not locate Sanjeev Kumar Goyal (deceased), he went to house of accused-Vaibhav Jain to ensure the whereabouts of his missing brother Sanjeev Kumar Goyal (deceased). On enquiry, mother and wife of accused-Vaibhav Jain responded to the query of P.W.1 Abhay Kumar Goyal by stating that accused-Vaibhav Jain himsel has not returned since he left home. Thus, accused-Vaibhav Jain was not at his home on 6.5.2004 at around 10:30 pm.

(xvi) In the intervening night of 6.5.2004/7.5.2004 at around 2:00 a.m., an unidentified person gave a phone call to P.W.2 Sarita Goyal wife of Sanjeev Kumar Goyal (deceased) informing her that damaged Motorcycle of Sanjeev Kumar Goyal (deceased) is lying abandoned near Railway Track at Baradari Railway crossing in damaged condition.

(xvii) Upon communication of aforesaid information by P.W.2 Sarita Goyal to P.W.1 Abhay Kumar Goyal, in the night of 6/7.05.2004, he immediately reached Baradari Railway Crossing alongwith others at 2:30 AM and found damaged motorcycle of Sanjeev Kumar Goyal (deceased) lying abandoned, in damaged condition.

(xviii) Having recovered damaged motorcycle of Sanjeev Kumar Goyal (deceased), P.W.-1 and others accompanying him searched for Sanjeev Kumar Goyal (deceased) and ultimately found his dead body lying in front of Jhala of Sardar Mehar Singh near field of Sardar Gyan Singh. A cut injury was found on the neck of deceased.

(xix) P.W.3 Anil Kumar and P.W.4 Vishal Anand lastly saw deceased Sanjeev Kumar Goyal at arround 9:30-10 pm on 6.5.2004 in company of four of the accused persons in his Maruti Van bearing no. UA 06 B 9209 whereas one of the accused namely Kaushal Kishore was seen driving motorcycle of deceased and following Maruti Van.

(xx) After dead body of Sanjeev Kumar Goyal (deceased) was recovered, F.I.R. dated 7.5.2004 (Ext. Ka-61) was lodged at Police station- Kotwali, Bilaspur, District Rampur by P.W.1 Abhay Kumar Goyal and was registed as Case Crime No. 3015 of 2004 under sections 302, 201, 427 IPC P.S. Bilaspur, District Rampur, wherein two persons namely, Vaibhav Jain and Suresh Apal have nominated as named accused, whereas three unknown persons were nominated.

(xxi) Pursuant to aforesaid F.I.R, Investigating Officer P.W.8 S.I. Hardev Singh reached the place where dead body of deceased was lying on 7.5.2004 i.e. village Indarpur in front of Jhala of Sardar Mehar Singh near field of Sardar Gyan Singh.

(xxii) After reaching place of occurrence, P.W.8 recovered damaged motorcycle belonging to Sanjeev Kumar Goyal. This recovery was witnessed by P.W.1 Abhay Kumar and Shyam Sunder. P.W. 8, accordingly, prepared recovery memo dated 7.5.2004 (Ext. Ka-2).

(xxiii) P.W.8 S.I. Hardev Singh recovered Rs. 7,500 cash from the pocket of pant worn by deceased and also a gold chain from his person. Aforesaid recovery was witnessed by Ajay Goyal and Shyam Sunder. Recovered articles were given in supurdigi of P.W. 1 Abhay Kumar Goyal. P.W.8, accordingly, prepared recovery memo of above dated 7.5.2004 (Ext. Ka-3).

(xxiv) P.W.8 S.I. Hardev Singh received information from informant on 07.05.2004 that three accused persons are standing along with Maruti Van of Sanjeev Kumar Goyal (deceased) near guest house of irrigation department. On this information, P.W.8 S.I. Hardev Singh alongwith P.W. 1, P.W. 4 and others immediately rushed to the place of their presence. He saw accused persons present were washing the Maruti Van belonging to Sanjeev Kumar Goyal (deceased). These accused persons attempted to run away upon seeing the police but were overpowered and arrested. They were identified as accused-Vaibhav Jain, Suresh Pal and Rajendra Vohra. This in an additional circumstance against aforesaid three accused vide (**Dhananjay Chatterjee Vs. State of West Bengal (1994) 2-SCC 220.**

(xxv) After arrest of aforesaid three accused, P.W. 8 S.I. Hardev Singh discovered that seat cover of back seat of Maruti Van belonging to deceased was having blood stains. He, accordingly cut the same and prepared its recovery memo (Ext.Ka-4). This recovery is evidenced by P.W.1 Abhay Kumar Goyal and P.W.4 Vishal Anand.

(xxvi) P.W.8 S.I. Hardev Singh recovered plain earth as well as earth mixed with blood from place of occurrence (Material Exts. 8 and 9), in presence of P.W.1 Abhay Kumar Goyal and Ajay Goyal. He also prepared a recovery memo of same dated 7.5.2004 (Ext. Ka.-69).

(xxvii) On pointing of accused-Vaibhav Jain P.W.8 S.I. Hardev Singh recovered the knife used in commission of crime and prepared recovery memo dated 7.5.2004 (Ext. Ka-5). This recovery is witnessed by P.W.1 Abhay Kumar Goyal and P.W. 4 Vishal Anand.

(xxviii) The knife recovered on the pointing of accused-Vaibhav Jain and other articles including the clothes worn by deceased Sanjeev Kumar Goyal were sent for forensic examination. Forensic Science Laboratory submitted FSL report dated 23.10.2004 (Ext. Ka-73) stating therein that blood stains found on the same were of human blood.

(xxix) P.W.-6, Dr. H. K. Mitra, who conducted autopsy of the dead body of deceased, prepared post-mortem report (Ext. Ka.-60) wherein cause of death of deceased i.e. Ajay Kumar Goyal is stated to be asphyxia and haemorrhage as a result of

ante-mortem injury. P.W.-6, discovered a cut injury in the neck of deceased. Accordinly to injury found on the body of deceased could have been caused by sharp-edged weapon. Thus medical evidence supports the prosecution case that injury found on dead body of deceased was caused by weapon of assault i.e. knife recovered by P.W.8 on pointing of accused-Vaibhav Jain.

(xxx) P.W. 6, who prepared the post-mortem report dated 7.5.2004 (Ext.Ka-60) has deposed before Court below that 200 gm of digested food was present in stomach. Digested food was present in small intestine and faecal material along with gas was present in large intestine. Thus, medical evidence clearly corroborates prosecution case that deceased was having dinner with accused Vaibhav Jain at around 8:30 pm on 6.5.2004,

(xxxi) Most of the circumstances noted above are incriminating and therefore, put to accused-appellants for their version under section 313 Cr.P.C. However, except for bald denial, no explanation was offered even when some of the accused had special knowledge of same. Accordingly, adverse inference can be drawn against them.

(xxxii). A false plea has been raised on behalf of accused that Maruti Van was not technically examined to prove whether it was in driving condition or not. Evidence of P.W.1 clearly proves that it was in driving condition as the same was driven down to police station by Police itself and thereafter it was given in his supurdigi. Therefore the same is an additional circumstance.

70. Mr. Sushil Shukla, learned counsel for accused appellant Vaibhav Jain and Kaushal Kishore Jain submits that various circumstances relied upon by prosecution firstly have not been established individually inasmuch as there is no clinching and reliable evidence to prove each of the circumstance and secondly, the circumstances do not form a complete chain of events giving conclusion about guilt of accused.

71. He has further submitted that;

(a) Prosecution has failed to establish debt of Sanjeev Kumar Goyal (deceased) upon accused-Vaibhav Jain

(b) The alleged debt of Sanjeev Kumar Goyal upon accused-Vaibhav Jain having not been established, no motive can be assigned to accused accused-Vaibhav Jain to commit the alleged crime.

(c) P.W.3 Anil Kumar and P.W.4 Vishal Anand who are witnesses of last seen are neither credible nor reliable. Hence their testimony is not worthy of trust.

(d) Prosecution has failed to establish that recovered motorcycle belonged to Sanjeev Kumar Goyal (deceased).

(e) Recovery of dead body of Sanjeev Kumar Goyal (deceased) clearly proves that death of deceased was homicidal but it does not in any way implicate accused appellants in death of Sanjeev Kumar Goyal (deceased).

(f) Recovery of blood stained seat cover from back seat of Maruti van belonging to Sanjeev Kumar Goyal (deceased) is not such circumstance so as to infer guilt of accused-appellants.

(g) Alleged recovery of weapon of assault i.e. knife on pointing of accused-

Vaibhav Jain has not been proved in accordance with Section 27 of Indian Evidence Act. Hence aforesaid circumstance cannot be considered against this accused-appellant.

72. Submissions urged by Mr. Shukla have been adopted by Mr. Abhishek Mishra, learned Amicus Curiae for accused appellant Rajendra Vohra.

73. We shall now proceed to deal with each of the submissions urged by Mr. Shukla, learned counsel for accused-appellants Vaibhav Jain and Kaushal Kishore Jain, taking the first point as last.

No motive can be assigned to any of the accused-appellants for committing the crime.

74. According to Mr. Sushil Shukla, evidence of P.W-1 Abhay Kumar Goyal i.e. informant who is also elder brother of deceased is completely sketchy regarding alleged loan or debt given by deceased to accused-Vaibhav Jain for the simple reason that the said witness has not specifically stated the amount of loan given by deceased to accused-Vaibhav Jain. Besides above, P.W.-1 stood completely contradicted by his own previous statement wherein he did not state the fact that the deceased had informed him about the loan given to accused-Vaibhav Jain. The evidence of P.W.-2 Sarita Goyal i.e. widow of deceased further does not prove the said fact conclusively.

75. It is then contended that production of alleged diary (M. Ext.-1) wherein deceased used to make entries of loan given to accused-Vaibhav Jain was produced for the first time before court by P.W.-2, Sarita Goyal. The same is an afterthought and no reliance can be placed upon same in absence of it not having beeen produced before Investigating Officer of the case during course of investigation. In fact, P.W-2 (at Pg 39 of paper book) has clearly admitted that she had discovered the said diary (M. Ext.-1) only after PW-1 i.e. her Jeth (elder brother of her husband) had deposed before Court.

76. Apart from above defence has specifically challenged and disputed the writings in M. Ext.-1, diary of the deceased. As such, prosecution was burdened with bounden duty to lead further evidence before trial Court to prove genuineness of writing in the said diary i.e. M. Ext.-1, but prosecution has failed to do so.

77. Furthermore, according to Mr. Shukla when it is the case of both P.W.-1 and P.W.-2 that relationship between accused-Vaibhav Jain and deceased were cordial and deceased gave money to him on several occasions, which also used to be returned by accused-Vaibhav Jain then this circumstance in itself becomes innocuous and cannot be said to be incriminating. The fact that deceased used to consider accused-Vaibhav Jain as his Sala (brother-in-law) also cannot be lost sight of.

78. He further contends that it is not the case of any of the prosecution witness that there was no dispute regarding repayment of loan between deceased and accused Vaibhav Jain or prior to incident accused Vaibhav Jain had refused any demand raised from deceased regarding re-payment or had threatened him.

79. According to Mr. Shukla, there is absolutely no evidence led by prosecution to suggest even remotely as to why accused

Vaibhav Jain would conspire with other arrayed co-accused to commit murder of deceased. No evidence is forth coming where from an inference can be drawn about meeting of minds between accused Vaibhav Jain and other co-accused for hatching the conspiracy to kill Sanjeev Kumar Goyal (deceased).

80. Thus, it is contended by Mr. Shukla, learned counsel for two of the appellants that prosecution has utterly failed to establish motive on part of accused Vaibhav Jain or any other co-accused to commit murder of Sanjeev Kumar Goyal (deceased) nor the prosecution has successfully established that there was meeting of minds of accused to commit crime in question.

81. Mr. K. M. Tripathi, learned counsel for complainant and Mr. Amit Sinha, learned A.G.A. for State have jointly refuted the submissions urged by Mr. Shukla. They jointly contend that issues regarding absence of motive on part of accused-Vaibhav Jain and other co-accused as well as the factum regarding non-meeting of minds of accused-appellants to commit crime in question and non-admissibility of Diary of deceased (M. Ext.-1) were specifically raised before court below but were not accepted. They have invited attention of Court to paragraphs 24, 24A, 24B, 24C, 24D, 24E, 25, 26, 27A, 27B, 27C, 27D, 27F, 27G and 28 of the impugned judgement rendered by Trial Court.

82. According to both Mr. Tripathi as well as Mr. Sinha, Court below has referred to the five point test laid down by Apex Court in the case of S**harad Birdhichanda Sarda (supra)** for judging a case based on circumstantial evidence. According to aforesaid counsel, there can be no quarrel with the proposition laid down in aforesaid case nor there can be any dispute regarding its applicability to the present case.

83. Court below thereafter has referred to **Padlaveera Reddy vs. State of Andhra Pradesh AIR 1990 SC 79, C. Chinna Reddy Vs. State of Andhra Pradesh, 1996 (10) SCC 193, State of U.P. Vs. Satish, 2005 (3) SCC 114, Ramreddy Rajeshkhanna Reddy and others Vs. State of Andhra Pradesh, 2006 (10) SCC 172** wherein it has been held that circumstances on the basis of which guilt of accused is sought to be established must be proved conclusively.

84. They further submit that Court below firstly stated the law as settled by Apex Court regarding evaluation of a case based on circumstantial evidence and then proceeded to examine each of the hypothesis put forward on behalf of accused-appellants in support of the proposition that there was no motive on part of accused-Vaibhav Jain as well as other co-accused to commit the crime.

85. After rejecting each of the hypothesis put forward by defence that there is no motive on part of accused-Vaibhav Jain as well as other co-accused to commit the crime, Court below referred to the case law on importance attached to establishing motive in a case based on circumstantial evidence and whether establishing of or failure to establish motive could ipso-facto result in conviction of accused or his acquittal.

86. Court below referred to **Dhananjay Yadav Vs. State of U.P., 2206 (54) ACC 394** wherein it has been held that failure to prove motive will not

automatically result in disbelieving the proved circumstances against accused. Reference has then be made to **Ram Reddy Rajesh Khanna Reddy and others (supra)** wherein it has been held that motive by itself is not sufficient to convict an accused.

87. Having elaborately discussed factual and legal matrix of the issue as to whether there is any motive on the part of accused-appellants to commit the crime and the relevance of motive in recording a finding of guilt, court below in paragraph 27 of the impugned judgement recorded a categorical finding that prosecution has successfully established motive on part of accused-appellants to commit crime.

88. Regarding the time of admissibility of Material Ext.-1-Diary of Sanjay Kumar Goyal (deceased), it was urged on behalf of accused before court below that aforesaid Diary is forged and fabricated. Same has been engineered only to give colour to prosecution case. The sanctity of this document was sought to be disputed on the ground that one of the entries in the Diary is dated 01.08.2004. Therefore, it was sought to be urged that once death of Sanjeev Kumar Goyal (deceased) itself has taken place on 6/7. 05.2004, no entry could have been made on 01.08.2004. As such this document is not reliable. Apart from above, the handwriting in this Diary (M. Ext.-1) was disputed and according to defence, the entries in the Diary were not in the handwriting of Sanjeev Kumar Goyal (deceased).

89. Court below rejected aforesaid objections and relied upon testimony of P.W.-2 Sarita Goyal wherein she clearly deposed that entries made in disputed Diary were in handwriting of Sanjeev Kumar Goyal (deceased). In respect of date 01.08.2004, mentioned in the diary of deceased, Court below found that only at one page only date i.e. 01.08.2004 has been mentioned but nothing else was written. Therefore, simply on this ground the document could not be held to be forged or fabricated.

90. On the aforesaid premise, it is next contented by both Mr. Tripathi as well as Mr. Sinha that learned counsel for appellants has failed to point out any perversity or illegality in the findings recorded by court below regarding above. They thus submit that in absence of any perversity or illegality being fully established in respect of findings recorded by court below regarding motive on part of accused-appellants or non-admissibility of M. Ext.-1, impugned judgement and order is not liable to be interfered with on this score.

91. To lend legal support to his submission, Mr. Tripathi, learned cousnel for informant has referred to **Sukhpal Singh Vs. State of Punjab, 2019 (15) SCC 622** and has relied upon paragraph 15, which reads as under:-

"15. The last submission which we are called upon to deal with is that there is no motive established against the appellant for committing murder. It is undoubtedly true that the question of motive may assume significance in a prosecution case based on circumstantial evidence. But the question is whether in a case of circumstantial evidence inability on the part of the prosecution to establish a motive is fatal to the prosecution case. We would think that while it is true that if the prosecution establishes a motive for the accused to commit a crime it will

undoubtedly strengthen the prosecution version based on circumstantial evidence, ***but that is far cry from saying that the absence of a motive for the commission of the crime by the accused will irrespective of other material available before the court by way of circumstantial evidence be fatal to the prosecution. In such circumstances, on account of the circumstances which stand established by evidence as discussed above, we find no merit in the appeal and same shall stand dismissed."***

92. We have already referred to the evidence on record in detail. The documentary evidence on record and testimonies of P.W. 1 and P.W.-2, clearly establish that accused Vaibhav Jain has taken huge amount of money from Sanjeev Kumar Goyal (deceased) but amount so taken on loan was not returned. All the hypothesis raised on behalf of accused Vaibhav Jain before court below to doubt capacity of Sanjeev Kumar Goyal (deceased) to lend money to accused-Vaibhav Jain or otherwise were only fancy-full doubts for which no evidence was led.

93. Irrespective of aforesaid we find that there is no direct evidence on record in respect of motive on part of other co-accused to commit the crime in question. The only evidence available on record is that names of co-accused were mentioned in the diary of the deceased. Accordingly, we are persuaded to modify the finding recorded by court below in respect of motive on part of accused-appellants Kaushal Kishore Jain, Suresh Pal and Rajendra Vohra to commit crime by holding that except for accused -Vaibhav Jain, no motive to commit the crime in question can be gathered from record against other co-accused.

94. The argument raised by Mr. Shulka for disputing the admissibility of M. Ext.-1-Diary was repelled by court below. However, learned counsel for appellants could not demolish the reasoning recorded by court below for rejecting the challenge regarding admissibility of M. Ext.-1. We find that same argument has been raised before us. Being the last court of fact, we ourselves perused the original of M. Ext.-1 i.e. Diary and find that the entry of date 01.08.2004 is simplicitor and is not explained by any other writing above or below the said date. Therefore, according to us simply on aforesaid ground the genuineness or admissibility of aforesaid document cannot be disputed. We are therefore therefore not inclined to hold that Diary of deceased was not admissible in evidence. Furthermore, pages of Diary M. Ext.-1 have been marked as Ext. Ka.-6 to Ext. Ka-51. Once the pages of the Diary have been marked as Exhibits their proof is no longer required. Once the diary itself has been proved its contents also stand proved by virtue of section 9 of the Evidence Act. Consequently, we do not find any force in this submission of Mr. Shukla. As the said submission sans merit, we reject the same.

The Theory of Last seen evidence

95. In present case, there are two sets of evidence regarding last seen. The first set of evidence comprises of oral testimony of P.W.-2 Sarita Goyal widow of Sanjeev Kumar Goyal and P.W.-1 Abhay Kumar Goyal elder brother of deceased. The second set of evidence originates from the testimonies of P.W.-3, Anil Kumar and P.W.-4, Vishal Anand, who are independent witnesses. The credibility and reliability of P.Ws. 3 and 4 and whether their testimonies are worthy of trust, shall

be dealt with separately. At this stage, we are concerned only with P.W.- 1 and P.W.-2.

96. Perusal of deposition given by P.W.-2 Sarita Goyal widow of deceased reveals that Sanjeev Kumar Goyal (deceased) left his home on 06.05.2004 at 7.00PM informing his wife i.e. P.W.-2 Sarita Goyal that he is going to accused-Vaibhav Jain for demanding return of money taken by him. This witness has further deposed that her husband Sanjeev Kumar Goyal gave a phone call at 8.30PM on same day informing her that he is having dinner at Sindhu Bar Restaurant along-with accused-Vaibhav Jain and shall return late after inspecting work at Rampura. Feeling suspicious, P.W.-2 went to house of P.W.-1 and requested him to enquire the whereabouts of her husband Sanjeev Kumar Goyal (deceased) and also his well being.

97. On above anxiety expressed by P.W.-2, Sarita Goyal, P.W.-1, Abhay Kumar Goyal, went to Sindhu Bar Restaurant. Outside aforesaid restaurant, he found Maruti Van and Motorcycle of Sanjeev Kumar Goyal (deceased) parked outside. He further saw co-accused Suresh Pal (driver of accused-Vaibhav Jain) standing near Maruti Van of Sanjeev Kumar Goyal (deceased) along-with three other persons. He went inside the aforesaid restaurant and saw his brother Sanjeev Kumar Goyal (deceased) sitting with accused -Vaibhav Jain. Both were drinking beer and having dinner. P.W.1 did not speak to his brother or accused-Vaibhav Jain, as he felt satisfied about the safety and well being of his brother He returned and accordingly informed P.W.-2 about above.

98. Sanjeev Kumar Goyal (deceased) did not return home till 10.00PM. P.W.-2 feeling nervous, desperately informed P.W.-1 that her husband Sanjeev Kumar Goyal (deceased) aforesaid and requested him to trace out her husband Sanjeev Kumar Goyal (deceased). P.W.-1 immediately went out to search his brother. When all attempts to find Sanjeev Kumar Goyal (deceased) failed, he along-with others went to the house of accused-Vaibhav Jain. On query raised by P.W.-1 regarding location of his brother, mother and wife of accused-Vaibhav Jain jointly stated that Vaibhav Jain (accused) has not returned since he left home. Consequently, P.W.-1 returned and informed P.W.-2 of aforesaid.

99. According to Mr. Shukla, learned counsel for accused-appellants Vaibhav Jain and Kaushal Kishore Jain, evidence of P.W-2, Sarita Goyal i.e. widow of deceased does not lend any support to prosecution case on the point of last seen inasmuch as it is not her case that while she received telephonic call from her husband at 7:00 PM. on 6.5.2004, her husband uttered anything suspicious against accused-Vaibhav Jain in whose company he was drinking beer and having dinner at Sindhu Bar Restaurant. The fact that both were in cordial relationship was known to her therefore, her statement to the effect that she suspected something fishy on receiving phone-call is absolutely unreliable and not genuine. More so, it was witnessed by P.W.-1 Abhay Kumar Goyal, who went to Sindhu Bar Restaurant to enquire about Sanjeev Kumar Goyal (deceased) that both were quietly having dinner and he himself did not notice any foul play at Sindhu Bar Restaurant.

100. Apart from above, according to Mr. Shukla, it is unnatural on part of PW-1 Abhay Kumar Goyal, who had gone to Sindhu Bar Restaurant for making enquiry about Sanjeev Kumar Goyal (deceased) to

ask or enquire or even talk to deceased at the bar. Clearly therefore, the prosecution story has been set up as an after thought to build up prosecution case.

101. Even otherwise, evidence of P.W.-1 and P.W.-2 does not raise any suspicion against accused-Vaibhav Jain or any other accused and is therefore, not incriminating, even if, believed to be true.

102. On perusal of record, we find that doubts expressed by Mr. Shukla regarding credibility and reliability of P.W.1 and P.W.-2 fall in the realm of fancy-full doubt. Both these witnesses were not cross-examined on any of the issues raised before us. Court below has already held that both P.W.-1 and P.W.-2 are not only credible and reliable but their testimonies are also worthy of credit. We see no reason to disagree with aforesaid conclusion of trial court.

103. Moreover, conversation in between P.W.-2 and Sanjeev Kumar Goyal (deceased) and P.W.-2 Sarita Goyal and P.W.-1 Abhay Kumar Goyal and vice-versa are contemporaneous in nature. Even though part of their testimony falls in the category of hearsay evidence yet it is admissible in evidence being part of the same transaction and therefore covered by the rule of res-gestae as embodied in Section 6 of Indian Evidence Act. For ready reference Section 6 of Evidence Act is quoted herein under:-

"6. Relevancy of facts forming part of same transaction.--Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places. Illustrations

(a) A is accused of the murder of B by beating him. Whatever was said or done by A or B or the by-standers at the beating, or so shortly before or after it as to form part of the transaction, is a relevant fact.

(b) A is accused of waging war against the 1[Government of India] by taking part in an armed insurrection in which property is destroyed, troops are attacked, and goals are broken open. The occurrence of these facts is relevant, as forming part of the general transaction, though A may not have been present at all of them.

(c) A sues B for a libel contained in a letter forming part of a correspondence. Letters between the parties relating to the subject out of which the libel arose, and forming part of the correspondence in which it is contained, are relevant facts, though they do not contain the libel itself.

(d) The question is, whether certain goods ordered from B were delivered to A. The goods were delivered to several intermediate persons successively. Each delivery is a relevant fact."

104. A Division Bench of this Court in ***Dalveer and Others Vs. State of U.P. 2020 (30) ADJ 373*** has dealt with the scope and applicability of Section 6 of Evidence Act to hearsay evidence. The Bench noticed to the evidence in above case and thereafter referred to various judgements of Supreme Court on the point and has observed in paragraphs 44,45 and 46 as under:

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)*

105. Having referred to various authorities of Supreme Court wherein ambit and scope of Section 6 of the Evidence Act has been explained, the Bench ultimately expressed its view in paragraph 47 which is as under:

"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."

106- In the light of above, when oral evidence of P.W.1 and P.W.2 is evaluated the logical conclusion is that their testimonies insofar as they relate to hearsay evidence are part of the same transaction and therefore, clearly admissible on account of the exception to the Rule of hearsay evidence as embodied in Section 6 of Evidence Act.

107. Apart from above, the incriminating circumstances emerging from

the testimonies of P.W.-1 and P.W.-2 were specifically put to accused-Vaibhav Jain under Section 313 Cr.P.C. He, however, simply denied all the questions put to him regarding above by repeatedly stating that it is false. He has not offered any explanation even in respect of facts which were in his special knowledge and thus failed to discharge the burden arising out of Section 106 of Evidence Act.

108. It has come in evidence that accused-Vaibhav Jain was not at his home at 10.30PM on 06.05.2004 when P.W.-1 visited his home to enquire about his brother Sanjeev Kumar Goyal (deceased). His presence at any other place was in his special knowledge and by virtue of Section 106 of Indian Evidence Act, accused-Vaibhav Jain was under legal obligation to disclose the same failing which adverse inference can be drawn. Neither any witness has been adduced on behalf of defence, nor accused have themselves appeared as witness nor they have offered any explanation in reply to questions put to them under Section 313 Cr. P. C regarding above. Accused Vaibhav Jain has failed to discharge this burden and therefore, the attempt to discard the testimonies of P.W.-1 and P.W.-2 regarding last seen is nothing else, but a futile attempt to dislodge the same. We, accordingly, reject this submission urged by Mr. Shukla.

P.W.-3, Anil Kumar and P.W.-4 Vishal Anand, who are independent witnesses are neither credible nor reliable as such their testimonies are not worthy of trust.

109. P.W.-3 Anil Kumar and P.W.-4 Vishal Ananad are independent witnesses and also witnesses of last seen. According to these two witnesses, deceased was last seen in company of three accused persons on 06.05.2004 at 10/10.30PM, who were sitting alongwith him in his Maruti Van which was being driven by co-accused Sureshpal. The fifth accused Kaushal Kishore was seen driving Motorcycle of deceased and was following Maruti Van. Court below has held these two witnesses are credible and consequently, their testimonies have been considered and relied upon by Court below for deciding the guilt of accused. Apart from their deposition that accused were last seen in the company of deceased, P.W.4 has further deposed that he accompanied P.W.1 when he went out to look for the motorcycle of deceased on the information given by P.W.2. This witness is thus a witness of recovery of the back seat of Maruti Van (Ext. Ka-4) as well as recovery of weapon of assault (Ext. Ka-5).

110. It is vehemently contended by Mr. Shukla that P.W. 3 and P.W-4, who are witnesses of last seen, are completely untrustworthy in so far as they claim to have seen deceased in his Maruti Van in company of accused persons including accused-Vaibhav Jain on the previous night of the day when his dead body was recovered. It is thus urged that they are got up witness created merely to fabricate prosecution case.

111. In elaboration of aforesaid submission, Mr. Shukla, learned counsel for two of the accused appellants has pointed out following reasons for disbelieving the testimonies of P.W.3 and P.W.4, in so far as they relate to last seen.

(A) P.W.-3 Anil Kumar, who is an independent witness claims his presence at Rudrapur-Vilaspur check post at 10:00 pm in the night of 6.5.2004. Same is

completely false and unreliable as he assigns no reason for his being present there at such point of time which is late at night.

(B.) P.W.-3 Anil Kumar, has clearly admitted that he does not know either accused-Vaibhav Jain or his relative from before and is not acquainted with deceased from before, He even went on to state that he had never seen any of the brothers of deceased including PW-1 before. He further admitted of not having any relationship with them. In such circumstances and clear admission by P.W.3, it is totally unbelievable that he would notice deceased and identify accused sitting in Maruti Van on the previous night of incident.

(C). The evidence of P.W.-3 identifying Maruti Van and Motorcycle belonging to deceased is most incredible part of his evidence and cannot be relied upon specially when he did not know the deceased prior to last seen and assigns no reason for his having recognized the accused persons.

(D). More so, P.W.-3 has failed to identify co-accused Sadab in the trial court who is alleged to have been seen in the company of deceased in Maruti Van along with other co-accused.

(E). P.W.-3 goes on to claim to have known the fact regarding money lended by deceased to accused-Vaibhav Jain, which on the facts as noted above makes his testimony completely false and cooked up therefore unreliable.

(E). P.W.4 in his testimony admits that he did not know deceased from before. He also stated that he never visited house of deceased or did any business with deceased or had any other kind of relationship with deceased. Inspite of aforesaid, he incredibly stated to have identified deceased in Maruti Van who was travelling in company of accused.

109. P.W.4 further claims not to have known co-accused kaushal Kishore Jain from before or prior to the night he had seen him yet he asserts that he had seen said co-accused driving motorcycle of deceased which was following Maruti Van in which deceased with other accused persons was seen sitting.

112. The claim of P.W.-4 that motorcycle of deceased was of Hero Honda make/company is belied completely from record of the case, which shows that said motorcycle was of TVS Victor make. Most incredible part of his testimony is that he claims to have known the registration number of motorcycle even when he was not knowing deceased from before (Page No. 49 of the paper book).

113. PW-4 does not mention his presence at the time of recovery of damaged motorcycle of deceased Sanjeev Kumar Goyal, which was lying abandoned near Baradari Railway Crossing whereas P.W-1 has asserted his presence at the place of recovery of motorcycle.

114. The statement of P.W.-4 about his presence near the dead body of deceased does not get any corroboration. To the contrary, his claim to have reached the place where dead body of deceased was lying and his assertion that PW-1 i.e. informant came later along with police is rendered false and contrary to testimony given by P.W.-1 who has stated that P.W.-4 came later after he had already reached near dead body.

115. More so, testimony of both PW-3 and P.W.-4 regarding last seen further becomes doubtful when examined in light of evidence of PW-1 who claimed to have been informed by both of them that they had seen the deceased being killed by the accused persons and later his dead body being thrown by them (Pg No. 22 of the paper book).

116. The claim of P.W.-4 to be present at cross road for smoking a cigarette is clearly engineered to assert his false presence. It is totally unbelievable that he will particularly notice Maruti Van of deceased when he himself admitted the fact that the traffic there was heavy and large number of vehicles were plying at relevant time.

117. On the above premise, it is sought to be urged that having regard to the nature of evidence of both PW-3 and PW-4 regarding last seen, it would not be exaggerating that their evidence is completely unreliable to prove the fact of last seen i.e. deceased was in company of accused. The circumstance of last seen by P.W. 3 and P.W.4 therefore is false and hence wiped out from the chain of events/circumstances.

118. It is thus urged by learned counsel for appellants that testimonies of P.W. 3 and P.W. 4 on the point of last seen are not reliable and therefore the circumstance that deceased was last seen at 10-10.30 P.M. on 6.5.2004 in company of accused is not proved. Consequently the chain of circumstances gets broken and accused-appellants are therefore, liable to be acquitted.

119- Mr. Tripathi and Mr. Sinha, learned A.G.A. have to the contrary, vehemently urged that P.W.3 and P.W.4 are both credible and reliable. It was on account of aforesaid that the testimony of these two witnesses on the point of last seen was relied upon by court below. They accordingly, placed various paragraphs of the impugned judgement to buttress their submission.

120. We have gone through the testimonies of these two witnesses and have examined the same threadbare. We find that these two witnesses have clearly stated that they saw deceased travelling in company of three accused namely Vaibhav Jain, Rajendra Vohra and Sadab in his Maruti Van which was being driven by accused Suresh Pal (driver of accused Vaibhav Jain). They have further stated that they saw accused-Kaushal Kishore, driving Motorcycle of deceased, which was following Maruti Van. Though there is clear deposition regarding above, but the testimony does not inspire confidence for the simple reason that there is no evidence to show as to how there was so much intimacy between deceased and these two witnesses or how these witnesses knew accused persons so well that they could recognize him and accused at 10/10.30PM in night at a place where there was heavy traffic. The various contradictions pointed out by learned counsel for two of the appellants coupled with the fact that these two witnesses are totally ignorant about the family members of deceased as well as acccused Vaibhav Jain and also their failure to identify accused Sadab, who was placed before them for identification and also the exaggeration in their testimonies could not be contradicted by Mr. Tripathi, learned counsel for informant and learned A.G.A. We therefore conclude that submissions made by Mr. Shukla, learned counsel for two of the appellants, are

sustainable and reflect reasons cogent enough to discard the testimonies of P.W.3 and P.W.4 on the point of last seen.

121. We according set aside the finding of Court below regarding credibility and reliability of these two witnesses and conclude that P.W.-3 is neither credible nor reliable and hence his testimony is not worthy of credit. P.W.4 though he is an independent witness, his testimony, insofar as it relates to last seen, is not liable to be accepted for the various contradictions, noted herein above. Accordingly, circumstance No. xix gets excluded from the chain of circumstance pointed out by us in paragraph 69 of this judgement.

RECOVERY OF DAMAGED MOTORCYCLE OF DECEASED AND HIS DEAD BODY

122. According to Mr. Shukla, the prosecution has completely failed to connect the damaged motorcycle allegedly belonging to deceased with the crime in question. No evidence is forthcoming connecting the said motorcycle with any of the accused persons, which could be said to be incriminating in nature. It is also not clear as to how the same was damaged or placed near the railway crossing. It is further urged that recovery of dead body merely proves homicidal death of deceased and not the fact that accused-appellants are guilty of committing the murder of Sanjeev.

123. Thus in the submission of learned counsel for appellants, this circumstance is also not connected in any manner with the chain of events and as such cannot be pressed against accused appellants.

124. Submission urged by Mr. Shukla appears to be attactive at the first flush. However, on deeper scrutiny, we find that this submission is devoid of any substance. Excluding the testimoies of P.W.-3 and P.W.-4, who are independent witnesses, on last seen yet this recovery has a material bearing. We have already excluded circumstance no. xix from the chain of circumstances pointed out by us on account of disbelieving P.W.-3 and P.W.-4. on the point of last seen. Irrespective of above, this argument does not help accused, Vaibhav Jain.

125. It has come in evidence of P.W.-1, Abhay Kumar Goyal that when he went to Sindhu Bar Restaurant, he found Maruti Van and Motorcycle of deceased parked outside. Sanjeev Kumar Goyal (deceased) and accused Vaibhav Jain were sitting together inside the restaurant. They were enjoying beer and having their dinner. Therefore, when P.W.-1 last saw deceased, his motorcycle was seen at Sindhu Bar Restaurant around 8:30 P.M.

126. In reply to question nos.7 and 8 put to accused under section 313 Cr.P.C. which relate to aforesaid incriminating circumstances, accused Vaibhav Jain has denied the factum of his going to Sindhu Bar Restaurant alongwith deceased. Thus, accused-Vaibhav Jain has failed to discharge the burden clothed upon him under Section 106 of Evidence Act. He has completely failed to give any evidence as to when this accused and deceased parted company. Apart from above, this witness was not found at his home at 10:30 pm on 6.5.2004. No explanation regarding his place of presence at aforesaid point of time has come forward. Both the aforesaid circumstances were put to accused under Section 313 Cr.P.C, but except for giving a bald denial, he has not given any explanation, even when same were in his

special knowledge. As such, adverse inference can safely be drawn against this accused by virtue of section 106 of evidence Act. Therefore, this circumstance becomes incriminating and when considered in its cumulative effect along-with other circumstances in proximity to time and manner of occurrence points at the guilt of accused-Vaibhav Jain.

RECOVERY OF MARUTI VAN BELONGING TO DECEASED AND BLOOD STAINED SEAT COVER

127. Mr. Shukla then submits that it is not an incriminating circumstance that Maruti Van was found to be in possession of accused-Vaibhav Jain inasmuch as it is own case of prosecution that it was taken by him from deceased two days before the date when the dead body of deceased was recovered and deceased had parted with his car voluntarily as both were close to each other.

128. The presence of bloodstain on the back seat cover of Maruti Van belonging to Sanjeev Kumar Goyal (deceased) in itself is not such a incriminating circumstance by which it can be established that deceased was done to death therein or there, more particularly when there was no forensic evidence to suggest that the blood group of those bloodstain matched with blood group of deceased. Similarly, since the blood group of blood-stains found on the recovered knife alleged to be weapon of assault has not been ascertained with blood group of deceased, the Forensic report Ext. Ka.-73 relied upon by prosecution does not lend any support to its case. Learned counsel for appellants has referred to **Ramchandra Sao V. State of Bihar (2000) 10 SCC 467** and has relied upon paragraph 6 of the judgement, which reads as under:

"We have heard learned counsel and we have also examined the available records. In our view, the circumstances above enumerated are not enough to maintain the conviction of the appellants. The father and the son had been living together all along and Smt. Asha Devi was the lone female who had been inducted into the family. The act of appellant No. 2 in catching hold of the arm of her daughter-in-law was viewed as an amorous suggestion and the deceased was successful in having a Panchayat convened for the purpose. The Panchayat, as said before advised separate residents for the father and son. Despite such suggestion father and son lived together and so did the deceased with them. There is no evidence that there was any untoward incident thereafter. Had there been any it would have been complained about. The appellants were living in a neighbourhood. If the deceased was murdered in the house as suggested and her dead body was thrown away at some distance, it is difficult to believe that the appellants could do so stealthily without attracting the attention of the neighbours either at the time of the homicidal death or when carrying and disposing of the dead body by throwing it in a well. ***The presence of blood-stains on the floor of the room of the house and the shawl by themselves are not such circumstances to establish that the deceased was killed in the room of the house or that those blood stains were matching, with the blood group of the deceased. During the course of the investigation, efforts were made to match the blood group but unsuccessfully. No report came from the expert.*** *The recovery of the dead body from the well even was not at the instance of the appellants by means of disclosure statements. Rather the dead body surfaced on its own and was noticed*

by the villagers. Thus in nutshell the only incriminating circumstance which can be said to have been established is that there was perhaps motive for appellant No. 2 to avenge himself for the accusation made against him by the deceased. Even so the deceased could have met homicidal death in other ways and not necessarily at the hands of the appellants. When links in the chain of circumstances are missing, we cannot jump to the conclusion that the assailants of the deceased could be no other than the appellants, thus, in our view, it is unsafe on the aforementioned circumstances to maintain the conviction of the appellants, we thus extend to them the benefit of doubt, we, therefore, order the appellants' acquittal. The appeal is thus allowed, upsetting the judgment and order of the High Court as also that of the Court of Session. The appellants shall, as a result, be set at liberty forthwith."

129. He has then referred to **Hardyal Prem Vs. State of Rajsthan 1991(Supp.) 1SCC 148** and has relied upon paragraph 5, which is reproduced herein under:

5. The first circumstance relied upon by the prosecution is that these appellants made an inquiry from the deceased herself about her movement which she had later on report ed to her sons PWs. 1 & 7 and her husband. It transpires from the evidence that this report was made by the deceased about 15 or 20 days prior to her death. This piece of evidence, in our view, cannot serve as an incriminating circumstance involving these appellants and Narain in this dastardly murder. The second piece of evidence is that of PWs. 3 & 4. These two witnesses speak about the suspicious movement of these two appellants in the company of Narain on the night of occurrence at about 8 or 9 p.m. Though the investigation started even on 2-10-74, these two witnesses who were the residents of the same locality, did not volunteer any statement at the earliest. They offered themselves as witnesses only after 3 or 4 days after the recovery of the dead body. The third piece of circumstantial evidence pressed into service is that the appellant Prem at the time of arrest was in possession of a letter exhibit P 26 written under his hand admitting that he had committed some illegal act. The court below has strongly relied upon this circumstance as a piece of formidable evidence. In our opinion this evidence cannot be relied upon for the reasons namely (1) that the story that Prem was carrying on a letter admitting an illegal act is highly unbelievable and (2) that the letter does not make any reference to this particular case. ***The other circumstantial piece of evidence relied upon by the courts below is the recovery of two weapons exhibit P 8 and P 7 from the houses of Prem and Narain respectively on a search made on 7-10-74. These two weapons are said to have been stained with human blood but the prosecution has not satisfactorily established that the blood found on these two weapons tallied with the blood group of the deceased.*** *Lastly we are left with the evidence relating to the recovery of the ornaments, Articles 1 to 6. These ornaments are said to have been recovered from the houses of the appellants on various dates i.e. a silver kada from the house of Narain on 7-10-74, some other silver articles from the houses of Prem and Hardyal on 8-10-74 and the blood stained clothes of Hardyal from his house on 29-10-74. Though much reliance was placed on the recovery of these ornaments, we are unable to agree with the view of the courts below for more than one reason. First, in exhibit P-1, there is absolutely no*

description of the ornaments of the deceased which she is said to have been wearing on the date of occurrence. Secondly, these ornaments were not recovered in pursuance of any statement made by the appellants. Thirdly, though even on 7-10-74 the houses of the appellants were searched, no ornament was recovered. Similarly no blood stained cloth was recovered from the house of Hardyal till 29-10-74 i.e. for nearly a month from the date of occurrence. Fourthly, these appellants and Narain though were arrested even on 5-10-74, it seems that no effort has been made by the police either on 5-10-74 or on 6-10-74 to make searches of the respective houses of the accused. When these appellants and Narain had been arrested even on 5-10-74, it is incomprehensible that the inmates of the houses of these appellants were safely keeping these ornaments which were the subject matter of robbery thereby enabling the police to recover these articles on 8-10-74. Fifthly, these ornaments are of common-pattern usually worn by the ladies in Rajasthan. Though the appellants are claiming these ornaments as belonging to them, we are unable to accept the appellants' statement in the absence of tangible evidence in support of their statements, instead hold that this piece of evidence relating to the recovery of ornaments was not at all worth accepting.

130. He has also referred to **State of Rajasthan Vs. Raja Ram (2003) 8SCC 182** wherein follow observations have been made in paragraph 21

"Coming to the bloodstains on the cloth which were allegedly seized on being pointed out by the accused, the forensic laboratory report indicated that there were blots of human blood on the shirts and trousers of the accused. There was no effort to find out the blood group. In fact, the High Court noted this position and observed that presence of PW-4 at the time of recovery is doubtful as he has been found to be an unreliable witness. ***It was observed that even if it is accepted that there was existence of blood, this circumstance is not such from which it can be found that the accused was perpetrator of the crime.*** *In the aforesaid report (Ex.61) it was clearly stated that the blood group of blood found on the clothes could not be determined. Neither the blood group of the deceased nor that of the accused was determined. In that background, the High Court held that the possibility of the blood being that of the accused cannot be ruled out. In view of the findings recorded by the High Court about the non- acceptability by evidence relating to alleged extra judicial confession, the conclusions of the High Court cannot be said to be one which are unsupportable. We decline to interfere in the appeals, and the same are dismissed." (emphasis supplied)*

131. Thus, it is urged by Mr. Shukla that this circumstance also is not proved by clinching evidence and is not by in itself sufficient to connect accused with the crime in question.

132. Mr. Amit Sinha, learned A.G.A. has strongly disputed the later part of the submission urged by Mr. Shukla and submits that if the origin of blood stains on recovered articles is not found, the same shall not be fatal for the prosecution. To buttress his submission, he has referred to **State of Rajasthan Vs. Teja Ram AIR, 1999 SC 1776** and relied upon paragraphs 24, 25, 26 and 27. The same are reproduced herein under:-

24. Normally, the above circumstance should have been given weighty consideration iii the evaluation of circumstantial evidence. But the High Court down staged it on a reasoning which is difficult to sustain. This is what the High Court has observed regarding the evidence relating to the recovery of the two axes (Kulhadi)

"The evidence of the blood stained Kulhadi is not sufficient as the prosecution has not been able to prove that Kulhadi which was stained with human blood was recovered from whom. Thus it is not clear whether the recovered Kulhadi was of Teja Ram or of Ramlal. The other infirmity in the Chemical Examiner' Report is that it does not mention the extent of blood seen on the Kulhadi. It has not been established clearly as to which particular accused, the incriminating axe belonged. As such, it can not be used against any one of these' two accused."

25. Failure of the Serologist to detect the origin of the blood, due to disintegration of the serum in the meanwhile, does not mean that the blood stuck on the axe would not have been human blood at all. Sometimes it happens, either because the stain is too insufficient or due to hematological changes and piasmatic coagulation that a Serologist might fail to detect the origin of the blood. Will it then mean that the blood would be of some other origin? Such a guess work that blood on the other axe would have been animal blood is unrealistic and far fetched in the broad spectrum of this ease. The effort of the criminal court should not be to prowl for imaginative doubts. Unless the doubt is of a reasonable dimension which a judicially conscientious mind entertains with some objectivity no benefit can be claimed by the accused.

26. Learned counsel for the accused made an effort to sustain the rejection of the above said evidence for which he cited the decisions in Prabhu Babaji v. State of Bombay, AIR (1956) SC. 51 and Raghav Prapdnna Tripathi \. State of UP, AIR (1963) SC 74. In the former Vivian Bose J. has observed that the Chemical Examiner's duty is to indicate the number of blood stains found by him on each exhibit and the extent of each stain unless they are too minute or too numerous to be described in detail. It was a case in which one circumstance projected by the prosecution was just one spot of blood on a dhoti. Their Lordships felt that "blood could equally have spurted on the -dhoti of a wholly innocent person passing through in the circumstances described by us earlier in the judgment." In the latter decision this Court observed regarding the certificate of a chemical examiner that inasmuch as the; blood stain is not proved to be of human origin the circumstance has no evidentiary value. "In the circumstances" connecting the accused with the murder. The further part of the circumstance in that case showed that a shirt was seized from a dry cleaning establishment and the proprietor of the said establishment had testified that when the shirt was given to him for dry cleaning it was not blood stained.

27. We are unable to find out from the aforesaid decisions any legal ratio that in all cases where there was failure of detecting the origin of the. blood the circumstance arising from recovery of the weapon would stand relegated to disutility. The observations in the aforesaid cases were made on the fact situation existed therein. They cannot be imported to a case where the facts are materially different."

133:- He has then referred to **R. Shaji Vs. State of Kerala, AIR 2013 SC 651** wherein following has been observed in paragraphs 17 and 18:-

"17. It has been argued by the learned counsel for the appellant, that as the blood group of the blood stains found on the chopper could not be ascertained, the recovery of the said chopper cannot be relied upon.

A failure by the serologist to detect the origin of the blood due to dis-integration of the serum, does not mean that the blood stuck on the axe could not have been human blood at all. Sometimes it is possible, either because the stain is insufficient in itself, or due to haematological changes and plasmatic coagulation, that a serologist may fail to detect the origin of the blood in question. However, in such a case, unless the doubt is of a reasonable dimension, which a judicially conscientious mind may entertain with some objectivity, no benefit can be claimed by the accused in this regard.

Once the recovery is made in pursuance of a disclosure statement made by the accused, the matching or non-matching of blood group (s) loses significance. (Vide : Prabhu Babaji Navie v. State of Bombay, AIR 1956 SC 51; Raghav Prapanna Tripathi v. State of U.P., AIR 1963 SC 74; State of Rajasthan v. Teja Ram, AIR 1999 SC 1776; Gura Singh v. State of Rajasthan, AIR 2001 SC 330; John Pandian v. State, represented by Inspector of Police, Tamil Nadu, (2010) 14 SCC 129; and Dr. Sunil Clifford Daniel v. State of Punjab, JT 2012 (8) SC 639).

18. In view of the above, the Court finds that it is not possible to accept the submission that in the absence of a report regarding the origin of the blood, the accused cannot be convicted, for it is only because of the lapse of time, that the blood could not be classified successfully. Therefore, no advantage can be conferred upon the accused to enable him to claim any benefit, and the report of dis-integration of blood etc. cannot be termed as a missing link, on the basis of which the chain of circumstances may be presumed to be broken. "

134. Reliance is also placed upon AIR 2017 SC 279, Kishore Bhadke Vs. State of Maharashtra, wherein following observations have been made in paragraph 24:-

"24. It was then contended that the circumstance of blood stained clothes recovered at the instance of accused No.3 was questionable because no evidence regarding the blood group or the fact that the blood stains belonged to the blood group of deceased Raman is forthcoming. Further, the recovery itself was doubtful. Even this aspect has been considered by both the courts below and negatived. The absence of evidence regarding blood group cannot be fatal to the prosecution. The finding recorded by the courts below about the presence of human blood on the clothes recovered at the instance of accused No.3 has not been questioned. The Courts have also found that no explanation was offered by the accused No.3 in respect of presence of human blood on his clothes. Accordingly, we affirm the concurrent finding recorded by the courts below in that behalf including about the legality of such recovery at the instance of accused No.3. "

135. Lastly learned A.G.A. has referred to **Prabhu Dayal Vs. State of Rajashthan, AIR 2018 SC 3199,** wherein following has been observed in paragraph 12:-

"12. The reports of the Forensic Science Laboratory as well as those of the

Ballistic Experts have been perused by us. The Forensic Science Laboratory report discloses that the samples collected from the scene of the offence had bloodstains of human origin. However, since the bloodstains were disintegrated by the time the bloodstains were examined by the Forensic Science Laboratory, the blood group could not be determined. For the same, the accused cannot be unpunished, more particularly when the bloodstains were found of human origin. In State of Rajasthan v. Teja Ram, (1999) 3 SCC 507, this Court concluded that even when the origin of the blood cannot be determined, it does not necessarily prove fatal to the case of the prosecution. In that case, the murder weapons had been recovered with blood on them, and the origin of the blood on one of the weapons could not be determined. Therein, the Court held as follows:

"25. Failure of the serologist to detect the origin of the blood due to disintegration of the serum in the meanwhile does not mean that the blood stuck on the axe would not have been human blood at all. Sometimes it happens, either because the stain is too insufficient or due to haematological changes and plasmatic coagulation that a serologist might fail to detect the origin of the blood. Will it then mean that the blood would be of some other origin? Such guesswork that blood on the other axe would have been animal blood is unrealistic and far-fetched in the broad spectrum of this case. The effort of the criminal court should not be to prowl for imaginative doubts. Unless the doubt is of a reasonable dimension which a judicially conscientious mind entertains with some objectivity, no benefit can be claimed by the accused.

26. Learned counsel for the accused made an effort to sustain the rejection of the abovesaid evidence for which he cited the decisions in Prabhu Babaji Navle v. State of Bombay [AIR 1956 SC 51 : 1956 Cri LJ 147] and Raghav Prapanna Tripathi v. State of U.P. [AIR 1963 SC 74 : (1963) 1 Cri LJ 70] In the former, Vivian Bose, J. has observed that the chemical examiner's duty is to indicate the number of bloodstains found by him on each exhibit and the extent of each stain unless they are too minute or too numerous to be described in detail. It was a case in which one circumstance projected by the prosecution was just one spot of blood on a dhoti. Their Lordships felt that "blood could equally have spurted on the dhoti of a wholly innocent person passing through in the circumstances described by us earlier in the judgment". In the latter decision, this Court observed regarding the certificate of a chemical examiner that inasmuch as the bloodstain is not proved to be of human origin the circumstance has no evidentiary value "in the circumstances" connecting the accused with the murder. The further part of the circumstance in that case showed that a shirt was seized from a drycleaning establishment and the proprietor of the said establishment had testified that when the shirt was given to him for drycleaning, it was not bloodstained.

27. We are unable to find out from the aforesaid decisions any legal ratio that in all cases where there was failure of detecting the origin of the blood, the circumstance arising from recovery of the weapon would stand relegated to disutility. The observations in the aforesaid cases were made on the fact situation existing therein. They cannot be imported to a case where the facts are materially different."

136. At this juncture, Mr. Tripathi, learned counsel for informant and Mr. Sinha, learned A.G.A. have jointly urged

that it is not in dispute that Maruti Van belonging to deceased was borrowed by accused-Vaibhav Jain two days prior to the occurrence. P.W.1 Abhay Kumar Goyal has clearly deposed that Maruti Van and Motorcycle of deceased was seen by him at 8:30 P.M. when both were parked at Sindhu Bar Restaurant. It is further not in dispute that three accused namely Vaibhav Jain, Suresh Pal and Rajendra Vohra were arrested by P.W.-8 when they were washing Maruti Van belonging to deceased. Seeing Police, aforesaid accused attempted to flee but were overpowered which is also an additional circumstance. It is at this juncture, P.W.-8 noticed blood-stains on back seat of Maruti Van. He according cut it and prepared its recovery memo (Ext. Ka.-4). Aforesaid recovery is witnessed by P.W.-1, Abhay Kumar Goel and P.W.-4 Vishal Anand. Maruti Van was thereafter given in "supurdagi" of P.W.-1, Abhay Kumar Goyal.

137. It is also contended that P.W.-1, Abhay Kumar Goyal was not cross-examined as to whether Maruti Van given in his 'supurdagi' was in driving condition or not. It has come in statement of P.W.1 that Maruti Van was driven down by Police up to Police Station Bilaspur and thereafter, same was given in supurdigi of this witness.

138. Upon evaluation of rival submission, in view of above, doubt expressed by learned counsel for two of the appellants that since it was not ascertained that Maruti Van belonging to deceased was in driving condition or not is of no help. To the contrary, according to us, burden was upon accused Vaibhav Jain himself to explain how Maruti Van of deceased reached the paved-road near Irrigation Department when it was last seen at Sindhu Bar Restaurant secondly why it was being washed and lastly how blood stains came on the seat cover of back seat of Maruti Van. Further in reply to question no. 19 put to accused-Vaibhav Jain under Section 313 Cr.P.C., this accused has simply made a bald denial without offering any explanation in terms of Section 106 of Indian Evidence Act. The recovery of Maruti Van was made by P.W.8 the Investigating Officer and accordingly, he prepared the recovery memo of the same dated 7.5.2004 (Ext-Ka-4). Aforesaid recovery has been witnessed by P.W.1 Abhay Kumar Goel and P.W.4 Vishal Anand. The memo of recovery has been proved by P.W.1 and P.W.4. Thus the contents of recovery memo also stand proved by virtue of Section 9 of Evidence Act. Therefore, the recovery of Marute Van belonging to Sanjeev Kumar Goyal (deceased) from 3 of the named accused were examined in the light of other circumstances related to them, clearly dislodge the submission lodged by learned counsel for appellant. Accordingly, we reject the argument so urged by Mr. Shukla.

Recovery of blood-stained knife i.e. weapon of assault on pointing of accused-Vaibhav Jain in furtherance of his alleged statement

139. Pursuant to F.I.R dated 07.05.2004 (Ext. Ka.-61), P.W.-8, S.I., Hardev Singh, Investigating Officer, proceeded with investigation. He received information on 07.05.2004 that some of the accused are present near Guest House of Irrigation Department on paved-road (Kharanja). He, accordingly, reached the place of their presence and saw three persons washing Maruti Van. Seeing Police Party and others, the accused present

attempted to flee but were overpowered. Upon arrest, they were identified as accused-Vaibhav Jain, Suresh Pal and Rajendra Vohra. It was also discovered that Maruti Van washed by these accused belonged to Sanjeev Kumar Goel (deceased). Aforesaid arrest was made on 06.05.2004 and on the same day on pointing of accused Vaibhav Jain, recovery of weapon of assault i.e. knife was recovered by P.W.-8, S.I. Hardev Singh. Thereafter, recovery memo of same (Ext. KA-5) was prepared. Aforesaid recovery was made in presence of P.W. 1 Abhay Kumar and P.W. 4 Vishal Anand.

140. According to Mr Sushil Shukla, learned counsel for appellants, recovery of blood stained knife has been falsely shown against accused-Vaibhav Jain on account of collective mischief of Investigating Officer of the case alongwith informant and other relatives of deceased. The showing of recovery at the behest of accused-Vaibhav Jain is a clear case of ingenuity on part of Investigating Officer who fabricated this piece of evidence just to make prosecution case impregnable. Circumstances clearly point out that since very beginning prosecuting agency instead of impartially endeavouring to unravel the truth behind murder of deceased was bent upon creating circumstances/evidence to get accused-Vaibhav Jain falsely implicated in instant case.

141. The recovery of alleged weapon of assault cannot be used against accused-Vaibhav Jain and is simply not reliable inasmuch as it does not conform to the requirement of Section 27 of Evidence Act. Before the said recovery becomes admissible, prosecution is required to prove the information supplied by accused to the Investigating Officer of the case otherwise, such recovery of weapon of assault becomes inadmissible in law and cannot be read or used against accused Vaibhav Jain. As the prosecution has failed to do so inasmuch as P.W.-8 has failed to prove the alleged recovery as required in law recovery of alleged weapon of assault cannot be used as an incriminating circumstance against accused-Vaibhav Jain.

142. To buttress his submission, he has relied upon **State of Karnatka Vs. David Rozrio (2002) 7SCC 728** and has refferred to paragraph 5, which according to learned counsel for appellants, supports his argument. The same reads as under:

"5.The first question is whether the evidence relating to recovery is sufficient to fasten guilt on the accused. Section 27 of the Evidence Act is by way of proviso to Sections 25 to 26 and a statement even by way of confession made in police custody which distinctly relates to the fact discovered is admissible in evidence against the accused. This position was succinctly dealt with by this Court in Delhi Admn. V. Balakrishan (AIR 1972 SC 3) and Md. Inayatullah v. State of Maharashtra (AIR 1976 SC483). ***The words "so much of such information" as relates distinctly to the fact thereby discovered, are very important and the whole force of the section concentrates on them. Clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate.*** *The ban as imposed by the preceding sections was presumably inspired by the fear of the Legislature that a person under police influence might be induced to confess by the exercise of undue pressure. If all that is required to lift the*

ban be the inclusion in the confession of information relating to an object subsequently produced, it seems reasonable to suppose that the persuasive powers of the police will prove equal to the occasion, and that in practice the ban will lose its effect. The object of the provision i.e. Section 27 was to provide for the admission of evidence which but for the existence of the section could not in consequences of the preceding sections, be admitted in evidence. ***It would appear that under Section 27 as it stands in order to render the evidence leading to discovery of any fact admissible, the information must come from any accused in custody of the police.*** *The requirement of police custody is productive of extremely anomalous results and may lead to the exclusion of much valuable evidence in cases where a person, who is subsequently taken into custody and becomes an accused, after committing a crime meets a police officer or voluntarily goes to him or to the police station and states the circumstances of the crime which lead to the discovery of the dead body, weapon or any other material fact, in consequence of the information thus received from him. This information which is otherwise admissible becomes inadmissible underSection 27 if the information did not come from a person in the custody of a police officer or did come from a person not in the custody of a police officer.* ***The statement which is admissible under Section 27 is the one which is the information leading to discovery. Thus, what is admissible being the information, the same has to be proved and not the opinion formed on it by the police officer. In other words, the exact information given by the accused while in custody which led to recovery of the articles has to be proved. It is, therefore, necessary for the benefit of both the accused and prosecution that information given should be recorded and proved and if not so recorded, the exact information must be adduced through evidence.*** *The basic idea embedded in Section 27 of the Evidence Act is the doctrine of confirmation by subsequent events. The doctrine is founded on the principle that if any fact is discovered as a search made on the strength of any information obtained from a prisoner, such a discovery is a guarantee that the information supplied by the prisoner is true. The information might be confessional or non-inculpatory in nature but if it results in discovery of a fact, it becomes a reliable information. It is now well settled that recovery of an object is not discovery of fact envisaged in the section. Decision of Privy Council in Palukuri Kotayya v. Emperor (AIR 1947 PC 67), is the most quoted authority for supporting the interpretation that the "fact discovered" envisaged in the section embraces the place from which the object was produced, the knowledge of the accused as to it, but the information given must relate distinctly to that effect. [see State of Maharashtra v. Danu Gopinath Shirde and Ors. (2000) Crl.LJ 2301].* ***No doubt, the information permitted to be admitted in evidence is confined to that portion of the information which "distinctly relates to the fact thereby discovered". But the information to get admissibility need not be so truncated as to make it insensible or incomprehensible. The extent of information admitted should be consistent with understandability. Mere statement that the accused led the police and the witnesses to the place where he had concealed the articles is not indicative of the information given."***

143. He has then referred to ***Mujeeb Vs. State of Kerala, (2000) 10 SCC 315***

and has relied upon paragraphs 19 and 20, which are reproduced herein under:

" 19. We find from the evidence of the investigating officer, PW 13 that the accused were taken to various places for the alleged recovery of the above articles. Though according to the investigating officer the recovery was made on the basis of the statement of the accused but we find from the evidence that actual words in verbatim leading to recovery were not recorded by the investigating officer. For example in case of the recovery PW 49 deposed in the following words:

"Thereafter, based on the statement of the same accused that he knows the person who runs a blade company and provision shop at Ambalavayal with whom he had pledged the gold bangles and that he could show the same place as led by the accused we reached the same place questioned the witness and recorded his evidence"

20. In our opinion such a statement by the accused cannot be treated as statement of the accused leading to recovery. Moreover witnesses to the recoveries were co-drivers of the deceased residing far away at a distance of about 100 km. Therefore, such recoveries are not legally acceptable."

144. He thus concludes that when aforesaid recovery of weapon of assault is examined in light of above quoted judgement defining the scope, content and applicability of S.27 of Evidence Act, it is evident that testimony of Investigating Officer of the case i.e. PW-8 (as at Pg 64 of paper book) does not prove the information obtained by him from accused-Vaibhav Jain leading to recovery of knife, Consequently, alleged recovery of weapon of assault becomes wholly irrelevant and is rendered inadmissible besides being suspicious.

145. It is also urged that as far as blood stains on knife are concerned, since the recovery itself is inadmissible in law, no explanation worth is required for this piece of evidence. However it is once again reiterated that prosecution has not proved the fact that blood stains found on the knife matched with blood group of deceased. For the very reasons submitted in respect of blood stained seat cover of Maruti Van belonging to deceased, this fact of blood stained knife also loses its significance.

146. Even otherwise, the recovery of knife in absence of any other proved incriminating circumstances connecting the accused with crime in question, cannot be relied upon to fasten guilt on the accused for committing murder of deceased.

147. Before proceeding to evaluate the submissions urged by learned counsel for appellant, it is appropriate to reproduce Section 27 of Indian Evidence Act. The same is quoted herein under:-

*27. **How much of information received from accused may be proved.**-- Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.*

148. What is the scope of Section 27 of Indian Evidence Act, has been explained in recent judgement of Supreme Court in

Asar Mohammad and Others Vs. State of Uttar Pradesh, (2019) 12 SCC 253. Paragraph 21 of above noted judgement is relevant for the controversy in hand. Same is accordingly reproduced below:-

"21.It is a settled legal position that the facts need not be self probatory and the word "fact" as contemplated in Section 27 of the Evidence Act is not limited to "actual physical material object". The discovery of fact arises by reason of the fact that the information given by the accused exhibited the knowledge or the mental awareness of the informant as to its existence at a particular place. It includes a discovery of an object, the place from which it is produced and the knowledge of the accused as to its existence. It will be useful to advert to the exposition in thecase of Vasanta Sampat Dupare v. State of Maharashtra, in particular, paragraphs 23 to 29 thereof. The same read thus :

"23. While accepting or rejecting the factors of discovery, certain principles are to be kept in mind. The Privy Council in Pulukuri Kotayyav. King Emperor23 has held thus: (IA p. 77)

"...it is fallacious to treat the 'fact discovered' within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that 'I will produce a knife concealed in the roof of my house' does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added 'with which I stabbed A', these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant."

24.In Mohd. Inayatullah v. State of Maharashtra24, while dealing with the ambit and scope of Section 27 of the Evidence Act, the Court held that: (SCC pp. 831-32, paras 11-13)

"11. Although the interpretation and scope of Section 27 has been the subject of several authoritative pronouncements, its application to concrete cases is not always free from difficulty. It will therefore be worthwhile at the outset, to have a short and swift glance at the section and be reminded of its requirements. The section says:

'27. How much of information received from accused may be proved.--Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.'

12. The expression 'provided that' together with the phrase 'whether it amounts to a confession or not' show that the section is in the nature of an exception to the preceding provisions particularly Sections 25 and 26. It is not necessary in this case to consider if this section

qualifies, to any extent, Section 24, also. It will be seen that the first condition necessary for bringing this section into operation is the discovery of a fact, albeit a relevant fact, in consequence of the information received from a person accused of an offence. The second is that the discovery of such fact must be deposed to. The third is that at the time of the receipt of the information the accused must be in police custody. The lastbut the most important condition is that only 'so much of the information' as relates distinctly to the fact thereby discovered is admissible. The rest of the information has to be excluded.The word 'distinctly' means 'directly', 'indubitably', 'strictly', 'unmistakably'. The word has been advisedly used to limit and define the scope of the provable information. The phrase 'distinctly relates to the fact thereby discovered' is the linchpin of the provision. This phrase refers to that part of the information supplied by the accused which is the direct and immediate cause of the discovery. The reason behind this partial lifting of the ban against confessions and statements made to the police, is that if a fact is actually discovered in consequence of information given by the accused, it affords some guarantee of truth of that part, and that part only, of the information which was the clear, immediate and proximate cause of the discovery. No such guarantee or assurance attaches to the rest of the statement which may be indirectly or remotely related to the fact discovered.

13. At one time it was held that the expression 'fact discovered' in the section is restricted to a physical or material fact which can be perceived by the senses, and that it does not include a mental fact (see Sukhan v. Emperor25; Ganu Chandra Kashid v.Emperor26).

14. Now it is fairly settled that the expression 'fact discovered' includes not only the physical object produced, but also the place from which it is produced and the knowledge of the accused as to this (see Pulukuri Kotayya v.King Emperor27; Udai Bhan v. State of U.P.28)."

(emphasis in original)

25.In Aftab Ahmad Anasari v. State of Uttaranchal29 after referring to the decision in Pulukuri Kotayya30, the Court adverted to seizure of clothes of the deceased which were concealed by the accused. In that context, the Court opined that (Aftab Ahmad Anasari case, SCC p. 596, para 40

"40. ... the part of the disclosure statement, namely, that the appellant was ready to show the place where he had concealed the clothes of the deceased is clearly admissible under Section 27 of the Evidence Act because the same relates distinctly to the discovery of the clothes of the deceased from that very place. The contention that even if it is assumed for the sake of argument that the clothes of the deceased were recovered from the house of the sister of the appellant pursuant to the voluntary disclosure statement made by the appellant, the prosecution has failed to prove that the clothes so recovered belonged to the deceased and therefore, the recovery of the clothes should not be treated as an incriminating circumstance, is devoid of merits."

26.In State of Maharashtra v. Damu 31 it has been held as follows: (SCC p.283, para 35)

"35. ... It is now well settled that recovery of an object is not discovery of a

fact as envisaged in [Section 27 of the Evidence Act, 1872]. The decision of the Privy Council in Pulukuri Kotayya v. King Emperor32 is the most quoted authority for supporting the interpretation that the 'fact discovered' envisaged in the section embraces the place from which the object was produced, the knowledge of the accused as to it, but the information given must relate distinctly to that effect."

The similar principle has been laid down in State of Maharashtra v. Suresh 33, State of Punjab v. Gurnam Kaur34, Aftab Ahmad Anasari v. State of Uttaranchal35, Bhagwan Dass v. State (NCT of Delhi)36, Manu Sharma v. State (NCT of Delhi)37 and Rumi Bora Dutta v.State of Assam38.

27.In the case at hand, as is perceptible, the recovery had taken place when the appellant was accused of an offence, he was in custody of a police officer, the recovery had taken place in consequence of information furnished by him and the panch witnesses have supported the seizure and nothing has been brought on record to discredit their testimony.

28.Additionally, another aspect can also be taken note of. The fact that the appellant had led the police officer to find out the spot where the crime was committed, and the tap where he washed the clothes eloquently speak of his conduct as the same is admissible in evidence to establish his conduct. In this context we may refer with profit to the authority in Prakash Chand v. State (Delhi Admn.) 39 wherein the Court after referring to the decision in H.P. Admn. v. Om Prakash40 held thus: (Prakash Chand case, SCC p.95, para 8)

"8. ...There is a clear distinction between the conduct of a person against whom an offence is alleged, which is admissible under Section 8 of the Evidence Act, if such conduct is influenced by any fact in issue or relevant fact and the statement made to a police officer in the course of an investigation which is hit by Section 162 of the Criminal Procedure Code.What is excluded by Section 162 of the Criminal Procedure Code is the statement made to a police officer in the course of investigation and not the evidence relating to the conduct of an accused person (not amounting to a statement) when confronted or questioned by a police officer during the course of an investigation. For example, the evidence of the circumstance, simpliciter, that an accused person led a police officer and pointed out the place where stolen articles or weapons which might have been used in the commission of the offence were found hidden, would be admissible as conduct, under Section 8 of the Evidence Act, irrespective of whether any statement by the accused contemporaneously with or antecedent to such conduct falls within the purview of Section 27 of the Evidence Act."

29.In A.N. Venkatesh v. State of Karnataka, it has been ruled that: (SCC p.721, para 9)

"9. By virtue of Section 8 of the Evidence Act, the conduct of the accused person is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact. The evidence of the circumstance, simpliciter, that the accused pointed out to the police officer, the place where the dead body of the kidnapped boy was found and on their pointing out the body was exhumed, would be admissible as conduct under Section 8 irrespective of the

fact whether the statement made by the accused contemporaneously with or antecedent to such conduct falls within the purview of Section 27 or not as held by this Court in Prakash Chand v. State (Delhi Admn.). Even if we hold that the disclosure statement made by the appellants-accused (Exts. P-15 and P-16) is not admissible under Section 27 of the Evidence Act, still it is relevant under Section 8. The evidence of the investigating officer and PWs 1, 2, 7 and PW 4 the spot mahazar witness that the accused had taken them to the spot and pointed out the place where the dead body was buried, is an admissible piece of evidence under Section 8 as the conduct of the accused. Presence of A-1 and A-2 at a place where ransom demand was to be fulfilled and their action of fleeing on spotting the police party is a relevant circumstance and are admissible under Section 8 of the Evidence Act." (emphasis supplied)

149- Reference may also be made to **Jai Karan Pasi Vs. State of U.P. reported in 2019 (6) ALJ 177,** wherein a Division Bench of this Court has considered scope and import of section 27 of the Evidence Act. Following has been observed in paragraphs 26 and 27, which are quoted herein under:

"Now the most incriminating piece of evidence is or would have been so if duly proved, the recovery of the incriminating articles at the instance of the accused i.e. the alleged recovery of blood stained knife and that of the wearing apparel 'kurta' belonging to the accused which too is claimed by the prosecution to have contained blood stains. It goes without saying that if a particular fact is discovered in consequence of an information furnished by the accused while being in police custody then so much of such information which distinctly relates to the discovery of such facts becomes a relevant circumstance to be considered. It does not need any elaboration on the point and is a matter of settled law that the discovery of such alleged 'fact' is not tantamount to the discovery of such 'article' or 'object' which may be discovered by the police in consequence of such information furnished by the accused-appellant. As was so pithily observed by the Privy Council that if a knife is discovered in consequence of an information furnished by the accused it cannot be said to be a discovery owing to the statement of accused because the knifes were discovered many centuries back! It is not the discovery of knife which is relevant. Actually such kind of discovery will assume importance and relevance only if it can be proved that the discovered article is connected with the crime in question. If it can be shown that the article or object recovered has a connecting nexus with the crime committed, it becomes an incriminating article or an incriminating object. But in order to call or term the recovered knife an incriminating article it has to be shown and proved by prosecution as to how is it connected with the crime in question. It is for this purpose that the prosecution seeks to prove in such cases that the article recovered contained the blood which was or which could have been that of the deceased. If the recovered knife and the kurta of the accused contained such human blood, it would be then called an incriminating article or an incriminating object having evidentiary relevance. Then shall arise the question as to how and why the accused of a particular case acquired the conspicuous knowledge about such incriminating article having been placed or concealed at a particular place which could not be within common sight of

people. If the recovered weapon was containing such blood or such features which demonstrated it to be a weapon of offence and if the kurta of the accused contained such blood which could be that of the deceased then the question would arise as to how had he acquired the knowledge about its whereabouts i.e. about the place of its concealment from where it has been recovered. Question will also arise as to how and under what circumstances the clothing belonging to the accused got the blood which could be or was that of the deceased. In fact, it is this guilty knowledge of the accused, the knowledge about the place of concealment of the weapon of offence or any such incriminating article like the Kurta which should be called a relevant fact and indeed be called the 'fact' discovered as a consequence of the information furnished by the accused as has been contemplated u/s 27 of Evidence Act. The time honoured observations made by the Privy Council in this regard while pronouncing its celebrated judgement in Kottaya v. Emperor, AIR (34) 1947 Privy Council 67 may be recalled profitably at this stage :

"8. The second question, which involves the construction of Section 27 of the Indian Evidence Act, will now be considered. That section and the two preceding sections, with which it must be read, are in these terms:-

'25. No confession made to a Police officer shall be proved as against a person accused of any offence.

26. No confession made by any person whilst he is in the custody of a Police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.'

9. The explanation to the section is not relevant.

27. Provided that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a Police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.

10. Section 27, which is not artistically worded, provides an exception to the prohibition imposed by the preceding section, and enables certain statements made by a person in police custody to be proved. The condition necessary to bring the section into operation is that the discovery of a fact in consequence of information received from a person accused of any offence in the custody of a Police officer must be deposed to, and thereupon so much of the information as relates distinctly to the fact thereby discovered may be proved. The section seems to be based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true, and accordingly can be safely allowed to be given in evidence; but clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate. Normally the section is brought into operation when a person in police custody produces from some place of concealment some object, such as a dead body, a weapon, or ornaments, said to be connected with the crime of which the informant is accused. Mr. Megaw, for the Crown, has argued that in such a case the "fact discovered" is the physical object produced, and that any information which

relates distinctly to that object can be proved. Upon this view information given by a person that the body produced is that of a person murdered by him, that the weapon produced is the one used by him in the commission of a murder, or that the ornaments produced were stolen in a dacoity would all be admissible. If this be the effect of Section 27, little substance would remain in the ban imposed by the two preceding sections on confessions made to the police, or by persons in police custody. That ban was presumably inspired by the fear of the legislature that a person under police influence might be induced to confess by the exercise of undue pressure. But if all that is required to lift the ban be the inclusion in the confession of information relating to an object subsequently produced, it seems reasonable to suppose that the persuasive powers of the police will prove equal to the occasion, and that in practice the ban will lose its effect. On normal principles of construction their Lordships think that the proviso to Section 26, added by Section 27, should not be held to nullify the substance of the section. In their Lordships' view it is fallacious to treat the "fact discovered" within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that "I will produce a knife concealed in the roof of my house" does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge; and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added "with which I stabbed A", these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant."

150. However, when facts of present case are examined in light of observation made in paragraph 27 of the judgement **State of Maharashtra Vs. Damu, (2000) 6-SCC 269** which has been quoted with approval in paragraph 21 in the case of Ashar Mohammad and others. (Supra), we find that recovery of weapon of assault i.e. knife had taken place when accused Vaibhav Jain was accused of an offence and was in custody. The recovery had taken place in consequence of an information furnished by him and the witnesses of recovery memo (Ext. Ka.-5) i.e. P.W.-1 and P.W.-4 have supported the seizure. Nothing has been brought on record to discard their testimony. Moreover, once the recovery memo regarding weapon of assault has been proved and marked as an exhibit, it's contents are also proved by virtue of Section 9 of Evidence Act. Consequently, aforesaid argument is not tenable and therefore rejected.

Circumstances relied upon by prosecution do not form a complete chain of events nor they have been individually established as there is no clinching and reliable evidence to prove the same.

151. It is submitted by learned counsel for accused-appellants Vaibhav Jain and Kaushal Kishore Jain that in instant case, it is easily demonstrated that various circumstances relied upon by

prosecution firstly have not been established individually inasmuch as there is no clinching and reliable evidence to prove each of the circumstances. Secondly, the circumstances do not form a complete chain of events giving conclusion about guilt of accused.

152. To lend support to his aforesaid submission, he has relied upon **Sudama Pandey Vs. State of Bihar (2002) 1SCC 679** wherein following has been observed in paragraphs 5 and 6:-

"5. The law relating to circumstantial evidence, in clear and unmistakable terms, has been laid down by this Court in various decisions and it is sufficient to quote statement of law made by this Court in Tanviben Pankajkumar Divetia vs. State of Gujarat 1997(7) SCC 156:-

45. The principle for basing a conviction on the basis of circumstantial evidence has been indicated in a number of decisions of this Court and the law is well settled that each and every incriminating circumstance must be clearly established by reliable and clinching evidence and the circumstances so proved must form a chain of events from which the only irresistible conclusion about the guilt of the accused can be safely drawn and no other hypothesis against the guilt is possible. This Court has clearly sounded a note of caution that in a case depending largely upon circumstantial evidence, there is always a danger that conjecture or suspicion may take the place of legal proof. The Court must satisfy itself that various circumstances in the chain of events have been established clearly and such completed chain of events must be such as to rule out a reasonable likelihood of the innocence of the accused. It has also been indicated that when the important link goes the chain of circumstances gets snapped and the other circumstances cannot, in any manner, establish the guilt of the accused beyond all reasonable doubts. It has been held that the Court has to be watchful and avoid the danger of allowing the suspicion to take the place of legal proof for sometimes, unconsciously it may happen to be a short step between moral certainty and legal proof. It has been indicated by this Court that there is a long mental distance between may be true and must be true and the same divides conjectures from sure conclusions.

6. These principles have been elaborately dealt with in Sharad Birdhichand Sarda vs. State of Maharashtra1984(4) SCC 116 and in various other decisions and reference to such cases is not necessary."

153. Mr. K.M. Tripathi, learned counsel for informant, on the other hand has relied upon judgement in the Case of **Sharad Birdhichand Sarda (Supra)** and contends that the test laid down in aforesaid judgement in paragraphs 152, 158 and 159 (already quoted above) is fully satisfied in present case. According to learned counsel for informant the various circumstances of present case (as detailed by us in paragraph 69 of this judgement except circumstance no.19.) form a complete chain of events in proximity to time and manner of occurrence and point at the guilt of accused appellants and no other hypothesis.

154. Mr. Amit Saxena, learned A.G.A has adopted the aforesaid argument of learned counsel for complainant and therefore, contends that present criminal appeals on behalf of accused appellants are

liable to be dismissed as the chance of circumstances even after excluding circumstance No. xix in complete and proved which point at the guilt of the accused and no other hypothesis.

155. On the rival submissions so urged before us by learned counsel for parties, this Court now has to decide whether part of the test laid down by Apex Court in the case of **Sharad Birdhichand Sarda (supra)** i.e. **"there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused"** for deciding a case based on circumstantial evidence is satisfied in the case in hand or not.

156. We have already pointed out 32 circumstances of this case and even after excluding circumstance no. 19, they according to us complete the chain of events in proximity to time and manner of occurrence. While deciding the issue relating to credibility and reliability of P.W.3 Anil Kumar a witness of last seen and P.W.4 Vishal Anand, who is a witness of last seen and also recovery of the weapon of assault (Ext. Ka-5), we have already held that P.W.3 is neither credible nor reliable and hence his testimony is not worthy of trust. His testimony is relevant only in respect of circumstance no. xix. Similar is the position regarding testimony of P.W.4 on last seen. As such, his testimony in so far as it relates to aforesaid is liable to be discarded. Once we have discarded testimonies of P.W.-3, Anil Kumar and P.W.-4, Vishal Anand, who are independent witnesses, in so far it relates to last seen circumstance no. xix gets wiped out from the chain of circumstances. Therefore, the question which arises for our consideration is:- once circumstance no.xix is removed from the chain of circumstances, the chain of circumstances in proximity to time and manner of occurrence remains intact or gets broken.

157. P.W.3 and P.W. 4 are witnesses of last seen. They both have deposed before Court below that deceased was last seen in company of four of the accused persons in his Maruti Van, while one of the accused was driving motorcycle of deceased and was following the Maruti Van. They are said to have been seen by these witnesses at around 10-10:30 pm.

158. Even if we discard above piece of evidence and consequently, circumstance no. 19, from the chain of circumstances, yet the chain of circumstances in proximity to time and manner of occurrence, still remains intact. The remaining circumstances stand proved by clinching and reliable testimonies of P.W. 1, P.W. 2 and P.W. 8 as well as other documentary and material evidence on record, to which we have already referred and dealt whith in previous part of the judgement.

159. P.W. 1, P.W.2 and P.W.8 have already been held by us to be credible and reliable and therefore, worthy of trust. Their testimonies insofar as they relate to hearsay evidence are part of same transaction and contemporaneous to the occurrence and therefore admissible under the Rule of res gestae embodied in Section 6 of Indian Evidence Act.

160. There is another aspect of the matter and that is whether accused have successfully discharged their burden under section 106 of Indian Evidence Act. The

relevancy of aforesaid provision in a case based on circumstantial evidence, and failure on the part of accused in not offering any explanation even in respect of facts which were in his special knowledge, has been considered in detail by a Division Bench of this Court comprising one of us **Rajeev Misra,J. in Ashok Kumar and Others Vs. State of U.P. 2018 (ADJ) Online 0377**. The relevant portion of aforesaid judgement regarding its applicability to the present case are to be found at pages 34 35, 36, 37, 38, 39, 40, 45, 46, 47, 48 and 49, of the judgement. The bench has observed at page 34 that Apex Court in the case of **State of West Bengal Vs. Mir Mohammad Umar and others 2000 (8) SCC, 382** held that it is difficult to put the extreme burden on the prosecution to lead such evidence which can only be gathered from those who have proximity with the deceased. It is in this context that the Court proceeded to discuss the presumption that can be raised on the basis of existing facts so as to allow the Court to treat the onus having been shifted on the accused.

161. The Bench thereafter, referred to paragraph nos. 13 to 18, 20, 21 and 22 of the judgement in the case of T**rimukh Maroti Kirkan Vs. State of Maharashtra 2006 (10) SCC 681**: The same are reproduced herein under:

"13. The demand for dowry or money from the parents of the bride has shown a phenomenal increase in last few years. Cases are frequently coming before the Courts, where the husband or in-laws have gone to the extent of killing the bride if the demand is not met. These crimes are generally committed in complete secrecy inside the house and it becomes very difficult for the prosecution to lead evidence. No member of the family, even if he is a witness of the crime, would come forward to depose against another family member. The neighbours, whose evidence may be of some assistance, are generally reluctant to depose in Court as they want to keep aloof and do not want to antagonize a neighbourhood family. The parents or other family members of the bride being away from the scene of commission of crime are not in a position to give direct evidence which may inculpate the real accused except regarding the demand of money or dowry and harassment caused to the bride. But, it does not mean that a crime committed in secrecy or inside the house should go unpunished.

14. If an offence takes place inside the privacy of a house and in such circumstances where the assailants have all the opportunity to plan and commit the offence at the time and in circumstances of their choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence, as noticed above, is insisted upon by the Courts. A Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. Both are public duties. (See Stirland v. Director of Public Prosecution 1944 AC 315 quoted with approval by Arijit Pasayat, J. in State of Punjab vs. Karnail Singh (2003) 11 SCC 271). The law does not enjoin a duty on the prosecution to lead evidence of such character which is almost impossible to be led or at any rate extremely difficult to be led. The duty on the prosecution is to lead such evidence which it is capable of leading, having regard to the facts and circumstances of the case. Here it is

necessary to keep in mind Section 106 of the Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Illustration (b) appended to this section throws some light on the content and scope of this provision and it reads:

(b) A is charged with traveling on a railway without ticket. The burden of proving that he had a ticket is on him."

15. Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. In view of Section 106 of the Evidence Act there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation.

16. A somewhat similar question was examined by this Court in connection with Sections 167 and 178-A of the Sea Customs Act in Collector of Customs v. D. Bhoormall AIR 1974 SC 859 and it will be apt to reproduce paras 30 to 32 of the reports which are as under:

"30. It cannot be disputed that in proceedings for imposing penalties under Clause (8) of Section 167 to which Section 178-A does not apply, the burden of proving that the goods are smuggled goods, is on the Department. This is a fundamental rule relating to proof in all criminal or quasi-criminal proceedings, where there is no statutory provision to the contrary. ***But, in appreciating its scope and the nature of the onus cast by it, we must pay due regard to other kindred principles, no less fundamental, of universal application. One of them is that the prosecution or the Department is not required to prove its case with mathematical precision to a demonstrable degree; for, in all human affairs absolute certainty is a myth, and-as Prof. Brett felicitously puts it - 'all exactness is a fake'. El Dorado of absolute proof being unattainable, the law, accepts for it, probability as a working substitute in this work-a-day world. The law does not require the prosecution to prove the impossible. All that it requires is the establishment of such a degree of probability that a prudent man may, on its basis, believe in the existence of the fact in issue. Thus, legal proof is not necessarily perfect proof; often it is nothing more than a prudent man's estimate as to the probabilities of the case.***

31. The other cardinal principle having an important bearing on the incidence of burden of proof is that sufficiency and weight of the evidence is to be considered - to use the words of Lord Mansfield in Blatch v. Archer (1774) 1 Cowp. at p.65 "according to the proof which it was in the power of one side to prove, and in the power of the other to have contradicted". Since it is exceedingly difficult, if not absolutely impossible for the prosecution to prove facts which are especially within the knowledge of the opponent or the accused, it is not obliged to prove them as part of its primary burden.

32. Smuggling is clandestine conveying of goods to avoid legal duties. Secrecy and stealth being its covering guards, it is impossible for the Preventive Department to unravel every link of the process. Many facts relating to this illicit business remain in the special or peculiar knowledge of the person concerned in it. On the principle underlying Section 106, Evidence Act, the burden to establish those facts is cast on the person concerned; and if he fails to establish or explain those facts, an adverse inference of facts may arise against him, which coupled with the presumptive evidence adduced by the prosecution or the Department would rebut the initial presumption of innocence in favour of that person, and in the result, prove him guilty. As pointed out by Best in 'Law of Evidence', (12th Edn., Article 320, page 291), the "presumption of innocence is, no doubt, presumptio juris; but every day's practice shows that it may be successfully encountered by the presumption of guilt arising from the recent (unexplained) possession of stolen property", though the latter is only a presumption of fact. Thus the burden on the prosecution or the Department may be considerably lightened even by such presumptions of fact arising in their favour. However, this does not mean that the special or peculiar knowledge of the person proceeded against will relieve the prosecution or the Department altogether of the burden of producing some evidence in respect of that fact in issue. It will only alleviate that burden, to discharge which, very slight evidence may suffice.

17. The aforesaid principle has been approved and followed in Balram Prasad Agrawal v. State of Bihar & Ors. AIR 1997 SC 1830 where a married woman had committed suicide on account of ill-treatment meted out to her by her husband and in-laws on account of demand of dowry and being issueless.

18. The question of burden of proof where some facts are within the personal knowledge of the accused was examined in State of West Bengal v. Mir Mohammad Omar & Ors. (2000) 8 SCC 382. In this case the assailants forcibly dragged the deceased, Mahesh from the house where he was taking shelter on account of the fear of the accused and took him away at about 2.30 in the night. Next day in the morning his mangled body was found lying in the hospital. The trial Court convicted the accused under Section 364 read with Section 34 IPC and sentenced them to 10 years RI. The accused preferred an appeal against their conviction before the High Court and the State also filed an appeal challenging the acquittal of the accused for murder charge. The accused had not given any explanation as to what happened to Mahesh after he was abducted by them. The learned Sessions Judge after referring to the law on circumstantial evidence had observed that there was a missing link in the chain of evidence after the deceased was last seen together with the accused persons and the discovery of the dead body in the hospital and had concluded that the prosecution had failed to establish the charge of murder against the accused persons beyond any reasonable doubt. This Court took note of the provisions of Section 106 of the Evidence Act and laid down the following principle in paras 31 to 34 of the reports :

"31. The pristine rule that the burden of proof is on the prosecution to prove the guilt of the accused should not be taken as a fossilised doctrine as though

it admits no process of intelligent reasoning. The doctrine of presumption is not alien to the above rule, nor would it impair the temper of the rule. On the other hand, if the traditional rule relating to burden of proof on the prosecution is allowed to be wrapped in pedantic coverage, the offenders in serious offences would be the major beneficiaries and the society would be the casualty.

32. In this case, when the prosecution succeeded in establishing the afore-narrated circumstances, the court has to presume the existence of certain facts.

Presumption is a course recognised by the law for the court to rely on in conditions such as this.

33. Presumption of fact is an inference as to the existence of one fact from the existence of some other facts, unless the truth of such inference is disproved. Presumption of fact is a rule in law of evidence that a fact otherwise doubtful may be inferred from certain other proved facts. When inferring the existence of a fact from other set of proved facts, the court exercises a process of reasoning and reaches a logical conclusion as the most probable position. The above principle has gained legislative recognition in India when Section 114 is incorporated in the Evidence Act. It empowers the court to presume the existence of any fact which it thinks likely to have happened. In that process the court shall have regard to the common course of natural events, human conduct, etc. in relation to the facts of the case.

34. When it is proved to the satisfaction of the court that Mahesh was abducted by the accused and they took him out of that area, the accused alone knew what happened to him until he was with them. If he was found murdered within a short time after the abduction the permitted reasoning process would enable the court to draw the presumption that the accused have murdered him. Such inference can be disrupted if the accused would tell the court what else happened to Mahesh at least until he was in their custody."

20. In Ram Gulam Chaudhary & Ors. v. Sate of Bihar (2001) 8 SCC 311, the accused after brutally assaulting a boy carried him away and thereafter the boy was not seen alive nor his body was found. The accused, however, offered no explanation as to what they did after they took away the boy. It was held that for the absence of any explanation from the side of the accused about the boy, there was every justification for drawing an inference that they have murdered the boy. It was further observed that even though Section 106 of the Evidence Act may not be intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt, but the section would apply to cases like the present, where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding death. The accused by virtue of their special knowledge must offer an explanation which might lead the Court to draw a different inference.

21. In a case based on circumstantial evidence where no eye-witness account is available, there is another principle of law which must be kept in mind. The principle is that when an incriminating circumstance is put to

the accused and the said accused either offers no explanation or offers an explanation which is found to be untrue, then the same becomes an additional link in the chain of circumstances to make it complete. This view has been taken in a catena of decisions of this Court. [See State of Tamil Nadu v. Rajendran (1999) 8 SCC 679 (para 6); State of U.P. v. Dr. Ravindra Prakash Mittal AIR 1992 SC 2045 (para 40); State of Maharashtra v. Suresh (2000) 1 SCC 471 (para 27); Ganesh Lal v. State of Rajasthan (2002) 1 SCC 731 (para 15) and Gulab Chand v. State of M.P. (1995) 3 SCC 574 (para 4)].

22. Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes placed in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime. In Nika Ram v. State of Himachal Pradesh AIR 1972 SC 2077 it was observed that the fact that the accused alone was with his wife in the house when she was murdered there with 'khokhri' and the fact that the relations of the accused with her were strained would, in the absence of any cogent explanation by him, point to his guilt. In Ganeshlal v. State of Maharashtra (1992) 3 SCC 106 the appellant was prosecuted for the murder of his wife which took place inside his house. It was observed that when the death had occurred in his custody, the appellant is under an obligation to give a plausible explanation for the cause of her death in his statement under Section 313 Cr.P.C. The mere denial of the prosecution case coupled with absence of any explanation was held to be inconsistent with the innocence of the accused, but consistent with the hypothesis that the appellant is a prime accused in the commission of murder of his wife. In State of U.P. v. Dr. Ravindra Prakash Mittal AIR 1992 SC 2045 the medical evidence disclosed that the wife died of strangulation during late night hours or early morning and her body was set on fire after sprinkling kerosene. The defence of the husband was that wife had committed suicide by burning herself and that he was not at home at that time. The letters written by the wife to her relatives showed that the husband ill-treated her and their relations were strained and further the evidence showed that both of them were in one room in the night. It was held that the chain of circumstances was complete and it was the husband who committed the murder of his wife by strangulation and accordingly this Court reversed the judgment of the High Court acquitting the accused and convicted him under Section 302 IPC. In State of Tamil Nadu v. Rajendran (1999) 8 SCC 679 the wife was found dead in a hut which had caught fire. The evidence showed that the accused and his wife were seen together in the hut at about 9.00 p.m. and the accused came out in the morning through the roof when the hut had caught fire. His explanation was that it was a case of accidental fire which resulted in the death of his wife and a daughter. The medical evidence showed that the wife died due to asphyxia as a result of strangulation and not on account of burn injuries. It was held that there cannot be any hesitation to come to the conclusion that it was the accused (husband) who was the perpetrator of the crime.

The aforesaid decision has been followed in the case of Raj Kumar Prasad

Vs. State of Bihar 2007 (10) SCC 433, in the case of Narendra Vs. State of Karnataka 2009 (6) SCC 61 and in the decision of Gajanan Dashrath Kharate Vs. State of Maharashtra 2016 (4) SCC 604."

162. Evidence has been defined in Section 3 of the Indian Evidence Act, 1872 as follows:-

"Evidence"- "Evidence" means and includes-

(1) All statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry; such statements are called oral evidence;

(2) [All documents including electronic records produced for the inspection of the Court], such documents are called documentary evidence."

157. The evidence relating to a fact can be understood from the definition of the word fact which is defined under the same as follows:-

"Fact"- "Fact" means and includes-

(1) anything, state of things, or relation of things, capable of being perceived by the senses;

(2) any mental condition of which any person is conscious.

3. A fact is stated to be proved according to the Act by the following definition:-

"Proved"- A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

163. Apart from this, the Indian Evidence Act, 1872 contains a guidance as to the presumption of a fact by a Court while appreciating evidence as to when a fact may be presumed to exist and proved or when the Court shall presume the fact to have been proved. Section 4 of the Indian Evidence Act, 1872 is extracted hereinunder:-

4. "**May presume"**.--Whenever it is provided by this Act that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it.

"Shall presume".--Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved:

"Conclusive proof".--When one fact is declared by this Act to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.

164. While defining the relevancy of facts Section 8 of the Indian Evidence Act, 1872 also brings within it its fold the conduct of a party in the following terms:-

".....The conduct of any party, or of any agent to any party, to any suit or proceeding, in reference to such suit or proceeding, or in reference to any fact in

issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.

Explanation 1- The work "conduct" in this section does not include statements, unless those statements accompany and explain acts other than statements; but this explanation is not to affect the relevancy of statements under any other section of this Act.

Explanation 2--When the conduct of any person is relevant, any statement made to him or in his presence and hearing, which affects such conduct is relevant."

165. **On the issue of the burden of proof under Chapter 7 of the Act, Section 106 prescribes the burden of proving a fact on a person especially within the knowledge of that person. Section 106 is extracted hereinunder:-**

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.

166. A case where circumstantial evidence is the only available evidence then in such cases, the task of the Court is to find out the motive for the commission of the offence in order to link it with the commission of the crime by an accused. This has to be done by following the principles relating to a conviction or an acquittal in a case arising out of circumstantial evidence. For this reference may be had to the celebrated decision of **Sharad Viridhi Chandra Sharda Vs. State of Maharashtra 1984 (4) SCC 116.** The principles that were culled out therein have been followed time and again in a large number of cases including the latest decision in the case of **State of Himanchal Pradesh Vs. Raj Kumar 2018 (2) SCC 69** where the Court has ruled that an inference of guilt can be drawn in a case based on circumstantial evidence.

167. In order to prove the case on the basis of the evidence available whether direct or circumstantial, it is the duty of the prosecution to discharge its initial burden by adducing material on the basis whereof an inference of the commission of an offence involving the accused can be drawn. This discharge of initial burden is mandatory as held in several cases and reiterated in the case of **Joydeb Patra and others Vs. State of West Bengal 2014 (12) SCC 444** where in paragraph 10, the supreme Court has ruled as follows:-

10. We are afraid, we cannot accept this submission of Mr. Ghosh. ***This Court has repeatedly held that the burden to prove the guilt of the accused beyond reasonable doubt is on the prosecution and it is only when this burden is discharged that the accused could prove any fact within his special knowledge under Section 106 of the Indian Evidence Act to establish that he was not guilty. In Sucha Singh Vs. State of Punjab (2001) 4 SCC 375, this Court held:***

"19. We pointed out that Section 106 of the Evidence Act is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt, but the section would apply to cases where prosecution has

succeeded in proving facts for which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of special knowledge regarding such facts failed to offer any explanation which might drive the court to draw a different inference."

168. Similarly, in **Vikramjit Singh Vs. State of Punjab (2006) 12 SCC 306**, this Court reiterated:

"14. Section 106 of the Indian Evidence Act does not relieve the prosecution to prove its case beyond all reasonable doubt. Only when the prosecution case has been proved the burden in regard to such facts which was within the special knowledge of the accused may be shifted to the accused for explaining the same. Of course, there are certain exceptions to the said rule, e.g., where burden of proof may be imposed upon the accused by reason of a statute."

Once the initial burden is discharged, then the onus shifts on the accused to explain the status of his innocence or involvement.

169. The burden to prove as to whether the death of the deceased was by an accident in the Kitchen lay on the accused. However, in view of the provisions of Sections 103 and 106 of the Indian Evidence Act 1872, the same does not absolve the prosecution of its initial burden to firmly establish it's own stand as held by the Apex Court in the case of **Sawal Das Vs. State of Bihar 1974 (4) SCC 193** paragraph no. 10 is extracted hereinunder:-

"10. Neither an Application of Section 103 nor of 106 of the Evidence Act could, however, absolve the prosecution from the duty of discharging its general or primary burden of proving the prosecution case beyond reasonable doubt. It is only when the prosecution has led evidence which if believed will sustain a conviction, or, which makes out prima facie case that the question arises of considering facts of which the burden of proof may lie upon the accused. The crucial question in the case before us is: Has the prosecution discharged its initial or general and primary burden of proving the guilt of the appellant beyond reasonable doubt?"

170. The Apex Court however in the same judgment in paragraph no. 9 has observed, relying on the case of Gurcharan Singh & Another Vs. State of Punjab AIR 1956 SC 460, that an accused having special knowledge of a fact has to come out with an explanation and discharge the burden as transcripted in paragraph no. 9 which is extracted hereinunder:-

"9. Learned Counsel for the appellant contended that Section 106 of the Evidence Act could not be called in aid by the prosecution because that section applies only where a fact relating to the actual commission of the offence is within the special knowledge of the accused, such as the circumstances in which or the intention with which an accused did a particular act alleged to constitute an offence. The language of Section 106 Evidence Act does not, in our opinion, warrant putting such a narrow construction upon it. This Court held in Gurcharan Singh v. State of Punjab(1), that the burden of proving a plea specifically set up by an accused, which may absolve him from criminal liability, certainly lies upon him. It is a different matter that the quantum of evidence by which he may succeed in discharging his burden of creating a

reasonable belief, that circumstance, absolving him from criminal liability may have existed, is lower than the burden resting upon the prosecution to establish the guilt of an accused beyond reasonable doubt."

171- Paragraphs 155 onwards are quoted from judgement in the case of Ashok Kumar (Supra). Since the aforesaid judgement is not paragraphed, we have numbered the quoted portion for convenience.

172- Having referred to the judgement of Apex Court as well as this Court on burden of proof and how and when the burden shifts. The provision contained in Section 313 Cr.P.C. requires to be noticed. What is the purpose of Section 313 Cr.P.C. has been succinctly explained in the case of Jai Karan Pasi (Supra) in paragraph 27, which reads as under:-

"Now when we advert to the facts of the present case we find nothing on record on the basis of which it may be said that either the knife so recovered at the instance of the accused or the kurta which is also said to have been recovered at the instance of accused ever contained the blood of the deceased. The only way to prove the same was the forensic or the chemical examiner's report. The articles were actually sent to the chemical examiner in this case and the report in that regard has also been received which we find available in lower court record showing that both of these articles contained human blood. But it was to our shock when we found that this important evidential piece of paper was never tendered by prosecution in evidence and as a consequence of this lapse it remained an unproved document and was never marked or exhibited! Though we have referred to this chemical examiner's report after having gone through it but we have serious doubts whether an unproved document ought to have been even referred to by us. Another serious hurdle in making any use of the same is for the reason that this circumstance of the aforesaid two articles having contained human blood was never put to the accused while he was examined under section 313 of Cr.P.C. The prosecution side either out of recklessness or for reasons best known to itself never chose either to prove this document and exhibit it as evidence nor it took care to put this fact before the accused as an incriminating circumstance to be used as evidence against him while he was being examined by the Court. The court itself also has never put this circumstance to the accused during the course of his examination under section 313 of Cr.P.C. In this context it may be pertinent to recall the law on the point. The purpose and object of putting the circumstances or the evidence and confront the accused with them directly is to give a first hand opportunity at a personal level to the accused so that he may explain those circumstances, if at all he could, which have been proposed to be used against him by the prosecution. There are so many things done in defence of the accused by his counsel but this part of the trial when the accused is examined u/s 313 Cr.P.C. has a solemn motto and object behind it. It is neither a casual exercise nor a purposeless exercise and the law as has evolved in this regard has remained consistent all throughout which asserts that any violation of statute in this regard goes to the root of the matter and may even vitiate the trial if prejudice can be shown to have been occasioned. Certainly those circumstances

or the pieces of evidence which have not been put to the accused during the course of his examination u/s 313 of Cr.P.C., have to be kept beyond the ken of consideration by the court and shall certainly not be reckoned against him in order to prove his guilt. Such facts and circumstances and pieces of evidence have got to be excluded by the court from consideration unless we may hold that such an omission has in fact not occasioned any prejudice to the accused for given reasons which may sometimes be conspicuously present in a given case. We may pile up a number of authorities in order to bring home this point but that is perhaps not needed as the point involved does not admit of any great controversy. Nevertheless it may be of use to cite some pertinent observations made by the Hon'ble Apex Court in this regard as were given in Nar Singh vs. State of Haryana (2015) 1 SCC 496 which reads as under :

9. The power to examine the accused is provided in Section 313 Cr.P.C. which reads as under:-

313. Power to examine the accused.- (1) In every inquiry or trial, for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him, the Court-

(a) may at any stage, without previously warning the accused put such questions to him as the Court considers necessary;

(b) shall, after the witnesses for the prosecution have been examined and before he is called on for his defence, question him generally on the case:

Provided that in a summons-case, where the Court has dispensed with the personal attendance of the accused, it may also dispense with his examination under clause (b).

(2). No oath shall be administered to the accused when he is examined under sub- section (1).

(3). The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them.

(4). The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.

(5). The Court may take help of Prosecutor and Defence Counsel in preparing relevant questions which are to be put to the accused and the Court may permit filing of written statement by the accused as sufficient compliance of this section.

10. There are two kinds of examination under Section 313 Cr.P.C. The first under Section 313 (1) (a) Cr.P.C. relates to any stage of the inquiry or trial; while the second under Section 313 (1) (b) Cr.P.C. takes place after the prosecution witnesses are examined and before the accused is called upon to enter upon his defence. The former is particular and optional; but the latter is general and mandatory. In Usha K. Pillai v. Raj K. Srinivas & Ors., (1993) 3 SCC 208, this Court held that the Court is empowered by Section 313 (1) clause (a) to question the accused at any stage of the inquiry or trial; while Section 313(1) clause (b) obligates the Court to question the accused before he

enters his defence on any circumstance appearing in prosecution evidence against him.

11. The object of Section 313 (1)(b) Cr.P.C. is to bring the substance of accusation to the accused to enable the accused to explain each and every circumstance appearing in the evidence against him. The provisions of this section are mandatory and cast a duty on the court to afford an opportunity to the accused to explain each and every circumstance and incriminating evidence against him. The examination of accused under Section 313 (1)(b) Cr.P.C. is not a mere formality. Section 313 Cr.P.C. prescribes a procedural safeguard for an accused, giving him an opportunity to explain the facts and circumstances appearing against him in the evidence and this opportunity is valuable from the standpoint of the accused. The real importance of Section 313 Cr.P.C. lies in that, it imposes a duty on the Court to question the accused properly and fairly so as to bring home to him the exact case he will have to meet and thereby, an opportunity is given to him to explain any such point.

12. Elaborating upon the importance of a statement under Section 313 Cr.P.C., in Paramjeet Singh alias Pamma v. State of Uttarakhand, (2010) 10 SCC 439 (para 22), this Court has held as under: Section 313 CrPC is based on the fundamental principle of fairness. The attention of the accused must specifically be brought to inculpatory pieces of evidence to give him an opportunity to offer an explanation if he chooses to do so. Therefore, the court is under a legal obligation to put the incriminating circumstances before the accused and solicit his response. This provision is mandatory in nature and casts an imperative duty on the court and confers a corresponding right on the accused to have an opportunity to offer an explanation for such incriminatory material appearing against him. Circumstances which were not put to the accused in his examination under Section 313 CrPC cannot be used against him and have to be excluded from consideration. (vide Sharad Birdichand Sarda v. State of Maharashtra(1984) 4 SCC 116 and State of Maharashtra v. Sukhdev Singh (1992) 3 SCC 700.

13. In Basava R. Patil & Ors. v. State of Karnataka & Ors., (2000) 8 SCC 740, this Court considered the scope of Section 313 Cr.P.C. and in paras (18) to (20) held as under:-

18. What is the object of examination of an accused under Section 313 of the Code? The section itself declares the object in explicit language that it is for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him. In Jai Dev v. State of Punjab (AIR 1963 SC 612) Gajendragadkar, J. (as he then was) speaking for a three-Judge Bench has focussed on the ultimate test in determining whether the provision has been fairly complied with. He observed thus:

The ultimate test in determining whether or not the accused has been fairly examined under Section 342 would be to enquire whether, having regard to all the questions put to him, he did get an opportunity to say what he wanted to say in respect of prosecution case against him. If it appears that the examination of the accused person was defective and thereby a prejudice has been caused to him, that would no doubt be a serious infirmity.

19. Thus it is well settled that the provision is mainly intended to benefit the accused and as its corollary to benefit the court in reaching the final conclusion.

20. 20. At the same time it should be borne in mind that the provision is not intended to nail him to any position, but to comply with the most salutary principle of natural justice enshrined in the maxim audi alteram partem. The word may in clause (a) of sub-section (1) in Section 313 of the Code indicates, without any doubt, that even if the court does not put any question under that clause the accused cannot raise any grievance for it. But if the court fails to put the needed question under clause (b) of the sub-section it would result in a handicap to the accused and he can legitimately claim that no evidence, without affording him the opportunity to explain, can be used against him. It is now well settled that a circumstance about which the accused was not asked to explain cannot be used against him."

173. The prosecution has successfully discharged its burden, inasmuch as circumstances relied upon by prosecution (detailed by us in paragraph 69 of this judgement but excluding circumstance no. xix) have been proved by leading evidence. Some of these circumstances, which were incriminating in nature were put to accused for their version in terms of section 313 Cr.P.C. However, the accused have simply made a bald denial and have failed to offer any explanation even in respect of facts which were in their special knowledge. Consequently, adverse inference has rightly been drawn against accused. However, the circumstances, pointed out by us in paragraph 69 form a complete chain and have proved by but they point at the guilt of accused appellant Vaibhav Jain and no other. There are only three pieces of evidence against co-accused and one additional circumstance against them. The same shall be referred to in the later part of the judgement. Therefore, we partly accept the submission urged by Mr. Shukla, and hold that the circumstances form a chain of events in proximity to time and manner of occurrence. They have been proved but point at the guilt of accused Vaibhav Jain

174. In view of the discussion made above, the inescapable conclusion is that that the test laid down by Apex Court in parapraphs 152, 158, 159 of the judgement in the case of **Sharad Birdhichand Sarda (Supra)** for deciding the guilt of an accused, in a case, based on circumstantial evidence, is fully proved against accused-appellant Vaibhav Jain. *"The circumstances from which the conclusion of guilt is to be drawn (detailed in paragraph 69 of this judgement and after excluding circumstance No. 19) are fully established. They are consistent only with the hypothesis of guilt of aforesaid accused appellant and no other. Above mentioned circumstances are of a conclusive nature and tendency. They exclude every possible hypothesis except the guilt of this accused appellant which is sought to be proved. Lastly, the circumstances are so complete that they do not leave any reasonable ground for the innocence of accused and in all probability point that the offence has been committed by above noted accused appellant."*

(Quoted with modification from judgement in Sharad Birdhichanda Sarda)

175. So far as the other three accused appellants namely, Kaushal Kishore Jain, Suresh Pal and Rajendra Vohra are

concerned, prosecution has failed to lead any evidence for establishing motive against these three appellants for committing the crime in question nor the chain of circumstances (detailed in paragraph 69 but excluding circumstance no. xix), point at the guilt of aforesaid three accused. The only legal evidence against these accused on record is that accused-appellant Suresh Pal, who is driver of accused-Vaibhav Jain was seen standing by P.W.1 Abhay Kumar Goyal at around 8:30 pm in front of Sindhu Bar Restaurant near Maruti Van of deceased, which was parked nearby. Apart from above, accused appellants Rajendra Vohra and Suresh Pal were arrested by P.W.8 S.I. Hardev Singh along with accused-Vaibhav Jain on 7.5.2004, when they were washing the blood stains on Maruti Van of deceased. Seeing Police, they attempted to flee but were overpowered which is an additional circumstance against them (Vide **Dhananjay Chatterjee Vs. State of U.P. (1994) 2SCC 220**. The names of accused persons are mentioned in the dieary of the deceased. As such the test laid down in Sharad Birdhichandra Sharda is not completely satisfied in present case qua the other three accused i.e. Kaushal Kishore, Rajendra Vohra and Suresh Pal.

176. The remaining three accused have also been convicted under sections 149 and 120-B IPC also and therefore, there must be clinching evidence on record to show that there was meeting of minds. Prosecution has miserably failed to lead any such evidence nor Court below has recorded specific finding to that effect. At this stage, it shall be useful to refer ***Firozuddin Basheeruddin and others Vs. State of Kerala, (2001) 7 SCC, 596,*** wherein Court has considered the constituents of Sections 120-A and 120-B IPC. In paragraphs 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32 and 33, Court has observed as follows:-

21. Section 120-A of the Indian Penal Code defines Criminal Conspiracy as follows :

"120-A. When two or more persons agree to do, or cause to be done---

(1) an illegal act, ot

(2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy:

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

Explanation It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object.

22. Section 120B, which prescribes in sub-section (1) the punishment for criminal conspiracy provides :

"120-B. (1) Whoever is a party to a criminal conspiracy to commit an offence punishable with death, [imprisonment for life] or rigorous imprisonment for a term of two years or upwards, shall, where no express provision is made in the Code for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence."

23. Like most crimes, conspiracy requires an act (actus reus) and an

accompanying mental state (mens rea). The agreement constitutes the act, and the intention to achieve the unlawful objective of that agreement constitutes the required mental state. In the face of modern organised crime, complex business arrangements in restraint of trade, and subversive political activity, conspiracy law has witnessed expansion in many forms. Conspiracy criminalizes an agreement to commit a crime. All conspirators are liable for crimes committed in furtherance of the conspiracy by any member of the group, regardless of whether liability would be established by the law of complicity. To put it differently, the law punishes conduct that threatens to produce the harm, as well as conduct that has actually produced it. Contrary to the usual rule that an attempt to commit a crime merges with the completed offense, conspirators may be tried and punished for both the conspiracy and the completed crime. The rationale of conspiracy is that the required objective manifestation of disposition to criminality is provided by the act of agreement. Conspiracy is a clandestine activity. Persons generally do not form illegal covenants openly. In the interests of security, a person may carry out his part of a conspiracy without even being informed of the identity of his co-conspirators. Since an agreement of this kind can rarely be shown by direct proof, it must be inferred from circumstantial evidence of co-operation between the accused. What people do is, of course, evidence of what lies in their minds. To convict a person of conspiracy, the prosecution must show that he agreed with others that together they would accomplish the unlawful object of the conspiracy.

24. Another major problem which arises in connection with the requirement of an agreement is that of determining the scope of a conspiracy who are the parties and what are their objectives. The determination is critical, since it defines the potential liability of each accused. The law has developed several different models with which to approach the question of scope. One such model is that of a chain, where each party performs a role that aids succeeding parties in accomplishing the criminal objectives of the conspiracy. No matter how diverse the goals of a large criminal organisation, there is but one objective: to promote the furtherance of the enterprise. So far as the mental state is concerned, two elements required by conspiracy are the intent to agree and the intent to promote the unlawful objective of the conspiracy. It is the intention to promote a crime that lends conspiracy its criminal cast.

25. Conspiracy is not only a substantive crime. It also serves as a basis for holding one person liable for the crimes of others in cases where application of the usual doctrines of complicity would not render that person liable. Thus, one who enters into a conspiratorial relationship is liable for every reasonably foreseeable crime committed by every other member of the conspiracy in furtherance of its objectives, whether or not he knew of the crimes or aided in their commission. The rationale is that criminal acts done in furtherance of a conspiracy may be sufficiently dependent upon the encouragement and support of the group as a whole to warrant treating each member as a causal agent to each act. Under this view, which of the conspirators committed the substantive offence would be less significant in determining the defendants liability than the fact that the crime was performed as a part of a larger division of

labor to which the accused had also contributed his efforts.

26. Regarding admissibility of evidence, loosened standards prevail in a conspiracy trial. Contrary to the usual rule, in conspiracy prosecutions any declaration by one conspirator, made in furtherance of a conspiracy and during its pendency, is admissible against each co- conspirator. Despite the unreliability of hearsay evidence, it is admissible in conspiracy prosecutions. Explaining this rule, Judge Hand said:

"Such declarations are admitted upon no doctrine of the law of evidence, but of the substantive law of crime. When men enter into an agreement for an unlawful end, they become ad hoc agents for one another, and have made a partnership in crime. What one does pursuant to their common purpose, all do, and as declarations may be such acts, they are competent against all. (Van Riper v. United States 13 F.2d 961, 967 (2d Cir.1926)."

27. Thus conspirators are liable on an agency theory for statements of co-conspirators, just as they are for the overt acts and crimes committed by their confreres.

28. Interpreting the provisions in Sections 120A and 120B of the IPC, this Court in the case of Yash Pal Mittal v. State of Punjab (1977) 4 SCC 540 in para 9 at pages 543 & 544, made the following observations :

"9. The offence of criminal conspiracy under Section 120-A is a distinct offence introduced for the first time in 1913 in Chapter V-A of the Penal Code. The very agreement, concert or league is the ingredient of the offence. It is not necessary that all the conspirators must know each and every detail of the conspiracy as long as they are co-conspirators in the main object of the conspiracy. There may be so many devices and techniques adopted to achieve the common goal of the conspiracy and there may be division of performances in the chain of actions with one object to achieve the real end of which every collaborator must be aware and in which each one of them must be interested. There must be unity of object or purpose but there may be plurality of means sometimes even unknown to one another, amongst the conspirators. In achieving the goal several offences may be committed by some of the conspirators even unknown to the others. The only relevant factor is that all means adopted and illegal acts done must be and purported to be in furtherance of the object of the conspiracy even though there may be sometimes misfire or overshooting by some of the conspirators. Even if some steps are resorted to by one or two of the conspirators without the knowledge of the others it will not affect the culpability of those others when they are associated with the object of the conspiracy. The significance of criminal conspiracy under Section 120-A is brought out pithily by this Court in Major E.G.Barsay v. State of Bombay (1962) 2 SCR 195 thus:

'The gist of the offence is an agreement to break the law. The parties to such an agreement will be guilty of criminal conspiracy, though the illegal act agreed to be done has not been done. So too, it is not an ingredient of the offence that all the parties should agree to do a single illegal act. It may comprise the commission of a number of acts. Under Section 43 of the Indian Penal Code, an act

would be illegal if it is an offence or if it is prohibited by law. Under the first charge the accused are charged with having conspired to do three categories of illegal acts, and the mere fact that all of them could not be convicted separately in respect of each of the offences has no relevancy in considering the question whether the offence of conspiracy has been committed. They are all guilty of the offence of conspiracy to do illegal acts, though for individual offences all of them may not be liable. '

We are in respectful agreement with the above observations with regard to the offence of criminal conspiracy.

29. In the case of Kehar Singh and Others v. State (Delhi Administration, (1988) 3 SCC 609, a bench of three learned Judges in paras 271 to 276 held : (SCC pp. 731-33)

"271. Before considering the other matters against Balbir Singh, it will be useful to consider the concept of criminal conspiracy under Sections 120-A and 120-B of IPC. These provisions have brought the Law of Conspiracy in India in line with the English law by making the overt act unessential when the conspiracy is to commit any punishable offence. The English law on this matter is well settled. The following passage from Russel on Crime (12th edn., Vol.I, p.202) may be usefully noted :

'The gist of the offence of conspiracy then lies, not in doing the act, or effecting the purpose for which the conspiracy is formed, nor in attempting to do them, nor in inciting others to the parties. Agreement is essential. Mere knowledge, or even discussion, of the plan is not, per se, enough.'

272. Glanville Williams in the Criminal Law (2nd edn. p.382) explains the proposition with an illustration :

'The question arose in an Iowa case, but it was discussed in terms of conspiracy rather than of accessoryship. D, who had a grievance against P, told E that if he would whip P someone would pay his fine. E replied that he did not want anyone to pay his fine, that he had a grievance of his own against P and that he would whip him at the first opportunity. E whipped P. D was acquitted of conspiracy because there was no agreement for concert of action, no agreement to co-operate". '

273. Coleridge,J., while summing up the case to jury in Regina v. Murphy (173 Eng. Reports 508) pertinently states :

'I am bound to tell you, that although the common design is the root of the charge, it is not necessary to prove that these two parties came together and actually agreed in terms to have this common design and to pursue it by common means, and so to carry it into execution. This is not necessary, because in many cases of the most clearly established conspiracies there are no means of proving any such thing, and neither law nor common sense requires that it should be proved. If you find that these two persons pursued by their acts the same object, often by the same means, one performing one part of an act, so as to complete it, with a view to the attainment of the object which they were pursuing, you will be at liberty to draw the conclusion that they have been engaged in a conspiracy to effect that object. The question you have to ask yourselves is, Had they this common design, and did they pursue it by these common means the design being unlawful?""

274. It will be thus seen that the most important ingredient of the offence of

conspiracy is the agreement between two or more persons to do an illegal act. The illegal act may or may not be done in pursuance of agreement, but the very agreement is an offence and is punishable. Reference to Sections 120-A and 120-B IPC would make these aspects clear beyond doubt. Entering into an agreement by two or more persons to do an illegal act or legal act by illegal means is the very quintessence of the offence of conspiracy.

275. Generally, a conspiracy is hatched in secrecy and it may be difficult to adduce direct evidence of the same. The prosecution will often rely on evidence of acts of various parties to infer that they were done in reference to their common intention. The prosecution will also more often rely upon circumstantial evidence. The conspiracy can be undoubtedly proved by such evidence direct or circumstantial. But the court must enquire whether the two persons are independently pursuing the same end or they have come together in the pursuit of the unlawful object. The former does not render them conspirators, but the latter does. It is, however, essential that the offence of conspiracy requires some kind of physical manifestation of agreement. The express agreement, however, need not be proved. Nor actual meeting of two persons is necessary. Nor it is necessary to prove the actual words of communication. The evidence as to transmission of thoughts sharing the unlawful design may be sufficient. Gerald Orchard of University of Canterbury, New Zealand explains the limited nature of this proposition :

'Although it is not in doubt that the offence requires some physical manifestation of agreement, it is important to note the limited nature of this proposition. The law does not require that the act of agreement take any particular form and the fact of agreement may be communicated by words or conduct. Thus, it has been said that it is unnecessary to prove that the parties actually came together and agreed in terms to pursue the unlawful object : there need never have been an express verbal agreement, it being sufficient that there was a tacit understanding between conspirators as to what should be done".'

276. I share this opinion, but hasten to add that the relative acts or conduct of the parties must be conscientious and clear to mark their concurrence as to what should be done. The concurrence cannot be inferred by a group if irrelevant facts artfully arranged so as to give an appearance of coherence. The innocuous, innocent or inadvertent events and incidents should not enter the judicial verdict. We must thus be strictly on our guard.

30. In the case of State of Maharashtra & Ors. vs. Som Nath Thapa & Ors., (1996) 4 SCC 659, a bench of three learned Judges observed in paras 22 24 :

"22. As in the present case the bomb blast was a result of a chain of actions, it is contended on behalf of the prosecution, on the strength of this Courts decision in Yash Pal Mittal v. State of Punjab which was noted in para 9 of Ajay Aggarwal case (1993)3 SCC 609 that of such a situation there may be division of performances by plurality of means sometimes even unknown to one another; and in achieving the goal several offences may be committed by the conspirators even unknown to the others. All that is relevant is that all means adopted and illegal acts done must be and purported to be in

furtherance of the object of the conspiracy, even though there may be sometimes misfire or overshooting by some of the conspirators.

23. Our attention is pointedly invited by Shri Tulsi to what was stated in para 24 of Ajay Aggarwal case wherein Ramaswamy, J. stated that the law has developed several or different models or techniques to broach the scope of conspiracy. One such model is that of a chain, where each party performs even without knowledge of the other, a role that aides succeeding parties in accomplishing the criminal objectives of the conspiracy. The illustration given was what is done in the process of procuring and distributing narcotics or an illegal foreign drug for sale in different parts of the globe. In such a case, smugglers, middlemen, retailers are privies to a single conspiracy to smuggle and distribute narcotics. The smugglers know that the middlemen must sell to retailers; and the retailers know that the middlemen must buy from importers. Thus the conspirators at one end of the chain know that the unlawful business would not, and could not, stop with their buyers, and those at the other end know that it had not begun with their settlers. The action of each has to be considered as a spoke in the hub there being a rim to bind all the spokes together in a single conspiracy.

24. The aforesaid decisions, weighty as they are, lead us to conclude that to establish a charge of conspiracy knowledge about indulgence in either an illegal act or a legal act by illegal means is necessary. In some cases, intent of unlawful use being made of the goods or services in question may be inferred from the knowledge itself. This apart, the prosecution has not to establish that a particular unlawful use was intended, so long as the goods or service in question could not be put to any lawful use. Finally, when the ultimate offence consists of a chain of actions, it would not be necessary for the prosecution to establish, to bring home the charge of conspiracy, that each of the conspirators had the knowledge of what the collaborator would do, so long as it is known that the collaborator would put the goods or service to an unlawful use."

31. This Court in the case of Mehbub Samsuddin Malek & Ors. Vs. State of Gujarat, (1996) 10 SCC 480, holding the conviction of the accused under Section 120-B of the IPC on drawing inference regarding an agreement from the circumstances, observed in para 37: (SCC pp. 495-96)

"37. It was, however, contended by the learned counsel for the appellants that even if the prosecution evidence against Appellant 1 is believed his conviction under Section 120-B cannot be sustained. It was contended that when the bus started from the station Appellant 1 did not know that a communal disturbance had taken place near Mandavi and that a mob of Muslim boys would be standing at the entrance of Rajpura Pole. Thus there was no scope whatsoever for him to hatch a conspiracy with the mob near the entrance of Rajpura Pole. It was also submitted that Appellant 2s getting down from the bus and going near the mob was consistent with his innocence and in all probability he had gone near the mob to say that he was a Muslim and therefore he should not be beaten. He submitted that before an accused can be convicted under Section 120-B the prosecution has to establish an agreement and an agreement requires at least two persons. In this case there is

nothing on record to show that there was an agreement between Appellant 1 and any person from that mob. In our opinion there is no substance in this contention. The prosecution case was that sensing some trouble and seeing a mob of armed Muslim boys standing at the entrance of Rajpura Pole Appellant 1 stopped the bus just opposite Rajpura Pole with a view to facilitate an attack on the passengers by the said mob. In spite of the request of passengers he did not start the bus before the mob and had some discussion with the persons of that mob. Thereafter the mob came near the bus and assaulted the passengers. That was the conspiracy alleged by the prosecution. If really the bus had stopped because of the mob coming in front of it then it was not necessary for him to get down from the bus. He could have disclosed his identify even by remaining in the bus. In view of the evidence of the eyewitnesses, the explanation given by him has to be regarded as false. His conduct is also inconsistent with his innocence. The stopping of the bus at a place where there was no necessity to stop it, his getting down from the bus and going across the road right up to the entrance of the Rajpura Pole and talking to the persons in the said mob leads to an irresistible inference that he not only facilitated the attack on the passengers by stopping the bus just opposite the assembly to attack the passengers. Thus an agreement between him and the said unlawful assembly is satisfactorily established by the prosecution and therefore his conviction under Section 120-B IPC also deserves to be upheld."

32. In the case of State through Superintendent of Police, CBI/SIT etc.etc. vs. Nalini & Ors. Etc.etc., (1999) 5 SCC 253, discussing the principles governing the Law of Conspiracy in the case under Sections 120-A, 120-B and 302 of IPC, Wadhwa, J., summarised the principles in para 583 as follows : (SCC pp 515-18)

" 583. Some of the broad principles governing the law of conspiracy may be summarized though, as the name implies, a summary cannot be exhaustive of the principles.

1. Under Section 120-A IPC offence of criminal conspiracy is committed when two or more persons agree to do or cause to be done an illegal act or legal act by illegal means. When it is a legal act by illegal means overt act is necessary. Offence of criminal conspiracy is an exception to the general law where intent alone does not constitute crime. It is intention to commit crime and joining hands with persons having the same intention. Not only the intention but there has to be agreement to carry out the object of the intention, which is an offence. The question for consideration in a case is did all the accused have the intention and did they agree that the crime be committed. It would not be enough for the offence of conspiracy when some of the accused merely entertained a wish, howsoever horrendous it may be, that offence be committed.

2. Acts subsequent to the achieving of the object of conspiracy may tend to prove that a particular accused was party to the conspiracy. Once the object of conspiracy has been achieved, any subsequent act, which may be unlawful, would not make the accused a part of the conspiracy like giving shelter to an absconder.

3. Conspiracy is hatched in private or in secrecy. It is rarely possible to

establish a conspiracy by direct evidence. Usually, both the existence of the conspiracy and its objects have to be inferred from the circumstances and the conduct of the accused.

4. Conspirators may for example, be enrolled in a chain A enrolling B, B enrolling C, and so on; and all will be members of a single conspiracy if they so intend and agree, even though each member knows only the person who enrolled him and the person whom he enrols. There may be a kind of umbrella-spoke enrolment, where a single person at the centre does the enrolling and all the other members are unknown to each other, though they know that there are to be other members. These are theories and in practice it may be difficult to tell which conspiracy in a particular case falls into which category. It may however, even overlap. But then there has to be present mutual interest. Persons may be members of single conspiracy even though each is ignorant of the identity of many others who may have diverse roles to play. It is not a part of the crime of conspiracy that all the conspirators need to agree to play the same or an active role.

5. When two or more persons agree to commit a crime of conspiracy, then regardless of making or considering any plans for its commission, and despite the fact that no step is taken by any such person to carry out their common purpose, a crime is committed by each and every one who joins in the agreement. There has thus to be two conspirators and there may be more than that. To prove the charge of conspiracy it is not necessary that intended crime was committed or not. If committed it may further help prosecution to prove the charge of conspiracy.

6. It is not necessary that all conspirators should agree to the common purpose at the same time. They may join with other conspirators at any time before the consummation of the intended objective, and all are equally responsible. What part each conspirator is to play may not be known to everyone or the fact as to when a conspirator joined the conspiracy and when he left.

7. A charge of conspiracy may prejudice the accused because it forces them into a joint trial and the court may consider the entire mass of evidence against every accused. Prosecution has to produce evidence not only to show that each of the accused has knowledge of the object of conspiracy but also of the agreement. In the charge of conspiracy the court has to guard itself against the danger of unfairness to the accused. Introduction of evidence against some may result in the conviction of all, which is to be avoided. By means of evidence in conspiracy, which is otherwise inadmissible in the trial of any other substantive offence prosecution tries to implicate the accused not only in the conspiracy itself but also in the substantive crime of the alleged conspirators. There is always difficulty in tracing the precise contribution of each member of the conspiracy but then there has to be cogent and convincing evidence against each one of the accused charged with the offence of conspiracy. As observed by Judge Learned Hand this distinction is important today when many prosecutors seek to sweep within the dragnet of conspiracy all those who have been associated in any degree whatever with the main offenders.

8. As stated above it is the unlawful agreement and not its accomplishment, which is the gist or

essence of the crime of conspiracy. Offence of criminal conspiracy is complete even though there is no agreement as to the means by which the purpose is to be accomplished. It is the unlawful agreement which is the gravamen of the crime of conspiracy. The unlawful agreement which amounts to a conspiracy need not be formal or express, but may be inherent in and inferred from the circumstances, especially declarations, acts and conduct of the conspirators. The agreement need not be entered into by all the parties to it at the same time, but may be reached by successive actions evidencing their joining of the conspiracy.

9. It has been said that a criminal conspiracy is a partnership in crime, and that there is in each conspiracy a joint or mutual agency for the prosecution of a common plan. Thus, if two or more persons enter into a conspiracy, any act done by any of them pursuant to the agreement is, in contemplation of law, the act of each of them and they are jointly responsible therefor. This means that everything said, written or done by any of the conspirators in execution or furtherance of the common purpose is deemed to have been said, done or written by each of them. And this joint responsibility extends not only to what is done by any of the conspirators pursuant to the original agreement but also to collateral acts incidental to and growing out of the original purpose A conspirator is not responsible, however, for acts done by a co- conspirator after termination of the conspiracy. The joinder of a conspiracy by a new member does not create a new conspiracy nor does it change the status of the other conspirators, and the mere fact that conspirators individually or in groups perform different tasks to a common end does not split up a conspiracy into several different conspiracies.

A man may join a conspiracy by word or by deed. However, criminal responsibility for a conspiracy requires more than a merely passive attitude towards an existing conspiracy. One who commits an overt act with knowledge of the conspiracy is guilty. And one who tacitly consents to the object of a conspiracy and goes along with other conspirators, actually standing by while the others put the conspiracy into effect, is guilty though he intends to take no active part in the crime.

33. Interpreting the provisions in Sections 120A and 120B of the IPC, this Court in the case of Saju vs. State of Kerala, (2001) 1 SCC 378 held:

"7. To prove the charge of criminal conspiracy the prosecution is required to establish that two or more persons had agreed to do or caused to be done, an illegal act or an act which is not legal, by illegal means. It is immaterial whether the illegal act is the ultimate object of such crime or is merely incidental to that object. To attract the applicability of Section 120-B it has to be proved that all the accused had the intention and they had agreed to commit the crime. There is no doubt that conspiracy is hatched in private and in secrecy for which direct evidence would rarely be available. It is also not necessary that each member to a conspiracy must know all the details of the conspiracy. This Court in Yash Pal Mittal v. State of Punjab (1977) 4 SCC 540 held: (SCC p.543-44, para 9)

'9. The offence of criminal conspiracy under Section 120-A is a distinct offence introduced for the first time in 1913 in Chapter V-A of the Penal Code. The very agreement, concert or league is the ingredient of the offence. It is not necessary that all the conspirators must

know each and every detail of the conspiracy as long as they are con-conspirators in the main object of the conspiracy. There may be so many devices and techniques adopted to achieve the common goal of the conspiracy and there may be division of performances in the chain of actions with one object to achieve the real end of which every collaborator must be aware and in which each one of them must be interested. There must be unity of object or purpose but there may be plurality of means sometimes even unknown to one another, amongst the conspirators. In achieving the goal several offences may be committed by some of the conspirators even unknown to the others. The only relevant factor is that all means adopted and illegal acts done must be and purported to be in furtherance of the object of the conspiracy even though there may be sometimes misfire or overshooting by some of the conspirators. Even if some steps are resorted to by one or two of the conspirators without the knowledge of the others it will not affect the culpability of those others when they are associated with the object of the conspiracy. The significance of criminal conspiracy under Section 120-A is brought out pithily by this Court in E.G.Barsay v. State of Bombay (1962) 2 SCR 195 (SCR at p.228) thus:

"The gist of the offence is an agreement to break the law. The parties to such an agreement will be guilty of criminal conspiracy, though the illegal act agreed to be done has not been done. So too, it is not an ingredient of the offence that all the parties should agree to do a single illegal act. It may comprise the commission of a number of acts. Under Section 43 of the Indian Penal Code, an act would be illegal if it is an offence or if it is prohibited by law. Under the first charge the accused are charged with having conspired to do three categories of illegal acts, and the mere fact that all of them could not be convicted separately in respect of each of the offences has no relevancy in considering the question whether the offence of conspiracy has been committed. They are all guilty of the offence of conspiracy to do illegal acts, though for individual offences all of them may not be liable."

We are in respectful agreement with the above observations with regard to the offence of criminal conspiracy. '

10. It has thus to be established that the accused charged with criminal conspiracy had agreed to pursue a course of conduct which he knew was leading to the commission of a crime by one or more persons to the agreement, of that offence. Besides the fact of agreement the necessary mens rea of the crime is also required to be established.

177. In light of above, we can safely conclude that the remaining three accused-appellants i.e. Kaushal Kishore Jain, Suresh Pal and Rajendra Vohra are liable to be acquitted of the charges under Sections 120-B and 149 IPC. We are fortified in taking this view by judgement of Supreme Court in **Soyebbhai Yusufbhai Bharania and others Vs. State of Gujarat (2017) 13-SCC 342 w**herein Supreme Court upheld the view taken by High Court which granted benefit of acquittal to one of accused on aforesaid ground. Paragraph 15 of aforesaid judgement is relevant for present controversy and is accordingly reproduced herein-under:

"15. Learned senior counsel further submitted that the proposition

submitted by the State are incorrect in view of the fact that Section 149 is not attracted in the absence of the overt act being attributed to each accused, since there is no finding to the effect that five or more persons were involved in the act.

178. In view of above, it would not be prudent or logical to maintain the sentence and conviction awarded by Court below to aforesaid three accused appellants.

179. This brings us to the issue as to whether in the light of findings returned by us upon reappraisal and re-appreciation of evidence, the conviction and sentence awarded to accused-appellant Vaibahv Jain can be maintained or is liable to be modified.

180. The golden test laid down in **Shard Birdhichand Sarda's case (supra)** is fully satisfied against accused-appellant Vaibhav Jain. However, as has already been held above, there is no evidence of meeting of minds to commit the crime in question, therefore, his conviction and sentence under Sections 120-B and 149 IPC cannot be sustained.

181. With regard to conviction and sentence of accused Vaibhav Jain under Section 364 is concerned, we may first refer to the Code wherein abduction has been defined in Section 362 IPC as follows:-

*"According to section **362** of Indian penal code, Whoever by force compels, or by any deceitful means induces any person to go from any place, is said to abduct that person."*

182. The offence of abduction is punishable under Section 364 IPC. From the chain of circumstances coupled with the fact that accused-appellant Vaibhav Jain has failed to discharge the burden in terms of Section 106 IPC, inasmuch as he has neither deposed before the Court as a witness, nor adduced any witness, in support of his defence and except for a bald denial of the questions put to him under section 313 Cr.P.C., he has not offered any explanation of facts which were even in his special knowledge. It has come in evidence of P.W.1 whom we have held to be credible and reliable has clearly deposed that deceased was seen in the company of appellants at Sindhu Bar Restaurant at 8-8:30 pm when he went out to look for his brother Sanjeev Kumar Goel (deceased). It has further come in his evidence that when Sanjeev Kumar Goel (deceased) did not return at his home, this witness made a search regarding his whereabouts and visited the house of accused at 10:30 pm to find out his brother but the accused Vaibhav Jain was not present at his home. Therefore, by drawing adverse inference, the commission of offence punishable under Section 364 IPC is fully proved against Vaibhav Jain. The conclusion drawn by Court below with regard to above requires no interference by us. We reiterate that deceased was abducted for committing his murder.

183. With regard to conviction and sentence for offences punishable under Section 427 IPC, we may state that three of the accused-appellants have already been acquitted by us for offences under Sections 120-B and 149 IPC. There is nothing on record to conclude that accused-appellants are also guilty of an offence punishable under Section 427 IPC. Once co-accused have been acquitted of the charges under Sections 120-B and 149 IPC, dictates of prudence compel us to acquit accused-

appellant Vaibhav Jain of the charges under Sections 120-B, 149 and 427 IPC.

184. In the result, Criminal Appeal No. 7957 of 2006 (Vaibhav Jain Vs. State of U.P.) succeeds in part and is liable to be partly allowed. It is, accordingly, partly allowed. The conviction and sentence of above named accused-appellant under Sections 120 B, 149, 201 and 427 I.P.C. are set aside. However, his conviction under Sections 302 and 364 IPC is maintained. Impugned judgement and order passed by Court below shall stand modified to that extent. Accused appellant Vaibhav Jain is in jail. He shall remain in jail to serve out the sentence awarded by Court below.

185. Criminal Appeal No. 7044 of 2006 (Kaushal Kishore Jain Vs. State of U.P.), Criminal Appeal No. 7672 of 2006 (Suresh Pal Vs. State of U.P.) and Criminal Appeal No. 106 of 2007 (Rajendra Vohra Vs. State of U.P.), succeed and are allowed. The impugned judgment and order dated 09.11.2006 passed by Special Judge (E. C. Act)/ Additional Sessions Judge, Rampur in Sessions Trial No. 76 of 2005 (State Vs. accused-Vaibhav Jain and four others) under Sections 364, 302, 201, 120B and 427 I.P.C., P.S.-Bilaspur, District-Rampur arising out of Case Crime No. 315 of 2004 under Sections 302, 201, 427 I.P..C. P.S.-Bilaspur, District-Rampur, in so far it relates to accused appellants Kaushal Kishore Jain, Suresh Pal and Rajendra Vohra, is set aside. They are acquitted of the charges alleged against them. Accused Appellants Kaushal Kishore Jain and Rajendra Vohra are on bail. Their bail bonds are canceled. Accused appellant Suresh Pal is in jail. He shall be set free forthwith, if not wanted in another case. Copy of this judgement be sent to Court below immediately for compliance.

(2020)09ILR A954
APPELLATE JURISDICTION

CRIMINAL SIDE
DATED: ALLAHABAD 28.07.2020

BEFORE

THE HON'BLE BACHCHOO LAL, J.
THE HON'BLE RAM KRISHNA GAUTAM, J.

Criminal Appeal No.8204 of 2007

Ghanshyam Chaudhary & Anr
...Appellants(In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Lav Srivastava, Sri Ganesh Shanker Srivastava, Sri Govind Saran Hajela, Sri Jag Narain Sharma, Sri N.K. Chaubey, Sri Nikhilesh Kumar Chaudhary, Sri R.K. Singh, Sri R.R. Singh, Sri V.P. Srivastava.

Counsel for the Opposite Parties:
Smt. Manju Thakur, A.G.A.

Criminal Law-Appeal against Conviction U/S 302 IPC and Section 25 of Arms Act
Minor Contradiction- Minor discrepancies are normal in the witness statements - Totality of situation has to be considered.

Testimony of the witness corroborated by the testimony of the medical officer who conducted the autopsy.

Role of Motive – Motive plays no role in the appreciation of evidence in criminal trial based upon the ocular testimony – it plays vital role in a case base on circumstantial evidence.

Learned trial court has rightly appreciated facts and law placed before it.

Conviction upheld and appeal dismissed. (E-2)

List of Cases cited: -

1. Kali Ram Vs St. of Himachal Pradesh, AIR (1) 1972 SCC 2773

2. Vijayee Singh & ors Vs St. of U. P., AIR 1976 SC 966

3. Narbada Prasad Vs Chhaganlal, AIR 1969 SC 393

4. H.P. Thakore Vs St. of Gujrat, (1976) 4 SCC 640 (para 6)

5. Caetano Piedade Fernandes Vs Union Territory of Goa, Daman & Dieu, (1977) 1 SCC 707

6. Thulia Kali Vs St. of T.N., (1972) 3 SCC 393

7. Chandra Bhal Vs St. of U.P., (1971)3 SCC 983 para 4

8. St. of U.P. Vs Akhlaq & anr., 2010 (71) ACC 764 (Allahabad High Court, Lucknow Bench).

9. Takhaji Hiraji Vs Thakore Kubersing Chamansing, (2001) 6 Scc 145, para 20

10. St. Of Punj. Vs Karnail Singh, (2003) 11 SCC 271, para 12

11. Krishna Mochi Vs St. of Bihar, (2002)6 SCC 81, para 32

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. This criminal appeal, under Section 374(2) of Code of Criminal Procedure, (hereinafter referred to as 'Cr.P.C.') has been filed by Ghanshyam Chaudhary and Vishwanath, against judgment of conviction and sentence dated 23.11.2007 made by Court of Additional District and Session Judge, Fast Track Court No. 1, Basti, in Sessions Trial No. 16 of 2005 (State Vs. Ghanshyam Chaudhary and another) connected with Session Trial No. 151 of 2005 (State Vs. Ghanshyam Chaudhary), arising out of Case Crime No. 678 of 2004 of P.S. Walterganj, District Basti, for offence punishable under Section 302 IPC and Case Crime No. 495 of 2004, under Section 25 of Arms Act, of Police Station Sonha, District Basti, wherein, both of convict appellants Ghanshyam Chaudhary and Vishwanath have been convicted and sentenced with rigorous life imprisonment and fine of Rs. 10,000/-, each and in case of default in payment of fine, they are to suffer further rigorous imprisonment for each, and in connected Sessions Trial No. 151 of 2005 (State Vs. Ghanshyam Chaudhary), appellant Ghanshyam Chaudhary, has been acquitted for offence punishable under Sections 3/25/27 of Arms Act.

2. Sri Ganesh Shanker Srivastava and Nikhilesh Kumar Chaudhary, learned counsel for the convict-appellants, argued by pressing grounds of appeal, given in memo of appeal that impugned judgment and sentence is against the evidence on record. Prosecution failed to prove its case beyond reasonable doubt. Presence of witnesses appears to be doubtful and they have not seen the occurrence. They were fabricated witnesses. None of the witnesses were present at the time of incident. Appellants have been named in the FIR because of some ulterior motive and suspicion. They are of no concern with occurrence. There was no motive for them to commit this offence. Hence, this appeal with a prayer for allowing this appeal and thereby quashing impugned judgment and conviction made therein.

3. Smt. Manju Thakur, learned AGA, argued that it was a murder, committed by convict- appellants, by giving assault over deceased, having eye witness account of same, for which instant report was got lodged. After investigation, charge-sheet for offence punishable under Section 302 of IPC, against both of appellants

Ghanshyam Chaudhary and Vishwanath and in connected session trial against Ghanshyam Chaudhary for offence punishable under Section 25 of Arms Act was submitted. Cognizance over it was taken. Magistrate had committed file to Court of Sessions, where, trial was held and all material evidences along with material exhibits were proved and exhibited. Then after statements under Section 313 of Cr.P.C. were got recorded and after hearing of arguments of learned counsel for both sides, impugned judgment of conviction, in Session Trial No. 16 of 2005, was passed against both of convict-appellants Ghanshyam Chaudhary and Vishwanath, whereas, judgment of acquittal in Session Trial No. 151 of 2005 was there. After hearing over quantum of punishment, impugned sentence of rigorous life imprisonment with fine of Rs. 10000/-, each and in default additional rigorous imprisonment of six months was imposed. This judgment of conviction and sentence made therein, was in accordance with evidence on record. No where trial Court failed to appreciate facts and law or apply appropriate proposition of law. Hence, this appeal merits its dismissal.

4. Having heard learned counsels for both sides and gone through record of trial court including impugned judgment, prosecution version surfaced was that First Information Report Ex. Ka-2, was presented before Station Officer of Police Station Walterganj, District Basti, by informant Tilak Ram, son of Katai, r/o Kakarhiya, P.S. Sonaha, District Basti, with this contention that his sister, Indramati, was married 15 years back with Ram Pratap, r/o village Pachasi, P.S. Sonaha, District Basti. Ram Pratap was Gram Sevak and a Government servant, who died issueless on 4.9.2004. Indramati was asked by Village Secretary and Village Pradhan Ghanshyam Chaudhary (devar of Indramati, who is convict-appellant No. 1), at Block Development Office, Ram Nagar, for getting copy of family register and death certificate of Ram Pratap. Informant took his sister Indramati to Block Office, Ram Nagar, where Village Secretary and Ghanshyam Chaudhary were present. Secretary asked for coming on Saturday for getting those documents. This was in presence of Ghanshyam Chaudhary. While coming back to home, Indramati was being followed by informant. Dhruvchandra and Lalman, r/o Siyarapar and Walterganj, respectively, were in company of informant Tilak Ram. When they all reached at Belhasa, Vishwanath, s/o Ram Kumar, r/o village Sihara Khurd, P.S. Rudhauli, riding on a Boxer Motorcycle of red color, having pillion rider Ghanshyam Chaudhary, who is brother-in-law of Vishwanath, came near Indramati. Vishwanath gave exhortation for killing Indramati and Ghanshyam Chaudhary did firearm shot by a tamancha, thereby, killed Indramati on spot. It was about 4:00 P.M. Both of them fled from spot. This was a murder with a view to grab entire property of Indramati. Her dead body was lying on road and report was instantly presented. On the basis of this report, FIR of Case Crime No. 678 of 2004 was got registered at P.S. Walterganj, through a chick FIR Ex.Ka-3. This registration of case crime number was got entered in general diary entry Ex. Ka-4. Inquest proceeding was got conducted and its report Ex. Ka-5, was got prepared. Death, owing to firearm shot injury was opined in inquest proceeding. But autopsy examination was referred. For which, relevant papers i.e. letter to Regional Inspector, Basti Ex. Ka-7, Specimen seal by which dead body was sealed Ex. Ka-8, Photo dead body Ex. Ka-9, Police Form No. 13 Ex. Ka-10, Site map Ex. Ka-11,

recovery memo of recovery of broken bangles of deceased lying on spot Ex. Ka-12, recovery memo of taking of blood stained and plain soil from spot Ex. Ka-14, recovery memo of taking of slipper of deceased lying on spot Ex. Ka-13, recovery memo of taking empty cartridges lying on spot Ex. Ka-15, were got prepared. Matter was investigated, wherein, there was a recovery of country made tamancha, having a cartridge in its barrel and on the basis of this recovery memo, Case Crime No. 495 of 2004, under Section 3/25/27 of Arms Act, at P.S. Sonha, Basti, was got registered. As this country made tamancha was confessed to be weapon of offence of murder of case crime No. 678 of 2004 of Police Station Walterganj, District Basti, hence, it was connected with above offence of murder. After investigation, a sanction from District Magistrate, Basti, was obtained and it is Ex. Ka-17, spot map of recovery of firearm Ex.Ka-16 was got prepared. Autopsy examination report Ex. Ka-20, revealed death by antemortem injury over person of deceased caused by firearm weapon. Hence, charge-sheet Ex. Ka-19 for offence of murder was filed. Chick FIR of Case Crime No. 495 of 2004 Ex. Ka-21, General Diary Entry of this registration of case crime number of Police Station Sonaha Ex. Ka-22 along with charge-sheet for this offence was submitted.

5. As offence, punishable under Section 302 of IPC, was exclusively triable by Court of Sessions, hence, both of these files were committed to Court of Sessions, where, Court of Additional Sessions Judge, Court No. 6, Basti, vide order dated 5.8.2005, levelled charge of offence of murder punishable under Section 302 of IPC against Ghanshyam Chaudhary and offence of murder committed under joint mensrea with Ghanshyam Chaudhary punishable under Section 302/34 IPC against Vishwanath was levelled. Another charge for offence punishable under Section 3/25/27 of Arms Act against Ghanshyam Chaudhary was levelled. All these charges were read over and explained to accused persons, who pleaded not guilty and claimed for trial.

6. Prosecution examined informant as PW-1 Tilak Ram, PW-2- Dhruv Chand, PW-3 Lal Man, PW-4 Sri Prem Singh Dubey, PW-5 Sri Shiv Pujan Chauhan, PW-6 Sri Ram Saran Prasad, PW-7 Sri Anjani Kumar Upadhayay, PW-8 Sri Ganesh Singh, PW-9 Sri B.D. Srivastava, PW-10 Sri Durga Prasad Singh, PW-11 Sri Ashok Kumar Tiwari.

7. For having explanation of accused persons over incriminating evidences, given by prosecution, both of convict-appellants were asked questions under Section 313 of Cr.P.C. on 30.8.2007, wherein, a general reply of testimony of prosecution witnesses were made that testimony was incorrect and accused persons have been falsely implicated. But this fact was admitted to be true that deceased Indramati, sister of informant Tilak Ram, was married with Ram Pratap, resident of Village Pachhasi, Police Station Sohna, District Basti, and she was issueless. Recovery of country made tamancha of 0.315 bore and cartridges were said to be planted one.

8. Defence witness No. 1 Smt. Geeta and Defence Witness No. 2 Sri Mahendra Kumar were examined.

9. After hearing arguments of learned public prosecutor as well as learned counsel for the defence, judgment of

conviction for offence punishable under 302/34 of IPC for both of accused persons Vishwanath and Ghanshyam Chaudhary and judgment of acquittal for offence punishable under Section 3/35/37 of Arms Act was delivered. After hearing over quantum of sentence, learned trial Court awarded rigorous life imprisonment with fine of Rs. 10,000/-, against each of convict and in default of fine additional rigorous imprisonment as above.

10. This appeal by both of convict-appellants Ghanshyam Chaudhary and Vishwanath is against this judgement of conviction and sentence awarded for offence of murder. No appeal either by State or by informant-complainant is against judgment of acquittal, passed in Session Trial No. 151 of 2005.

11. Learned counsel for the appellants has vehemently argued that place of occurrence is not in consonance with case of prosecution. The spot, where deceased sustained firearm injury was a place having shrubs of Behya (a wide growing shrubs) and dead body was lying there at, whereas prosecution case proves spot other than it. Indramati- deceased was wife of Ram Pratap, who is real brother of Ghanshyam Chaudhary, who was a Gram Sevak- a Government Servant, having no issue and informant Tilak Ram was being very often fed by them. Deceased persuaded Tilak Ram for return of her money. Tilak Ram managed for murder of Indramati. Ghanshyam Chaudhary and his brother-in-law Vishwanath were got falsely implicated for this murder. The landed property was mutated in the name of Indramati, after death of her husband Ram Pratap and after her death, it was not to be diverted to accused persons. Hence, there had been no motive for this murder. This dead body was recovered from a place, having distance of about 5 kms. from the house of informant Tilak Ram. Whereas, accused persons were of remote places. Documentary evidence of extract of khatauni paper list marked as 81 (kha), having entry of Gata No. 39, 40, 41 of Village Chuthana and 85 (kha) with a copy of complaint No. 1185 of 2005 (Mahendra Pratap Vs. Tilak Ram Chaudhary) and order have been filed. Certified copies of statements of witnesses Jairam and Akriti, recorded therein, have been filed. Meaning thereby, murder of deceased Indramati by firearm shot and her inquest proceeding as well as autopsy examination has not been disputed by defence. Rather it has been argued before trial Court as well as before this appellate Court that it was a murder of Indramati by and under conspiracy of Tilak Ram and these appellants have been falsely implicated.

12. In **Kali Ram Vs. State of Himachal Pradesh, AIR (1) 1972 SCC 2773,** Court has propounded that in criminal case onus is upon prosecution to prove different ingredients of offence and unless it discharges that onus it cannot succeed to prove its case. Prosecution has to prove its case beyond all reasonable doubt; whereas accused is required to prove only till establishing preponderance of probabilities as has been propounded by Apex Court in **Vijayee Singh and others Vs State of U. P., AIR 1976 SC 966.**

13. In appeal, the burden is on appellant to prove how judgment under appeal is wrong? Appellant must show where assessment has gone wrong, as has been propounded in **Narbada Prasad Vs. Chhaganlal, AIR 1969 SC 393.**

14. Judgment of Hon'ble Apex Court by Hon'ble Mr. Justice V. R. Krishna Iyer in ***H.P. Thakore Vs. State of Gujrat,***

(1976) 4 SCC 640 (para 6) has propounded that while the murder is the tragedy, the discovery of the murderer beyond doubt is the judicial function. Hence, in this trial, this judicial function has been performed by learned Trial Court and it is being re-assessed by this Appellate court. Because as per verdict of Hon'ble Apex Court in ***Caetano Piedade Fernandes vs Union Territory of Goa, Daman And Dieu, (1977) 1 SCC 707*** Para 4 this has been propounded that "Appellate Court has the same power as the trial court of appreciating evidence and coming to its own conclusion on question of fact."

15. Informant- PW1 Tilak Ram, in his examination in chief, has categorically stated that he is an eyewitness account of this occurrence of murder of his sister Indramati, committed by Ghanshyam Chaudhary and Vishwanath. He, along with Dhruv and Lalman, was on his way to his village from Saltauva and his sister Indramati was also on the same way at about eight Kattha (about 40 Ft.) distance from him, when this occurrence, near Belhasa minor canal bridge, took place. Indramati was given firearm shot by Ghanshyam Chaudhary, who is younger brother of her pre-deceased husband and she died on spot. Dead body was lying on spot and it was about 4.00 P.M. of 06.10.2004. He immediately rushed to Police Station, where he gave information by written report, paper no. 3A/3 and the same is under his signature on record. This has been exhibited as Exhibit Ka 1. Regarding this registration of case crime number, at above time and place at police station concerned, is the same, being not under signature of this witness, no question in cross-examination has been asked by learned counsel for defence. This portion of his evidence is fully intact having no embellishment or contradiction. This has further been corroborated by statement of Scribe of Chick F.I.R., PW5 Constable 308 Shiv Poojan Chauhn, who, in his examination in chief, has categorically stated that he on 06.10.2004 while being posted as constable clerk at Police Station Walterganj, District Basti, has got registered FIR No. 71 of 2004 of Case Crime No. 678 of 2004, u/s 302 I.P.C. at P.S. Walgerganj, against Village Pradhan Ghanshyam, resident of Village Pachasi, P.S. Saunaha, District Basti, and Vishwanath, son of Rajkumar, resident of Village Sihari, P.S. Rudhauli, District Basti, on the basis of written report submitted by informant Tilak Ram, son of Kataee, resident of Village Kakraiya, P.S. Sonaha, District Basti. Chick FIR is on record as paper no. 3A/2 and the same is before this witness, having been under his handwriting and signature, which has been verified by him and on the basis of this testimony, it has been exhibited as Exhibit Ka3. This registration of case crime number, as above, for offence, as above, against accused, as above, was entered in General Diary entry of Police Station concerned at Report No. 34 at 17.30 hours on 06.10.2004. This G.D. entry was made by way of putting carbon beneath it and the same, original G.D., was with this witness at the time of recording of his statement before Court. This is true copy of original G.D. entry, prepared under one and common process, having his handwriting and signature, and this has been proved and exhibited as Exhibit Ka4.

16. In cross-examination, not a single question has been asked about this Exhibit Ka 3 and Ka4, for not being under handwriting and signature of this witness or not prepared at above given time and date or informant Tilak Ram was not present

with above written report Exhibit Ka1 i.e. no cross-examination over those facts is there and this is unrebutted evidence. Hence, on the basis of Exhibit Ka1- written report, Exhibit Ka2- Chick FIR and Exhibit Ka3- G.D. entry as well as oral testimonies of PW1 and PW5, it is proved that F.I.R. for occurrence of 4.00 P.M. of 06.10.2004 of offence of murder of deceased Indramati by firearm shot given at above place near Minor Canal of village Belhasa was got registered at P.S. Walterganj at 17.30 hours of the same day i.e. the report was within one and half hour i.e. a very prompt report having sequence of occurrence, mode of occurrence, weapon of occurrence, name of accused, who committed this offence, and witnesses, who witnessed this occurrence, is there and thus lodging of prompt F.I.R. has been proved beyond any doubt.

17. Hon'ble Apex Court by Hon'ble Mr. Justice H. R. Khanna in ***Thulia Kali Vs. State of T.N., (1972) 3 SCC 393*** at para 12 has propounded:

"The first information report in a criminal case is an extremely vital and valuable piece of evidence for the purpose of corroborating the oral evidence adduced in the trial. The object of insisting upon prompt lodging of the report to the police in respect of commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of the actual culprits and the part played by them as well as, the names of eye witnesses present at there scene of occurrence. Delay in lodging the first information report quite often results in embellishment, which is a Creature of after thought."

18. In the present case, it is a prompt F.I.R. having all those essential ingredients given in above precedent.

19. Though Hon'ble Apex Court regarding appreciation of evidence of F.I.R. in a criminal administration of justice has propounded in ***Chandra Bhal Vs. State of U.P., (1971)3 SCC 983 para 4:-***

"No doubt the first information report being an early record and the first version of the alleged criminal activity conveyed to the police officer with the object of putting the police in motion in order to investigate, is an important and valuable document. But it has also to be remembered that it is not a substantive piece of evidence and it can only be used for the purpose of corroborating or contradicting its maker. The statute does not provide that it must be made by an eyewitness to the commission of the alleged offence or that it must give full and precise details. It is, therefore, not intended to be treated as the last word of the prosecution in the matter. It merely marks the beginning of the investigation into the reported offence and its value must accordingly depend on the circumstances of each case including the nature of the crime, the position of the informant and the opportunity he had of witnessing the whole or part of the commission of the alleged offence."

20. First informant, PW1- Tilak Ram, is admittedly real brother of deceased. It is further admitted fact of defence, in reply to question no. 1 of statement recorded u/s 313 Cr.P.C., that Ram Pratap, who was a Gram Sewak, a Government servant, was real elder brother of accused- Ghanshyam Chaudhary, died on 04.09.2004. He was issueless and this accused Ghanshyam Chaudhary was Village Pradhan. As per defence case, Indramati was dependent upon her brother and she had gone to her parental village Kakarahiya. There was

previous close relation in between informant and his brother-in-law Ram Pratap, wherein money share was also there. Hence the circumstance, admitted, as above, reveals that Indramati was taking assistance of her brother. As per informant-PW1, he along with his sister Indramati had gone to Block Development Office Saltaua for having copy of Kutumb Register as well as death certificate of Ram Pratap and this was asked to be given by Village Secretary Dashshala. When this informant along with his sister (deceased Indramati) went Block Office, accused Ghanshyam Chaudhary, who was Village Pradhan, was present at Block Office near Village Secretary and it was asked by Village Secretary in presence of Ghanshyam Chaudhary for coming on next Saturday for taking those documents. Then on this information, the informant and his sister proceeded for their village Kakarahiya. But in town Saltauva at the eastern end Dhruv and Lalman met to the informant. As they were of village where informant's sister was married, hence, they all became in the company, because they were going towards one and same side. When they were accompanying each other, this Indramati was moving ahead 4-5 Kattha (about 40 to 45 Ft.) and this occurrence took place. Accused-Ghanshyam, who was at Block Development Office, Saltauva, being pillion rider on red colour Boxer motorcycle being driven by Vishwanath, his brother-in-law, came near Indramati and upon exhortation of Vishwanath, Ghanshyam Chaudhary gave firearm shot over Indramati, resulting her instant death. It was about 4.00 P.M. After this, informant proceeded for Police Station and got this report lodged. He came back at spot before police rushed. Then after inquest proceeding was conducted. Dead body was sealed intact and it was sent for autopsy examination. Statement of informant was got recorded by Investigating Officer. This testimony of informant- PW1 is with no exaggeration or embellishment or in contradiction with his previous statement made in the F.I.R. Rather it was in full corroboration in examination-in-chief as well as in cross-examination of the same. This witness is with no contradiction or exaggeration. His testimony is further corroborated by testimony of PW6- S.I. Ram Saran Prasad, who in his examination-in-chief has categorically stated that while being posted as S.I. Police at P.S. Walgerganj on 6.10.2004, Case Crime No. 678 of 2004, u/s 302 I.P.C. against Ghanshyam and Vishwanath was got registered in his presence and he was deputed with investigation of the same. He made entry in his paper number of case diary, wherein copy of chick FIR and G.D. entry was entered then after he proceeded for spot, where he got inquest report prepared. The same, in his handwriting and signature, is on record as Paper no. 3A/18. It has been proved and exhibited as Exhibit Ka5. Dead body was sealed on spot by preparing specimen seal of the same. Requisite papers, for autopsy examination of dead body, including letter to Regional Inspector of Police, letter to C.M.O., photo of dead body and challan of dead body were prepared under his own handwriting and signature and the same are on record as Paper No. 3A/9 to 3A/11, 3A/16 and 3A/17. They have been exhibited as Exhibit Ka6, Ka7, Ka8, Ka9, Ka10, respectively. Spot was visited, upon pointing out of the informant, at the same time. Statement of informant was recorded u/s 161 Cr.P.C. Spot map, under his handwriting and signature, is on record as paper no. 3A/20, which has been proved and exhibited as Exhibit Ka11. There were broken bangles of deceased lying on spot. Her slipper was

lying there at. These articles were taken in possession and recovery memos for those were got prepared under handwriting and signature of this witness. Blood stained soil as well as plain soil were taken from spot. This recovery memo was prepared under his dictation by S.I. Keshav Prasad Dubey in his handwriting, having signature of this witness too. These recovery memos have been proved and exhibited as Exhibit Ka12, Ka13 and Ka14. An empty cartridge as well as a bullet of cartridge were lying there at. These too were taken into possession, of which recovery memo was prepared by S.I. Keshav Prasad Dubey, under his dictation, and the same is Exhibit Ka15 on record. In cross-examination, he has specifically stated that the dead body was lying on road in area of Village Belhasa. A suggestive leading question has been put to this witness by learned counsel for defence that this witness visited spot but did not perform inquest proceeding. Rather dead body was taken to Police Station Walterganj, where inquest was conducted. This has been vehemently answered in negative by specific assertion that inquest proceeding was performed at spot and dead body was sealed, papers were prepared then after it was handed over to Police Constable for carrying it to mortuary for autopsy examination. Learned counsel for defence has argued that dead body was taken to Regional Police Line on the next day at about 10.00 A.M. and dead body was kept at Police Station Walterganj for whole night. This question has been answered in negative by this witness as well as Constable Clerk and it has specifically been said that the dead body was handed over to Constable concerned then after this witness is not aware of the same. Though, informant, in his cross-examination, has stated that it became night and it was told that the dead body will be taken in morning, hence, it was taken to mortuary in the morning. It is a plausible circumstance. Once dead body was sealed and it was handed over for carrying to mortuary then nothing matters as to when it was taken, particularly when murder on above date, time and place is not disputed or the witness, who had conducted autopsy examination has proved that the dead body was fully intact and sealed. Hence no question of any tampering ever arisen. Hair splitting cross-examination regarding site map, Exhibit Ka11, and taking of dead body, covering dead body by a bed-sheet etc. etc. has been vehemently argued by learned counsel for appellant, but the same is of no avail. Because time and again it has been propounded by Hon'ble Apex Court as well as this court that hair splitting examination is not to be said for throwing case of prosecution. Minor embellishment and trivial discrepancies are usual in witness statement. Inspite of hair splitting on any point, totality of situation ought to have been recognized. ***Leela Ram Vs. State of Haryana, 2000 SCC (Cri) 222.***

21. Testimonies of PW1 and PW6 have been further corroborated by testimony of Medical Officer, who had conducted autopsy examination. PW9- Dr. Vishnu Deepak Srivastava, Senior Skin Specialist, District Hospital, Basti, has categorically stated in his examination-in-chief, that while being posted as Senior Dermatologist at District Hospital, Basti, on 7.10.2004, he was deputed on post-mortem duty and dead body of deceased Indramati, aged about 35 years, wife of Ram Pratap, resident of Village Kakarahiya, P.S. Sonaha, District Basti, brought under sealed intact position, having been sealed by S.O. Waltergang, Basti, through CP 281 Rajendra Kumar Singh and CP 70 Jai Prakash Singh, was examined

upon identification by those constables at 3.10 P.M. of 7.10.2004. Deceased was of average body built. Eyes were closed, mouth was semi closed, rigor mortis was present in all limbs. There were antemortem injuries:- Injury No. 1- wound of entry of firearm shot 3x 2.5 cm x right side chest cavity deep over back- right side at the place of 6th rib joint with spinal chord at 2 cm distance having blackening and palming mark in 3x 5 cm area, all around injury, having inverted margin. Injury No. 2:- corresponding wound of exit firearm shape 4.5x 3 cm x chest cavity deep with everted margin, present in mid line sternum area. In internal examination 6th vertebra was fractured and portion of 6th rib, which adjoins 6th vertebra was fractured and missing. Right pleura and right lung were congested and lacerated. Clot of 500 Ml blood was there in right chest cavity. Cardiac membrane was lacerated. Right Atrium was having through and through laceration. Blood clot was present in pericardium. Semi digested meal to the tune of about 200 Mg was in stomach. This was a death owing to those ante-mortem firearm injuries. Documents, which were accompanying the sealed dead body, were got signed by this Medical Officer and they were returned back in an envelope. Autopsy examination report, under his handwriting and signature, was prepared at the time of examination. The same is on record as paper no. 3A/12, which has been proved and exhibited as Exhibit Ka19. In cross-examination no question with any inconsistency or exaggeration is there. Rather it is in full tune with examination-in-chief. More so, death by firearm shot is not disputed by learned counsel for defence either in its case taken as defence before trial court or in statement recorded u/s 313 Cr.P.C. or before this Appellate Court. Hence, it is a culpable homicide by giving firearm shot having one wound of entry and one wound of exit, resulting laceration over vital part, fracture of rib and vertebra, resulting death, amounting to murder of deceased, which has been fully proved by prosecution.

22. Motive has been vehemently argued by learned counsel for appellant. Whereas Hon'ble Apex Court as well as this court has at many times, propounded that motive plays no role in appreciation of evidence in a criminal trial based upon ocular testimony. It plays vital role in a case based on circumstantial evidence. ***State of U.P. Vs. Akhlaq and another, 2010 (71) ACC 764 (Allahabad High Court, Lucknow Bench)***. This trial is not based on circumstantial evidence. Rather it is based on ocular testimony of informant and two of witnesses, who were present on spot and were witness of occurrence, whose names were there in prompt F.I.R. (Exhibit Ka1).

23. PW2 is Dhruv Chandra, who in his examination-in-chief, has given the case of prosecution, fully intact and in corroboration of testimony of PW1, written as above. Lengthy cross-examination of this witness is there. But there is neither any contradiction nor embellishment. A suggestive question has been given that assailants went towards the same side from which side they have come on spot and this has been answered in negative by this witness. This suggestive question itself reveals presence of this witness at the time of assailants' assault and this is not being disputed. Time of occurrence, sequence of occurrence, names of assailants, circumstances under which this witness was capable to identify assailants, perceived sequence of occurrence have been fully narrated by this witness in his

examination-in-chief and there is no variance in cross-examination.

24. PW3 is Lalmani Chaudhary, who has repeated the same prosecution story, in his examination-in-chief, that Ghanshyam and Vishwanath came on a Boxer motorcycle from Saltaua side when Indramati was on her way to Kakrahiya near minor canal of Belhasa when exhortation was made by Vishwanath and firearm shot was given by Ghanshyam, Village Pradhan, resulting her death on spot. Though, in cross-examination, some contradictions and omissions have been tried to be established by learned counsel for defence, but the same are of no material in nature. The material fact is fully intact in his cross-examination, resulting him a fully reliable and trustworthy witness.

25. PW11 is a formal witness, who has concluded investigation. This witness PW11- Ashok Kumar Tiwari, S.S.I., in his statement-in-chief, has said that while being posted as Station Officer, P.S. Walterganj, on 6.10.2004, he took investigation of Case Crime No. 678 of 204, u/s 302 I.P.C. and after recording statements of Anjani Kumar Upadhyay, the then S.O., Sonaha, S.I. Vinod Kumar Baranwal, S.I. Raj Kumar, S.I. Anand Kumar Gupta, statement of Prem Shanker Dubey, Constable Yugul Kishore Mishra and Rajendra Yadav, got copied report of Forensic Science Laboratory of 24.12.2004, submitted charge-sheet for offence of murder against Vishwanath and Ghanshyam Chaudhary, under his own handwriting and signature, which is paper No. 3A/1, proved and exhibited as Exhibit Ka22.

26. Certain embellishment and exaggeration of prosecution witnesses regarding motive has been put to this witness and he has admitted the same to be an addition. On over all appreciation of those testimonies, it is apparently clear that those alleged addition of embellishment are not going to impeach testimonies of those witnesses. Rather they makes witnesses more natural and probable.

27. PW4- Prem Shanker Dubey, PW7- Anajani Kumar Upadhyay, PW8- S.I. Ganesh Singh, are witnesses of recovery of firearm, registration of above case crime of Arms Act, informant, who recovered above firearm and investigation of above Case Crime number of Arms Act. But trial court has delivered judgment of acquittal for above connected Sessions Trial of Arms Act and there is no appeal either by State or by victim against this judgment of acquittal. Hence appreciation of those evidence of those witnesses, for whom there is judgment of acquittal, is not needed by this court. Though, alleged Tamancha and its specification of its fire pin, over empty cartridge found on spot and test cartridges, in Forensic Science Laboratory were having same characters and similarities, which were there over empty cartridge recovered from spot and bullet found on spot, which was projectile of above empty fired cartridges. Hence it was fully proved by prosecution that Tamancha, proved as Material Exhibit, was the same Tamancha of which empty cartridge recovered from spot, was fired and it was given in Forensic Science Laboratory reports dated 27.4.2005, 24.2.2005 and 8.4.2005. But as there is no appeal against this judgment of acquittal, hence need not to be discussed in it.

28. Learned counsel for appellant has vehemently opposed spot map, whereas spot map, Exhibit Ka11, was fully proved

by its maker, first investigating officer-PW6- Ram Saran Prasad, and articles recovered from spot with recovery memos Exhibit Ka12, Ka13, Ka14 and Ka15 were with full report of Forensic Science Laboratory dated 27.4.2005, 24.2.2005 and 8.4.2005, which were tendered by learned Public Prosecutor and admissible in evidence because of being report of Forensic Science Laboratory. Which reveals that they were blood stained soil, recovered from spot, was with human blood like the other articles of deceased, recovered from spot. Physical structure of plain soil and blood stained soil were one and common. Hence place of occurrence was the same, where dead body was recovered and from where these articles were taken. Hence spot map was with no material variance. No cogent and specific reply or explanation explained. A general denial over prosecution evidence and exhibited proof has been given by accused persons before trial court while examined u/s 313 Cr.P.C.

29. Two witnesses, examined in defence, were of those facts that Ghanshyam Chaudhary was apprehended from his home and on the basis of this testimony of defence witness, the judgment of acquittal for offence of Arms Act is there. Hence these two defence witnesses DW1- Geeta Dev and DW2- Mahendra Kumar were concerned with facts relating to arrest and alleged recovery of Tamancha from Ghanshyam Chaudhary, wherein there is a judgment of acquittal.

30. So far as, offence of murder is concerned, these witnesses are of no detrimental to prosecution.

31. Learned counsel for appellant has vehemently argued as pleaded in memo of appeal that prosecution failed to prove its case beyond reasonable doubt.

32. Hon'ble Apex Court in ***Takhaji Hiraji vs Thakore Kubersing Chamansing, (2001) 6 Scc 145, para 20,*** has propounded that "benefit of doubt must always be reasonable nor fanciful".

33. Hon'ble Apex Court in ***State Of Punjab vs Karnail Singh, (2003) 11 SCC 271, para 12,*** has propounded that "exaggerated devotion to the rule of benefit of doubt must not nurture fanciful doubts or lingering suspicion and thereby destroy social defence. Justice cannot be made sterile on the plea that it is better to let hundred guilty escape than punish an innocent. Letting guilty escape is not doing justice according to law."

34. "Some discrepancy is bound to be there in each and every case which should not weigh with the Court so long it does not materially affect the prosecution case. In case discrepancies pointed out are in the realm of pebbles, court should tread upon it, but if the same are boulders, court should not make an attempt to jump over the same" as has been propounded by Hon'ble Apex Court in ***Krishna Mochi Vs. State of Bihar, (2002)6 SCC 81, para 32.***

35. It is true that prosecution is required to establish its case beyond reasonable doubt, but that does not mean that decree of proof must be beyond shadow of doubt. Doubts would be called reasonable, if they are free from zest for abstract speculation. In the present case, argument of learned counsel for appellant is not of that much degree to create any doubt for giving benefit, what to say a reasonable doubt.

36. Upon over all appreciation of evidence led by prosecution and arguments

advanced by learned counsel for both sides, it is very well established that learned trial court has rightly appreciated facts and law placed before it. Hence rightly concluded with judgment of conviction for offence of murder against both of appellants Vishwanath and Ghanshyam Chaudhary.

37. Regarding quantum of punishment, section 302 I.P.C. provides lowest punishment of imprisonment of life with fine and highest punishment is capital punishment and it is mandate of law that while administering to criminal law justice system making judicial decision regarding imposition of sentence, court must impose befitting sentence proportionate to degree and gravity of offence, mode of its commission, impact on society and public abhorrence. Upon these points, judgment of sentence is of minimum side sentence awarded. Hence, on this score too, there is no merit in argument of learned counsel for appellants.

38. Accordingly, this appeal merits its dismissal. **Dismissed** as such.

39. Certified copy of this judgment along with record be sent back to Court concerned for follow up action.

(2020)09ILR A966
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.05.2019

BEFORE

THE HON'BLE DINESH KUMAR SINGH-I, J.

Criminal Revision No. 60 of 1995

Suresh @ Dinesh ...Revisionist (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Revisionist:
Sri Satish Trivedi, Sri P.S. Gupta, Sri Prem Sagar Gupta, Sri Puneet Bhaduria, Sri R.K. Srivastava

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

A. Criminal Law - Code of Criminal Procedure, 1973-Section 401 r/w Section 397-Prevention of Food Adulteration Act,1954-Section 7/16-non-compliance of Section 10(7) & 13(2)-proceeding will not be vitiated for non-availibility of independent witness and section 10(7) will not help the accused at all-for mere absence of corroboration, Food Inspector's evidence cannot be disbelieved. (Para 3 to 20)

B. Where accused raises plea for non-compliance of section 13(2), the court would not allow accused to take such factual plea when the stand taken before courts below shows that service of notice was not disputed.Food inspector made it clear that he had sent the report of Public Analyst on the address of the accused by registered post with the letter of Local Health Authority. Since the registries did not return therefore, it would be presumed that the same were served upon the accused. (Para 13 to 16)

The revision is dismissed. (E-6)

List of cases cited: -

1. St. of Raj. Vs Jagdish Prasad, (2009) Law Suit SC 694

(Delivered by Hon'ble Dinesh Kumar Singh-I, J.)

1. Heard Sri Puneet Bhadauria, learned counsel for revisionist and Sri G.P. Singh, learned AGA for the State.

2. This revision has been preferred against the judgment and order dated 16.12.1994 passed by 3rd Additional District and Sessions Judge, Deoria in Criminal Appeal No.4 of 1994 (Suresh and

others Vs. State of U.P.) whereby the judgement and order dated 27.1.1994, has been affirmed and the appeal has been dismissed. By the said judgment and order dated 27.1.1994, passed in Criminal Case No.519 of 1993 (State of U.P. Vs. Suresh), the Munsif Magistrate, Kasia Deoria has held the accused-revisionist Suresh @ Dinesh guilty under Section 7/16 of the Prevention of Food Adulteration Act, 1954 (hereinafter referred to as the Act "1954") and has awarded one year of R.I. and a fine of Rs.1,000/- and in default of payment of fine one month further imprisonment and the other accused-revisionist Ganesh @ Pyare Lal has been convicted and sentenced under the said Section with six months R.I. and a fine of Rs.1,000/- and in default of payment of fine one month further imprisonment.

3. The facts in brief of the case are that on 22.12.1982, at about 1 PM Suresh @ Dinesh and Ganesh @ Pyare Lal was found carrying mustered oil for sale in Kasia within the jurisdiction of P.S. Kasia who told P.W.1 that he does work of sale while his father Ganesh @ Pyare Lal is owner of the shop. P.W.1 purchased 375 grams mustered oil from him for the purposes of sample and gave the seller, notice form no.6 and obtained his signature thereon after making him payment of Rs.6/- for the said sample and also obtained receipt thereof. The said mustered oil was filled in three dry bottles in equal quantity and after closing the same they were sealed and labels were prepared which were pasted thereon and one sample, on which full description was written was read out to the seller in presence of the witnesses. After pasting the label on all the three bottles signatures of the seller was obtained thereon and on 4th copy also signatures were obtained from the seller as well as witnesses. All the three bottles of sample, labels were pasted, whole description was written and the signature of the seller was also taken on the code. After taking all the three bottles of samples, he (P.W.1) came to the Head Quarter on 23.12.1982, and after sealing one bottle of sample along with a copy of one form-7 sent the same by registered post vide receipt no.947 dated 23.12.1982 to Public Analyst, Lucknow for the purposes of analysis and one copy of the form no.7 was separately sent in a sealed envelop vide receipt no.4055, dated 23.12.1982 to Public Analyst, Lucknow through post office and two sample of bottles after being sealed along with two copies of form no.7 were deposited in the Office of C.M.O. Deoria and one separate copy of form no.7 was also deposited in C.M.O. Office separately. Thereafter, he came to know that seller Suresh had disclosed his name as well as his father's name wrong, therefore, he inquired correct name of the seller as well as of owner after pointing out about the same and he made corrections in the letters in respect of name and parentage and informed about it on 28.12.1982 to Public Analyst, Lucknow and one copy of the same was also sent to C.M.O. Deoria. The correct name of the seller was Dinesh son of Pyare Lal Baniyan resident of Village Sakhopar, P.S. Kasia, District Deoria. The Public Analyst gave its report no.28484 dated 8.2.1983 in respect to the sample, finding it 100% oil of Alsi instead of mustered oil. The said report was received by him on 2.6.1983, under the order of C.M.O. Deoria and the same was deposited in the Office of C.M.O. Deoria by him with application dated 10.5.1983 and after having perused those documents permission was given to him for preparing challani report against the accused-revisionist which was prepared by him and a written permission was granted by

C.M.O. for prosecution of the seller as well as owner of the shop in accordance with law for having committing offence under Section 2(ia)(c) read with Section 7(i) of the Act. The cognizance was taken by the Trial Court and Sri B.N. Singh, Food Inspector was examined as P.W.1 and Ashok Kumar Gupta Food Clerk was examined as P.W.2. P.W.1 has clearly stated that accused had told the wrong names of the owners of the shop, therefore, he found out the correct name and had written to the Public Analyst, Lucknow and C.M.O. Deoria for correcting the names and addresses of the accused, therefore, on this ground no benefit can go the accused. He has also stated that form no.7 which is exhibit ka-8 which has not been filled fully by C.M.O. Deoria. He has further stated that he had asked the witnesses on the spot to be witness, but they were not ready and the Trial Court has held that this witness has stated nothing such on the basis of which his testimony in examination-in-chief be disbelieved. Regarding P.W.1 it is written in the judgement that he has stated that he had gone to send information to the seller Suresh @ Dinesh son of Ganesh @ Pyare Lal Baniyan, Village-Sakhopur, District Deoria vide dispatch register no.79(1) dated 18.5.1984 and to the owner Sri Ganesh @ Pyare Lal son of Lal Jee @ Ram Lal Baniya, Village Sakhopur, District Deoria about initiation of the case against them vide dispatch no.18(2). He has further stated that the public analyst report no. 28484 dated 8.2.1983 were also sent to them vide letter no.29/84-78(1), 80(2) dated 17.5.1984/18.5.1984 vide postal office receipt nos. 4573 and 4570 dated 18.5.1984 which are exhibits ka-12, 13 and 14 respectively. Therefore the Trial Court has held that this witness had sent report of the public analyst to both the accused and whatever has been asked in cross-examination from him no benefit would go to the accused thereon. He has also recorded in the judgment that all the necessary steps which were required to be taken at the time of taking samples were complied with and though, the accused have stated that entire evidence against them is false but no evidence has been adduced in their defence.

4. It is further recorded by the Trial Court that the Food Inspector has stated in his statement under Section 244 Cr.P.C. that the accused was challaned on 12.12.1982, while actually he was challaned on 22.12.1982 but no benefit of the same would go to the accused because on the basis of documentary evidence the samples were taken from the accused on 22.12.1982 which date is mentioned in the documents.

5. It is opined by the Trial Court that merely because an error has been committed in giving the date, will not amount to holding the whole prosecution story to be false. It is also mentioned in the judgment that it was argued before him that sample was taken on 22.12.1982 and Form no.7 was prepared on 23.12.1982 but the prosecution story cannot be held to be wrong only because Form-7 was prepared on 23.12.1982 because in the Act, 1954, it is provided that on the day on which sample will be taken the Form-7 shall be prepared either the same day or on the next date. Therefore, it does not appear that Food Inspector committed any error in preparing the Form-7.

6. It was also argued before the Trial Court that C.M.O. Deoria did not apply his mind while granting the sanction to prosecute, in this regard it is recorded that perusal of the sanction order makes it clear

that the C.M.O. had made compliance of all necessary provisions and a perusal of Ex. Ka-11 (sanction order) would make it clear that CMO had given sanction in accordance with law merely because the sanction was typed written would not mean that C.M.O. Deoria did not grant sanction after applying his mind.

7. Further it was argued before the Trial Court that Rule 17 and 18 of the Prevention of Food Adulteration Act, 1955 were not followed which provides that the seal used should be sent to the Public Analyst, Lucknow separately so that the seal used in the process could be compared. It is mentioned about it that from the perusal of file it is clear that Form-7 was presented before public analyst on 23.12.1982 which is exhibit ka-4 and both the parts of the same were sent to the C.M.O. Deoria, thus Rule 17 was fully complied with and Rule 18 is its supplementary which provides that the seal used on Form-7 should be separately sent and also provides that on whatever day the sample is taken, on the very next day, this compliance should be made. The Food Inspector in his statement has stated that he had sent the seal after closing the same on 23.12.1982 to Public Analyst, Lucknow and rest of the copies were sent to the C.M.O. Deoria and thus Rule 18 fully stands complied with.

8. Further the Trial Court has recorded that after perusal of the statement of accused under Section 313 Cr.P.C. he reaches the conclusion that the Food Inspector had complied with all the necessary requirements and had purchased 375 grams of mustered oil regarding which the accused was sent notice forthwith and its price Rs.6/- was paid to him as per the prescribed procedure and on 23.12.1982, the sample was sent to Public Analyst Lucknow with one copy of Form-7 and thereafter, the remaining samples were deposited in the Office of C.M.O. Deoria. The Food Inspector in his statement under Section 244 Cr.P.C. has stated that notice given to the accused (Ex. Ka-2) label Form-3 and notice exhibit ka-4 were subsequently, amended as initially accused had disclosed their names wrong and the letters were sent regarding this amendment to Public. Analyst, Lucknow as well as Chief Medical Officer, Deoria by letter Exhibit Ka-6. After receipt of report from public analyst, the sanction for prosecuting the accused was obtained from the C.M.O. Deoria and after having completed all the local formalities the charge levelled against the accused are found proved.

9. The Appellate Court has held that the sample of mustered oil is stated to have been taken from the foot path where accused Dinesh was selling mustered oil, the total quantity of which was 14 Kg and after the analysis of the sample, it was found to be 100% of Alsi oil and, therefore, the argument was made before the Appellate Court that the accused are resident of Village-Sakhopar where they have their shops and in such condition the Food Inspector of Sakhopar had no authority to go to Sakhopar and collect the sample because the Food Inspector was of Kasia area. The Food Inspector Sri B.N. Singh has admitted that he did not have Sakhopar in his jurisdiction but this objection has been over-ruled by the Appellate Court mentioning that he had found the accused Dinesh selling mustered oil in his area and the accused had stated to him that his father was the owner of the shop and it was not necessary that the seller must have some shop only. 14 Kg oil was found being sold at foot-path and, therefore

Food Inspector did not commit any mistake in taking sample. Accused could not prove that they had shop in Sakhopar at which place. In village areas it is often found that the sellers sometimes sell their items in market at other place instead of at their original place. Moreover, it is held that no enmity has been proved by the accused with the said Food Inspector and, therefore, why the Food Inspector would falsely implicate him.

10. It was argued before Appellate Court that compliance of Section 10(7) of the Act was not made because public witnesses were not taken. In this regard it was held by the Appellate Court that people of public at the said place were asked to be a witness but they were not prepared to be witnesses hence, the compliance of said section shall be taken to have been made. As regards 12.12.1982, being written as the date on which sample was taken while in papers 22.12.1982 is reported as the date when the sample was taken, it is held in this regard that the entire documents with respect to taking sample on 22.12.1982 is endorsed and only in the statement the Food Inspector said date is wrongly mentioned as 12.12.1982 which appears to be a mistake on the part of reader and appears to be a bonafide mistake and moreover no cross-examination has been done from the Food Inspector on the person, hence, no benefit would go to the accused.

11. It was also raised before the Appellate Court that the Local Health Authority did not apply his mind in granting sanction because the same has been granted on printed form and hence, application of mind does not appear to have been made. It has been repelled by the Appellate Court by saying that because the said authority has seen all the documents which find reference in Exhibit ka-9, hence, it would be treated that the application of mind was made while granting the sanction of prosecution.

12. It was also argued before the Appellate Court that proceeding for collecting the sample was made on 22.12.1982 while Form-7 was prepared on 23.12.1982 hence, compliance of Rule 17 and 18 of the Rules, 1955 was not made but it is held that no such question was asked in cross-examination from the said witness and from the papers it was evident that after taking the sample, next day of the same, the entire proceedings for sending the sample was completed and it is evident from the evidence of Public Analyst that a separate copy of Form-7 along with bottle of samples were sent to the Public Analyst, Lucknow and about this fact mention is also made by Public Analyst in his report. As regards the other bottles of sample being deposited in the Office of Local Health Authority is concerned, the argument of the counsel for defence was that the same was deposited on 26.12.1982 while the same ought to have been deposited on the very next date of taking the sample but in this regard the Appellate Court has held that no such question was asked from the said Food Inspector so that he could give his explanation regarding the same.

13. Next argument placed from the side of accused was that the provision of Section 13(2) was not complied with but it was found to be not sustainable by the Appellate Court because Food Inspector Ashok Kumar Gupta had made it clear that he had sent the report of the Public Analyst on the address of the accused by registered post along with the letter of Local Health

Authority and the receipt of the said letter is Exhibit ka-12 and the postal receipts are Exhibits ka-13 and 14. Since the registries did not return therefore, it would be presumed that the same were served upon the accused. In exhibit ka-12 name of the Munsif Magistrate, Kasia is mentioned regarding which it was stated that there were many Courts of Judicial Magistrate in Kasia but that was not taken to be correct argument because in Kasia on the post of Munsif Magistrate there was only one Officer working. Therefore, the argument that accused could not have come to know that he could have given an application before Court for getting his second sample sent for being tested does not hold water.

14. From the perusal of the judgement of the Trial Court and Appellate Court, the facts which have emerged are that the co-accused Ganesh @ Pyare Lal has died, hence, his Revision has been abated vide Courts order dated 25.4.2019. As regards the other accused namely Suresh @ Dinesh, it is apparent that he was found selling the mustered oil by P.W.1 Food Inspector, sample of which was taken in accordance with the provisions of the Act which was found to be 100% oil of Alsi and hence the Trial Court as well as Appellate Court have held him guilty under Section 7/16 of Act, 1954.

15. Only the two points have been raised by the learned counsel for the revisionist; (1) the accused-revisionist was selling oil of Alsi and not mustered oil, hence he has not committed any offence; (2) No public witness has been taken of proving recovery of such adulterated oil. It is further argued that accused has no criminal history.

16. I do not find that there was no jurisdiction of the concerned Food Inspector and that there was non-application of mind in granting prosecution sanction. The compliance of Section 13(2) of the Act and compliance of Rules 17 and 18 of the Rules of 1955, all have been dealt with by the Trial Court as well as Appellate Court adequately and looking to the fact that two Lower Courts have been given a concurrent finding and nothing much has been argued before this court on merits by the learned counsel for the revisionist-accused, I do not find any reason to interfere in the concurrent findings of the Courts below and hence, the conviction of accused-revisionist is upheld. The accused-revisionist is on bail his bail bonds stands discharged.

17. The only consideration for me remains that the incident is stated to be of the year 1982 when the accused Dinesh @ Suresh was just 22 years old and now 36 years have gone by since then and he would have become 58 years old approximately by now, therefore, at this far point of time it would be extremely painful for him to go to jail. Therefore, I would like to reduce the sentence of the accused from one year to six months although no interference is required in the fine imposed and in the default clause and it is done accordingly.

18. Reliance has been placed by learned counsel for the revisionist in the Case of **State of Rajasthan Vs. Jagdish Prasad, 2009 Law Suit (SC) 694,** in which it has been held that the Trial Court had awarded six months imprisonment to the accused under Section 6/17 of the Act, 1954 and the High Court had upheld the conviction but imposed the fine of Rs.6,000/- and directed commutation of sentence of six months R.I. When the matter came up before the Hon'ble Apex

Court it was held that strict adherence to the provision of Prevention of Food Adulteration Act and Rules framed there-under is essential for safe-guarding the interest of consumers of articles of food. Stringent laws will have no meaning if offenders could get away with mere fine and therefore, order of sentence by the Trial Court was upheld. Further for a period of three months accused was given liberty to move appropriate Government for commutation of sentence and accordingly, the impugned order of High Court was set aside.

19. It was argued by learned counsel for the accused-revisionist that the revisionist-accused has now turned 58 years old approximately by now and, therefore, it would be very painful for him to go to jail and serve out the remaining sentence at this far distant point of time, therefore, in view of the judgment of Apex Court in the case of **State of Rajasthan Vs. Jagdish Prasad, 2009 Law Suit (SC) 694,** this Court deems it proper to grant him three months time from today to approach appropriate Government annexing a certified copy of this order to seek remission under Section 433(d) Cr.P.C., if so advised.

20. If the revisionist files any such application for grant of remission by the Government before the Trial Court with its receipt then the Trial Court shall await the outcome of the said application which shall be informed by the revisionist to the Trial Court also immediately. If he is granted remission by the Government, the Trial Court shall abide by it, failing which the accused-revisionist shall be taken into custody after expiry of the period of 3 months from today, to serve out the remaining sentence.

21. Office is directed to send a copy of this order to the Trial Court immediately for compliance

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(2020)09ILR A972
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.08.2020

BEFORE

THE HON'BLE MANOJ KUMAR GUPTA, J.

Criminal Revision No. 182 of 2020

Sanjay Chaudhary (minor) ...Revisionist
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri Bipin Kumar Tripathi

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

A. Criminal Law - Code of Criminal Procedure, 1973 - Section 401 r/w Section 397 & Indian Penal Code,1860-Sections 363,366, 376,342 & Protection of Children from Sexual Offence Act, 2012-Section ¾ & Juvenile Justice (Care and Protection of Children) Act, 2015-Section 102-application –rejection of bail- issue of granting bail regarding revisionist has been wrongly decided by the trial court and application has been rejected even after giving specific finding in favour of accused/revisionist by district probation officer-trial court has unnecessarily entered into hypertechnical things while rejecting the application for bail which is contrary to procedure provided under the Act-the report of the District Probation Officer is in favour of revisionist and the family members of the revisionist had no criminal history-on enquiry from neighbours it transpired that the revisionist had no criminal proclivity-hence, the revisionist should be enlarged on bail.(Para 1 to 15)

B. Perusal of Section 12 of the Act of 2015 makes it clear that ordinarily, the bail has to be granted to the juvenile and the same can be rejected only when it appears to the court concerned that either of three conditions laid down in this provision are in existence. The order of the juvenile justice board and the sessions court go to show that while passing the same both the courts below have not at all considered the report of Probation Officer in a correct manner and rejected the application of the applicant for his release on bail in a mechanical manner. (Para 9,10)

The Revision is allowed. (E-6)

List of Cases cited: -

1. Juvenile accused Prem Kumar Thru His Father Kashi Ram Pasi Vs St. of U.P. & anr., (2019) 2 JIC 296 All

2. Sanjay Chaurasia Vs St. of U.P. & anr.,(2006) 55 ACC 480 Alld

3. Manglesh Rajbhar Vs St. of U.P. & anr., (2018) 2 JIC 359 All

(Delivered by Hon'ble Manoj Kumar Gupta, J.)

1. This revision under Section 102 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (hereinafter referred to as 'the Act') has been preferred by Sanjay Chaudhary (minor) through his father, natural guardian for being enlarged on bail in Case Crime No.186 of 2019 u/s 363, 366, 376, 342 IPC and Section 3/4 Protection of Children from Sexual Offence Act, 2012, P.S. Thodhibari, district Maharajganj.

2. The Juvenile Justice Board, Maharajganj by order dated 29.11.2019 in Bail Application No.76 of 2019 has rejected the bail application. The Sessions Judge, Maharajganj by order dated 20.12.2019 in Criminal Appeal No.62 of 2019 has dismissed the appeal upholding the order passed by the Juvenile Justice Board.

3. The facts giving rise to the instant revision in brief are that a First Information Report was lodged on 14.9.2019 at 16:40 hour by opposite party no.2 Virendra Chaudhary alleging that on 22.8.2019 between 4-5 hour, the revisionist enticed away his minor daughter Km. Gunja aged 16 years; that when he went to the house of the revisionist to complain to his parents, they abused him and also threatened to kill him; that he made serious attempts to search out his daughter, but when she could not be found, he lodged the First Information Report in question. The police got the statement of the victim recorded under Section 164 Cr.P.C. on 5.10.2019, in which she stated that she was married to one Sonu in May, 2016; that her gaunah had not taken place; that the accused belongs to her village; that the accused took her to his bua's place at Nautanava; that they kept roaming from one place to another for about 10-15 days; that the accused established physical relationship with her; that she was released only after her father lodged the First Information Report. The police submitted charge sheet against the revisionist u/s 363, 366, 376, 342 IPC and Section 3/4 Protection of Children from Sexual Offence Act, 2012.

4. The Juvenile Justice Board, after taking evidence, by order dated 19.11.2019, declared the accused a juvenile in conflict with law as envisaged under Section 2 (13) of the Act.

5. Counsel for the revisionist submitted that the charges against the revisionist are absolutely false and

fabricated; that there was no credible evidence against the revisionist. The revisionist and the prosecutrix were in love with each other. She was married with one Sonu against her will; that she wanted to marry the revisionist; that they had also applied before the Marriage Officer, Maharajganj for court marriage; that the relationship between them was consensual; that the prosecutrix is major aged about 20 years; that her husband had applied for divorce by filing Suit No.491 of 2019 Sonu Chaudhary Vs. Smt. Gunja Devi on 11.10.2019 in the court of Principal Judge, Family Court, Maharajganj on the ground of illicit relationship with the revisionist. It is vehemently submitted that there was no reliable evidence that may bring the case of the juvenile revisionist within the exceptions carved out under Section 12 (1) of the Act; that the only evidence was the report of the District Probation Officer, which was in favour of the revisionist; that the said report was based on enquiry made by the District Probation Officer from members of the family and neighbours whose statements were also recorded, but the Juvenile Justice Board ignored the statement of the neighbours recorded by the District Probation Officer in not relying on the said report and thus, committed a manifest error of law; that the Juvenile Justice Board on pure assumptions, without even an iota of evidence, held that in case the revisionist is enlarged on bail, there is likelihood of his absconding to the neighbouring country Nepal on mere saying of the Investigating Officer. The appellate court committed the same mistake and without referring to any evidence held on pure conjectures, that the release of the revisionist on bail would defeat the ends of justice.

6. Per contra, learned A.G.A. submitted that the revisionist has been charged of serious offence committed against a minor girl and in case he is released on bail, there is every likelihood of his absconding to the neighbouring country and that it would also have adverse impact on the prosecutrix.

7. I have considered the submissions advanced by learned counsel for the parties and have gone through the material on record. The provision for bail to a person, who is apparently a child alleged to be in conflict with law is governed by Section 12 of the Act, which is reproduced below:-

*"**12. Bail to a person who is apparently a child alleged to be in conflict with law.-** (1) When any person, who is apparently a child and is alleged to have committed a bailable or non-bailable offence, is apprehended or detained by the police or appears or brought before a Board, such person shall, notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law for the time being in force, be released on bail with or without surety or placed under the supervision of a probation officer or under the care of any fit person:*

Provided that such person shall not be so released if there appears reasonable grounds for believing that the release is likely to bring that person into association with any known criminal or expose the said person to moral, physical or psychological danger or the person's release would defeat the ends of justice, and the Board shall record the reasons for denying the bail and circumstances that led to such a decision.

(2) When such person having been apprehended is not released on bail under sub-section (1) by the officer-in-charge of the police station, such officer shall cause the person to be kept only in an

observation home in such manner as may be prescribed until the person can be brought before a Board.

(3) When such person is not released on bail under sub-section (1) by the Board, it shall make an order sending him to an observation home or a place of safety, as the case may be, for such period during the pendency of the inquiry regarding the person, as may be specified in the order.

(4) When a child in conflict with law is unable to fulfil the conditions of bail order within seven days of the bail order, such child shall be produced before the Board for modification of the conditions of bail."

8. A close reading of the above provision reveals that bail should invariably be granted to a juvenile accused alleged to be in conflict with law unless his case falls under one of the exceptions engrafted by the proviso to sub-section (1). In other words, a bail to a juvenile accused shall not be granted *"if there appear reasonable ground for believing that the release is likely to bring him into association with any known criminal or expose him to moral, physical or psychological danger or that his release would defeat the ends of justice.*" It is also well settled now that the gravity of offence or its seriousness could not be made sole ground divorced from the legislative intent in denying bail to a juvenile in conflict with law. The legislature itself has enumerated the exceptional reasons where discretion should not be exercised in favour of the juvenile and prayer for bail has to be rejected. The said power should be exercised with due care and caution only when there is some reliable material on record which justifies bringing the case within one of the exceptions. It is the burden of the prosecution to bring such material on record. In the absence of such material, the bail cannot be rejected on assumptions. Some of the decisions propounding law on the point are extracted below, for ready reference:-

9. In **Juvenile accused Prem Kumar Through His Father Kashi Ram Pasi Vs. State of U.P. and another, 2019 (2) JIC 296 (All)**, it has been held as under:-

"10. Perusal of Section 12 of the Act of 2015 makes it clear that ordinarily, the bail has to be granted to the juvenile and the same can be rejected only when it appears to the court concerned that either of three conditions laid down in this provision are in existence. The orders of the Juvenile Justice Board and the Sessions Court go to show that while passing the same both the courts below have not at all considered the report of Probation Officer in a correct manner and rejected the application of the applicant for his release on bail in a mechanical manner simply by reproducing few words of Section 12 of the Act of 2015. Further the courts below have presumed many things of their own, which is not part of record of Probation Officer. These aforesaid two orders passed by the Courts below do not stand on the touchstone of the relevant legal provisions."

10. In **Sanjay Chaurasia Vs. State of U.P. and another, 2006 (55) ACC 480 (Alld),** the Court held:-

"10. In case of the refusal of the bail, some reasonable grounds for believing abovementioned exceptions must be brought before the court concerned by

the prosecution but in the present case, no such ground for believing any of the abovementioned exception has teen brought by the prosecution before the Juvenile Justice Board and appellate court. The appellate court dismissed the appeal only oh the presumption that due to commission of this of fence, the father and other relatives of other kidnapped boy had developed enmity with the revisionist, that is why in case of his release, the physical and mental life of the revisionist will be In danger and his release will defeat the ends of justice but substantial to this presumption no material has been brought before the appellate court and the same has not been discussed and only on the basis of the presumption, Juvenile Justice Board has refused the bell of the revisionist which is In the present case is unjustified and against the spirit of the Act. It appears that the Impugned order dated 27.6.2005 passed by the learned Sessions Judge, Meerut and order dated 28.5.2005 passed by the Juvenile Justice Board are Illegal and are hereby set aside".

11. In **Manglesh Rajbhar Vs. State of U.P. and another, 2018 (2) JIC 359 (All)**, it is held as follows:-

"8. Turning to the requirements of recording reasons and spelling out those circumstances where bail is denied to a child as postulated in the proviso to Section 12 (1) of the Act, the impugned order passed by the Board does no more than paraphrase the provisions of the statute. It does not record with reference to evidence available findings on the parameters mentioned in the proviso to Section 12 (1) of the Act where bail may be refused on facts and evidence emerging in the present case. An echoing and recitation of the statutory provisions of the proviso to Section 12 (1) of the Act is certainly not in the opinion of this Court the requirement of the law which the Board are charged to fulfill while dealing with a child's plea for bail."

12. It transpires from the material brought on record that there is nothing adverse against the revisionist in the social enquiry report submitted by the District Probation Officer. In fact, this report is more or less in favour of the revisionist, as it clearly mentions that the family members of the revisionist had no criminal history; they are peace loving persons; the revisionist had maintained cordial relations with the family members, friends and neighbours; that on enquiry from neighbours it transpired that the revisionist had no criminal proclivity; that the revisionist was in love with the prosecutrix and that they ran away to Delhi, resulting in arrest of the revisionist. The conclusion drawn by the District Probation Officer in his report is as follows:-

i-	भावनात्मक कारण	-	सामान्य
ii-	शारीरिक स्थिति	-	शारीरिक रूप से स्वस्थ बताया गया तथा
iii-	बुद्धिमत्ता	-	मनसिक रूप बुद्धिमान भी था
iv-	स्माजिक एवं आर्थिक कारण	-	स्माज के लोगों का प्रति धारणा अच्छी पाई गयी और आर्थिक रूप से कमजोर पाया गया
v-	समस्याओं के सुझाए गए कारण	-	
vi-	अपराध के कारणों/ कारणों में	-	

	अंशदायी कारकों की विश्लेष्ण		
vii	परामर्श किये गये विशेषज्ञों की राय	-	
Viii	परिवीक्षा अधिकारी /बाल कल्याण अधिकारी / सामाजिक कार्यकर्ता द्वारा पुनर्वास के सम्बन्ध में सिफारिश	-	मुहल्लेवासियों, संरक्षकों आदि से वार्ता के उपरान्त ज्ञात हुआ कि किशोर के साथी संगी एवं परिवार के सदस्य अच्छे आचरण एवं व्यवहार के हैं और किशोर तथा उनके परिवार के किसी सदस्य का सम्बन्ध किसी अपराध या आपराधिक प्रवृत्ति के व्यक्तियों से नहीं था। किशोर को सामाजिक एवं नैतिक खतरे की संभावना नहीं है। किशोरावस्था के प्रमाण और विपरीत लिंग के प्रति आकर्षण के कारण घटना घटित हुई। अतः किशोर को माता–पिता के द्वारा उचित नियंत्रण एवं संरक्षण की आवश्यकता है।

13. The Juvenile Justice Board in its impugned order as well as the appellate authority have recorded finding in favour of the revisionist that there is no likelihood of his coming into association with any known criminal or risk of exposing him to moral, physical or psychological danger. However, in so far as the Juvenile Justice Board is concerned, it had proceeded to discard the report of District Probation Officer on the sole ground that the said report is not based on testimony of any person. However, the same does not appear to be correct. Alongwith the said report, there is joint statement of the neighbours (Page 41). The State has filed a counter affidavit and has not denied that the statement of neighbours was part of the report of the District Probation Officer or was not filed before the Board. The second ground taken by the Board in rejecting the bail application was that there is apprehension that the revisionist, if released on bail, would abscond to Nepal. It is based on pure conjectures and suggestion of the Investigating Officer, without appreciating that the revisionist had no criminal antecedents nor had company of any criminal or anti-social elements. Likewise, the appellate authority placed undue emphasis on the mental state of the revisionist in committing the alleged offence while holding that grant of bail would defeat the ends of justice, ignoring the recitals in the report of the District Probation Officer that the revisionist and the prosecutrix were having love affair and they ran away to Delhi. They have also ignored from consideration the own admission of the prosecutrix that she is a married woman and that her husband had instituted a suit for divorce, in which it is alleged that since 15.6.2018 she had deserted her husband and living with her parents in the same village in which the revisionist resides. The entire approach of the courts below is wholly erroneous in law, consequently, the impugned orders dated 29.11.2019 passed by the Principal Judge, Juvenile Justice Board and the appellate order dated 20.12.2019 are hereby quashed.

14. I am satisfied that it is a fit case where the revisionist should be enlarged on bail. It is accordingly directed that the revisionist **Sanjay Chaudhary** be released on bail on his father Radhey Shyam Chaudhary executing a personal bond of Rs.50,000/- with solvent securities each in the like amount to the satisfaction of the Principal Judge, Juvenile Justice Board, Maharajganj on the condition that he will keep the revisionist in proper custody and will constantly monitor his conduct and will report to the Juvenile Justice Board,

Maharajganj once in every three months regarding the same.

15. In the result, the revision stands allowed as above.

16. It is made clear that this Court has not expressed any opinion on merits of the case and the trial court would be at liberty to decide the trial strictly in accordance with law on the basis of evidence so adduced by the parties.

(2020)09ILR A978
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.09.2019

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.

Criminal Revision No. 620 of 1996

Jai Karan Singh & Anr. ...Revisionists(In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Revisionists:
Sri Kameshwar Singh, Sri Pratap Kanchan Singh

Counsel for the Opposite Party:
A.G.A.,

A. Criminal Law – Arms Act, 1959 - Sections 25, 29, 30 - **Mere fact that witnesses are police personnel does not mean that their evidence must be rejected, if Courts find it clear, truthful and creditworthy**. (Para 19)

As a matter of rule, there can be no legal proposition that evidence of police officers, unless supported by independent witnesses, is unworthy of acceptance. Non-examination of independent witness or even presence of such witness during police raid would cast an added duty on Court to adopt greater care while scrutinising the evidence of the police officers. If the evidence of police officer is found acceptable, it would be an erroneous proposition that Court must reject prosecution version solely on the ground that no independent witness was examined. (Para 20 to 25)

B. In absence of anything to show that findings recorded by both the Courts below are perverse or there is any misreading or any relevant evidence has not been examined, there is no reason to take a different view in this revision - The case set up by Accused-Revisionists is that the gun and cartridges were licensed to Jai Karan Singh, who had gone to attend natural call and, therefore, a temporary possession was given to Balbir Singh. This was the explanation given by Accused-Revisionists and to prove it onus lay upon them. **Defence taken by Accused-Revisionists has been found untrustworthy and afterthought, as could not be proved.** (Para 27)

Revision dismissed. (E-4)

Precedent followed:

1. Pradeep Narayan Madqaonkar & ors. Vs St. of Mah., (1990) 4 SCC 255 (Para 20)

2. Balbir Singh Vs State, (1996) 11 SCC 139 (Para 21)

3. Paras Ram Vs St. of Hary., (1992) 4 SCC 662 (Para 21)

4. Sama Alana Abdulla Vs St. of Guj., (1996) 1 SCC 427 (Para 21)

5. Anil alias Andya Sadashiv Nandoskar Vs St. of Mah., (1996) 2 SCC 589 (Para 21)

6. Suhash Singh Thakurshyam Vs State (Through CBI), (1997) 8 SCC 732 (Para 22)

7. St. of U.P. Vs Zakaullah, 1998 Cri. L.J. 863 (Para 23)

8. Girja Prasad Vs St. of M.P., (2007) 7 SCC 625 (Para 24)

Present criminal revision has been filed against the judgment and order dated 18.04.1996, passed by Special Judge (EC

Act), Banda, which affirmed judgment dated 04.08.1994, passed by Chief Judicial Magistrate, Banda.

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

1. Heard Sri Kameshwar Singh, learned counsel for revisionists and learned A.G.A. for State.

2. This criminal revision has been filed against the judgment and order dated 18.04.1996, passed by Sri Nand Lal Agarwal, Special Judge (EC Act), Banda, in Criminal Appeal No. 46 of 1994 and 48 of 1994. Both the aforesaid appeals have been decided by Special Judge by means of impugned common judgment dated 18.04.1996. By impugned judgment conviction and sentence awarded to Accused-Revisionists vide judgment dated 04.08.1994 passed by Chief Judicial Magistrate, Banda, has been affirmed.

3. Learned Trial Court vide judgment dated 04.08.1994 has convicted Jai Karan Singh, Revisionist-2 under Sections 29 and 30 of Arms Act, 1959 *(hereinafter referred to as "Act, 1959")* and sentenced to 3 months Rigorous Imprisonment. Revisionist-2, Balbir Singh has been convicted and sentenced under Section 25 Act, 1959 to undergo one year rigorous imprisonment. It is also provided that period already spent in jail shall be adjusted towards the sentence awarded.

4. Being aggrieved with the judgment and order dated 04.08.1994, Accused-Revisionists approached Appellate Court separately. Accused-Revisionist Jai Karan filed Criminal Appeal No. 49 of 1994 whereas Accused-Revisionist Balbir Singh, filed Criminal Appeal No. 48 of 1994. Both appeals were clubbed and heard together and have been decided by a composite judgment and order 18.04.1996, impugned in this revision. Appellate Court has dismissed appeals of Revisionists and affirmed judgment and order dated 04.08.1994 passed by Trial Court.

5. Feeling aggrieved by the judgment and order dated 18.04.1996 passed by Appellate Court this revision has been preferred by Accused-Revisionists.

6. The brief facts giving rise to instant revision are that on 14.2.1990, at about 10.00 AM, while Police of Police Station Mathaudh, District, Banda was on routine patrolling, they received an information through Informer that an illegal factory of manufacturing single barrel gun was running and apprehension of untoward incident was also expressed. Relying on this information, Station Officer, Nand Kishore, along with Police personnel reached in front of the house of Revisionist-2, Balbir Singh, at 10.00 AM and saw aforesaid Revisionist standing at the door along with a gun. Seeing Police, he tried to escape by going inside but Police seized and arrested him by force. On enquiry he disclosed his name as Balbir Singh son of Ram Manohar Singh, resident of village Duredi, Police Station, Mathaudh, District Banda.

7. From possession of Accused-Revisionist, Balbir Singh, one single barrel factory made gun, two cartridges, one of red colour and another black, one another cartridge LG made in Holland, white in colour, one cartridge LG Indian, one LG ordinary and one empty cartridge were recovered, for which, he could not show any licence. He told that the said gun belong to Accused-Revisionist-1, Jai Karan Singh, who had gone to attend nature's call leaving his gun and cartridges with Balbir

Singh. Guns and cartridges were taken by Police in possession and after sealing the same, recovery memo was prepared and a copy thereof was handed over to accused.

8. Thereafter along with recovered articles Police returned to Police Station and deposited the same. Case under Section 25 Act, 1959 against Accused-Revisionist-2, Balbir Singh, and under Section 29/30 of Act, 1959 against Accused-Revisionist, Jai Karan Singh, were registered. Thereafter Investigating Officer (hereinafter referred to as "I.O.") PW-3, Ram Avtar Mathur investigated the case and prepared site plan Ext. ka-6. He sought necessary sanction to prosecute Accused-Revisionist, Balbir Singh under Section 25 of Act, 1959. District Magistrate vide order dated 04.10.1990 (Ext. ka-7) accorded sanction for prosecution against Accused-Revisionist, Balbir Singh under Section 25 of Act, 1959. After conclusion of investigation I.O. submitted charge sheet Ext. ka-2 in the Court of First Additional Chief Judicial Magistrate, Banda against Accused-Revisionist, Balbir Singh and, Ext. ka-3 against Accused-Revisionist, Jai Karan Singh.

9. Additional Chief Judicial Magistrate-I took cognizance of the offence on 15.11.1990. Thereafter he framed charge against Accused-Revisionist, Balbir Singh on 07.05.1991 as under:

''मैं अजित मनोहर प्रथम अति0 मुख्य न्यायिक दण्डाधिकारी, बांदा तुम अभियुक्त बलवीर सिंह पर निम्नवत् आरोप लगाता हूँ:–

1. यह कि दिनांक 14.2.90 को समय करीब 10 बजे दिन बहद ग्राम दुरेड़ी थाना मटौंध में आपके मकान से आपके पास से पुलिस कर्मचारियों ने एक बन्दूक एकनाली 12 बोर तथा 6 कारतूस 12 बोर के बरामद किये जिसको रखने का आपके पास कोई वैध लाईसेंस नहीं था। इस प्रकार आपने धरा 25 आयुध अधिनियम के अन्तर्गत दण्डनीय अपराध किया जो मेरे प्रसंज्ञान में है।

एतद्}ारा आप को निर्देश दिया जाता है कि आप का परीक्षण इस न्यायालय द्वारा किया जायेगा।''

I, Ajit Manohar, I Additional Chief Judicial Magistrate, Banda charge you accused Balvir Singh as under:-

1. That on 14.02.1990 at about 10.00 AM, in Village Duredi within P.S. Mathaudh police personnel recovered a single barrel gun of 12 bore and 6 cartridges of 12 bore from your possession at your house for which, you had no valid licence. Thus you have committed an offense punishable under Section 25 Arms Act and within my cognizance. You are hereby directed to be tried by this Court for the aforesaid offense.

You are hereby directed to be tried by this Court for the aforesaid charges." (English translation by Court)

10. Accused-Revisionist, Jai Karan was charged vide order dated 07.05.1991 as under:

''मैं अजित मनोहर प्रथम अति0 मुख्य न्यायिक दण्डाधिकारी, बांदा तुम अभियुक्त जयकरण पर निम्नवत् आरोप लगाता हूँ:–

1. यह कि दिनांक 14.2.90 को समय करीब 10 बजे दिन बहद ग्राम दुरेड़ी थाना मटौंध में बलवीर सिंह के पास से आपकी लाईसेंसी बन्दूक 12 बोर पुलिस कर्मचारियों ने बराबद की। जिसको आपने अपनी बन्दूक का अवैध प्रयोग किया, इस प्रकार धारा 29/30 आयुध अधिनियम के अन्तर्गत दण्डनीय अपराध किया जो मेरे प्रसंज्ञान में है।

एतद्द्वारा आप को निर्देश दिया जाता है कि आप का परीक्षण इस न्यायालय द्वारा किया जायेगा।''

"I, Ajit Manohar, First Additional Chief Judicial Magistrate, Banda charge you accused Jai Karan as under:-

1. That on 14.02.1990 at about 10 AM in village Duredi, P.S. Mathaudh police personnel have recovered your 12 bore licensed gun from possession of Balvir Singh and thereby you have made illegal use of your gun and thus committed an offence punishable under Section 29/30 Arms Act and within the cognizance of this Court.

You are hereby directed to be tried by this Court for the aforesaid charges." (English translation by Court)

11. Thereafter prosecution in order to substantiate the guilt of Accused-Revisionists, examined three witnesses namely PW-1 Constable Jagbhan Singh, who was amongst the police team who arrested accused Balbir at his house; PW-2 Veerpal Singh who had also accompanied Police Party and a witness of recovery of arms and ammunition and arrest of the Accused, Balbir Singh, and PW-3 S.I. Ram Avtar Mathur, I.O., who proved site plan Ext. ka-6, sanction for prosecution of Accused-Revisionist, Balbir Singh (Ext. ka-7). PW-2 has also proved charge-sheet, Ext. ka-2, and ka-3 against Accused-Revisionists.

12. After closure of prosecution evidence, Accused-Revisionists were examined under Section 313 Cr.P.C. on 07.05.1991. They had denied prosecution story and stated that witnesses are deposing falsely. Accused-Revisionist, Balbir Singh has stated that co-accused Jai Karan after leaving his gun and 10 cartridges with him inside his house, had gone to attend the call of nature. In the mean time Inspector reached and recovered the gun. They had not recovered LG cartridges from his possession. Similarly Revisionist, Jai Karan Singh, has also denied prosecution story and stated the same to be false. Supporting statement of Accused Balbir Singh, he has stated that he had left one licensed gun and 10 cartridges with his bhanja-Balbir inside his house and had gone to attend nature's call. In the mean time, Inspector came and made recovery. He has stated that no LG cartridge was recovered.

13. It appears that both the Accused-Revisionist were again examined under Section 313 Cr.P.C. on 09.05.1994. Balbir Singh has reiterated his earlier statement and stated that on the date of occurrence at about 10.00 AM, Jai Karan had kept his single barrel gun along with 10 cartridges in his house saying that he is going to attend call of nature. In the mean time Station Officer of Police Station arrived and recovered the aforesaid gun and cartridges from inside the house. He also stated that villagers had seen the occurrence but due to fear of police nobody came forward. In the mean time, Jai Karan, came over there and demanded his gun but police did not hand over and challaned them. Balbir Singh further has stated that PW-1 and PW-2 are police personnel and deposing falsely. They have prepared a fabricated case against him and never visited the place of occurrence; alleged sanction obtained from District Magistrate is also a manufactured document and since he did not give money to police, he has been falsely implicated. Accused-Revisionist, Jai Karan, on 09.05.1994 has reiterated his earlier stand saying that prosecution story is false.

14. Thereafter in defence, Accused-Revisionist, Jai Karan Singh, examined

himself as DW-1. He has stated that Accused, Balbir Singh is his Bhanja and on 13.09.1990 he had gone to his village and stayed at his house. He also had taken his lisensed gun and cartridges with him. In the next morning at about 9-10 AM he had gone to ease near Cane River where he also took bath. When he returned to the house of Balbir Singh, he saw that Inspector was coming from inside the house of Balbir with his gun. On enquiry, Inspector said that he was taking the accused Balbir with the gun and cartridges to Police Station. He has also stated that in his belt there were no LG cartridges. He also had gone to Police Station but Police personnel had driven him away.

15. In defence accused have also examined Gajodhar Singh as DW-2. He has stated that on 13/14.09.1990, Jai Karan Singh had gone to the house of Balbir Singh. Next day, Inspector reached there and called Balbir Singh who came out of the house empty handed. In the meantime Police personnel along with the Inspector entered the house of Balbir Singh. Inspector sat in the courtyard and other police personnel got opened the lock of the room inside the house and took out a gun, cartridges and the belt. After taking the gun, cartridges, belt and licence, Inspector went away. There were no LG cartridges in the belt when Inspector left for Police Station. Jai Karan Singh had come back after easing himself. Jai Karan Singh had protested and said to Inspector that the gun is licensed and why he was taking away the same. Thereafter, Inspector had gone to Police Station along with gun, cartridges and Revisionist, Balbir Singh.

16. On appreciation of evidence on record and after hearing counsel for the parties, Trial Court has convicted and sentenced Accused-Revisionist as stated above. Appeal against conviction and sentence recorded by Trial Court having been dismissed, the Accused-Revisionists are before this Court against the impugned order of dismissal of appeal and affirmation of order of Trial Court.

17. I have heard learned counsel for parties and perused the record.

18. Learned counsel for revisionists contended that in this case prosecution has set up its case totally founded on the statement of PWs-1 and 2, Constable Jagbhan Singh and Constable Veerpal Singh and there was no independent witness, therefore, conviction on the basis of only police witnesses is illegal and it cannot be said that prosecution proved its case beyond doubt. He next contended that the gun was licensed and belong to Accused-Revisionist, Jai Karan Singh, who has gone to attend his natural call. Only for a short period it was in the possession of Accused-Revisionist, Balbir Singh and short possession thereof cannot be said to be an offence under Section 25 of Act, 1959.

19. It is true that entire prosecution case is founded on the evidence of police personnel but mere fact that witnesses are police personnel does not mean that their evidence must be rejected, if Courts find it clear, truthful and creditworthy.

20. As a matter of rule, there can be no legal proposition that evidence of police officers, unless supported by independent witnesses, is unworthy of acceptance. Non-examination of independent witness or even presence of such witness during police raid would cast an added duty on Court to adopt greater care while

scrutinising the evidence of the police officers. If the evidence of police officer is found acceptable, it would be an erroneous proposition that Court must reject prosecution version solely on the ground that no independent witness was examined. In **Pradeep Narayan Madqaonkar & others vs. State of Maharashtra 1995 (4) SCC 255,** it was held:

"Indeed, the evidence of the official (police) witnesses cannot be discarded merely on the ground that they belong to the police force and are, either interested in the investigation of the prosecuting agency but prudence dictates that their evidence needs to be subjected to strict scrutiny and as far as possible corroboration of their evidence in material particulars should be sought. Their desire to see the success of the case based on their investigation, requires greater care to appreciate their testimony."

21. In **Balbir Singh vs. State 1996(11) SCC 139**, Court has repelled a similar contention based on non-examination of independent witnesses. The same legal position has been reiterated time and again by Apex Court vide **Paras Ram vs. State of Haryana 1992 (4) SCC 662, Sama Alana Abdulla vs. State of Gujarat 1996 (1) SCC 427 and Anil alias Andya Sadashiv Nandoskar vs. State of Maharashtra 1996 (2) SCC 589.**

22. In **Subhash Singh Thakurshyam vs State (Through CBI) (1997) 8 SCC 732**, a Two Judge Bench comprising of Hon'ble M. Mukherjee and Hon'ble K. Thomas JJ, in para 90, observed:

"....We should not forget that the time of the raid was during the odd hours when possibly no pedestrian would have been trekking on the road nor any shopkeeper remaining in his shop nor a hawker moving around on the pavements."

23. In **State of U.P. v. Zakaullah 1998 Cri. L.J. 863** in para-10, it is said:

"The necessity for "independent witness" in cases involving police raid or police search is incorporated in the statute not for the purpose of helping the indicted person to bypass the evidence of those panch witnesses who have had some acquaintance with the police or officers conducting the search at some time or the other. Acquaintance with the police by itself would not destroy a man's independent outlook. In a society where police involvement is a regular phenomenon many people would get acquainted with the police. But as long as they are not dependent on the police for their living or liberty or for any other matter, it cannot be said that those are not independent persons. If the police in order to carry out official duties, have sought the help of any other person he would not forfeit his independent character by giving help to police action. The requirement to have independent witness to corroborate the evidence of the police is to be viewed from a realistic angle. Every citizen of India must be presumed to be an independent person until it is proved that he was a dependent of the police or other officials for any purpose whatsoever."

24. Referring to some of the the aforesaid decisions, Court in **Girja Prasad Vs. State of M.P. (2007) 7 SCC 625** held:

"It is well-settled that credibility of witness has to be tested on the touchstone of truthfulness and trustworthiness. It is quite possible that in a

given case, a Court of Law may not base conviction solely on the evidence of Complainant or a Police Official but it is not the law that police witnesses should not be relied upon and their evidence cannot be accepted unless it is corroborated in material particulars by other independent evidence. The presumption that every person acts honestly applies as much in favour of a Police Official as any other person. No infirmity attaches to the testimony of Police Officials merely because they belong to Police Force. There is no rule of law which lays down that no conviction can be recorded on the testimony of Police Officials even if such evidence is otherwise reliable and trustworthy. The rule of prudence may require more careful scrutiny of their evidence. But, if the Court is convinced that what was stated by a witness has a ring of truth, conviction can be based on such evidence." (para 25)

25. In view thereof contention that prosecution evidence comprised of only statement of police personnel, therefore, must be rejected, has no substance and not accepted.

26. Coming to second aspect, I find that recovery of gun and cartridges from possession of Balbir Singh is duly proved, as discussed above. Both the Courts below have recorded concurrent finding on this aspect, which could not be shown perverse or contrary to record.

27. Now the case set up by Accused-Revisionists is that the gun and cartridges were licenced of Jai Karan Singh, who has gone to attend natural call and, therefore, a temporary possession was given to Balbir Singh. This was the explanation given by Accused-Revisionists and to prove it onus lie upon them. The said fact sought to be proved by Sri Gajodhar Singh, DW-2, whose deposition has been found wholly untrustworthy. It is also evident from record that if gun and cartridges were taken by police personnel illegally no complaint was made by Jai Karan Singh or even by Balbir Singh to any police officer, superior to police personnel who had taken the gun and cartridges. Therefore, defence taken by Accused-Revisionists has been found untrustworthy and afterthought. The findings recorded by both the Courts below are concurrent and in absence of anything to show that same are perverse or there is any misreading or any relevant evidence has not been examined, I find no reason to take a different view in this revision.

28. On the question of sentence, learned counsel for revisionists sought to argue that punishment of one year awarded to Accused-Revisionist, Balbir Singh is excessive but he has been found to be in possession of firearm and cartridges without licence, which is a serious matter and I find no reason to remit the sentence. In my view sentence awarded by Courts below is justified and warrants no interference.

29. Dismissed. Interim order, if any, stands vacated.

30. The accused, Jai Karan Singh and Balbir Singh, are on bail. Their bail bonds and surety bonds are cancelled. The Chief Judicial Magistrate concerned shall cause them to be arrested and lodge in jail to serve out the sentence passed against them. The compliance shall be prepared within two months.

31. Certify this judgment to the lower Court immediately.

(2020)09ILR A985
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.09.2018

BEFORE

THE HON'BLE VIVEK KUMAR SINGH, J.

Criminal Revision No. 932 of 2016

Mohd. Ashraf ...Revisionist
Versus
State of U.P. ...Opposite Party

Counsel for the Revisionist:
Sri Lav Srivastava, Sri V.P. Srivastava, Sri Ashutosh Mishra.

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

A. Criminal Law – U.P. Gangster & Anti-Social Activities Prevention Act, 1986 - Section 3(1), 14(1), 16(1)- Release of Vehicle - It is not desirable in the matter of motor vehicle, that the same be kept at the police station for a long time which results in the vehicle becoming junk, therefore, the vehicle-in-question should be released in favour of the registered owner on such terms and conditions as the Court below may deem fit and proper. (Para 12)

In the instant case no criminal case has been ever instituted against the revisionist nor has it come on record that the alleged vehicle has been used in the crime in question alleged to have been committed by the brother of the revisionist.

Rejection of release application set aside and matter is remitted.

Revision disposed off. (E-4)

Precedent followed: -

1. Sunder Bhai Ambalal Desai Vs St. of Guj., 2003 (46) A.C.C. 223 (Para 13)

Present criminal revision has been filed for quashing order dated 15.03.2016, passed by learned Special Judge (Gangster Act), Bhadohi-Gyanpur.

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

1. Heard Sri V.P. Srivastava, learned Senior counsel assisted by Sri Lav Srivastava, learned counsel for the revisionist and Sri Abhinav Prasad, learned A.G.A. for the State.

2. The present criminal revision under Section 397/401 Cr.P.C. has been filed for quashing the order dated 15.3.2016 (wrongly mentioned in the impugned order dated as 15.3.2015) passed by learned Special Judge (Gangster Act), Bhadohi-Gyanpur in Reference Case No.3 of 2015, whereby the release application filed by the revisionist has been rejected.

3. It is contended by learned counsel for the revisionist that vehicle i.e. Toyota Fortuner bearing registration No.U.P. 70 CU 5707 belongs to the revisionist and it has no concern with his brother Muzaffar. The aforesaid vehicle was financed by the Baroda Uttar Pradesh Gramin Bank, Branch Bamrauli. It is next contended that brother of the revisionist namely Muzaffar is being prosecuted under Section 3(1) of U.P. Gangster & Anti Social Activities Prevention Act, 1986 for which first information report bearing case crime no.90 of 2014 was lodged at Police Station Aurai, District Sant Ravidas Nagar, Bhadohi. It is further submitted that in case crime no.90 of 2014 a report was submitted by the Officer Incharge of Police Station Mahila Thana, under Section 14(1) of U.P. Gangster & Anti Social Activities Prevention Act for attachment of property of brother of the revisionist Muzaffar, thereafter, on aforesaid report

Superintendent of Police Sant Ravidas Nagar, Bhadohi referred the matter to District Magistrate for attachment of property of Muzaffar under Section 14(1) of U.P. Gangster & Anti Social Activities Prevention Act. On the basis of aforesaid recommendation under Section 14(1) of U.P. Gangster & Anti Social Activities Prevention Act for attachment of property of the revisionist's brother Muzaffar, Superintendent of of Police, Sant Ravidas Nagar, Bhadohi referred the matter to the District Magistrate for attachment of the property of Muzaffar under Section 14(1) of the U.P. Gangster & Anti Social Activities Prevention Act the properties of Muzaffar were attached including one Fortuner bearing registration no.U.P.70 CU 5707, engine no.1KDU480871 and chechis no.MBJ11JV510535506. An application under Section 14(1) of U.P. Gangster & Anti Social Activities Prevention Act before District Magistrate, Sant Ravidas Nagar, Bhadohi for release of vehicle in question was moved by the revisionist on 4.4.2015, but the District Magistrate, Sant Ravidas Nagar, Bhadohi refused to release the vehicle of the revisionist and under the provisions of Section 16(1) of U.P. Gangster & Anti Social Activities Prevention Act referred the matter to Special Judge (Gangster Act), Bhadohi. Revisionist contested the case before Special Judge (Gangster Act), Bhadohi in Reference Case No.3 of 2013 and it was specifically argued that vehicle bearing registration no.U.P.70 CU 5707 exclusively belongs to him and Muzaffar has no concern with the same therefore the same should be released in his favour relevant documents i.e. registration certificate, hypothecation certificate, issued by the Branch Manager, Baroda Uttar Pradesh Gramin Bank, Branch Bamrauli were there, but the concerned Court below has rejected the said application of the revisionist and refused to release the vehicle-in-question in favour of the revisionist. It is, thus contended that the order impugned passed by the concerned Court below refusing to release the vehicle-in-question is illegal and deserves to be set aside.

4. Sri Abhinav Prasad, learned A.G.A for the State-respondent has vehemently opposed the prayer for release of vehicle in favour of the revisionist and submitted that the revisionist failed to bring on record any legal or valid paper such as Khasara, Khatauni and annual earnings with regard to agricultural field i.e. 50 Bigha of land and the revisionist also did not produce any agricultural papers to prove ownership of it by his father as well as other sources the revisionist had also failed to produce any papers with regard to actual earnings from agricultural land from which earnings such a heavy cost vehicle has been purchased by the revisionist or his brother Muzaffar and no such papers has been produced. Thus, it is submitted that the order impugned passed by the concerned Court below is just, legal and suffers from no illegality.

5. I have heard the submissions as advanced by the counsel for the respective parties and perused the documents available on record.

6. The revisionist has contested the case that the revisionist is a registered owner of Toyota Fortuner bearing registration no. U.P.70 CU 5707, which vehicle was wrongly attached treating the same as the property belonging to his brother Muazffar who is said to involve in some criminal cases of which revisionist has no concern, however application (33 Ga) was filed before the concerned Court below to release the vehicle-in-question, but the same has been rejected.

7. While rejecting the application (33 Ga) filed by the order dated 15.3.2015 has made following order observations which reads as under:-

चूँकि प्रार्थी के द्वारा अपने कथन के समर्थन में कोई भी साक्ष्य नहीं दिया गया है जिससे यह साबित हो कि प्रार्थी ने वैध श्रोतों की आय से सम्पत्ति अर्जित की है प्रार्थी अभियुक्त मुजफ्फर का सगा भाई है और प्रार्थी के द्वारा यह भी साबित नहीं किया जा सका है कि वह अभियुक्त मुजफ्फर से किस प्रकार से अलग रहता है, कहॉ पर रहता है किस मकान में रहता है एवं प्रार्थी एवं उसके भाई के मध्य बटवारा कब हुआ। अतः प्रार्थी का यह कहना कि वह स्वयं आय करता है एवं उसके भाई मुजफ्फर से कोई सम्बन्ध नहीं है। यह भी तथ्य प्रार्थी द्वारा साबित नहीं किया गया है। अतः प्रार्थी का आवेदन वाहन निर्मुक्त 33ग खारिज किए जाने योग्य है।

आदेश

प्रार्थी का प्रार्थना पत्र अन्तर्गत धारा 16(1) यू0पी0 गिरोह बन्द एवं समाज विरोधी क्रिया कलाप निवारण अधिनियम 1986 खारिज किया जाता है। शेष आवेदकगण की सुनवाई के लिए पत्रावली दिनांक 05–04–2016 को पेश हो।

8. Learned counsel for the revisionist submits that the revisionist is living separately and he has no concern with his brother Muzaffar, reference in this regard has been made to annexure-SA-1 to the supplementary affidavit dated 23.11.2016, which is copy of ration card of the revisionist. Learned counsel for the revisionist has further submitted that the revisionist is an income tax payee as is authenticated by annexure-SA-2, SA-3 & SA-4 to the supplementary affidavit dated 23.11.2016, which is the copy of the Indian Income Tax Return Verification Form for financial years 2012-13, 2013-14, 2015-16. It is further submitted that the revisionist is the owner of a truck bearing registration no.U.P.73-A - 1610 which is sold to one Shanti Devi w/o Raj Narayan, a copy of registration certificate in the name of revisionist and receipt of transfer dated 21.1.2013 and the transfer application duly filed and signed by the revisionist dated 20.2.2013 have been annexed as annexure-SA-5, SA-6 and SA-7 to the supplementary affidavit dated 23.11.2016. Learned counsel for the revisionist submits that the vehicle-in-question bearing U.P. 70 CU 5707 engine no.1KDU480871, Chesis No.MBJ11JV510535506 has been purchased by the revisionist after taking financial aid from Baroda Uttar Pradesh Gramin Bank, Branch Bamrauli after furnishing proper sureties.

9. So far as the observation made by concerned Court below that the revisionist had also failed to produce any papers with regard to actual earnings from agricultural land it is submitted by the revisionist that late Imtiyaj Uddin S/0 Sirajuddin was the grand father of revisionist, he had landed property in the village Chafari Uparhar, Pargana Nawabganj. Tehsil Soraon, District Allahabad. Revisionist's grandfather Imtiyaj Uddin was the owner in possession of various plots of Khata no.50, 73, 76 and 77. Total area of the plots of Khata no.73 is 7 bighas 18 biswa and that plot no.77 is 10 bighas 18 biswa. Total area of the plots of Khata no.76 is 22 bighas 7 biswa, to substantiate the aforesaid fact photo copy of khatauni 1421-1426 fasli of khata no.50, khatauni 1388-1393 fasli of khata no.76 and khatauni 1388-1393 fasli of khata no.73 and 77 is filed herewith this revision and marked as annexure-RA-1, RA-2 and RA-3 respectively to this rejoinder affidavit. Thus, the grandfather of the revisionist had been the owner in possession of more than 50 bighas of land which ultimately came to revisionist and his brothers after the death of grandfather and father of the revisionist, the father of the revisionist Mukhtar died in the year 2015 leaving behind the revisionist and his brothers as his legal representatives.

10. It is further submitted no criminal cases are there to the credit of the revisionist, and it is brother of the revisionist namely Muzaffar against whom eight cases were shown, which have been detailed in the counter affidavit filed by the State-respondent and the revisionist has no concern with the said cases lodged against his brother, therefore, it is submitted that the revisionist cannot be penalized for alleged wrong doing/criminal cases registered against his brother Muzaffar.

11. Learned counsel for the revisionist has drawn the attention of this Court towards Section 451 Cr.P.C. which reads as under:-

"451. Order for custody and disposal of property pending trial in certain cases. When any property is produced before any Criminal Court during any inquiry or trial, the Court may make such order as it thinks fit for the proper custody of such property pending the conclusion of the inquiry or trial, and, if the property is subject to speedy and natural decay, or if it is otherwise expedient so to do, the Court may, after recording such evidence as it thinks necessary, order it to be sold or otherwise disposed of. Explanation.- For the purposes of this section," property" includes-

(a) property of any kind or document which is produced before the Court or which is in its custody,

(b) any property regarding which an offence appears to have been committed or which appears to have been used for the commission of any offence."

12. It is thus, submitted that provisions of Section 451 Cr.P.C. clearly provides that when any property is produced before any Criminal Court during any inquiry or trial, the Court may make such order as it thinks fit for the proper custody of such property pending the conclusion of the inquiry or trial, and, if the property is subject to speedy and natural decay, or if it is otherwise expedient so to do, the Court may, after recording such evidence as it thinks necessary, order it to be sold or otherwise disposed of. In the instant case no criminal case has been ever instituted against the revisionist nor it has come on record the alleged vehicle has been used in the crime in question alleged to have been committed by the brother of the revisionist. Therefore, it is submitted that seizure of Toyota Fortuner of the revisionist, is bad and unjustified.

13. Learned counsel further contends that if the vehicle is kept in police station, the same would result in the vehicle becoming junk. Learned counsel for the applicant has relied upon a decision of Hon'ble Apex Court in the matter of ***Sunder Bhai Ambalal Desai Vs. State of Gujarat 2003 (46) A.C.C. 223*** in support of his contention, in which it has been held that it is not desirable in the matter of motor vehicle, the vehicle be kept at the police station for a long time which result in the vehicle becoming junk, therefore, the vehicle-in-question should be released in favour of the registered owner on such terms and conditions as the court below may deem fit and proper.

14. Accordingly, the order dated 15.3.2016 (wrongly mentioned in the impugned order dated as 15.3.2015) passed by learned Special Judge (Gangster Act), Bhadohi-Gyanpur in Reference Case No.3 of 2015, whereby the release application filed by the revisionist has been rejected is set aside and the matter is remitted to the concerned Magistrate to consider and decide the matter in accordance with law preferably within a period of two months from the date of production of certified copy of this order before it.

15. With the aforesaid directions, this revision is finally disposed off.

(2020)09ILR A989
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.05.2019

BEFORE

THE HON'BLE DINESH KUMAR SINGH-I, J.

Criminal Revision No. 1620 of 1995

Gopal Pal ...Revisionist (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Revisionist:
Sri Tapan Ghosh, Sri Ajay Kumar Sharma, Sri Atul Sharma, Sri K.S. Singh, Sri Prakash Chandra Srivastava, Sri Gaurav Singh, Sri Kripa Shanker Singh, Sri Lakshman Tripathi, Sri Mukesh Kumar, Sri R.N. Sharma.

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

A. Criminal Law – Prevention of Food and Adulteration Act, 1954 - Section 2(ia), 7/16, 10(7), 11(1)(b), 13(2) – Compliance of Section 10(7) - The evidence of the Food Inspector shall be analyzed on the basis of merit and on his testimony the case can be held proved. The duty of the Food Inspector is held confined to only calling independent witnesses but the said inspector cannot compel any witness to appear and that if the evidence of the Food Inspector is found to be believable, the accused could be held guilty. (Para 9)

B. Jurisdiction of C.M.O. - It has been argued that CMO did not have any authority to grant sanction for prosecution and the Court held that new Notification No. 6000 dated 20.1.1997, had authorized all Chief Medical Officers to act as Local Health Authority for the whole District, and, therefore, the C.M.O., Mirzapur had full jurisdiction to grant sanction to prosecute the accused-revisionist. (Para 8)

C. Compliance of Section 13(2) - If the registry was sent and the same did not return, it would be deemed that the same was served upon the accused. **The filing of receipt of registry from the side of prosecution would be an admissible piece of evidence u/s 114 of the Evidence Act.** (Para 11, 14)

Registered notice was sent to the accused on his given address which provided him sufficient opportunity, within the prescribed time of 10 days, to move for obtaining the second sample, for getting the same analyzed from the Director of Central Food Lab. Furthermore, when he appeared before the Trial Court, he had a right to move an application for getting the second sample tested, by sending it to the Central Food Lab but he did not avail that opportunity and, therefore, he cannot take this plea at this late stage and no benefit can be allowed to him. (Para 16)

D. Strict adherence to the provision of Prevention of Food Adulteration Act and Rules framed there-under is essential for safeguarding the interest of consumers of articles of food. Stringent laws will have no meaning if offenders could get away with mere fine. (Para 17)

Revision is partly allowed. (E-4)

Precedent followed:

1. St. of Raj. Vs Jagdish Prasad, 2009 Law Suit (SC) 694 (Para 17, 20)

Precedent distinguished:

1. Ram Labhaya Vs Municipal Corporation of Delhi & ors., AIR 1974 SC 789 (Para 9)

2. Nagar Swastha Adhikari, Nagar Maha Palika Vs Chhunni Lal, 1991 Supp. ACC 403 (Para 16)

3. Jugul Kishore Vs St. of U.P. [2019 (106) ACC 752] (Para 13)

Present revision has been preferred against judgment and order dated 06.12.1995, passed by Vth Additional Sessions Judge, Mirzapur.

(Delivered by Hon'ble Dinesh Kumar Singh-I, J.)

1. Heard Sri Prakash Chandra Srivastava, learned counsel for revisionist along with Sri Atul Sharma, Advocate and Sri G.P. Singh, learned AGA for the State.

2. This revision has been preferred against the judgment and order dated 6.12.1995, passed by Vth Additional Sessions Judge, Mirzapur in Criminal Appeal No.5 of 1993 (Gopal Pal Vs. State of U.P.). Whereby the appeal has been dismissed and the order of Trial Court has been upheld.

3. The Trial Court (C.J.M. Mirzapur) vide judgment and order dated 23.7.1993, passed in Criminal Case No.762 of 1992 (State Vs. Ram Kumar and another) has held accused Gopal Pal guilty under Section 7/16 of the Prevention of Food and Adulteration Act, 1954 (hereinafter referred to as 'Act, 1954') and has awarded punishment of one year as rigorous imprisonment and fine of Rs.2,000/- and in default of payment of fine four months additional rigorous imprisonment.

4. The main contention of learned counsel for the accused-revisionist is that the accused-revisionist is a 67 year old person. The co-accused Ram Kumar Pal who was the owner of the shop and had a proper licence has been acquitted. The allegedly recovered Namkeen (Sev) is not covered in Section 2(ia) as an adulterated article of food. It is further argued that it is alleged that the revisionist was found selling the same, and, therefore, he cannot be made liable to be punished under Section 7/16 as he was not owner of the said shop. He was not caught manufacturing the said Namkeen and lastly it was argued that the provision of Section 13(2) of Act, 1954 was not complied with which is a mandatory provision, non-compliance of which vitiates the entire proceedings.

5. For appreciation of arguments of learned counsel for the revisionist, it would be proper to go through the facts of the case first and the opinion expressed by the Courts Below.

6. According to the prosecution case, on 30.11.1991 at about 10:30 AM Food Inspector Mohd. Haneef Ansari had inspected the shop in question, located near Naveen Chitra Mandir in District Mirzapur which was a sweet shop as well as shop for sale of tea and namkeen, when he reached there, accused Gopal Ram was found present selling the items. The co-accused Ram Kumar Pal was having a licence of the said shop. The Food Inspector having suspicion of adulteration in the Namkeen (Sev), purchased 600 grams of it for the purpose of analysis after paying an amount of Rs.24/- and also gave Form-6 to accused Gopal Pal and obtained receipt for purchase of the said items from him. The said Namkeen was kept in three clean and dried bottles for the purposes of sample and were sealed according to the rules and, thereafter, code slip was pasted thereon which is provided by C.M.O. Mirzapur and had obtained signatures thereon of accused Gopal Pal. One bottle containing sample was sent by registered post on 2.12.1992, to public analyst U.P. Lucknow while rest of the two bottles were deposited in the Office of Chief Medical Officer, Mirzapur. He received a report of public analyst, in which the sample was found containing Kheshari (Lathyrus Sativus) which is prohibited in edible articles. Thereafter, an application for sanctioning prosecution of the accused persons was moved before the Chief Medical Officer, Mirzapur on which the then C.M.O., Mirzapur granted sanction

to prosecute the accused on 6.3.1992, and, thereafter, the Food Inspector Mohd. Haneef Ansari instituted the present complaint case. Thereafter, after following due procedure from the side of complainant the Food Inspector Mohd. Haneef Ansari was examined as P.W.1, retired Food Inspector S.K. Singh as P.W.2 and Food Clerk Aquil Ahmad Hasmi as P.W.3 and, thereafter, the evidence of prosecution was closed and the statement of accused were recorded under Section 313 Cr.P.C. in which the prosecution case was stated to be false and in defence it was further stated that there was no sweet shop near Naveen Chitra Mandir, rather there was an electricals shop near that place where the electrical items are sold in retail, regarding which he (co-accused) had licence. As regards the present accused-revisionist he stated that the entire prosecution evidence was false and that the witnesses being of the department had falsely implicated him. He also stated that he is brother of co-accused Ram Kumar Pal who has an electrical shop on which he sits. One witness Bihari Lal was also examined as D.W.1 in defence from the said of accused person and various documents were also provided which have been mentioned in the judgment.

7. After evaluating the evidence on record, the Trial Court has held the accused guilty and awarded punishment as mentioned above and the Appellate Court has upheld the said judgment in which it is mentioned that the accused had taken a defence that the C.M.O. did not have authority to grant sanction for prosecution; no compliance was made of Section 10(7) of Act, 1954; the provision of Section 13(2) of the Act, 1954 was not complied with and provision of Section 11(1)(b) of Act, 1954 was not complied with.

8. As regards the C.M.O. not having jurisdiction to grant sanction it was held that new Notification No.6000 dated 20.1.1997, had authorized all Chief Medical Officers to act as Local Health Authority for the whole District, and, therefore, the C.M.O., Mirzapur had full jurisdiction to grant sanction to prosecute the accused-revisionist and that point stands settled because it is not agitated before this Court.

9. As regards none-compliance of Section 10(7) of Act, 1954, it is held by the Appellate Court that the said provision is mandatory provision, compliance of which is made mandatory at the end of Food Inspector. At the time of collecting the sample, more than one independent witness is directed to remain present but it is also correct that if the Food Inspector summons independent witnesses for the said purpose but they do not co-operate, in such a condition if Food Inspector is not able to comply with the said provision according to law laid down by the Hon'ble Apex Court in **AIR 1974 Page 789,** the duty of the Food Inspector is held confined to only calling independent witnesses but the said inspector cannot compel any witness to appear and that if the evidence of the Food Inspector is found to be believable, on that basis the accused could be held guilty. It is further recorded in the judgment the said provision is made with a view to taking extra precaution and the same cannot be treated to be a mandatory Principle of Law. It is further held that if the Food Inspector while performing his official duty, in that capacity, purchases some article for the purposes of analysis of the test in accordance with the provisions laid down in the Act and the same is found to be adulterated after its analysis by public analyst, in that situation it is mandatory for

the Food Inspector to proceed against such a person from whom the sample was taken. The evidence of the Food Inspector shall be analyzed on the basis of merit and on his testimony the case can be held proved. In the case in hand there was no such allegation made against the Food Inspector that he was inimical towards the accused hence, there could be no doubt that he had collected the sample from the accused which was found to be adulterated. The Trial Court as well as Appellate Court have dealt with this point at length and I find that there is no reason why it should not be concluded that the provision of Section 10(7) of the said Act were complied with.

10. It is recorded in the impugned judgment that on Form no.6 (Ex- Ka-2), the signature of accused-revisionist is available which is made on behalf of co-accused Gopal who has been acquitted in this case. The receipt which was issued in view of purchase also bears signature of Gopal for co-accused Ram Kumar which is Ex Ka-3 and on both these Exhibits, the date is of 30.11.1991, and time is about 10.30 AM for purchase of 600 *Grams of Namkeen (Sev)* for an amount of Rs.24/-. Form no.6 and purchase receipts are Exhibits ka-2 and ka-3 respectively and it has been mentioned in them that witnesses were called from the vicinity but they refused to be witnesses to the said recovery and also refused to disclose their names and addresses. Therefore, it is held that the compliance of Section 10(7) was adequately made in this case. I also concur with the said opinion and find that there is no infirmity as regards holding that the compliance of the said Section was wholly made.

11. The next most important point is non-compliance of provision of Section 13(2) of Act, 1954 which is mandatory provision. In this regard, it is recorded in the impugned judgment that the revisionist was sent a copy of public analyst's report regarding which postal receipt was available and on the basis of that notice, the revisionist was informed that a complaint case had been filed against him and in case, he wanted, he could take necessary action within 10 days of the receipt of the notice. In the said notice there is mention made of the complaint case having been filed, which was sent on 16/17.6.1992 and a report of public analyst was also annexed therewith. In the said notice Gopal Pal son of Kedar Nath Pal near Naveen Cinema, Post- Sadar, Meerapur was mentioned. P.W.3 A.A. Hasmi has clearly stated that public analysts report was transmitted to both the accused i.e. Ram Kumar Pal as well as Gopal Pal (on their home address vide letter of C.M.O. LHA Mirzapur Letter No. F-20-92-93 dated 16/17.6.1992, copies of which were brought by him today which were deposited and the same was marked as Ex Ka-11. It is also recorded in the judgment that it appears to be by mistake that Ex Ka-11 was mentioned, though on the said Prapatra, Ex. Ka.12 was mentioned and the said receipts by which the registered letter is sent, was paper no.16-A which is Exhibit Ka-11. From the evidence of A. A Hasmi P.W.3 dated 25.5.1993, it was evident that both the accused were sent separate registry and therefore, if they wanted, within 10 days, they could have sent the other sample to CFL for being tested. Those registries did not return. From SPS Register, page 7, it was evident that the entry was made by this witness in his hand writing in respect of the said registries having been sent and the entry was also made of postal receipt no.4477 and 4475, dated 17.6.1992 which was submitted by him in Court which is Ex Ka-11. Therefore, it was evident that the registries were sent

to the revisionist-accused and if he had not received the same, in that condition when he had appeared before Court he could have asked for the second sample to be sent for CFL for being tested. In his not doing so, he could not get any benefit. This part has been adequately dealt with by the lower court, if the registry was sent and the same did not return, it would be deemed that the same was served upon the accused and with that conclusion I do not have any quarrel.

12. Much argument was made by learned counsel for the revisionist that it was not proved that the registry was sent on the given address of the revisionist-accused because on the receipt filed before the Court, the same did not contain the whole address of the accused-revisionist. Hence, that could be treated to be a breach in sending mandatory notice to the accused-revisionist. I do not accept this argument because the details of the address are always noted on the envelope which is sent and not on the receipt of registry, because receipt of registry always contains small reference of the name of the person whom the same is sent as well as to place, which is normal practice being commonly observed. Therefore, in my opinion the compliance of Section 13(2) of Act, 1954 is found to have been made adequately.

13. Learned counsel for the accused-revisionist has relied upon in the Case of **Jugul Kishore Vs. State of U.P. [2019 (106) ACC 752]**, in which it has been held that prosecution has to prove the fact of service by producing evidence aliunde, not just the dispatch of notice, in order to be in accord with section 13(2) of Act, 1954 and held in the present case that admittedly, no acknowledgment card or other evidence, such as, a certificate of delivery of the registered postal cover by the postal department has been placed on record, hence, it would fall foul of requirement of section 13(2) of the act read with the relevant rule.

14. There is no quarrel with the principle laid down above, but in the present case, I find that the receipt of registry has been produced by the prosecution in respect of which evidence is also led that the information was sent to the accused by registered post, receipt of which was presented in court, showing the given address and though the full address was not written on the receipt but it has been held to be a common practice that the full address is always written on the envelope which is sent to the addressee while the person who sends the registered letter is given a receipt mentioning thereon the name of the addressee, normally, which appears to have happened in the present case also. Hence, the filing of receipt of registry from the side of prosecution would be an admissible piece of evidence under Section 114 of the Evidence Act.

15. One more point which needed to be considered was that when the accused had appeared before the Court he had opportunity to move an application for getting the second sample sent for being tested which right has not been exercised by the accused. I do not know whether in the case relied upon by the learned counsel for the accused-revisionist, the accused had appeared before Court and had applied for excising his right or not to get the second sample sent for being tested, therefore, the facts of the present case may be distinguishable from the facts of the case relied upon by the learned counsel for the revisionist

16. The learned counsel for the revisionist-accused has relied upon the **Nagar Swastha Adhikari, Nagar Maha**

Palika Vs. Chhunni Lal, 1991 supplementary ACC page 403, in which it is held that under Sub-Section 2 of Section 13 of Act, 1954, the accused-revisionist has been given a valuable right to apply to the court to have the sample taken and get it analyzed by Director of the Central Food Lab, if this right is prejudiced, in any way by the carelessness or negligence of the prosecution, report of the public analyst cannot be relied upon and the accused-revisionist can not be convicted on the basis of said report. The said provision is mandatory and a violation thereof would deprive the accused-revisionist of a valuable right. There is no dispute with the above Principle Law but I have already given my finding that the compliance of Section 13(2) was properly made in this case, as soon after the receipt of public analyst report and the filing of the complaint case, registered notice was sent to the accused on his given address which provided him sufficient opportunity, within the time prescribed of 10 days, to move for obtaining the second sample, for getting the same analyzed from the Director of Central Food Lab. Furthermore, when he appeared before the Trial Court, he had a right to move an application for getting the second sample for being tested, sent to the Central Food Lab but he did not avail of that opportunity and, therefore, he cannot take this plea at this late stage and no benefit can be allowed to him.

17. I may rely upon the case of **State of Rajasthan Vs. Jagdish Prasad, 2009 Law Suit (SC) 694,** in which it has been held that the Trial Court had awarded six months imprisonment to the accused under Section 6/17 of the Act, 1954 and the High Court had upheld the conviction but imposed the fine of Rs.6,000/- and directed commutation of sentence of six months R.I. When the matter came up before the Hon'ble Apex Court it was held that strict adherence to the provision of Prevention of Food Adulteration Act and Rules framed there-under is essential for safe-guarding the interest of consumers of articles of food. Stringent laws will have no meaning if offenders could get away with mere fine and therefore, order of sentence by the Trial Court was upheld. Further for a period of three months accused was given liberty to move appropriate Government for commutation of sentence and accordingly, the impugned order of High Court was set aside.

18. In view of the above analysis made by me, I am of the opinion that there is no infirmity in the impugned judgment and order dated 6.12.1995, and that the accused-revisionist has been rightly convicted under section 7/16 of Act, 1954 but as regards sentence, I find that much time has elapsed since the occurrence took place and by now the accused has turned to be about 67 years of age, therefore, it would be proper that instead of one year S.I and fine of Rs. 2,000/- the same be reduced to six months simple S.I. which is minimum sentence prescribed under Section 16 of the Act. However, no interference is required as regards fine. Therefore, the sentence of accused-revisionist is reduced to S.I. for six months and a fine of Rs.2,000/- and in default of payment fine 15 days S.I., to meet the ends of justice.

19. This revision is accordingly partly allowed and a copy of this judgment be transmitted to the Trial Court expeditiously to carry out the judgment and ensure that the accused is taken into custody to serve out the sentence awarded. The period for which he has been detained earlier the same

would be adjusted against the said sentence. The bail bonds and surety bonds of accused-revisionist are discharged.

20. It was argued by learned counsel for the accused-revisionist that the revisionist-accused has now turned 67 years of age and, therefore, it would be very painful for him to go to jail and serve out the remaining sentence at this far distant point of time, therefore, in view of the judgment of Apex Court in the case of State of **Rajasthan Vs. Jagdish Prasad, 2009 Law Suit (SC) 694**, this Court deems it proper to grant him three months time from today to approach appropriate Government annexing a certified copy of this order to seek remission under Section 433(d) Cr.P.C., if so advised.

21. If the revisionist files any such application for grant of remission by the Government before the Trial Court with its receipt then the Trial Court shall await the outcome of the said application which shall be informed by the revisionist to the Trial Court also immediately. If he is granted remission by the Government, the Trial Court shall abide by it, failing which the accused-revisionist shall be taken into custody after expiry of the period of 3 months from today, to serve out the remaining sentence.

23. Office is directed to send a copy of this order to the Trial Court immediately for compliance

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(2020)09ILR A995

REVISIONAL JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 15.06.2020

BEFORE

THE HON'BLE J.J.MUNIR, J.

Criminal Revision No. 2388 of 2019

Amit Kumar @ Raja ...Revisionist

Versus

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

Counsel for the Revisionist:

Sri Uttam Singh, Sri Dharm Jeet Singh, Sri Hari Bans Singh

Counsel for the Opposite Parties:

A.G.A.

A. Criminal Law - Code of Criminal Procedure, 1973-Section 401 r/w Section 397 & Indian Penal Code, 1860-Sections 147, 148,149, 323, 504, 506, 304, 308-application-claim to be juvenile-four adult accused granted bail while the revisionist/juvenile were disentitled to bail-the adult offenders whose case is at par with the revisionist/juvenile, being found entitled to bail, there is absolutely no justification to fetter the revisionist's liberty merely because he is a child in conflict with law-it would be a great travesty of justice that the revisionist is liable to suffer institutional incarceration in a situation where an adult at par is entitled to the liberty of bail.(Para 2 to 11)

B. The proviso in Section 12(1) is a special provision designed to ensure bail to a juvenile. If an adult accused and a child have the same role and the adult accused is found entitled to bail, and holding the juvenile in institutional incarceration,would work hostile discrimination against the revisionist/juvenile.(Para 7 to 11)

The revision is allowed. (E-6)

List of cases cited: -

1. Dharmendra (Juvenile) Vs St. of U.P. & ors., (2018) 7 ADJ 864

(Delivered by Hon'ble J.J.Munir, J.)

1. Supplementary affidavit filed today in Court is taken on record.

2. This Revision is directed against an order of Sri Pramod Kumar Srivastava-II, the then Additional Sessions Judge, Court no.1, Ballia, dated 18.05.2019 passed in Criminal Appeal no.23 of 2019, dismissing the said appeal and affirming an order of the Juvenile Justice Board, Ballia, dated 12.04.2019, rejecting the revisionist's bail plea in Misc. Case no.10 of 2019, arising out of Case Crime no.515 of 2018, under Sections 147, 148, 149, 323, 504, 506, 304, 308 IPC, P.S. Kotawali, District Ballia.

3. It appears that there are general allegations of assault against unknown offenders in the FIR lodged by Neeraj Dixit on 18.12.2018. He has said in the FIR that in the night of 17/18.12.2018 at about 12 O' clock, 6 - 7 persons armed with sticks (danda, hockey stick and rod) came over to his shop and inquired about his whereabouts. The informant's uncle, Guddan Tiwari informed those unwelcome visitors that the revisionist was away. Thereupon, the assailants hurling abuses, beat up his uncle and struck him employing the weapons they were carrying. Upon call for rescue, the neighbouring shop keepers intervened and dissipated the assault. Guddan Tiwari was taken to Hospital, where he succumbed to his injuries. It transpires that in the statement of the informant under Section 161 Cr.P.C. recorded soon after the FIR also, no one was named. However, in the statement that was recorded under Section 161 Cr.P.C. 15 days later, the name of the revisionist and the other co-accused, numbering a total of seven, was disclosed.

4. It is pointed out by the learned Counsel for the revisionist that amongst the seven assailants who have been brought in through the supplementary statement of the informant, recorded under Section 161 Cr.P.C. four are adults, whereas three of them are juveniles, including the revisionist. The revisionist was a child aged 13 years 5 months and 2 days on the date of occurrence. This fact has not been disputed by the learned A.G.A. It is further pointed out by the learned Counsel for the revisionist that all the four adult-accused, that is to say, Shiv Gupta, Amit Giri @ Golu, Vikas Kumar @ Vikki Rathaur and Amit Kumar Pawar have been admitted to bail by this Court vide orders dated 28.03.2019, 13.03.2019 and 21.02.2019 passed in Criminal Misc. Bail Applications nos.12554 of 2019, 10259 of 2019 and 7564 of 2019 respectively.

5. The submission of the learned Counsel for the revisionist is that once on identical facts accused, who are adults, have been granted bail, it would be travesty of justice to hold in institutional incarceration, the accused who are children in conflict with law, with no different allegations than those against the adult accused. He submits that incarceration for the revisionist who is a juvenile while the adult accused have been granted bail, would also be discriminatory.

6. Learned A.G.A. has supported the orders impugned, but does not dispute the fact that the adult accused have been granted bail by this Court on their bail applications under Section 439 Cr.P.C.

7. This Court has keenly considered the rival submissions. Apart from other things that are specific to the case of the revisionist and the special rights that he has in relation to bail unless his case falls in one or the other exceptions envisaged under the proviso to sub-Section (1) of Section 12 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (for

short, the Act), there is a plea of discrimination urged on his behalf. The submission of the learned Counsel for the revisionist is that holding the juvenile in institutional incarceration whereas the adult accused, against whom there are identical allegations, have been admitted to bail, would work hostile discrimination against the revisionist. This requires serious consideration. Section 12 of the Act is extracted below:

"Section 12- Bail to a person who is apparently a child alleged to be in conflict with law

(1) When any person, who is apparently a child and is alleged to have committed a bailable or non-bailable offence, is apprehended or detained by the police or appears or brought before a Board, such person shall, notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law for the time being in force, be released on bail with or without surety or placed under the supervision of a probation officer or under the care of any fit person:

Provided that such person shall not be so released if there appears reasonable grounds for believing that the release is likely to bring that person into association with any known criminal or expose the said person to moral, physical or psychological danger or the person's release would defeat the ends of justice, and the Board shall record the reasons for denying the bail and circumstances that led to such a decision.

(2) When such person having been apprehended is not released on bail under subsection (1) by the officer-in-charge of the police station, such officer shall cause the person to be kept only in an observation home in such manner as may be prescribed until the person can be brought before a Board.

(3) When such person is not released on bail under sub-section (1) by the Board, it shall make an order sending him to an observation home or a place of safety, as the case may be, for such period during the pendency of the inquiry regarding the person, as may be specified in the order.

(4) When a child in conflict with law is unable to fulfil the conditions of bail order within seven days of the bail order, such child shall be produced before the Board for modification of the conditions of bail."

8. The proviso to sub-Section (1) of Section 12 is a special provision designed to ensure bail to a juvenile or a child in conflict with law where an identically circumstanced adult is not entitled. The purpose of the aforesaid proviso is not to circumscribe a child's liberty with additional clogs which a similarly situate adult accused would not subject to. In other words, if an adult accused and a child have the same role and the adult accused is found entitled to bail, the proviso to sub-Section (1) of Section 12 of the Act, cannot be read in a manner so as to disentitle the child to the liberty of bail. If the provision was to be construed in the manner that a child would have added hurdles to overcome in order to win his liberty of bail, it might expose the provision to attack about its constitutionality on the ground of invidious discrimination.

9. I have considered this question in **Dharmendra (Juvenile) vs. State of U.P.**

and others, 2018 (7) ADJ 864, where it is held:

"10. The matter can be looked at from another vantage. In case the revisionist were an adult and stood charged of the offence that he faces with a weak circumstantial evidence of last seen and confession to the police, in all probability, it would have entitled him to bail pending trial. If on the kind of evidence forthcoming an adult would be entitled to bail, denying bail to a child in conflict with law may be denying the juvenile/ child in conflict with law the equal protection of laws guaranteed under Article 14 of the Constitution.

11. The rule in Section 12(1) of the Act is in favour of bail always to a juvenile/ child in conflict with law except when the case falls into one or the other categories denial contemplated by the proviso. It is not the rule about bail in Section 12 of the Act that in case a child in conflict with law is brought before the Board or Court, his case is not to be seen on merits prima facie about his complicity at all for the purpose granting him bail; and all that has been done is to see if his case falls is one or the other exceptions, where he can be denied bail. The rule in Section 12 sanctioning bail universally to every child in conflict with law presupposes that there is a prima facie case against him in the assessment of the Board or the Court based on the evidence placed at that stage. It is where a case against a child in conflict with law is prima facie made out that the rule in Section 12(1) of the Act that sanctions bail as a rule, except the three categories contemplated by the proviso comes into play. It is certainly not the rule, and, in the opinion of the Court cannot be so, that a case on materials and evidence collected not being made out against a child at all, his case has to be tested on the three parameters where bail may be denied presuming that a prima facie case is constructively there. Thus, it would always have to be seen whether a case prima facie on merits against a child in conflict with law is there on the basis of material produced by the prosecution against him. If it is found that a prima facie case on the basis of material produced by the prosecution is there that would have led to a denial of a bail to an adult offender, in that case also the Rule in Section 12(1) of the Act mandates that bail is to be granted to a juvenile/ child in conflict with law except where his case falls into any of the three disentitling categories contemplated by the proviso.

12. In the opinion of this Court, therefore, the perception that merits of the case on the basis of prima facie evidence is absolutely irrelevant to a juvenile's bail plea under the Act would not be in conformity with the law. The catena of decisions that speak about merits of the case or the charge against a juvenile being irrelevant, proceed on facts and not an assumption that a case on merits is made out, and, not where the case is not at all made out prima facie. It is not that a child alleged to be in conflict with law against whom there is not iota of evidence to connect him to the crime would still have bail denied to him because his case may be placed in or the other disentitling categories under the proviso to Section 12(1) of the Act. If this kind of a construction were to be adopted it might expose the provisions of Section 12(1) of the Act to challenge on ground of violating the guarantee of equal protection of laws enshrined in Article 14 of the Constitution. It is an enduring principle that a construction that lends a

statute to challenge about its constitutionality should be eschewed and one that saves and upholds its vires is to be adopted. In this context the guidance of their Lordships of the Hon'ble Supreme Court in Japani Sahoo vs. Chandra Sekhar Mohanty, (2007) 7 SCC 394 may be referred to:-

"51. The matter can be looked at from different angle also. Once it is accepted (and there is no dispute about it) that it is not within the domain of the complainant or prosecuting agency to take cognizance of an offence or to issue process and the only thing the former can do is to file a complaint or initiate proceedings in accordance with law. If that action of initiation of proceedings has been taken within the period of limitation, the complainant is not responsible for any delay on the part of the Court or Magistrate in issuing process or taking cognizance of an offence. Now, if he is sought to be penalized because of the omission, default or inaction on the part of the Court or Magistrate, the provision of law may have to be tested on the touchstone of Article 14 of the Constitution. It can possibly be urged that such a provision is totally arbitrary, irrational and unreasonable. It is settled law that a Court of Law would interpret a provision which would help sustaining the validity of law by applying the doctrine of reasonable construction rather than making it vulnerable and unconstitutional by adopting rule of 'litera legis'. Connecting the provision of limitation in Section 468 of the Code with issuing of process or taking of cognizance by the Court may make it unsustainable and ultra vires Article 14 of the Constitution."

10. In the facts of the present case, there is no quarrel that the role of all the accused is identical. The four adult accused, to wit, Shiv Gupta, Amit Giri @ Golu, Vikas Kumar @ Vikki Rathaur and Amit Kumar Pawar have all been admitted to bail by this Court, a fact about which there is no quarrel. This Court does not find any justification to undertake further inquiry with reference to the proviso to sub-Section (1) of Section 12 of the Act, to find out in these circumstances, whether the revisionist is disentitled to bail under one or the other category. Even if the revisionist were disentitled under one or the other contingencies envisaged in the proviso to sub-Section (1) of Section 12 of the Act, the adult offenders, whose case is at par with the revisionist, being found entitled to bail, there is absolutely no justification to fetter the revisionist's liberty merely because he is a child in conflict with law. It would be a great travesty of justice to read the provision that way and hold that the revisionist is liable to suffer institutional incarceration in a situation where an adult at par is entitled to the liberty of bail.

11. In the result, this revision succeeds and is **allowed**. The impugned order dated 18.05.2019 passed by the learned Additional Sessions Judge, Court no.1, Ballia in Criminal Appeal No.23 of 2019 and the order dated 12.04.2019 passed by the Juvenile Justice Board, Ballia in Misc. Case no.10 of 2019, arising out of Case Crime no.515 of 2018, under Sections 147, 148, 149, 323, 504, 506, 304, 308 IPC, P.S. Kotawali, District Ballia, rejecting the revisionist's bail plea, are hereby set aside and reversed. The bail application made on behalf of the revisionist before the Board through his father stands allowed.

12. Let the revisionist, **Amit Kumar @ Raja** through his natural guardian/ father Ikbal Ram @ Ekbar son of late

Raghuraj, be released on bail in Case Crime no.515 of 2018, under Sections 147, 148, 149, 323, 504, 506, 304, 308 IPC, P.S. Kotawali, District Ballia upon his father furnishing a personal bond with two solvent sureties of his relatives each in the like amount to the satisfaction of the Juvenile Justice Board, Ballia subject to the following conditions:

(i) that the natural guardian/ father Ikbal Ram @ Ekbar will furnish an undertaking that upon release on bail the juvenile will not be permitted to come into contact or association with any known criminal or allowed to be exposed to any moral, physical or psychological danger and further that the father will ensure that the juvenile will not repeat the offence.

(ii) The revisionist and his father Ikbal Ram @ Ekbar will report to the District Probation Officer on the first Monday of every calendar month commencing with the first Monday of July, 2020 and if during any calendar month the first Monday falls on a holiday, then on the following working day.

(iii) The District Probation Officer will keep strict vigil on the activities of the revisionist and regularly draw up his social investigation report that would be submitted to the Juvenile Justice Board, Ballia on such periodical basis as the Juvenile Justice Board may determine.

(iv) The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad.

(v) The computer generated copy of such order shall be self attested by the counsel of the party concerned.

(vi) The concerned Court/Authority/Official shall verify the authenticity of such computerized copy of the order from the official website of High Court Allahabad and shall make a declaration of such verification in writing.

(2020)09ILR A1000
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.08.2020

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Criminal Revision No. 4186 of 2019

Jitendra Kumar Bind ...Revisionist (In Jail)
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri Pavan Kumar Srivastava, Sri Bare Lal, Sri Ajay Pratap Singh

Counsel for the Opposite Parties:
A.G.A., Sri Pavan Kumar Mishra, Sri Pavan Kumar Mishra

A. Criminal Law – Bail plea – Juvenile Justice (Care and Protection of Children) Act, 2015 - Section 12, 18(1)(g) - Code of Criminal Procedure - Sections 161, 164 - The gravity of the offence is not relevant consideration for refusing grant of bail to the juvenile (Para 16, 17)

Present bail plea arises out of case u/s 342, 323, 376D, 506 IPC and u/s 5/6 POSCO Act as well as u/s 3(2) 5 SC/ST Act. It is observed that the statements under Sections 161 and 164 Cr.P.C. are self-contradictory, which has been overlooked by both the Courts below and further the Courts have also not considered the radiological age of the victim as per the medical report. (Para 4, 15)

The maximum period for which a juvenile can be incarcerated in whatever form of detention,

is three years, as per Section 18(1)(g) of the Act. It is submitted that the revisionist has done more than half of institutional incarceration. (Para 9, 10)

B. Juvenile Justice Act, 2015 - Section 12 - **Bail for a juvenile, particularly, one who is under the age of 16 years, is a matter of course and it is only in the event that his case falls under one or the other disentitling categories mentioned in the proviso to sub-Section (1) of Section 12 of the Act that bail may be refused.**

The Court in the present case observes that juvenile is clearly below 16 years of age and does not fall into that special category of a juvenile between the age of 16 and 18 years whose case may be viewed differently, in case, they are found to be of a mature mind and persons well understanding the consequences of their actions. (Para 6, 13, 14)

In this case, the juvenile, who is a young boy, less than the age of 16 years, has no criminal history. There is nothing said against the juvenile, appearing from the Social Investigation Report that may show him to be a desperado or misfit in the society. The two Courts below have not indicated any reason for his disentitlement to bail. Even if it be assumed that the offence was committed in the manner alleged, it would be rather strained logic to hold that release of the juvenile on bail would lead to the ends of justice being defeated. (Para 15)

C. Constitution of India: Article 21 - Overall view of all the facts and circumstances of this case, the nature of evidence, the period of detention already undergone, the unlikelihood of early conclusion of trial and also in the absence of any convincing material to indicate the possibility of tampering with the evidence and in view of the larger mandate of the Article 21 of the Constitution of India and the dictum of Apex Court, this Court is of the view that the present criminal revision may be allowed and the revisionist may be released on bail. (Para 17)

Revision allowed. (E-4)

Precedent followed: -

1. Kamal Vs St. of Har., (2004) 13 SCC 526 (Para 9, 17)

2. Takht Singh Vs St. of M.P., (2001) 10 SCC 463 (Para 10, 17)

3. Shiv Kumar @ Sadhu Vs St. of U.P., 2010 (68) ACC 616 (LB) (Para 16, 17)

4. Dataram Singh Vs St. of U.P. & anr., (2018) 3 SCC 22 (Para 17)

Present revision is directed against the judgment and order dated 28.9.2019 passed by Special Judge POCSO Act, Allahabad dismissing Criminal Appeal No. 79 of 2019 (Radhey Shyam v. State of U.P.).

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

1. This revision is directed against the judgment and order dated 28.9.2019 passed by Special Judge POCSO Act, Allahabad dismissing Criminal Appeal No.79 of 2019 (Radhey Shyam versus State of U.P.), filed under Section 101 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (for short "the Act') and affirming an order of Juvenile Justice Board, Prayagraj dated 28.6.2019 refusing the bail plea to the revisionist in Case No.71 of 2019 (State vs. Jitendra Kumar Bind), arising out of Case Crime No.243 of 2018, under Sections 342, 323, 376D, 506 IPC and under Section 5/6 POCSO Act as well as under Section 3(2) 5 SC/ST Act, Police Station Phoolpur, District Prayagraj.

2. Heard Sri Pavan Kumar Srivastava assisted by Sri B. Lal, learned counsel for the revisionist, learned A.G.A. for the State and Sri Pavan Kumar Mishra, learned counsel for opposite party no.2 and perused the record.

3. The prosecution case, as per the version of the FIR, is that on 5.7.2018 at 10

p.m. when the grand-daughter of the informant namely Km. Soni, who is aged about 15 years, had gone in the field for call of nature, the revisionist Jitendra Kumar Bind along with another co-accused came there and closed her mouth. Thereafter, they have taken her away at the house of the revisionist where they closed the door from outside. The revisionist was present in the room and firstly he committed maarpeet with her and threatened to kill her and thereafter removed her clothes and committed rape upon her.

4. Learned counsel for the revisionist submits that the revisionist is innocent and he has been falsely implicated in the present case. The FIR has been lodged by the Nana (grand-father) of the victim on 6.7.2018 at about 15.44 p.m. with regard to the incident which took place on 5.7.2018. In the FIR the age of the victim has been shown to be minor aged about 15 years whereas as per radiological report dated 7.7.2018 filed as Annexure-4 to the affidavit, the victim is major aged about 18 years. As per supplementary medico legal report also, the radiological age of the victim is 18 years filed as Annexure-5 to the affidavit. Thus, the victim was major on the date of alleged occurrence. Learned counsel further submits that there is a vast contradiction in the statement under Section 161 Cr.P.C. and the statement under Section 164 Cr.P.C. In her statement under Section 161 Cr.P.C. the victim has stated that the revisionist often used to come to her grand-father's house and he is well known to her and family members. On 5.7.2018 at 10 p.m. when she came outside for call of nature, the revisionist along with another person to whom she did not know, closed her mouth. Thereafter, they took her away forcibly in a room where another person closed the door from outside. Firstly, the revisionist committed maarpeet with her and threatened to kill her. Thereafter, when she tried to resist, he tied her hands and committed wrongful act with her. On the other hand, in her statement under Section 164 Cr.P.C. she has stated that when she had gone outside for call of nature, two persons came from back side and closed her mouth. Out of them she is known to one person whose name is Jitendra and he lives in front of her house. She was caught by both the persons and Jitendra took her in his house and after taking her in a room, he tied her hands also. Another person closed the door from outside. When the victim tried to resist, the revisionist committed maarpeet with her and threatened to kill her and thereafter removed her clothes and committed rape upon her. The statements under Sections 161 and 164 Cr.P.C. are self-contradictory. Learned counsel for the revisionist submits that the revisionist is well known to the victim prior to the alleged incident and it appears that there was consenting relationship between the revisionist and the victim.

5. Learned counsel for the revisionist further submits that the revisionist is juvenile and there is no apprehension of reasoned ground for believing that the release of the revisionist is likely to bring him in association with any known criminals or expose him to mental, physical or psychological danger or his release would defeat the ends of justice. He further submits that except this the revisionist has no previous criminal history. The father of the revisionist is giving his undertaking that after release of the revisionist on bail, he will keep him under his custody and look after him properly. Further, the revisionist undertakes that he will not tamper the

evidence and he will always cooperate the trial proceedings. There was no report regarding any previous antecedents of family or background of the revisionist. There is no chance of revisionist's re-indulgence to bring him into association with known criminals.

6. Learned counsel for the revisionist further submits that it is not in dispute that the revisionist is a juvenile as he already been declared juvenile by Juvenile Justice Board, Prayagraj vide order dated 12.4.2019. The revisionist was a juvenile aged 15 years, 9 months and 16 days on the date of occurrence. He was, thus, clearly below 16 years of age. He is in jail since 7.1.2019 in connection with the present crime and has completed more than half of the sentence out of the maximum three years institutional incarceration permissible for a juvenile, under Section 18(1)(g) of the Act.

7. Learned counsel for the revisionist further submits that thereafter the revisionist applied for bail before the Juvenile Justice Board, Prayagraj upon which a report from the District Probation Officer was called for. The bail application was rejected vide order dated 28.6.2019, being aggrieved, the revisionist preferred an appeal under Section 101 of the Act, which was also dismissed vide order dated 28.9.2019. Hence the present criminal revision has been filed before this Hon'ble Court mainly on the following amongst other grounds:

(i) That the revisionist is innocent and has been falsely implicated in the present case due to rivalry/village partibandi.

(ii) That the revisionist is juvenile and there is no apprehension of reasoned ground for believing that the release of the revisionist is likely to bring him in association with any known criminals or expose him to mental, physical or psychological danger or his release would defeat the ends of justice.

(iii) That the revisionist has no criminal history except the present case.

(iv) That the law has been laid down by this Court as well as the Apex Court that the seriousness of the offence is no ground to reject the bail of the juvenile and only three contingencies have been provided to be considered at the time of consideration of the bail application and those are if the release is likely to bring him into association with any known criminal or would expose him to moral, physical or psychological danger or that his release would defeat the ends of justice.

(v) That the father of the revisionist is giving his undertaking that after release of the revisionist on bail, he will keep him under his custody and look after him properly.

(vi) That the revisionist undertakes that he will not tamper the evidence and he will always cooperate the trial proceedings.

(vii) That both the courts below have committed gross illegality by rejecting the revisionist's bail prayer after declaring him juvenile.

(viii) That both the courts below have given wrong findings without any material available on record.

(ix) That there was no report regarding any previous criminal antecedents of the family or background of the revisionist.

(x) That there is no chance of revisionist's re-indulgence to bring him into association with known criminals.

(xi) That the impugned orders passed by the courts below are totally arbitrary, illegal and bad in law.

(xii) That the findings given by the courts below are based on conjectures and surmises.

8. Several other submissions in order to demonstrate the falsity of the allegations made against the revisionist have also been placed forth before the Court. The circumstances which, according to the counsel, led to the false implication of the accused have also been touched upon at length. It has been assured on behalf of the revisionist that he is ready to cooperate with the process of law and shall faithfully make himself available before the court whenever required and is also ready to accept all the conditions which the Court may deem fit to impose upon him. It has also been pointed out that in the wake of heavy pendency of cases in the Court, there is no likelihood of any early conclusion of trial.

9. Learned counsel for the revisionist has pointed out that the revisionist has by now done more than half of institutional incarceration. The maximum period for which a juvenile can be incarcerated in whatever form of detention, is three years, going by the provisions of Section 18(1)(g) of the Act. In support of his contention, learned counsel for the revisionist has placed reliance of Hon'ble Apex Court judgment in the case of **Kamal Vs. State of Haryana, 2004 (13) SCC 526** and submitted that the Hon'ble Apex Court was pleased to observe in paragraph no. 2 of the judgment as under :-

"2. This is a case in which the appellant has been convicted u/s 304-B of the India Penal Code and sentenced to imprisonment for 7 years. It appears that so far the appellant has undergone imprisonment for about 2 years and four months. The High Court declined to grant bail pending disposal of the appeal before it. We are of the view that the bail should have been granted by the High Court, especially having regard to the fact that the appellant has already served a substantial period of the sentence. In the circumstances, we direct that the bail be granted to the appellant on conditions as may be imposed by the District and Sessions Judge, Faridabad."

10. Learned counsel for the revisionist has also placed reliance of Hon'ble Apex Court judgment in the case of **Takht Singh Vs. State of Madhya Pradesh, 2001 (10) SCC 463**, and submitted that the Hon'ble Apex Court was pleased to observe in paragraph no. 2 of the judgment as under:-

"2. The appellants have been convicted under Section 302/149, Indian Penal Code by the learned Sessions Judge and have been sentenced to imprisonment for life. Against the said conviction and sentence their appeal to the High Court is pending. Before the High Court application for suspension of sentence and bail was filed but the High Court rejected that prayer indicating therein that the applicants can renew their prayer for bail after one year. After the expiry of one year the second application was filed but the same has been rejected by the impugned order. It is submitted that the appellants are already in jail for over 3 years and 3 months. There is no possibility of early hearing of the appeal in the High Court. In the aforesaid circumstances the applicants be released on bail to the satisfaction of the learned Chief Judicial Magistrate, Sehore. The appeal is disposed of accordingly."

11. Learned A.G.A. as well as Sri Pavan Kumar Mishra, learned counsel for opposite party no.2 have filed their counter affidavit and have opposed the revisionist's case with the submission that the release of the revisionist on bail would bring him into

association of some known criminals, besides, exposing him to moral, physical and psychological danger. It is submitted that his release would defeat the ends of justice, considering that he is involved in a heinous offence.

12. Learned counsel for the revisionist thereafter filed the rejoinder affidavit and has denied the averments made in the counter affidavit and reiterated the grounds taken in the revision.

13. This Court has carefully considered the rival submissions of the parties and perused the impugned orders. The juvenile is clearly below 16 years of age and does not fall into that special category of a juvenile between the age of 16 and 18 years whose case may be viewed differently, in case, they are found to be of a mature mind and persons well understanding the consequences of their actions. The provisions relating to bail for a juvenile are carried in Section 12 of the Act, which reads as under:

"(1) When any person, who is apparently a child and is alleged to have committed a bailable or non-bailable offence, is apprehended or detained by the police or appears or brought before a Board, such person shall, notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law for the time being in force, be released on bail with or without surety or placed under the supervision of a probation officer or under the care of any fit person:

Provided that such person shall not be so released if there appears reasonable grounds for believing that the release is likely to bring that person into association with any known criminal or expose the said person to moral, physical or psychological danger or the person's release would defeat the ends of justice, and the Board shall record the reasons for denying the bail and circumstances that led to such a decision.

(2) When such person having been apprehended is not released on bail under subsection (1) by the officer-in-charge of the police station, such officer shall cause the person to be kept only in an observation home in such manner as may be prescribed until the person can be brought before a Board.

(3) When such person is not released on bail under sub-section (1) by the Board, it shall make an order sending him to an observation home or a place of safety, as the case may be, for such period during the pendency of the inquiry regarding the person, as may be specified in the order.

(4) When a child in conflict with law is unable to fulfil the conditions of bail order within seven days of the bail order, such child shall be produced before the Board for modification of the conditions of bail."

14. A perusal of the said provision show that bail for a juvenile, particularly, one who is under the age of 16 years, is a matter of course and it is only in the event that his case falls under one or the other disentitling categories mentioned in the proviso to sub-Section (1) of Section 12 of the Act that bail may be refused. The merits of the case against a juvenile acquire some relevance under the last clause of the proviso to sub-section (1) of Section 12 that speaks about the ends of justice being defeated. The other two disentitling

categories are quite independent and have to be evaluated with reference to the circumstances of the juvenile. Those circumstances are to be gathered from the Social Investigation Report, the police report and in whatever other manner relevant facts enter the record.

15. What is of prime importance in this case is that the juvenile, who is a young boy, less than the age of 16 years, has no criminal history. There is nothing said against the juvenile, appearing from the Social Investigation Report that may show him to be a desperado or misfit in the society. The two courts below have held the juvenile disentitled to bail on account of his case falling under each of the three exceptions enumerated in the proviso to sub section (1) of Section 12, for which no reason has been indicated. That finding, in both the orders impugned, is based on an ipse dixit, in one case of the judge and in the other of the Board. Even if it be assumed that the offence was committed in the manner alleged, it would be rather strained logic to hold that release of the juvenile on bail would lead to the ends of justice being defeated. Both the courts below have also overlooked the statement of the victim recorded under Section 161 and 164 CrPC and further the courts below have also not considered the radiological age of the victim as per the medical report.

16. This Court in the case of **Shiv Kumar alias Sadhu Vs. State of U.P. 2010 (68) ACC 616(LB)** was pleased to observe that the gravity of the offence is not relevant consideration for refusing grant of bail to the juvenile.

17. After perusing the record in the light of the submissions made at the bar and after taking an overall view of all the facts and circumstances of this case, the nature of evidence, the period of detention already undergone, the unlikelihood of early conclusion of trial and also in the absence of any convincing material to indicate the possibility of tampering with the evidence and in view of the larger mandate of the Article 21 of the Constitution of India and the dictum of Apex Court in the case of **Dataram Singh vs. State of UP and another, (2018) 3 SCC 22** and the view taken by the Apex Court in the cases of **Kamal Vs. State of Haryana (supra), Takht Singh Vs. State of Madhya Pradesh (supra) and Shiv Kumar alias Sadhu Vs. State of U.P. (supra).,** this Court is of the view that the present criminal revision may be allowed and the revisionist may be released on bail.

18. In the result, this revision **succeeds** and is **allowed.** The impugned judgment and order dated 28.9.2019 passed by Special Judge POCSO Act, Allahabad in Criminal Appeal No.79 of 2019 (Radhey Shyam versus State of U.P.) and the order dated 28.6.2019 passed by Juvenile Justice Board, Prayagraj in Case No.71 of 2019 (State vs. Jitendra Kumar Bind), arising out of Case Crime No.243 of 2018, under Sections 342, 323, 376D, 506 IPC and under Section 5/6 POCSO Act as well as under Section 3(2) 5 SC/ST Act Police Station Phoolpur District Prayagraj, are hereby **set aside** and **reversed.** The bail application of the revisionist stands **allowed.**

19. Let the revisionist, **Jitendra Kumar Bind** through his natural guardian/ father Radhey Shyam be released on bail in Case Crime No.243 of 2018, under Sections 342, 323, 376D, 506 IPC and under Section 5/6 POCSO Act as well as under Section 3(2) 5 SC/ST Act Police

Station Phoolpur District Prayagraj upon his father furnishing a personal bond with two solvent sureties of his relatives each in the like amount to the satisfaction of the Juvenile Justice Board, Prayagraj subject to the following conditions:

(i) That the natural guardian/ father, Radhey Shyam will furnish an undertaking that upon release on bail the juvenile will not be permitted to come into contact or association with any known criminal or allowed to be exposed to any moral, physical or psychological danger and further that the father will ensure that the juvenile will not repeat the offence.

(ii) The revisionist and his father, Radhey Shyam will report to the District Probation Officer on the first Wednesday of every calendar month commencing with the first Wednesday of October, 2020 and if during any calendar month the first Wednesday falls on a holiday, then on the next following working day.

(iii) The District Probation Officer will keep strict vigil on the activities of the revisionist and regularly draw up his social investigation report that would be submitted to the Juvenile Justice Board, Prayagraj on such periodical basis as the Juvenile Justice Board may determine.

(iv) The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad or the certified copy issued by the Registry of the High Court, Allahabad.

(v) The computer generated copy of such order shall be self attested by the counsel of the party concerned.

(vi) The concerned Court/Authority/Official shall verify the authenticity of such computerized copy of the order from the official website of High Court Allahabad and shall make a declaration of such verification in writing.

20. However, considering the peculiar facts and circumstances of the case, the court below is directed to make every possible endeavour to conclude the trial of the aforesaid case within a period of four months from today without granting unnecessary adjournments to either of the parties.

(2020)09ILR A1007
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.08.2020

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Criminal Revision No. 4743 of 2019

Shyamu (Juvenile) ...Revisionist (In Jail)
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri Ashwini Kumar Awasthi, Sri Atharva Dixit, Sri Manish Tiwary

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

A. Criminal Law – Bail plea - Juvenile Justice (Care and Protection of Children) Act, 2015 - Section 12, 18(1)(g), 101 - Indian Penal Code, 1860 - Sections 498-A, 304-B, 323 - Dowry Prohibition Act, 1961: Section 3/4.

Juvenile Justice Act, 2015 - Section 18(1)(g) - Right of a juvenile to be released on bail where a similarly circumstanced adult offender had been extended that liberty - The maximum period for which a juvenile can be

incarcerated in whatever form of detention, is three years. In the present case there appears to be no distinguishing feature from the case of co-accused Satyapal and Vijendra, who are adult offenders circumstanced identically as the revisionist. There is no justification to hold the revisionist not entitled to the liberty of bail. The offence on its own terms may be heinous but the role of the revisionist, as well as the other accused, is based prima facie on weak circumstantial evidence. It is also taken note of by this Court that the revisionist has by now done more than half of institutional incarceration. (Para 16, 18)

B. Juvenile Justice Act, 2015 - Section 12 - Gravity of the offence is not relevant consideration for refusing grant of bail to the juvenile - The rule in Section 12(1) of the Act is in favour of bail always to a juvenile/child in conflict with law except when the case falls into one or the other categories denial contemplated by the proviso. It would always have to be seen whether a case prima facie on merits against a child in conflict with law is there on the basis of material produced by the prosecution against him. If it is found that a prima facie case on the basis of material produced by the prosecution is there that would have led to a denial of a bail to an adult offender, in that case also the Rule in S.12(1) of the Act mandates that bail is to be granted to a juvenile/child in conflict with law except where his case falls into any of the three disentitling categories contemplated by the proviso. (Para 16, 17)

C. Constitution of India - Article 14 - It is an enduring principle that a construction that lends a statute to challenge about its constitutionality should be eschewed and one that saves and upholds its vires is to be adopted - The perception that merits of the case on the basis of prima facie evidence is absolutely irrelevant to a juvenile's bail plea under the Act would not be in conformity with the law. The catena of decisions that speak about merits of the case or the charge against a juvenile being irrelevant, proceed on facts and not an assumption that a case on merits is made out, and, not where the case is not at all made out prima facie. It is not that a child alleged to be in conflict with law against whom there is not iota of evidence to connect him to the crime would still have bail denied to him because his case may be placed in or the other disentitling categories under the proviso to Section 12(1) of the Act. If this kind of a construction were to be adopted it might expose the provisions of Section 12(1) of the Act to challenge on ground of violating the guarantee of equal protection of laws enshrined in Article 14 of the Constitution. (Para 16)

D. Constitution of India - Article 21 - After perusing the record in the light of the submissions made at the bar and after taking an overall view of all the facts and circumstances of this case, the nature of evidence, the period of detention already undergone, the unlikelihood of early conclusion of trial and also in the absence of any convincing material to indicate the possibility of tampering with the evidence and in view of the larger mandate of the Article 21 of the Constitution of India and the dictum of Apex Court, this Court is of the view that the present criminal revision may be allowed and the revisionist may be released on bail. (Para 19)

Revision allowed. (E-4)

Precedent followed:

1. Kamal Vs St. of Har., (2004) 13 SCC 526 (Para 11, 19)

2. Takht Singh Vs St. of M.P., (2001) 10 SCC 463 (Para 12, 19)

3. Dharmendra (Juvenile) Vs St. of U.P. & ors., [2018 (7) ADJ 864] (Para 16, 19)

4. Japani Sahoo Vs Chandra Sekhar Mohanty, (2007) 7 SCC 394 (Para 16, 19)

5. Shiv Kumar @ Sadhu Vs St. of U.P., 2010 (68) ACC 616 (LB) (Para 17, 19)

6. Dataram Singh Vs St. of U.P. & anr., (2018) 3 SCC 22 (Para 19)

Present revision is against the judgment and order dated 02.11.2019, passed by Special Judge (POCSO Act)/Additional Sessions Judge, Mathura dismissing Juvenile Criminal Appeal No. 68 of 2019

and affirming an order of Juvenile Justice Board, Mathura dated 07.08.2019 refusing the bail plea to the revisionist.

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

1. This revision is directed against the judgment and order dated 2.11.2019 passed by Special Judge (POCSO Act)/Additional Sessions Judge, Court No.9, Mathura dismissing Juvenile Criminal Appeal No.68 of 2019 (Shyamu vs State of UP and another), filed under Section 101 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (for short "the Act') and affirming an order of Juvenile Justice Board, Mathura dated 7.8.2019 refusing the bail plea to the revisionist in Case Crime No.489 of 2018 under Sections 498A, 304B, 323 IPC and Section 3/4 Dowry Prohibition Act, Police Station Barsana District Mathura.

2. Heard Sri Manish Tiwary, learned senior Advocate assisted by Sri Atharva Dixit, learned counsel for the revisionist, learned A.G.A. appearing for the State and perused the record.

3. The prosecution case, as per the version of the FIR, is that the marriage of the deceased of the present case namely Smt. Neetu, who happens to be the daughter of the first informant of the present case namely Ramesh Chandra was solemnized with the brother of the revisionist namely Satyapal on 25.4.2015 and allegedly after the marriage the husband of the deceased namely Satyapal, mother-in-law of the deceased namely Vimla Devi, father-in-law of the deceased namely Vijendra and the revisionist used to torture the revisionist in lieu of demand of dowry.

4. It has been further alleged that on 12.10.2018 the husband of the deceased namely Satyapal informed the first informant over the phone that in a cylinder blast the deceased of the present case Smt. Neetu has sustained injuries and she has been admitted in hospital and upon receiving the said information the informant reached the hospital where he was informed by the deceased that it was the co-accused Vimla Devi who had set her ablaze by pouring kerosene oil on her with the help of other persons. The FIR was initially lodged on 13.10.2018 under Sections 498A, 323, 326 IPC and Section 3/4 Dowry Prohibition Act which after the death of the deceased was converted to Section 498A, 304B, 323 IPC and Section 3/4 Dowry Prohibition Act on 25.10.2018.

5. Learned counsel for the revisionist further submits that the revisionist is innocent and has been falsely implicated in the present case. The revisionist has no concern with the demand of dowry and he is not beneficiary of the same. No specific role has been assigned to revisionist regarding demand of dowry or treating the deceased with cruelty for non-fulfilment of demand of dowry. It is further submitted that the entire allegations levelled by the prosecution are entirely false and preposterous and hold no iota of truth in them. In the FIR merely vague and omnibus allegations regarding demand of dowry have been made by the first informant and it has not at all been mentioned as to what was the demand being made by the accused persons from the deceased.

6. Learned counsel for the revisionist further submits that after the incident the husband immediately admitted his wife in the hospital where her dying declaration was recorded on 12.10.2018 wherein she had stated that she was set ablaze by her

mother-in-law Smt. Vimla Devi and the revisionist has been assigned the role of being present on the spot. Subsequently, on 18.10.2018 in the statement of the deceased under Section 161 Cr.P.C. collective role of beating has been assigned to all the accused persons.

7. Learned counsel for the revisionist further submits that even if the dying declaration recorded by the Magistrate is believed to be true even then the revisionist has been assigned the role of being present on the spot and no active role has been attributed to the revisionist. The present case is one of an accidental death where, on the unfortunate day the deceased caught fire as a result of cylinder blast, information of which was immediately given by the husband of the deceased i.e. brother of the revisionist to the first informant. He further submits that the investigating officer of the present case has not collected the primary medical examination papers of deceased Smt. Neetu which could have unearthed the truth and moreover in the absence of the opinion of the doctor conducting the post mortem examination report nor any finding of kerosene oil present on the body of the deceased, it would be wrong to infer that the death of the deceased was caused by setting her ablaze after pouring kerosene oil on her.

8. Learned counsel for the revisionist further submits that it is not in dispute that the revisionist is a juvenile as he has already been declared juvenile by Juvenile Justice Board, Mathura vide order dated 11.7.2019 by placing reliance upon his educational certificate. The revisionist was a juvenile aged 14 years, 9 months and 11 days on the date of occurrence. He was, thus, clearly below 16 years of age. He is in jail since 20.10.2018 in connection with the present crime and has completed more than half of the sentence out of the maximum three years institutional incarceration permissible for a juvenile, under Section 18(1)(g) of the Act. It is submitted with much emphasis that co-accused Satyapal, husband of the deceased and Vijendra, father-in-law of the deceased, who are adults and similarly circumstanced as the revisionist, have been admitted to bail by this Court vide orders dated 26.2.2019 and 16.5.2019 passed in Criminal Misc. Bail Application Nos. 7980 of 2019 and 20636 of 2019 respectively, filed as Annexure-8 to the affidavit. It is argued that the revisionist being a minor, cannot be held in institutional incarceration any further once co-accused, similarly circumstanced, have been admitted to bail. Further submission is that the case of the revisionist is not on worse footing than that of the co-accused, therefore on principles of parity also the revisionist be released on bail.

9. Learned counsel for the revisionist further submits that thereafter the revisionist applied for bail before the Juvenile Justice Board, Mathura, upon which a report from the District Probation Officer was called for. The bail application of the revisionist was rejected vide order dated 7.8.2019, being aggrieved, the revisionist preferred an appeal under Section 101 of the Act, which was also dismissed vide order dated 2.11.2019. Hence the present criminal revision has been filed before this Hon'ble Court mainly on the following amongst other grounds:

(i) That the bail application of the revisionist was rejected by the court below in a very cursory and arbitrary manner.

(ii) That the revisionist, who is juvenile, is wholly innocent and has been

falsely implicated by the first informant in the present case.

(iii) That the courts below have not appreciated the report of the District Probation Officer in its right perspective.

(iv) That the courts below have failed to appreciate the fact that the prosecution in the first information report has not at all stated as to what demand of dowry was being raised by the accused persons.

(v) That the courts below have also failed to appreciate the fact that there are stark discrepancies in the statements of the deceased recorded by the investigating officer and the Magistrate.

(vi) That the courts below have failed to appreciate the fact that there are stark discrepancies in the statement of the deceased and the statement of the first informant regarding the demand of dowry as the deceased in her statement states about demand of a bike and cash being made by the accused persons while the first informant does not even make a whisper about any demand of a motorcycle.

(vii) That the courts below have also failed to appreciate the fact that the revisionist being brother-in-law could never have been a beneficiary if the alleged demand raised by the accused persons was fulfilled by the family members of the deceased.

(viii) That if the dying declaration recorded by the Magistrate is believed to be true, even then the revisionist has been assigned the role of being present on the spot and no active role has been attributed to him.

(ix) That the present case is one of an accidental death where on the unfortunate day the deceased caught fire as a result of cylinder blast, information of which was immediately given by the husband of the deceased i.e. brother of the revisionist to the first informant.

(x) That the information regarding the unfortunate incident was given by the husband of the deceased and it was in fact he who along with the help of the other family members including the revisionist took the deceased to the hospital and got her admitted in the hospital where she unfortunately succumbed to the injuries sustained.

(xi) That the investigating officer of the present case has not collected the primary medical examination papers of deceased Smt. Neetu which could have unearthed the truth and moreover in the absence of the opinion of the doctor conducting the post mortem examination report nor any finding of kerosene oil present on the body of the deceased it would be wrong to infer that the death of the deceased was caused by setting her ablaze after pouring kerosene oil on her.

(x) That the revisionist has no criminal antecedents except the present case.

10. Several other submissions in order to demonstrate the falsity of the allegations made against the revisionist have also been placed forth before the Court. The circumstances which, according to the counsel, led to the false implication of the accused have also been touched upon at length. It has been assured on behalf of the revisionist that he is ready to cooperate with the process of law and shall faithfully

make himself available before the court whenever required and is also ready to accept all the conditions which the Court may deem fit to impose upon him. It has also been pointed out that in the wake of heavy pendency of cases in the Court, there is no likelihood of any early conclusion of trial.

11. Learned counsel for the revisionist has further argued that the revisionist has already undergone half of the imprisonment/institutional incarceration and has placed reliance of Hon'ble Apex Court judgment in the case **of Kamal Vs. State of Haryana, 2004 (13) SCC 526** and submitted that the Hon'ble Apex Court was pleased to observe in paragraph no. 2 of the judgment as under :-

"2. This is a case in which the appellant has been convicted u/s 304-B of the India Penal Code and sentenced to imprisonment for 7 years. It appears that so far the appellant has undergone imprisonment for about 2 years and four months. The High Court declined to grant bail pending disposal of the appeal before it. We are of the view that the bail should have been granted by the High Court, especially having regard to the fact that the appellant has already served a substantial period of the sentence. In the circumstances, we direct that the bail be granted to the appellant on conditions as may be imposed by the District and Sessions Judge, Faridabad."

12. Learned counsel for the revisionist has also placed reliance of Hon'ble Apex Court judgment in the case of **Takht Singh Vs. State of Madhya Pradesh, 2001 (10) SCC 463,** and submitted that the Hon'ble Apex Court was pleased to observe in paragraph no. 2 of the judgment as under:-

"2. The appellants have been convicted under Section 302/149, Indian Penal Code by the learned Sessions Judge and have been sentenced to imprisonment for life. Against the said conviction and sentence their appeal to the High Court is pending. Before the High Court application for suspension of sentence and bail was filed but the High Court rejected that prayer indicating therein that the applicants can renew their prayer for bail after one year. After the expiry of one year the second application was filed but the same has been rejected by the impugned order. It is submitted that the appellants are already in jail for over 3 years and 3 months. There is no possibility of early hearing of the appeal in the High Court. In the aforesaid circumstances the applicants be released on bail to the satisfaction of the learned Chief Judicial Magistrate, Sehore. The appeal is disposed of accordingly."

13. Learned A.G.A. has filed the counter affidavit and has opposed the revisionist's case with the submission that the release of the revisionist on bail would bring him into association of some known criminals, besides, exposing him to moral, physical and psychological danger. It is submitted that his release would defeat the ends of justice, considering that he is involved in a heinous offence.

14. Learned counsel for the revisionist thereafter filed the rejoinder affidavit and has denied the averments made in the counter affidavit and submitted that there is no whisper about the specific role assigned to the revisionist in the case and has reiterated the grounds mentioned in the revision.

15. This Court has carefully considered the rival submissions of the

parties and perused the impugned orders. The juvenile is clearly below 16 years of age and does not fall into that special category of a juvenile between the age of 16 and 18 years whose case may be viewed differently, in case, they are found to be of a mature mind and persons well understanding the consequences of their actions. The provisions relating to bail for a juvenile are carried in Section 12 of the Act, which reads as under:

"(1) When any person, who is apparently a child and is alleged to have committed a bailable or non-bailable offence, is apprehended or detained by the police or appears or brought before a Board, such person shall, notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law for the time being in force, be released on bail with or without surety or placed under the supervision of a probation officer or under the care of any fit person:

Provided that such person shall not be so released if there appears reasonable grounds for believing that the release is likely to bring that person into association with any known criminal or expose the said person to moral, physical or psychological danger or the person's release would defeat the ends of justice, and the Board shall record the reasons for denying the bail and circumstances that led to such a decision.

(2) When such person having been apprehended is not released on bail under subsection (1) by the officer-in-charge of the police station, such officer shall cause the person to be kept only in an observation home in such manner as may be prescribed until the person can be brought before a Board.

(3) When such person is not released on bail under sub-section (1) by the Board, it shall make an order sending him to an observation home or a place of safety, as the case may be, for such period during the pendency of the inquiry regarding the person, as may be specified in the order.

(4) When a child in conflict with law is unable to fulfil the conditions of bail order within seven days of the bail order, such child shall be produced before the Board for modification of the conditions of bail."

16. The present case, as a whole, is built on circumstantial evidence where prima facie there are loopholes serious enough that the adult co-accused have been admitted to bail. It does not appear to bear any justification that where the men said to be behind the death of the deceased and bearing a motive besides being adults, have been admitted to bail, the revisionist may be denied his liberty by testing his case with reference to the disentitling condition mentioned in the proviso to sub Section (1) of Section 12 of the Act. This Court has, in particular, looked into the role of the various accused and finds that Satyapal and Vijendra, who have already been granted bail by this Court, and the revisionist have identical role of assembling. According to the prosecution, the revisionist and co-accused Satyapal are brothers and co-accused Vijendra is the father of the revisionist. Once co-accused Satyapal and Vijendra have been admitted to bail, who are adults, there seems no justification to additionally test the case of the revisionist with reference to the requirements of the proviso to sub Section (1) of Section 12 of the Act. In this connection, I had occasion to consider the question about the right of a

juvenile to be released on bail where a similarly circumstanced adult offender had been extended that liberty. In the case of **Dharmendra (Juvenile) vs. State of U.P. and others, [2018 (7) ADJ 864],** the High Court was pleased to observe as under:

"10. The matter can be looked at from another vantage. In case the revisionist were an adult and stood charged of the offence that he faces with a weak circumstantial evidence of last seen and confession to the police, in all probability, it would have entitled him to bail pending trial. If on the kind of evidence forthcoming an adult would be entitled to bail, denying bail to a child in conflict with law may be denying the juvenile/ child in conflict with law the equal protection of laws guaranteed under Article 14 of the Constitution.

11. The rule in Section 12(1) of the Act is in favour of bail always to a juvenile/ child in conflict with law except when the case falls into one or the other categories denial contemplated by the proviso. It is not the rule about bail in Section 12 of the Act that in case a child in conflict with law is brought before the Board or Court, his case is not to be seen on merits prima facie about his complicity at all for the purpose granting him bail; and all that has been done is to see if his case falls is one or the other exceptions, where he can be denied bail. The rule in Section 12 sanctioning bail universally to every child in conflict with law presupposes that there is a prima facie case against him in the assessment of the Board or the Court based on the evidence placed at that stage. It is where a case against a child in conflict with law is prima facie made out that the rule in Section 12(1) of the Act that sanctions bail as a rule, except the three categories contemplated by the proviso comes into play. It is certainly not the rule, and, in the opinion of the Court cannot be so, that a case on materials and evidence collected not being made out against a child at all, his case has to be tested on the three parameters where bail may be denied presuming that a prima facie case is constructively there. Thus, it would always have to be seen whether a case prima facie on merits against a child in conflict with law is there on the basis of material produced by the prosecution against him. If it is found that a prima facie case on the basis of material produced by the prosecution is there that would have led to a denial of a bail to an adult offender, in that case also the Rule in Section 12(1) of the Act mandates that bail is to be granted to a juvenile/ child in conflict with law except where his case falls into any of the three disentitling categories contemplated by the proviso.

12. In the opinion of this Court, therefore, the perception that merits of the case on the basis of prima facie evidence is absolutely irrelevant to a juvenile's bail plea under the Act would not be in conformity with the law. The catena of decisions that speak about merits of the case or the charge against a juvenile being irrelevant, proceed on facts and not an assumption that a case on merits is made out, and, not where the case is not at all made out prima facie. It is not that a child alleged to be in conflict with law against whom there is not iota of evidence to connect him to the crime would still have bail denied to him because his case may be placed in or the other disentitling categories under the proviso to Section 12(1) of the Act. If this kind of a construction were to be adopted it might expose the provisions of Section 12(1) of

the Act to challenge on ground of violating the guarantee of equal protection of laws enshrined in Article 14 of the Constitution. It is an enduring principle that a construction that lends a statute to challenge about its constitutionality should be eschewed and one that saves and upholds its vires is to be adopted. In this context the guidance of their Lordships of the Hon'ble Supreme Court in ***Japani Sahoo vs. Chandra Sekhar Mohanty, (2007) 7 SCC 394*** *may be referred to:-*

"51. The matter can be looked at from different angle also. Once it is accepted (and there is no dispute about it) that it is not within the domain of the complainant or prosecuting agency to take cognizance of an offence or to issue process and the only thing the former can do is to file a complaint or initiate proceedings in accordance with law. If that action of initiation of proceedings has been taken within the period of limitation, the complainant is not responsible for any delay on the part of the Court or Magistrate in issuing process or taking cognizance of an offence. Now, if he is sought to be penalized because of the omission, default or inaction on the part of the Court or Magistrate, the provision of law may have to be tested on the touchstone of Article 14 of the Constitution. It can possibly be urged that such a provision is totally arbitrary, irrational and unreasonable. It is settled law that a Court of Law would interpret a provision which would help sustaining the validity of law by applying the doctrine of reasonable construction rather than making it vulnerable and unconstitutional by adopting rule of 'litera legis'. Connecting the provision of limitation in Section 468 of the Code with issuing of process or taking of cognizance by the Court may make it unsustainable and ultra vires Article 14 of the Constitution."

17. This Court in the case of **Shiv Kumar alias Sadhu Vs. State of U.P. 2010 (68) ACC 616(LB)** was pleased to observe that the gravity of the offence is not relevant consideration for refusing grant of bail to the juvenile.

18. In the present case there appears to be no distinguishing feature from the case of co-accused Satyapal and Vijendra, who are adult offenders circumstanced identically as the revisionist. There is no justification to hold the revisionist not entitled to the liberty of bail. The impugned orders proceed on the reasoning about the offence being heinous overlooking the fact that the offence on its own terms may be heinous but the role of the revisionist, as well as the other accused, is based prima facie on weak circumstantial evidence. It is also taken note of by this Court that the revisionist has by now done more than half of institutional incarceration. The maximum period for which a juvenile can be incarcerated in whatever form of detention, is three years, going by the provisions of Section 18(1)(g) of the Act. This Court, thus, finds that the impugned orders cannot be sustained and are liable to be set aside and reversed.

19. After perusing the record in the light of the submissions made at the bar and after taking an overall view of all the facts and circumstances of this case, the nature of evidence, the period of detention already undergone, the unlikelihood of early conclusion of trial and also in the absence of any convincing material to indicate the possibility of tampering with the evidence and in view of the larger mandate of the Article 21 of the Constitution of India and the dictum of Apex Court in the case of **Dataram Singh vs. State of UP and another, (2018) 3**

SCC 22 and the view taken by the Hon'ble Court in the cases of **Kamal Vs. State of Haryana (supra), Takht Singh Vs. State of Madhya Pradesh (supra), Dharmendra (Juvenile) vs. State of U.P. and others (supra), Japani Sahoo vs. Chandra Sekhar Mohanty (supra) and Shiv Kumar alias Sadhu Vs. State of U.P. (supra),** this Court is of the view that the present criminal revision may be allowed and the revisionist may be released on bail.

20. In the result, this r**evision succeeds** and is **allowed.** The impugned judgment and order dated 2.11.2019 passed by Special Judge (POCSO Act)/Additional Sessions Judge, Court No.9, Mathura dismissing Juvenile Criminal Appeal No.68 of 2019 (Shyamu vs State of UP and another) and the order dated 7.8.2019 passed by the Juvenile Justice Board, Mathura in Case Crime No.489 of 2018 under Sections 498A, 304B, 323 IPC and Section 3/4 Dowry Prohibition Act, Police Station Barsana District Mathura, are hereby **set aside** and **reversed**. The bail application of the revisionist stands **allowed.**

21. Let the revisionist, **Shyamu (Juvenile)** through his natural guardian/ father Vijendra be released on bail in Case Crime No. Case Crime No.489 of 2018 under Sections 498A, 304B, 323 IPC and Section 3/4 Dowry Prohibition Act, Police Station Barsana District Mathura upon his father furnishing a personal bond with two solvent sureties of his relatives each in the like amount to the satisfaction of the Juvenile Justice Board, Mathura subject to the following conditions:

(i) That the natural guardian/ father, Vijendra will furnish an undertaking that upon release on bail the juvenile will not be permitted to come into contact or association with any known criminal or allowed to be exposed to any moral, physical or psychological danger and further that the father will ensure that the juvenile will not repeat the offence.

(ii) The revisionist and his father, Vijendra will report to the District Probation Officer on the first Wednesday of every calendar month commencing with the first Wednesday of October, 2020 and if during any calendar month the first Wednesday falls on a holiday, then on the next following working day.

(iii) The District Probation Officer will keep strict vigil on the activities of the revisionist and regularly draw up his social investigation report that would be submitted to the Juvenile Justice Board, Mathura on such periodical basis as the Juvenile Justice Board may determine.

(iv) The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad or the certified copy issued by the Registry of the High Court, Allahabad.

(v) The computer generated copy of such order shall be self attested by the counsel of the party concerned.

(vi) The concerned Court/Authority/Official shall verify the authenticity of such computerized copy of the order from the official website of High Court Allahabad and shall make a declaration of such verification in writing.

22. However, considering the peculiar facts and circumstances of the case, the court below is directed to make every

possible endeavour to conclude the trial of the aforesaid case within a period of four months from today without granting unnecessary adjournments to either of the parties.

(2020)09ILR A1017
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.01.2020

BEFORE

THE HON'BLE ANIL KUMAR -IX, J.

Application U/S 482 No. 1381 of 2020

Vaibhav Nigam ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Awadh Bihari Pandey

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

Criminal Law - Code of Criminal Procedure, 1973 - Section 239 Cr.P.C.- Application for discharge rejected- Difference in registration number of the offending vehicle in the claim petition and in the FIR and evidence collected by the I.O - The claim petition which is now not in existence and has been dismissed in non appearance of the claimant, is not such an exceptional defence material demonstrating the prosecution version absurd or preposterous. At the top of first page of the claim petition parties names are mentioned with the registration number of offensive vehicle as UP74PE6327 (Car) but in para 23 of the same petition the registration number of the offensive vehicle is clearly mentioned as UP78DE6327. Therefore, the aforesaid claim petition was not a such type of exceptional defence evidence which was required to be looked into at the time of framing charges.

It is settled law that at the time of framing of charges there must be very rare and exceptional circumstances where the defence material could convince the Court that the entire case is absurd and preposterous but in the present case, where the claim petition has been dismissed for want of prosecution and the same registration number of the vehicle is mentioned in the paragraph of the claim petition which is also in the FIR, exceptional circumstances are made out for the interference of the Court.

Criminal Application rejected. (Para 11) (E-3)

Case law relied upon/ Discussed: -

1. St. of Orissa Vs Debendra Nath Padhi (2005) 1 SCC 568

2. Rukmini Narvekar Vs Vijay Sataredkar & ors. A.I.R. 2009 SC 1013

3. St. of M.P. Vs S.B. Johari & ors. A.I.R. 2000 SC 665

(Delivered by Hon'ble Anil Kumar -IX, J.)

1. This application under Section 482 Cr.P.C. has been moved by the applicant with prayer to quash the order dated 07.06.2019 passed by Additional Chief Judicial Magistrate Court No.1, Kanpur Dehat on the discharge application of the applicant under Section 239 Cr.P.C. in Case No. 721 of 2014 (State Vs. Vaibhav Nigam) arising out of Case Crime No. 41 of 2014, under Sections 279, 337, 338, 304-A, 427 I.P.C. and Section

2. Briefly stated facts relevant for disposal of this application are that F.I.R. Case Crime No. 41 of 2014, under Sections 279, 337, 338, 304-A, 427 I.P.C. and Section 184 of Motor Vehicle Act has been lodged on written complaint of Rakesh Kumar against driver of the vehicle Maruti Registration No.UP78DE6327 alleging therein that on 20.02.2014 at about 4:30 PM the driver of the aforesaid vehicle by his rash and negligent driving collided with

Motor Cycle Registration No.UP78DC7624 on which informant's brother Anil Kumar was riding with his father. In this accident both of them sustained serious injury and due to injury sustained in this accident father of the informant died. After investigation I.O. has submitted charge sheet against the applicant Vaibhav Nigam under Sections 279, 337, 338, 304-A, 427 I.P.C. and Section 184 of Motor Vehicle Act.

3. The applicant moved application for discharging him under Section 239 Cr.P.C. before the Magistrate concerned, learned Court below was of the view that there was sufficient ground to proceed and frame the charges against the applicant under Sections 279, 337, 338, 304-A, 427 I.P.C. and Section 184 of Motor Vehicle Act and rejected the application of the applicant. Against the aforesaid order this application under Section 482 Cr.P.C. has been moved by the applicant before this Court.

4. Learned counsel for the applicant submitted that applicant has been falsely implicated in this case. The vehicle which he was driving was not involved in this accident. Learned counsel for the applicant further contended that Anil Kumar son of the deceased had filed a claim petition No. 783 of 2014 regarding this accident and the same was dismissed on 23.05.2017 in non appearance of the claimant. In that claim petition at the top of the first page where parties names were mentioned, the registration number of the offensive vehicle was mentioned as UP74PE6327 (Car) this fact was brought in notice of the Court below but it was not considered and application of the applicant was rejected illegally by the impugned order.

5. Learned A.G.A. vehemently opposed the prayer for quashing the impugned order and submitted that there was sufficient materials to proceed against the applicant and there is no illegality in the impugned order.

6. I have considered the submissions of learned counsel for the parties and perused the record.

7. On the basis of F.I.R. registered in this case, statement of the witnesses recorded under Section 161 Cr.P.C. and other evidence collected by the I.O., charge sheet against the applicant/accused has been submitted under Sections 279, 337, 338, 304-A, 427 I.P.C. and Section 184 of Motor Vehicle Act. On the basis of evidence collected by the I.O. learned Magistrate has concluded that there is sufficient ground to proceed against the applicant in this case, therefore, application to discharge the applicant was rejected.

8. Learned counsel for the applicant contended that in claim petition No. 783 of 2014 filed by the son of the deceased regarding death of the deceased in this accident which was dismissed due to non appearance of the claimant, at the top of the petition registration number of the offensive vehicle was mentioned as UP74PE6327 (Car) whereas in F.I.R. and evidence collected by the I.O. The registration number of the offensive vehicle is mentioned as UP78DE6327, copy of the aforesaid claim petition is being annexed as Annexure No.3 with affidavit accompanying this application.

9. Learned counsel for the applicant further contended that vehicle No. UP78DE6327 was not involved in this accident and charge could not be framed against the applicant. Learned counsel for the applicant submitted that this matter was

brought before the Court but it was not considered. In ***State of Orissa Vs. Debendra Nath Padhi 2005 (1) SCC 568*** it was observed by Hon'ble the Apex Court that at the time of framing of charges only the material produced by the prosecution side can be looked into by the Court but the material produced by the defence cannot be looked into.

10. In case of ***Rukmini Narvekar Vs. Vijay Sataredkar & others A.I.R. 2009 SC 1013*** it has been observed by the Hon'ble Apex Court that ordinarily defence material cannot be looked into by the Court while framing of the charges in view of D.N. Padhi's case (supra), there may be some very rare and exceptional cases where some defence material when shown to the trial Court would convincingly demonstrate that the prosecution version is totally absurd or preposterous, and in such very rare cases the defence material can be looked into by the Court at the time of framing of the charges or taking cognizance.

11. In instant case the aforesaid claim petition which is now not in existence and has been dismissed on 23.05.2017 in non appearance of the claimant, is not such an exceptional defence material demonstrating the prosecution version absurd or preposterous. I have perused the copy of the said claim petition No.783 of 2014 annexed as Annexure no.3 to the affidavit. At the top of first page of the claim petition parties names are mentioned with the registration number of offensive vehicle as UP74PE6327 (Car) but in para 23 of the same petition the registration number of the offensive vehicle is clearly mentioned as UP78DE6327. Therefore, the aforesaid claim petition was not a such type of exceptional defence evidence which was required to be looked into at the time of framing charges.

12. In ***State of M.P. Vs. S.B. Johari and others A.I.R. 2000 SC 665*** it has been observed by Hon'ble the Apex Court that it is settled law 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 the evidence and arrive at the conclusion that the materials produced are sufficient or not for convicting the accused. If the Court is satisfied that a prima facie case is made out for proceeding further then a charge has to be framed.

13. In case at hand, from perusal of the F.I.R., statement of injured Anil Kumar and other evidence collected by the I.O. there was sufficient material to proceed against the applicant/accused. In view of the above discussion there is no illegality in the impugned order, the application is liable to be dismissed.

14. Consequently prayer for quashing the impugned order is refused.

15. This application under Section 482 Cr.P.C. is accordingly, **dismissed.**

(2020)09ILR A1019
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 15.06.2020

BEFORE

THE HON'BLE ALI ZAMIN, J.

Application U/S 482 No. 10567 of 2020

Bhoop Kishor Saini & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Rajesh Kumar Mishra

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

Criminal Law - Indian Penal Code, 1860- Sections 188/171 and 127 Representation of the People Act- Code of Criminal Procedure, 1973- Section 468 (2) (b)- Complaint case filed after one year- Barred by limitation- For the offence of Section 171H of IPC maximum punishment provided is fine of Rs.500/- and for the offences u/s 188 IPC and Section 127 Representation of the People Act, six months imprisonment is provided for each offence, therefore, in view of the provision of Section 468 (2) (b) Cr.P.C. the complaint should have been filed within a period of one year from the date of incident but it has been filed beyond one year from the date of incident.

In view of the period of limitation provided u**/s** 468 (2) (b) of the Cr.Pc, the complaint filed in a case where the punishment provided is six months, would be barred by limitation and the same would not be maintainable.

Criminal Law - Code of Criminal Procedure, 1973- Section 468 (2) (b)- It is well settled that for the purpose of computing the period of limitation u/s 468 Cr.P.C. the relevant date is the date of filing of the complaint or the date of institution of prosecution. Chapter XXXVI provides limitation period for certain types of offences for which lesser sentence is provided which is based on the policy of law to assist the vigilant and not the sleepy as expressed in Latin maxim vigilantibus et non dormientibus. The complaint filed by the complainant and on it cognizance taken by the Magistrate in view of law laid down by Hon'ble Supreme Court and Section 468 (2) (b) Cr.P.C. is barred by time.

The period of limitation as provided under Section 468 (2) (b) of the Cr.Pc is based on the maxim of vigilantibus et non dormientibus and is therefore to assist the vigilant. Therefore, a time barred complaint cannot be entertained in view of the law settled by the Hon'ble Supreme Court.

Criminal Application allowed. (Para 9, 12, 13) (E-3)

Case law relied upon/ Discussed: -

1. St. of Punj. Vs Sarwan Singh (1981) 3 SCC 34

2. Japani Sahoo Vs Chandra Sekhar Mohanty (2007) 7 SCC 394

3. Sarah Mathew Vs Institute of Cardio Vascular Diseases by its Dir. Dr. K.M. Cherian & ors (2014) 2 SCC 62:

4. (2014) 1 SCC (Crl.) 721: 2013 SCC OnLine SC 1043

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

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

2. This Application has been filed under Section 482 Cr.P.C. for quashing the entire proceeding of Complaint Case No.6161 of 2018 (State vs. Bhoop Kishor & another), under Sections 188, 171 IPC and 127 Representation of the People Act, P.S. Kotwali, District Rampur, pending in the court of Chief Judicial Magistrate, Moradabad.

3. As per complaint (Annexure-1 of the application) in sequence of General Vidhan Sabha Election-2017, orders for Model Code of Conduct and Section 144 Cr.P.C. were promulgated and during the effect of the above orders, on 12.2.2017 at about 10:15 a.m., accused Bhoop Kishor Saini (Shiv Sena Candidate) and Vishal Sharma along with 40-50 motorcycles and 10-15 cars came to Imperial Trivium (Tiraha) Crossing by holding a roadshow where Sub Inspector-Pramod Kumar Sharma, on duty, and employees demanded permission of roadshow, which they could

not show it, thus, they committed offence u/s 188 IPC. The procession was dispersed by the police and by registering Case Crime No.97/17, u/s 188/171H of IPC and 127 Representation of the People Act, matter was investigated and prima facie case was found against the accused-applicants. Names and addresses of the other accused persons could not be traced. According to Section 195 (1) Cr.P.C., a complaint should be filed by the competent officer in the matter, therefore, a complaint was filed. As per FIR, Annexure-2 of the application, Case Crime No.0097/2017, under Sections 188/171-H IPC and 127 Representation of the People Act, was registered against the applicants to the same aspect.

4. Learned counsel for the applicants submits that applicant no.1-Bhoop Kishor Saini was permitted by the competent authority for holding a roadshow of 100 cars and 200 motorcycles on 12.2.2017 since 11.00 A.M. to 4.00 P.M., vide its order dated 12.2.2017, but according to complaint only 40 to 50 motorcycles and 10 to 15 cars were used for the roadshow, therefore, in view of the permission granted by the competent authority, they have not flouted any order, hence, no offence of Section 171H of IPC has been committed by them. He further submits that for the offences u/s 171H & 188 IPC, 1860 and 127 Representation of the People Act, 1950, punishment provided is fine of Rs.500/- and six months imprisonment each, respectively. As per complaint version, the offence has been committed on 12.2.2017 and maximum sentence provided for the offences is six months, therefore, complaint should have been filed within a period of one year as provided in Section 468 Cr.P.C. but complaint has been filed after a period of one year i.e. on 15.6.2018, which is barred by time, but court below has not considered this aspect while passing the impugned order, therefore, it is not sustainable and liable to be quashed.

5. Learned AGA opposed the prayer of the applicants by contending that permission was granted on 12.2.2017 for a fixed period i.e. from 11:00 a.m. to 4:00 p.m. but applicants had held a roadshow on 12.2.2017 at 10:15 a.m. and on a demand by complainant, they could not show the permission.

6. In the instant case the issue involved for consideration is, whether, complaint filed against the applicants is time barred and in view of Section 468 (2) (b) Cr.P.C. it is liable to be quashed.

7. As per impugned summoning order dated 15.6.2018, a complaint, on the same day, was presented by Sub Inspector-Pramod Kumar Sharma against applicants-Bhoop Kishor Saini and Vishal Sharma, under Sections 188/171 IPC and 127 Representation of the People Act, which was registered as a Complaint Case No.6161 of 2018 and learned Magistrate considering that complainant is a public servant, so there is no necessity to record statement u/s 200 Cr.P.C. and forming the opinion that from the available evidence on record offences, under Sections 188/171 IPC and 127 Representation of the People Act, appear to have been committed by applicants-Bhoop Kishor Saini and Vishal Sharma, accordingly, they were summoned for the date 26.7.2018.

8. For proper appreciation of the matter and ready reference Sections 171H and 188 IPC, Section 127 the Representation of the People Act, 1950 and Section 468 Cr.P.C. are quoted below :-

"Section 171H IPC: Whoever without the general or special authority in

writing of a candidate incurs or authorizes expenses on account of the holding of any public meeting, or upon any advertisement, circular or publication, or in any other way whatsoever for the purpose of promoting or procuring the election of such candidate, shall be punished with fine which may extend to five hundred rupees;

Provided that if any person having incurred any such expenses not exceeding the amount of ten rupees without authority obtains within ten days from the date on which such expenses were incurred the approval in writing of the candidate, he shall be deemed to have incurred such expenses with the authority of the candidate."

"Section 188 IPC: Disobedience to order duly promulgated by public servant.?Whoever, knowing that, by an order promulgated by a public servant lawfully empowered to promulgate such order, he is directed to abstain from a certain act, or to take certain order with certain property in his possession or under his management, disobeys such direction, shall, if such disobedience causes or tends to cause obstruction, annoyance or injury, or risk of obstruction, annoyance or injury, to any person lawfully employed, be punished with simple imprisonment for a term which may extend to one month or with fine which may extend to two hundred rupees, or with both; and if such disobedience causes or trends to cause danger to human life, health or safety, or causes or tends to cause a riot or affray, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both."

"Section 127 the Representation of the People Act, 1950: Disturbances at election meetings.?

(1) Any person who at a public meeting to which this section applies acts, or incites others to act, in a disorderly manner for the purpose of preventing the transaction of the business for which the meeting was called together, 1[shall be punishable with imprisonment for a term which may extend to 2[six months or with fine which may extend to two thousand rupees], or with both]]. 3[(1A) An offence punishable under sub-section (1) shall be cognizable.]

(2)This section applies to any public meeting of a political character held in any constituency between the date of the issue of a notification under this Act calling upon the constituency to elect a member or members and the date on which such election is held.

(3)If any police officer reasonably suspects any person of committing any offence under sub-section (1), he may, if requested so to do by the chairman of the meeting, require that person to declare to him immediately his name and address and, if that person refuses or fails so to declare his name and address, or if the police officer reasonably suspects him of giving a false name or address, the police officer may arrest him without warrant."

"Section 468 Cr.P.C: Bar to taking cognizance after lapse of the period of limitation.

(1) Except as otherwise provided elsewhere in this Code, no Court shall take cognizance of an offence of the category specified in sub- section (2), after the expiry of the period of limitation.

(2) The period of limitation shall be-

(a) six months, if the offence is punishable with fine only

1. Provisions of this Chapter shall not apply to certain economic offences, see the Economic Offences (Inapplicability of Limitation) Act, 1974 (12 of 1974), s. 2 end Sch.

(b) one year, if the offence is punishable with imprisonment for a term not exceeding one year;

(c) three years, if the offence is punishable with imprisonment for term exceeding one year but not exceeding three years.

(3) For the purposes of this section, the period of limitation in relation to offences which may be tried together, shall be determined with reference to the offence which is punishable with the more severe punishment or, as the case may be, the most severe punishment."

9. From the above provisions, it is crystal clear that for the offence of Section 171H of IPC maximum punishment provided is fine of Rs.500/- and for the offences u/s 188 IPC and Section 127 Representation of the People Act, six months imprisonment is provided for each offence, therefore, in view of the provision of Section 468 (2) (b) Cr.P.C. the complaint should have been filed within a period of one year from the date of incident i.e. 12.2.2017, but it has been filed on 15.6.2018, which is beyond one year from the date of incident.

10. To decide the issue involved in the instant case, it will be apt to refer the following cases :-

In the case of ***State of Punjab v. Sarwan Singh (1981) 3 SCC 34*** (supra) respondent accused was charged u/s 406 IPC for misappropriating the amounts deposited with him as a cashier. The challan was presented against him on 13.10.1976. The trial court acquitted him of the charge u/s 408 IPC but convicted u/s 406 IPC and sentenced him to rigorous imprisonment for one year and to pay a fine of Rs.1000/-. The respondent then filed an appeal to the High Court which was allowed and respondent was acquitted, mainly on the ground that prosecution launched against the respondent was clearly barred by limitation under Sections 468 and 469 Cr.P.C. According to High Court, charge-sheet clearly shows that the embezzlement is said to have been committed on 22nd August, 1972 and audit report, through which, the offence was detected is dated 5th January, 1973. Taking any of these dates, prosecution was barred by limitation u/s 468(2) (b) Cr.P.C. Hon'ble Apex Court has held that-

"The object which the statutes seek to subserve is clearly in consonance with the concept of fairness of trial as enshrined in Article 21 of the Constitution of India. It is, therefore, of the utmost importance that any prosecution, whether by the State or a private complainant must abide by the letter of law or take the risk of the prosecution failing on the ground of limitation. The prosecution against the respondent being barred by limitation the conviction as also the sentence of the respondent as also the entire proceedings culminating in the conviction of the respondent herein become non-est. For these reasons, given above, the Court hold that the point of law regarding the applicability of Section 468 Cr.P.C. has been correctly decided by the Punjab and Haryana High Court."

11. In ***Japani Sahoo vs. Chandra Sekhar Mohanty (2007) 7 SCC 394,*** in

para 52 of the judgment, Hon'ble Supreme Court has held that for the purpose of computing the period of limitation, the relevant date must be considered as the date of filing of complaint or initiating criminal proceedings and not the date of taking cognizance by a Magistrate or issuance of process by a court and in Krishna Pillai vs. T.A. Rajendran, 1990 SCC (Crl.) 646, it was held that no court shall take cognizance of any offence under Section 9 of the Child Marriage Restraint Act, 1929 after the expiry of one year from the date on which offence is alleged to have been committed. In view of contrary opinion, matter was referred to constitution bench for consideration whether for the purpose of computing the period of limitation u/s 468 Cr.P.C. relevant date is date of filing of the complaint or the date of institution of the prosecution or whether the relevant date is the date on which a Magistrate takes cognizance of the offence. Constitution Bench in ***Sarah Mathew vs. Institute of Cardio Vascular Diseases by its Director Dr. K.M. Cherian and others (2014) 2 SCC 62: (2014) 1 SCC (Crl.) 721: 2013 SCC OnLine SC 1043***, in para 51 of the judgment has held that for the purpose of computing the period of limitation u/s 468 Cr.P.C. the relevant date is the date of filing of the complaint or the date of institution of prosecution and not the date on which the Magistrate takes cognizance.

12. Thus, from the law laid down by the Hon'ble Apex Court in the above cases, it is well settled that for the purpose of computing the period of limitation u/s 468 Cr.P.C. the relevant date is the date of filing of the complaint or the date of institution of prosecution.

13. In the criminal procedure code Chapter XXXVI provides limitation period for certain types of offences for which lesser sentence is provided which is based on the policy of law to assist the vigilant and not the sleepy as expressed in Latin maxim vigilantibus et non dormientibus. In the instant case, for the offences of Sections 171H & 188 IPC and 127 Representation of the People Act, the incident alleged to have occurred on 12.2.2017 and complaint has been filed on 15.6.2018, which is beyond a period of more than one year. For the offences maximum punishment provided is six months and as per Section 468 (2) (b) Cr.P.C. an offence punishable with imprisonment for a term not exceeding one year, period of limitation shall be one year thus the complaint filed by the complainant and on it cognizance taken by the Magistrate in view of law laid down by Hon'ble Supreme Court in Sarah ***Mathew vs. Institute of Cardio Vascular Diseases by its Director Dr. K.M. Cherian and others*** (supra) and Section 468 (2) (b) Cr.P.C. is barred by time. The Magistrate concerned while passing the impugned order has not considered the law of limitation for taking cognizance in the matter, therefore, cognizance taken on 15.6.2018 by the Magistrate on complaint regarding incident of 12.2.2017 for the offences is against Section 468 (2) (b) Cr.P.C. as well as law laid down by Hon'ble Supreme Court in State of Punjab v. Sarwan Singh (supra).

14. Having considered the facts and circumstances of the case, submissions advanced by learned counsel for the parties, as discussed herein above, and legal position on the point, the Court is of the opinion that the impugned order dated 15.6.2018 contradicts Section 468 (2) (b) Cr.P.C. as well as law laid down by Hon'ble Supreme Court in ***State of Punjab***

v. Sarwan Singh (supra), therefore, no useful purpose will be served by prolonging the proceeding of the above mentioned complaint case and to secure ends of justice, it is a fit case to quash the entire proceeding of complaint case by invoking the power provided u/s 482 Cr.P.C. Accordingly, the proceedings in the aforesaid case are, hereby, quashed and the application is allowed.

15. A copy of this order be transmitted to the lower court for compliance.

(2020)09ILR A1025
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.06.2020

BEFORE

THE HON'BLE ALI ZAMIN, J.

Application U/S 482 No. 11344 of 2020

Parveen Kumar & Ors. ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Avinash Pandey

Counsel for the Opposite Parties:
A.G.A., Sri Dinesh Kumar Yadav

Criminal Law - Code of Criminal Procedure, 1973- Section 482- Indian Penal Code- Section 320- Quashing of criminal proceedings on basis of compromise – Non-Compoundable offences – Matrimonial dispute - Offence under section 498A IPC is non-compoundable - Hon'ble Supreme Court has held that High Court in exercise of its inherent power can quash criminal proceedings or FIR or complaint and section 320 of the Code does not limit or affect the powers under Section 482 of the Code but while exercising such power the High Court has to consider the facts and circumstances of each case. FIR, complaint or the criminal case having overwhelmingly and predominatingly civil flavour, arising out of matrimony relating to dowry, etc.or the family disputes where the wrong is basically private or personal in nature and entire dispute has been resolved between the parties, possibility of conviction is remote and bleak in such case the prosecution becomes a lame prosecution and pursuing such prosecution would be wastage of time and energy as well as it will unsettle the compromise and obstruct restoration of peace, and continuation of 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 and the High Court is convinced that quashing of such proceeding on account of compromise would bring peace and would secure ends of justice it should not hesitate to quash them.

It is settled law that in the exercise of its inherent powers u/s 482 of the Cr.Pc, the High Court can quash the criminal proceedings in the event of the parties arriving at a compromise even in non-compoundable offences, provided the offences are not heinous or grave and are either matrimonial or civil disputes in nature and the possibility of the court securing the conviction of the accused as a result of compromise is remote or impossible.

In view of the compromise arrived at between the parties, there is unpropitious chance of conviction in the instant case. In such a situation it will be ineffective prosecution and continuing the criminal proceeding before the court below will be nothing but a dawdle and an otiose exercise only.

Criminal Application allowed. (Para 22, 23) (E-3)

Case law relied upon/ Discussed: -

1. B.S.Joshi Vs St. of Har., 2003 (4) SCC 675,

2. Nikhil Merchant Vs C. B.I & anr., (2008) 9 SCC 677

3. Gian Singh Vs St. of Punj. & anr, (2012) 10 SCC 303,

4. Yogendra Yadav & ors. Vs St. of Jhar., (2014) 9 SCC 653 and

5. Narinder Singh & Ors. Vs St. of Punj. & anr., (2014) 6 SCC 466

6. St. of Kar. Vs L.Muniswamy & Ors.,MANU/SC/0143/1977: 1977 CriLJ 1125

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

1. Short counter affidavit filed by Sri Dinesh Kumar Yadav, learned counsel for opposite party no.2 is taken on record.

2. Heard learned counsel for the applicants, learned A.G.A. for the State, learned counsel for opposite party no.2 and perused the record.

3. On the basis of compromise entered into between the parties, the present application under section 482 Cr.P.C. has been filed for quashing the entire proceeding of Complaint Case No. 205/9 of 2015 (Aruna Rani Vs.Parveen Kumar & others), under section 498A, 323, 504, 506 I.P.C. & 3/4 Dowry Prohibition Act, P.S. Adarsh Mandi, District Shamli, pending in the Court of Chief Judicial Magistrate, Shamli.

4. Learned counsel for the applicants submits that on account of some disputes, opposite party no.2 had filed the Complaint Case in which applicants were summoned by the trial court vide order dated 25.06.2015. Thereafter, applicants moved an Application No. 25403 of 2017 under section 482 Cr.P.C. before this Court and obtained bail from the trial court on the basis of order dated 16.08.2017 passed on the application by a co-ordinate Bench of this Court. Now the parties have settled their disputes amicably. Opposite party no.2 is living with the applicants, therefore, this application has been moved for quashing the complaint. In support of the application opposite party no.2, Smt. Aruna Rani herself has filed affidavit and in para 9 of the affidavit it has been specifically stated that the matter has been settled between the parties and she is living in her matrimonial house without any complaint. Since parties have settled their dispute, therefore, learned counsel relying upon the cases of **B.S.Joshi Vs. State of Haryaya, 2003 (4) SCC 675, Nikhil Merchant Vs. Central Bureau of Investigation and another), (2008) 9 SCC 677, Gian Singh vs. State of Punjab and another, (2012) 10 SCC 303, Yogendra Yadav and others vs. State of Jharkhand, (2014) 9 SCC 653 and Narinder Singh And Others vs. State of Punjab And Another, (2014) 6 SCC 466**, prays that the proceedings of the aforesaid complaint case no.205/9 of 2015 may be quashed.

5. Learned A.G.A. fairly submits that since the matter relates to matrimonial dispute and the parties have amicably settled the dispute, therefore, the proceedings of the complaint case will be nothing but only abuse of process of the court.

6. Learned counsel for the opposite - party no.2 submits that on accruing some disputes between the parties the opposite party no.2 had filed the complaint but the disputes have been settled amicably between the parties and now she is living happily with the applicants, therefore, she does not want to prosecute the case against the applicants and wants that the matter may be decided on the basis of compromise.

7. A perusal of the record, would show that at the instance of opposite party

no. 2 the complaint case was filed that on 04.08.2006 opposite party no.2 married Praveen Kumar, applicant no.1. After marriage the applicants started demanding Swift D-zire Car in additional demand of dowry and on showing inability by the opposite party no.2 they started harassing her, physically and mentally. On 01.03.2014 applicants by abusing kicked her out from the house. Thereafter, on 10.05.2015 at about 11.00 hour of the day, applicants came to her parental house and again they abused and beat her by 'Lathi Danda'. In the complaint applicants were summoned by the Court below for trial under section 498A, 323, 504,506 IPC and 3/4 of D.P. Act vide its order dated 25.06.2015.

8. According to the applicants, now the matter has been settled between the parties and opposite party no. 2 is living in her matrimonial house happily without any complaint. Along with the application an affidavit has been filed of opposite party no. 2, Smt. Aruna Rani. Apart from above affidavit, a short counter affidavit also has been filed by the opposite party no. 2, Smt. Aruna Rani and in Para 8 of the counter affidavit, it has been averred that she does not want to prosecute the present case against the applicants and wants to decide the present case on the basis of compromise.

9. In view of the affidavit filed by opposite party no.2, Aruna Rani, there is no reason to doubt about the settlement between the parties and living of opposite party no. 2 happily without any compliant in her matrimonial house along with the applicants.

10. Offence under section 498A IPC is non-compoundable. Therefore, the considerable question in the instant case is whether the complaint can be quashed under section 482 Cr.P.C. on the basis of compromise entered into between the parties.

11. To decide the question in the instant case it will be appropriate to refer the following cases decided by Hon'ble Supreme Court in which ambit and power of High Court to quash the FIR, complaint or proceeding of criminal case has been considered.

12. In case of ***B.S. Joshi (supra)***, appellant no.4 was the husband of respondent no.2. Their marriage took place on 21.07.1999 and they were living separately since 15.07.2000. Appellant nos.1 to 3 were father, mother and younger brother of appellant no.4. FIR No.8 of 2002 was registered under section 498A and 406 IPC at Police Station, Central Faridabad at the instance of the wife on 02.01.2002. Thereafter she had filed an affidavit that the FIR was registered at her instance due to temperamental differences and implied imputations. According to the affidavit, her disputes with the appellants were finally settled and she and appellant no.4 had agreed for mutual divorce.

13. Appellants filed petition before the High Court for quashing of FIR . High Court dismissed the petition in view of the offences under section 498A and 406 IPC are not compoundable and inherent power under section 482 IPC of the Code cannot be invoked to bypass the mandatory provision of section 320 of the Code.

14. The question for consideration before the Hon'ble Supreme Court was regarding the ambit of the inherent powers of the High Court under section 482 of the

Code of Criminal Procedure read with Articles 226 and 227 of the Constitution of India to quash the criminal proceeding or FIR or complaint. It was considered that when such matters are resolved either by wife agreeing to rejoin the matrimonial home or mutual separation of husband and wife and also mutual settlement of other pending disputes as a result whereof both sides approached the High Court and jointly pray for quashing of the criminal proceedings or the FIR or complaint filed by wife under sections 498A and 406 IPC, can the prayer be declined on the ground that since the offences are non-compoundable under section 320 of the Code and, therefore, it is not permissible for the Court to quash the criminal proceedings or FIR or complaint.

15. Hon'ble Supreme Court considering the finding of its own Court in ***State of Karnataka vs. L.Muniswamy and Ors.,MANU/SC/0143/1977: 1977 CriLJ 1125*** that in the exercise of this wholesome power, the High Court is entitled to quash proceedings if it comes to the conclusion that ends of justice so required. It was also observed that in a criminal case, the veiled object behind a lame prosecution, the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court in quashing the proceedings in the interest of justice and the ends of justice are higher than the ends of mere law though justice had got to be administered according to laws made by the legislature. The compelling necessity for making these observations is that without a proper realization of the object and purpose of the provision which seeks to save the inherent powers of the High Court to do justice between the State and its subjects, it would be impossible to appreciate the width and contours of that salient jurisdiction.

16. Hon'ble Supreme Court considered that what would happen to trial of the case where the wife does not support the imputations made in the FIR of the type in question. She has filed an affidavit that FIR was registered at her instance due to temperamental differences and implied imputations. There may be many reasons for not supporting the imputations. It may be, either for the reason that she has resolved disputes with her husband and his other family members and as a result thereof she has again started living with her husband with whom she earlier had differences or she has willingly parted company and is living happily on her own or has married someone else on earlier marriage having been dissolved by divorced on consent of parties or fails to support the prosecution on some other similar grounds. In such eventuality, there would almost be no chance of conviction. Would then be proper to decline to exercise power of quashing on the ground that it would be permitting the parties to compound non-compoundable offences. Answer clearly has to be in 'negative'. It would, however, be a different matter if the High Court on facts declines the prayer for quashing for any valid reasons including lack of bona fides.

17. On over all considerations Hon'ble Supreme Court has held that High Court in exercise of its inherent power can quash criminal proceedings or FIR or complaint and section 320 of the Code does not limit or affect the powers under Section 482 of the Code.

18. In **Nikhil Merchant (supra)**, the Hon'ble Supreme Court has held as under:

"29. Despite the ingredients and the factual content of an offence of cheating

punishable under Section 420 IPC, the same has been made compoundable under sub-section (2) of Section 320 Cr.P.C. with the leave of the court. Of course, forgery has not been included as one of the compoundable offences, but it is in such cases that the principle enunciated in B.S.Joshi (supra) case becomes relevant."

19. In ***Gian Singh (supra),*** the Hon'ble Supreme Court has held that inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz; (i) to secure the ends of justice or (ii) to prevent abuse of the process of any Court. In what cases power to quash the criminal proceeding or complaint or F.I.R may be exercised where the offender and victim have settled their dispute would depend on the facts and circumstances of each case and no category can be prescribed. The criminal cases having overwhelmingly and pre-dominatingly civil flavour stand on different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, the High Court may quash criminal proceedings if in its view, because of the compromise between the offender and victim, the possibility of conviction is remote and bleak and continuation of criminal case would put accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and wrongdoer and whether to secure the ends of justice, it is appropriate that criminal case is put to an end and if the answer to the above question(s) is in the affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding.

20. In ***Yogendra Yadav (supra)***, the Hon'ble Supreme Court has held that the High Court can quash a criminal proceeding in exercise of its power under section 482 of the Code having regard to the fact that the parties have amicably settled their disputes and the victim has no objection, even though the offences are non-compoundable. In which cases the High Court can exercise its discretion to quash the proceedings will depend on facts and circumstances of each case. However, when the High Court is convinced that the offences are entirely personal in nature and, therefore, do not affect public peace or tranquillity and where it feels that quashing of such proceedings on account of compromise would bring about peace and would secure ends of justice, it should not hesitate to quash them. In such cases, the prosecution becomes a lame prosecution. Pursuing such a lame prosecution would be waste of time and energy. That will also unsettle the compromise and obstruct restoration of peace.

21. In the case of ***Narinder Singh (supra)***, the Hon'ble Apex Court has laid down the principle for quashing of cases that power conferred under section

482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under section 320 of the Code. No doubt, under section 482 of the Code, the High Court has inherent power to quash the criminal proceedings even in those cases which are not compoundable, where the parties have settled the matter between themselves. However, this power is to be exercised sparingly and with caution. When the parties have reached the settlement and on that basis petition for quashing the criminal proceedings is filed, the guiding factor in such cases would be to secure: (i) ends of justice, or (ii) to prevent abuse of the process of any court. While exercising the power the High Court is to form an opinion on either of the aforesaid two objectives. Those criminal cases having overwhelmingly and pre-dominantly civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes should be quashed when the parties have resolved their entire disputes among themselves.

22. From the law laid down by the Hon'ble Supreme Court in the above referred cases it is well settled that even the offences which are non- compoundable can be quashed by exercising inherent powers under section 482 Cr.P.C. but while exercising such power the High Court has to consider the facts and circumstances of each case. FIR, complaint or the criminal case having overwhelmingly and pre-dominatingly civil flavour, arising out of matrimony relating to dowry, etc.or the family disputes where the wrong is basically private or personal in nature and entire dispute has been resolved between the parties, possibility of conviction is remote and bleak in such case the prosecution becomes a lame prosecution and pursuing such prosecution would be wastage of time and energy as well as it will unsettle the compromise and obstruct restoration of peace, and continuation of 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 and the High Court is convinced that quashing of such proceeding on account of compromise would bring peace and would secure ends of justice it should not hesitate to quash them.

23. In view of the compromise arrived at between the parties, there is unpropitious chance of conviction in the instant case. In such a situation it will be ineffective prosecution and continuing the criminal proceeding before the court below will be nothing but a dawdle and an otiose exercise only. Since parties have decided to live happily together and if the criminal proceeding is not quashed then it will unsettle the compromise and obstruct the restoration of peace between the parties, therefore, in view of the law laid down by the Hon'ble Supreme Court in the above referred cases, in the facts and circumstances of the case, to secure the ends of justice between the parties it is expedient and a fit case to quash the proceeding of the complaint case by invoking the power provided under section 482 Cr.P.C..

24. Accordingly, the entire proceeding of Complaint Case No. 205/9 of 2015 (Aruna Rani Vs. Parveen Kumar & others), under section 498A, 323, 504, 506 I.P.C. & 3/4 Dowry Prohibition Act, P.S. Adarsh Mandi, District Shamli, pending in the Court of Chief Judicial Magistrate, Shamli is hereby quashed.

25. Accordingly, the application is allowed.

26. Registry is directed to inform the trial court for compliance of order.

(2020)09ILR A1031
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.07.2020

BEFORE

THE HON'BLE ALI ZAMIN

Application U/S 482 No. 11813 of 2020

Kashi Nath Pandey & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants
Sri Anjani Kumar Rai, Sri Ashok Kumar Rai, Sri Mangala Prasad Rai.

Counsel for the Opposite Parties:
A.G.A.,Sri Dhiraj Singh.

Criminal Law - Code of Criminal Procedure, 1973- Section 482- Quashing of criminal proceedings on basis of compromise – Indian Penal Code- Section 320- Non-Compoundable offences –Civil dispute - The offences imputed under Sections 467, 468, 471 I.P.C. are not compoundable-It is well settled that even the offences which are not compoundable can be quashed by exercising inherent powers under Section 482 Cr.P.C. While exercising such power High Court has to consider whether offences are arising out of family dispute where the wrong is basically private or personal in nature and the parties have resolved their entire dispute, if it is so, then High Court may quash the criminal proceedings if in its view, on account 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.

It is settled law that in the exercise of its inherent powers u/s 482 of the Cr.Pc, the High Court can quash the criminal proceedings in the event of the parties arriving at a compromise even in non-compoundable offences, provided the offences are not heinous or grave and are either matrimonial or civil disputes in nature and the possibility of the court securing the conviction of the accused as a result of compromise is remote or impossible.

Since, the instant case has arisen out of family dispute and parties have arrived at a compromise, the wrong is of private and personal nature, have not impact on the society. In such circumstance, to let the proceeding continuing before the trial court will be nothing but a futile exercise.

Criminal Application allowed. (Para 11, 12) (E-3)

Case law relied upon/ Discussed: -

1. B.S. Joshi & ors. Vs St. of Har. & ors., (2003) 4 SCC 675

2. Gian Singh Vs St. of Punj. & anr. (2012) 10 SCC 303

3. Yogendra Yadav & ors. Vs St. of Jhar. & ors. (2014) 9 SCC 653

4. Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur & ors. Vs St. of Guj. & anr. (2017) 9 SCC 641

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

1. Sri Dhiraj Singh, Advocate has filed his vakalatnama on behalf of opposite party no.2. The same is taken on record.

2. Heard learned counsel for the applicants, learned A.G.A. for the State as

well as learned counsel for the opposite party no.2. and perused the record.

3. The present application under Section 482 Cr.P.C. has been filed to quash the entire proceedings of Criminal Case No.1883 of 2019 (State vs. Kashi Nath Pandey and others), arising out of Case Crime No.393 of 2019, under Sections 419, 420, 467, 468, 471 I.P.C., P.S. Rohaniya, District Varanasi, pending in the court of Special Chief Judicial Magistrate, Varanasi.

4. Learned counsel for the applicants submits that late Mahadev had three sons namely Hari Prasad Pandey, Kamla Prasad Pandey and Vishnu Prasad Pandey. Vishnu Prasad Pandey had no issue and was living with Hari Prasad Pandey, who had executed a Will deed in favour of applicant no.1 Kashi Nath Pandey son of Hari Prasad Pandey. Being aggrieved with the Will, opposite party no.2 Rama Shankar Pandey lodged an F.I.R. against applicants under Sections 419, 420, 467, 468, 471 I.P.C. alleging that a fake Will deed has been prepared on 27.01.2018 while Vishnu Prasad Pandey (executant of the Will) died on 06.07.2016. During investigation a compromise entered into between the parties but Investigating Officer did not include the compromise as part of case diary and submitted charge sheet, thereafter, informant moved an application before the S.S.P., Varanasi but of no avail, thereafter, in the court also a compromise deed was filed on 07.01.2020 but court has not accepted the compromise and kept on record. He further submits that since F.I.R. was lodged by family members of the applicants and they have arrived to a settlement, therefore, there would be only a futile exercise of the trial, no fruitful purpose would be served. Hence, he prays that the entire proceedings of the aforesaid case be quashed.

5. Learned A.G.A. as well as learned counsel for the opposite party no.2 submitted that a compromise has been arrived between the parties and compromise has been filed by the parties on 07.01.2020. Therefore, they do not want to prosecute the case.

6. The offences imputed under Sections 467, 468, 471 I.P.C. are not compoundable. Therefore, it has to be considered by the Court whether by exercising inherent power under Section 482 Cr.P.C., the criminal case pending against the applicants can be quashed and to resolve the issue, it will be apt to refer the following cases.

7. In ***B.S. Joshi and others Vs. State of Haryana and others, (2003) 4 SCC 675,*** the Hon'ble Supreme Court has held that the High Court in exercise of its inherent powers can quash the criminal proceedings or complaint and Section 320 of the Code does not limit or affect the powers under Section 482 of the Code.

8. In ***Gian Singh Vs. State of Punjab and Another (2012) 10 SCC 303***, the Hon'ble Supreme Court has held that 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 victim have settled all disputes between them amicably, irrespective of the fact that such offences have not been made compoundable, the High Court may within the framework of its inherent power, quash the criminal proceeding or criminal complaint or F.I.R, if it is satisfied that on

the face of such settlement, there is hardly any likelihood of the offender being convicted and by not quashing the criminal proceedings, justice shall be casualty and ends of justice shall be defeated.

9. In ***Yogendra Yadav and others Vs. State of Jharkhand and Others (2014) 9 SCC 653***, the Hon'ble Supreme Court has held that when the High Court is convinced that the offences are entirely personal in nature and, therefore, do not affect public peace or tranquility and where it feels that quashing of such proceedings on account of compromise would bring about peace and would secure ends of justice, it should not hesitate to quash them. In such cases, the prosecution becomes a lame prosecution. Pursuing such a lame prosecution would be waste of time and energy. That will also unsettle the compromise and obstruct restoration of peace.

10. In the case of ***Parbatbhai Aahir Alias Parbatbhai Bhimsinhbhai Karmur and Others Vs. State of Gujarat and Another (2017) 9 SCC 641***, the Hon'ble Supreme Court has held that criminal cases having overwhelmingly and predominantingly 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.

11. From the law laid down by the Hon'ble Supreme Court in the above referred cases, it is well settled that even the offences which are not compoundable can be quashed by exercising inherent powers under Section 482 Cr.P.C. While exercising such power High Court has to consider whether offences are arising out of family dispute where the wrong is basically private or personal in nature and the parties have resolved their entire dispute, if it is so, then High Court may quash the criminal proceedings if in its view, on account 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.

12. From the perusal of the record, it is clear that the F.I.R. was lodged by a member of the family of the applicants and they have entered into a compromise. The compromise has been filed before the court concerned and which is also annexed-10 to the affidavit filed in support of application and order sheet annexed-11 to the affidavit filed in support of application, order sheet dated 07.01.2020, discloses the compromise filed has been kept on record. The F.I.R. was lodged alleging that a forged Will deed has been prepared by applicant no.1 but now as per para 3 of the affidavit filed in support of the application informant has no objection with regard to the Will.

Since, the instant case has arisen out of family dispute and parties have arrived at a compromise, the wrong is of private and personal nature, have not impact on the society. In such circumstance, to let the proceeding continuing before the trial court will be nothing but a futile exercise, waste of time and energy only, therefore, in the facts and circumstances of the case, it is a fit case to exercise the power under Section 482 Cr.P.C. and quash the proceedings of aforementioned case.

13. Accordingly, the entire proceedings of Criminal Case No.1883 of 2019 (State vs. Kashi Nath Pandey and others), arising out of Case Crime No.393 of 2019, under Sections 419, 420, 467, 468, 471 I.P.C., P.S. Rohaniya, District Varanasi, pending in the court of Special Chief Judicial Magistrate, Varanasi is hereby quashed.

14. The application under Section 482 Cr.P.C. is allowed.

15. Office is directed to communicate this order to the concerned trial court.

(2020)09ILR A1034
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.07.2020

BEFORE

THE HON'BLE ALI ZAMIN, J.

Application U/S 482 No. 11903 of 2020

Ajay Kumar & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Ram Kumar Dubey, Sri Abhay Krishn

Counsel for the Opposite Parties:
A.G.A., Sri Ajay Kumar Jagdish

Criminal Law - Code of Criminal Procedure, 1973- Section 482- Quashing of criminal proceedings on basis of compromise – Indian Penal Code- Section 320- Non-Compoundable offences - Section 363 and 366 - Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accordance with the guideline engrafted in such power viz: (i) to secure the ends of justice, or (ii) to prevent abuse of process of any court. Even the offences which are not compoundable can be quashed by exercising inherent powers under section 482 Cr.P.C. While exercising such power High Court has to consider whether offences are arising out of family dispute where the wrong is basically private or personal in nature and the parties have resolved their entire dispute, if it is so, then High Court may quash the criminal proceedings if in its view, on account 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. While exercising such power 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 quashed even though victim or victim's family and offender have settled the dispute as such offences are not private in nature and have a serious impact on the society. Offences under special statutes like prevention of Corruption Act or offences committed by public servants while acting in that capacity also cannot be quashed. The offences which have been levelled against the applicants are of private in nature and have not serious impact on the society. Opposite party No. 2 has also filed a short counter affidavit stating therein that now he has accepted

applicant no. 1 as his son-in-law and no dispute remains between them.

It is settled law that in the exercise of its inherent powers u/s 482 of the Cr.Pc, the High Court can quash the criminal proceedings in the event of the parties arriving at a compromise even in non-compoundable offences, provided the offences are not heinous or grave and are either matrimonial or civil disputes, which are private in nature, and the possibility of the court securing the conviction of the accused as a result of compromise is remote or impossible. (Para 13, 15)

Criminal Application allowed. (E-3)

Case Law relied upon/ Discussed: -

1. Madhavarao Jiwajirao Scindia & ors. Vs Sambhajirao Chandrojirao Angre & ors., (1988) 1 SCC 692

2. B.S. Joshi & ors. Vs. St. of Har. & ors., (2003) 4 SCC 675

3. Gian Singh Vs St. of Punj. & anr. (2012) 10 SCC 303

4. Yogendra Yadav & ors. Vs St. of Jhar. & ors. (2014) 9 SCC 653

5. Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur & ors. Vs St. of Guj. & anr. (2017) 9 SCC 641.

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

1. Sri Ajay Kumar Jagdish, learned counsel for the opposite party No.2 filed short counter affidavit, which is taken on record.

2. Heard Sri Ram Kumar Dubey learned counsel for the applicants, learned A.G.A. for the State, Sri Ajay Kumar Jagdish, learned counsel for the opposite party No.2 and perused the material on record.

3. The present application under section 482 Cr.P.C. has been filed to quash the impugned charge sheet dated 09.01.2016 as well as the entire criminal proceeding of Criminal Case No. 5224 of 2017 (State Vs. Ajay and others), under sections 363 and 366 I.P.C., arising out of case crime No. 617 of 2015 in terms of compromise dated 04.03.2020 arrived between the parties, pending in the Court of learned Chief Judicial Magistrate, Hasanpur, District- Amroha.

4. Learned counsel for the applicant submits that F.I.R. under sections 363, 366 I.P.C. was lodged on 01.11.2015 by the informant-opposite party no.2 Sri Banke Lal that applicant No.1 Ajay Kumar with assistance of applicant no.2 Kamal kidnapped his daughter aged about 16 years from his house at a time, when no family member was there in the house. They also took away jewellery of about Rs. one lakh and Rs.35,000/- cash as well as pass book of the bank. He submits that as per High School Certificate date of birth of victim is 16.04.1998 but this date of birth is not exact one, real fact is that Samiksha was major, applicant and victim developed love affair and decided to marry but Opposite Party No. 2, father of the victim, was opposed to the marriage that is why he lodged the F.I.R. against the applicants. Applicant no.1 and victim solemnized marriage on 18.04.2016 and they are living as husband and wife. At present they have two kids also and parties have also arrived at a compromise in the matter. Informant-opposite party no.2 Banke Lal on 04.03.2020 has moved an application before the trial court that applicant no.1 has married his daughter and at present they have two kids also. Now there is no dispute between the parties, hence the case should be disposed off in terms of compromise. He prays that the criminal proceeding against the applicants be quashed.

5. Learned A.G.A. opposes and submits that at the time of incident as per High School Certificate victim was minor below 18 years, so on the basis of compromise it can not be disposed off.

6. Learned counsel for the opposite party no.2 submits that applicant no.1 and daughter of Opposite Party No.2 had love affair and both decided to enter into marriage. To marry Ajay Kumar the applicant no.1 , daughter of opposite party No.2 had left her parental house and married him. She is living also with the applicant no.1 as husband and wife. Since opposite party no.2 was not happy with the aforesaid marriage on account of which he had lodged the F.I.R. Applicant no.1 and opposite party no.2 on 04.03.2020 have entered into a compromise. In the compromise it has been mentioned that now opposite party no.2 has accepted the applicant No.1 as his son-in-law and no dispute exists between the applicant and opposite party no. 2. There is no dispute between applicant no.1 and daughter of Opposite Party No.2 also, they have two kids and they are living as husband and wife and leading a happy marital life. Matter has been resolved between the parties. Therefore he prays that case may be disposed of in terms of the compromise.

7. The offences of section 363 and 366 I.P.C. are not compoundable. Therefore, in the instant case considerable issue is, whether the criminal proceeding can be quashed or not. To decide the issue involved in the case, it will be apt to refer the following cases.

8. In ***Madhavarao Jiwajirao Scindia and others Vs. Sambhajirao Chandrojirao Angre and others, 1988, 1 SCC 692***, the Hon'ble Supreme Court has held that while exercising inherent powers of quashing under section 482, it is for the High Court to take into consideration any special features which appear in a particular case to consider whether it is expedient and in the interest of justice to permit a prosecution to continue, the Court may, while taking into consideration the special facts of a case, also quash the proceedings.

9. In ***B.S. Joshi and others Vs. State of Haryana and others, (2003) 4 SCC 675,*** the Hon'ble Supreme Court has held that the High Court in exercise of its inherent powers can quash the criminal proceedings or complaint and section 320 of the Code does not limit or affect the powers under section 482 of the Code.

10. In ***Gian Singh Vs. State of Punjab and another (2012) 10 SCC 303***, the Hon'ble Supreme Court has held as under:-

"Where High Court quashes a criminal proceeding having regard to the fact that the dispute between the offender and the victim has been settled although offences are not compoundable, it does so as in its opinion, continuation of criminal proceedings will be an exercise in futility and justice in the case demands that the dispute between the parties is put to an end and peace is restored; securing the ends of justice therefore, being the ultimate guiding factor. No doubt, crimes are acts which have harmful effect on the public and consist in wrong doing that seriously endangers and threatens well-being of society and it is not safe to leave the crime-doer only because he and the victim have settled the dispute amicably or that the victim has been paid compensation, yet certain crimes have been made compoundable in law, with or without

permission of the Court. In respect of serious offences like murder, rape, dacoity, etc; or other offences of mental depravity under IPC or offences of moral turpitude under special statutes, like the Prevention of Corruption Act or the offences committed by public servants while working in that capacity, the settlement between the offender and 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 victim have settled all disputes between them amicably, irrespective of the fact that such offences have not been made compoundable, the High Court may within the framework of its inherent power, quash the criminal proceeding or criminal complaint or F.I.R if it is satisfied that on the face of such settlement, there is hardly any likelihood of the offender being convicted and by not quashing the criminal proceedings, justice shall be casualty and ends of justice shall be defeated. The above list is illustrative and not exhaustive. Each case will depend on its own facts and no hard and fast category can be prescribed."

11. In ***Yogendra Yadav and others Vs. State of Jharkhand and Others (2014) 9 SCC 653,*** the Hon'ble Supreme Court has held as under:-

"The High Court can quash a criminal proceeding in exercise of its power under Section 482 of the Code having regard to the fact that the parties have amicably settled their disputes and the victim has no objection, even though the offences are non-compoundable. In which cases the High Court can exercise its discretion to quash the proceedings will depend on facts and circumstances of each case. Offences which involve moral turpitude, grave offences like rape, murder etc. cannot be effaced by quashing the proceedings because that will have harmful effect on the society. Such offences cannot be said to be restricted to two individuals or two groups. If such offences are quashed, it may send wrong signal to the society. However, when the High Court is convinced that the offences are entirely personal in nature and, therefore, do not affect public peace or tranquility and where it feels that quashing of such proceedings on account of compromise would bring about peace and would secure ends of justice, it should not hesitate to quash them. In such cases, the prosecution becomes a lame prosecution. Pursuing such a lame prosecution would be waste of time and energy. That will also unsettle the compromise and obstruct restoration of peace."

12. In the case of ***Parbatbhai Aahir Alias Parbatbhai Bhimsinhbhai Karmur and Others Vs. State of Gujarat and Another (2017) 9 SCC 641,*** the Hon'ble Supreme Court has held as under:-

"The power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz.: (i) to secure the ends of justice, or (ii) to prevent abuse of the process of any court.

In what cases power to quash the criminal proceeding or complaint or 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 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."

13. From the law laid down by the Hon'ble Supreme Court in the above referred cases, it is very much clear that inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accordance with the guideline engrafted in such power viz: (i) to secure the ends of justice, or (ii) to prevent abuse of process of any court. In what cases power of quashing, may be exercised would depend upon the facts and circumstances of each case and no category can be prescribed. Even the offences which are not compoundable can be quashed by exercising inherent powers under section 482 Cr.P.C. While exercising such power High Court has to consider whether offences are arising out of family dispute where the wrong is basically private or personal in nature and the parties have resolved their entire dispute, if it is so, then High Court may quash the criminal proceedings if in its view, on account 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. While exercising such power 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 quashed even though victim or victim's family and offender have settled the dispute as such offences are not private in nature and have a serious impact on the society. Offences under special statutes like prevention of Corruption Act or offences committed by public servants while acting in that capacity also cannot be quashed. It can be put in other words that while exercising inherent power the High Court also must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and the wrongdoer and whether to secure the ends of justice, it is appropriate that the criminal case be 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.

14. In the instant case, it is alleged that applicant No. 1 Ajay Kumar kidnapped daughter of Opposite Party No. 2 aged about 16 years. As per High School Certificate date of birth of the victim is 16.04.1998, as such on the date of the incident the victim was aged about 17 years and 06 months. It is also submitted that the date of birth of the victim recorded in the High School Certificate is not exact one and at the time of the incident she was major. It is further submitted that on 18.04.2016 applicant no. 1 and victim solemnized marriage, since then they are passing their marital life happily and they have also at present two kids from their wedlock. The offences alleged do not come within the category of heinous or serious offences of mental depravity, murder, rape or dacoity which cannot be quashed as held by Hon'ble Supreme Court in the above referred cases. On the other hand the offences which have been levelled against the applicants are of private in nature and have not serious impact on the society. Opposite party No. 2 has also filed a short counter affidavit stating therein that now he has accepted applicant no. 1 Ajay Kumar as his son-in-law and no dispute remains between them.

15. Considering that on account of compromise between the parties, there are remote and bleak chances of conviction. Appellant no.1 Ajay Kumar and victim have two kids also and offences are private in nature and have not serious impact on society, to let continuing the case proceeding will be nothing but waste of time and energy of the Court only. Thus, in the facts and circumstances of the case as discussed above to secure the ends of justice for the parites, it is a fit case to quash the impugned charge sheet dated 09.01.2016 as well as the entire criminal proceeding of Criminal Case No. 5224 of 2017 (State Vs. Ajay and others), under section 363 and 366 I.P.C., arising out of Case Crime No. 617 of 2015 in terms of compromise dated 04.03.2020 arrived between the parties, pending in the Court of learned Chief Judicial Magistrate, Hasanpur, District- Amroha by exercising the power provided under section 482 Cr.P.C. Accordingly, the entire criminal proceeding of the aforesaid case is hereby quashed.

16. The application under section 482 Cr.P.C. is allowed.

17. Office is directed to communicate this order to the concerned trial court.

(2020)09ILR A1040
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.07.2020

BEFORE

THE HON'BLE GAUTAM CHOWDHARY, J.

Application U/S 482 No. 12144 of 2020

Dakshpal Singh ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Ashish Goyal

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

Criminal Law - Protection of Women from Domestic Violence Act- Section 29- Appeal – Challenged through Criminal Application u/s 482 Cr.Pc - Alternative remedy- Settled by Full Bench in Dinesh Kumar Yadav Vs. State of U.P. reported in 2016 (11) ADJ 29 that a revision under Section 397/401 of Cr P C against a judgment and order passed by the Court of Sessions under Section 29 of the Act, 2005 is maintainable - The applicant has statutory alternative remedy of filing a revision. Consequently, present application under section 482 Cr.P.C. is dismissed on the ground of alternative remedy.

An appellate order passed u/s 29 of the Protection of Women from Domestic Violence Act can only be challenged through a criminal revision and an application u/s 482 Cr.P.C challenging the order u/s 29 of the Act is not maintainable, as held by the Full Bench of this Court in **Dinesh Kumar Yadav Vs. State of U.P. reported in 2016 (11) ADJ 29.**

Criminal Application dismissed. (E-3)

Case law relied upon/ Discussed: -

1. Dinesh Kumar Yadav Vs St. of U.P. reported in 2016 (11) ADJ 29

(Delivered by Hon'ble Gautam Chowdhary, J.)

1. Heard Sri Ashish Goyal, learned counsel for the applicant and Sri Prashant Kumar, learned A.G.A. assisted by Sri P.K. Shahi, for the State.

2. By means of this application under section 482 Cr.P.C. the applicant has challenged the order dated 27.02.2020 passed by the Addl. Session Judge, Court No. 16, Agra in Criminal Appeal No. 137 of 2019 9Dakshpal Singh Vs. State of U.P. and others0 as well as the ordered 27..03.2019 passed by Additional Chief Judicial Magistrate,Court no. 07,Agra in complaint case No. 1415 of 2017 (Smt. Vijay Laxmi & Twinkal and others Vs. Dakshpal Singh), under section 12 of the Protection of Women from Domestic Violence Act, police Station Jagdishpura, District Agra.

3. The brief facts of this case are that that opposite party no. 2 filed a complaint under section 12 of the Protection of Women from Domestic Violence Act in Police station- Jagdishpura, District- Agra before the court below on 15.07.2017 against the applicant and other family members. On 27.03.2019 the learned Additional Chief Judicial Magistrate, Court No. 7 granted the interim maintenance in favour of the opposite party No. 2 and directed the applicant to pay Rs. 8,000/- per month from the opposite party no. 2 and Rs. 2,000/- per month for her minor child on 10th date of each month.

4. After passing the aforesaid order the applicant moved a criminal appeal before the court of District & Sessions Judge, Agra on 07.05.2019 and challenged the order dated 27.03.2019 passed by the Addl. Chief Judicial Magistrate, Court No.

7, Agra whereby on 27.02.2020 learned Addl. Sessions Judge, Court no. 16, Agra confirmed the order dated 27.03.2019 passed by the A.C.J.M.,Court No. 7, Agra.

5. It is argued on behalf of applicant that the application under section 482 Cr.P.C. is maintainable but failed to produce or supply any case law in support of his arguments.

6. Learned A.G.A. has vehemently opposed the application and raised the controversy with regard to the maintainability of the revision against the order passed in appeal under section 29 of the Act which has already been settled by Full Bench of this Court in the case of **Dinesh Kumar Yadav Vs. State of U.P. reported in 2016 (11) ADJ 29** wherein it has been held in paragraph No.23.2, 24 and 25 as under:

"23.2 In view of the above, as the remedy of an appeal had been provided under Section 29 of the Act, 2005 before a Court of Sessions, which means a Court of Sessions referred under Section 6 read with Sections 7 and 9 of the Cr P C, without saying anything more as regards the procedure to be followed in such appeal, and there being nothing to the contrary in the Act of 2005 which may be indicative of exclusion of the application of the provisions of Cr.P.C. to such an appeal, the normal remedies available against a judgment and order passed by a Court of Sessions by way of appeals and revisions prescribed under the Cr P C before the High Court, are available against an order passed in appeal under Section 29 of the Act, 2005.

24. The Single Judge Benches of this Court in the case of Nishant Krishan Yadav (supra) and Mrs. Manju Sree Robinson (supra) have erred in holding that such a criminal revision is not maintainable before the High Court. The judgment in Chiranjeev Kumar Arya (supra) against which the Special Leave Petition has been dismissed by the Supreme Court on 12.08.2016 and the judgment in Prabhunath Tiwari (supra) lay down the law correctly.

25. In the result, we answer the first question in the affirmative holding that the decisions in Nishant Krishna Yadav (supra) and Manju Shree Robinson (supra) do not lay down the law correctly. In other words, we hold that a revision under Section 397/401 of Cr P C against a judgment and order passed by the Court of Sessions under Section 29 of the Act, 2005 is maintainable and that the decisions in Nishant Krishna Yadav (supra) and Manju Shree Robinson (supra) do not lay down the law correctly."

7. As such the applicant has statutory alternative remedy of filing a revision. Consequently, present application under section 482 Cr.P.C. is dismissed on the ground of alternative remedy.

8. Certified copy, if any, may be returned to the applicant's counsel.

9. Taking into consideration that Covid-19 pandemic is continuing and due to which certified copy of this order would not be possible to be obtained by the applicant, therefore, if a copy of this order downloaded from the official website of Allahabad High Court and self-attested by the counsel for the applicant is placed before the Court concerned, the same would be entertained.

(2020)09ILR A1042
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.07.2020

BEFORE

THE HON'BLE RAM KRISHNA GAUTAM, J.

Application U/S 482 No. 12537 of 2019

Dharmendra Kumar Tiwari ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Kamla Kant Mishra, Sri Varun Mishra

Counsel for the Opposite Parties:
A.G.A., Sri Jitendra Kumar Mishra, Sri Lok Nath Shukla

Criminal Law - Indian Penal Code, 1860- Section 498A of I.P.C. - Code of Criminal Procedure, 1973- Section 177 – Territorial Jurisdiction- The offence under section 498A of the IPC is a continuing offence- In a case where a trial can be held in any of the places falling within the purview of the aforementioned provision, investigation can be conducted by the officer-in-charge of the police station concerned, which has jurisdiction to investigate in relation there to. Section 178(b) of Cr.P.C.-Speaks of cases when an offence is committed partly in one area and partly in another area, that the courts having jurisdiction in both the areas have got territorial jurisdiction to take cognizance of an offence.

Since the offence u/s 498A of the IPC is a continuing offence, hence the courts having jurisdiction in both the areas, e.i matrimonial as well as parental home of the wife will have the jurisdiction to take cognizance of the said offence.

Criminal Law -Code of Criminal Procedure, 1973- Section 227- 239- Charge- Third round of litigation- Application u/s 482 Cr.P.C. was filed with same contentions, which were previously declined twice. An option was given for moving discharge application, if any, u/s 239, 227/228 Cr.P.C., as the case may be. But it was not raised at that time and charge has already been framed. Pre-trial charge acquittal is not permissible. At the time of disposal of application u/s 227 or 239 Cr.P.C. meticulous analysis of facts and circumstances with marshaling of facts and application of judicial precedent is not to be made by trial court at that stage.

It is settled law that charge can be framed even on the ground of strong suspicion and the court is not required to analyse the facts in a detailed manner.

Criminal Application rejected. (Para 6, 7, 9, 17) (E-3)

Case law relied upon/ Discussed: -

1. Naresh Kavarchand Khatri Vs St. of Guj., (2008) 8 SCC 300

2. Ratilal Bhanji Mithani Vs St. of Maha. & Ors, AIR 1979 SC 94,

3. Palwinder Singh Vs Balwinder Singh & ors, (2008) 14 SCC 504

4. R.S. Nayak Vs A.R. Antulay & anr, AIR 1986 SC 2045

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. This application u/s 482 of Cr.P.C. has been filed by Dharmendra Kumar Tiwari against State of U.P. and Ajit Kumar Pandey with a prayer to quash impugned judgment and order dated 16.1.2019, passed by C.J.M., Bhadohi at Gyanpur, along with entire proceeding of Criminal Case No. 2596 of 2015, State Vs. Dilwar Tiwari and others, pending before above court, arising out of Case Crime No. 147 of 2013, u/s 498A, 504, 506 I.P.C. and 3/ 4 D.P. Act, P.S. Gopiganj, District Sant Ravidas Nagar (Bhadohi), because of being

beyond jurisdiction of above Court, as per provisions of sections 177 and 178 of Cr.P.C.

2. Learned counsel for applicant argued that Dharmendra Kumar Tiwari was married with Madhulika, daughter of O.P. No. 2 on 2.12.2007, as per Hindu rituals. Child Ansh Tiwari was born on 7.1.2011 at Bangluru, where his parents were residing. On 2.11.2011 Sohan Lal Pandey, father of O.P. No. 2 and grandfather of Madhulika, took Madhulika, leaving behind a tiny child of ten months at Bangluru, to Mungra Badshahpur, District Jaunpur, where O.P. No. 2 was residing, because of being at job of Manager at Hawkins Company, Sathariya, Mungra Badshahpur, District Jaunpur. It was a journey by Flight, born by applicant. Then after Smt. Madhulika refused to cohabitate with applicant at Bangluru. Letters, dated 13/14.6.2013 as well as 1.7.2013, were written for and on behalf of applicant to Smt. Madhulika, requesting her to resume her marital obligations, but she was not amenable. Rather this case crime number was got registered at Police Station Gopiganj, District Sant Ravidas Nagar Bhadohi, with a concocted story on 7.3.2013. A Criminal Misc. Writ Petition No. 14704 of 2013 was filed before this court, with a prayer for quashing of F.I.R. of Case Crime No. 147 of 2013 and it was decided on 5.8.2014. Subsequently, a case for maintenance u/s 125 Cr.P.C. being Case No. 70/21 of 2013, was filed by Madhulika before the Court of Judicial Magistrate Bhadohi and it was decided on 4.12.2017 by the court of Principal Judge, Family Court, Bhadhohi, wherein a restoration application was moved and was decided on 28.8.2018. Investigation resulted in submission of charge sheet for offences punishable u/s 498A, 504, 506 I.P.C. and 3/ 4 D.P. Act, whereas no part of offence ever accrued within the territorial jurisdiction of Sessions Division Bhadohi or Police Station Gopiganj, because just after marriage Madhulika went with applicant at Bangluru, where she resided and from there she was taken by her grandfather to Mungra Badhshahpur, District Jaunpur. Hence cause of action, if any, may be said to have accrued either within the territorial area of Court of Bangluru or Jaunpur. But without any jurisdiction this case crime number was filed and cognizance was taken. This trial was in utter disregard to provisions of sections 177 and 178 of Cr.P.C. and thereby it was beyond jurisdiction of Court of C.J.M., Bhadohi. Madhulika, in her testimony, recorded as PW1 before Court of Additional Judge, Family Court, Bhadohi at Gyanpur, in Case No. 70 of 2013 u/s 125 Cr.P.C., has categorically stated that she was residing with her father at Mungra Badshahpur, District Jaunpur, and this piece of evidence was an evidence under section 3 of the Evidence Act. A proceeding u/s 482 No. 29730 of 2015, Dharmendra Kumar Tiwari and four others Vs. State of U.P. and another, was filed with a prayer to quash the proceeding of aforesaid criminal case, wherein, leaving applicant, for remaining accused persons, accusation was quashed. Then after applicant appeared before Court, wherein he was granted bail. Trial proceeded. Again a proceeding u/s 482 Cr.P.C. was filed before this court with a prayer for quashing proceeding because of devoid of jurisdiction and it was dismissed with an observation of moving discharge application before trial court. Thereafter discharge application was moved before trial court and those facts were mentioned. But the trial court dismissed above application without applying its judicial mind and giving reason for the same.

Hence this application has been filed with above prayer for ends of justice and avoiding misuse of process of law.

3. Learned counsel for O.P. No. 2 has vehemently opposed the application by pressing counter affidavit, filed by O.P. No. 2, that it was a marriage solemnized in between applicant and Madhulika at parental house situated at Village Bhawanipur, within the area of P.S. Gopiganj, and Sessions Division Bhadohi at Gyanpur. Dowry, as per rituals, were given, then after Smt. Madhulika was taken to Bangluru, where persistent demand of dowry, in form of Rs. Five lacs, and cruelty with regard to it was there. Sometimes, it was partly fulfilled and persuasion with request was being made for not doing such cruelty. In between child Ansh was born. Then after cruelty accelerated. The grandfather of Madhulika brought her from Bangluru to Delhi and from Delhi to Mungra Badshahpur, District Jaunpur, where father of Madhulika was at job as Manager in Hawkins Company, Sathariya, District Jaunpur and was residing there at. Subsequently she was taken by applicant, her child was snatched and she was brought by Bolero and was thrashed, abused and left over near a tubewell of village Bhawanipur, P.S. Gopiganj, District Bhadohi, at 9.00 A.M. of 01.6.2013, from where she went to her ancestral house in above village and this report was got lodged, wherein two times proceedings were challenged in applications moved u/s 482 Cr.P.C. and this fact was taken by applicant. For husband both of applications were dismissed and this was not accepted by this court in above proceedings u/s 482 Cr.P.C. Though, an option for moving discharge application at appropriate stage was given. But the charge was already framed and trial was proceeding, wherein three witnesses including victim were examined and then after an application u/s 239 Cr.P.C. was moved with same repetition of allegations and vide impugned order it was rejected. This order is a reasoned and elaborate order. Offence punishable u/s 498A I.P.C. is a continuing offence. Admittedly, marriage was performed at Village Bhawanipur, within the area of P.S. Gopiganj, and of Sessions Division Bhadohi at Gyanpur, and since marriage, performed on 2.12.2007, there was persistent demand of dowry coupled with cruelty with regard to it. The sequence of cruelty was there, including one occurrence wherein grandfather of Madhulika had brought her to Jaunpur. This occurrence of 1.6.2013 was the last cruelty made by applicant and his relatives and this occurred as a part of cruelty at above village of Bhawanipur within the area of Sessions Division Bhadohi at Gyanpur. Hence this application is of no force, be dismissed.

4. Learned AGA has also vehemently opposed the application.

5. The submissions made by learned counsel for the applicant call for adjudication on pure questions of fact, which may be adequately adjudicated upon only by the trial court and while doing so even the submissions made on points of law can also be more appropriately gone into by the trial court in this case. Veracity of the statements are material evidence of fact and is not to be ascertained in this proceeding u/s 482 Cr.P.C. by this Court. Because the same is within the jurisdiction of Trial Court and is a point of fact to be seen in the trial.

6. Offence punishable u/s 498A of I.P.C. was added in the Penal Code by

Criminal Law (Second Amendment) Act of 1983, which came into force with effect from 25th of December, 1983. This section reflects the anxiety to extend protection of the weaker spouse. Traditionally in any society, a woman is subjected to the whims or caprices of man, especially when it relates to the relationship of husband and wife. Life for a woman in the family of the husband is sometimes so intolerable and so miserable that it drags the woman towards suicide and it is in such cases that Section 498-A I.P.C. comes into play. This offence is a continuing offence.

7. Section 177 of Chapter XI of Code of Criminal Procedure, 1973 provides about ordinary place of enquiry and trial that every offence shall ordinarily be inquired into and tried by a Court within whose local jurisdiction it was committed. This section has been elaborately discussed by the Apex Court in ***Naresh Kavarchand Khatri Vs. State of Gujarat, (2008) 8 SCC 300*** that whether an officer-in-charge of a police station has the requisite jurisdiction to make investigation or not? will depend upon a large number of factors, including those contained in section 177, 178 and 181 of the Code of Criminal Procedure. In a case where a trial can be held in any of the places falling within the purview of the aforementioned provision, investigation can be conducted by the officer-in-charge of the police station concerned, which has jurisdiction to investigate in relation there to. Section 181(4) Cr.P.C. is also relevant in this regard.

8. Section 178 in the Code Of Criminal Procedure, 1973 provides place of inquiry or trial.

(a) When it is uncertain in which of several local areas an offence was committed, or

(b) where an offence is committed, partly in one local area and partly in another, or

(c) where an offence, is a continuing one, and continues to be committed in more local areas than one, or

(d) where it consists of several acts done in different local areas, it may be inquired into or tried by a Court having jurisdiction over any of such local areas.

9. Meaning thereby section 178(b) of Cr.P.C. does not envisage a position in which one ingredient of the offence is committed at one place and other is committed at another place. But it speaks of cases when an offence is committed partly in one area and partly in another area, that the courts having jurisdiction in both the areas have got territorial jurisdiction to take cognizance of an offence.

10. In the present case, it is an undisputed fact that the marriage was performed at Village Bhawanipur, within the area of police station Gopiganj falling in the jurisdiction of Sessions Division Bhadohi at Gyanpur and accusation is of leaving Smt. Madhulika near Tubewell of Village Bhawanipur, P.S. Gopiganj, District Bhadohi, on 1.6.2013 at 9.00 A.M. after threshing and abusing her by her husband and his relatives, after snatching her son i.e. this part of offence was specifically said to have been committed within the area of P.S. Gopiganj, District Bhadohi. Now veracity of this part is to be seen by trial court on the basis of evidence led before it and it is within the jurisdiction of trial court itself. This court in exercise of inherent jurisdiction u/s 482 Cr.P.C. is not to analyse facts and evidence.

11. Judgement of Court of Additional District Judge/ Judge, Family Court, Bhadohi at Gyanpur, in Case No. 70 of 2013 dated 4.12.2017 has been very vehemently pressed by learned counsel for applicant. Wherein in this case too specific occurrence of snatching of child and leaving Smt. Madhulika near Tubewell of village Bhawanipur within district of Bhadohi, after threshing and abusing her on 1.6.2013 has been said and contention of applicant was not accepted by above court.

12. Applicant himself has filed M.C. No. 1023 of 2015 u/s 9 of Hindu Marriage Act before the Court at Bangluru and copy of petition has been filed by applicant, which reveals that the address of Madhulika has been given as of Village Bhawanipur, P.S. Gopiganj, District Bhadohi. Meaning thereby applicant himself has given the address of Smt. Madhulika as of district Bhadohi. It itself proves that Madhulika was residing at Village Bhawanipur within the area of Sessions Division Bhadohi at Gyanpur.

13. Applicant, along with others, had filed an Application u/s 482 No. 29730 of 2015, Dharmendra Kumar Tiwari and four others Vs. State of U.P. and another, with same contentions and after hearing both sides, this court, vide order dated 15.10.2015, has refused to give any relief to the applicant. Meaning thereby his contention was not accepted and there was no abuse of process of law with regard to present applicant-husband. Again subsequent proceeding u/s 482 Cr.P.C. was filed by applicant. Though, first one was dismissed and this subsequent proceeding i.e. Application u/s 482 No. 40268 of 2018, Dharmendra Vs. State of U.P. and another, was with specific defence regarding non-jurisdiction of court of C.J.M., Bhadohi at Gyanpur. This too was dismissed having no substance in it. Meaning thereby present contention was previously taken, it was heard and declined. Again this third round Application u/s 482 Cr.P.C. was filed with same contentions, which were previously declined twice.

14. No doubt an option was given for moving discharge application, if any, u/s 239, 227/228 Cr.P.C., as the case may be. But it was not raised at that time and charge has already been framed. Whereas trial court has specifically mentioned that trial was being proceeded wherein charge was framed. Hence as per law laid down by Apex Court in ***Ratilal Bhanji Mithani Vs. the State of Maharashtra and others, AIR 1979 SC 94***, that after framing of charge the Magistrate remains with no jurisdiction for hearing over discharge application.

15. Apex Court in ***Palwinder Singh Vs. Balwinder Singh and others, (2008) 14 SCC 504***, has propounded pre-trial charge acquittal is not permissible. Jurisdiction of trial court while exercising power u/s 227 or 239 Cr.P.C. Charges can be framed also on the basis of strong suspicion. Marshaling of facts and appreciation of evidence is not in the domain of the Court at that point of time.

16. Apex Court in ***R.S. Nayak vs A.R. Antulay and another, AIR 1986 SC 2045,*** has propounded that at the time of disposal of discharge application no detailed evaluation of the material or meticulous consideration of possible defences need be undertaken at this stage. Meaning thereby at the time of disposal of application u/s 227 or 239 Cr.P.C. meticulous analysis of facts and circumstances with marshaling of facts and application of judicial precedent is not to be made by trial court at that stage.

17. In the present case ,plea of jurisdiction was raised by applicant in two proceedings filed u/s 482 Cr.P.C. and it was declined. Charge was framed, but this was not disclosed. Hence option was given for moving of discharge application, if any, and it was decided by a reasoned and elaborate order. There is no abuse of process of law or failure of ends of justice.

18. Accordingly, this application merits its dismissal. Dismissed as such.
